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### A Practitioner's Perspective on Section 404 Permitting—or—How to Survive the Daze from the Hazy Maze

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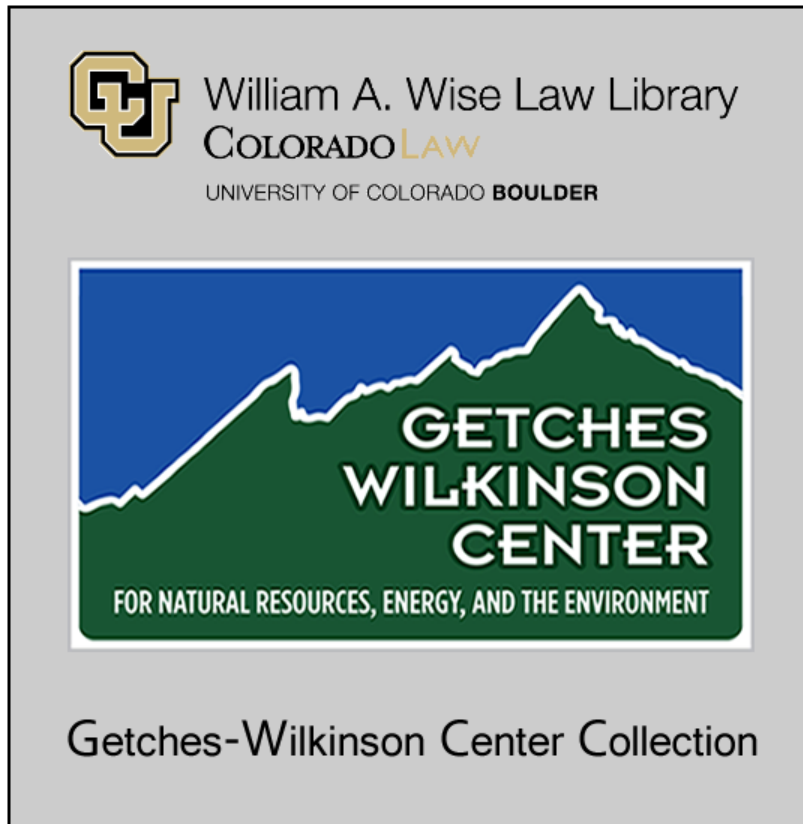
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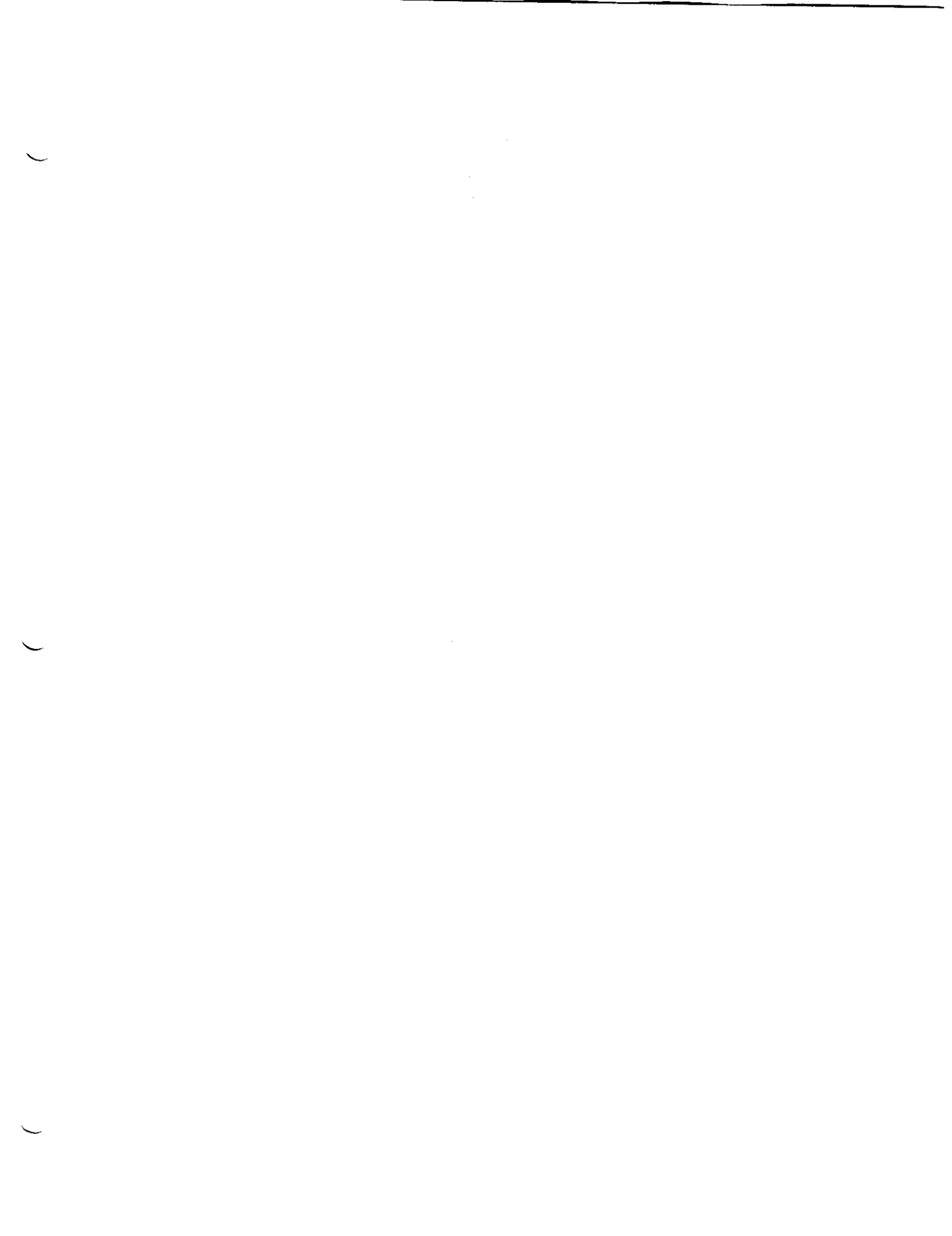
**A PRACTITIONER'S PERSPECTIVE  
ON SECTION 404 PERMITTING -- OR --  
HOW TO SURVIVE THE DAZE FROM THE HAZY MAZE**

