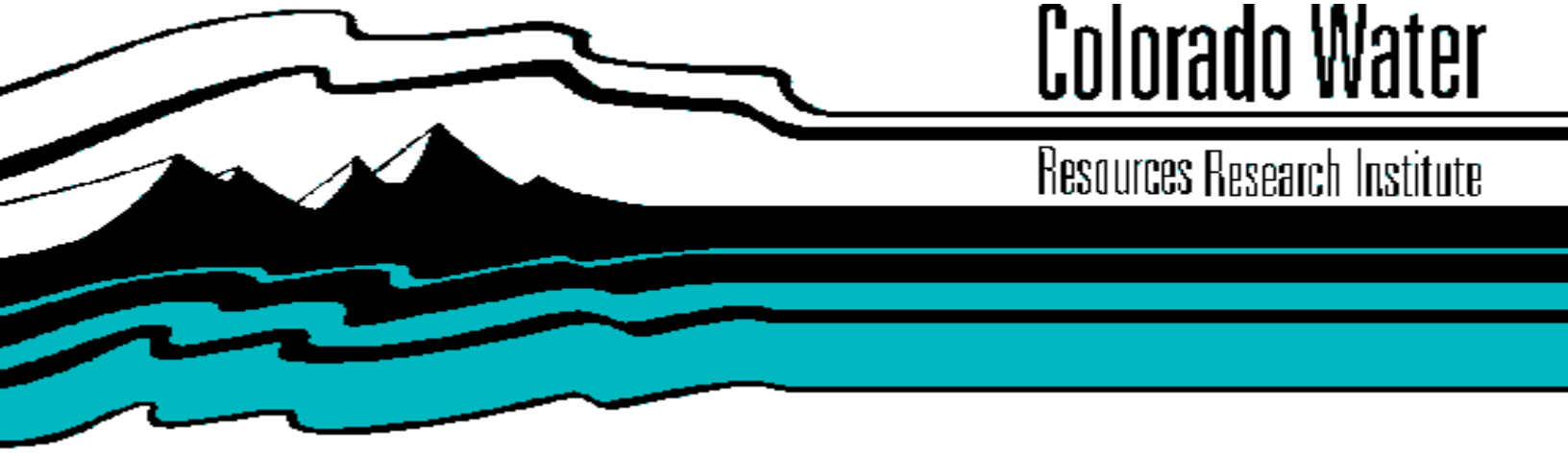
Section 404 of the Clean Water Act-An Evaluation of the Issues and Permit Program Implementation in Western Colorado

by

Dennis W. Barnett



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SECTION 404 OF THE CLEAN WATER ACT - AN EVALUATION OF THE ISSUES AND PERMIT PROGRAM IMPLEMENTATION IN WESTERN COLORADO

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EXECUTIVE SUMMARY

With passage of the Federal Water Pollution Control Act Amendments of 1972, Congress instituted a program under section 404 authorizing the Secretary of the Army to regulate the discharge of dredged or fill material into the navigable waters, defined as "waters of the United States." In section 404 Congress blended its efforts to strengthen ineffective pollution control legislation with an existing administrative framework for regulating activities in navigable waters established by the 1899 Rivers and Harbors Act.

As initially interpreted, the program only regulated those discharges into waters meeting the traditional test of navigability, those presently or previously used or susceptible to use as a route to transport interstate commerce. However, a 1975 court decision forced a much broader interpretation of navigable waters, consistent with its definition in the Act and the legislative history. This mandate to regulate discharges of dredged or fill material into all waters of the United States represented a major expansion in the territorial scope of the program.

The broadened scope of the program imposed a significant impact in the arid West. Heretofore, the regulatory authority of the Corps of Engineers under section 404 and section 10 of the 1899 Act in the arid West had been negligible because of the limited extent of waters meeting the traditional test of navigability. In western Colorado, the study area chosen for this evaluation of the section 404 program, only eight percent of all section 404 permits issued currently involve activities in

"traditional" navigable waters. Thus, the tremendous increase in Federal regulatory authority occasioned by the expanded jurisdiction was greeted with great apprehension and opposition in the western Colorado region.

Debate over the appropriateness of the current section 404 program in the region has focused on four major issues. Those issues involve (1) whether the program as administered is clearly what Congress intended, (2) whether administrative authority for the program should be with the Federal government or delegated to the individual states, (3) whether the program represents a Federal interference with state water allocations, and (4) whether the benefits derived from the program are worth the costs.

The expanded definition of navigable waters has been fully implemented for about five years. An evaluation of program implementation in western Colorado shows the program in 1982 to be reasonable, manageable, and effective. It has not resulted in significant interference in state and local matters. The 404 program provides substantial benefits attributable to maintenance of water quality and protection of wetland values. The program serves as a valuable technology transfer mechanism and contributes significant public education benefits.

The Reagan Administration has perceived the current 404 program to be costly and burdensome to the public and has called for significant reform. While some improvements are in order, the prescribed reform measures make too many changes to a basically effective program which will largely be detrimental to its application in western Colorado.

Having considered the implementation of section 404 in western Colorado, the issues that have been raised concerning the program, and

the impact of Reagan Administration regulatory reform measures in the region, the following recommendations are made:

- The broad definition of navigable waters as "waters of the United States" should be maintained by Congress and not compromised by administrative discretion.
- Regulations should be revised to encourage the state to assume the 404 program in Colorado, but only if the state program is comparable to that of the Corps and strong (but flexible) Federal oversight is maintained.
- Permit applications for which there are no objections or significant impacts should be processed within 60 days. However, those involving major impacts and/or significant objections should be fully and expeditiously processed without regard to an arbitrarily-established time limit.
- The expanded use of general permits to shorten processing times should be encouraged, but only if general permit authorizations include any necessary project-specific conditions to accompany general conditions and if general permitted work can be adequately monitored for compliance.
- The Justice Department should be supportive of 404 enforcement efforts in order that the program not earn a reputation as a "paper tiger."
- The Corps and environmental agencies should continue to promote research and development of methodologies to better understand and quantify environmental impacts and mitigation requirements, thus improving the quality and efficiency of the permit process.

- The Corps should be clearly established as the sole official contact with applicants and the ultimate authority in permit matters, so that duplication of effort, miscommunication, and confusion for applicants can be minimized.

INTRODUCTION

It must appear strange to all but those who are close observers of water quality legislation in the United States that the Army Corps of Engineers -- recognized for its role in river and harbor development for navigation and major flood control projects -- would be found in 1982 regulating the placement of fill in a small mountain stream in the arid West for water quality purposes. Yet this regulatory authority provided to the Corps under section 404 of the 1972 amendments to the Federal Water Pollution Control Act (now commonly known as the Clean Water Act) is a major part of the program under the Act "to restore and maintain the chemical, physical, and biological integrity of the Nations waters."

Section 404 provides for the regulation of the placement of dredged or fill material into the navigable waters (defined in the Act as "waters of the United States"). The history of the section 404 regulatory program provides for an interesting study of the complex interaction of the legislative, executive, and judicial branches of government in the formation of policy. Furthermore, it is particularly exemplary of the premise that policy formation is an unending, iterative process.

The section 404 program has long been clouded in controversy. With the exception of some statutory exemptions and provisions for nationwide and general permits for specific categories of minor discharges, the program currently regulates discharges of dredged or fill material into essentially all waters of the United States and/or adjacent wetlands. This massive regulatory authority has generated wide-spread apprehension among those who might perform any work in and around water because of the

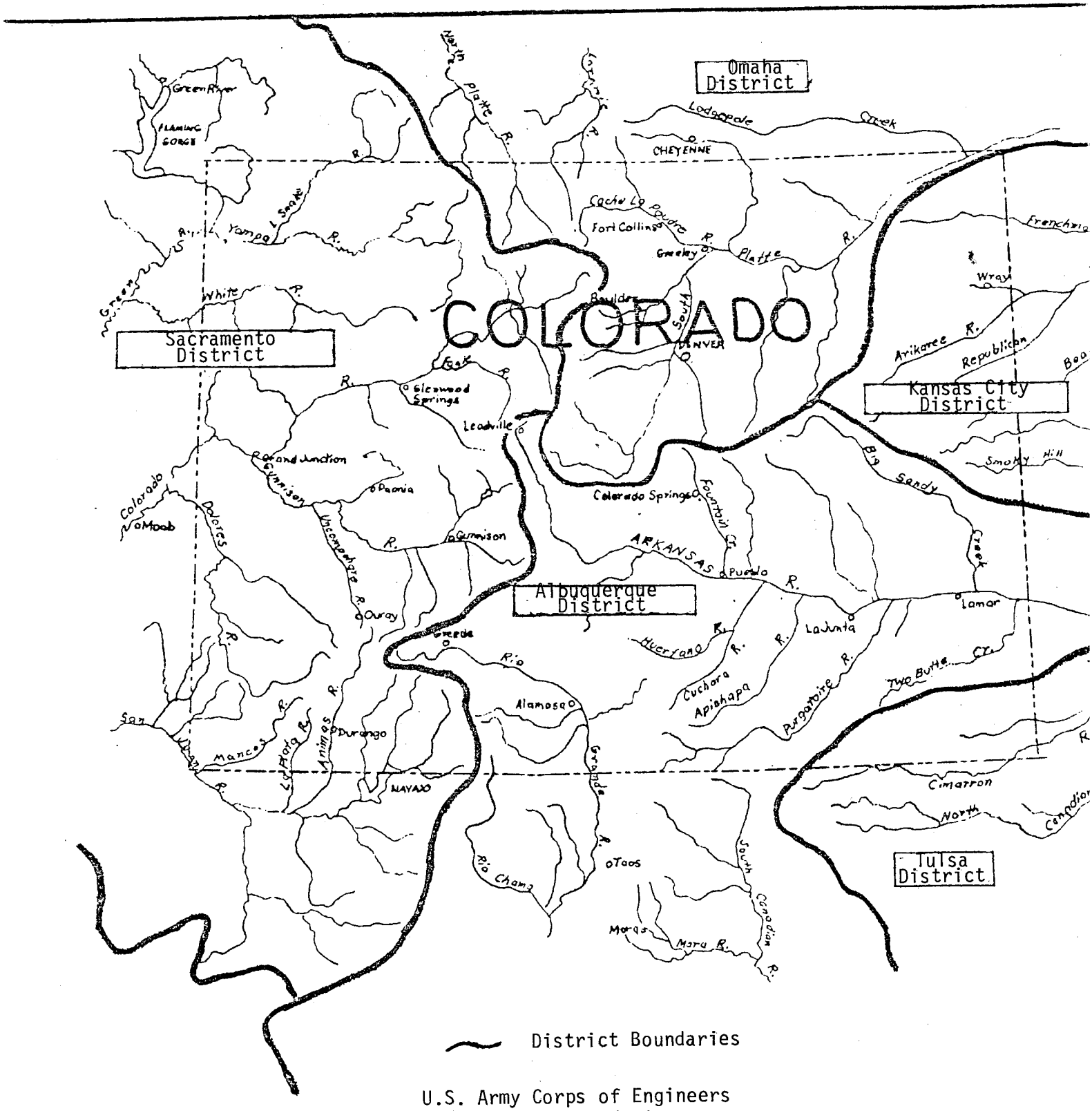
potential for being subjected to lengthy permit processes and faced with possible permit denials. As a result of this apprehension the program has been strongly criticized.

The purpose of this paper will be to evaluate the section 404 permit program as implemented in western Colorado, an area within the jurisdiction of the Sacramento District of the Corps of Engineers. Specifically, the study area encompasses all land in Colorado west of the Continental Divide, in the Upper Colorado River Basin. A map depicting the study area is provided as Figure 1.

There are many reasons for choosing to evaluate the implementation of the program in western Colorado. The region is experiencing a period of unprecedented change. Ski area development in the last two decades has increased pressures for construction of second homes and service facilities. Mining interests are moving to extract the vast mineral resources available in the region. Population growth resulting from employment opportunities has created demand for housing and adequate infrastructure. Many of these activities involve discharges of dredged or fill material.

Despite change, western Colorado retains much of the flavor of the Old West characterized by an attitude of independence and self-sufficiency, perhaps best exemplified by farmers and ranchers. Those espousing this attitude are typically negative toward Federal regulation in any form. Consequently, agricultural interests have vigorously opposed the section 404 permit program over the years. An evaluation of the program as implemented in western Colorado therefore will address the

FIGURE 1



District Boundaries

U.S. Army Corps of Engineers
District Boundaries
in the State of Colorado

Source: Sacramento District,
U.S. Army Corps of Engineers

issues in a region where criticism of it is likely to be as severe as anywhere in the country.

Traditional arguments in favor of a strong section 404 regulatory program usually focus upon the importance of protecting such significant areas as estuaries and coastal marshes, large rivers and their adjacent riparian floodplain habitat, and vast freshwater swamps and marshes. Colorado is a contrast -- arid, with predominantly small watercourses (many of which are intermittent) and relatively few wetland areas. Yet the same section 404 program is applicable in both extremes. This point is the basis for much criticism of the section 404 program in the arid West. Critics cry for tangible evidence that this regulatory program as administered in the West really produces an improvement in the quality of the Nation's waters.

The assumption of the author in selecting western Colorado as the study area for evaluation is that the region is a sort of "microcosm" of the arid West with respect to the issues and concerns associated with implementation of section 404. Indeed, most of these issues and concerns are not even unique to the West, as evidenced by controversy over the program throughout the country. It is the hope of this author that this evaluation may be a representative "case study" of section 404 implementation which will provide some useful insight.

Chapter 1 will explore in some detail the origin and evolution of section 404 of the Clean Water Act. The permit process itself will be briefly explored in Chapter 2 to provide an understanding of the full scope of the regulatory program. These chapters will form the foundation for a discussion in Chapter 3 of the issues and concerns related to

section 404 implementation in the study area as perceived by citizens and those who represent them in some capacity. Chapter 4 will evaluate the actual implementation of the permit program in western Colorado, focusing on the issues and concerns enumerated in Chapter 3. Chapter 5 will include a brief summary of the paper followed by conclusions and recommendations which address the overall effectiveness and appropriateness of the section 404 program in western Colorado with respect to public perception of the issues.

CHAPTER 1

ORIGIN AND EVOLUTION OF SECTION 404

Rivers and Harbors Appropriation Act of 1899

Regulation of activities in navigable waters of the United States is rooted in the Rivers and Harbors Appropriation Act of 1899 (hereafter referred to as the 1899 Act).[1] In that act Congress codified scattered earlier laws and court decisions regarding Federal authority over navigable waterways under the Commerce Clause of the United States Constitution. The 1899 Act authorized the U.S. Army Corps of Engineers to regulate activities in navigable waters which might affect their navigability. Section 9 prohibited the construction of bridges, dams, dikes, or causeways obstructing navigable waters without the consent of Congress and approval of the Chief of Engineers and Secretary of War (the Army). Section 10 prohibited the unauthorized obstruction or modification of any navigable waters. Obstruction and modification were broadly defined to include excavation and filling in such waters, or any work affecting the course, location, condition, or capacity of such waters. These activities could only be conducted with the authorization of the Secretary of War. Section 13 (also called the Refuse Act) prohibited the discharge of refuse matter, which might affect a navigable waterway, unless authorized by the Secretary of War. Interestingly, Congress extended section 13 authority beyond navigable waters by including discharges into tributaries or onto the banks of navigable waters if either activity would result in the refuse reaching navigable waters. Clearly, the intent of the 1899 Act was to protect and maintain navigability.

One of the most important considerations in implementing the 1899 Act was the jurisdictional limits defined by the term "navigable waters." At the time of the passage of the 1899 Act, navigable waters had been interpreted by the courts to be those waterways with the capability or potential for public use as a route of interstate commerce. However, by 1940 navigable waters encompassed those waters which were presently, had been previously, or with reasonable improvements might be made suitable for navigation in interstate commerce. The shoreward limit of Federal authority was established by the Supreme Court as the mean high water mark for rivers and streams and the mean high tide line in coastal areas (mean higher high tide on the west coast).[2]

From the time of its passage until the mid-1960s,the 1899 Act was only applied in terms of impacts to navigation and navigability. By the 1960s the Corps of Engineers was issuing about 8,000 section 10 permits a year. However, by 1970 only four permits had ever been issued under section 13 (Refuse Act) because no specific program had ever been created to issue them.[3] According to Brigadier General Richard Groves, Deputy Director of Civil Works, Office of the Chief of Engineers, while testifying before the House Committee on Public Works in 1971, "other sections of the 1899 Act (had) provided adequate authorities for controlling activities which might adversely affect navigation and the navigable capacity of our waterways."[4] The Corps of Engineers and Justice Department had only occasionally used section 13 as the basis for criminal prosecution and injunctions against industrial plants that deposited solid wastes in shipping channels, which the Corps was obligated to remove as part of its waterways maintenance reponsibilities, and against

those responsible for oil spills which could constitute a fire hazard in navigation channels.[5]

An important Supreme Court decision in 1966 expanded the scope of the Refuse Act to include industrial discharges regardless of whether or not they impacted upon navigation. In the case of the United States v. Standard Oil Company, the Court overturned a District Court ruling that "refuse matter" did not include commercially valuable oil that had been spilled. The Court stated that the history of the Refuse Act forbade such a narrow interpretation and held that the word refuse "includes all foreign substances and pollutants apart from those flowing from streets and sewers and passing therefrom in a liquid state."[6]

The significance of the 1966 Supreme Court decision was not immediately recognized. Only with the growing national concern for environmental quality and the increasing frustration of the environmental community with the delays, inefficiencies, and jurisdictional limits of the existing Federal Water Pollution Control Act did pressure develop upon the Corps of Engineers and Department of Justice to file injunctions against dangerous dischargers.[7] In March 1970, the Justice Department at the request of the Department of Interior sought an injunction against Florida Power and Light Company on the grounds that a discharge of heated water was refuse under section 13 of the 1899 Act. Soon thereafter, the Refuse Act was used to control industrial discharges of mercury into navigable waters. The Refuse Act had become a powerful, efficient pollution control mechanism no longer tied to the considerations of navigation alone.[8]

Concurrent events involving the administration of the well-established section 10 permit program resulted in the initiation of a policy that considerations other than navigation would weigh in permit decisions under the 1899 Act. The Fish and Wildlife Coordination Act had required the Corps of Engineers to consult with the U.S. Fish and Wildlife Service and state fish and wildlife agencies with a view toward conservation of wildlife resources prior to issuing permits for work in navigable waters. However, the Act did not provide that the Corps must accept the recommendations of the wildlife agnecies and, therefore, the Corps sometimes issued permits over the objections of the Fish and Wildlife Service and the state agencies.

These actions led to a legislative proposal in 1967 to establish an environmental protection permit for dredge and fill operations in estuarine areas to be administered by the Department of Interior. In July 1967, partly to avoid the possibility of a dual permit system, the Secretaries of the Army and Interior signed a memorandum of understanding which specified detailed procedures for consultation, public hearings, and conflict resolution on section 10 permit actions. The Corps revised its permit regulations accordingly and effectively stopped issuing section 10 permits for those projects to which the Fish and Wildlife Service objected.[9]

The Corps' policy was tested in the case of Zabel-Russell v. Tabb in which to landowners sued the Jacksonville (Florida) District Engineer for refusal to issue a section 10 permit solely on the grounds of objections by the Fish and Wildlife Service. The Fifth Circuit Court of Appeals in 1970 ruled that "there is no doubt that the Secretary (of the Army) can

refuse on conservation grounds to grant a permit under the River and Harbors Act."[10] Thus, the court upheld the appropriateness of the Corps' policy established as a result of the memorandum of understanding.

