UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1990

MEMORANDUM

SUBJECT: Special Review of EPA Region 10 Employee Allegations on the Region's Handling of Air and Water Issues Report No. EGaWGO-10-0022-0400015

TO: F. Henry Habicht II
Deputy Administrator

Attached is a copy of our Special Review conducted on the Allegations of Region 10's Handling of Air and Water Issues. This Special Review originated from allegations made to us by Region 10 employees while we were conducting the Bunker Hill Superfund Site Special Review.

The complaints alleged that the Regional Administrator consistently intervened, delayed or vetoed staff recommendations on: Clean Water Act National Pollutant Discharge Elimination System permits; Clean Water Act Section 304(L) lists; National Environmental Policy Act Environmental Impact Statements; Clean Air Act enforcement cases; and Clean Water Act Section 404 wetland permits. In total, there were eleven allegations concerning the actions of the Regional Administrator.

The purpose of our review was to ascertain if there was substance to the allegations. We also followed up on the perceptions of Region 10 staff regarding their concerns about the work atmosphere in the Region.

In performing this review, our staff became especially concerned about two aspects of overall Regional operations. First, adequate records were not maintained to document the basis of Regional decisions related to such key areas as permitting, environmental assessments or impact statements, and enforcement actions. Additionally, a climate of distrust and divisiveness apparently has developed between Regional staff and their management. This climate is exemplified by the fact that numerous Air and Water Division staff, like the Hazardous Waste Division staff in our previous review of Bunker Hill, indicated that they felt intimidated by the Regional Administrator. They also believed

that Regional management gave more consideration to outside political and industry pressure than to staff recommendations on environmental issues, and that Regional operations offices are more interested in keeping good relationships with the States than in protecting the environment. In our opinion, the new Regional Administrator and management team will need to work actively to improve documentation and to change this climate before they can build the team necessary to effectively and efficiently run Region 10.

As discussed in the attached report, our review indicated that actions taken by Regional management were questionable for ten of the eleven allegation areas reviewed. The report details information we were able to gather related to the actions and involvement of the former Regional Administrator and other members of Regional management.

Because our review raised questions about the appropriateness of Agency actions, we are making recommendations for Region 10's Acting Regional Administrator to deal with these actions. As many of the actions on the areas discussed are not yet completed, EPA has the opportunity to look again at the situations and properly document the basis of its decisions or to deal with the environmental concerns not previously resolved. In other cases, EPA can put into place adequate controls to ensure appropriate decisions and consistency in dealing with questions of pollution control and enforcement. Since high level Regional managers were previously involved in the Region's decisions, you may want to have responsible Water, Air, or Enforcement officials in Headquarters provide oversight to the corrective actions taken.

If members of your staff have questions or wish to discuss the report or our conclusions further, please have them contact Kenneth A. Konz, Assistant Inspector General for Audit, on 382-4106.

John C. Martin

Attachment

United States
Environmental Protection
Agency

Office of the Inspector General
Washington, DC 20460

May 1990

Report of Review

E6AWG0-10-0022-0400015

SPECIAL REVIEW OF EPA REGION 10 EMPLOYEE ALLEGATIONS ON THE REGION'S HANDLING OF AIR AND WATER ISSUES

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1990

OFFICE OF
THE INSPECTOR GENERAL

MEMORANDUM

SUBJECT: Special Review of EPA Region 10's Employee Allegations on the Region's Handling of Air and Water Issues
Report No. E6aWG0-10-0022-0400015

FROM: Kenneth A. Konz
Assistant Inspector General for Audit

TO: F. Henry Habicht II
Deputy Administrator

PURPOSE AND SCOPE

We performed this review in response to allegations made to the Office of the Inspector General (OIG) by employees of EPA, Region 10, Seattle, Washington (the Region). The allegations were made to OIG staff members during the "Special Review of EPA Handling of the Bunker Hill Superfund Site." The complaints alleged that the Regional Administrator consistently intervened, delayed, or vetoed staff recommendations on: Clean Water Act National Pollutant Discharge Elimination System (NPDES) permits; Clean Water Act section 304(L) lists; National Environmental Policy Act Environmental Impact Statements; Clean Air Act enforcement cases; and Clean Water Act section 404 wetland permits. It was indicated that the Regional Administrator's actions in these areas showed a pattern of decision making which benefitted industry at the expense of the environment, and put political considerations above Agency responsibilities and goals. The purpose of our review was to ascertain if there was substance to the allegations. We also followed up on Region 10 staff perceptions provided to us regarding their concerns about the work atmosphere in the Region.

In total, there were 11 allegations concerning the actions of the Regional Administrator. The allegations relate to various actions which occurred between the time the Regional Administrator was appointed in August 1986 and late 1989. The allegations are briefly summarized below and detailed in the "Analysis of Allegations" section of this report.

Allegation No. 1. The Regional Administrator failed to adequately protect the environment by approving a draft NPDES permit for disposal of molybdenum tailings from the Quartz Hill Mine, Alaska into the Wilson Arm of the Smeaton Bay fjord, the least environmentally acceptable site.

Allegation No. 2. The Regional Administrator intervened in the enforcement case against Del Ackels, Placer Miner, Alaska for NPDES permit violations, and dismissed the enforcement action.

Allegation No. 3. The Regional Administrator intervened and ordered the issuance of a NPDES permit to the Sunbeam Mining Corporation, even though the Region's technical staff recommended against its issuance.

Allegation No. 4. The Regional Administrator interceded in the Clean Air Act asbestos violation penalty setting process.

Allegation No. 5. The Regional Administrator approved the State of Alaska's list of environmentally impaired waters submitted under section 304(L) of the Clean Water Act (the Act), although it was incomplete.

Allegation No. 6. The Regional Administrator approved the State of Idaho's list of environmentally impaired waters, although he was aware that the list did not comply with the requirements of section 304(L) of the Act.

Allegation No. 7. The Regional Administrator significantly influenced the Region's decision to approve the Legislative Environmental Impact Statement for the Arctic National Wildlife Refuge, and did not address significant environmental concerns in his final comment letter to the Department of the Interior.

Allegation No. 8. The Regional Administrator influenced the Region's final decision on the Environmental Impact Statement for the Navy's plan to build a homeport for its carrier battle group in Everett, Washington. Also, significant environmental concerns including alternative dredge material disposal sites were not addressed.

Allegation No. 9. The Regional Administrator interceded in the Corps of Engineer's section 404 wetlands permit review process, and gave favorable treatment to the Nisqually Fish Hatchery project.

Allegation No. 10. The Regional Administrator improperly reacted to concerns from external sources in connection with the Region's decision on the Corps of Engineers section 404 wetlands permit for Pickering Farms Industrial park.

Allegation No. 11. The Regional Administrator intervened in and declined to elevate the Region's disagreement with Corps of Engineers section 404 wetlands permit on Lake Washington Ridge to a higher level.

We performed the review at EPA, Regional Office in Seattle, Washington and its Alaska Operations Office in Juneau, Alaska. We reviewed the Region's files relating to the allegation areas. We also met with and discussed the allegation areas with the regional management and staff, including those in the Office of Regional Counsel; the Water Division; the Environmental Services Division; and the Air and Toxics Division; the Alaska Operations Office in Anchorage and Juneau, Alaska; and the Idaho Operations Office, Boise Idaho. At the completion of our review, we also interviewed the Regional Administrator although he had resigned and left his position at the beginning of our review.

We also met or discussed the allegation areas with staff from EPA's Office of Enforcement and Compliance Monitoring, Washington, D.C.; the U.S. National Oceanic and Atmospheric Administration, Juneau, Alaska; the U.S. Army Corps of Engineers, Seattle Division, Seattle, Washington; the U.S. Forest Service, Juneau and Ketchikan, Alaska; the U.S. Fish and Wildlife Service, Juneau, Alaska; the U.S. Department of Justice, Seattle, Washngton; the State of Washington, Department of Ecology, Olympia, Washington; the State of Idaho, Division of Environmental Quality, Boise, Idaho; and the State of Alaska, Department of Environmental Conservation, Fairbanks and Juneau, Alaska. Our review fieldwork was conducted during the period January to April 1990.

