CESPK-CO-R(1145) 1 Oct 2003

REGULATORY BRANCH MEMORANDUM 2003-02

SUBJECT: Processing After-the-Fact (ATF) Permit Applications

1. Purpose. To establish policy regarding processing permit applications where there has been an unauthorized discharge of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act or unauthorized work or structures in navigable waters under Section 10 of the Rivers and Harbors Act.

2. Applicability. This applies to all Regulatory actions subject to Department of the Army permit requirements in the Sacramento District.

3. References.

a. Section 10 of the Rivers and Harbors Act of 1899, 33 USC 403.

b. Section 404 of the Clean Water Act, 33 USC 1344.

c. 33 CFR Parts 320-330.

d. 33 CFR Parts 326.3(e), After-the-fact permit applications.

5. Background. In situations involving an unauthorized activity, the violator is normally required to "cease and desist" from further work in waters and may apply for an ATF permit. The requirement to stop work can result in inconvenience and financial loss to the violator. In such cases, the violator may exert pressure on regulatory staff through private individuals or elected officials to expedite processing of an ATF permit for the unauthorized work. Expedited processing for an ATF application could result in a violator receiving a faster permit decision than those that work diligently and legally to comply with the law. The violator could benefit at the expense of those complying with the law if expedited processing of an ATF application is accomplished by shifting regulatory resources from normal permit processing. Such circumstances, if perpetuated, would create a regulatory program that encourages people

to construct their projects first and apply for permits later.

4. Policy. Applicants for ATF permits will not receive faster permit processing at the expense of those who apply for permits in good faith. Therefore, the following priorities for establishing regulatory workload are set:

a. Regulatory will investigate reports of unauthorized activities, and when necessary, promptly issue "cease and desist" orders. Unpermitted activities in progress should be stopped as soon as possible after discovery. As specified in regulations, an ATF application may be accepted after coordination with the Environmental Protection Agency, completion of any necessary initial corrective measures, which may include removal of some or all of the fill, and submission of a tolling agreement.

b. Depending on the nature and extent of the violation, and following coordination with Office of Counsel, the violator may be required to pay an administrative civil penalty.

c. Once the decision has been made to accept an ATF application, the processing of that application shall not supercede the processing of normal applications that are properly submitted before any activity, which requires a permit, has taken place.

d. Regulatory resources and manpower will not be shifted from work on normal applications to expedite ATF applications.

These priorities do not apply to activities that have a net benefit to the aquatic ecosystem, or where important public resources can be conserved by expedited processing.

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