Actions by Congress at this time reflected a growing concern for protecting environmental values. The National Environmental Policy Act of 1969 mandated that Federal agencies consider the environmental effects of their proposed activities as part of the decision-making process. Further, the Water Quality Improvement Act of 1970 required that any Federal agency issuing a permit involving activities in the navigable waters of the United States must ensure that the activities would not violate applicable water quality standards.[11]

Refuse Act Permit Program

The stage was set by the above events for the Department of the Army (Corps of Engineers) to enter the environmental protection field. With the liberal interpretation of "refuse" under section 13 of the 1899 Act and increasing environmentalist pressure to prosecute, virtually every industry discharging wastes suddenly found itself vulnerable to enforcement of the law. However, the Justice Department in June 1970, overwhelmed by reports of violations, announced a program of limited, selective prosecution with the remainder of violations deferred to abatement procedures under the Federal Water Pollution Control Act.[12]

Pressure mounted for an effective permit program to be implemented under section 13 which would require all dischargers to obtain permits. Of particular significance were the efforts of the Conservation and Natural Resources Subcommittee of the House Committee on Government

Operations, chaired by Henry Reuss (Wisconsin), which requested that the Corps take the lead in Refuse Act enforcement by informing dischargers to obtain a permit or stop their discharges.[13]

On December 23, 1970, President Nixon responded by establishing the Refuse Act Permit Program (RAPP) by the issuance of Executive Order 11574. The Corps was responsible for administering the program, but the Environmental Protection Agency (EPA) was to have complete responsibility for determining whether discharges conformed to water quality standards.[14]

From the beginning the program was controversial. Industry was shaken at the sudden imposition by the President of a system involving permits, penalties, and demands for information. Environmentalists claimed that the permits would be too lax, particularly with Corps of Engineer involvement. Congressional committees responsible for Federal pollution legislation were angered at the creation of a new Federal program without congressional approval. Further, there were no firm answers to basic questions concerning the standards by which the program would be administered.[15]

About one year after the RAPP began, with about 23,000 applications filed and 20 permits issued, a court decision brought it to a halt. In Kalur v. Resor (1971), a District Court ruled that the permit program was subject to the requirements of the National Environmental Policy Act (NEPA) and issued an order that forbade the Corps and EPA to issue any permits until the regulations for the program were revised to provide for environmental impact statements. The ruling was upheld on appeal. It had been the interpretation of the administering agencies that, since

the whole purpose of the program was to protect the environment, it was not subject to NEPA's requirement to prepare environmental impact statements.[16] Without the manpower to carry out the ruling, the RAPP fell into disarray.

Federal Water Pollution Control Act Amendments of 1972 - Creation of Section 404

At the time of the Kalur decision, Congress had been pursuing the formulation of amendments to the Federal Water Pollution Control Act (FWPCA), a law that had up to that point been inadequate in achieving the abatement of water pollution. The resulting 1972 amendments to the FWPCA established two separate permit programs to replace the defunct RAPP. One program was established under section 402 to regulate point source discharges from industries and municipalities, the National Pollution Discharge Elimination System (NPDES), and the other program established under section 404 for the regulation of discharges of dredged or fill material into navigable waters.

In February 1971, the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works held oversight hearings on existing water pollution programs. Subsequently, the Subcommittee held hearings on 15 water pollution bills on various dates between March and June 1971, including field hearings in several cities throughout the country.[17] The most prominent of the bills were S.523, introduced by Senator Muskie (Maine) et al., and S.1012, S.1013, S.1014, and S.1015, introduced by Senator Cooper (Kentucky), et al., for the Nixon Administration. The bills called for a significant overhaul of existing pollution control

programs. Included in the proposals was the establishment of a permit program under the Administrator of the EPA to regulate discharges of wastes into navigable waters. The hearings were so oriented toward discharges of industrial and municipal wastes that the issue of possible regulation of the discharge of dredged material under the program was obscured to the point of not even being mentioned.

However, dredged material soon became an issue. Upon completion of the hearings and receipt of comments, the Subcommittee produced a draft working print of FWPCA amendments on July 2, 1971.[18] The draft print again called for a single regulatory program for the discharge of "pollutants" under section 402. But perhaps more importantly, the draft print defined "pollutants" to include dredged material. Acceptance of the language in the draft print would have subjected Corps of Engineer construction and maintenance dredging activities to an EPA permit process. Because of logistic and economic considerations on many projects, the Corps had often employed "open-water disposal" for dredged material, or transferring shoaled materials from the navigation channel to another underwater area. The prospect that such Corps activities would be regulated by EPA, creating the potential for permit delays and denials which could shut down harbors and channels, was strongly opposed by the American Association of Port Authorities in a letter of comment in response to the draft print.[19] The Association proposed that responsibility for the regulation of the discharge of dredged material remain with the Corps.

The Committee made minor changes to the draft print, which Senator Muskie reintroduced as S.2770, and unanimously reported it to the Senate

for action on October 28, 1971. S.2770 retained the single permitting authority for all discharges under section 402 despite an effort to amend this provision in committee. Senator Randolph (West Virginia) had offered an amendment to the Committee providing that the Secretary of the Army regulate the discharge of dredged material rather than the EPA Administrator. The amendment failed by a 6 to 9 vote.[20]

A significant aspect of S.2770 was the definition assigned to "navigable waters." Defined as "navigable waters of the United States, portions thereof, and tributaries thereof, including the territorial seas and the Great Lakes,"[21] the language of the Committee clearly indicated the intent to encompass a broader jurisdiction than the "traditional" meaning of navigable waters.

S.2770 reached the Senate floor for debate on November 2, 1971. During the debate, Senator Ellender (Louisiana) introduced an amendment to create a section 404 in the bill which again would authorize the Secretary of the Army to issue permits for the discharge of dredged material into navigable waters. The amendment would require that the potential discharge site be evaluated under criteria established by the Administrator (of EPA), but that the Secretary of the Army also consider the economic impact on navigation and anchorage in his consideration of the permit application. In defense of the amendment, Senator Ellender argued that the discharge of dredged material does not involve the introduction of new pollutants and that it merely relocates pollutants from navigation channels to other open-water locations, a problem that would improve if municipal and industrial sources were controlled.[22] Mr.

Ellender, concerned about the economic impacts of EPA authority over the discharge of dredged material, further stated:

> . . . The bill (S.2770), as reported, would in effect give the Environmental Protection Agency a veto power the spoil disposal areas required for the construction and maintenance of all navigation projects . . . Strict adherence to the published standard would result in 90 percent of the ports and harbors of the United States being closed, until such time as land disposal areas are provided. This would create a catastrophical situation with respect to our foreign and domestic commerce.
>
> Perhaps the most significant effect of applying standards for the discharges of effluents as it relates to moving spoil material from one place in the waterway to another, without the interjection of new pollutants, is the effect . . . standards will have on the benefit-to-cost ratio of navigation projects.[23]

Senator Muskie, the floor manager for S.2770, vigorously resisted the Ellender amendment arguing that the Corps of Engineers should not be in the business of environmental regulation and that all Federal agencies (including the Corps) should be just as obligated to meet standards as industry or the public. After further discussion on the issue, Senator Muskie introduced a compromise amendment to create a section 402(m) in lieu of the Ellender amendment. Section 402(m) retained EPA as the permit authority but allowed the Corps of Engineers accompany a permit application with a certificate from the Secretary of the Army stating that the area chosen for the disposal (discharge) of dredged material was the only reasonable available alternative. If the proposed discharge would not have adverse effects on municipal water supplies, shellfish beds, wildlife, fisheries or recreation areas, the permit would be issued. The amendment was accepted by a voice vote.[24] When debate on

the entire bill was completed, S.2770 passed the Senate by an 86 to 0 vote and concurrence was requested from the House.

House consideration of FWPCA amendments in 1971 began with oversight hearings by the Committee on Public Works between May and July 1971.[25] Of special concern to the Committee was the effectiveness of the RAPP and whether or not new legislation was needed to supercede portions of the 1899 Act. Between July 13 and November 9, 1971 the Committee held 22 days of hearings on a number of bills to amend the FWPCA.[26] Again the American Association of Port Authorities voiced strong opposition, as it had to the Senate Subcommittee, to defining dredged material as a "pollutant" and subjecting its discharge into navigable waters to a permit program administered by EPA.[27]

Following the series of hearings, new bills were introduced: H.R.11895 and H.R.11896 (same text) on November 29, 1971 by Congressman Blatnik, et al.[28] H.R.11896 contained a section 404 which would authorize the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into the navigable waters (subsection(a)). Subsection (b) would require that proposed discharge be evaluated in accordance with guidelines promulgated by the Administrator of EPA and that the discharge not be permitted if it would violate the designation that the Administrator found necessary to protect critical areas. However, if the Secretary could certify that there was no economically feasible alternative to the discharge reasonably available, the Secretary need not follow the designation of the Administrator. Subsection (c) provided that the Secretary could promulgate regulations in lieu of a permit process for

Federal projects involving a discharge of dredged or fill material into navigable waters.[29]

With the passage of S.2770 on November 2, 1971 and the House version, H.R.11896, still in committee, the White House and industry pressured the House Committee on Public Works to reopen hearings in hopes that certain other aspects of the bill could be weakened. Congressman Blatnik, Chairman of the Committee, strongly opposed reopening the hearings, not wanting to subject the legislation to that pressure. However, in late November 1971 Mr. Blatnik was temporarily removed from the scene when he suffered a heart attack. Shortly thereafter the Committee scheduled hearings for December 7-10, 1971.[30]

Environmentalists were angered by efforts to weaken the strong legislation passed by the Senate, including the concept of a section 404 program administered by the Corps of Engineers as proposed in H.R.11896. In testimony provided on December 8, 1971, the Citizen's Committee on Natural Resources, National Wildlife Federation, League of Women Voters, and Izzak Walton League strongly objected to establishment of a separate permit system administered by the Corps.[31] The EPA also opposed section 404, feeling that "all permits for discharges into navigable waters or the oceans should either be issued by EPA or subject to EPA review and concurrence with respect to environmental considerations."[32]

H.R.11896 was reported out of the House Committee on Public Works on March 11, 1972. Section 404 was not changed by the Committee. In leaving the final authority for permit issuance under section 404 with the Secretary of the Army, the Committee stated:

> . . . (U)ntil such time as economic and feasible alternative methods for disposal of dredge material are available, no arbitrary or unreasonable restrictions shall be imposed on dredging activities essential for the maintenance of interstate and foreign commerce, and that, consistent with the intent of this Act, the Committee expects the disposal activities of private dredgers and the Corps of Engineers will be treated in a similar manner.
>
> The Committee further notes that under section 404 the Secretary of the Army shall have the final decision-making responsibility and he shall not abdicate this responsibility to any other agency . . . [33]

Navigable waters for the purpose of administering section 404 was defined in H.R.11896 as "navigable waters of the United States, including the territorial seas".[34] However, the Committee expressed its intent that the term "navigable waters" be given the "broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[35]

H.R.11896 reached the House floor for debate on March 27, 1972. Although there was substantial debate on the bill, section 404 remained unaffected. Upon completion of the floor debate, the House passed H.R.11896 by a 380 to 14 vote and substituted its language into S.2770.[36]

As the House and Senate versions of the legislation went into the conference committee, substantial differences existed in prescribed procedures for permitting discharges of dredged or fill material into navigable waters. The Senate's version (section 402(m)) provided for a program administered by EPA which allowed the consideration of economic impacts when no reasonable disposal alternative was available. The House version (section 404) provided for a program administered by the Corps

of Engineers with permit applications evaluated under EPA-promulgated guidelines. The Secretary of the Army could issue a permit over EPA objection if he determined that there were overriding economic considerations.

The conference report on the bill, dated September 28, 1972 retained most of the House version of section 404 but included provisions for an EPA veto of a Secretary of the Army permit decision when the Administrator determined that the proposed discharge would have an unacceptable adverse effect on municipal water supplies, shellfish beds, and fisheries areas (including spawning and breeding areas), wildlife or recreational areas.[37] Additionally, the conference committee rejected both definitions of navigable waters and inserted a new one -- "waters of the United States, including the territorial seas"[38] -- by far the broadest definition yet considered. On October 4, 1972 the Senate accepted the conference report by a vote of 74 to 0 as did the House by a 366-11 margin.[39]

President Nixon vetoed the bill on October 17, 1972 on grounds that the funding authorization to carry out its provisions were much too high. Section 404 was not an issue in the veto. The Senate overrode the veto in the early morning hours of October 18, the House followed suit that afternoon, and the bill became law on that date.[40]

The 1972 legislative history shows that section 404 was created to protect Corps of Engineer and private dredging operations from excessive EPA and environmentalist interference which could stall or delay the maintenance of navigation channels when the discharge of dredged material into navigable waters appeared to be the only practicable alternative.

However, section 404 was not deemed to be a license to continue the practice indefinitely. According to comments by Senator Muskie during the Senate debate of the conference report:

> . . . the (Conference) Committee expects the Administrator and the Secretary to move expeditiously to end the process of dumping dredged spoil in water -- to limit to the greatest extent possible the disposal of dredged spoil in the navigable waters . . . -- to identify land-based sites for the disposal of dredged spoil . . .
>
> All of these alternatives are available. The only justification for continuing to utilize open water disposal is the cost of alternatives. The Conferees believe that the economic argument alone is not sufficient to override the environmental requirements of fresh water lakes and streams.[41]

Implementation of Section 404, 1972-1977

Section 404 was not to retain its limited interpretation. Much of the controversy surrounding implementation of the permit program revolved around use of the term "fill" and confusion about the legal meaning and intent of "navigable waters." Fill material was not discussed in the legislative history, and neither its meaning nor the reasons for including it in section 404 were explained.[42] As Senator Muskie later explained in 1976, "the only reason we added the word fill was to make it clear that if the specific disposal site agreed upon by the (Corps of) Engineers and EPA happened to be on land thus taking the form of fill, that there be no ambiguity on the question of whether or not it also was covered by Section 404."[43]

"Navigable waters" proved to be a more significant implementation problem. Throughout the formulation of the 1972 amendments, Congress had clearly expressed its intent to break ties with the traditional meaning

of navigable waters. Representative Dingell (Michigan), although not a conferee, explained the conference report:

> The conference bill defines the term navigable waters broadly for water quality purposes. It means all "waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense we sometimes see in some laws . . .
>
> Thus the new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.[44]

Nevertheless, applying new definitions to old terminology was destined to create confusion and controversy, particularly for an agency whose mission through the years had been closely tied to navigation and navigability in the factual sense.

In 1972, the Corps published a proposed regulation for administering the section 404 program expressing its intent to exert jurisdiction to the broader definition of navigable waters. However the final regulation published in 1974 confined the scope of jurisdiction to "traditional" navigable waters as administered under the 1899 Act.[45] In publishing the final regulation, the Corps explained that the change was based on the comments and questions received on the proposed regulation and on extensive review of the judicial precedents in the area.[46]

Meanwhile, EPA was using the expanded definition in administering the section 402 (NPDES) permit program, which was substantially developed by the time the final Corps regulation was published. EPA became concerned with the Corps' reluctance to expand its jurisdiction as expressed

in a June 19, 1974 letter from the Administrator to the Chief of Engineers:

> Our interpretation of "navigable waters" within the meaning of the FWPCA does not conform to the Corps recently issued regulation. We firmly believe that the Conference Committee deleted "navigable" from the FWPCA definition of "navigable waters" in order to free pollution control from jurisdictional restrictions based on "navigability."[47]

The Administrator further argued that recent court decisions had supported EPA's definition. The Justice Department concurred with EPA's criticism and took the position that it would not bring enforcement action against persons disposing of dredged or fill material in wetland areas without section 404 permits as long as the Corps refused to issue such permits.[48]

The Corps maintained its narrow definition of navigable waters. Therefore, in late 1974 the Natural Resources Defense Council (NRDC) and National Wildlife Federation brought suit seeking judgement to compel the Corps to rescind its 1974 regulation and establish a new one. On March 27, 1975 the district court granted the plaintiff's motion in NRDC v. Calloway, ordering the recission of that part of the Corps regulation limiting the scope of "navigable waters" and the promulgation of a new regulation to replace it.[49]

On May 6, 1975 the Corps published four alternative proposals for administering the expanded section 404 program and invited comments. The four alternatives involved varying degrees of jurisdictional limits and state participation.[50] However, simultaneously the Corps issued a press release that touched off significant controversy. The press release stated that:

> . . . Under some of the proposed regulations, Federal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion . . .
>
> Under the broad interpretation of the 1972 FWPCA amendments, millions of people may be presently violating the law. Convicted offenders may be subject to fine of up to $25,000 a day and one year imprisonment. These persons could also be required to remove any dredged or fill material placed without a permit in or on waters of the United States.[51]

The press release angered agricultural and forestry interests. Most of the 4,500 comments received responded to the press release and not the proposed alternatives. The EPA Administrator urged the Corps to make a public retraction of the press release.[52] Nine environmental groups jointly issued a press release criticizing the Corps' "scare campaign."[53]

Some environmental groups were sensitive to the backlash caused by the Corps' press relese. Shortly after the press release critical of the Corps, both the NRDC and the Environmental Defense Fund provided comments to the Corps on the proposed regulations recommending that certain activities be exempted from regulation and that exemptions be granted for activities involving insignificant quantities of dredged and/or fill material. Both groups also sought to have the Corps change the terms used to indicate the jurisdictional limits of navigable waters to incorporate a system based on plant life definition.[54]

The furor sparked by the Corps' press release attracted congressional interest. Hearings were held during July 1975 by the Subcommittee on Water Resources of the Committee on Public Works and Transportation to inquire into the proposed regulations and associated

problems. During the hearings the Assistant Secretary of the Army and Assistant EPA Administrator appeared together and agreed that a manageable program regulating dredging and filling operations had been devised to protect and improve water quality. The "manageable program" would provide for certain exemptions to appease agriculture and forestry interests and a series of public meetings across the country to discuss local problems.[55] Apparently the testimony convinced skeptical congressmen to refrain from legislative action to curb the section 404 program at that time.

The interim final regulation was published on July 25, 1975.[56] The regulation included the expanded definition of navigable waters and increased state participation in the review and approval process. To address the issue of a suddenly expanded permit program, the Corps adopted a two year phase-in process which would allow time to recruit personnel and develop procedures to handle the expanded program. Phase I, effective upon publication, included "traditional" navigable waters and their "adjacent wetlands." Phase II, to be effective July 1, 1976, incorporated primary tributaries, freshwater wetlands contiguous thereto and all lakes not within the traditional jurisdiction of the Corps. Phase III, to begin July 1, 1977, encompassed the entire area of section 404 jurisdiction.

During implementation of Phase I, the Corps encouraged public input on the new regulation by way of 4 major public hearings and 243 local public meetings throughout the country.[57] Comments were about evenly divided between those favoring the expanded jurisdiction and those opposing it. The best organized opponents were agriculture,

silviculture, and construction interests who resented the possibility that formerly routine activities could be subjected to regulation under section 404. These opponents wanted specific exemptions and other revisions in the program codified in law rather than regulation and thus approached Congress for legislative change.[58]

Congress responded by considering revisions in 1976, to be subsequently discussed in detail. Because proposed revisions were before Congress, President Ford was persuaded to place a 60-day moratorium on Phase II implementation, scheduled for July 1, 1976. With Congress remaining deadlocked on the proposed revisions, the moratorium expired and Phase II was implemented in September 1976.[59]

In late 1976, the Corps proceeded to prepare draft revisions to its 404 regulation, not directed at substantive change but rather to shorten and clarify them.[60] Shortly after the implementation of Phase III, the revised regulation took effect on July 19, 1977.[61]

The 1977 regulation threw out the term "navigable waters" in favor of exclusive reference to "waters of the United States" for jurisdictional purposes. It incorporated wetlands into the definition of section 404 jurisdiction by rejecting some of the old terminology of the 1975 regulation and adding the words "including adjacent wetlands" to each category of "waters of the United States."[62] "Wetlands" and "adjacent" were defined:

> The term "wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas . . . The term "adjacent" means bordering, contiguous, or neighboring. Wetlands

> separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.[63]

The 1977 regulation also continued the effort to streamline the permit process for activities subject to section 404 which were recognized as minor in nature. A district court had ruled in NRDC v. Train that the EPA could not grant exemptions to the prohibitions of section 301 of the FWPCA merely on the basis of the type of industry involved such as agriculture and silviculture. 1975 Corps regulation had taken a similar approach to exemptions. Therefore, the 1977 regulation for the 404 program accommodated the ruling in NRDC v. Train by removing reference to exempted industries and substituting exemptions for certain activities of the agriculture and silviculture industries into the definitions of "dredged" and "fill" material.[64]

To supplement this change, the Corps created the concept of permitting by regulation by establishing the "nationwide permit." This action permitted by regulation many of the routine activities, not specifically exempted by definition, that agriculture, silviculture, and construction interests did not want subjected to a permit process.[65] These activities could commence without further section 404 permit action subject to certain conditions and best management practices.[66] However, the use of the nationwide permit did not obviate the need to comply with applicable local and state laws and section 10 of the 1899 Act for work in "traditional" navigable waters.

1977 regulations also retained the portion of the 1975 regulation which provided for the issuance of general permits by Corps' District Engineers for groups of activities that are substantially similar in

nature and determined to have insignificant impacts. The general permits could be issued after being processed and subjected to public interest review just as individual permits would be handled.[67]

The Clean Water Act of 1977 - Changes in Section 404

The first rumblings for legislative change to the section 404 program had surfaced shortly after the decision in NRDC v. Calloway in March 1975. Upon the drafting of proposed regulations to comply with the decision and publication of the controversial Corps' press release, several bills were introduced in both the House and Senate designed to significantly curb the program. The agricultural and silviculture interests had largely been responsible for this effort. Proposed changes included: redefining navigable waters in traditional terms; delegating a significant portion of the permitting authority to the states; and redefining the terms "dredge" and "fill" material.[68] Legislation did not materialize during the 1975 session. As indicated earlier, congressmen may have been satisfied at that time with Corps efforts to develop a workable program in cooperation with EPA that would exempt many of the routine activities of agriculture and silviculture.