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**WATER QUALITY CONTROL: INTEGRATING BENEFICIAL USE AND  
ENVIRONMENTAL PROTECTION**

**Sponsored by the  
Natural Resources Law Center  
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**June 1-3, 1988**



A PRACTITIONER'S PERSPECTIVE  
ON SECTION 404 PERMITTING -- OR --  
HOW TO SURVIVE THE DAZE FROM THE HAZY MAZE

MARCIA M. HUGHES

I. INTRODUCTION

*Cottleston, Cottleston, Cottleston Pie  
A fly can't bird, but a bird can fly.  
Ask me a riddle and I reply:  
Cottleston, Cottleston, Cottleston Pie.<sup>1</sup>  
(Page 39).*

A. SUMMARY

There is no doubt that 404 permitting is an art, not a science. This paper will seek to help demonstrate some of the artistry involved in performing the 404 dance.

This paper builds on an earlier speech in this seminar which has reviewed the legal details of the 404 process. Here, I will review client relations and how to move through the 404 permitting process in the most practical way possible. This paper will walk through the 404 process assuming a client, we will call her Madam X, has just called an environmental attorney with some questions and confusion regarding something she has heard about called 404 permits. The project her company wants to construct may affect some streams and will be assisting the neighborhood by cleaning up an area that is currently a public health hazard as it is wet and mosquito infested. The attorney has some conflicting thoughts. The first is, "Wonderful, sounds like an interesting new client." The second is, "Oh, how am I ever going to explain what Madam X is going to have to go through to get 404 permits?"

Some of the issues relating to client relations and how to help people who are not familiar with the sometimes bizarre nature of the environmental regulatory universe to understand the process are discussed in this paper. It will also discuss some of the specific issues that must be addressed concerning the timing, the process, and the scope of matters to be discussed in a permit application. In reviewing what to plan for, key areas to identify are the "black holes". These are the areas where it is possible that only a small amount of work will be necessary, but the issue could mushroom and much more could be needed beyond any rational expectation. Black holes could include: proving the project need; impacts on threatened and endangered species; impacts on

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<sup>1</sup> All quotations in this paper are from The Tao of Pooh, by Benjamin Hoff, E.P.Dutton, Inc., New York (1982). Throughout the text only the page citation to these quotations will be given.

water quality or air pollution; the specificity needed at the time of permitting regarding impacts or mitigation success; cumulative impacts; socioeconomic impacts; and the adequacy of mitigation.

