

FEDERAL CONTROL OF WATER POLLUTION: THE REFUSE ACT PERMIT PROGRAM

By

RICHARD G. HILDRETH*

San Francisco, California

Pending enactment by Congress of a more comprehensive water pollution program, the Nixon Administration has instituted a permit program under Section 13 of the Rivers and Harbors Act of 1899, commonly known as the Refuse Act.¹ That act prohibits the discharge or deposit of:

“any refuse matter . . . other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . .”

and the deposit of:

“material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, . . . whereby navigation shall or may be impeded or obstructed. . . .”

The prohibition of discharges of refuse matter is much broader than the prohibition of deposits on banks in that there is no requirement that navigation be impeded or obstructed,² and the exclusion of liquid sewage from the act's prohibition does not extend to industrial wastes.³ By its terms the act does not apply to “operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work.”

As to permits for discharges and deposits, the Refuse Act provides:

“. . . [T]he Secretary of the Army, whenever in the judgment of

* Member of the California Bar.

1. 33 U.S.C.A. § 407 (1970); *see*, Annot., 16 L. Ed. 2d 1256; Note, 22 *HASTINGS L.J.* 782 (1971); Comment, 1 *ECOLOGY L.Q.* 176 (1971). In 1888 the Supreme Court had held that there was no federal common law prohibition of obstructions in navigable waters of the United States. *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888).

2. *United States v. Ballard Oil Co.*, 195 F.2d 369, 370 (2d Cir. 1952); *La Merced*, 84 F.2d 444, 446 (9th Cir. 1936); *Myrtle Point Transportation Co. v. Port of Coquille River*, 86 Ore. 311, 168 P. 625 (1917); *see*, *United States v. Esso Standard Oil Co.*, 375 F.2d 621, 623 (3d Cir. 1967).

3. *United States v. Republic Steel Corp.*, 362 U.S. 482 *rehearing denied*, 363 U.S. 858 (1960), *upon remand*, 286 F.2d 875 (7th Cir. 1961); *United States v. Pennsylvania Industrial Chemical Corp.*, 2 *BNA ENVIRONMENT REP. CAS.* 1804 (W.D. Pa. 1971).

the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such materials; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.”

Thus, discharges without a permit have been unlawful since 1899, and the institution of a permit program in 1971 does not confer immunity from prosecution on past discharges or immunity from prosecution and the permit requirements on present discharges.⁴ Also, there are two statutory conditions to the issuance of a permit: (1) application for a permit must have been made prior to making the deposit authorized by the permit; and (2) in the judgment of the Chief of Engineers, anchorage and navigation will not be injured by the deposit. Because a permit cannot approve deposits made prior to the application for the permit, prosecution for such previous deposits is not prevented by the issuance of a permit approving similar deposits.⁵ Finally, in issuing a permit, the Secretary of the Army is authorized to impose conditions and limitations on the deposits, and any violation of the permit conditions is also a violation of the Refuse Act.⁶ Until President Nixon issued Executive Order 11574 on December 23, 1970, the Corps of Engineers had taken no steps to implement the permit program authorized for discharges of refuse matter by the Refuse Act. Not only were permits not required, but it was the policy of the Corps not to take any action where a violation of the Refuse Act was “minor and unintentional or accidental” and not to recommend prosecution when the violation was “trivial, apparently unpremeditated, and results in no material public injury.”⁷

4. *Id.* at 1806.

5. *See*, Corps of Engineers Reg. § 209.131(d)(4), 36 Fed. Reg. 6565 (1971).

6. Unlawful discharges and deposits are a misdemeanor, punishable by a fine of \$500 to \$2500, and, if the violator is a natural person, imprisonment. 33 U.S.C.A. § 411 (1970). One-half of the fine is to be paid to the persons who provide information leading to conviction. *Id.*; *see*, Shipman v. United States, 309 F. Supp. 441 (E.D. Va. 1970); United States v. St. Regis Paper Co., 2 BNA ENVIRONMENT REP. CAS. 1619 (W.D. Wis. 1971); United States v. Transit-Mix, 2 BNA ENVIRONMENT REP. CAS. 1074 (S.D. N.Y. 1970). However, the federal district courts have uniformly held that no private right of action may be based on the Refuse Act. *Qui tam* and injunction unsuccessfully sought: Lavigno v. Port-Mix Concrete, Inc., 2 BNA ENVIRONMENT REP. CAS. 1895 (D. Colo. 1971); Bass Anglers v. Scholze Tannery, 2 BNA ENVIRONMENT REP. CAS. 1771 (E.D. Tenn. 1971); Connecticut Action Now, Inc. v. Roberts Plating Company, Inc., 2 BNA ENVIRONMENT REP. CAS. 1731 (D. Conn. 1971); *qui tam*: Mattson v. Northwest Paper Co., 2 BNA ENVIRONMENT REP. CAS. 1566 (D. Minn. 1971); Gerbing v. I.T.T. Rayonier, Inc., 2 BNA ENVIRONMENT REP. CAS. 1801 (M.D. Fla. 1971); damages: Guthrie v. Alabama By-Products Co., 40 U.S.L.W. 2001 (N.D. Ala. June 21, 1971). The Justice Department has issued guidelines for citizen investigations of violations of the Refuse Act. 2 BNA ENVIRONMENT REP. 370, 390 (1971).

7. 33 C.F.R. § 209.170(g)(4) (1970); *see*, United States v. Interlake Steel Corp., 297 F. Supp. 912, 915 (N.D. Ill. 1969). Only four permits had been

EXECUTIVE ORDER 11574

On December 23, 1970 President Nixon signed Executive Order 11574 ordering the executive branch to implement a permit program under the Refuse Act to regulate the discharge of pollutants and other refuse matter into navigable waters and their tributaries.⁸ Significantly, the order divides responsibility between the Secretary of the Army and the Administrator of the recently created Environmental Protection Agency (EPA).⁹ The order directs the Secretary of the Army to set up procedures for processing applications for permits and gives him the responsibility of granting or denying permits. However, in making his decisions he is directed to accept the determinations and interpretations of the Administrator of EPA with respect to applicable water quality standards and compliance with those standards in particular circumstances. The Secretary of the Army does have the responsibility for considering factors other than water quality and for consulting with other federal agencies respecting environmental values as required by the National Environmental Policy Act of 1969.¹⁰ In particular, where the discharge for which a permit is sought physically modifies the body of water or its channel, Executive Order 11574 directs the Secretary of the Army to consult with the Secretaries of the Interior and Commerce, the Administrator of EPA and the state head of wildlife resources of any affected state, regarding effects on fish and wildlife.

The relationship between the Department of the Army and EPA has been defined further in memoranda of understanding between the Secretary of the Army and the Administrator of EPA.¹¹

CORPS OF ENGINEERS REGULATIONS

As directed by Executive Order 11574, the Corps of Engineers published proposed regulations governing the issuance of permits under

issued in the past seventy years. In regard to prior Corps deference to local pollution standards, see 33 C.F.R. §§ 209.330, .395, 400 (1967). See also, 33 C.F.R. § 209.120(d)(1) (1970) (§ 10 permit program).

8. 35 Fed. Reg. 19627 (1970). A suit challenging the validity of this program under the Refuse Act itself, the National Environmental Policy Act of 1969 and the Fifth and Ninth Amendments to the Constitution has been brought in the District of Columbia federal district court. See, 2 BNA ENVIRONMENT REP. 303 (1971).

9. EPA replaced the Federal Water Quality Administration, 33 U.S.C.A. § 1152 (1970), under Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), Annot., 42 U.S.C.A. § 4321 (Supp. 1971). The Administrator is William D. Ruckelshaus.

10. 42 U.S.C.A. § 4332 (March Supp. 1970).

11. 36 Fed. Reg. 3074-75 (1971), 1 BNA ENVIRONMENT REP. 1155-57 (1971) (executed as to cooperation in enforcement and investigations); 36 Fed. Reg. 983-84 (1971) (proposed in regard to permit program). The terms of the proposed memorandum are expressly incorporated in the executed one. 36 Fed. Reg. at 3074. Among other things, the Army and EPA agree to give each other thirty days' notice of any regulations or guidelines to be issued in regard to Refuse Act permits. 36 Fed. Reg. at 984.

the Refuse Act on December 31, 1970,¹² and final regulations on April 7, 1971.¹³ A form of permit also has been promulgated.¹⁴ The regulations and form of permit may conveniently be summarized as follows:

1. *Discharges and Deposits for Which Permits Are Required*

The broad scope of the Refuse Act permit program becomes apparent upon consideration of the definitions of "refuse matter," the discharge or deposit of which in "any navigable water" and its tributaries without a permit is prohibited. The scope of navigable waters and their tributaries is restricted only by the constitutional limits on the federal interstate commerce power; Congress has elsewhere defined navigable waters as

"streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids. . . ."¹⁵

Similarly, the meaning of "refuse matter" has been broadly interpreted, both by the courts and the Corps in the regulations. It includes solids in water suspension,¹⁶ refuse indirectly deposited, such as discharges into waste treatment systems which then flow into navigable waters¹⁷ and oil discharged upon the ground so that it flows into the sea by the force of gravity alone,¹⁸ small quantities of refuse such as a few pieces of timber,¹⁹ commercially valuable products such as gasoline uninten-

12. 35 Fed. Reg. 20005-09 (1970).

13. 36 Fed. Reg. 6564-70 (1971). The regulations will be codified as 33 C.F.R. § 209.131.

14. 36 Fed. Reg. 13835 (1971). *See*, 36 Fed. Reg. 5431 (1971) for the form as initially proposed.

15. 16 U.S.C.A. § 796 (1960); *see*, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Rochester Gas and Electric Corporation v. Federal Power Comm.*, 344 F.2d 594, 595-96 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965); 33 C.F.R. § 209.260 (navigable waters of the United States).

16. *United States v. Republic Steel Corp.*, 362 U.S. 482, 909 (1960).

17. Corps of Engineers Reg. § 209.131(d)(1).

18. *United States v. Esso Standard Oil Co.*, 375 F.2d 621, 623 (3d Cir. 1967); *see*, *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952).

19. *The Pile Driver No. 2*, 239 F. 489, 491 (2d Cir. 1916).

tionally discharged,²⁰ and even "thermal pollution," such as discharges of heated water by electric power generating stations.²¹

The principal exclusion is the statutory one of refuse flowing from streets and sewers in a liquid state, the obvious example being municipal liquid sewage. This has been held by the Supreme Court not to extend to industrial wastes.²² The act also excludes discharges in connection with the improvement of navigable waters or federally supervised public works construction, but the regulations emphasize that all other governmental discharges are covered by the Refuse Act.²³ The regulations do exclude the following discharges from the permit program without otherwise affecting the applicability of the Refuse Act:²⁴

- (1) discharges of any kind into and from municipal or other public sewage treatment systems;
- (2) storm water runoff from public *and private* streets;
- (3) discharges into but not from public and private waste treatment systems not tied in with a public sewage treatment system;
- (4) deposits on banks which will not by gravity flow into a navigable waterway;
- (5) discharges from ships and other watercraft;²⁵ and
- (6) public and private dredging and filling, which is covered by a separate Corps permit program.²⁶

In no event will permits be issued under the Refuse Act for discharges of "harmful quantities" of oil as defined pursuant to Section 11 of the Federal Water Pollution Control Act (F.W.P.C.A.).²⁷

2. Due Dates for Applications

The initial deadline for applications covering existing discharges was July 1, 1971, with applications covering existing discharges from facilities which were not in existence or lawfully under construction prior to April 3, 1970 being due as soon as possible prior to July 1.²⁸

20. *United States v. Standard Oil Co.*, 384 U.S. 224, 226, 494n. 3 (1966), *overruling*, *United States v. Delvalle*, 45 F. Supp. 746, 748 (E.D. La. 1942).

21. Corps of Engineers Reg. § 209.131(d)(1); *cf.* *United States v. Florida Power & Light Co.*, 311 F. Supp. 1391 (S. D. Fla. 1970).

22. *United States v. Republic Steel Corp.*, 362 U.S. 482; *see*, *United States v. Pennsylvania Industrial Chemical Corp.*, 2 BNA ENVIRONMENT REP. CAS. 1804.

23. Corps of Engineers Reg. § 209.131(d)(1).

24. Corps of Engineers Reg. § 209.131(d)(2).

25. Discharges of refuse from ships are expressly prohibited by the Refuse Act. *See*, *The President Coolidge*, 101 F.2d 638 (9th Cir. 1939) (garbage thrown overboard onto harbor inspector).

26. *See*, 33 U.S.C.A. § 403 (1970). However, discharges from activities permitted under Section 403 other than dredging and filling do require a separate discharge permit issued under the new program. Corps of Engineers Reg. § 209.131(f).

27. Corps of Engineers Reg. § 209.131(d)(11)(ii); 33 U.S.C.A. §§ 1161(b)(2)(B), (b)(3) (1970).

28. Corps of Engineers Reg. § 209.131(d)(3).

By July 14, 1971, only 15,000 of an originally estimated 40,000 to 100,000 applications due had been received. The deadline for the filing of some information was then informally extended to October 1, 1971 for certain "critical" industries.²⁹ In August, when the number of applications on file leveled off at 18,000, regional offices of EPA were instructed to begin notifying companies of the need for compliance within the next thirty days and to refer any who did not respond affirmatively to the Justice Department. In late September, EPA submitted the names of 28 companies who had not filed applications to the Justice Department with a recommendation to prosecute.³⁰ For discharges to commence on or after November 1, 1971, the due date has remained no later than 120 days prior to the proposed commencement date.³¹

According to the regulations, the filing of an application does not prevent prosecution for violating the Refuse Act while the application is pending, and applications covering discharges which are being prosecuted may still be accepted and processed.³²

3. Form and Contents of Application for Permit

The required form of application is to be filed with the Army District Engineer.³³ Private applicants pay a fee of \$100 plus \$50 for each outlet above one where there are multiple outlets from which discharges will flow.³⁴ The application must identify the waterway involved and the precise location of each discharge or deposit. The character of each discharge and monitoring devices and procedures which will be used by the applicant must be fully identified. Such information must include data pertaining to chemical content, water temperature differentials, toxins, sewage, and the amount and frequency of discharge. If a discharge includes solids of any type, the applicant must identify the type and quantity of solids involved, and the proposed method of instrumentation to determine the effect of the deposit of solids on the waterway, and either agree to periodically remove the solids by dredging or to reimburse the United States for the costs of such dredging.³⁵

An additional requirement that is the subject of some controversy is that an application submitted by a corporation must be signed by

29. For a complete list see page 3 of Section II of the application form described in note 33 *infra*. It includes iron and steel, chemicals, food and wood processing.

30. Wall Street Journal, September 24, 1971, at 8, col. 1. In general, this article reflects developments reported through October 1, 1971.

31. Corps of Engineers Reg. § 209.131(d)(4).

32. *Id.*

33. An application form, ENG Forms 4345 and 4345-1, totaling 8 pages, together with an instruction manual exceeding 100 pages may be obtained from any of the 36 district offices of the Corps as well as the division office of the Corps.

34. Corps of Engineers Reg. § 209.131(g)(3).

35. Corps of Engineers Reg. § 209.131(g)(1).

the principal executive officer of the corporation "or by an official of the rank of corporate vice-president or above who reports directly to such principal executive officer and who has been designated by the principal executive officer to make such applications on behalf of the corporation." Although a written designation is not expressly required, it is advisable, and would seem to be an appropriate subject for inclusion in the board of directors' minutes. In the case of a partnership or sole proprietorship, the application must be signed by a general partner or the proprietor. Each application must contain a certification by the person signing the application that he is familiar with the information provided and that to the best of his knowledge and belief such information is complete and accurate.³⁶

4. Requirements for Issuance of Permit

a. State Certification

For all discharges into navigable waters from facilities the construction of which was not lawfully commenced prior to April 3, 1970, applicants except federal agencies³⁷ must provide certification under Section 21(b) of the Federal Water Pollution Control Act³⁸ by the appropriate state or interstate agency that "there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards" to the District Engineer before an application will be processed further.³⁹ For discharges from *existing facilities* and all discharges into nonnavigable tributaries, applicants except federal agencies must provide the District Engineer with a letter from the state in which the discharge is located "describing the impact of the proposed discharge or deposit and indicating the views of the State on the desirability of granting a permit."⁴⁰ Because of the time involved in obtaining such a state certification or letter, the practical first step for any applicant is to initiate the appropriate state proceed-

36. Corps of Engineers Reg. § 209.131(g)(2). 18 U.S.C.A. § 1001 (1966) provides for fines and imprisonment in the case of false statements. *See*, Form of Permit, ¶I(g), 36 Fed. Reg. 13835 (1971).

37. 33 U.S.C.A. § 1171(b)(6) (1970); Corps of Engineers Reg. § 209.131(h)(4).

38. 33 U.S.C.A. § 1171(b) (1970). The Federal Water Pollution Control Act does not supercede the Refuse Act. 33 U.S.C.A. § 1174 (1970); *see*, *United States v. Interlake Steel Corp.*, 297 F. Supp. at 916; *United States v. Maplewood Poultry*, 2 BNA ENVIRONMENT REP. CAS. 1646 (D. Me. 1971). Therefore, compliance with water quality standards established under the Federal Water Pollution Control Act is no defense to a Refuse Act prosecution. *United States Steel Corp.*, 2 BNA ENVIRONMENT REP. CAS. 1700, 1702-03 (N.D. Ind. 1970); *United States v. Pennsylvania Industrial Chemical Corp.*, 2 BNA ENVIRONMENT REP. CAS. at 1806-07.

39. Corps of Engineers Reg. § 209.131(h)(2).

40. Corps of Engineers Reg. § 209.131(h)(3). The difference arises in part out of the grace period until April 3, 1973, for facilities existing or lawfully under construction on April 2, 1970, in the certification provisions of Federal Water Pollution Control Act § 21(b). *See*, 33 U.S.C.A. §§ 1171(b)(7), (8).

ings to obtain the required certificate or letter, particularly since District Engineers are instructed to provide the certifying agency with six months in which to take action before determining that a waiver of the certification requirement has occurred.⁴¹ To aid in determining whether a waiver has occurred, the regulations require that the state certifying agency be provided with a copy of the Refuse Act permit application, and that a copy of the state certification application be filed with the District Engineer.⁴²

If the state denies certification, then the permit must be denied.⁴³

b. Absence of Objection by the Regional Representative of EPA

When any required state certification or letter has been provided and the District Engineer finds the application otherwise to be in order, he must promptly forward a copy to the Regional Representative of EPA. The Regional Representative has thirty days within which to advise the District Engineer pursuant to F.W.P.C.A. Section 21(b) (2)⁴⁴ whether the proposed discharge may affect the quality of waters of another state besides the one where the discharge is located, and, unless he notifies the District Engineer that he requires additional time, forty-five days within which to determine and advise the District Engineer as to the following:

- (1) the meaning and content of the water quality standards applicable to the discharge;
- (2) the application of these water quality standards to the proposed discharge, including the impact of the discharge on the "water quality standards and related water quality considerations";
- (3) the permit conditions required to comply with the water quality standards or to carry out the purposes of the Federal Water Pollution Control Act where no water quality standards are applicable;
- (4) the protection afforded fish and wildlife resources by the water quality standards; and
- (5) the duration of the permit.⁴⁵

If the Regional Representative determines that the proposed discharge may affect the quality of the waters of another state, the procedures set out in F.W.P.C.A. Section 21(b) (2) are to be followed:⁴⁶ The other state has 60 days within which to determine whether its

41. Corps of Engineers Reg. § 209.131(h)(1), (3).

42. Corps of Engineers Reg. §§ 209.131(h)(2), (3).

43. Corps of Engineers Reg. § 209.131(d)(11)(i); [Proposed] Memorandum of Understanding, Procedures, ¶¶5, 8, 36 Fed. Reg. 983 (1971).

44. 33 U.S.C.A. § 1171(b)(2) (1970).

45. Corps of Engineers Reg. §§ 209.131(i)(3), (d)(7)(i)-(vii). EPA has issued guidelines to its regional offices for the processing of applications and enforcement of the Act. 2 BNA ENVIRONMENT REP. 524, 535, 543, 562 (1971).

