

Regulatory Guidance Letter 87-02

SUBJECT: Use of the Word *Significant* in Permit Documentation

DATE: March 30, 1987

EXPIRES: December 31, 1989

1. The recent decisions of the Federal courts in the "Westway" case, *Sierra Club v. U.S. Army Corps of Engineers*, demonstrates that the word "significant" and comparable words must be used with great care and careful documentation in administrative records relating to Corps permit applications.
2. The National Environmental Policy Act (NEPA) requires the preparation of an Environmental Impact Statement (EIS) for every proposal for a "major Federal action significantly affecting the quality of the human environment..." (42 USC 4322) (emphasis added). Under the 404(b)(1) Guidelines, 40 CFR 230.10(c) mandates that "Except as provided under 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of waters of the United States." (emphasis added)
3. For any particular 404 permit case, if the NEPA document states that the proposed activity would have a "significant" impact on the aquatic environment, such a statement could be held by a reviewing court, not only as a conclusion that the permit application requires an EIS, but, quite possibly, that the permit must be denied under 40 CFR 230.10(c) (presuming that the impact is "degradation" of the waters). If the district engineer does not intend to present those conclusions, then either the word "significant" should not be used, or his precise meaning and intentions must be thoroughly explained and documented.
4. Similarly, if a draft EIS indicates that a proposal would have "significant" adverse impacts on the aquatic environment, then the final EIS and the final 404(b)(1) analysis must either present consistent conclusions, or they must thoroughly explain and document why those final documents differ from the draft EIS on that crucial point.
5. Of course, in a particular permit case one might reasonably conclude that a proposal may have "significant" environmental impacts triggering preparation of an EIS, yet the permit still could be issued notwithstanding 40 CFR 230.10(c). For example, the significant impacts leading to preparation of an EIS could relate to aspects of the environment outside the waters of the United States but still within the NEPA scope of analysis; or the impacts could be beneficial rather than adverse; or the adverse impacts originally anticipated in the draft EIS could be avoided or mitigated by permit conditions, so that 40 CFR 230.10(c) is satisfied.

6. The central point is that use of the word "significant" or equivalent words in permit documentation implies certain legal consequences under NEPA and the 404(b)(1) Guidelines, so one should use the word advisedly and with thorough explanation and documentation in the administrative record to support its use.

7. This guidance expires 31 December 1989 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS: