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Environmental Permitting: Getting to “Yes” with the Army Corps of Engineers

By JOHN EISENHAUER and ROB VINING

A few years ago, a developer with plans for a terminal in the Pacific Northwest realized that before he could begin, he needed approval under Section 10 of the Rivers and Harbors Act from the U.S. Army Corps of Engineers. A local consulting company advised that approval required an expansive Biological Assessment (BA) of the construction's impact on the nearby Columbia River.

To speed approval, the developer took this advice and conducted an assessment beyond the proposed construction site all the way to the river's mouth, more than 268 river miles away. The thought was that with an expanded assessment area, the Corps would be less likely to request additional information. Therefore the project would receive faster approval. Problem solved, right?

Wrong.

By expanding the assessment area, the developer overstepped the bounds of the Corps of Engineers' authority. Federal law limits the Corps of Engineers to evaluating direct and indirect effects linked to the permitting action.

Worse for the developer, the plan's opponents used this assessment to increase public pressure on federal officials for a more costly and time-consuming Environmental Impact Statement, which would be based on impact to the entire 268-mile area.

The result: Three years later, the project is still awaiting completion of the Environmental Assessment. Its opponents will most likely use the faulty scope of the BA to litigate against the project, should a permit gain approval, costing the developer further expenditures of time and money.

This is just one instance of countless examples of companies defeating themselves because they did not understand Corps' policies and procedures. This usually leads to frustration and unfair criticism leveled at Corps' officials.

This is especially unfortunate because in the vast majority of such situations, there is typically an agreeable solution based on proper presentation of an applicant's project and proper interpretation of statute and policy.

To understand how the Corps operates, it is important to recognize that Corps policy is written in Washington, DC and reflects federal law. The laws not only reflect major legislation (Clean Water Act, Endangered Species Act) but also language in annual appropriations and authorizations.

But it is up to each district office to implement this policy. This is where effective outreach makes a world of difference. First, each district has varying levels of experience in working through regulatory processes and this fact sometimes results in friction when working with applicants, especially when working actions across multiple districts or for projects that are unique in nature.

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Second, it might be only a mild exaggeration to state that you can probably find a Corps regulation that could, in some strained way, be used to prohibit just about any particular development. Yet, there is also probably a precedent somewhere that could be used to justify the project.

Here are a few guidelines that should help create a successful working relationship with Corps officials:

LESSON #1

It is crucial to select the best possible precedents and examples of Corps’ action to win approval for your project.

To do that requires not only an understanding of the Corps’ policies and procedures but also an appreciation of why they are this way.

LESSON #2

You must be certain about the nature of your advocacy. This almost always involves much more than just relevant policies and the precedents. Specifically, you also need to understand the Corps’ sometimes distinctive language.

A case in point is the difference in the phrase “Scope of Analysis” in relevant law that guides Corps policies and procedures. Under the 1970 National Environmental Policy Act (NEPA), a “Scope of Analysis” addresses “the impacts of the specific activity” requiring a permit, including portions of the project over which the district engineer has responsibility. (33 CFR Part 325 Appendix B)

But under Section 7 of the 1973 Endangered Species Act, the phrase is much broader, reflecting “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area.” (50 CFR Part 402)

LESSON #3

If someone tells you that bypassing the Corps and lobbying Congress will bring success faster, be skeptical. For starters, Congress doesn’t exactly enjoy a reputation for rapid action and even brief inserts into legislation require lengthy outreach. Also, while the Corps has established procedures that dictate success or failure, Congress operates under far more opaque rules.

Beyond that, the vast majority of members of Congress are careful about maintaining working relationships with their Corps’ District headquarters. Therefore, they don’t want to be seen as “blindsiding” the local office on a particular project.

Consider the experience of Port Orford, Oregon as an example. In recent years, appropriations for dredging low-use harbors diminished considerably. As a result, the Port of Port Orford was no longer competitive for dredging funds, which placed the area’s commercial fishery at risk.

Certain federal officials decided that the solution would be a legislative appropriation from the Harbor Maintenance Trust Fund, a federal program that funds port and harbor operations. After two years, this legislative appropriation has still not worked.

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But tellingly, a local solution did bear fruit. The local community and Corps District agreed to identify other funding sources. Within six months, the parties reached a funding agreement between the Army and the State of Oregon to address dredging funding shortfalls for all of Oregon’s low-use harbors.

LESSON #4:

One of the uniform truisms of negotiation with the Corps involves the importance of a collaborative “peer-to-peer” discussion. This is invariably the surest way to gain advocates within the Corps, which is crucial to attaining your overall goals. Well before your first filing or meeting with the Corps, you need to understand fully the likely perspectives within the district and division offices as well as the national headquarters. That includes previous actions, policy, and likely concerns. It also means laying out your goals fully at the outset — the “no surprises” rule should be ironclad.

The Army Corps of Engineers is filled with professional and smart civilians and military officials who take their roles very seriously and will work cooperatively with you. But you will help your cause immensely by understanding the parameters that govern their actions and designing your outreach accordingly.

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