It should be noted that the scope of our review was limited by the fact that the Region's files on the allegation related areas were inadequate. We routinely found that the files failed to document the decision making process related to the allegation areas. As a result, we had to rely extensively on interviews with regional management and staff personnel in an attempt to reconstruct the events which occurred during the decision making process. In addition, due to his resignation, the Regional Administrator was not available during the time of our field work. Further, regional management advised us they did not have current functional statements providing authorities and responsibilities of the various regional organizational components. We cannot ascertain the effect that these scope limitations have on the conclusions presented in the "Summary of Review Results" and "Analysis of Allegations" sections of this report.

BACKGROUND

The Region 10 Headquarters is located in Seattle, Washington. The Region also has Operations Offices in Anchorage, Alaska and Juneau, Alaska; Boise, Idaho; Portland, Oregon; and Olympia, Washington. In addition, the Region has a laboratory located at Port Orchard, Washington.

The "Analysis of Allegations" section of this report addresses Region 10 employees by their titles, not their names. One regional management employee referred to in our report had several different management positions during the period involving the various allegation areas. For informational purposes, references to the Acting Deputy Regional Administrator, Former Water Division Director, and Water Division Director in the various allegation areas are references to the same employee.

SUMMARY OF REVIEW RESULTS

Our review disclosed that the actions of regional management were questionable for 10 of the 11 allegation areas reviewed. The "Analysis of Allegations" section of this report details the information we gathered concerning the involvement of the former Regional Administrator and other members of the Regional management staff.

In reviewing the allegations, we noted conditions in the region that must be addressed for the office to effectively carry out its responsibilities.

First, the regional project files we reviewed were inadequate. Generally, the basis and justification for final decisions were not documented. The files often did not document who made decisions. The Water Division staff indicated that they were specifically directed not to include their notes or drafts in the official project files. This was particularly true for negative comments which did not support the official regional position.

Second, an atmosphere of distrust and divisiveness existed in the Region. Staff in the Water and Air Divisions expressed to us that they felt intimidated by the Regional Administrator due to the manner in which he dealt with staff and the lack of support normally exhibited by their Division Directors and Branch and Section Chiefs. As a result, the staff told us, they often ceased expressing their views on controversial environmental issues. Also, numerous staff in the Water and Air Divisions believed that staff recommendations were discounted when outside pressure was applied to environmental issues. They also believed that the Operations Offices put good working relationships with the States ahead of protection of the environment.

The results of our review are summarized in the following subparagraphs, and detailed in the "Analysis of Allegations" section of this report. We have also included a "Recommendations" section following this summary for those allegation areas where we believe specific corrective actions are necessary. Some of the allegation areas did not require corrective actions because the areas were completed, suspended, or abandoned.

Allegation 1 - Quartz Hill Molybdenum Mine, Alaska

We concluded that the Regional Administrator's decision to approve a draft NPDES permit for the disposal of mine tailings into the Wilson Arm of Smeaton Bay Fjord fails to adequately protect the environment. It was also noted that the Regional Administrator's decision was not supportable based on available economic or scientific data. The decision was also contrary to the unanimous recommendations of the Water division management and staff, and other Federal and State agencies that the Boca de Quadra fjord was the environmentally preferred site. Environmental studies indicate that the disposal of mine tailings into the Wilson Arm of Smeaton Bay fjord will turn the fjord into a bay. This has the potential to destroy a valuable salmon resource.

The NPDES permit files show that the Regional Administrator attempted to justify his decision based on the need to balance the environmental and socioeconomic factors. However, the files did not document what these factors were or how they were applied in the decision making process. The Regional Administrator was apparently concerned because it would cost an additional $59 million for the permittee (U.S. Borax and Chemical Company) to dispose of the tailings in the environmentally preferred fjord. Apparently, he believed that the additional cost would put the economic viability of the project at risk. The Water Division staff did not agree with this justification. They pointed out that the economic viability of the project had already been addressed in an economic analysis completed by the regional economist. This analysis did not support the conclusion that the economic viability of the project was conditional on the cost of the disposal site.

During our interview with the Regional Administrator, he denied that the decision was based solely on socioeconomic factors. He commented that a risk assessment was made of each fjord, and the assessment did not indicate a lot of difference between the selection of either fjord. EPA's 1988 Ecological Risk Assessment does not support the Regional Administrator's comments, as it concluded that the Boca de Quadro fjord was the environmentally preferred site.

The Water Division staff believe that the change in the Regional Administrator's position was made primarily because the State of Alaska had decided to conditionally accept the project. The staff felt that the Regional Administrator did not want to challenge the State.

We also noted that the Regional Administrator's involvement in the draft NPDES permit process was a deviation from the Region's normal review process. The Regional Administrator normally did not become involved in reviewing a draft NPDES permit. The permits are usually reviewed and approved by the Water Division Director on the basis of technical input from his staff. For the Quartz Hill draft NPDES permit, the Regional

Administrator made the final approval decision, and directed that the Water Division issue the draft NPDES permit, even though they were opposed to it (page 17).

Allegation 2 - Del Ackels, Placer Miner, Alaska

Our review concluded that the Regional Administrator refused to sign the referral letter to the Department of Justice, and thereby terminated the enforcement process on Del Ackels' NPDES permit violations. The Regional Administrator's actions were contrary to the recommendations of Water Division management and staff and Regional Counsel staff. The Region's files did not include any documentation supporting the Regional Administrator's position. In this regard, the only comment on the closing of the enforcement case stated "Robie Russell refused to sign referral. Case closed."

The regional staff believe that Del Ackels' violations of his NPDES permit limitations, caused substantial environmental damage to Gold Dust Creek. The damage included harming fish and their habitat, destroying drinking water, decreasing the clarity of the stream, destroying vegetation, and causing soil erosion. Del Ackel's permit violations were not referred for enforcement action although they were more serious than permit violations of other placer miners who had enforcement action taken against them.

In early 1987, the Commissioner of the Alaska State Department of Environmental Conservation attended an EPA briefing and strongly recommended that the Region not pursue an enforcement action against Del Ackels. We were also advised that the Commissioner considered that an enforcement action would be politically sensitive to the State of Alaska. Regional staff further commented that they were advised by the Alaska State Attorney General's Office that the Del Ackels case would never "fly" because of the State politics involved.

In our interview with the Regional Administrator, he indicated that he did not have a clear recollection of the Del Ackels case. However, he advised that it was his policy to defer to the State because he felt the State had primary enforcement responsibility (page 23).

Allegation 3 - Sunbeam Mine, Idaho

We concluded that the Regional Administrator interceded in the Sunbeam NPDES permit review process to some extent. Normally, the Regional Administrator would not be involved in the process of reviewing NPDES permits. With respect to the specific allegations, our review confirmed that the Regional Administrator intervened in the Sunbeam NPDES permit process by overturning the Water Division's request for either a supplemental Environmental Impact Statement or an Environmental Assessment of the project. The Water Division considered the additional environmental information necessary before making its final decision on the

NPDES permit. It should be noted that the Regional Administrator's decision was made during a meeting with Sunbeam representatives, who argued that the additional environmental information was not necessary. During our interview with the Regional Administrator, he indicated that he could not recall the meeting.

We noted that the Water Division Director's approval for pre-construction work occurred eight days after a U.S. Senator wrote the Regional Administrator indicating that the Sunbeam permit should be approved. The Senator's letter stated the "every job in Idaho is critical" and "a year's delay would not only damage Sunbeam, it would be an economic loss to Idaho, too." We could not confirm that this letter had any impact or that the Regional Administrator had any involvement in the Region's approval of pre-construction work. The Water Division Director approved Sunbeam's request to perform pre-construction work before the NPDES permit was issued. He also advised us that he could not recall being directed to do so. Further, none of the Water Division staff interviewed indicated that they had first hand knowledge of the Regional Administrator's intervention.

We could not confirm any Regional Administrator involvement in the final NPDES approval. The Water Division Director also issued the NPDES permit for Sunbeam in July 1988. During our interviews, he did not suggest that the Regional Administrator directed him to issue the permit. We also concluded from interviews with Water Division management and staff that they felt the issued permit contained conditions sufficient to protect the environment. However, other Federal and State agencies did not agree with the Water Division's assessment and took legal action. The other agencies were concerned by the fact that the arsenic concentration would exceed the water quality standard by 100 times, and also result in the destruction of four acres of wetland area. As a result of the above legal actions, and a subsequent change in ownership of the Sunbeam mine, it is very unlikely that the mine will ever operate under the issued NPDES permit. It should be noted that our conclusions on this allegation area are limited due to lack of regional files on the decision making process and the conflicting interview information obtained (page 28).

Allegation 4 - Asbestos Demolition and Renovation Penalties

We confirmed that the Regional Administrator interceded in the air asbestos penalty setting process. As a result, the penalty amounts proposed by the Region were substantially below those contemplated by EPA's Civil Penalty Policy. Our review of three specific air asbestos enforcement cases in the States of Idaho, Washington, and Oregon, disclosed that EPA's civil penalty actions against the violators were weakened, even though there was a preponderance of evidence indicating recurring violations and protracted asbestos exposure to humans. In this respect, the asbestos exposure to humans in the two school cases reviewed was particularly flagrant.

The Region's asbestos violation penalty calculations were consistently rejected by EPA's Office of Enforcement and Compliance Monitoring (OECM) before forwarding to the Department of Justice. The penalties were significantly undercalculated at the direction of the Regional Administrator. According to the Air Division staff and management and Regional Counsel staff, it was common knowledge that the Regional Administrator did not like referrals to the Department of Justice, particularly those affecting entities in the State of Idaho. We were advised that it was an unwritten policy within the Air and Toxics Division that civil referral penalties should be calculated at the minimum amount possible. If the penalty amounts were too high, the Regional Administrator would not sign them. In this regard, we were advised by an Air Division employee that "If we calculate the real penalty, Robie will pull the referral." As a result, we found that the Air and Toxics Division staff, in anticipation of the Regional Administrator's desire for lower penalties, took very conservative approaches to development of asbestos enforcement cases and corresponding penalties. Consequently, applicable EPA penalty policy was not followed. When staff calculations of air asbestos violation penalties were rejected by the Regional Administrator as too high, the staff recalculated them at lower amounts to get them approved. Furthermore, we found that the Region did not have internal control procedures in place to document how initial penalty amounts were developed or subsequently adjusted. The initial penalty calculation worksheets were not retained, and the reasons the penalties were reduced were not documented. The impact of the Regional Administrator's involvement in the establishment of the penalty amounts was only revealed from "incidental" scribbled notes and verbal testimony from the staff.

During our interview with the Regional Administrator, he advised us that he did not believe that EPA's nationwide penalty policy was appropriate for the Northwest, except for the Puget Sound area.

There was no evidence in the files that the Air and Toxics Division Director or the Air Programs Branch Chief made any attempt to assure that the penalty amounts were calculated in accordance with EPA's penalty policy (page 33).

Allegation 5 - Section 304(L) List, Alaska

The State's section 304(L) "long" list of environmentally impaired waters approved by the Regional Administrator was incomplete, and did not comply with the intent of the Clean Water Act. The Water Division had previously concluded the State's list should be disapproved because all impaired waters were not included. The Act required that all environmentally impaired or potentially impaired waters in the State be included on the list. However, the approved list included only 35 of the 147 environmentally impaired or potentially impaired waters listed in the State's Water Quality Assessment Report (section 305(B) report).

A total of 112 waters were, therefore, not subjected to the scrutiny and time limitations imposed by the Act. The submission of the list was a one-time requirement, and there is no provision for change once it was approved.

While Water Division staff indicated that there was pressure from industries to exclude certain waters from the list, we were unable to confirm the extent of such pressure. However, in our interview with the Assistant Regional Administrator, Alaskan Operations Office (ARA-AOO), he indicated that he was aware of the State's reluctance to list waters affected by the mining and timber industries.

We also substantiated that the Water Division was removed from the Region's final decision making process relating to the list, and ARA-AOO became involved. However, the extent of his involvement in the decision making process is not completely clear. In our interview with the ARA-AOO, he denied any major involvement with the list. Interviews with the Water Division staff indicated that the ARA-AOO was instrumental in the Regional Administrator's approval of Alaska's section 304(L) list as submitted.

In our interview with the Regional Administrator, he stated that he could not recall his involvement with the list. He also advised us that he would normally be advised by the ARA-AOO on matters pertaining to Alaska (page 41).

Allegation 6 - Section 304(L) List, Idaho

The Regional Administrator violated section 304(L) of the Clean Water Act by approving Idaho's "short list" of environmentally impaired waters, even though pulp and paper mills were not listed as required by EPA national directive. The Water Division had previously advised the Regional Administrator that the list should be disapproved because it did not include all environmentally impaired waters and documented point source dischargers. The Regional Administrator's authorities in the section 304(L) process were quite specific, and provided only for an "approval" or "disapproval" of the list. However, in an attempt to circumvent the section 304(L) requirements, the Region transmitted the list to EPA Headquarters without approving or disapproving it. As a result, the list failed to identify all impaired waters and known point source dischargers of priority pollutants. In this respect, we noted that the South Fork of the Coeur d'Alene River and the Hecla Lucky Friday Mine were excluded from the list. This has delayed the implementation of corrective action plans to control environmental damage that the discharge of these pollutants may be causing to the waters of the State.

During our interview with the Regional Administrator, he denied any involvement with the Idaho section 304(L) list. He advised that the Water Division Director and his staff made all decisions regarding the list and related transmittals to EPA Headquarters. While the Regional Administrator's comments are

acknowledged, they are inconsistent with the other information that we obtained related to this allegation area (page 46).

Allegation 7 - Arctic National Wildlife Refuge (ANWR), Alaska

Our review confirmed that the Regional Administrator abruptly transferred the principal reviewer responsibility for the Legislative Environmental Impact Statement (LEIS) from the Water Division to the Alaskan Operation Office (AOO). This occurred about three weeks before the Regional Administrator issued the final comment letter to the Department of Interior. Up to that time, or for about two months, the Environmental Evaluation Branch (the Branch) in the Water Division had fulfilled the principal reviewer responsibility. The reassignment occurred within a couple of days after a briefing provided by the Branch's principal reviewer to the Regional Administrator. The principal reviewer's briefing was critical of the LEIS. According to the principal reviewer, she believed that the LEIS was sufficiently deficient to be rated "Environmentally Unsatisfactory." The Water Division Director indicated that the reassignment was made at the direction of the Regional Administrator. It is interesting to note that the AOO had apparently never before functioned in a principal reviewer capacity on an EIS and was inexperienced in that role.

During our interview with the Regional Administrator, he confirmed that he assigned the review to the AOO in mid-January 1987 after the Water Division briefing. The reassignment was made in order to utilize the AOO's expertise, and because he did not consider the Branch's principal reviewer to be objective.

The transfer of responsibility was not officially conveyed to staff in either the Branch or the AOO. There was a great deal of confusion with respect to the transfer of responsibility. The documents in the Region's project file contain a denial by the AOO staff that a transfer of principal reviewer responsibility had occurred. The AOO staff contended that responsibility resided with the Branch. However, the ARA-AOO claimed in our interview with him that he and the Water Division Director had agreed at the beginning of the process that the AOO would serve as principal reviewer for the LEIS. This accord was not documented in the files. The Water Division Director could not recall any accord prior to the beginning of the LEIS review.

An initial draft comment letter, dated January 6, 1987, was prepared by the AOO and submitted by the Region to EPA Headquarters for review. The letter did not address the consequences and alternatives to oil development and several other environmental concerns considered significant by the Branch. Also, this draft comment letter did not contain an overall environmental rating. A subsequent draft comment letter submitted by the Region to Headquarters for review on February 4, 1987, also did not address the consequences and alternatives to oil development and several other environmental concerns considered significant

by the branch. This draft, however, included an overall environmental rating of "Environmental Concerns." Headquarter's review of this draft recommended some significant changes. With respect to the overall environmental rating, Headquarters recommended that a more critical rating of "Environmental Objection" be given to the LEIS. The EPA final comment letter to the LEIS was signed by the Regional Administrator on February 6, 1987. It included an environmental rating of "Environmental Objections." However, the final comment letter did not include several areas considered critical by the Branch including: an absence of certain mitigation areas; a loss of wildlife habitat; and a lack of analysis of alternative offshore oil sites.