Congress maintained an interest in section 404 into the 1976 legislative session. In the spring of 1976 while the House Committee on Public Works was considering H.R.9560, a bill to provide financial authorizations under FWPCA, Representative Breaux (Louisiana) offered an amendment to section 404 which the Committee adopted. The Breaux amendment would restrict the definition of navigable waters to cover only areas "presently used" or "susceptible to use in their natural condition

or by reasonable improvement" to transport interstate or foreign commerce. This definition would have been more restrictive than court interpretations under the 1899 Act. In fact, the Breaux amendment would have applied to the 1899 Act as well.[69] Breaux's home state of Louisiana, with its vast wetland areas, was probably as much affected as any state by the significant expansion of section 404 mandated by the NRDC v. Calloway decision.

On June 3, 1976 the House adopted a more moderate stance by accepting an amendment to the Breaux language introduced by Representative Wright (Texas). The Wright amendment added "and adjacent wetlands" to the Breaux definition of navigable waters. Other provisions included: authorization for the Secretary of the Army to enter into agreements with states regarding regulation of other wetland areas not adjacent to navigable waters if the states so desired; incorporation of general permit procedures and exemptions specified in the 1975 regulation into the law; exemptions for Federal or federally assisted projects from permit requirements if the environmental impact statement submitted to Congress in connection with project authorization addressed the impacts of any associated dredging and filling; and creation of a mechanism to turn the section 404 proram over to the states if they developed programs acceptable to the Secretary of the Army.[70]

H.R.9560 as passed by the House was introduced in the Senate as S.2710. Senators Baker (Tennessee) and Randolph (West Virginia) offered an amendment to S.2710. This amendment would reduce Corps jurisdiction under section 404 to Phase I of the 1975 regulations -- "traditional" navigable waters plus adjacent wetlands. However, instead of scrapping

the remainder of the program, the amendment proposed to have EPA regulate discharges of dredged or fill material in other waters of the United States as point source discharges under the section 402 program. Provisions were included to delegate this portion to the states that developed acceptable programs. Other provisions related to exemptions and general permits were essentially the same as the Wright amendment.[71] Environmental groups reacted much more favorably to the Baker-Randolph amendment than the Wright amendment.[72]

The Senate Public Works Committee adopted the Baker-Randolph amendment 7 to 6, but on the floor of the Senate, Senator Tower (Texas) tried to have the Wright amendment with its more restricted jurisdictional scope reinstated into S.2710. Senator Tower's motion failed by a close 39 to 40 vote.[73] Differences between the Senate and House versions could not be reconciled in conference and the 1976 session passed without a clean water bill being enacted.

Among the several bills introduced in the House in 1977, the most prominent and comprehensive was H.R.3199, introduced by Representative Roberts (Texas) et al. on February 7, 1977.[74] Amendments to section 404 in H.R.3199 adopted the language of the Wright amendment to H.R.9560 of the previous session. When hearings were held on March 1-4, 1977, development-oriented interest groups including soil conservation, mining, agriculture, silviculture, realtors, state highway agencies, and petroleum appeared in force to express opposition to the broad section 404 jurisdiction then in effect and to announce support for curbing the 404 program as proposed in H.R.3199. Environmental interest groups at the hearings wanted to see the broad jurisdiction retained, allowing for some

limited exemptions, and opposed exempting Federal projects from public scrutiny under section 404 even if an environmental impact statement had been submitted to Congress.[75]

Despite Administration support for broad jurisdiction for the program, the House Committee on Public Works and Transportation reported H.R.3199 on March 29, 1977 with no change in the section 404 amendment proposal.[76] Committee members Ambro (New York), and Edgar and Myers (Pennsylvania) filed supplemental views in the report opposing the action of the Committee for what they believed was the dismantling of a valuable section 404 program.

H.R.3199 reached the House floor for debate on April 5, 1977. Section 404 was a frequent topic of the debate. Sentiment was strong on both sides of the section 404 jurisdiction issue. Representative Edgar (Pennsylvania) and Cleveland (New Hampshire) introduced amendments that would restore the broad section 404 jurisdiction to H.R.3199 while retaining provisions for certain exemptions and general permits. Both were defeated by voice vote. H.R.3199 shortly thereafter passed the House by a 361 to 43 vote.[77] Many in the House who had opposed the provisions for section 404 in H.R.3199 voted for the bill, believing that the issues would be resolved to their satisfaction in conference with the Senate.

The Senate Committee on Environment and Public Works held comprehensive hearings around the country between June 1 and July 1, 1977 to consider water quality issues in preparing to introduce amending legislation to the FWPCA. Hearings in Fort Collins, Colorado; Lemars, Iowa; New Orleans, Louisiana; and Washington, D.C. provided the most spirited

discussion and comments on section 404.[78] In Fort Collins, Wyoming and Colorado farmers, cattlemen, and associated interests strongly favored restricting the broad section 404 jurisdiction and providing exemptions in the law for their routine activities. Comments at the Lemars hearing were substantially the same. The New Orleans and Washington hearings featured opposition to broad 404 jurisdiction from a wider variety of interests groups involved in various forms of development and activity affecting water and wetlands. Although environmental support for leaving the program intact appeared at Fort Collins and Lemars, it was far more visible and vocal in New Orleans and Washington.

The Senate Committee seemed determined to maintain the broad jurisdictional limits of section 404 in one form or another. Therefore, when the Committee reported an original bill, S.1952, on July 28, 1977, it essentially contained the same approach as the Baker-Randolph amendment of the previous year. It left the jurisdictional limits intact under Corps responsibility but specifically provided under section 402 a mechanism for turning the section 404 program over to the state's for all waters except "traditional" navigable waters and their adjacent wetlands, which would continue to remain under Corps authority.[79]

The Senate debated S.1952 on August 4, 1977. An amendment introduced by Senator Bentson (Texas) to institute the House language (H.R.3199) for section 404 was defeated 51 to 45. An amendment introduced by Senator Haskell (Colorado), to exempt from section 404 permit requirements any Federal project specifically authorized by Congress for which a final environmental impact statement had been prepared, was

accepted. When debate on the bill was completed, the Senate passed it 96 to 0.[80]

Because of substantial differences in section 404 and other portions of H.R.3199 and S.1952, the House Public Works and Transportation Committee held additional hearings between September 15 and 20, 1977, to feel out public sentiment on the issues.[81] Jurisdictional limits, exemptions, and transfer of portions of the program to the states continued to be the significant issues of section 404 with development-oriented interests favoring change in the program. Thirty-four environmental groups, apparently not wanting the 1977 session to pass without clean water legislation, had united to form the National Clean Water Campaign. Spokesmen at the hearings opposed reducing the section 404 program, transferring portions of it to the states, and granting any exemptions from section 404 for Federal projects.[82]

A conference compromise bill (H.R.3199) was reported on December 6, 1977.[83] The House agreed to the conference report by a vote of 346 to 2 and the Senate by voice vote on December 15, 1977. President Carter signed the Clean Water Act of 1977 into law on December 28, 1978.[84]

The 1977 compromise made many changes in section 404, but perhaps more significant was the change that Congress chose not to make -- navigable waters was not redefined and it retained its broad interpretation as all "waters of the United States" for the purpose of water quality. Key changes to section 404 in the 1977 Act include: (1) codification into law the authority for the Secretary of the Army to issue general permits, previously performed only by regulation; (2) codification into law specific exemptions for routine activities considered to be of

insignificant impact; (3) exemption from regulation any discharge of dredged or fill material which is determined to be a "best management practice" under an approved Section 208 plan; (4) procedures for a state to assume the administration of the Section 404 program (except in waters presently used or susceptible to use for navigation, including adjacent wetlands); (5) procedures to expedite permit processing; (6) exemption of Federal projects involving discharge of dredged or fill material from regulation if the effects of the discharge are addressed in an environmental impact statement submitted to Congress prior to authorization or funding; (7) procedures for handling violations and establishment of specific civil and criminal penalties for violations of section 404; and (8) recognition of a state's authority to control discharges of dredged or fill material within its jurisdiction, including the activity of any Federal agency (aimed at requiring the Corps to acquire state water quality certification for discharges from maintenance dredging of channels). Use of this authority by the states could not be construed as impairing the Secretary of the Army's authority to maintain navigation.

CHAPTER 1

ENDNOTES

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[3]Beatrice Hort Holmes, History of Federal Water Resources Programs and Policies, 1961-1970 (USDA Economics, Statistics, and Cooperatives Service, Misc. Publication 1379, 1979), p. 131.

[4]U.S. Congress, House, Committee on Public Works, Water Pollution Control Legislation - 1971 (Oversight of Existing Program), Hearings before the Committee on Public Works, Serial 92-10, 92nd Cong., 1st sess., 1971 (hereafter referred to as 1971 Oversight Hearings), pp. 262-63.

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[6]1971 Oversight Hearings, p. 263.

[7]Holmes, p. 135.

[8]1971 Oversight Hearings, p. 263.

[9]Holmes, p. 133.

[10]Zabel-Russell v. Tabb, 430 F.2d 199 (5th Cir. 1970).

[11]1971 Oversight Hearings, p. 263.

[12]Holmes, p. 136.

[13]Ibid., p. 136.

[14]Ibid., p. 136.

[15]John Quarles, Cleaning Up America: An Insider's View of the EPA (Boston: Houghton Miflin Company, 1976), p. 103.

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[17]U.S. Congress, Senate, Federal Water Pollution Control Act Amendments of 1971, S. Rept. 414 to Accompany S.2770, 92nd Cong., 1st sess., 1971, p. 4.

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[21]Ibid., p. 165.

[22]U.S. Congress, Senate, Committee on Public Works, Legislative History of the Water Pollution Control Act Amendments of 1972, Serial 93-1, 93rd Cong., 1st sess., 1973 (hereafter referred to as Legislative History - 1972), pp. 1386-87.

[23]Ibid., p. 1387.

[24]Ibid., pp. 1392-93.

[25]1971 Oversight Hearings.

[26]U.S. Congress, House, Committee on Public Works, Water Pollution Control Legislation, 1971 (Proposed Amendments to Existing Legislation), Hearings before the Committee on Public Works, Serial 92-16, 92nd Cong., 1st sess., 1971.

[27]Ibid., pp. 2394-95.

[28]U.S. Congress, House, Committee on Public Works, Water Pollution Control Legislation, 1971, Hearings before the Committee on Public Works, Serial 92-24, 92nd Cong., 1st sess., 1971, p. 199.

[29]U.S. Congress, House, Federal Water Pollution Control Act Amendments of 1972, H. Rept. 911 to Accompany H.R.11896, 92nd Cong., 2nd sess., 1972, p. 52.

[30]Quarles, p. 154.

[31]U.S. Congress, House, Committee on Public Works, Water Pollution Control Legislation, 1971, Hearings before the Committee on Public Works, Serial 92-24, 92nd Cong., 1st sess., 1971, pp. 354-423.

[32]Legislative History - 1972, pp. 855-56.

[33]U.S. Congress, House, H. Rept. 911, 92nd Cong., 2nd sess., 1972, p. 130.

[34]Ibid., p. 53.

[35]Ibid., p. 131.

[36]Legislative History - 1972, pp. 749-51.

[37]U.S. Congress, Senate, Federal Water Pollution Control Act Amendments of 1972, Conference Report to Accompany S.2770, S. Rept. 1236, 92nd Cong., 2nd sess., 1972, pp. 141-42.

[38]Ibid., p. 144.

[39]Legislative History - 1972, pp. 222, 276.

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[45]Myhrum, p. 596.

[46]39 Federal Register 12115 (1974).

[47]1976 Senate Hearings, pp. 349-50.

[48]Ibid.

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[54]Robert W. Haines, "Wetlands' Reluctant Champion: The Corps Takes a Fresh Look at 'Navigable Waters'," Environmental Law, The Lewis and Clark Law School - Northwestern School of Law, vol. 6, no. 4, 1975, pp. 232-33.

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[58]Myhrum, p. 607.

[59]P. S. Ward, "Section 404: A Controversial Program That Grew Like Topsy," Journal Water Pollution Control Federation, vol. 49, no. 5, May 1977, p. 731.

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[62]33 CFR 323.2(a)(1)-(4) (1980).

[63]33 CFR 323.2(c)-(d) (1980).

[64]Myhrum, pp. 611-12.

[65]Ibid.

[66]33 CFR 323.4 (1980).

[67]33 CFR 323.3(c) (1980).

[68]Haines, pp. 233-37.

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[71]Congressional Record, vol. 122, 1966, pp. 28780-81.

[72]Ibid.

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[74]U.S. Congress, Senate, Committee on Environment and Public Works, Legislative History of the Clean Water Act of 1977, Serial 95-14, 95th Cong., 2nd sess., 1978 (hereafter referred to as Legislative History - 1977), pp. 1143-65.

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[76]U.S. Congress, House, Federal Water Pollution Control Act Amendments of 1977, H. Rept. 139 to Accompany H.R.3199, 95th Cong., 1st sess., 1977.

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CHAPTER 2

OVERVIEW OF THE SECTION 404 PERMIT PROCESS

Section 404 Since 1977

Although Congress in the Clean Water Act of 1977 attempted to streamline and clarify the section 404 program and provide a mechanism to turn a portion of the program over to the states, many of the expected benefits have not materialized. Complaints of over-regulation still run rampant and none of the states have assumed administration of the program for Phase II and III waters. Therefore, several bills were introduced in the 97th Congress to further amend section 404. Those bills included: H.R.393, sponsored by Mr. Paul (Texas) et al.; H.R.3083, by Mr. Hall (Texas) et al.; H.R.3962, by Mr. Hightower (Texas) et al.; and S777, by Mr. Tower (Texas) et al. The basic intent of each of these bills was to restrict the definition of navigable waters for purposes of section 404 to its traditional meaning.[1]

In the administrative arena, the Corps of Engineers published proposed amendments to its permit regulations on September 19, 1980, for the purpose of incorporating changes necessitated by the 1977 Act, simplifying the process, and expanding the use of general permits.[2] However, the incoming Reagan Administration did not allow the proposed amendments to take effect. The entire regulatory program of the Corps was designated for review by the Presidential Task Force on Regulatory Relief with the opinion that "although the (proposed) changes were a step in the right direction, they did not go as far as is needed to balance the program."[3] The reform effort for the section 404 program is targeted

toward modifying its jurisdictional extent, reducing the time required to reach a permit decision, and eliminating duplication with states and other agencies.

According to the task force, action needed to "balance the permit program" includes revisions to regulations, policy, and procedures, methods to induce the states to assume the program, and possibly legislative changes.[4] The philosophy of the Reagan Administration on section 404 has perhaps been best stated by Assistant Secretary of the Army William R. Gianelli:

> The Section 404 program has gone far beyong its originally envisioned scope and . . . beyond the appropriate role of the Federal government in regulating the development of private and public resources involving the nation's waters and wetlands . . . . The present regulations are putting the Corps far beyond its original mission of protecting the nation's navigational waterways.[5]

Issuance of final rules implementing some of the proposed 1980 changes which are consistent with Reagan Administration policies of reducing regulation and streamlining the program were issued in July 1982.[6] Proposals for implementation of substantial revisions in the program in accordance with task force recommendations may be forthcoming in future months.

The Nature of the Permit Process

The permit process under section 404 (and also section 10 of the 1899 Act for traditionally defined navigable waters) far transcends the issue of water quality. The issue, according to the Corps regulation, in evaluating permit applications is one of considering the "public interest." The regulation states:

> The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity and its intended use on the public interest . . . . That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.[7]

The primary onus for this broad-based approach to permit decision-making is derived from the policy declaration in NEPA that Federal agencies "use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, . . . create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[8] NEPA therefore serves as a type of umbrella under which the section 404 process can function complementary to other environmental legislation and public welfare considerations.

The permit process requires compliance with a number of specific environmental statutes. Each one mandates that Federal activities, to include processing of Federal licenses and permits, comply with its substantive requirements. In the absence of compliance, a permit cannot be issued. While NEPA only requires full disclosure of the impact of and alternatives to a proposed activity without legally binding the decision-maker, most of these laws mandate specific procedures and requirements which will directly affect whether the permit is issued. Some of the most significant applicable laws are briefly described in the following

paragraphs. Note that most of these laws are not directly related to water quality.

Section 401 of the Clean Water Act requires that a permit applicant secure a certification from the state in which the discharge will occur that the discharge will comply with applicable effluent standards and water quality standards.[9] The Fish and Wildlife Coordination Act requires that Federal agencies responsible for issuing permits or licenses for proposals to modify any body of water must first consult with the U.S. Fish and Wildlife Service and the head of the appropriate state agency exercising administration over the wildlife resources of the affected state. The purpose for coordination is that conservation of fish and wildlife resources receive equal consideration with other features of water resource development.[10]

The National Historic Preservation Act of 1966 provides that the Advisory Council on Historic Preservation is authorized to review and comment upon activities licensed by the Federal government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for listing.[11] The Preservation of Historical and Archeological Data Act of 1974 provides that, whenever a federally-licensed activity threatens significant historical or archeological data, the Secretary of Interior may take action necessary to recover and preserve the data prior to commencement of the activity.[12]

The Endangered Species Act requires that Federal agencies must take any action necessary to insure that any activity authorized by them will not jeopardize the continued existence of endangered or threatened species or result in the destruction or modification of critical

habitat.[13] The Wild and Scenic Rivers Act provides that no Federal agency shall assist by loan, grant, license, or otherwise in the construction of a water resource project that would have a direct and adverse effect on the values for which a river was designated under the Act.[14] Other applicable laws may include the Coastal Zone Management Act; Marine Protection, Research and Sanctuaries Act of 1972; Federal Power Act of 1920; Interstate Land Sales Full Disclosure Act; Deep Water Port Act of 1974; Marine Mammal Protection Act of 1972; and the Land and Water Conservation Fund Act of 1965.

The Corps of Engineers maintains a strong policy for the protection of wetland areas. Wetlands perform the following functions which are important to the overall public interest: (1) natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing, and resting sites for aquatic or land species; (2) areas for study of the aquatic environment or as sanctuaries or refuges; (3) preservation of natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, and current patterns; (4) shoreline protection; (5) storage areas for storm and flood waters; (6) natural groundwater recharge; (7) natural water filtration and purification.[15] The Corps regulation states:

> Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration of which should be discouraged as contrary to the public interest . . . . No permit will be granted to work in wetlands . . . unless the District Engineer concludes . . . that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits.[16]

Clearly, the section 404 permit process has implications for water and land use far beyond the consideration of water quality impacts. The law is in effect a powerful land use regulation tool. Not only can the program dictate directly how wetland areas can be used, but major upland developments involving relatively minor work in "waters of the United States" are subjected in total to the section 404 "public interest" review and NEPA. Furthermore, a small-scale proposal by an individual which requires a permit will be subjected to the same comprehensive review process.

Processing of Permits

Comprehensive review and analysis procedures under section 404 begin with the submission of an application for a permit to discharge dredged or fill material into waters of the United States. The application must provide a complete description of the proposed activity. Public input is solicited by way of a public notice and, if significant public opposition to a proposed activity is present, a public hearing may be held.[17]

The District Engineer performs a technical analysis of the impacts of the proposed discharge in the form of an environmental assessment or a more rigorous environmental impact statement if permitting the activity would be a major Federal action significantly affecting the quality of the human environment. In addition, the District Engineer must specifically evaluate the water quality impacts of the proposed discharge in accordance with section 404(b) guidelines promulgated by EPA.[18]

If after weighing the benefits of the proposed discharge against the adverse effects the District Engineer determines it to be in the "public interest," the permit will be issued. The decision is based upon the results of the technical evaluations, coordination, and adequacy of compliance with other environmental statutes. The permit may include conditions deemed necessary to minimize or offset adverse impacts. Should Fish and Wildlife Service or EPA personnel object to a District Engineer's preliminary decision to issue a permit, the matter will be elevated to higher authorities in the respective agencies for resolution if they so request. If those agencies decide not to request that the matter be elevated, the District Engineer may issue over the objections.[19]

All discharges of dredged or fill material, except those exempted by the law, must be authorized by one of the following types of permits under section 404: (1) the nationwide permit, (2) general permits, or (3) individual permits. The nationwide permit was authorized by issuance of the final 1977 regulation as discussed in Chapter 1. The general and individual permits must be fully processed through the public interest review by the District Engineer as described in the previous paragraphs.