B. GENERAL REFERENCES

Regulations

1. Corps of Engineers 404 Regulations: 33 C.F.R. Part 320 (1987).
2. Environmental Protection Agency 404(b)(1) Guidelines: 40 C.F.R. Part 230 (1987).
3. Colorado 401 Certification Regulations: 5 C.C.R. 1002-18 (1988).

II. CLIENT RELATIONS IN THIS AMORPHOUS PROCESS

*Now, scholars can be very useful and necessary, in their own dull and unamusing way. They provide a lot of information. It's just that there is Something More, and that Something More is what life is really all about. (Page 31).*

Many clients who need a 404 permit have never had any personal dealings with the environmental regulatory world. They, therefore, generally have a limited perspective of how difficult, frustrating, time consuming and expensive the process can be. The person or company being regulated probably has some experience with land use controls but these are expected hurdles that occur at the local level. Clients usually have planned for the need to work their issues through the city council or county commissioners. Environmental regulations add a new level of regulation to land use planning. Even though this regulation may seem untenable, the client needs to understand that the 404 permit action will affect the life or death of the project. Without that permit, if any activity regulated by the 404 process is affected, the activity cannot be implemented as planned.

Much of the controversy of 404 regulation is due to the effects on wetlands. It is now easier to explain to the client the necessity of this process given the Supreme Court decision in U.S. v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985) in which the Supreme Court stated that adjacent wetlands are subject to regulation under the 404 permit process.

The next response from the client may well be one of anger, believing that it is inappropriate to take environmental

regulations so far as to impose significantly restrictive rules on the ability to develop land. It is even possible that the federal agencies will deny the ability to develop the land as proposed. When this occurs landowners are likely to think of making a taking argument, seeking compensation from the United States for "taking" the value of their property. Many may feel spurred on by the fairly recent decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378 (1987). However, I don't believe the substantive law of taking has been changed by this decision.

It is necessary to significantly, if not fully, move through the 404 permit process and be denied a permit before harm can be demonstrated, in my opinion. See Conant v. United States, 12 Ct. Cl. 689 (1987). The court in Conant dismissed the claim finding it premature and unripe. Because Conant had not sought a 404 permit, he had not exhausted his administrative remedies and might yet avoid any economic detriment. Although the court agreed with Conant that he need not await denial of a permit when to do so would be futile, the court concluded that futility had not been shown and resolution of his claim was still possible through administrative challenges. See also, Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987); 1902 Atlantic Limited v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983).

Any client with an excellent taking case should be warned that the lawsuit may well engender national participation. Environmental groups and environmental agencies likely will be concerned deeply if the scope of this regulation finally is limited. As such, there well can be a major battle in whatever case looks like it might establish a precedent for making an affirmative takings determination.

So now Madam X understands that the permit is needed and her company wants to take environmentally responsible action. Given both these factors, Madam X is likely to say to the attorney, "Well, just tell me what the law says, I will do it, and we will have this done quickly." One of the most difficult situations I have found with clients is not being able to respond effectively when they say "simply tell me what the law says." The problem is the law does not say anything simply, much less directly. General parameters are set forth with an enormous amount of discretion left to the agencies. Therein lies reason for the number of months to years and thousands to millions of dollars, that are spent in the 404 permitting process. There is enormous uncertainty as to what is needed, and it is a constant back and forth process working with agencies to eventually convince them that they have enough information so that a decision to issue a permit is appropriate. As Madam X begins to understand this in more detail, the attorney's next job probably will be to help her explain to her board or those funding the project what is happening in this expensive and time-consuming process. Thus,

providing education, assistance, and understanding of the process are key parts of the practitioner's job.

### III. MULTIPLE AGENCY INVOLVEMENT

*Bisy Backson is always On The Run, it seems, always:*

GONE OUT  
BACK SOON  
BUSY  
BACK SOON

*or, more accurately:*

BACK OUT  
GONE SOON  
BUSY  
GONE SOON (Pages 96-97).

A key aspect of being "Bisy Backson" is trying to receive coordinated and prompt decisions from the number of agencies involved. Congress established an unusual process for administering 404 permits. The Corps of Engineers ("Corps") directly administers the permit program pursuant to section 404 of the Clean Water Act, 33 U.S.C. section 1344. However, Congress also established a direct role for EPA. Thus, EPA has issued regulations, confusingly known as guidelines, issued pursuant to section 404(b)(1) of the Act. 33 U.S.C. section 1344(b)(1). These are hard hitting and difficult to meet whenever the agencies decide to play hardball. EPA also has a potentially "hard hitting" role under its authority under section 404(c) whereby it can veto permits issued by the Corps of Engineers. This has been a silent authority during most of its existence. However, EPA has used the authority in one controversial case in denying the 404 permit for Attleboro Mall in Massachusetts, Bersani v. United States EPA, 674 F.Supp. 405 (N.D.N.Y. 1987). Furthermore, EPA proposed vetoing three other permits in 1987.<sup>2</sup> One of those three, for filling wetlands in New Jersey to build warehouses, was vetoed by EPA Region II.

The United States Fish and Wildlife Service (FWS) also frequently plays a significant commenting role, though not as powerful as EPA's. The Fish and Wildlife Service may comment in two different capacities, first through issuance of its Fish and Wildlife Coordination Act report which is a recommendation which

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<sup>2</sup> The two proposed "vetoes" are: (1) In East Everglades, 52 Fed. Reg. 38,519 (Oct. 16, 1987); and (2) In San Diego County, 52 Fed. Reg. 49,082 (Dec. 29, 1987). The New Jersey veto was noticed at 52 Fed. Reg. 29,431 (Aug. 7, 1987).



the Corps may or may not implement. 16 U.S.C. section 661 (1982). Secondly, the FWS may have a more compelling role through its actions under the Threatened and Endangered Species Act. 16 U.S.C. section 1531.

In addition to significant federal involvement, there are two fairly major players at the state level. One consistent "player" in Colorado is the Water Quality Control Division which issues the 401 Certificate.<sup>3</sup> State law provides, however, that a 401 Certificate is waived for purposes of nationwide permits, C.R.S. section 25-8-301(1)(f) (1987 Supp.). Additionally, in Colorado the Division of Wildlife sometimes plays a major role in the 404 review. Their comments are primarily developed together with the U.S. Fish and Wildlife Service and address impacts on wetlands, vegetation and wildlife habitat. Usually, the FWS will address federally identified threatened and endangered species. The Division of Wildlife will discuss state species of special concern which have been named either by the Wildlife Commission or pursuant to the State Natural Areas Program. C.R.S. 36-10-101.

One of the first tasks the practitioner needs to assist her client Madam X with is in understanding the interplay between the different agencies. The Corps of Engineers has the lead. However, this can be altered by EPA through its veto authority. While this seldom happens, there now is a higher degree of risk than existed in the past. The primary focus should be in cooperating with the Corps as the lead agency. However, it is important to stay in communication with the EPA and to identify any particular wildlife or threatened endangered species issues and work with the Division of Wildlife and the FWS on those issues. If the species impacted are species of state concern, such as trout, rather than threatened and endangered species, such as the bald eagle, I recommend working primarily with the state agency where there is a possibility of a higher degree of cooperation and more understanding of the project than usually occurs at the federal level.

#### IV. DETAILS OF THE PERMIT PROCESS

*... you can't help respecting anybody who can spell TUESDAY, even if he doesn't spell it right; but spelling isn't everything. There are days when spelling Tuesday simply doesn't count. (Page 27).*

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<sup>3</sup> The Colorado 401 regulations were recently amended and are found at, 5 C.C.R. 1002-18 (Feb. 2, 1988). These are emergency regulations; a hearing is to be held to finalize the regulations in November 1988.

A. TIMING

*Why should we live with such hurry and waste of life? We are determined to be starved before we are hungry. Men say that a stitch in time saves nine, and so they take a thousand stitches today to save nine tomorrow. (Page 108, quoting Henry David Thoreau in Walden).*

The practitioner is going to particularly endear herself with her client, Madam X, when she informs Madam X that the Corps does have time limitations set forth in its permit regulations in 33 C.F.R. section 325 (1987). However, the prompt decision-making time set forth in the regulations is likely to occur only with small non-controversial projects. With larger projects, it will take much longer. Madam X might be able to force a prompt decision, but in all probability that would cause a denial of the application. So, Madam X finds herself with regulations stating that a prompt decision will be made and knowledge that a prompt decision probably will not be made. It is important for the client to understand that the length of time permitting can take likely will be outside the bounds of reason.