We did not confirm the validity of any of the other allegations made against the Regional Administrator on the ANWR project. Our conclusions on the allegations are limited to the extent that the Region's records on its decision making process during the review of the LEIS were deficient. In this regard, there was a lack of documentation as to the assignment of review responsibilities and the preparation of the comment letter. In addition, our interviews with regional management and staff frequently resulted in inconsistent information (page 50).

Allegation 8 - Navy Homeporting, Washington

We were unable to corroborate the allegation concerning any undue influence by the Regional Administrator. During our interview with the Regional Administrator, he advised that the project to construct a homeport for a Navy carrier group was well along when he arrived at EPA. He commented that he believed that a good environmental decision was made on the project.

The Water Division Director accepted full responsibility for the Region's position on the homeporting project in the final response to the Supplemental Environmental Impact Statement (SEIS) and section 404 permit application. The reasons for the reversal of the Region's initial opposition to the section 404 permit, and its unsatisfactory rating on the SEIS were neither documented, nor supported by available project information.

In responding to the initial draft EIS in November 1985, the Region commented that it contained insufficient information because of its potential adverse effect on a fertile dungeness crab breeding area and rated the EIS as Environmentally Unsatisfactory. Although the proposed site was subsequently relocated, it was still adjacent to the crab breeding area. For this reason, the Water Division staff, the Fish and Wildlife Service, and the National Marine Fish and Wildlife Service continued to disagree with the proposed site.

However, the Region's comments on the final SEIS in December 1986, found it fulfilled basic National Environmental Policy Act (NEPA) requirements. The Region, therefore, advised it would no longer oppose the section 404 permit application, if certain monitoring concerns were included in the section 404 permit.

According to Water Division staff, the Corps permit also did not include the special monitoring conditions which the Region indicated were essential. We concluded that the Region had significant environmental concerns at the time it advised the Corps that it would not oppose the section 404 permit application. Also, the Region's comments on the final SEIS did not discuss alternative sites, although it was aware of sites with less severe environmental impacts from dredge material disposal. With these environmental concerns, it is unclear why the Region gave up its opposition to the section 404 permit application and its authority to further impact the process (page 56).

Allegation 9 - Nisqually Fish Hatchery, Washington

We found no evidence to support the allegation that the Regional Administrator interceded in the decision making process on the Nisqually Fish Hatchery permit application to allow favorable treatment on the permit. During our interview with the Water Division Director, he accepted full responsibility for the Region's decision to reverse its original opposition to this project. It is the opinion of Water Division staff that the Division Director allowed the normal section 404 permit review process to be circumvented. The Region had several opportunities to minimize the impact of the degradation of wetlands by the hatchery project, but did not adequately fulfill its responsibilities under the section 404 permit process. In this respect, the Water Division Director considered approval of the project inevitable, and commented that any additional efforts by the Region would be wasted. As a result, the Region withdrew its objections to the project prior to the staff's completion of its review. As such, there is an increased risk that unnecessary degradation of the valuable Clear Creek wetland area will occur. The Water Division staff advised us that they felt betrayed by the Division Director's action to withdraw from the permit process, and believed that political pressure had been exerted by the Nisqually Tribe. One staff member stated, "We were told that if this had been any other applicant we would have recommended permit denial, but could not do so with the Nisqually Tribe."

The Region's withdrawal from the permit process left the Corps standing alone in its opposition to the permit. The Corps of Engineers is currently continuing to deliberate over the Nisqually Fish Hatchery permit application (page 63).

Allegation 10 - Pickering Farms Industrial Park, Washington

We found that the Regional Administrator gave directions to the Water Division Director that had a direct impact on the Region's decision to withdraw its recommendation to deny the section 404 permit. The Water Division Director actually signed the final letter withdrawing the Region's recommendation and deferring to the Corps judgment on whether to issue a permit.

According to the Division Director, he changed the Region's position after being directed by the Regional Administrator to "get the permit resolved." The Regional Administrator's directions occurred after a telephone call from a representative of a potential tenant to the proposed industrial park. During our interview with the Regional Administrator, he acknowledged that he probably made the statement. He indicated that he would make such comments as part of his normal process of attempting to encourage staff to resolve permits timely. The Division Director indicated that he interpreted the Regional Administrator to mean that the Region should withdraw its recommendation that the permit be denied.

The Water Division Director stated that his decision to withdraw objections to the permit took into account that his staff had assured him that the subject wetlands were not of high value. While we confirmed that his staff made such comments, we also noted that the staff considered one of the first objectives of the Act to be to save wetlands. Prior to the reversal of its position, the Region consistently maintained that the developer had not properly considered all available alternatives. There was nothing in the project files indicating that the Region's concerns on the available alternatives were alleviated (page 69).

Allegation 11 - Lake Washington Ridge, Washington

We found no evidence to support the allegation that the Regional Administrator used undue influence or otherwise interfered in the normal decision making process on the project. In addition, we did not find any evidence that the former Regional Counsel discussed this project with the Regional Administrator. Our review concluded that the decision on the permit for this project was made solely by staff in the Water Division's Environmental Evaluation Branch. There was no indication of any pressure from either the Regional Administrator or the Water Division Director concerning this particular project. While the Corps' issuance of this permit allows for a definite loss of a valuable and unique urban wetland area, we concluded that the decision not to elevate the project for higher level review was within the Region's area of discretion (page 72).

COMMENTS OF REGIONAL ADMINISTRATOR

We interviewed the Regional Administrator at the completion of our review, and after he had left the Agency. In several of the allegations areas, the Regional Administrator advised us that he did not recall the particular area, and in other instances, he had only a general recollection of the area. Where the Regional Administrator had a specific recollection about an allegation area, we incorporated his comments into the "Analysis of Allegations" section of our report. In the interview, the Regional

Administrator also made several general observations which we have summarized below:

- To his knowledge, none of the allegations we reviewed suggested that he had committed any unlawful or illegal acts.

- He considered his decisions as to how extensively to become involved in a particular subject within the Region to be within his discretion.

- He believed the Region's actions in the allegation areas should be judged by the final decision reached; not the process used to reach the final decision.

- He advised that any information in regional files purporting to reflect the position of the Regional Administrator should be viewed with caution because the files may have been "purged" or "salted".

- In his view, the Region's enforcement program was consistently one of the most successful in the Agency.

RECOMMENDATIONS

We recommend that the Deputy Administrator require the Acting Regional Administrator in Region 10 to:

1. Establish procedures to assure that the basis for all major decisions on environmental issues and enforcement actions are appropriately documented in the official regional files, including the name of the individual responsible for the decision.

2. Assure that Water Division staff comments, both negative and positive, are documented in the official project files.

3. Take immediate steps to foster open communications and teamwork within the Region to create an atmosphere of trust and respect between management and staff.

4. Before issuing the final Quartz Hill molybdenum mine NPDES permit, reconsider the environmental impact on the locations selected for disposal of mine tailings.

5. Assure that fines and penalties for NPDES violations by Alaska Placer Miners are calculated and assessed in a manner consistent with other placer miners who have had enforcement actions taken against them for less serious violations.

6. Reevaluate the NPDES permit for the Sunbeam open pit gold and silver mine project in view of the change in ownership of the mine and the court imposed "Stay of Proceedings".

7. Ensure that the Air and Toxics Division complies with the EPA Clean Air Act Stationary Civil Penalty Policy. In addition, the Division should be directed to compute penalties in accordance with EPA's Office of Enforcement and Compliance Monitoring (OECM) Policies.

8. Assess whether the State of Alaska's section 304(L) "long" list of environmentally impaired waters can be amended to add the 112 waters not included in the State's original list; and if so, amend the list.

9. Amend the State of Idaho's section 304(L) "short" list of environmentally impaired waters in accordance with EPA's national directive to include pulp and paper mills and include the South Fork of the Coeur d'Alene River and the Hecla Lucky Friday Mine.