Nationwide permits authorize discharges of dredged or fill material into (1) watercourses and adjacent wetlands located above the headwaters, that point on a non-tidal stream above which the average annual flow is less than five cubic feet per second, and (2) natural lakes or other non-tidal bodies of water, either isolated or above the headwaters, which are less than ten acres in surface area, including adjacent wetlands. Other specific categories of discharges covered by nationwide permit

include: (1) those associated with utility line crossings where there is no change in the bottom contours of the water body, (2) minor bank stabilization less than 500 feet in length, (3) minor road crossing fills of less than 200 cubic yards, and 4) fill placed incidental to the construction of bridges across tidal waters including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills.[20] Conditions and application of best management practices are required to insure that environmental values and overall public interest are protected.

There is no maximum time limit on the processing of either individual or general permits because of the inherent uncertainties involved in specific permit circumstances. However, consistent with the intent of the Clean Water Act (Section 101(f)) "to encourage the drastic minimization of paperwork and interagency decision procedures . . . so as to prevent needless duplication and unnecessary delays . . .," Congress established a target time limit. Section 404(q) states that "to the maximum extent practicable, a decision . . . will be made not later than the ninetieth day after the date the (public) notice . . . is published." Nevertheless, certain requirements that might be necessitated in a particular permit circumstance would cause the process to far exceed 90 days. Those factors might include preparation of an environmental impact statement, mitigation of an affected archeological site, negotiations to determine wildlife mitigation requirements, unresolved agency objections, and other factors.

Monitoring and Enforcement Activities

Monitoring and enforcement activities are a vital part of the regulatory program. When unauthorized activities are discovered, the District Engineer will immediately issue a cease and desist order and direct that any interim protective measures deemed necessary are accomplished. If the unauthorized activity is such that legal action is not warranted, the District Engineer may choose to process an after-the-fact permit. The after-the-fact permit may be denied if the activity is not found to be in the public interest. If so, restoration of the area to pre-project conditions will be required and possible legal action considered.[21]

When more serious violations are discovered, the District Engineer will seek voluntary restoration and consider the appropriateness of legal action. If efforts to seek voluntary restoration fail, the District Engineer will pursue criminal or civil action through the U.S. Attorney, as the appropriate case warrants.[22]

These provisions provide for a strong, enforceable program, provided that adequate staffing is maintained to conduct monitoring and surveillance activities and the Justice Department is supportive of enforcement efforts.

CHAPTER 2

ENDNOTES

[1]Information News Service, Inc., Water Information News Service, Washington, D.C., vol. 6, no. 18, 31 December 1981, pp. 3-7.

[2]45 Federal Register 62732-77 (1980).

[3]47 Federal Register 1697 (1982).

[4]Ibid.

[5]William R. Gianelli, Assistant Secretary of the Army for Civil Works, Speech before the American Society of Civil Engineers' Water Forum '81, San Francisco, California, 10 August 1981.

[6]47 Federal Register 31793 - 31834 (1982).

[7]33 CFR 320.4(a) (1980).

[8]National Environmental Policy Act of 1969, P.L. 91-190, U.S. Code, vol. 42, secs. 4341-47.

[9]Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, U.S. Code, vol. 33, sec. 1341.

[10]Fish and Wildlife Coordination Act, P.L. 85-624, U.S. Code, vol. 16, secs. 661-666c.

[11]National Historic Preservation Act of 1966, P.L. 89-665, U.S. Code, vol. 16, sec. 470.

[12]Preservation of Historical and Archeological Data Act of 1974, P.L. 93-291, U.S. Code, vol. 16, secs. 469 et seq.

[13]Endangered Species Act of 1973, P.L. 93-205, U.S. Code, vol. 16, secs. 1531 et seq.

[14]Wild and Scenic Rivers Act, P.L. 90-542, U.S. Code, vol. 16, secs. 1278 et seq.

[15]33 CFR 320.4(b) (1980).

[16]Ibid.

[17]33 CFR 325 (1980).

[18]Ibid.

[19]Ibid.

[20]33 CFR 323.4 (1980).

[21]33 CFR 326 (1980).

[22]Ibid.

CHAPTER 3

SECTION 404 IN WESTERN COLORADO - AN ANALYSIS OF THE MAJOR ISSUES AND CONCERNS

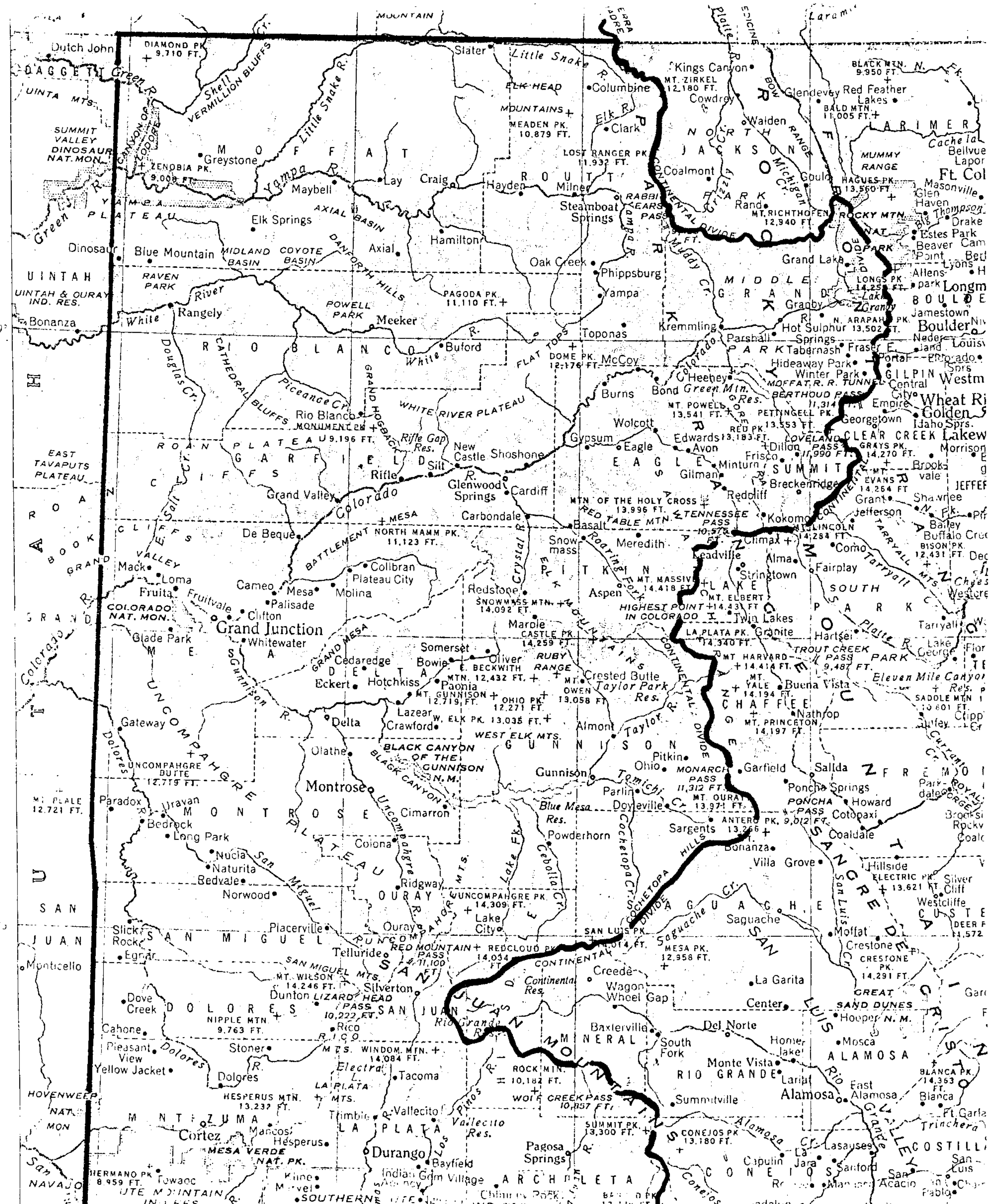
Description of the Western Colorado Environment and Economy

To better understand the issues and concerns regarding the implementation of section 404 in western Colorado, it is important to provide a brief description of the region - the land, the economic base, the lifestyle. The following paragraphs are adapted from Colorado, A Guide to the Highest State,[1] except where noted.

The portion of Colorado west of the Continental Divide comprises an area of about 40,000 square miles, all within the Colorado River basin. A detailed map of the region is provided as Figure 2. The landforms vary from the forested mountains along the Divide westward to the more arid mesa country bordering Utah. In the northwest corner of the state are two great and almost inaccessible river gorges, along the Green and Yampa Rivers. Through the central portion of the region, the Colorado River and its tributary, the Gunnison, flow from the mountains through the mesa country, both lined with fields and orchards in their lower reaches. The southwest corner is ringed by the high walls of San Juans, San Miguels, and La Platas which descend to the arid mesa country of the Ute and Southern Ute Indian Reservations.

Because of the extreme range in altitude, the region is rich in biological diversity. The mountains primarily support coniferous forests and the mesa country is characterized by a shrub/brush type of vegetation. The region supports populations of elk, antelope, deer, and

FIGURE 2



The Western Colorado Region
Study Area for the Evaluation of
Section 404 Implementation

Source: The World Book Atlas

numerous small mammals and birds. Bear, lynx, bobcat, and big horn sheep are among those animals found at higher elevations. Streams and lakes support a cold water fishery most commonly known for the rainbow trout.

Flanking the rivers and streams that flow through the region are narrow fringes of periodically saturated or snow-covered wetlands. These areas are critical to the survival of the region's wildlife. Of the approximately 900 species of wildlife found in Colorado, an estimated 65 percent are either partially or completely dependent on this riparian wetland habitat. This important habitat makes up only one to two percent of the state's total area.[2]

The mean annual precipitation in the state is about 17 inches. Areas in the western region annually receive from less than 10 inches up to about 27 inches at Silverton in the San Juan Mountains. Although the region only has about 37 percent of the state's land area, it receives about 69 percent of the surface water. Water is used in the region for irrigation and hydropower, and large quantities are diverted across the Divide to the eastern plains for irrigation and municipal water supply.

The region is abundant in mineral resources. The large coal fields on the Western Slope rank Colorado high among the states in coal reserves. Mesa, Garfield, and Rio Blanco Counties contain billions of barrels of recoverable oil locked in the oil shale reserve. Scattered oil and natural gas fields are found in the region. Molybdenum and uranium are also extracted. Granite, marble, limestone, sandstone, and lava are quarried in the region.

Ranching and farming play an important role in the economy and lifestyle of western Colorado. The rangeland of the mesa country is

suitable for cattle and sheep grazing. Irrigated agriculture is prevalent in the Grand Junction area.

Recreation and tourism are important to western Colorado. Numerous ski areas dot the mountains throughout the region. Summer recreation opportunities include hiking, backpacking, fishing, river rafting, and sightseeing. Many tourists are attracted to western Colorado by its scenic beauty and diversity and the presence of the many areas set aside for national parks, monuments, recreation areas, and forests.

Much of the land in western Colorado is owned and controlled by the U.S. Forest Service and the U.S. Bureau of Land Management. The lands are managed by these agencies for the optimum utilization of their resources, including considerations for conservation, recreation, and general health and welfare.

Despite the influx of tourists and development-oriented interests, the region remains characteristically rural. A sense of independence and self-sufficiency thrives among the people, primarily due to the strong influence of farmers and ranchers and the lifestyle they represent. Resistance to the control or regulation of their activities by government is strong. It is in this setting that the issues regarding section 404 implementation will be evaluated.

Many of the concerns and criticisms discussed in the subsequent paragraphs of this chapter have proven to be more based on unfounded fears, misunderstanding, and misinformation than the record of actual program implementation in the region (addressed in Chapter 4) will show to be the case.

Unclear Congressional Intent

The most commonly raised issue related to the section 404 program involves the broad geographical expanse and the range of activities regulated under it. There has been much debate as to whether the program that has evolved since 1972 is what Congress intended for it to be. Probably the best source of the confusion which has fueled this debate may be found in the record of Congress itself.

Despite the apparent overwhelming evidence presented in Chapter 1 that the intent of Congress was to extend pollution control authority to all waters of the United States, there is important evidence even prior to passage which tends to contradict that concept. Senator Muskie, the leading figure in the passage of the 1972 amendments, presented the following comment on the floor of the Senate during the conference bill debate in October 1972:

> Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered navigable in fact when they form in their ordinary condition by themselves or by uniting with other waters or other systems, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.[3]

With the 1975 court decision and new Corps regulations to implement section 404, the subject of congressional intent became more important, considering the perceived ramifications of the broad regulatory powers that had evolved. Hearings by the Senate Committee on Public Works in

1976 were a manifestation of the massive controversy created by the expansion of the 404 program to include all waters. Senator Muskie compared the congressional intent for section 404 with the controversial program that had evolved:

> Section 404 is designed to require the Corps . . . to regulate the dumping of dredge spoil at specified disposal sites, the EPA having veto power over the selection of the sites. That was the intent precisely and specifically stated.
>
> Section 404 was an exception to the otherwise comprehensive regulatory program embodied in section 402. But the implementation of section 404 has not led to the end of open water dredge spoil discharge, which was the specific objective of section 404.
>
> No specified disposal sites have been established. Instead section 404 regulations have led to confusion, irritation, and divisiveness that have undermined the confidence in the basic Federal role in water pollution control.[4]

Senator Muskie further made some important comments about the meaning of "fill" as intended under section 404. As indicated in Chapter 1, Muskie had declared that the use of the word "fill" was included to distinguish between polluted dredge spoil placed on land and in open water. He denounced the inclusion under the definition of fill "all kinds of activities which might not involve toxic materials as such."[5]

Although Congress did not significantly modify or reduce the scope of the section 404 program in the Clean Water Act of 1977, this can hardly be viewed as a clear statement of support for broad application of the program. The House voted overwhelmingly to reduce the jurisdiction to traditional navigable waters while the Senate vote on an amendment to reduce the jurisdiction failed by a very close margin. Apparently, other measures taken by Congress in the 1977 Act to moderate the 404 program enabled it to survive the attack on the broad territorial scope of

regulation. The Colorado legislative delegation was divided on the jurisdiction issue. Voting records on the issue reveal that Senators Hart and Haskell and Representatives Schroeder and Wirth, with urban constituencies, supported retention of the broad jurisdiction. Congressmen Evans, Johnson, and Armstrong, representing western Colorado and the primarily rural areas of eastern Colorado, favored reducing the authority of the 404 program to traditional navigable waters.

The issue of unclear congressional intent is of major interest and importance to Colorado and the entire arid West. Sentiment in the region concerning the scope of the 404 program has been so strong that a sister state, Wyoming, challenged Corps and EPA regulations in court based on the premise that regulatory jurisdiction extended only as far as waters which meet the traditional Federal test for navigability. The district court held in 1977 that the regulations were lawful.[6]

The importance of the jurisdictional question in Colorado is clear. Nationally, approximately 85 percent of the regulatory workload of the Corps involves work in traditional navigable waters. However, navigable waters (as defined for purposes of administering section 10 of the 1899 Act) includes only the following reaches in Colorado - the Colorado River from the 5th Street bridge in Grand Junction to the Utah border, approximately 25 river miles, and about 15 miles of Navaho Lake on the San Juan River in the extreme southern portion of the state at the New Mexico border.[7] Without the broad territorial jurisdiction currently defined under section 404, the regulatory program of the Corps in Colorado would essentially cease to exist.

Developers and water users in western Colorado have consistently supported efforts to redefine navigable waters in its traditional sense and consequently remove Corps permit authority from the region. One of the leaders in the opposition to broad jurisdiction has been the Colorado Water Congress, representing water conservancy and river conservation districts, many county and municipal governmental bodies, major industrial firms,small businesses, banks, irrigation districts, ditch companies, and individuals. Its Executive Director has stated that "the courts rewrote the legislation and decided navigable waters should mean all waters, regardless of their navigability."[8] The Colorado River Water Conservation District, the primary western Colorado water policy body, made the following observation:

> This (the section 404 program) goes far beyond the intent or understanding of Congress at the time the original legislation was passed. Section 404 and P.L. 92-500 generally have been widely and vaguely interpreted by the Federal bureaucracy and the net effect is that legislation is being promulgated through rules and regulations to an extent never intended by Congress without review and scrutiny by elected representatives. If the Congress intended to exercise federalized control over all the waters of the United States it would have said so.[9]

Many other organizations representing western Colorado citizens have strongly urged that Congress consider and clarify its intent, not only on the navigable waters issue but also the range and scope of the activities to be regulated. Those groups have included the Colorado Cattleman's Association, Colorado Farm Bureau, Colorado Association of Soil Conservation Districts and individual districts, Colorado Association for Housing and Building, and the Water Resources Congress.[10]

Environmental groups in Colorado have strongly supported continuation of the broad section 404 jurisdiction as consistent with

congressional intent. The president of the Colorado Open Space Council, representing a number of environmental organizations, commented to the Senate Subcommittee on Environmental Pollution in 1977 that, without the broad interpretation, "the act would be left with an enormous loophole which would seriously hinder the achievement of the clean water goals articulated in section 101."[11] The program guarantees the appropriate consideration of the values of Colorado wetlands and riparian habitat and, therefore, is viewed as essential to the protection of water quality in the state.

Federal Regulation v. Delegation to the States

Assuming that the Federal role in regulating the discharge of dredged or fill material into non-navigable waters is indeed appropriate and fully within the intent of Congress, the next issue becomes whether a Federal agency should administer the program or the states be delegated the authority. Although section 402 provided a mechanism for states to assume responsibility for the NPDES permit program, section 404 did not originally include such authority. Following the NRDC v. Calloway decision which expanded the section 404 jurisdiction to non-navigable waters, the Corps began to express a willingness to delegate some of its permit authority to the states. Testifying before the Senate Subcommittee on Water Resources in 1975, Major General John W. Morris, Director of Civil Works, stated:

> Our preference would be that the States have a major role in the decision-making process to the point that they could be delegated authority. That will require some kind of legislation because neither the 1899 Act nor section 404 of the Federal Water Pollution Control Act allows us to do that.[12]

A Corps' survey of the fifty states and two territories in 1976 revealed significant interest in seeking a delegation of section 404 authority. Thirty-four indicated their intent, under various conditions, to assume the program. Six responded negatively, and twelve were undecided.[13]

In Colorado, substantial support for administering the section 404 program at the state level has been evident in the past. In 1977 testimony before the Senate Subcommittee on Environmental Pollution in Fort Collins, Colorado, a representative of the Colorado Water Quality Control Commission urged that section 404 be amended to permit state water quality organizations to assume the program or a portion of it contingent upon adequate legislative authority and staffing.[14] Testimony by many other organizations and individuals at those hearings tended to support the concept of state and local control.

Despite the inclusion of procedures in the 1977 Amendments to delegate the administration of Phase II and III waters to the states, no state has yet assumed the authority. Nevertheless, the Corps regulations specify that the state position on a permit application will receive considerable weight in the decision-making process such that state control is allowed to the extent possible. The regulation states:

> In the absence of overriding national factors of the public interest . . . a permit will generally be issued following receipt of a favorable State determination . . . Permits will not be issued where certification or authorization of the proposed work is required by Federal, State and/or local law . . . and has been denied.[15]

A concerted effort began in EPA in 1980 to encourage states to develop the necessary programs to enable a transfer of section 404 authority

(for Phase II and III waters) from the Corps. The Reagan Administration has further encouraged transfer to states under his "New Federalism" concept of reducing the Federal administrative role in favor of state and local control. One of the major mandates of the Presidential Task Force on Regulatory Relief, designed to encourage state assumption of the program, directs EPA to revise its regulations under section 404(g)-(l) to provide increased incentives and simplified procedures for state assumption of the section 404 program. Once a state has assumed the program, Federal oversight will be kept to the minimum consistent with statutory obligations and considerations of national importance.[16]

Federal Interference with State Water Allocations

In the arid West, water is the critical factor around which life in the region revolves. Development of water resources for irrigated agriculture, at first by private, cooperative, and local public entities and then by the Federal government under the Reclamation Act of 1902, was recognized as the best way to promote settlement and stable economic development of the West. Since continued development in the West will be both guided and constrained by the availability of relatively limited supplies of water, rights to water use under state laws are extremely valuable. Potential interference with those rights is obviously a sensitive issue.