A general scenario should be developed setting forth the steps that probably will occur in moving through the permit process. In projecting the time it may take for each step, the expected time should be multiplied by a factor of somewhere between 2 and 10, depending upon the complexity and controversy associated with the project.

B. PROCESS

*It sounds easy, doesn't it? Let's see. First, you dig a hole ... making sure that it's big enough for a Heffalump. (Page 53).*

The practitioner should sit down with her client, Madam X, and all key consultants or management personnel and develop a scenario of the key actions expected. This should include identifying, to the best extent possible, what issues will be considered in a routine matter and what will become a big deal. Thus, agency desires can be anticipated and decisions can be made with regard to the scope of study that will be conducted in order to answer the questions. Of course, it is not necessary that every agency question be answered to the maximum. The agencies are accustomed to testing applicants by asking a great many questions, some of which are only marginally relevant and some of which are simply theoretical items that the agencies would love to have somebody research. It is important to develop a reasonable scope of study which is as specific as possible. Develop this scope early. To the extent that the agencies' concerns can be

anticipated, the process may be expedited and the credibility with the agencies may increase.

C. SCOPE

*"Swamp?" said Eeyore indignantly. "It's not a Swamp. It's a Bog."*

*"Swamp, Bog...."*

*"What's a Bog?" asked Pooh.*

*"If your ankles get wet, that's a Bog," said Eeyore.*

*"I see," said Pooh.*

*"Whereas," continued Eeyore, "if you sink in up to your neck, that's a Swamp."*

*"Swamp, indeed," he added bitterly. "Ha!"*  
*(Page 105).*

Several of the aspects that need to be looked at in developing information for submitting permit applications and in evaluating the overall process are identified below. This is not a comprehensive list, but simply identifies several of those which need key attention.

1. Detail of Information

Both the 404 and 404(b)(1) regulations require that several issues be discussed in a permit application. The 404(b)(1) Guidelines require the Corps to make certain findings including (1) factual determinations about the proposed discharge and (2) determinations as to whether there are practicable alternatives to the discharge. This alternative analysis is one of the key parts of the 404 evaluation.

The details of the regulations should be read carefully to find concerns which the proposed activity may impact that need to be addressed. This is one of the many areas where significant judgment calls likely will be required. The amount of information which could be submitted is endless. Therefore, it is important to determine analysis cut-off points which the applicant will suggest and possibly insist upon. Obviously, there will be a continuing dialogue with the agencies in determining the depth of study necessary.

If the project is complex, it is important to take advantage of the opportunity provided under the Corps rules, Appendix B of

33 C.F.R. section 230 (1987), which provides for pre-application consultation. Note that this provision is found under the Corps "Environmental Assessment" criteria. The Corps has its own NEPA regulations found at 33 C.F.R. section 230 (1987), amended in part at 53 Fed. Reg. 3,120 (Feb. 3, 1988). These supplement CEQ's NEPA regulations. 40 C.F.R. section 1500 (1987). The Corps regulations provide at 33 C.F.R. section 325.2(a)(4) (1987) that the district engineer will follow its regulations to implement the NEPA process in making permit decisions. This provides that "[a] decision on a permit application will require either an Environmental Assessment or an Environmental Impact Statement unless it is included within a categorical exclusion." There are very few categorical exclusions; thus, most 404 permits are issued with an Environmental Assessment. In general, the information submitted in the permit application and its supporting documentation will constitute the Environmental Assessment.

Madam X could rejoice in the fact that the Corps recently has amended its regulations to narrow the scope of analysis by the Corps under NEPA when evaluating environmental effects of Corps regulated activities. In general, the new rule limits the scope of analysis to "the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 53 Fed. Reg. 3,120 (Feb. 3, 1988). However, the practitioner likely will tell her that after all of the haggling that went on in limiting these rules, it is not clear exactly where this limitation is going to apply. There is no track record on implementation of the new rules yet, so it is good news that the regulations have been intentionally limited with the concurrence of the CEQ; however, the scope of the limitation is as yet unclear.