10. Review the current status of Department of the Interior plans to conduct additional Environmental Impact Statements (EIS) for the Arctic National Wildlife Refuge, and take action to assure that the EIS include areas of significant environmental concern which were not previously commented on. This includes the areas of mitigation, loss of wildlife habitat, and consideration of alternative offshore oil sites.

11. Assess whether the Region should have any additional role in the Navy Homeporting issue for the Everett, Washington area.

12. Contact the Corps and discuss opportunities for the Region to provide additional input on the section 404 wetlands permit review relating to the Nisqually Fish Hatchery project. As necessary, consideration should be given to using the provisions of section 404(c) of the Clean Water Act to elevate the project if a permit is expected to be issued without satisfactorily resolving the mitigation and Clear Creek wetlands issues.

13. Contact the Corps and discuss opportunities for the Region to provide additional support to the Corps in connection with section 404 wetlands permits reviews relating to the Pickering Farms Industrial Park project. Of particular interest is the need to consider project alternative that would minimize environmental impacts on wetlands.

ACTION REQUIRED

Please provide this office with a written response of the action taken or proposed to be taken on the review recommendations within 90 days of the date of this report.

ANALYSIS OF ALLEGATIONS

1 - CLEAN WATER ACT-NPDES DRAFT PERMIT QUARTZ HILL MOLYBDENUM MINE STATE OF ALASKA

ALLEGATION

It was alleged that the Regional Administrator failed to adequately protect the environment by approving a draft National Pollutant Discharge Elimination System (NPDES) permit for the disposal of molybdenum tailings from the Quartz Hill mine into the Wilson Arm of Smeaton Bay fjord in the State of Alaska. It was also alleged that the Regional Administrator's decision ignored recommendations made by regional staff and other Federal and State agencies that another fjord (the Boca de Quadra fjord) was the more environmentally preferred site. The allegation also indicated that the Regional Administrator could not support his statement that the additional costs required for the environmentally preferred site would have had a significant socio-economic impact on the project.

BACKGROUND

In 1974, a geochemical exploration program initiated by U.S. Borax and Chemical Corporation (U.S. Borax) resulted in the discovery of a world class molybdenum deposit at Quartz Hill, Alaska. Molybdenum is a metallic element that resembles chromium and tungsten in many properties. It is used to strengthen and harden steel. It is a trace element in plant and animal metabolism.

In 1980, the Alaska National Interest Lands Conservation Act (ANILCA) established the Misty Fjords National Monument in the Tongass National Forest. The Quartz Hill site is contained within the boundary of the National Monument. ANICA specifically excluded 152,610 acres from the "wilderness" classification so development at the Quartz Hill site could take place. This Act clearly provided for the development of the molybdenum resource at Quartz Hill.

In 1982, EPA revised its guidelines entitled "Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards." These guidelines prohibit the discharge of pollutants from molybdenum ore mining facilities. However, the guidelines state that, "The provisions of this subpart shall not apply to discharges from the Quartz Hill Molybdenum Project in the Tongass National Forest, Alaska." In waiving these guidelines for Quartz Hill, EPA placed itself in

the position of needing to develop a technology based permit which, in its best professional judgment, would meet the objectives of the Clean Water Act (the Act).

In 1986, U.S. Borax asked the U.S. Department of State to establish closure lines across the mouths of the Smeaton Bay and Boca de Quadra fjords. The Department of State agreed, and designated both fjords as inland waters. Under this classification, the fjords are not subject to the ocean discharge criteria. The fjords had been classified as territorial seas. With the change, EPA could only use the ocean discharge criteria as a guideline in developing a best professional judgment permit for the proposed discharge. The process of changing the classification began in 1985, before EPA issued a preliminary ocean discharge criteria evaluation which recommended that tailings be disposed of in the Boca de Quadra fjord.

The Quartz Hill molybdenum mine concept includes an open pit which would occupy 1,040 acres and have a final depth ranging from 1,325 to 1,875 feet. It would be about 2 miles long and 1.3 miles wide. The tailings discharge would average 40,000 tons per day for the first 4 to 6 years, and approximately 80,000 tons per day for the remaining 49 to 51 years of the project. This discharge would represent approximately 99 percent of the mined materials, since the molybdenum accounts for less than 1 percent. The total estimated capital cost for the Quartz Hill project is $1 billion.

U.S. Borax submitted its first application for a NPDES permit for the Quartz Hill molybdenum mine in July 1983. This application was revised in May 1984. Both the original and revised NPDES applications called for the tailings to be deposited in the inner basin of Boca de Quadra fjord, with the overflow settling in the middle basin. However, EPA and the U.S. Forest Service (USFS) agreed to tailings disposal in only the middle basin of the fjord. In 1985, U.S. Borax revised the NPDES application and proposed disposal of the tailings to the Wilson Arm of the Smeaton Bay fjord. There were no initial objections to the change because the scientific studies for this fjord had not yet been completed.

An EPA contractor completed a best professional judgment evaluation of the impact of the tailings disposal. The evaluation concluded that after 55 years of mining operations, the discharge into Smeaton Bay fjord would convert it from a basin-and-sill fjord system to a bay-like system. The study also commented that any increases in predicted volumes or an error in the predictions used in the sedimentation model could result in the overfilling of the fjord. In addition, the 1988 Ecological Risk Assessment completed by EPA concluded that "the aquatic ecosystem in the fjord would be less able to accommodate the

introduction of tailings material than the middle basin of Boca de Quadra."

While the USFS reversed its position, the Region stood firm that Boca de Quadra fjord remained the environmentally preferable tailings disposal site until November 1988. At that time, the Regional Administrator met with the Water Division staff, and without discussion, announced that he would accept the USFS position and allow the tailings to be disposed in the Smeaton Bay fjord. The Regional Administrator did not provide the Water Division staff with any new information or studies to support or otherwise justify his decision. He then ordered the Director of the Water Division to issue the draft NPDES permit.

When Water Division staff prepared the fact sheet which accompanied the draft permit, they specifically documented that the Regional Administrator was responsible for the decision. Water Division staff continued to support the tailings disposal into Boca de Quadra fjord as the environmentally preferable site, and stated this in the fact sheet.

The Region normally issues a final NPDES permit within 90 days after the draft is issued. However, in this case, the final NPDES permit for Quartz Hill has not been issued as of March 1990, although the draft was issued on November 9, 1988. In addition, it does not appear that a final permit will be issued any time in the near future. There are several reasons for the delay. The principal reason is the Water Division staff's disagreement with the draft NPDES permit. It was the staff's position that they might be able to compensate for the Regional Administrator's decision by putting a stringent monitoring program in place as part of the final NPDES permit. They have continued to work on the environmental monitoring program in conjunction with the Alaska Department of Environmental Conservation (ADEC). We were informed that ADEC's review, originally scheduled to be completed by January 1990, has been delayed indefinitely.

Completion of the monitoring plan is not the last hurdle to overcome before the NPDES permit can be issued. In June 1989 it was determined that the Quartz Hill site did not comply with the prevention of significant deterioration permit requirements of the Alaska State Implementation Plan (SIP). In accordance with the requirements of the Clean Air Act, the Region cannot issue the NPDES permit to a source unless it is in compliance with the SIP.

Additionally, the Region is hesitant to issue a final permit until the results of a Sierra Club appeal have been resolved. The Sierra Club has appealed the USFS's Record of Decision on this project. The appeal, which is not expected to be settled until

late 1990, raises the possibility that the Environmental Impact Study may have to be reopened. If this occurs, EPA would be required to modify the final permit. In the meantime, the NPDES permit cannot be finalized until the environmental review process is completed.

REVIEW RESULTS

It is the opinion of Water Division management and staff, and we concur, that the Regional Administrator's decision to approve a draft NPDES permit for the disposal of mine tailings into the Wilson Arm of Smeaton Bay Fjord fails to adequately protect the environment. Environmental studies indicate that the disposal of mine tailings into the Wilson Arm of Smeaton Bay fjord will turn the fjord into a bay. This has the potential to destroy a valuable salmon resource.

