

Reference: RGL 84-09

Subject: DOCUMENTATION REQUIREMENTS

Title: PERMIT DECISION DOCUMENTATION

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Originator: DAEN-CWO-N

Description: CLARIFIES DOCUMENTATION REQUIRED FOR PUBLIC INTEREST REVIEW INCLUDING CUMULATIVE IMPACTS, PRACTICABLE ALTERNATIVES, WATER DEPENDENCY, & IMPORTANT WETLANDS.

1. The purpose of this guidance is to clarify what documentation is appropriate in certain areas of the public interest review and balancing process. Two recent court decisions (Henry Beetle Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982), and 1902 Atlantic Limited v. Hudson, Civil No. 82-533-N, U.S.D.C., E.D. VA. (September 28, 1983)) have found that documentation of the permit decision process was inadequate, remanded the decisions back to the districts involved and asked that a better administrative record be developed.

2. Ideally, the administrative record for every permit decision clearly documents consideration of all relevant factors, as discussed below. This is especially important for complex cases or where litigation can be anticipated. Therefore, district commanders should establish a screening process to insure that all cases which are complex, for which litigation might reasonably be expected or which involve permit denials are thoroughly documented. The documentation should clearly show the weighing process used to balance project benefits against detriments. A determination of adverse effects from certain factors does not end the evaluation. The record must reflect the balance of advantageous effects versus harmful effects. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated, the (b)(1) evaluation should be conducted as an integral part of the public interest review set forth at 33 CFR 320.4(a) and all the factors of 320.4(a) should be considered in both favorable and unfavorable lights.

3. The court decisions previously mentioned singled out most of the following areas for improvement in documentation. We have added a few, where our review of several recent case records indicates a need for improvement.

a. Cumulative Impacts: Both the Corps regulations and the 404(b)(1) guidelines call for assessment of cumulative impacts. The geographic size of the area (e.g., watershed or other readily identifiable geographic area) in which cumulative impacts are to be

considered should be established. Within this selected area, a description of historical permitting activity should be developed, along with anticipated future activities in the area. This will provide the decision maker some sense of the rate of development in the area. Applicable regional or local land use plans or a special area management plan (SAMP), if any exist, should be described in context with the proposed work. In certain limited situations, where a high level of public interest is evident, districts may develop special studies or SAMP's.

b. Important Wetlands: The Corps regulations (33 CFR 320.4(b)) recognize that some (but not necessarily all) wetlands perform functions important to the public interest (see 33 CFR 320.4(b)(2)). When alteration of wetlands considered to have important functions is proposed by the applicant, especially on important cases, the environmental documentation should be as specific as possible about how the functional importance (or lack of functional importance) of the wetland was determined. Statements such as, "this type of wetland is known generically to be important" (or unimportant) are not adequate for important cases; such statements should be augmented with more specific information, including the incremental contribution of the area in question to the whole. Documentation of value and importance should be objective and factual.

c. Practicable Alternatives: Alternatives to the applicant's proposal must be discussed to demonstrate compliance with the 404(b)(1) guidelines (40 CFR 230.10(a)), the Corps' permit regulations (33 CFR 320.4(b)(4)), and NEPA 320.4(a)(2)(ii). These various requirements to discuss alternatives require somewhat redundant documentation, so each can be satisfied in part by one thorough discussion of alternatives, to be incorporated by reference in the various documents of the administrative record. Nevertheless, the essential differences between 33 CFR 320.4(b)(4) and 40 CFR 230.10(a) must be remembered. The Corps regulations' provision merely requires the District Engineer (DE) to consider whether a proposed activity is water dependent, and whether practicable alternative sites are available. If the benefits of a proposed alteration of wetlands are deemed to outweigh the damage to the wetlands resource, 33 CFR 320.4(b)(4) authorizes the DE to "grant the permit. In contrast, the 404(b)(1) guidelines provide for a more detailed treatment of practicable alternatives, all the requirements of which should be carefully documented (see 40 CFR 230.10(a)). The discussion of practicable alternatives for any or all of the above requirements should be guided by the rule of reason, and should consider alternatives both in terms of the applicant's wishes and capabilities, and in terms of the need for or purpose to be served by the proposed activity. See especially 40 CFR 230.3(g) which requires consideration of cost, existing technology, and logistics in light of overall project purposes.

d. Water Dependency: Both the Corps' regulations and the 404(b)(1) guidelines contain a water dependency "test." Corps regulations limit the application of this test to work which would alter wetlands, while the guidelines set up a rebuttable presumption against discharges in all special aquatic sites. In both situations, however, the water dependency test, standing alone, is not intended to be determinative of whether a permit is issued. Activities which are not water dependent may still receive permits, provided the overall public interest balancing process so warrants, and also provided the guidelines'

presumption against such discharges is successfully rebutted and the other criteria of the guidelines are met.

FOR THE CHIEF OF ENGINEERS: