Regulatory Guidance Letter 88-12
SUBJECT: Processing Time; Regulatory Thresholds
DATE: September 9, 1988
EXPIRES: December 31, 1990

As part of the overall effort to decrease the regulatory workload, it is important to consider the points at which evaluation of a permit application can be terminated without completion of a full public interest review. These points can be referred to as "thresholds" which must be passed in order for a permit to be issued. Thresholds should not be used sequentially or on a priority basis. Thus, it is inappropriate to delay the evaluation of a permit while a threshold is being assessed. Rather, FOAs should continue to gather all necessary facts and evaluate their relevance to the overall public interest review. Additionally, FOAs must allow the applicant every reasonable opportunity to modify his application to eliminate the conflict with a threshold. However, at such time as it becomes clear that a particular threshold criteria can not be met, it is appropriate to terminate the evaluation and deny the permit.

The two most clearly stated thresholds in the Corps regulations are the denial of 401 certification and non-concurrence in CZM consistency determinations. Similarly, the denial of a required local, state or Federal permit 33CFR 325.8(b) or the denial of a specific local zoning appeal are justification for terminating the evaluation. (Note: An evaluation should not be terminated simply because a project does not conform with local zoning. It should only be terminated after the entire zoning appeal process has been exhausted.)

Thresholds exist in the review process when it is determined that an activity would:

Violate the provisions of the Endangered Species Act;

Violate the provisions of Section 302 of the Marine Protection, Research and Sanctuaries Act;

Violate the provisions of the National Historic Preservation Act;

Violate the provisions of the Marine Mammal Protection Act;

Violate the provisions of Section 7(a) of the Wild and Scenic Rivers Act;

No be compatible with a Congressionally authorized, Federal project;

Clearly interfere with navigation (33 CFR 325.8);

Compromise national security; and

Not comply with the provisions of 40 CFR 230.10(b) or (c). Generally, when termination is appropriate because of the failure of a threshold which is not determined directly by the

district engineer (e.g. denial of 401 certification or failure of the Secretary of Commerce to certify an activity in a marine sanctuary), the application should be denied without prejudice unless the evaluation has been completed and the activity is found to be contrary to the public interest 33 CFR 320.4(j).

For those thresholds which can be passed only by a determination of the district engineer (e.g. impacts on historic properties or on navigation), denial should be unqualified. In addition the record must clearly state the specific reason(s) for the denial.

Additional clarification of 3.i. above is necessary. While no permit may be issued which would not comply with them (33 CFR 320.4(a)(1)), the 404(b)(1) guidelines in and of themselves are not a threshold. Thus, evaluation of an activity involving a 404 discharge should proceed through both the guidelines and the public interest review, simultaneously. However, noncompliance with any of the provisions of 40 CFR 230.10(b)is a violation of a Federal statute, irrespective of the guidelines. Similarly, any discharge which would significantly degrade waters of the U.S. (as described at 40 CFR 230.10(c)), can never comply with the guidelines. Thus, in the case Where an applicant is unable or unwilling to mitigate the adverse effects of a discharge to below the threshold of significance, the application must be denied.

The remaining two compliance factors considered in the guidelines (i.e. consideration of alternatives (40 CFR 230.10(a) and mitigation (40 CFR 230.10(d)) rely upon a determination of practicability. Encompassed within the concept of practicability are factors which go beyond the plain violation of Federal statute into judgmental considerations identical to some of those used in reaching a public interest decision. Thus in order to make a fair and impartial decision, the district engineer cannot deny a permit on the basis of 40 CFR 230.10(a) or (d) until he has completed his public interest review.

This guidance expires 31 December 1990 unless sooner revised or rescinded.