

Regulatory Guidance Letter

No. 88-12

Date: 09 Sep 1988

Expires: 31 Dec 1990

CECW-OR

SUBJECT: Regulatory Thresholds

1. 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.
2. The two most clearly stated thresholds in the Corps regulations are the denial of 401 certification and nonconcurrence in CZM consistency determinations. Similarly, the denial of a required local, state or Federal permit (33 CFR 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.)
3. Thresholds exist in the review process when it is determined that an activity would:
 - a. Violate the provisions of the Endangered Species Act;
 - b. Violate the provisions of Section 302 of the Marine Protection, Research and Sanctuaries Act;
 - c. Violate the provisions of the National Historic Preservation Act;
 - d. Violate the provisions of the Marine Mammal Protection Act;

- e. Violate the provisions of Section 7(a) of the Wild and Scenic Rivers Act;
 - f. Not be compatible with a Congressionally authorized, Federal project;
 - g. Clearly interfere with navigation (33 CFR 325.8);
 - h. Compromise national security; and
 - i. Not comply with the provisions of 40 CFR 230.10(b) or (c).
4. 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)).
5. 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.
6. 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.
7. 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 can not deny a permit on the basis of 40 CFR 230.10(a) or (d) until he has completed his public interest review.

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 This guidance expires 31 December 1990 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

/s/
JOHN P. ELMORE
Chief, Operations and Readiness Division
Directorate of Civil Works

DEPARTMENT OF THE ARMY
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DAEN-CWO-N

18 JUN 1982

SUBJECT: Regulatory Guidance Letter 82-8; State and Local Primacy

1. The purpose of this letter is to emphasize our policy that the Regulatory Program is not to be used to "second guess" decisions made by state and local governments on such matters as zoning or land use unless there are significant issues of overriding national importance. Such issues would include national security, navigation, national economic development, water quality, and national energy needs.
2. The importance of state and local decisions in the regulatory process is recognized in the Clean Water Act, the Environmental Quality Improvement Act of 1970, and our regulations. The policy of Congress as expressed in Section 101(b) of the Clean Water Act is to "recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ... It is the policy of Congress that the states ... implement the permit program under Sections 402 and 404 of this act." In the Environmental Quality Improvement Act of 1970, Section 202(b), Congress expressed the policy that the primary responsibility for enhancement of environmental quality rests with state and local government. In the public interest review criteria at 33 CFR 320.4(a)(2)(i), district commanders are required to consider the public and private need for a project. Section 320.4 (j)(2) states, "where officially adopted state, regional, or local land use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest..." and Section 320.4(j)(4) states, "In the absence of overriding national factors of the public interest that may be revealed during the processing of the permit application, a permit will generally be issued following receipt of a favorable state determination ..."
3. The district commander is responsible to determine when a public interest factor is of national significance and when it becomes an overriding factor in the public interest balancing process. If a district commander proposes to make a decision on a permit application which is contrary to state or local decisions, the district commander must clearly document the significant national issues and explain how they are overriding in importance.

4. This guidance expires 31 December 1984 unless sooner revised or rescinded.

FOR THE COMMANDER:

/s/
FORREST T. GAY, III
Brigadier General, USA
Deputy Director of Civil Works

