

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 Sanctuaries (sic) 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 applications (sic) 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 concomitant 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 occurred 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.