## 2. Segmentation

If Madam X has a very large activity or set of activities, she may want to consider submitting separate permit applications. Perhaps some activities will have only minor impacts which are regulated under the much more simple nationwide or general permits. Furthermore, if in fact there are separate projects, it might be possible to receive different individual permits for the different projects. Her practitioner should caution her that this may or may not be an effective strategy. It is important to look at the reasons why separate permit applications might be desirable. The purpose might be to reduce the scope of study needed or in order to minimize the nature of the project so that the agency does not determine that it is a major federal action, thus requiring an Environmental Impact Statement.

If it is the latter purpose, it must be reviewed very cautiously. Several judicial decisions as well as the Corps

regulations have looked carefully at any activities attempting to "segment" a project into different pieces in order to avoid intended regulatory review. The Corps regulations provide at 33 C.F.R. section 325.1(d)(2) (1987):

All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA [Department of the Army] permit would be required should be included in the same permit application. District Engineers should reject, as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina would include dredging required for access as well as any fill associated with the construction of the marina.

### 3. Cumulative Analysis

Regulations adopted by the CEQ to implement NEPA impose requirements for cumulative analysis in 40 C.F.R. section 1508.7. This requirement is supplemented by the Corps regulations in its requirement for public interest review at 33 C.F.R. sections 320.4(a), 320.4(b)(3), and 320.4(l)(2)(1987). Furthermore, the Corps' NEPA regulations impose cumulative analysis requirements in 33 C.F.R. sections 230.1 and 325.7(b)(1987). The 404(b)(1) Guidelines "call for cumulative analysis in 40 C.F.R. sections 230.1(c) and 230.12(g)(1987). The Fish and Wildlife Service calls for cumulative analysis under its Threatened and Endangered Species Act regulations in 50 C.F.R. sections 402.02, 402.12(f) and 402.14(9)(g). Case law reviewing these regulations consistently has upheld the provisions.

This is an area of potential concern referred to as a "black hole" below, due to the tremendous amount of analysis that could be required in order to conduct the cumulative studies. My experience has been that extensive cumulative analysis seldom is required. However, it is always a potential threat. A key concern may be the type of cumulative study an agency desires. The cumulative discussion could be limited to impacts to the environment or there actually could be review of socioeconomic cumulative impacts. The analysis of socioeconomic effects is, in my experience, much more difficult to pin down and address with any certainty.

### 4. Secondary and Indirect Effects

One of the challenging issues in today's 404 regulatory world is a determination of the extent of analysis necessary for what may be termed either "secondary" or "indirect" effects. The environmental regulations generally use the term "indirect

effects". For example, the CEQ definition at 40 C.F.R. section 1508.8 (1987) guides the distinction between direct and indirect effects. That states:

Indirect effects, which are caused by the action and are later in time or farther removed the distance, but are still reasonably foreseeable. [examples in the CEQ Regulations include effects related to induced changes in the pattern or land use, population density or growth rate.]

This is a controversial area. However, there is quite a bit of regulatory direction, which is supported by case law, calling for review of indirect effects on the environment. The extent of review required for indirect socioeconomic effects is much more questionable. EPA guidelines require that a "Factual Determination" be made identifying "secondary effects" of the proposed discharge, and those effects are defined as: "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from an actual placement of dredged or fill material." 40 C.F.R. section 230.11(h)(1) (1987). The Corps regulations require consideration of indirect effects on wildlife resources, wetlands and floodplain development. 33 C.F.R. section 320.4 (1987).

In 1984, the U.S. Supreme Court ruled that NEPA does not apply to harms that lack a close causal connection with actual changes in the physical environment. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983). This is helpful for project proponents such as Madam X. However, case law leaves general confusion in determining where the line is drawn.

For example, in Mall Properties, Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987), the court held that denial of the wetland permit by the Corps could not be based upon economic harm to a city when there is no proximate causal relationship between the impact of the proposed activity (construction of shopping mall) on the physical environment and socioeconomic impact (harm to competing businesses in a nearby town) upon which the Corps based its permit denial. Nevertheless, the same court agreed with the holding in Sierra v. Marsh, 769 F.2d 868 (1st Cir. 1985), that a change in the physical environment, such as construction of a port and causeway that caused creation of an extraordinary number of new jobs, and industrial development which would further impact the physical environment would be an appropriate one for the Corps' consideration in its decision whether or not to issue a permit.