46. Corps of Engineers Reg. § 209.131(i)(3).

water quality standards will be violated by the discharge and request a public hearing; no permit may be issued unless it is conditioned so as to insure compliance with the applicable water quality standards.⁴⁷ If the Regional Representative objects to the issuance or the terms and conditions of a permit on water quality grounds, the District Engineer must accept his determinations or else refer the matter to the Secretary of the Army and the Administrator of EPA for resolution. The Secretary is bound by the findings of the Administrator as to water quality and must deny the permit if the Administrator decides that applicable water quality standards will be violated.⁴⁸ If the 45 days or any extension period passes with no response from the Regional Representative, then the advice of the state is deemed to be the advice of the Regional Representative, unless the state also waived; in that case the advice of the Regional Representative must be obtained.⁴⁹

If the discharge is a hazardous substance as defined in regulations to be promulgated by the Administrator of EPA under F.W.P.C.A. Section 12, then the approval of the Administrator is required before a permit may be issued. For other toxic substances besides such hazardous substances, no permit may be issued if the Regional Representative of EPA advises the District Engineer that a permit could not be conditioned so as to ensure that the discharge would not pose any significant risk to health or safety.⁵⁰

c. Anchorage and Navigation Will Not Be Impaired

The Refuse Act itself requires that the Chief of Engineers determine that anchorage and navigation will not be injured before a permit may be issued. In the regulations the Chief of Engineers has made the general determination that anchorage and navigation will not be injured when the discharge "will cause no significant displacement of water or reduction in the navigable capacity of a water" and authorized District Engineers to make the necessary evaluation and deny a permit if anchorage and navigation will be impaired.⁵¹

d. No Substantial Adverse Impact on Fish and Wildlife Resources

Whenever any body of water or its channel is proposed to be physically altered under federal permit, the Fish and Wildlife Coordination Act requires the permitting agency to first consult with the United States Fish and Wildlife Service of the Department of the Interior (some of whose functions were recently transferred to the Na-

47. 33 U.S.C.A. § 1171(b)(2) (1970); see, EPA Proposed Regulations, 36 Fed. Reg. 2516 (1971).

48. Corps of Engineers Reg. §§ 209.131(d)(10), (11)(iii); (i)(7).

49. Corps of Engineers Reg. § 209.131(i)(3); [Proposed] Memorandum of Understanding, Procedures, ¶4, 36 Fed. Reg. 983 (1971).

50. Corps of Engineers Reg. §§ 209.131(d)(11)(iv), (v).

51. Corps of Engineers Reg. §§ 209.131(e), (d)(5)(i); see [Proposed] Memorandum of Understanding, Procedures, ¶6(i), 36 Fed. Reg. 983 (1971).

tional Oceanic and Atmospheric Administration)⁵² and the wildlife resources agency of the state involved.⁵³ The Refuse Act permit regulations omit the limitation to cases of physical alteration and provide that if there is an objection to any proposed discharge by the Regional Director of the National Oceanic and Atmospheric Administration or the Department of the Interior on the grounds that there will be a significant and unreasonable adverse impact on fish and wildlife resources, the District Engineer must provide an additional thirty days for consultations and possible referral of the matter to Washington before issuing a permit.⁵⁴ Where there is no such objection, the District Engineer may still deny the permit if he determines that the proposed discharge will have a significant adverse impact on fish and wildlife values not reflected in or adequately protected by applicable water quality standards.⁵⁵

e. Notice and Public Hearing

At approximately the same time a copy of the permit application is furnished to the Regional Representative of EPA for his advice on water quality considerations, a public notice of the application is issued by the District Engineer. He is instructed to post copies in Post Offices and other public places in the vicinity of the discharge and to send copies "to all parties known to be interested in the application," including navigation interests, state, county and municipal authorities, adjacent property owners, heads of state agencies having responsibility for water quality improvement and wildlife resources, and conservation organizations.⁵⁶ Interested parties have 30 days in which to express their views concerning the application and comments during this period are to be considered in determining whether a permit should be issued.⁵⁷ The comments of all governmental agencies, all information and data provided by the applicant identifying the nature and frequency of the discharge, and any state water quality certifications are available to the public at the District Engineer's office without restriction. All other data submitted by the applicant is also available to the public unless it is specifically identified and demonstrated to the satisfaction of the Secretary of the Army that disclosure would divulge methods or processes entitled to protection as trade secrets.⁵⁸ The District Engineer

52. Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15627 (1970), Annot., 42 U.S.C.A. § 4321 (Supp. 1971); see, 1 BNA ENVIRONMENT REP. 266 (1970).

53. 16 U.S.C.A. § 662(a) (1960); see, Exec. Order No. 11574, § 2(3), 35 Fed. Reg. 19628 (1970).