Under the appropriation doctrine applicable in Colorado and other western states, once water is diverted and applied to beneficial use, an appropriation is complete. This establishes a water right which is duly recognized as a vested property right. This property right includes the

right to change the point of diversion, provided that the change does not adversely impact other water rights. Additionally, a "conditional" water right may be established under state law. This right is acquired by providing evidence of an intent to appropriate water for beneficial use. If the appropriation is accomplished within a "reasonable" period, an absolute right is established effective to the date the "intent to appropriate" was declared.[17]

Regulation of the discharge of dredged or fill material associated with construction, maintenance, improvement, or replacement of diversion structures in Colorado creates the potential for Federal interference in state water allocations authority. Subjecting such discharges to the comprehensive section 404 permit process, including possible denial based on the "public interest" review, might result in permit applicants being deprived of an important and valuable property right. The fear of Federal intrusion is particularly manifest in the potential for denying or conditioning permits in order to maintain minimum stream flows for water quality and habitat protection purposes. The section 404 program may by such actions bring itself into direct conflict with the Colorado Constitution which provides:

> The water of every natural stream, not heretofore appropriated, within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided . . . . The right to divert the unappropriated waters of a natural stream to beneficial use shall never be denied.[18]

Western Colorado water users have expressed strong concern about the potential for section 404 permitting to interfere with water rights. The Colorado-Ute Electric Association characterized the feelings of the

region's water users in 1977 when it commented that the denial of a section 404 permit related to water diversions conducted in accordance with state water law appeared to be a taking of property without just compensation in conflict with the Fifth and Fourteenth Amendments of the U.S. Constitution.[19] Further, the Colorado River Water Conservation District stated that:

> Three United States Supreme Court decisions . . . require the United States to adjudicate its claims for water in Colorado in the Colorado State Water Courts. Under the section 404 rules proposed to be enforced July 1, 1977 and without clarification of the intent of Congress . . . it is likely that the United States may be attempting to appropriate water inconsistent with the Supreme Court decisions and in violation of Colorado law.[20]

The issue of Federal interference with state water allocations was addressed in the 1977 amendments to the Act. Prior to this time the wording of the Act would clearly allow the denial or conditioning of sectin 404 permits involving water diversions even if in accordance with state water laws. Section 101(g), sponsored by Senator Wallop (Wyoming), provided that "the authority of each state to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by this Act." Although the wording appears to prevent the Corps from denying or conditioning 404 permits involving water allocations, the legislative history does not completely support this stance. Appropriately interpreted, water quality programs under the Clean Water Act may not interfere with state water rights except where necessary to meet the requirements of the Act.[21] Senator Wallop explained section 101(g):

> . . . It is not intended to change existing law . . . . Legitimate water quality measures authorized by this act may at times have some effect on the method of (water) usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights . . . . It is not the purpose of this amendment to prohibit those incidental effects.[22]

The Value of the Section 404 Program - Water Quality Improvement Attained v. Costs of the Program

The final and perhaps the key issue relative to section 404 implementation in western Colorado involves the public perception of the value of the program. Much of the basis for the controversy surrounding the program has been the concern as to whether the benefits accruing from the program justify the costs resulting from its presence. Economic justification for the program is particularly vulnerable to attack because the benefits are largely intangible and difficult to quantify while the costs can be more easily estimated with tangible values.

According to a 1981 report by the Corps of Engineers Institute for Water Resources (IWR),[23] the benefits attributable to the section 404 program fall in the following categories - water quality, wetlands, and other public interest benefits. Water quality benefits include management of large quantities of dredged disposal material, beneficial use of dredged material (habitat development, landfills, and beach nourishment), and control of about 15 percent of the nation's inorganic point source pollution. Wetland benefits include the protection of wetland values and prevention of unnecessary wetland destruction, the development of additional wetland habitat, and the protection of economic and cultural activities which are dependent on wetlands (commercial and recreational fishing, commercial fur harvest, and waterfowl hunting).

Much less tangible and often overlooked are other public interest benefits accruing to the program. The program places the Corps in a role as a mediator on permit actions among many Federal, state, and local interests, creating a forum for improved interagency cooperation and public involvement. The permit process facilitates technology transfer of better management and construction practices to applicants. General public education benefits are realized by way of increased awareness of water quality and wetland values and increased sensitivity to those values when applying for permits.

Critics of the section 404 program, particularly the broad jurisdictional scope, claim that its tangible costs far exceed any benefits that may accrue. The IWR report categorized the costs of the current program as follows - administrative processing costs, opportunity costs, implementation costs, and delay costs. Among those representing the western Colorado region who are opposed to the broad section 404 program, the focus of concern has appeared to be upon the opportunity, implementation, and delay costs associated with the permit process, even though administrative costs have been deemed significant.

Administrative processing costs are those incurred by applicants and agencies to complete the permit review process. Included are all costs associated with preparation of a complete application, preparation of all decision documents, and coordination with appropriate agencies.[24] During the phase-in period for the expanded jurisdiction following the 1975 court decision, there was great concern that the 404 program would generate a massive bureaucracy at great expense to the American public. Testifying before the Senate Committee on Public Works in 1976, a

representative of the National Farm Bureau, using Corps of Engineer estimates, commented that the jurisdiction in terms of river miles and lake shoreline miles would be increased from 50,000 each to 3.5 million and 4.7 million miles, respectively. This expansion was expected to generate an additional requirement of 1,750 Corps employees and an annual cost of $5.3 million. The National Grange, the American Cattleman's Association, the National Association of Conseration Districts, and the National Water Resources Association joined the National Farm Bureau in condemning such expansion.[25] Many western Colorado farmers and ranchers are represented among these groups. Despite efforts in subsequent years to streamline the section 404 program and avoid the expected growth in the bureaucracy,[26] opposition to the administrative cost and the bureaucracy remains strong.

Opportunity costs involve reductions in net returns on investments caused by the use of alternative disposal sites as a result of the permit process.[27] Implementation costs are those additional costs for site development or mitigation imposed by the permit program. The fact that the Corps via law, regulation, and interagency agreements has the authority to significantly modify or condition permits and to require mitigation where deemed necessary has made these costs an important issue to those representing the western Colorado region.

Opponents point out that conditions and mitigation requirements can result in significant cost increases and that some are beyond the authorities and financial capabilities of the applicant. Further, the requirements may appear to applicants to be arbitrarily determined without a clear, defendable basis as to why the measures are necessary.

Probably the most significant examples of opposition to permit requirements involving significant opportunity or implementation costs are those involving the reservation and/or management of lands for mitigation of habitat damage from a proposed activity. A Colorado Water Congress representative, expressing dismay with the section 404 program, indicated that "Congress didn't say, or intend saying, that a 404 permit applicant had to create a wildlife habitat where it didn't exist previously."[28] The comment was made in particular reference to a section 404 permit application by the Brazos River Authority in Texas to construct Lake Limestone near Waco. The U.S. Fish and Wildlife Service recommended denial of the permit unless 15,800 acres of privately-owned land were purchased for wildlife management to compensate for habitat damage caused by filling the reservoir. The implication here is that the permit process lends itself to being "held hostage" to agencies that make environmental demands that may be unreasonable.

Other appeals for moderation and full consideration of other factors in making mitigation recommendations have been voiced. The Water Resources Congress provided the following comments at the Senate hearings on the Clean Water Act in 1977 at Fort Collins, Colorado:

> Projects for which a section 404 permit are required from the Corps of Engineers should not be required to provide additional lands as mitigation for wildlife habitat unless it can be clearly demonstrated that to do so is unquestionably in the best public interest, giving full consideration to all other aspects of the project, including especially the economic and social impacts of taking additional land out of private ownership and off of local government tax rolls to provide wildlife management areas.[29]

Delay costs include charges for sunk capital idled as a result of unanticipated processing time, price increases for inputs for projects

which rise faster than general price levels during a delay period, and reductions in the expected return on investments produced by delays in the start of the productive life of projects.[30] The IWR report points out that delay cost is by far the largest component of the total cost of the section 404 permit process for the more significant and controversial proposals. While administrative and opportunity costs described above may be accepted as tolerable to opponents of the program, delay costs are viewed as unnecessary, wasteful, and typical of the bureaucracy. Public perception of delay costs as too high and unacceptable will significantly damage the prospects of maintaining a politically viable program at its current level and scope.

Many Coloradoans associated with development and agricultural activities have expressed concern about delay costs from section 404 permitting. The Colorado Water Congress has expressed concern that the comprehensive nature of the public interest review, described in Chapter 2, may cause significant delays in permitting and become the "ultimate obstructionist weapon."[31] Robert Gardner, a Grand Junction developer, commented in 1977 as vice president of the Colorado Association for Housing and Building that the impact of delay costs on the home building industry resulting from the 404 permit process could be significant. With Federal regulation in the form of section 404 permitting introduced into Colorado, in Mr. Gardner's words "delays and resulting cost increases (beyond those caused by state and local control) shall become even more repressive and adversely affect both the (homebuilding) industry and potential purchasers."[32] Specifically, the concern revolved around preparation of lengthy environmental studies and impact statements

associated with the comprehensive section 404 permit process.

Agricultural interests in Colorado have also been concerned about the impact of permit delays. Anxiety has persisted among farmers and ranchers over the potential for regulation of some of their activities under section 404 with costly delays, despite specific provisions by the Corps and subsequently Congress to exempt "normal" farming practices from regulation. According to the Colorado Association of Soil Conservation Districts:

> The regulations . . . fail to take into consideration the critical nature of the short growing season and short construction periods at higher elevations. A 2-month delay means the loss of a crop or the loss of a construction period usually causing the problem to become intensified by the time it can be corrected.[33]

The Clean Water Act specifically excluded the concept of performing benefit-cost analyses for the various measures mandated under the Act to restore and maintain the quality of the Nation's waters. The goal that all waters be swimmable and fishable was deemed justified at practically any cost. However, this has been recognized as a panacea and it is generally accepted that some balancing of benefits and costs is an inescapable reality for all programs under the Act, including section 404. The Colorado Chapter of the American Society of Civil Engineers strongly encouraged the use of benefit-cost analysis for the section 404 program in its comments to the Senate in 1977, stressing the incorporation of all tangible and intangible items and promoting efforts to upgrade the art of quantifying the intangible items.[34]

The "public interest" evaluation required by Corps regulations does involve a balancing process in which all positive and negative effects of

a proposed activity on the overall public interest are considered. Opponents of the program, however, proport that the scales have shifted too far toward preservation instead of balanced development of resources.

CHAPTER 3

ENDNOTES

[1]Harry Hansen, ed., Colorado, A Guide to the Highest State (New York: Hastings House, 1970), pp. 3-75.

[2]Sam Iker, "Look What We've Done to Our Wetlands," National Wildlife, vol. 20, no. 4, June-July 1982. p. 46.

[3]Legislative History - 1972, p. 179.

[4]1976 Senate Hearings, p. 2.

[5]Ibid., p. 62.

[6]Wyoming v. Hoffman, 437 F. Supp. 114-118 (D. Wyo., 1977).

[7]Interview with Rodney Woods, Area Engineer, Grand Junction Field Unit, Sacramento District, U.S. Army Corps of Engineers, 1 June 1982.

[8]U.S. Congress, Senate, Committee on Environment and Public Works, Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Environmental Pollution, Serial 95-H25, part 4, 95th Cong., 1st sess., 1977 (hereafter referred to as 1977 Senate Hearings), pp. 198-99.

[9]Ibid., p. 369.

[10]Ibid.

[11]Ibid., p. 238.

[12]U.S. Congress, Senate, Committee on Public Works and Transportation, Corps of Engineers Oversight Hearings - 1975, Hearings before the Subcommittee on Water Resources, Serial 94-H15, 94th Cong., 1st sess., 1975, p. 43.

[13]1976 Senate Hearings, p. 51.

[14]1977 Senate Hearings, p. 240-41.

[15]33 CFR 320.4(j) (1980).

[16]Presidential Task Force on Regulatory Relief, "Administrative Reforms to the Regulatory Program under Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act," May 1982.

[17]David L. Harrison and Charles N. Woodruff, "Accommodations of the Appropriation Doctrine and Federal Goals under Section 208 and 404 of Public Law 92-500 and Section 10 of the Rivers and Harbors Act of 1899," paper presented to the Twenty-second Annual Rocky Mountain Mineral Law Institute, reprinted in 1977 Senate Hearings, pp. 381-431.

[18]Colorado Constitution, Article 16, secs. 5 and 6.

[19]1977 Senate Hearings, p. 378.

[20]Ibid., p. 369.

[21]Michael C. Blumm, "The Clean Water Act's Section 404 Permit Program Enters Its Adolescense: An Institutional and Programmatic Perspective," Ecology Law Quarterly, University of California School of Law, vol. 8, no. 3, pp. 466-69.

[22]Legislative History - 1977, pp. 531-32.

[23]U.S. Army Corps of Engineers, Institute for Water Resources, "Impact Analysis of the Corps Regulatory Program, Executive Summary," draft report, November 1981 (hereafter referred to as IWR Report).

[24]Ibid., p. 9.

[25]1976 Senate Hearings, pp. 551-53.

[26]According to the IWR Report, see note 23, only about 800 employees in the Corps currently administer the entire regulatory program, with about half the workload devoted solely to Section 10 permitting under the 1899 Act.

[27]IWR Report, p. 9.

[28]1977 Senate Hearings, p. 200.

[29]Ibid., p. 40.

[30]IWR Report, pp. 9-10.

[31]1977 Senate Hearings, p. 200.

[32]Ibid., pp. 235-36.

[33]Ibid., p. 233.

[34]Ibid., p. 332.

CHAPTER 4

EVALUATION OF THE SECTION 404 PROGRAM IN WESTERN COLORADO

Introduction

Much criticism has been leveled at the section 404 program since its creation in 1972, particularly since the full implementation of the expanded territorial jurisdiction in 1977. The major issues regarding the program as perceived by many western Coloradoans have been presented in Chapter 3. Much debate has ensued in recent years as to whether these issues involve hollow accusations at a vital environmental program or accurate criticism of a program that is causing undue hardship on the public and is in desperate need of reform. This evaluation will provide a general overview of the program as it impacts western Colorado, based on information provided by a wide range of participants in the permit process.

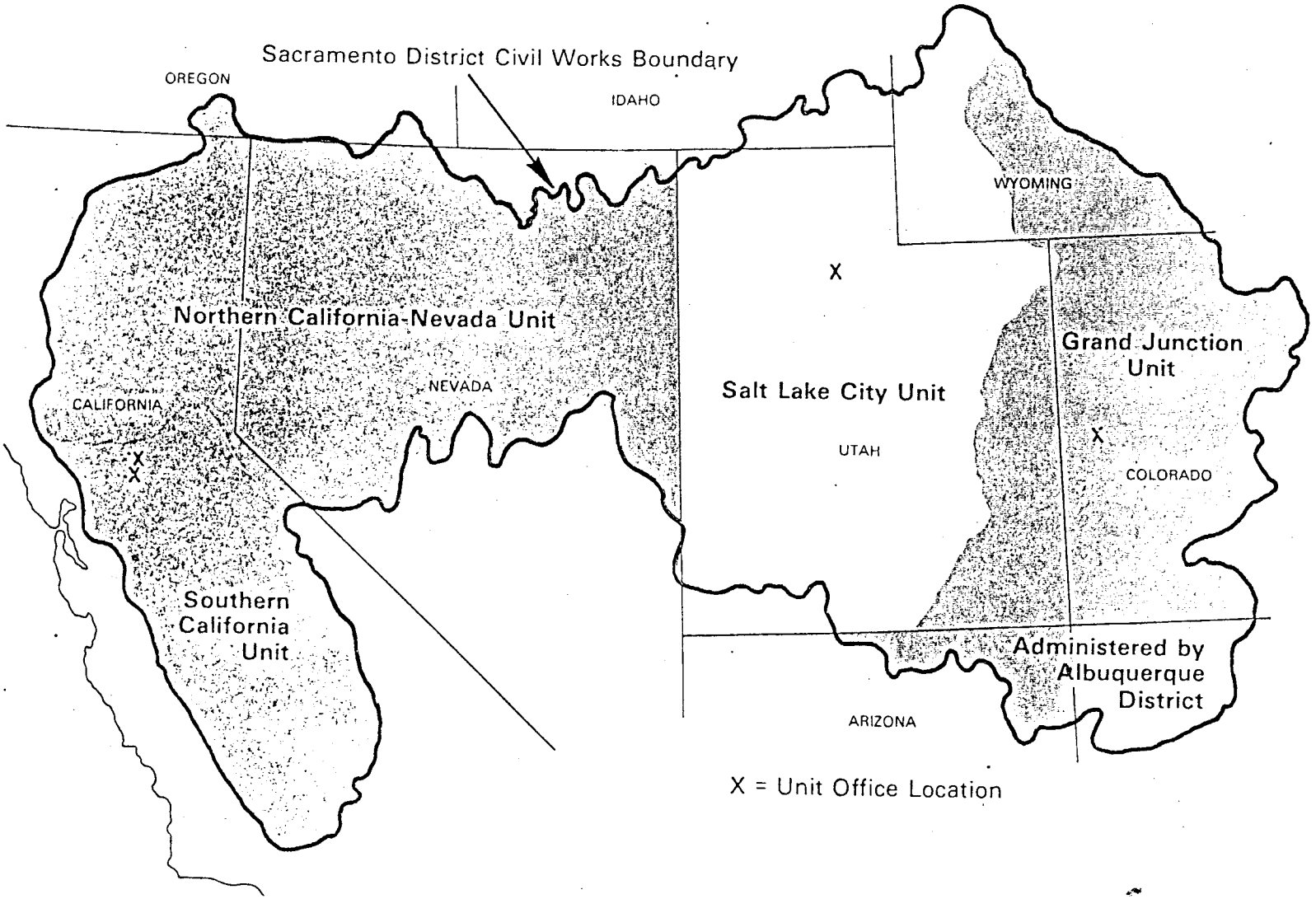
The Sacramento (California) District of the Corps of Engineers maintains a field unit office in Grand Junction, Colorado, one of two regulatory functions field offices maintained outside the District office. The Grand Junction field unit was established in April 1978; its jurisdiction includes western Colorado and eastern Utah. The boundaries of the Sacramento District and the regulatory functions units within the District are depicted on Figure 3.

Although permits are issued from Sacramento by the District Engineer, practically all aspects of processing for western Colorado permit applications are handled by the Grand Junction office. This

FIGURE 3

U.S. Army Engineer District, Sacramento

General Regulatory Functions



Source: Sacramento District, U.S. Army Corps of Engineers

arrangement facilitates public accessibility, interagency coordination, monitoring of permitted activities, and enforcement action on section 404 violations. Sacramento District maintains a staff of four employees in Grand Junction.

Section 404 and the State Assumption Issue in Colorado

Many citizens in the western Colorado region have supported state assumption of the 404 program so that this aspect of Federal regulatory authority would be removed from the region in favor of state control. This popular concept has been reinforced by recent aggressive efforts by EPA to encourage state assumption of the 404 program. One of the major objectives specified in EPA's 1980 section 404 program strategy was to facilitate the transfer of the 404 program to qualified states.[1] According to EPA:

> . . . It will give the states a big plus - more direct control over the use of its own waters and land. The state will become the focal point for natural resource management within its borders. It will be able to better coordinate the permitting processes and environmental considerations required by other Federal programs.
>
> Because the state handles these permits within its own borders, the state will be able to speed up the permitting process . . . . The local factor is the key, not only to expediting permits but to making the entire program succeed.[2]

In making provisions for states to assume the 404 program in the 1977 amendments to the Act, Congress established in section 404(j)-(m) a cumbersome process providing for EPA oversight authority over individual state permit actions rather than general program review authority and for duplicative oversight roles by EPA, the Corps, and the U.S. Fish and Wildlife Service. However, Congress did allow room for some flexibility

in state-assumed 404 programs, the level of which would be left to administrative discretion at EPA.[3]

Many western interests feel that EPA itself may have become the biggest obstacle to state assumption of the 404 program,[4] despite the agency's apparent eagerness to delegate the authority. Regulations governing assumption of the program by the states are included in the Consolidated Permit Regulations adopted by EPA in May 1980.[5] They did not provide for the kind of flexible, manageable 404 program that states like Colorado were seeking. This is apparently a major reason why no state has yet assumed the program. Marcia Hughes, former Colorado Assistant Attorney General, Natural Resources Section, characterized the problems with the EPA regulations:

> . . . The excessive administrative and copying charges, the delay, and the incredible detail found in the regulations controlling most decisions the state might make, create an enormous and effective disincentive for state assumption of the 404 program.[6]

In spite of the obstacles, Colorado interests have pursued state assumption of the program in recent years. The first attempt came in March 1979, when State Senator Fred Anderson introduced a bill to completely revamp Colorado water quality legislation and programs (S.B.480). The bill included a provision to authorize the state to assume the section 404 program. The intent of the provision was to give the state more discretionary powers and eliminate Federal involvement in state matters.[7] S.B.480 died in the 1979 session, largely for reasons unrelated to assumption of the 404 program, but considerable concern about the uncertainty of the cost of assuming the program did contribute to the bill's demise. Estimates ranged from $90-900 thousand per year,[8]

reflecting the significant uncertainty about the scope of program that EPA would require before delegating authority.