The practitioner is likely to tell her client that she believes one of the best decisions on this matter is found in Enos v. Marsh, 769 F.2d 1363 (9th Cir. 1985) where the court upheld the

adequacy of the environmental review and noted that the EIS stated that relocation of existing industries was expected, that a potential increase in population probably would occur and acknowledged that urbanization of currently undeveloped or agricultural lands could be "far reaching" and the demand for infrastructure facilities and road improvements could be affected. The court pointed out that such consequences were speculative and dependent upon local development and zoning policies. It held that although discussions of these matters were not extensive, they had been addressed sufficiently in the EIS by the Corps.

The important point is that many actions are subject to local decisions and cannot be analyzed thoroughly prior to those decisions being made. Furthermore, the applicant is not responsible for the local decisions or the related actions. As it is beyond the clients' control, she will argue her company should not be responsible. The client may or may not be successful in such argument. A few cases which are cause for concern are discussed below. A relatively early case, National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976), addressed a highway project which would traverse the habitat of an endangered species, the sandhill crane. The land affected was designated as critical habitat. The EIS for the project addressed the direct impacts of 300 acres of crane habitat but did not address the indirect impacts. The Corps found the EIS was inadequate and stated that:

The relevant consideration is the total impact of the highway on the crane. As the D.C. Circuit has noted, "a far more subtle calculation than merely totaling the number of acres to be asphalted" is required where the environmental impact of a project is at issue.

Id. at 373.

Concern also can come from reading Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987), where the court held that an agency must evaluate reasonably foreseeable effects on the environment which would be proximately caused by the construction of a ski resort. The effects on deer migration from development in the area which would not be implemented by the applicant but which were reasonably certain to follow the construction of the ski area had to be considered in the agency's environmental assessment.

##### 5. Mitigation

Another area of substantial uncertainty that is receiving much scrutiny by project opponents is the evolving realm of mitigation. One of the largest concerns is the degree to which

mitigation has to be set forth in an EA or EIS. EPA Region VIII has recently taken the position that there needs to be a great deal of detail regarding mitigation in the EIS process. In making such statements, the Region has relied upon Northwest Indian Cemetery Protective Association v. Peterson, 795 F. 2d 688, 697 (9th Cir. 1986); See also, Oregon Natural Resource Council v. Marsh, 820 F.2d 1051 (9th Cir. 1987). The problem with this approach is that mitigation often cannot be identified with exactitude until a project has been designed. Design, of course, is usually not completed until after permits are issued after the project proponent has determined that the expenditure on the design process is worthwhile. This can create the proverbial "rock and hard place" and be a substantial challenge to the applicant.

The Corps rules do address mitigation to some degree at 33 C.F.R. section 320.4(r) (1987) which states that "[c]onsideration of mitigation will occur throughout the permit application review process[.]" Five types of mitigation are listed and are set forth in the same order as they are listed in the CEQ regulations implementing NEPA. The five types of mitigation are: "avoiding, minimizing, rectifying, reducing, or compensating for resource losses." The regulations state that losses are to be avoided to the extent practicable, and compensation may occur on-site or off-site. The practitioner also may wish to review a draft mitigation policy developed by Region VIII which is referred to by Bruce Ray, Assistant Regional Counsel in EPA Region VIII office.<sup>4</sup> Mr. Ray implies that the draft policy will be followed by Region VIII. However, it is a draft and it is a policy. The courts have frequently ruled that policies or guidelines are not binding documents. For example, see McLouth Steel Products Corp. v. Thomas, No. 87-1049, (D.C. Cir. Feb. 9, 1988); and Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

## V. BLACK HOLES

*We were discussing the "Ode to Joy," the  
choral finale to Beethoven's Ninth Symphony.*

*"It's one of my favorites," said Pooh.*

*"Same here," I said.*

*"My favorite part," said Pooh. "is where they go:*

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<sup>4</sup> Mr. Ray refers to this policy in his paper "Section 404 of the Clean Water Act: an EPA perspective," Natural Resources and Environment, American Bar Association, Vol. 2, No. 3 (Winter, 1987).