Our review of the NPDES permit files indicated that the regional staff did not support the decision to dispose of the tailings in the Wilson Arm of Smeaton Bay fjord. To the contrary, the files support the use of the Boca de Quadra fjord. The basis for the Regional Administrator's decision was not documented in the files except for a comment that socioeconomic factors were considered in making the selection. During our interview with the Regional Administrator, he denied that the decision was based solely on socioeconomic factors. He commented that a risk assessment was made of each fjord and the assessment did not indicate a lot of difference between the selection of either fjord. We were unable to find any documentation to support this statement. To the contrary, the 1988 EPA Ecological Risk Assessment concluded that the Boca de Quadra fjord was the environmentally preferred site.

In an attempt to establish the chronology of the decision process, we discussed the draft permit with Water Division management and staff associated with the project. During these discussions, it was the unanimous position of all of the Water Division management and staff that the Regional Administrator's decision was improper. In this regard, the acting Deputy Regional Administrator (the former Water Division Director) advised us that he will request the new acting Regional Administrator to modify the draft NPDES permit to designate the Boca de Quadra fjord as the site for the disposal of the tailings. We also noted that the Regional Administrator's involvement in the draft NPDES permit process was a deviation from the Region's normal review process. In our interview with the Regional Administrator, he indicated that he considered his involvement in the draft NPDES permit process for the Quartz Hill mine consistent with the environmental significance of the area.

EPA, and Other Federal and State Agencies Opposition to Disposal Site

The decision to use the Smeaton Bay fjord did not have any scientific or environmental support, within or outside of EPA, except from the proponents of the project. The proponents included the USFS and U.S. Borax, who contended that the environmental impact was the same regardless of which fjord was used for the disposal. In this respect, the USFS's Record of Decision document for the site claimed that "there is little difference in environmental effects of tailings disposal in the marine environment between Wilson Arm and Boca de Quadra Fjords. The effect of disposal on anadromous fish (migrating up from the sea), other food fish, and fish habitat is similar in both fjords."

This conclusion was not supported by either the regional staff; the Department of Interior, Fish and Wildlife Service (FWS); the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS); or the Alaska Department of Fish and Game (ADFG). For example, a March 1989 ADFG memorandum concluded that, "At the present time, too many unknown factors still exist to be able to unequivocally present statements such as these. Although we can be fairly confident that major ecological changes will not occur with Boca de Quadra middle basin disposal, it is recognized that more uncertainties exist with Wilson/Smeaton disposals." The studies and risk assessments and reports made by these agencies have all indicated that the preferred site was the Boca de Quadra fjord. A joint technical assistance report prepared by the NMFS and FWS concluded that tailings disposal into the Smeaton Bay fjord would result in the conversion of a fjord into a bay, and cause a potential destruction of a significant salmon resource. The FWS also commented that, "the Service finds that the project, as proposed, would have significant needlessly adverse impacts upon important fish, wildlife, and their habitats." The NMFS stated in June 1987 that, "The NMFS remains opposed to discharge of mine tailings into Smeaton Bay."

In terms of the total volume of materials to be discharged, the Quartz Hill project would be without precedent. It was expected that 80,000 tons per day of tailings may be disposed of during peak production periods.

Unsupported Socioeconomic Benefits

The Region's files indicated that the Regional Administrator justified his decision on the draft NPDES permit on the basis that he was balancing environmental and socioeconomic values. However, the Region's files did not include any documentation to support this justification. The socioeconomic argument appeared to be based on claims by the USFS and U.S. Borax that the additional costs of $59 million would be required if the Boca de

Quadra fjord was used for the tailings disposal. In this respect, they stated that this fjord "would result in increased capital and operating costs that could increase the per unit cost of molybdenum production. As a result the mined product could be more susceptible to the world market price fluctuations and the economic viability of the mining operation could be at some risk."

However, the economic analysis completed by the regional economist did not support a conclusion that the use of the Boca de Quadra fjord was economically unfeasible. He reported that, while the more costly waste disposal method seemed to threaten the project, that was not the case. His report stated ". . . the decision on waste disposal site does not seem to be critical to the success of the Quartz Hill project. Though an operation utilizing the Wilson Arm waste disposal arrangement would unquestionably be more profitable, Boca de Quadra disposal would not invalidate Quartz Hill under operational and financial conditions that would make the Wilson Arm choice feasible. The major effect that could be expected from an EPA decision to permit discharge only to the Boca de Quadra Middle Basin would be an (indeterminate) period of delay in beginning the project."

Normal Regional NPDES Review Process Was Not Followed

The decision process used by the Region to review the Quartz Hill draft NPDES permit was unusual. The permits were normally reviewed and approved by the Water Division Director on the basis of technical input from his staff. The Regional Administrator was not normally involved in the review and approval of draft NPDES permits. However, he maintained an active interest in this project, and even toured the site in August 1986. Until 1987, he appeared to support regional staff recommendations for disposal of the tailings. In a November 1988 meeting with senior Water Division staff, the Regional Administrator, without discussion, announced that he had changed his position. The following senior staff personnel were in attendance at the meeting: the Director of the Water Division; the Chief, Water Permits and Compliance Branch; the Director of the Environmental Services Division; and the Chief, Environmental Evaluation Branch. The results of the meeting were not documented. We were advised that, during this meeting, the Regional Administrator commented that there was no compelling reason not to agree with U.S. Borax to allow use the Smeaton Bay fjord for tailings disposal. We were advised that he also commented that additional tailings disposal costs which would occur by using the Boca de Quadra fjord would put the economic viability of the project at risk.

The Water Division staff believe that the change in the Regional Administrator's position was made primarily because the State of Alaska had decided to conditionally accept the project. Water Division staff felt that the Regional Administrator did not wish to challenge the State.

2 - CLEAN WATER ACT-NPDES PERMIT VIOLATIONS DEL ACKELS, PLACER MINER STATE OF ALASKA

ALLEGATION

It was alleged that, as a result of the Regional Administrator's intervention, the Region did not initiate appropriate enforcement actions against Del Ackels, Placer Miner, for violating his National Pollutant Discharge Elimination System (NPDES) permit and consent order. The Region's Water Division proposed civil penalties for NPDES discharge violations into Gold Dust Creek, and recommended that the case be referred to the United States Department of Justice (DOJ). It was alleged that the Regional Administrator refused to sign the referral, even though the technical evidence and the regional management and staff supported the referral.

BACKGROUND

Del M. Ackels, owner of Goldust Mines, had a mining claim on Gold Dust Creek. The creek, which is a tributary of the wild and scenic Birch Creek, is about 25 miles southwest of Central, Alaska.

Del Ackels applied for an NPDES permit to discharge into Gold Dust Creek in June 1976. A permit was issued on November 26, 1976, and subsequently reissued in August 23, 1983, and June 8, 1984. The June 8, 1984, NPDES permit was modified on May 10, 1985, and expired on December 31, 1986.

The Clean Water Act (the Act) prohibits the discharge of any pollutant into the waters of the United States, unless the discharge is authorized by, and in compliance with, a NPDES permit. During the 1984 mining season, Del Ackels was found to be in violation of his NPDES permit effluent discharge requirements for turbidity. This violation resulted in a consent order, which became effective on June 20, 1985. The consent order: (i) required full compliance with all NPDES permit conditions and limitations by November 30, 1986; and (ii) established requirements to be met during the 1985 and 1986 mining seasons. Subsequent inspections made in 1986 found that adequate progress had not been taken to comply with the consent order. The inspections also found additional NPDES permit violations.

As a result of these violations, the Water Division staff, in conjunction with the Regional Counsel staff, prepared an enforcement referral package for submission to the DOJ for civil enforcement action.

REVIEW RESULTS

Our review concluded that the decision not to refer the Del Ackels violations to the DOJ for civil enforcement action was made solely by the Regional Administrator. We confirmed that the decision was made against the recommendations of the Water Division management and staff. The Region's files did not include any documentation supporting the Regional Administrator's position. In this regard, the only comment on the closing of the enforcement case stated "Robie Russell refused to sign referral. Case closed."