In the 1981 session, Senator Anderson introduced S.B.16, a bill specifically to provide authority for state assumption of the section 404 program. Since this bill was introduced after adoption of the Consolidated Permit Regulations, it was done with some recognition of the costs and problems associated with those regulations. An opinion was requested from EPA as to the adequacy of the proposed legislation as an effective basis for state assumption. EPA's opinion was that the legislation would not be sufficient.[9] Thus, the bill was not pursued further.

A November 1981 report by the Colorado Department of Health, made possible by a grant from the U.S. Fish and Wildlife Service, identified the following deterrents to state assumption of the 404 program: (1) Federal efforts to include conditions in permits that affect state water allocation decisions; (2) lack of flexibility in designing and tailoring state programs to meet state needs; (3) the number and breadth of criteria that a state must apply in evaluating the impacts of 404 permits; and (4) power of the Federal government to deny or overturn a state authorized permit once the state has assumed the program.[10]

Reagan Administration regulatory reform directives designed to encourage state assumption may not meet with much success. Most states, including Colorado, have been experiencing a fiscal crisis in recent years with no relief for many in the foreseeable future. Assuming a new pollution control program at the state level in light of continuing reductions in Federal assistance for existing programs is an unlikely

prospect. Referring to the fiscal crisis in the pollution control field created by those reductions, the assistant director of the Colorado Health Department stated in May 1982 that:

> . . . its going to very detrimental in the long run.
>
> We possibly are going to have to begin dealing only with areas covered by state laws. We'll probably have to give up much compliance surveillance and monitoring.[11]

According to the deputy director of the Water Quality Control Division, the office within the Colorado Department of Health that would be responsible for a state-assumed section 404 program, a state program given the current climate of budget cuts and staffing restrictions would be practically impossible.[12]

In one other issue related to state assumption in Colorado, opponents of the concept fear that the quality of the current program as administered by the Corps would be compromised if the program were delegated to the Water Quality Control Division. That agency is currently responsible under Corps permitting procedures, for granting water quality certification for proposed 404 actions in accordance with section 401 of the Clean Water Act. Much of the apprehension by critics of state assumption in Colorado is based upon the record of the section 401 water quality certification process. Water quality certification has not been denied for any western Colorado section 404 permit application. On two occasions in the region, when the staff did recommend denial, the agency chose to waive the certification requirement.[13] This record has largely been the basis for the general criticism that, without stringent Federal standard and oversight, state 404 permitting in Colorado could become a "rubber stamp operation."[14]

Section 404 and the State Water Allocation Issue in Western Colorado

The section 404 program has not interfered to any significant degree with the right to appropriate water to beneficial use in the western Colorado region.[15] In fact, the performance of the Corps in the region appears to show a deliberate effort to stay out of the issue wherever possible.

On August 20, 1981 the Sacramento District issued a general permit for the placement of fill for construction, improvement, or replacement of small irrigation or municipal water diversion structures and associated temporary cofferdams in waters of the State of Colorado.[16] The general permit contains certain reporting requirements to the Sacramento District office and a number of special conditions with which the proposed activity had to comply. The general permit provisions pertaining to irrigation diversions have since been superceded by a policy decision that regulation of these structures will be deferred solely to compliance with state laws governing water diversions. Small municipal diversions are still regulated under the general permit.[17]

About 15 percent of the section 404 applications processed by the Grand Junction field unit for western Colorado involve major diversions and dams associated with large industrial/mining uses and storage for agricultural use.[18] Maintenance of minimum instream flows for protection of fish and wildlife habitat is always a consideration in the review process. Some type of minimum streamflow conditions are often included in such permits in the region. For example, a condition of the operation of the Yamcolo Dam and Reservoir, a project of the Upper Yampa Water

Conservancy District, reads as follows:

> . . . That a minimum flow of 5 cubic feet-per-second shall be maintained in Bear River to the confluence of Coal Creek by reservoir releases from 1 October to 1 May, and shall be increased and maintained at 12 cubic feet-per-second during the remainder of the year.[19]

Such conditions have been negotiated with applicants in the region such that conflicts with water rights under state water law are avoided as much as possible.

However, with the complex array of environmental legislation that Congress has passed since the late 1960s, the requirements of which attach to each Federal action (including 404 permitting), the potential for interference with state water law remains a concern in the western Colorado region. Currently, much attention is focused on a court case (Riverside v. Stippo)[20] involving section 404 and a project in eastern Colorado, which has significant implications for the relationship between section 404 and state water allocations in western Colorado and the remainder of the arid West.

Public Service Company of Colorado has proposed to construct a dam and reservoir project on Wildcat Creek in the South Platte River basin. In response to the section 404 permit application, the Corps has indicated that it would issue the permit only if Public Service Company will replace the water to be used by the project. This decision is based upon a determination by the U.S. Fish and Wildlife Service that depleted streamflows downstream from the project would adversely modify a 53-mile reach of river about 260 miles downstream in Nebraska which is critical habitat for the endangered whooping crane. However, the proposed use of the water right in Colorado is in accord with the congressionally-

approved South Platte River Compact.[21] The case as of July 1982 was in litigation in the United States District Court for Colorado.

This situation does not appear to be an example of the abuse of administrative discretion under section 404 far beyond the intent of Congress. Rather, it clearly represents the resolve on the part of the Corps to comply with one of a myriad of Federal environmental statutes with which each Federal agency must contend, namely the Endangered Species Act. The Corps' decision on this permit action cannot merely fly in the face of the following mandate:

> . . . Each Federal agency shall . . . insure that any action authorized . . . by such agency does not . . . result in the destruction or adverse modification of habitat of such (endangered or threatened) species which is determined . . . to be critical . . .[22]

The courts will have to determine whether these circumstances qualify as one of the permissible incidental interferences with state water allocations that Senator Wallop intended when explaining the purposes for including Section 101(g) in the 1977 amendments (see Chapter 3 for a complete discussion on Section 101(g)).

Corps of Engineer Efforts to Build a Workable Program - The Western Colorado Experience

A cost-effective section 404 program will be both reasonable and manageable. As presented in earlier chapters, expansion of the program to cover all waters of the United States brought with it widespread fear of a massive bureaucracy, requirements for thousands of permits in each state, and typical delays of one to two years. Many western Colorado citizens have been particularly apprehensive about such possibilities since the Corps had essentially never regulated activities in state

waters prior to 1977, whereas in most states Corps regulatory authority under section 10 of the 1899 Act was already substantially understood and accepted.

The Sacramento District via the Grand Junction field unit processes about 60 to 80 permit applications per year, far less than the hundreds and thousands predicted upon the inception of the program in the state. Of the permit applications received, approximately 6 percent are denied and 14 percent are withdrawn by the applicant. An interesting commentary on the importance of the jurisdictional definition of "navigable waters" to the program in western Colorado, only 8 percent of all permits in the region involve waters meeting the traditional test of navigability, the basis of jurisdiction for section 10 of the 1899 Act.[23]

Strictly interpreted, section 404 could have resulted in the kind of bureaucratic nightmare so feared by western Coloradoans. However, the implementation of several measures to reduce administrative and delay costs has resulted in substantial progress toward a workable program.

General and nationwide permits have significantly helped to streamline the 404 program. Nationally, general permitting has reduced the need for an estimated 60,000 individual permit applications per year. As of November 1981, 374 general permits (361 regional or statewide and 13 national) had been issued.[24]

The Sacramento District has processed three general permits which are applicable to the entire State of Colorado and the Albuquerque District has one general permit in effect throughout Colorado. Although statewide general permits are processed by a single Corps office having jurisdiction in the state, they are the culmination of a cooperative

effort between the five Corps districts in Colorado which is intended to promote some uniformity of administration in the state. The general permits are for (1) roadway fills up to 500 cubic yards, (2) fill material associated with the installation of stream gages, (3) placement of stream habitat improvement structures, and (4) fill material associated with small irrigation or municipal water diversion structures.[25] As indicated earlier, the general permit provisions for small irrigation diversion structures have been superceded by a policy decision to defer those matters to state laws governing diversions.

Work performed under the general permits must be authorized by letter from the Sacramento District before commencement of construction activity. The applicant must obtain a certification or waiver for the activity both from the Colorado Water Quality Control Division and the Colorado Division of Wildlife prior to Corps authorization. The activity must also be coordinated with the State Historic Preservation Officer.

The general permits have reduced the workload of the Grand Junction office by an estimated 10 to 15 percent.[26] The value of the general permit concept is that processing time can be significantly reduced or practically eliminated along with much of the paperwork and, at least in theory, some control and oversight authority is maintained by the Corps. However, in practice there is often little follow up on general permitted activities to ensure compliance with permit conditions because of preoccupation with the number and significant nature of individual permits.

There are no reporting requirements for work performed under the nationwide permits. However, many inquiries to the Grand Junction office involve activities covered by nationwide permit, obviating the need for

an individual permit application. According the the Grand Junction office,the number of actions performed under nationwide permit in western Colorado are at least as many as the number of individual permits processed.[27]

Robert Gardner, the Grand Junction developer who had commented as vice-president of the Colorado Association for Housing and Building in 1977 that the expected requirements of 404 permitting would hurt the housing industry, indicated in June 1982 that the impact of the program to his knowledge had been minimal. Mr. Gardner has not had to apply for a 404 permit for any of his projects, and his only exposure to 404 permitting in the last five years has been in an advisory capacity on a few occasions.[28]

Another regulatory policy measure to further promote a reasonable, workable 404 program was predicated upon events in western Colorado. A common agricultural practice in the Gunnison River valley and other similar areas in the region since the 1880s has been to irrigate lands along the rivers to produce hay. The procedure is to divert river water so it flows over the land for 30 to 45 days during May and June, after which the diversion is stopped and the hay is harvested in the fall. However, most irrigated lands develop wetland characteristics and it becomes difficult to distinguish between natural riparian wetlands and the irrigation wetlands. After a preliminary determination by the Grand Junction office that the irrigation wetlands should be subject to section 404, guidance from the Office of the Chief of Engineers was requested in early 1981.[29] After coordination with local officials and involvement by Senators Hart and Armstrong, the Corps made a policy decision that

irrigation wetlands that would cease to exist if irrigation practices were stopped are not subject to regulation under section 404.[30]

One of the factors often causing delays in the processing of individual 404 permits is the failure of the applicant to provide complete information on the permit application form. Adequate information facilitates the permit evaluation process and enables Corps personnel to publish a public notice that can be appropriately reviewed. About 85 percent of the applications have been inadequate on their first submission.[31] This poor performance is beginning to show improvement with better understanding of the requirements. To minimize the problem of incomplete applications, the Grand Junction office encourages the concept of "preapplication consultations." In many cases this includes an onsite visit by Corps and Colorado Division of Wildlife personnel with the prospective applicant. Some form of preapplication consultation is performed on about 90 percent of the applications received in the Grand Junction office. Corps personnel further estimate that, for every preapplication consultation involving the subsequent processing of an individual permit, there are four to five times that number of consultations in which the prospective applicant is informed that the proposed action is covered by nationwide permit or is not subject to regulation under section 404.[32]

In contrast to the apprehensions of many western Coloradoans that many permit applications would require the preparation of lengthy environmental impact statements, the Sacramento District has prepared only three for permit actions in the region. Those three involve construction of a reach of Interstate Highway 70 along the Colorado River

in Glenwood Canyon, construction of the Taylor Draw Dam on the White River near Rangely, and the expansion of the Union oil shale project in Garfield County (currently underway - initiated April 1982).[33] The three impact statements involve less than one percent of the permits which have been processed in the region. The Sacramento District has been a cooperating agency on about 40 other environmental impact statements, primarily for proposed activities on Federal land in the region (Forest Service, Bureau of Land Management) where section 404 requirements are involved.[34]

Operational Aspects of the Current 404 Program in Western Colorado

According to the IWR report, the average processing time for all permit applications nationally in fiscal year 1981 was 120 days, down from an average of 141 days in fiscal year 1978.[35] This is a clear signal that interagency coordination and processing efficiency has improved. The average processing time for permits processed in the entire Sacramento District in 1982 is estimated at 110 to 115 days and slightly higher than that average for western Colorado permits handled by the Grand Junction field unit.[36] This performance is reasonably close to the target established by Congress in the 1977 amendments concerning acceptable 404 permit processing times. The target was set at 105 days, to be achieved to the maximum extent practicable (15 days to publish a public notice after receipt of a complete application plus up to 90 days to reach a final decision).[37]

Most permits are issued within the target time established by Congress. Nationally, about 3 of every 10 permit actions are classified

as "delayed," those actions whose total processing time exceeds 120 days.[38] A slightly higher portion of western Colorado permit applications are "delayed."[39] The major reasons for delays in issuing permits in western Colorado are: (1) applicant inaction and slowness to respond to requests for information; (2) interagency coordination and negotiations with applicants concerning permit conditions and mitigation plans; and (3) compliance with specific requirements of related environmental laws. About 30 percent of the permit actions involve activities which may affect an endangered or threatened species or its critical habitat. Resolution of the matter in accordance with the Endangered Species Act may take anywhere from two months to two years, depending on the nature and significance of the impact.[40] About 15 percent of the permit applications involve activities which may affect sites either on or eligible for inclusion on the National Register of Historic Places, delaying action on permits until necessary cultural resources coordination and evaluations are complete.[41] Requirements for environmental impact statements for permit actions in accordance with NEPA, although rare, will delay the permit process from one to two years, and the requirement for less rigorous environmental assessments for other permit actions may still take considerable time to prepare, depending on the nature of the proposed activity.

Some of the causes of 404 permit delays often cited by critics of the program have not materialized as significant problems for 404 permitting in western Colorado. State of Colorado section 401 water quality certification is processed in an average of about 45 days.[42] EPA, U.S. Fish and Wildlife Service, and Colorado Division of Wildlife offices that

comment on western Colorado 404 permit applications report providing comments within the 30-day comment period on better than 90 percent of the public notices.[43] Primary reasons for the few delays in responding that do occur are inadequate information in the public notice and the inability to make a site visit due to extended, harsh winter weather. EPA has not used its veto authority under section 404(c) for any Sacramento District decision on a western Colorado permit application; in fact, the veto has only been used once nationally.[44]

A major concern of program critics has been the perception of delays caused by procedures to elevate permit actions with unresolved objections from the EPA, U.S. Fish and Wildlife Service, and National Marine Fisheries Service to higher authority for resolution. No western Colorado permit action has been subjected to this lengthy elevation process;[45] nationally, less than one-half of one percent of all permit applications processed by the Corps are elevated.[46] A further issue seen as a source of delays involves potential disagreements between the Corps and EPA concerning decisions on what areas are subject to section 404 jurisdiction. In western Colorado there have only been a couple of such cases, characterized as minor, which were resolved quickly at the district level.[47]

Environmental agency participation is vital to the 404 review process in the region. The Colorado Division of Wildlife (DOW) assumes the lead role among environmental agencies in this capacity. As many as 60 DOW employees (both field and administrative peronnel) distributed through the western Colorado region spend at least some portion of their time commenting on permit applications, participating in site visits, and

monitoring permitted activities. DOW staff cooperate with Corps personnel in preapplication meetings with applicants to provide input on fish and wildlife concerns and assist in development of mitigation plans. The agency recommends permit denial rarely and seeks rather to recommend modification or mitigation measures so that projects can be permitted and adverse impacts reduced; such measures are recommended by the agency on over half the permit applications.[48] One DOW staff member acknowledged that the 404 program imposes a significant burden on the staff and budget of the agency and suggested that it might be better for agency personnel to be more selective of the permit applications with which to get deeply involved. This might be accomplished by mapping the more critical, less environmentally deteriorated, habitat of western Colorado and concentrating DOW efforts on permit applications in those areas.[49]

The vital, active role played by the DOW in the 404 permitting process in western Colorado can be better appreciated when compared with the limited participation afforded by other environmental agencies. Extremely limited staff and budget for review of 404 permits in EPA, the U.S. Fish and Wildlife Service, and Colorado Water Quality Control Division restrict active involvement in the permit process to only the most significant and controversial applications. These agencies acknowledge the importance of the role of DOW in providing specific comments on each application in the region based on site visits.[50] These agencies rely on and often defer to DOW comments.

About 55 to 60 percent of the section 404 permits issued for actions in western Colorado include conditions to minimize or mitigate the environmental impact of those actions.[51] This is indicative of a

balancing process at work, reflecting the intent of the public interest review concept. These conditions may involve relatively minor measures, such as incorporation of a best management practice or avoiding a specific sensitive area, to more significant ones, which might include compensation for lost wetlands by purchase/preservation of other wetlands or building new wetlands.

Potential loss of wetlands is associated with about 40 percent of the individual permits processed for western Colorado.[52] In keeping with the general Corps policy of no net loss of wetlands, almost without exception the Sacramento District requires mitigative measures for activities impacting wetlands.[53] For applications processed or pending in the last two years, about 370 acres of wetlands in western Colorado have been involved.[54] Through the 404 program in the region these wetland areas have been given favorable consideration. According to one critic of the program, the Sacramento District is noted for its aggressive posture in identifying and regulating wetlands.[55]

The 404 permit process in the region has significantly matured since 1977, but it remains far from perfect. One of the inherent problems in the process is the often subjective nature of impact evaluation and mitigation recommendations. One specific instance in the region exemplifies the problem and shows the basis of the frustration felt by many permit applicants. A proposal to construct a condominium development impacting 13 acres of wetlands at the base of the Keystone ski area in Summit County involved lengthy studies and negotiations regarding the mitigation

plan that would be required by the permit, one of the key reasons the permit process lasted about two years.[56]

The original mitigation plan proposal for the project involved compensating for the loss of wetlands by implementing measures in the headwaters to reduce concentrations of metals and acids in the Snake River from abandoned mining operations. Some recognized experts opposed filling the wetlands because they asserted that the wetland areas filtered out much of the metal and acid content, a claim disputed by other recognized wetlands experts in this case. The final agreement on mitigation resulted in a trade, the applicant building or buying wetlands away from the project to compensate for the 13 acres filled on the project site.[57] The problem is merely a reflection of the state-of-the-art in the understanding and quantification of environmental impacts. In essence, no one really knows the correct answers to such questions.

Another problem apparent from a review of the program in the region is the tendency of agencies to communicate independently with applicants, creating a potentially confusing and frustrating situation. In the case of the mitigation plan for the Yamcolo Reservoir project, the Colorado Division of Wildlife worked directly with the Upper Yampa Water Conservancy District on matters concerning the mitigation plan for the project under the Corps 404 permit. Over a subsequent one and a half year period, the Corps, EPA, and Division of Wildlife all became involved in direct correspondence with the District concerning the same issue, the acceptability of modifying the mitigation plan.[58] This is an unacceptable situation to impose on a permit applicant; the Corps should be the sole contact with an applicant on 404 permit matters, all other agencies

working through them. Anything contrary to that lends credence to the accusation that there are too many "chiefs" involved in the 404 process.

Monitoring and Enforcement Activities under Section 404 in Western Colorado

The Sacramento District through the Grand Junction field unit conducts an effective monitoring and enforcement program in the western Colorado region. Each permitted activity is field-checked by Corps personnel more than once during construction to insure compliance with permit conditions.[59] Colorado Division of Wildlife personnel also monitor each activity in progress to assist and support Corps enforcement efforts.[60] Other agencies involved in the section 404 review process seldom monitor permitted activities; manpower limitations and coverage by the Corps and Division of Wildlife account for this lack of participation.