54. Corps of Engineers Reg. § 209.131(i)(7).

55. Corps of Engineers Reg. §§ 209.131(d)(5)(iii), (e)(2); cf. [Proposed] Memorandum of Understanding, Procedures ¶6(ii), 36 Fed. Reg. 983 (1971).

56. Corps of Engineers Reg. § 209.131(j)(4).

57. Corps of Engineers Reg. § 209.131(j)(1)(v).

58. Corps of Engineers Reg. § 209.131(i)(5); Form of Permit, ¶I(h), 36 Fed. Reg. 13835 (1971).

must provide the applicant with all objections received to the permit, and provide an opportunity to rebut or resolve the objections.⁵⁹

A *public hearing* is mandatory under Sections 21(b)(2) and 21(b)(4) of the Federal Water Pollution Control Act when a state other than the state where the discharge is located objects to the issuance of a permit and requests a hearing, or a state notifies the Secretary of the Army that the operation of a facility for which a construction permit has been issued will violate applicable water quality standards.⁶⁰ In all other cases, a public hearing will be held whenever, in the opinion of the District Engineer, such a hearing is advisable. In deciding whether a public hearing is advisable, the District Engineer is to consider the degree of interest shown by the public, requests for hearing by the applicant or responsible federal, state or local authorities, including members of Congress, and the likelihood that information will be presented at the hearing which will be of assistance in the permit decision. A hearing will not generally be held if there has been a prior hearing at either the local, state or federal level regarding the proposed discharge, unless it clearly appears that the holding of another hearing may result in the presentation of significant new information concerning the impact of the proposed discharge. The need for a hearing is to be reported to the Army Division Engineer and his concurrence obtained.⁶¹

If the decision is to hold a hearing, a notice of the hearing identifying the proposed discharge is to be issued at least 30 days in advance of the hearing date. It is to be disseminated in the same manner as the previous notice of the application, and in addition distributed to interested members of Congress, governors of the states involved, news media within the geographical area and appropriate specialized media for reaching interested groups and organizations. The transcript of the hearing, along with copies of relevant documents, becomes a part of the permit application record.⁶²

f. For Discharges Which May Have a Significant Environmental Impact Unrelated to Water Quality, Completion of Procedures under the National Environmental Policy Act

Section 102(2)(c) of the National Environmental Policy Act (N.E.P.A.), administered by the Council on Environmental Quality (CEQ), directs all agencies of the federal government to include in every recommendation or report on major federal actions significantly affecting the environment, a detailed statement by the responsible

59. Corps of Engineers Reg. § 209.131(j)(4).

60. 33 U.S.C.A. §§ 1171(b)(2), (b)(4) (1970); Corps of Engineers Reg. §§ 209.131(k)(1), (5).

61. Corps of Engineers Reg. § 209.131(k)(1). See the proposed regulations for hearings published in 2 BNA ENVIRONMENT REP. 625-26.

62. Corps of Engineers Reg. §§ 209.131(k)(3), (4).

official on the environmental impact of the proposed action.⁶³ However, the Council on Environmental Quality has advised the Corps of Engineers that such statements will not be required where the only impact of a proposed Refuse Act discharge will be on water quality; a Section 102(2)(c) statement is required for a discharge which may have a significant environmental impact unrelated to water quality, in which case the District Engineer is to prepare such a statement with the aid of the applicant.⁶⁴ Copies of the statement and the comments of other governmental agencies which are authorized to enforce environmental standards are to be made available to the President, CEQ and the public⁶⁵ and accompany the application throughout the review process.⁶⁶ In addition, the guidelines for Section 102 statements issued by the Council⁶⁷ provide that to the fullest extent possible, no administrative action such as the issuance of a permit is to be taken sooner than ninety days after a draft or thirty days after a final Section 102 statement has been circulated and made available to the public.⁶⁸

When the foregoing requirements for the issuance of a permit are considered together, the time between application and issuance of a permit is approximately nine months to a year, consisting of the six months for state certification, the forty-five days for comments by the Regional Representative of EPA, the thirty days minimum notice of any hearing that is held, the ninety days for comments on any environmental impact statement, plus any extensions granted the state or the Regional Representative of EPA,⁶⁹ and the time it takes the District Engineer to decide whether to hold a public hearing and whether to issue a permit, any hearing days, and additional time if the application is referred to higher authorities by the District Engineer.⁷⁰

5. *Duration, Revocation and Other Terms and Conditions of Permits*

Permits issued for discharges from facilities which were in existence or lawfully under construction on April 2, 1970, will expire on April 2, 1973, and be conditioned to require annual demonstration by the permittee that the discharge is in compliance with applicable water quality implementation schedules. For other discharges, the maximum duration of a permit without revalidation is five years unless the Administrator of EPA specifically approves a longer period.⁷¹

63. 42 U.S.C.A. § 4332(2)(C) (Supp. 1971).