The Regional Administrator's actions allowed Del Ackels to violate, without penalty, the requirements of the Act. The Act prohibits the discharge of any pollutant into the waters of the United States, unless the discharge is authorized by, and in compliance with, an NPDES permit. The regional staff believes that the Del Ackels' violations of his NPDES permit limitations, caused substantial environmental damage to Gold Dust Creek. The damage included harming fish and their habitat, destroying drinking water, decreasing the clarity of the stream, destroying vegetation, and causing soil erosion.

During the 1986 mining season, regional and State of Alaska inspections determined that Del Ackels violated: (i) a regional consent order that was effective on June 20, 1985, by failing to comply with best management practices and wastewater treatment construction requirements; and (ii) its NPDES permit by exceeding the effluent limitations for settleable solids, turbidity, and total arsenic. The regional staff supported a referral of the Del Ackels case to the DOJ for civil enforcement action due to the flagrant violations of his consent order and NPDES permit. The Regional Administrator refused to sign the referral. The Region's NPDES files did not include any documentation explaining or otherwise justifying his decision. Regional staff suggested that the Regional Administrator was influenced by the strong recommendation of the Commissioner of the Alaska Department of Environmental Conservation (ADEC) not to pursue an enforcement action. Our interview with the Regional Administrator tended to confirm this point. During the interview, he indicated that he did not have a strong recollection of the Del Ackels case. However, it was his policy to defer to the State because he felt the State had primary responsibility to determine if enforcement actions were necessary.

From the Water Division management and staff's perspective, an enforcement action against Del Ackels was important from the standpoint of maintaining enforcement credibility, since the violations were serious, flagrant, and widespread. By not initiating enforcement action, the Regional Administrator has deviated from EPA's enforcement strategy. The decision also resulted in an inconsistent treatment of placer miners. Since 1983, the Region has assessed penalties against 27 placer miners in the State of Alaska for NPDES permit violations similar to those committed by Del Ackels. During 1985, the Region forwarded

14 civil enforcement referrals against placer miners to DOJ for comparable NPDES violations of settleable solids, turbidity, and arsenic limitations. Penalties ranging from $2,000 to $50,000 were assessed against these placer miners. There were nine enforcement actions filed in 1986 and two enforcement actions filed in 1987. The final penalties for these violations ranged from $400 to $50,000.

Chronology of Events On Del Ackels Enforcement Referral

On July 7, 1986, the ADEC notified Del Ackels that an aerial survey had been performed of his mining operation at Gold Dust Creek on June 24, 1986. It was observed that the creek flowed through several in-stream settling ponds for which there was no bypass. This action violated NPDES permit conditions and Alaska's water quality standards.

On July 15, 1986, an inspection of Del Ackels' Gold Dust Creek mining facilities was performed by inspectors from the Region, ADEC, and a Department of Justice attorney on special assignment. The inspection found that the NPDES permit limitations for turbidity were exceeded. The turbidity contamination resulted primarily from (i) Gold Dust Creek flowing through 12 in-stream settling ponds; and (ii) the lack of a bypass around all mining and treatment facilities. On July 28, 1986, a follow up inspection was performed by the Region and ADEC. The inspection found that Gold Dust Creek was still flowing through the 12 in-stream settling ponds, and that the NPDES limitation for turbidity, total arsenic, and settleable solids had been exceeded. Samples, aerial video recordings, and still photographs were taken during both inspections.

The inspections of Del Ackels' facilities found him in violation of his NPDES permit, plus an existing consent order issued for similar violations in 1984. The violations included: (i) a failure to comply with the best management practices and wastewater treatment construction requirements in the NPDES permit; (ii) a failure to comply with the requirements in the administrative consent order; and (iii) a failure to meet the NPDES permit's effluent limitations for turbidity, settleable solids, and arsenic. Because of the continuing violations, and Del Ackels improper management practices, the Water Division recommended that a civil enforcement action be initiated.

Subsequent to the inspections, the Region's Water Division and Office of Regional Counsel prepared a civil litigation referral package for the DOJ. The package recommended a civil enforcement action under section 309 of the Act in order to (i) assess civil penalties; and (ii) ensure compliance with requirements in the NPDES permit and consent order.

The recommendation to refer the case for enforcement was approved by the Assistant Regional Administrator of the Alaska Operations Office (ARA-AOO), the Director of the Water Division, the Chief of the Water Permits and Compliance Branch, the Chief

of the Water Compliance Section, and the Regional Counsel. The enforcement action was considered necessary because: (i) the violations were significant; (ii) the NPDES permit criteria was violated for settleable solids, turbidity, and total arsenic; (iii) the violations exceeded the permit requirements by a larger margin than other placer miners, who had enforcement actions taken against them; (iv) the violator failed to initiate corrective actions on previous deficiencies; and (v) the video tape of the inspections clearly showed definite violations of the NPDES permit. The referral package calculated that the maximum penalty, which could be calculated for Del Ackels' violations, was $140,000, and the minimum penalty would be $32,850.

During early 1987, the regional staff provided the Regional Administrator with a briefing on the Del Ackels referral case. A written record of the briefing was not prepared. We were advised that during the briefing, a video tape was used to show the Del Ackels violations at Gold Dust Creek. According to regional staff, the Commissioner of ADEC attended the briefing and strongly recommended that the Region not pursue an enforcement action. We were also advised that the Commissioner commented that an enforcement action against Del Ackels would be politically sensitive to the State of Alaska, and would be somewhat of an embarrassment to ADEC. With respect to the Commissioner's comments, the regional staff commented that they were subsequently advised by the Alaska State Attorney General's Office that the Del Ackels case would never "fly" because of the State politics involved. It was indicated that the State had given Del Ackels a State grant on advanced mining technology, and that he successfully completed the grant in a timely fashion without controversy. In addition, Del Ackels mine had been selected as a State study site, because his mine was thought to be one of the better mines in treating wastewater.

When the referral package was provided to the Regional Administrator, he refused to sign it. His action disregarded the recommendations of the regional staff and their documentation supporting the recommended enforcement action against Del Ackels. We were also advised by the Water Division and Regional Counsel staff that the Regional Administrator did not believe in enforcement actions, and that he referred only the number of cases that he needed to fulfill his performance requirements. Regional staff indicated they felt intimidated when they had to discuss enforcement referral cases with the Regional Administrator.

During our interview with the ARA-AOO, he indicated that the Regional Administrator's decision not to refer the Del Ackels case was based on technical data provided by ADEC. He stated that the decision was not based on political considerations. We note that the ARA-AOO's statement contradicted an earlier interview statement in which he indicated that he did not remember why the referral was not signed. Further, this statement is also contradicted by other regional management and staff. The regional files did not contain any technical data to justify the

Regional Administrator's decision, nor were any other regional staff aware of the technical data purportedly submitted by ADEC. During our interview with the Regional Administrator, he stated that he could not recall whether any additional information was provided.

3 - CLEAN WATER ACT-NPDES PERMIT SUNBEAM MINE STATE OF IDAHO

ALLEGATION

It was alleged that the Regional Administrator intervened in the Region's National Pollutant Discharge Elimination System (NPDES) permit review process for Sunbeam Mining Corporation's (Sunbeam) request to operate an open pit gold and silver mine. Allegedly, the intervention occurred when the Regional Administrator overturned the Water Division's request for either a supplemental environmental impact statement (EIS) or an Environmental Assessment (EA) of the project; and when he overruled the Water Division's opposition to Sunbeam's request for pre-construction work before the permit was issued. It was also alleged that the Regional Administrator ordered the Water Division Director to issue the NPDES permit even though technical staff had recommended against its issuance.

BACKGROUND

In February 1986, the Region received an application for a NPDES permit for operation of an open pit gold and silver mine by Sunbeam. The proposed Sunbeam mine, located in the Salmon River Mountains of the Challis National Forest in central Idaho, is characterized by relatively steep mountainous slopes and is bordered by Jordan Creek on one side. The mining operation proposed by Sunbeam entailed drilling and blasting of ore and rock, crushing, and then vat leaching with cyanide to recover the gold and silver. The spent ore tailings would then be disposed of into approximately 60 acres of the Pinyon Basin, including a bog wetland area of approximately four acres.