About 40 to 50 cases of violations of section 404 in western Colorado are handled each year. The number has been on a decline in recent years, down from more than 100 per year in the late 1970s, primarily due to increasing awareness of the program's requirements. Less than 5 percent of the violations involve non-compliance with permit conditions, with the remainder being discharges performed without a permit. The Corps office attributes the low number of violations of permit conditions to the fact that permittees know that activities will be monitored.[61]

Another important permit program enforcement statistic is indicative of an increase in public awareness of the 404 program and the environmental values it represents. In the early stages of the program in western

Colorado, virtually all violations were discovered by Corps personnel. Current estimates provided by the Grand Junction field unit reveal that other agencies and private citizens and organizations play major roles in reporting violations. Presently, about 10 percent of the violations are discovered by Corps personnel, about 60 percent are reported by other agencies (practically all by the Division of Wildlife), and about 30 percent by private interests.[62]

Violations are dealt with in accordance with the severity of the offense. About half are of such minor nature that they are resolved by the violator's compliance with a letter which indicates that no further enforcement action will be necessary if the violation is cleaned up. On the remaining ones, the Corps follows its cease and desist order with a letter informing the violator that an investigation has been initiated. The Corps formally seeks the input of environmental agencies and subsequently determines what corrective measures are appropriate. Of the violations in the region, about 15 to 20 percent are ultimately granted after-the-fact permits usually requiring some mitigation, particularly if wetlands were involved.[63]

Apparently the formality of the legal cease and desist order and the mere threat of court action with possible civil and/or criminal penalties is adequate to resolve almost all violations. Only one case in the region has gone as far as court, and it was resolved out of court just prior to trial when the defendant agreed to comply with the conditions of the injunction against him.[64]

However, this seemingly perfect record is not without blemish. When the responsible individual refuses to fulfill permit conditions, complete mitigation plans, or restore a violation as directed, the Corps may find itself powerless to take recourse because of the apparent reluctance of the Justice Department to prosecute. One such case involving a refusal to restore a violation in the region had been filed as of June 1982 with the Justice Department office in Denver for months without initiation of any effort to prosecute.[65] Violations of section 404, except for the most severe cases, are apparently assigned a low priority in the Justice Department when compared to the backlog of major Federal crimes awaiting prosecution.

Benefits of the Section 404 Program in Western Colorado

After about five years of section 404 implementation in western Colorado, many of the benefits accruing from the program remain unquantifiable, but they are obvious and significant. The program has promoted the consideration of intangible values as part of the public interest review process.

The program has undoubtedly helped to maintain and, in some cases, probably improve the status quo with respect to water quality and wetlands. The comprehensive review process has often resulted in reduced requirements for fill and incorporation of various best management practices which minimize water quality impacts and loss of wetlands.[66] Water quality evaluations and studies accomplished during the review process have increased knowledge of quality problems in Western Slope waters and provide for a closer look at the chemical quality of materials discharged

into those waters. As discussed earlier, the program has offered appropriate consideration of the value of about 370 acres of wetlands in the last two years that would have been lost in the absence of section 404. Probably many additional acres of wetlands have been indirectly protected by the program due to the reluctance of prospective applicants to submit proposals in direct conflict with the Corps' tough wetlands protection policy, although there are no statistics to support this theory.

Through the auspices of the public interest review under section 404, full consideration is given to the direct, indirect, and cumulative impacts of proposed activities subject to regulation. Other environmental benefits accrue through this mechanism, including, for example, protection for endangered species and significant cultural resources. The Sacramento District is an active participant, because of its section 404 responsibilities, in the Colorado Joint Review Process (JRP), a comprehensive coordination mechanism for major energy and mineral resource development projects. A Colorado Department of Natural Resources staff member working with the JRP credits Corps involvement in the process with helping to focus on many of the impacts associated with these projects. One particular instance where the Corps' role was especially vital involved the proposed AMAX, Inc., Mount Emmons project (molybdenum mine) at Crested Butte, which as planned would result in the destruction of 114 acres of wetlands. On another project under the JRP, expansion of Union Oil Company's Parachute Creek Shale Oil Program, the Corps because of section 404 requirements will be the lead agency for preparation of the

enviromental impact statement, the central review mechanism around which the JRP will revolve.[67]

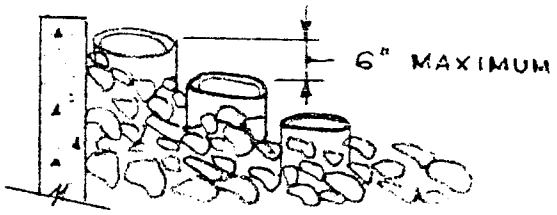
The section 404 program provides a major public interest benefit by facilitating technology transfer and development of new technologies. The comprehensive review has clearly encouraged better conceived projects with improved design features. New design techniques and innovative methods to minimize impacts resulting from the permit process are passed on to new applicants.[68] One of the best examples of such technology attributable to the program in western Colorado is the development of a simple, inexpensive, but very effective fish ladder for use on diversion structures and box culverts with steep grades (see Figure 4). Applicants in the region are encouraged to incorporate the fish ladder in their plans, where applicable, and the technique is now being promoted in adjacent states. Furthermore, agency personnel who review and comment on permit applications evaluate the implementation of their recommendations on previous permits to ascertain which methods and techniques achieve their objectives and to abandon those that do not work, thus continually improving the quality and cost-effectiveness of the permit conditions and mitigation plans.[69]

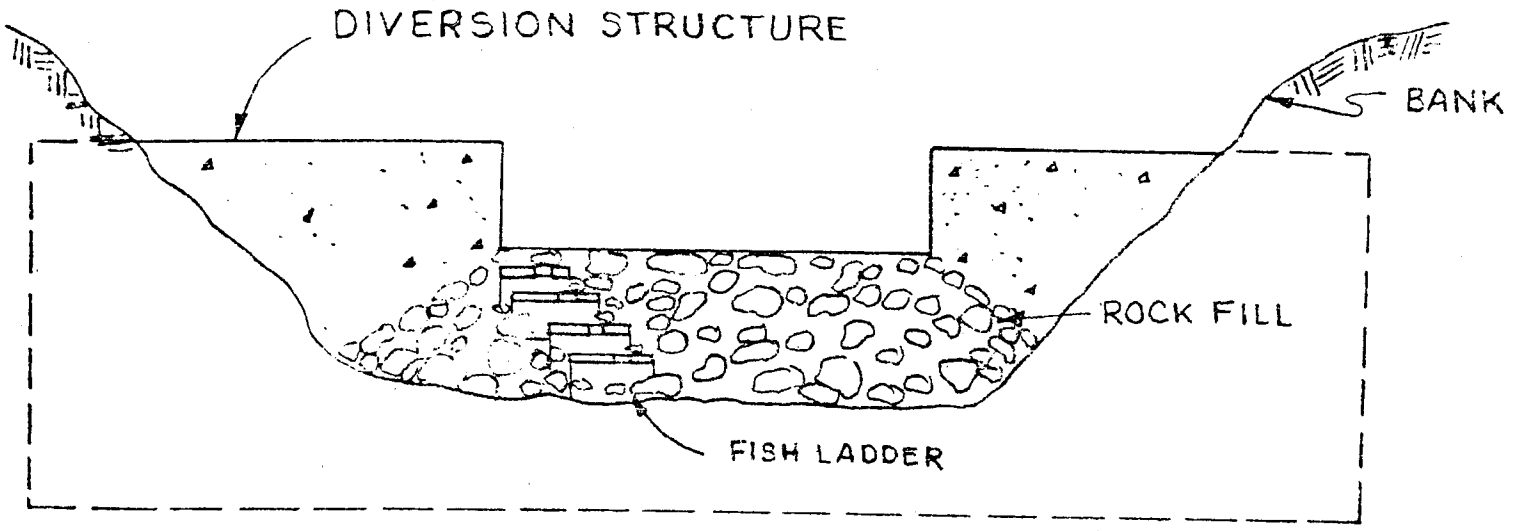
Significant public education benefits have accrued from implementation of section 404 in the region. Public awareness of the program has increased as evidenced by submission of more complete applications proposing better designed projects, many of which include mitigative measures in the original design, as well as a decreasing number of violations. A rising percentage of the number of violations that are reported by the private sector also indicates an increasing awareness of the program's requirements and the values it is intended to protect. Local

FIGURE 4

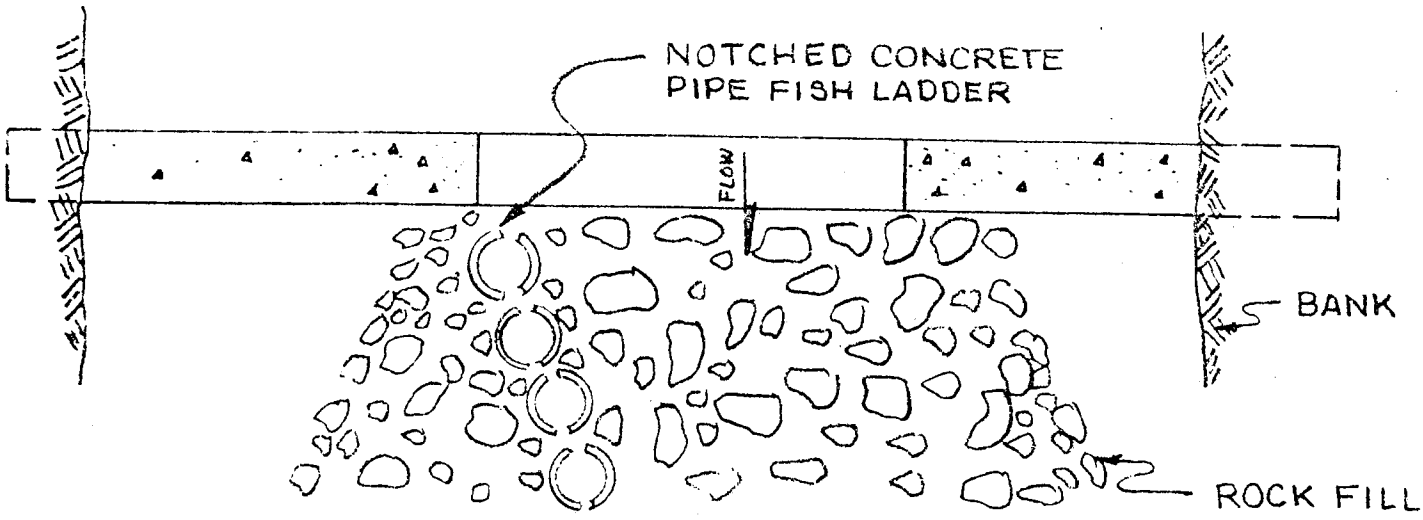
Innovative Fish Ladder Design for Diversion Structures and Steep-Graded Box Culverts

Source: Sacramento District, U.S. Army Corps of Engineers





ELEVATION



PLAN

CONCRETE DIVERSION

governments in western Colorado have become more familiar with the program and many have begun to incorporate some of the principles of water quality and wetland protection in local ordinances and land use regulations.[70] In May 1981, the Northwest Colorado Council of Governments, representing government entities in Eagle, Grand, Jackson, Pitkin, Routt, and Summit Counties, published with the assistance of the Corps' Grand Junction field unit a detailed section 404 mitigation handbook.[71] Its purpose is to provide guidance to local citizens concerning preparation of section 404 permit applications and development of mitigation plans when wetlands might be impacted by a proposed activity. These actions indicate a growing public acceptance of the 404 program, in spite of a reasonable assumption that some of that acceptance has come reluctantly.

The Impact of Reagan Administration Regulatory Reform Measures on the Section 404 Program in Western Colorado

The Reagan Administration has actively pursued reform of the section 404 program. The Presidential Task Force on Regulatory Relief designated the program for review in August 1981. Administrative and regulatory reforms based on the recommendations of an interagency work group, chaired by the Department of the Army, and including the Departments of Interior and Commerce, EPA, and the Office of Management and Budget were announced in May 1982.[72] The major administrative and regulatory reforms may be summarized as follows (see Appendix A for the full text of the reform measures):

1. New interagency agreements will be developed to streamline the procedures for "elevation" of permit decisions to higher authority when

there are unresolved objections to a Corps permit decision, and to significantly reduce the number of permits subjected to that process.

2. Administrative measures will be implemented to reduce the average time to reach a decision on permit applications. Strict time limits will be established so that a decision on a completed application will ordinarily be made within 60 days of its receipt.

3. The Corps will expand the use of general permits, including active pursuit of the concept of "state program general permits" for particular categories of discharges in those states whose programs are substantially similar to the Corps program.

4. EPA will revise its regulations to provide increased incentives and simplified procedures for state assumption. The regulation will provide for minimum Federal oversight consistent with legal requirements and considerations of national importance.

5. Within the present interpretation of the Clean Water Act, the jurisdictional scope of the section 404 program will be clarified. According to the task force, "while Congress' definition goes beyond the traditional definition of 'navigable waters' covered by earlier Corps regulatory programs, it also does not encompass all biological 'wetlands' however defined or regardless of their connection to waters."

The proposed procedures relative to elevation of disputes to higher authority will have no impact on the section 404 program in western Colorado. No permit actions in the region have been elevated upon the request of either the U.S. Fish and Wildlife Service or the EPA. Any disagreements between the Corps and these agencies have been resolved at the district level. This issue appears to be exaggerated even at the

national level because of the very small percentage of actions that are actually elevated.

The requirement to complete permit actions within 60 days will create significant problems for 404 permitting in western Colorado. Few permits are issued that quickly because the comprehensive public interest review simply cannot meet all requirements in many cases within 60 days. With 40 percent of the applications involving wetlands, about 30 percent Endangered Species Act requirements, about 15 percent cultural resource coordination requirements, more than 50 percent including recommendations for permit modification or mitigation, and other requirements that may impact timing, the 60-day time limit will be unattainable in many cases. Regulatory guidance for implementing the time limit does make allowance for special cases of delay,[73] but the Grand Junction field unit estimates that the policy will result in more permit denials in the region because of inability to meet time limits. Measures that might be taken to work within the framework of the policy guidance include persuading an applicant to completely work out the details of mitigation plans in preapplication consultation or having the applicant request a processing extension from the Corps in the event that problems with the application develop.[74]

The Grand Junction field unit has indicated that through June 1982 all general permits that have been practicable and prudent have been issued. However, with the dynamic nature of the permit program, new categories of activities which can be general permitted will be considered. Currently being considered are general permits for recreational gold dredging and fill associated with construction of sewage treatment

facilities.[75] The expanded use of general permits must be tempered with an understanding that the Corps risks the loss of control of some activities that possibly should be regulated. The prospect of "state program general permits" affecting western Colorado dredge and fill activities appears remote at this time because Colorado has no program for regulating section 404 activities comparable to the Corps program.

Simplified procedures for state assumption will interest Colorado citizens who oppose the Federal regulatory program and desire a uniform state 404 program. Nevertheless, the current fiscal crisis for environmental programs in Colorado and unlikely prospects for financial assistance from EPA to assist state assumption dim hopes for a state 404 program at the present time.

Until specific guidance is developed as to the "clarified" jurisdictional scope of the section 404 program, it will be impossible to evaluate the impact of any change in western Colorado. The Reagan Administration supports a redefinition of the scope to traditional navigable waters, a move that would essentially remove the program from the entire State of Colorado. However, such a change will require legislation. Any changes accomplished without legislation will involve a reduction in the current scope of the program based on administrative interpretation within the limits of the congressionally mandated definition of navigable waters as "waters of the United States."

CHAPTER 4

ENDNOTES

[1]U.S. Environmental Protection Agency, Office of Water Regulations and Standards, Section 404 Program Strategy, EPA 440/5-81-001, October 1980, p. 8.

[2]U.S. Environmental Protection Agency, Office of Water Regulations and Standards, The States' Choice: 404 Permit Program, EPA 440/5-81-002, October 1980, p. 1.

[3]Marcia M. Hughes, "Western Prospective on Section 404 Water Quality Permit Program," paper presented at the National meeting of the Natural Resources and Environment Committee of the National Conference of State Legislators, 27 February 1981, pp. 8-10.

[4]Ibid., p. 16.

[5]45 Federal Register 33290-515 (1980).

[6]Hughes, p. 12.

[7]Larry Svoboda, "Recent Developments in Colorado Water Quality Policy," paper prepared for PO 792A - Seminar on Water Policy, Colorado State University, 3 May 1982. p. 10.

[8]Ibid., p. 12.

[9]Hughes, p. 13.

[10]A copy of the Department of Health report was unavailable to the author; it was cited and discussed in Hughes, pp. 13-14.

[11]"Pollution Controls Could Flounder in Planned Shift," Denver Post, 23 May 1982.

[12]Telephone conversation with Frank Rosich, Deputy Director, Colorado Water Quality Control Division, Denver, Colorado, 23 June 1982.

[13]Telephone conversation with Jerry Biberstein, Colorado Water Quality Control Division, Grand Junction, Colorado, 23 June 1982.

[14]This was a widely held opinion among the numerous people interviewed during the preparation of this report. The general feeling was that a strong 404 program could not survive the pressures of state politics and development pressures in Colorado.

[15]Interview with Rodney Woods, Area Engineer, Grand Junction Field Unit, Sacramento District, U.S. Army Corps of Engineers (COE), 1 June 1982; confirmed in numerous other interviews with various participants in and observers of the 404 program in the region.

[16]U.S. Army Corps of Engineers, Sacramento District, "General Permit 013, State of Colorado Diversion Structure Fills," 20 August 1981.

[17]Interview with Woods, COE, 1 June 1982.

[18]Ibid.

[19]Lieutenant Colonel Henry Lee, Acting District Engineer, Sacramento District, U.S. Army Corps of Engineers, to John R. Fetcher, Secretary, Upper Yampa Water Conservancy District, 17 February 1982, Files of the Upper Yampa Water Conservancy District, Steamboat Springs, Colorado.

[20]Riverside Irrigation District and Public Service Company v. Colonel V. D. Stippo, Civil Action No. 80K624 (D.C. Colo.).

[21]Hughes, p. 6.

[22]Endangered Species Act of 1973, P.L. 93-205, U.S. Code, vol. 16, sec. 1536.

[23]Determined from data obtained from the Grand Junction Field Unit, Sacramento District, U.S. Army Corps of Engineers, June 1982.

[24]IWR Report, p. 5.

[25]U.S. Army Corps of Engineers, Sacramento District, "General Permit 004, State of Colorado - Roadway Fill," 1 July 1979; "General Permit 007, State of Colorado - Fill Material for Stream Gages," 30 September 1978; "General Permit 013, State of Colorado Diversion Structure Fills," 20 August 1981; U.S. Army Corps of Engineers, Albuquerque District, "General Permit CO-OYT-0169: Stream Habitat Improvement Structures within the State of Colorado," 20 July 1979.

[26]Interview with Woods, COE, 1 June 1982.

[27]Ibid.

[28]Telephone conversation with Robert Gardner, Grand Junction developer, Grand Junction, Colorado, 2 June 1982.

[29]Major David E. Peixotto, Acting Assistant Director of Civil Works, Pacific, Office of the Chief of Engineers, U.S. Army Corps of Engineers, "Memorandum for the Record, Subject: Declaration of Irrigated Lands in Colorado as Wetlands," 13 February 1981, Files of the Grand Junction Field Unit, Sacramento District, Corps of Engineers.

[30]U.S. Army Corps of Engineers, Office of the Chief of Engineers, "Regulatory Guidance Letter 81-3, Subject: Regulatory Jurisdiction in Wetlands Created Using Irrigation."

[31]Interview with Woods, COE, 1 June 1982.

[32]Ibid.

[33]Ibid.

[34]Ibid.

[35]IWR Report, p. 6.

[36]Interview with Woods, COE, 1 June 1982.

[37]Clean Water Act of 1977, P.L. 95-217, Statutes at Large, vol. 91, secs. 1601-5 (1977).

[38]IWR Report, p. 6.

[39]Interview with Woods, COE, 1 June 1982.

[40]Ibid.

[41]Ibid.

[42]Telephone conversation with Tom Bennett, Colorado Water Quality Control Division, Denver, Colorado, 23 June 1982.

[43]Telephone conversations with Brad Miller, Environmental Protection Agency, Denver, Colorado, 23 June 1982; Vern Helbig, U.S. Fish and Wildlife Service, Denver, Colorado, 23 June 1982; Rick Sherman, Colorado Division of Wildlife (Colo. DOW), Montrose, Colorado, 23 June 1982; Interview with Mike Grode, Colorado Division of Wildlife, Glenwood Springs, Colorado, 1 June 1982. Mr. Grode's office was the only exception with a response rate of 75 to 80 percent within the public notice comment period.

[44]Telephone conversation with Miller, EPA, 23 June 1982.

[45]Interview with Woods, COE, 1 June 1982.

[46]Wildlife Management Institute, Outdoor News Bulletin, vol. 36, no. 12, 11 June 1982.

[47]Interview with Woods, COE, 1 June 1982.

[48]Telephone conversation with Sherman, Colo. DOW, 23 June 1982; Interview with Grode, Colo. DOW, 1 June 1982.

[49]Interview with Bill Clark, Colo. DOW, Grand Junction, Colorado, 2 June 1982.

[50]Telephone conversations with Miller, EPA, 23 June 1982; Helbig, U.S. Fish and Wildlife Service, 23 June 1982; Biberstein, Colorado Water Quality Control Division, 23 June 1982.

[51]Interview with Woods, COE, 1 June 1982.

