



**US Army Corps  
of Engineers**  
Headquarters

# Corps Facts

Date: Mar. 1, 2000

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## **SUBJECT: Regulatory Decision Safeguards**

### **Introduction**

The permit evaluation process contains many safeguards designed to ensure objectivity in the evaluation process. Even before an application is formally submitted, such safeguards come into play, for example, in the pre-application consultation stage.

### **Internal Safeguards**

Probably the single biggest safeguard of the program is the Corps public interest review, which also forms the main framework for overall evaluation of the project. This review requires the careful weighing of all public interest factors relevant to each particular case. Thus, one specific factor (e.g., economic benefits) cannot by itself force a specific decision, but rather the decision represents the net effect of balancing all factors, many of which are frequently in conflict.

The public interest review is used to evaluate applications under all authorities administered by the Corps. There are additional evaluation criteria used for specific authorities. For example, applications for fill in waters of the United States are also evaluated using, the Section 404(b)(1) Guidelines developed by EPA in conjunction with the Department of the Army. These guidelines are heavily weighted towards preventing environmental degradation of waters of the United States and so place additional constraints on Section 404 discharges. Likewise, ocean dumping permits (Section 103) are evaluated using special criteria developed by EPA in consultation with Army. These criteria are also primarily aimed at preventing environmental degradation and set up some very stringent tests which must be passed before a Section 103 permit can be granted. Although required for permit issuance, compliance with these authority specific criteria is only a part of the public interest review. Therefore, projects which comply with the criteria may still be denied a permit if they are found to be contrary to the overall public interest.

### **External Safeguards**

There are several external safeguards which work to maintain objectivity. One is EPA's Section 404(c), also called "veto" authority. EPA may prohibit or withdraw the specifications of any disposal site if the EPA Administrator determines that discharges into the site will have unacceptable adverse effects on municipal water supplies, shellfish

beds and fishery areas, wildlife, or recreational areas. This authority also carries with it the requirement for notice and opportunity for public hearing. EPA may invoke this authority at any time. An application need not be pending.

Section 404(q) of the Clean Water Act requires the Department of the Army to enter into interagency agreements to minimize duplication, needless paperwork, and delays in the Section 404 permit process. Current agreements allow EPA and the Department of Commerce and the Interior to request higher level review within the Department of the Army when they disagree with a permit decision which is about to be made by the district engineer. Higher level review can only be requested when certain criteria are met and must be conducted within time limits specified in the agreements. The agreements also provide for the elevation of policy issues. The decision on such requests is made by the Assistant Secretary of the Army for Civil Works.

Individual state permitting and water quality certification requirements provide an additional form of objective safeguard to the Corps regulatory program. Section 401 of the Clean Water Act requires state certification or waiver of certification prior to issuance of a Section 404 permit.

Section 307 of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1458(c)), requires that the applicant certify that the project is in compliance with an approved State Coastal Zone Management Program and that the State concur with the applicant's certification prior to a Corps permit being issued. The Corps' standard permit form contains a statement notifying the permittee that the Federal permit does not remove any requirement for state or local permits. This has the effect of making the Corps' permit unusable without these additional authorizations. If the state or local permit is denied before the Corps has made its decision, the Corps permit is also denied.

In addition to these requirements, the Corps' implementing regulations require that district engineers conduct additional evaluations on applications with potential for having an effect on a variety of special interests (e.g., Indian reservation lands, historic properties, endangered species, and wild and scenic rivers).

Another form of external safeguard, of course, is legal challenge of a permit decision. A permit applicant or landowner must appeal a permit decision prior to filing a lawsuit. However, any member of the public, may challenge, in court, a Corps decision to issue or deny a permit. Generally, such a challenge alleges failure to comply with procedural requirements, such as NEPA documentation, the 404(b)(1) Guidelines, or the procedures in the Corps permit regulations.

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