CORPS OF ENGINEERS PERMIT PROCEDURE FOR CONSTRUCTION AND MAINTENANCE OPERATIONS IN AND ACROSS WATERWAYS

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1899 TO MID 1960's—PERMIT PROCEDURE SIMPLE

In 1899, Congress passed and the President signed one of a series of River and Harbor Acts. The entire intent of that act at that time was to protect commercial navigation on the nation's waterways.

Section 10 of that act prohibited the construction of any structures on, over, under, or near a navigable water of the United States without a permit from the Secretary of the Army. The Chief of Engineers was given responsibility for this program by the Department of the Army. In reading that section, it is obvious that the total intent of Congress was to protect navigation. The permitting procedure was quite simple. Normally, a person or company proposing such an activity sent plans into the appropriate district office. They were reviewed internally and, if navigation would not be affected, a permit was issued in a matter of days.

This procedure lasted until the mid 1960's. During that entire period, we of the Louisville District claimed jurisdiction over 1,532 miles of waterways. This was confined basically to the Ohio River, large sections of the Kentucky and Green Rivers, Lower Wabash and small sections of the White and East Fork White Rivers.

ENVIRONMENTALISTS CAUSE PERMIT RESTRICTIONS MID 60's

The situation began to change radically in the mid 1960's. It was at that time that the almost explosive increase in interest in environmental matters occurred.

At this point a very pertinent matter regarding federal laws should be explained. Federal laws are composed of both the law itself and

what is termed "case law." That is the body of written judges' opinions on matters tried under that law. What I am leading up to is that federal law is what federal judges say it is.

During the 1960's, a whole series of court cases were brought under Section 10 of the 1899 Act. As a result of these cases, and the judges' opinions, the Corps of Engineers was directed to examine numerous other factors pertaining to our permit program. In addition to navigation, all permit requests must now be examined for their effects on water quality, water supply, flood damage prevention, land use classification, aesthetics, recreation, fish and wildlife values, economics, historic values, conservation, general environmental concerns, and any other factors which might weigh on public interest. Needless to say, the days of a quick review were over.

LOUISVILLE DISTRICT JURISDICTION EXPANDS— 1,532 MILES IN MID 60's TO 6,000 MILES IN '72

During this same period, another change was occurring in our Section 10 program. Since the other factors, which I have just noted, were added to the list, and since the public's interest in such factors is not confined to those waterways which are truly navigable, another series of court cases was brought against the corps asking that we expand our jurisdictional limits.

As a result of those cases, the corps published in September 1972 a new definition of navigable waters of the United States. This definition encompasses all waters which were at one time, are now, or may be in the future used for interstate or foreign commerce.

At first, we felt that this change would not have a significant effect on our jurisdictional limits. However, in order to establish this, Louisville District hired a historian to do research on past usage of the district's waterways.

If any of you have seen some of the movies depicting pioneer times, you probably saw at least one scene of a fur trapper loading pelts in his canoe at the end of the trapping season and taking off to Pittsburgh or New Orleans. We were rather surprised to find that there were records made of such trips and that such records, such as receipts and bills of landing, were still in existence.

In effect, we found that of the three criteria the historic criteria is by far the most extensive. The 1,532 miles I mentioned previously will probably, when our reports are finally filed, increase to about 6,000 miles.

FINANCIAL AID TO UPGRADE SEWAGE TREATMENT PLANTS IN '72

This covers the status of Section 10 to present. However, also in 1972, Congress passed another law which might impact even more directly on those of you here. That was the Federal Water Pollution Control Act amendments of 1972. This law is also referred to as Public Law 92-500. The most important, and most publicized, aspect of that law dealt with the federal government's financial aid to communities upgrading their sewage treatment plants. However, buried in that law is another section which we will refer to as Section 404.

CORPS NOW RESPONSIBLE FOR ALL FILL GOING INTO NAVIGABLE WATERS

According to legislative history of the act, the original intent of this section was to require permits for the disposal of material dredged from, and placed in, navigable waters. However, at some point in the drafting of the bill, the term dredge and fill was changed to read dredged or fill. The significance of this is that Section 404 now covers the placement of any fill material in a navigable water regardless of the source of that material.

CORPS JURISDICTION EXPANDED AGAIN BY BROADER DEFINITION

You will note that in referring to Section 404, I have been discussing the disposal of material in "navigable waters." Under Section 10, the phrase used was "navigable waters of the United States." To most people, the terms would be synonymous. However, in law this is not necessarily so. Title 5 of Public Law 92-500 defines navigable waters as waters of the United States. This definition is, of course, much broader.

When the law was originally passed, the Corps of Engineers chose to ignore the definition and to exercise Section 404 jurisdiction on the same waters which we had under the 1899 Act.