[52]Determined from data obtained from the Grand Junction Field Unit, Sacramento District, COE, June 1982.

[53]Interview with Woods, COE, 1 June 1982.

[54]Determined from data obtained from the Grand Junction Field Unit, Sacramento District, COE, June 1982.

[55]Hughes, p. 8.

[56]Telephone conversation with Paul Dettor, Linclay Corporation, Dillon, Colorado, 23 June 1982.

[57]Ibid.

[58]Package of correspondence from the files of the Upper Yampa Water Conservancy District, 5 December 1980 to 22 February 1982.

[59]Interview with Woods, COE, 1 June 1982.

[60]Interview with Grode, Colo. DOW, 1 June 1982.

[61]Interview with Woods, COE, 1 June 1982.

[62]Ibid.

[63]Ibid.

[64]Ibid.

[65]Ibid.

[66]Ibid.

[67]Telephone conversation with Adam Poe, Colorado Department of Natural Resources, Denver, Colorado, 23 June 1982.

[68]Interview with Woods, COE, 1 June 1982.

[69]Telephone conversation with Sherman, Colo. DOW, 23 June 1982.

[70]Interview with Woods, COE, 1 June 1982.

[71]Northwest Colorado Council of Governments, Protection of Wetlands from Development Activities, A Mitigation Handbook, May 1981.

[72]Presidential Task Force on Regulatory Relief, "Administrative Reforms to the Regulatory Program under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act," May 1982.

[73]U.S. Army Corps of Engineers, Office of the Chief of Engineers, "Regulatory Guidance Letter 82-7, 60 Day Time Limit for Decision Making," 8 June 1982.

[74]Telephone conversation with Rodney Woods, COE, 25 June 1982.

[75]Ibid.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

The continued political viability of the current section 404 program hinges upon whether it is reasonable, manageable, and able to operate responsively to the issues concerning its implementation. The major issues regarding the program that have concerned Coloradoans include (1) whether the program as administered is clearly what Congress intended, (2) delegation of the program to the states, (3) Federal interference with state water allocations, and (4) whether the benefits derived from the program are worth the costs.

The issues related to section 404 in western Colorado are clearly based upon a view of the Federal interference and problems the program might entail, rather than what five years of program implementation reveal to be the case. Doubtless, there are specific cases that reflect excessive regulatory requirements and unnecessary delays, but the overall performance indicates a genuine effort to develop a reasonable and effective program that accomplishes the purposes of the Clean Water Act.

The 404 program in western Colorado results in substantial benefits attributable to maintenance of water quality and protection of wetland values. One Colorado Division of Wildlife biologist commented that the 404 program has "probably saved more critical habitat than any other program in the state."[1] Further, the program is an effective and beneficial technology transfer mechanism, and it provides significant public education benefits.

Nevertheless, perceptions of problems with public programs will initiate the processes necessary to change policy to deal with those problems. Such are the regulatory reforms for the section 404 program prescribed by the Reagan Administration. The reform measures will largely be detrimental to the application of section 404 in western Colorado. However, this is not to say that efforts to continue to streamline and improve the 404 program are not prudent and necessary.

Having considered the section 404 program in western Colorado in light of the issues and concerns, its implementation, and the impact of the regulatory reform measures, the following recommendations are presented:

- The broad definition of navigable waters as "waters of the United States" should be maintained by Congress and not compromised significantly by administrative discretion. Reducing the definition to include only those waters meeting the traditional test of navigability would all but eliminate the section 404 program from western Colorado and much of the arid west, leaving many valuable wetlands and waters unprotected from discharges of dredged and/or fill materials.

- Regulations should be revised to encourage the state to assume the 404 program in Colorado, but only if the state program is comparable to that of the Corps and strong Federal oversight is maintained. The state should be allowed some flexibility and Federal oversight should not be conducted on a permit by permit basis, but rather using a broader programmatic approach.

- Permit applications for which there are no objections or significant impacts could and should be processed within 60 days. However, those

with major impacts and/or significant objections should be fully considered without regard to an arbitrary time limit which, if enforced, may result in poor premature decisions.

- The expanded use of general permits to shorten processing times should be encouraged, but only if general permit authorizations include project-specific conditions and work performed under general permits can be adequately monitored for compliance.

- The Justice Department should be supportive of 404 enforcement efforts in order that the program not earn a reputation as a "paper tiger."

- The Corps and other agencies involved in the permit process should continue to develop methods to better understand and quantify the impacts of proposed activities and to monitor the successes and failures of permit conditions and mitigation plans such that the quality and efficiency of the permit process can continue to improve.

- The Corps should be clearly established as the sole official contact with applicants and the ultimate authority in permit matters, so that duplication of effort, miscommunication, and confusion for applicants can be minimized.

CHAPTER 5

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[1]Interview with Grode, Colo. DOW, 1 June 1982.

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APPENDIX A

Presidential Task Force on Regulatory Relief

Administrative Reforms to the Section 404 Regulatory Program

May 1982

ADMINISTRATIVE REFORMS TO THE REGULATORY PROGRAM UNDER SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE RIVERS AND HARBORS ACT

I. Reducing Uncertainty and Delay

A. The United States Army Corps of Engineers operates the Section 404 and Section 10 permit programs under Memoranda of Agreement with several other federal agencies that have responsibility for commenting to the Corps about the environmental, wildlife, and other aspects of proposed dredging or filling operations. These Memoranda provide for four layers of automatic review or "elevations" of individual permit decisions whenever a commenting agency disagrees with the approach adopted by the Corps. The review process has introduced long delays into a substantial number of major permit applications. It has also been used to blur authority and accountability for final permit decisions, which by statute belong with the Army. These aspects of the program run directly counter to the language of Section 404, which directs that the purpose of the Memoranda of Agreement is to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits" (404(q)), and which does not authorize "appeals" of Corps decisions among federal agencies.

To cure these problems and return the program to the expeditious procedures required by Congress, the Department of the Army and the commenting agencies will prepare new Memoranda of Agreement no later than two months from today providing that:

1. The final permit decision will be made by the District Engineer in the vast majority of cases.

2. The necessity for reopening the record of a case developed by the District Engineer will be minimized.

3. Once the District Engineer gives notice of his intent to issue a permit, his decision will be reviewed only upon the recommendation of the Administrator or Deputy Administrator of the Environmental Protection Agency, the Assistant Secretary of the Interior for Fish and Wildlife and Parks, or the Administrator of the National Oceanic and Atmospheric Administration. Reviews will be limited to cases of insufficient interagency coordination at the District level, the development of significant new information, or the necessity for policy-level review of issues of national importance within the authority of the agency recommending review.

4. Recommendations for review must be made within 15 working days of the District Engineer's notice of intent to issue a permit. Upon receipt of a recommendation for review, the Assistant Secretary of the Army (Civil Works) must decide whether or not to concur within an additional 15 working days. If he does not concur, the District Engineer's decision will be the final decision. If he does concur, he will also determine whether the review and final decision will be made by the Division Engineer, the Chief of Engineers, or by himself; the record of the District Engineer's decision will then be forwarded to the reviewing official within 10, 20, or 30 working days, respectively. In the vast majority of cases the entire review process should be completed within 90 calendar days of the District Engineer's notice of intent to issue a permit; in no case should the review process exceed 120 calendar days.

5. Requests for extensions of time in the basic public comment period from commenting agencies must be made in writing by the Regional Director or Regional Administrator and must demonstrate the need for additional data which could not have been collected during the original period. Time extensions for any individual permit may not exceed 30 days.

6. The Memoranda of Agreement with the Departments of Agriculture and Transportation will provide that the Corps will accept to the extent legally appropriate the environmental documentation and decisions made under the regulations of these departments. Provision should be made for DOT and DOA to elevate a permit action to the ASA(CW) in a similar way to that outlined in paragraphs 3 and 4 above when the District Engineer proposes, contrary to the view of DOT or DOA, to deny a permit on a DOT or DOA project.

7. The Memoranda of Agreement will apply only to permit applications under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection Research and Sanctuaries Act (except for compliance with ocean dumping criteria). They will not be used for review of permits for which an exemption has been sought under the Endangered Species Act or for those which have a separate review mechanism.

B. The Army will also revise its own regulations to reduce substantially the time it currently takes to prepare Environmental Impact Statements and other documents required by the National Environmental Policy Act. Furthermore, the Army will take steps to reduce or eliminate delays caused by investigations and other procedures required under the National Historic Preservation Act. Finally, the Army will revise the application process to ensure that only the minimum necessary information is received at the outset, to clarify what is required of applicants, and to limit requests for additional information to that essential for a complete record of the decision.

C. The Army will adopt as soon as practicable administrative measures to reduce the average time for obtaining a decision on a permit application. Strict time limits on the Corps' in-house procedures will be set so that, apart from requirements or procedures mandated by law, a decision on a completed application will ordinarily be forthcoming within 60 days of its receipt. An internal monitoring system will be established to ensure that these time limits are strictly observed. These measures will demonstrate the Army's resolve to demand no less from itself than from other agencies to speed up the Section 404 process. The Army will also consider other measures to reduce the delays to which the program has been prone.

II. Giving the States More Authority and Responsibility

A. The Army will proceed promptly to evaluate existing state programs and to issue general permits for particular categories on a state-wide basis, with appropriate safeguards, in those states whose programs are substantially similar to the Army's regulatory program.

B. The Army will not override decisions made by state and local governments on such matters as zoning or land use, unless water quality, navigation, or other issues of national importance are involved.

C. The EPA will revise its regulations under Section 404(g)-(l) to provide increased incentives and simplified procedures for state assumption of the Section 404 program. Once a state has assumed the program, federal oversight will be kept to the minimum consistent with statutory obligations and considerations of national importance.

III. Reducing Conflicting and Overlapping Policies

A. Recognizing that the Section 404 program will greatly benefit from improved operational controls and reduced jurisdictional conflicts, the Army will:

1. Revise its regulations to reduce the time needed for state action on certification requests to the greatest extent reasonably possible.

2. Review those regulations which affect the Army's Section 404 activities and which impede implementation of the reform measures described herein, and develop proposals to correct the identified deficiencies.

B. The EPA's Section 404(b)(1) guidelines will be shortened, simplified, and made consistent with the reform measures described herein.

IV. Expanding Use of General Permits

The Army will expand the use of general permits on a regional and national basis as quickly as possible, both to minimize delay and paperwork and to eliminate duplication with other federal programs. The Army will vigorously pursue the concept of "state program general permits" for appropriate categories in recognition of states' ongoing efforts to protect environmental quality.

V. Clarifying the Scope of the Permit Program

The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

The current administrative definitions of the jurisdiction of the Section 404 program, contained in regulations of the EPA and the Corps, need to be clarified to provide better guidance to private parties and the Corps' own District Engineers. EPA and the Army, in consultation with other expert agencies, will develop new and more specific criteria redefining the scope of the program, based upon technical parameters and specifying which types of wetlands are and are not appropriately covered by the Clean Water Act. The purpose of the new criteria will be to introduce a reasonable degree of certainty into the scope of the Section 404 regulatory program and to maintain essential protection of the chemical, physical, and biological integrity of the Nation's waters.

VI. Review of Administrative Reforms

All regulations, guidelines, and Memoranda of Agreement under this reform program will be submitted to the Office of Management and Budget for review under Executive Order 12291 for consistency with the principles set forth in that Order, the policies set forth in the relevant statutes, and the administration's resolve to streamline and simplify the Section 404 regulatory program. The New Memoranda of Agreement will be submitted to OMB for approval within 60 days after the announcement of these regulatory reforms.

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FACT SHEET

The U.S. Army Corps of Engineers'
Section 10/404 Regulatory Program

- The Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 were enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 404 of the Clean Water Act authorizes the Secretary of the Army, acting through the Chief of the U.S. Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into the waters of the United States, applying guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army.

- The Army Corps of Engineers administers Section 404 as part of its regulatory permit program, which also includes Section 10 of the Rivers and Harbors Act of 1899 and Section 103 of the Marine Protection, Research and Santuaries Act. Section 404 expanded the Corps' regulatory program from traditional navigable waters (for which Section 10 permits were also required) to "waters of the United States," which have been construed by some to encompass practically all waters and wetlands.

- Over 100,000 actions are annually affected by the Corps' regulatory program. As allowed by the Act, the Corps has issued "general permits" which do not ordinarily require individual processing. About 90,000 actions annually are covered under general permits. The total number of permits processed individually in one year under Sections 10, 10/404, and 404 is about 18,000. Of these, 43 percent are for Section 10 permits, 40 percent are for Section 10/404 permits, and 17 percent are for Section 404 permits.

- The Act calls for minimization of duplication, needless paperwork, and delays in issuance of permits, and sets a target of ninety days for a decision on an application. For this purpose, the Secretary of the Army is required to develop agreements with heads of other agencies, such as EPA and the Departments of Interior and Commerce, which have statutory responsibilities for advising the Corps about environmental, wildlife, and other impacts of permit applications.

- The Section 404 program has been plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public. Despite recent improvements, average processing time for "delayed" (processing time greater than 120 days) permit actions was 815 days for applications requiring Environmental Impact Statements (EIS), and 270 days

for those not requiring an EIS. Roughly 3 of every 10 permit actions are delayed and 1 percent of those delayed require an EIS. Based upon the number of permit aplications experiencing processing time longer than 120 days, the total cost of delays has been estimated on a very rough basis by the Corps to be in excess of $1.5 billion annually.

- A significant part of the delay experienced in the program has resulted from the time extensions frequently requested by commenting agencies and the complex "elevation" process for dispute resolution permitted by the Memoranda of Agreement. An agency that is dissatisfied with a decision of the Corps District Engineer can have the case elevated for reconsideration through four successive decision levels. Furthermore, the threat of elevation, with its concommitant delay in reaching a decision, has often caused applicants to accede to unnecessary and unreasonable changes in their plans. Since March 24, 1980, there were 281 cases where the District Engineer proposed to issue a permit over the objection of another federal agency. Of these, 211 cases were not elevated. Of the remaining 70 cases, 55 were resolved by the Division Engineer, for an average delay time of 150 days. An additional 5 cases are still pending at this level. Five cases were resolved by the Office of the Chief of Engineer, for an average delay time of 320 days. The remaining five cases were resolved by the Assistant Secretary of the Army (Civil Works), for an average delay time of 650 days. Of those 70 cases, 26 elevations were requested by the National Marine Fisheries Service (NMFS), 50 by the U.S. Fish and Wildlife Service (FWS) and 16 by the EPA (an elevation request is sometimes made by more than one agency). The average delay resulting from elevation for these cases was 202 days. The Corps has also estimated that the threat of elevation affected about 1700 other cases, causing an average delay of 75 days.

- Two illustrative cases of delays in the Section 404 program are provided at the end of this fact sheet. The first illustrates the kinds of complications that can arise from several layers of reviews involving different agencies. The second illustrates that long delays have occured even over relatively minor issues.

- The Act contemplates that the states will eventually administer their own dredge and fill permitting programs. It therefore sets out conditions and procedures whereby EPA will approve transfer of authority to such states. These transfer provisions (Section 404(g) thru (l)) and the EPA's implementing regulations are extremely complex and give the states minimal incentives for assuming permitting authority. As yet no state has assumed such authority, although to varying degrees they do administer their own water resource management programs.

- In administering its regulatory program, the Corps is subject to a large number of statutory, executive, and regulatory constraints requiring extensive documentation. These constraints include EPA's detailed guidelines under Section 404(b)(1), EPA's veto authority under Section 404(c), state authority to regulate discharges in navigable waters within their jurisdiction under Section 404(t), state authority to issue water quality certification under Section 401, and coordination with other federal agencies such as FWS, NMFS, EPA, and the Advisory Council on Historic Preservation (and their state counterparts). The NEPA process and Executive Order 11988 on flood plains also apply to the Army's program.

- The Act does not define "waters of the United States" in operational terms. However, it has been interpreted in the broadest possible terms so that considerable uncertainty and difficulty have arisen concerning the extent of the Corps' jurisdiction. This has led over the past decade to several attempts at more precise jurisdictional delineation, both statutory and regulatory, as well as to considerable litigation. Currently, the term is defined by regulation to cover all traditional navigable and interstate waters, their tributaries, and their adjacent wetlands, including such areas as prairie potholes, isolated lakes, and intermittent streams. The Corps has estimated that the area of wetlands that could be associated with its program amounts to hundreds of millions of acres. The process of clarifying precisely what types of bodies of "water" are included in the Section 404 program is still continuing, even though the primary purpose of the Act--protecting the chemical, physical and biological integrity of the Nation's waters--is not in dispute.

- In August 1981, the Presidential Task Force on Regulatory Relief designated the Section 404 regulatory program for review. The administrative and regulatory reforms announced today are based upon the recommendations of an interagency working group, chaired by the Department of the Army and consisting of the Department of Interior, the Department of Commerce, the Environmental Protection Agency, and the Office of Management and Budget. In developing its recommendations, the working group received helpful suggestions and information from government agencies and several state officials and private citizens and organizations. Both the administrative and the regulatory reforms are scheduled to be implemented over the next 2-6 months. The Corps expects that these reforms, when fully in place, will reduce significantly the number of permit applications likely to experience significant delays. They can be translated, roughly, into a cost savings in excess of $1 billion annually, based on the estimated cost of current permit delays of more than $1.5 billion.

CASE SUMMARY NO. 1

LAKE ALMA PERMIT

The Lake Alma project was originally part of a Department of Housing and Urban Development grant to construct a public reservoir to help satisfy water-oriented recreation needs of the City of Alma and Bacon County, Georgia, and to stimulate economic growth in the region.

On October 4, 1977, the City of Alma and Bacon County Commissioners applied for an Army Section 404 permit. The application called for the construction of an earthen dam to create a 1,400 acre recreation lake on Hurricane Creek.

EPA and the US Fish and Wildlife Service objected to issuing the permit on the ground that the project did not justify elimination of approximately 1,400 acres of wetlands and that quality of the lake water would be unacceptable for recreational uses. The Georgia Department of Natural Resources supported the project citing the relative low quality of the existing wetlands; the Environmental Protection Division of DNR stated that water quality in the proposed lake would meet or exceed all applicable water quality standards for recreational waters.

The FWS conducted an evaluation of the project and submitted a mitigation plan which included a provision that the applicants purchase and manage additional acreage to offset the loss of wildlife habitat. Following acceptance of the mitigation plan by the applicants, FWS withdrew its objection.

The mitigation plan included a group of six small artificial lakes (green tree reservoirs, comprising a total of 194 acres) to be constructed and managed for wildlife habitat. EPA then added to its objection the concern that the green tree reservoirs would be detrimental to water quality. EPA continued its objection to the project as it was elevated through the Division Engineer and the Chief of Engineers to the Assistant Secretary of the Army for Civil Works, with each level trying to resolve EPA's concerns. When the ASA(CW) received the report in August 1981, he consulted with EPA and called for a restudy of the green tree reserviors. Upon completion of the study, the ASA(CW) directed the issuance of the permit. In September 1981 he transmitted his decision to the EPA Administrator who could have, but did not, elevate the matter to the Secretary of the Army.

The permit was finally issued on November 10, 1981, four years after the application.

CASE SUMMARY NO. 2

CAMERON CONSTRUCTION COMPANY

On June 19, 1979 the Cameron Construction Company applied for a Corps permit to convert 10 acres of marsh along a navigation channel to a water oriented commercial use. The proposed project would allow Cameron Construction to expand its operations in Cameron, Louisiana, to meet the increased needs of energy producers. The proposed site is near Cameron Construction's existing facility and would require the placement of fill material over the 10 acres and construction of a 614-foot long bulkhead.

The National Marine Fisheries Service, part of the Department of Commerce, objected to the permit on the grounds that the project would have significant adverse consequences on important marine resources and that there were other viable alternatives. The Corps of Engineers disagreed with NMFS and proposed to issue the permit. Subsequently, in accordance with the 404(q) Memorandum of Agreement, NMFS elevated the issue to the Division Engineer and then to the Chief of Engineers. At each level, the Corps weighed all factors, including the concerns of NMFS, and found that the public interest was best served by issuing the permit.

On February 2, 1981, the matter was elevated to the Assistant Secretary of the Army for Civil Works. After evaluating all aspects of the issue, the ASA(CW) found that, although the 10 acres of wetlands would be lost, this only represented five ten-thousandths of one percent of the total wetlands in the area and that the benefits to be gained from the project were considerable. Further, he found that the Corps had adequately evaluated eight alternatives to the proposed action and had found that none of them offered significant advantages over the proposal.

In April 1981, the ASA(CW) decided that it was in the public interest to issue the permit and directed the Corps of Engineers to do so. The permit was issued on June 20, 1981, two years after the application.