*Sing HO! for the life of a Bear!"*

*"But -----"*

*"Sing Ho! for a Bear!"*

*Sing Ho! for a Pooh!"*

*"But they don't ----"*

*"Sing Ho! for the life of a Bear!"*

*"My favorite part," he added.*

*"But they don't sing, 'Sing Ho! for the life of a Bear!' in the 'Ode to Joy.'" I said.*

*"They don't?"*

*"No, they don't."*

*"Why not?"*

*"Well, because they hadn't thought of it, I guess."*

*"They what?"*

*(Pages 115-116).*

Black holes in the environmental regulatory universe are similar in part to the new song created by Pooh Bear, except they are not as fun. There are unlimited regulatory aspects that the agencies may not have thought of before, but they certainly might with Madam X's application. As a warning, some of the aspects that could be considered include the following:

1. The need for the project.
2. Impacts on threatened and endangered species or designated habitat.
3. Impacts on water quality.
4. The almost unlimited number of socioeconomic impacts that could occur.
5. How much profit will the applicant make and how much is "appropriate"?

6. How much specificity on impacts and mitigation the agencies must have before them at the time of permitting.
7. What are the cumulative impacts?
8. The specificity and scope of mitigation.

There is no way to give Madam X a complete list of all of the danger points. To determine the current "hot spots," I recommend checking out current activities in the region and determining which issues have most recently been raised by the key regulatory or commenting agencies. Additionally, check for "hot spots" being raised by major environmental litigation organizations.

## VI. PUBLIC RELATIONS V. ENVIRONMENTAL LEGAL RESPONSIBILITY

*. . . while pounding on the piano keys may produce noise, removing them doesn't exactly further the creation of music. The principles of Music and Living aren't all that different, we think. (Page 59).*

Madam X should watch the different statements made about her company's project. The people seeking support for the project will want to tout its far reaching, wonderful benefits. However, the practitioner consistently should warn Madam X of the potential ramifications of these "far-reaching benefits." The environmental regulatory process, particularly in the review and regulation of indirect, socioeconomic and cumulative effects, appears to be expanding, which will make the applicant particularly vulnerable to claims of far reaching benefits. Those wonderful claims could result in a great deal of expense to the applicant through first attempting to study what the environmental effects of those benefits will be. Second, there is some possibility that mitigation could be required because of those effects. So far, agencies usually have not attempted to require mitigation for many of these effects; however, it is possible, and it is a current issue in Colorado with regard to the potential permitting of the Burnt Mountain ski area, an expansion of Snowmass.

## VII. ENFORCEMENT

*Sing Ho! for a Bear!*

*Sing Ho! for a Pooh!*

*Sing Ho! for the life of a Bear!*

*(Page 138).*

After explaining much of this to Madam X and working with her employees for a few months, they likely will throw up their hands and say what if we just construct the project and ignore these silly regulations. This is the time to discuss enforcement. There is concurrent and independent enforcement authority by EPA and the Corps. 33 C.F.R. section 326.2 (1987). Both agencies have agreed to coordinate enforcement efforts; however, there is a potential for differing positions. 33 C.F.R. section 326.3(g) (1987). EPA generally has not taken a lead role in enforcement actions. However, EPA has surprised many recently through its enforcement actions this year. Region V, for example, has issued penalties of \$15,000, \$75,000 and \$125,000 for impacts on wetlands.

And here is a shocker! The Wall Street Journal reported on an enforcement action for filling five acres of wetlands without a permit. The article, page 42 of the March 11, 1988 issue, states:

Sentencing in the case is scheduled for May 4. The company and Mr. Geoghegan each could receive up to \$625,000 in fines, the attorneys said. In addition, Mr. Geoghegan could be sentenced to one year imprisonment for each of the 25 counts. (emphasis added).

#### VIII. SUMMARY

*Cottleston, Cottleston, Cottleston Pie.  
Why does a chicken, I don't know why.  
Ask me a riddle and I reply:  
Cottleston, Cottleston, Cottleston Pie.  
(Page 39).*

Neither Madam X nor any other project proponent likely will be pleased as they begin to understand the amorphous 404 process. As a matter of fact, clients probably have to go through it several times before they can come close to an understanding. It is a challenge; however, it is the law. The practitioner needs a lot of understanding and patience to move through the process with success.