64. Corps of Engineers Reg. § 209.131(l)(2); *see*, Exec. Order No. 11574, § 2(4), 35 Fed. Reg. 19628 (1970).

65. *See*, 5 U.S.C.A. § 552 (1970); CEQ Guidelines § 10, 36 Fed. Reg. 7726 (1971).

66. 42 U.S.C.A. § 4332(2)(C) (Supp. 1971).

67. The Council is authorized to issue guidelines and instructions to other federal agencies by Sections 3(h) and (i) of Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970).

68. CEQ Guidelines, § 10(b), 36 Fed. Reg. 7726 (1971).

69. Corps of Engineers Reg. §§ 209.131(h)(1), (i)(3).

70. *See*, Corps of Engineers Reg. §§ 209.131(d)(10), (i)(7); [Proposed] Memorandum of Understanding, Procedures, ¶7, 36 Fed. Reg. 984 (1971).

71. Corps of Engineers Reg. § 209.131(n).

The District Engineer is responsible for conditioning a permit so that navigation and anchorage will not be injured and there will be no significant adverse impact on fish and wildlife resources, and the Regional Representative of EPA is responsible for conditions to insure compliance with applicable water quality standards and the purposes of the F.W.P.C.A.⁷² Such conditions may include periodic demonstrations of compliance, site and sampling accessibility and periodic reports.⁷³ In addition, the form of permit promulgated by the Corps requires that a permitted discharge comply with any upgrading of the applicable water quality standards within six months of the effective date of the new standards.⁷⁴ The discharge of any substance not specifically indentified in the permit or at levels or frequencies greater than those so specified is a violation of the terms and conditions of the permit.⁷⁵

Any violation of a permit condition is grounds for revocation of the permit and also a violation of the Refuse Act.⁷⁶ If a permit is to be revoked, the Secretary of the Army issues a written notice of revocation. The permittee has thirty days within which to establish that the alleged violation did not in fact occur or that the violation was accidental and future operations will be in full compliance with the permit, or request a public hearing. Any hearing is to be conducted and a decision made whether to modify, suspend or revoke the permit in accordance with the regulations of the Chief of Engineers.⁷⁷

The proposed form of permit also states that the issuance of a Refuse Act permit does not affect state and local permit requirements or prevent the federal government from levying taxes or other charges on the permitted discharge, or authorize construction of the facilities whose operation will result in the discharge.⁷⁸

Finally, a permit may be transferred to a third party only if the transferee agrees in writing to comply with all the terms and conditions of the permit.⁷⁹ Presumably this includes "deemed transfers," such as mergers, consolidations and stock acquisitions.

72. Corps of Engineers Reg. § 209.131(o)(2); [Proposed] Memorandum of Understanding, Procedures, ¶¶3(iii), (iv), 36 Fed. Reg. 984 (1971).

73. *Id.*, Permit Conditions, ¶2.

74. ¶I(c), 36 Fed. Reg. 13835 (1971); *see*, Exec. Order No. 11574, § 2(a)(2), 35 Fed. Reg. 19627 (1970).

75. Form of Permit, ¶I(a), 36 Fed. Reg. 13835 (1971). As to responsibility for discharges caused by independent contractors, *see*, United States v. Georgetown University, 3 BNA ENVIRONMENT REP. CAS. 1038 (D.D.C. 1971).

76. 33 U.S.C.A. § 407 (1970); Corps of Engineers Reg. § 209.131(p); Form of Permit, ¶I(a), (n), 36 Fed. Reg. 13835 (1971).

77. *Id.*, ¶I(n). *See* the proposed regulations for hearings published in 2 BNA ENVIRONMENT REP. 625-26.

78. *Id.*, ¶I(i)-(k).

79. *Id.*, ¶I(1).