Earlier this year, the corps was sued by the National Resources Defense Council in the District of Columbia Federal Court. The NRDC claimed in their suit that the Corps of Engineers was not fulfilling its obligation under the law. They sued to force us to claim 404 jurisdiction over all waters of the United States. On March 27 of this year, the federal court found for the NRDC and directed the Chief of Engineers to issue a new permit regulation reflecting this decision. That regulation is what we are talking about now.

JURISDICTION—FLOW 5 CFS OR MORE (NOW 60,000 MILES)

The regulation was published on July 25 of this year and defined navigable waters to be all streams up to a point at which the normal flow is five cubic feet per second, or five cfs. Further, the definition encompasses all natural lakes of five acres or more and all man-made lakes built on navigable waters. Also, this definition includes any wetlands contiguous or adjacent to such waters. This last point is extremely critical in that wetlands are today the most critical and controversial environmental areas that we deal with. These areas assume added importance since the courts have chosen to interpret the phrase contiguous and adjacent rather broadly.

In order to realistically implement this regulation, the corps has chosen to expand its jurisdiction in a phased program. Phase one, which took effect on publication of the regulation, includes the navigable waters of the United States and their contiguous and adjacent wetlands. Phase two, which will take effect on July 1, 1976, includes navigable waters of the United States and their primary tributaries up to the point of a normal flow of five cfs. Primary tributaries are those tributaries connecting to and directly feeding a navigable water of the United States. Phase three will take effect on July 1, 1977. That will include all streams, both natural and relocated, up to the point of a five-cfs discharge. Of course, in each phase we will also take jurisdiction over contiguous and adjacent wetlands.

The impact of this expansion can best be understood by looking at the mileages involved. As I said previously, our jurisdiction under Section 10 is expanding from 1,500 miles to approximately 6,000 miles. We expect our jurisdiction under Section 404 to reach approximately 60,000 miles under phase three.

LATERAL LIMITS OF WATERWAY JURISDICTION BY CORPS

Having discussed the longitudinal limits of jurisdiction, I would like to define the lateral limits; that is, how far up the stream bank we control.

Our limit here is known as the ordinary high-water line (ohw). That name in itself is the best definition of the concept. It is not the high water of record. In any particular area, the ohw is usually established by biological determination. On any overgrown bank, there is usually a distinct break between the type of plants which must be frequently flooded to thrive, and those which cannot stand frequent

inundation. This point is the ordinary high-water line. This line is usually within the clearly defined stream banks.

I should point out here that, while the corps only permits work below the ohw, our public interest review must include all facets of the job, even those which are, technically speaking, outside of our jurisdictional area.

NORMAL FARMING PRACTICES EXEMPT FROM PERMITTING REQUIREMENT

By now, you are probably wondering what this means to you in terms of your future work. The most important point to keep in mind is that our regulation specifically exempts normal farming practices from a permitting requirement. Of course, there can be much debate as to what constitutes normal farming practices.

CORPS PERMITS—EXISTING AND NEW DRAINAGE DITCHES AND WETLANDS

There is one thing I want to make clear. We do not have answers to all of the questions which can be raised. It is our opinion at this time that the cleaning out of existing drainage ditches is excluded from the permitting requirement. This refers only to ditches constructed solely for this purpose and not to natural rivers or to channelized rivers.

The construction of new ditches and the installation of field tile drains will probably not require a permit. However, should a new ditch connect to a navigable water and particularly if that connection requires riprap along the bank of that navigable water, a permit might be required.

Further, if the intent of a ditch or a tile field is to drain an existing wetland, a permit might also be required. Many of these issues have not yet been raised and I would advise you for your own protection, if you have any doubts, to contact us for a determination before starting a job. To contact us, the telephone number is (502) 582-5607.

PERMIT LEAD TIME 75-90 DAYS

If you find you need a permit, it would probably take 75 to 90 days to process one. In most cases, we must issue a public notice and allow a 30-day period for comments to be received. If objections are received, it is our normal practice to send the applicant a copy with a request that he contact the objector and try to resolve their differences. Quite frequently, we find that the objections are based on ignorance of

exacly what work is planned. During this same period, we must contact interested federal, state, and local agencies such as EPA and the Fish and Wildlife Service to get their comments. If there are no objections from agencies or individuals and if the corps determines, based on the many criteria discussed earlier, that the proposal is in the public interest, a permit can be issued.

SOME QUESTIONS DIFFICULT TO ANSWER

I stated earlier that there were many questions on this program, some of which we can answer and some of which we cannot. This is partly because we are dealing with a regulation based on a body of case law, and probably few, if any, of the cses involving the type of activity you are routinely involved in. Therefore, to a certain extent, we must feel our way on a case-by-case basis.