The EIS for this project was issued by the U.S. Forest Service (USFS) in September 1984. After the NPDES application was received by the Region in February 1986, both EPA and Sunbeam conducted additional studies to address and resolve issues which were not fully covered by the EIS. The project files indicated that there were numerous meetings and a significant amount of correspondence on the studies between the Region and Sunbeam. While the Region and Sunbeam never completely reached a mutual understanding on the measures necessary to resolve these issues, the Region decided to proceed with the NPDES permit.

On July 29, 1988, approximately 29 months after the initial application had been received, the Region issued its final NPDES permit. Prior to the issuance of the final permit, the Region held public hearings on the proposed permit. Many of the comments received from the public hearing were from other Federal

and State agencies, as well as national environmental organizations. Most of the comments recommended against the issuance of a permit primarily due to: (i) the potential violations of water quality standards as a result of arsenic contamination; and (ii) the loss of four acres of irreplaceable bog wetlands in Pinyon Basin.

The NPDES permit regulates discharges of spent ore disposed into Pinyon Basin, and effluent from sedimentation ponds disposed into Jordan Creek. The NPDES permit also sets forth effluent limits for cyanide and for the following toxic metals: arsenic, cadmium, lead, mercury, copper, and zinc. The NPDES permit also sets forth total suspended solids and pH effluent limits.

In August 1988, the Region received requests for "Evidentiary Hearings" on the Sunbeam project from the National Wildlife Federation, the Idaho Wildlife Federation, and the Idaho Natural Resources Legal Foundation. Subsequently, the Region and Grouse Creek Mining, Inc., (the new owner of Sunbeam mine) requested a "Stay of Proceedings." The new owner advised that it was contemplating a mining operation that would make the current NPDES permit inappropriate. In August 1989, an Administrative Law Judge issued an "order granting motion for stay of proceedings." Thus, it is expected that a new environmental review and new NPDES permit application will be required before a mining operation is initiated.

RESULTS OF REVIEW

We concluded that the Regional Administrator interceded in the Sunbeam NPDES permit review process to some extent. Normal regional NPDES permit review procedures would not involve the Regional Administrator. However, our conclusions are limited to the extent that the Region's files on the decision making process related to the Sunbeam NPDES review were inadequate and contained only limited information; mostly consisting of official correspondence. There was little or no documentation of meetings; and there were no drafts of correspondence, notes, or other evidence available to document the decision making process. In addition, our interviews with regional management and staff sometimes resulted in inconsistent information.

Supplemental EIS or EA

Our review confirmed that the Regional Administrator intervened in the Sunbeam NPDES permit process by overturning the Water Division's request for either a supplemental EIS or an EA of the project. The Water Division considered additional environmental information necessary before making its final decision on the NPDES permit. We noted that the Regional Administrator's decision was made during a meeting with Sunbeam representatives, who argued that the additional environmental information was not necessary.

During its review of Sunbeam's NPDES permit application, the Region expressed serious concerns about two conditions that were not adequately addressed in the EIS. One condition concerned arsenic leaching from the spent ore into Jordan Creek. The second pertained to the disposal of spent ore into the Pinyon Basin resulting in destruction of the four acres of sphagnum bog wetland. The Region maintained that these conditions required additional discussion in order to satisfy the requirements of the National Environmental Policy Act (NEPA). On December 1, 1986, the Water Division Director sent a letter to Sunbeam's legal counsel stating, "We will need to supplement that document in the form of either a supplemental EIS or an Environmental Assessment (EA) to have a complete NEPA analysis that would allow us to proceed with a permit." This same request for information had previously been made by the Water Division staff over the preceding six month period.

We were advised by the Water Division Director and his staff that, during a meeting on December 19, 1986, with Sunbeam representatives, the Regional Administrator made the decision not to pursue the request for any additional NEPA studies. Instead, he agreed with Sunbeam, that the additional NEPA studies were not required. Although this decision was not documented, the Water Division Director and staff advised us that the Regional Administrator was swayed by Sunbeam's statement that ". . .it was willing to take the risk that no further NEPA work was required. . . ." During our interview with the Regional Administrator, he indicated that he could not recall the meeting.

There was considerable disagreement over the extent of the arsenic leaching problem that would result from the spent ore disposal site. The arsenic was a byproduct which resulted from the use of cyanide in processing the ore. The regional hydrologist concluded that arsenic concentrations in the leachate from the spent ore pile would exceed 5 mg/l, which was 100 times greater than the water quality standard of 0.05 mg/l. Sunbeam disputed this finding, and as a result, the Region requested additional technical studies. The studies, performed by the EPA laboratories in Ada, Oklahoma and Cincinnati, Ohio, confirmed the regional hydrologist's conclusions. As a result, on March 19, 1987, the Water Division Director wrote to Sunbeam and concluded that ". . .the only way a permit can be issued to allow spent ore to be placed in Pinyon Basin is if the arsenic is removed or immobilized before permanent disposal."

Pre-Construction Approval

We could not confirm any involvement by the Regional Administrator in the Region's approval of pre-construction work. The Water Division Director signed the approval for Sunbeam's pre-construction work in May 1987, and advised us that he could not recall being directed to do so. Also, none of the Water Division staff interviewed indicated that they had first hand knowledge of the Regional Administrator's intervention. The Region notified Sunbeam on April 3, 1987, that no preliminary construction work

would be authorized in light of the arsenic leachate problem. On April 10, 1987, Sunbeam again requested approval of preliminary construction indicating that pre-construction authorization could be given by the Regional Administrator. On May 19, 1987, the Regional Administrator received a letter from a U.S. Senator urging that Sunbeam's NPDES permit be approved. The letter requested that Sunbeam be allowed to continue its operations because "every job in Idaho is critical" and "a year's delay would not only damage Sunbeam, it would be an economic loss to Idaho, too." On May 27, 1987, or eight days after the U.S. Senator's letter, the Water Division Director signed the approval for Sunbeam's pre-construction work in May 1987.

NPDES Permit Approval

We could not confirm any Regional Administrator involvement in the final NPDES approval. The Water Division Director issued the NPDES permit for Sunbeam in July 1988. During our interview, he did not suggest that the Regional Administrator directed him to issue the permit. The Water Division management and staff believed that the issued permit contained conditions sufficient to protect the environment. Regional staff advised us that they anticipated the permit would be approved regardless of their objections. It was, therefore the staff's intent to make the permit very restrictive in the areas of mitigation measures, arsenic control requirements, and monitoring procedures.

However, other Federal and State agencies did not agree with the Water Division Director's decision to issue the NPDES permit. These agencies included the U.S. Fish and Wildlife Service, the U.S. National and Oceanic and Atmosphere Administration, the National Wildlife Federation, the Idaho Department of Fish and Game, the Idaho Wildlife Federation, the Idaho Natural Resources Legal Foundation, and the Shoshone-Bannoch Indian Tribes. All of the above agencies recommended against issuance of the final NPDES permit. An example of the type of comments received by the Region was shown in a letter from the U.S. Fish and Wildlife Service (USFWS) Regional Director which stated:

> "The U.S. Fish and Wildlife Service's (Service) Boise Field Station submitted comments to your agency on March 24, 1988, regarding proposed issuance of a National Pollution Discharge Elimination system permit (section 402, Clean Water Act) to the Sunbeam Mining Corporation...No project should be authorized that would result in irreparable losses to important natural resources when suitable less damaging alternatives are available."
>
> "We are hopeful that issues that have been raised will be adequately addressed, however, should this not occur, we intend to exhaust administrative appeal opportunities available through 40 CFR Part 124. Your staff is encouraged to continue to work with our Boise staff to resolve the outstanding issues."

Subsequent to the above letter on July 6, 1988, the USFWS Regional Director also met with the EPA, Regional Administrator. The meeting covered his concerns with the proposed issuance of the NPDES permit. The meeting was followed up with a letter, dated July 8, 1988, in which the Regional Director brought out his continuing concerns with EPA's technical information that arsenic levels could be reduced to attain water quality criteria limits through the attenuation of the Pinyon Basin soils. The letter further stated, "Under the current development alternative, destruction of the four acre Pinyon Lake wetland would occur, and potentially, approximately 13 miles of anadromous fish spawning and rearing habitat would be degraded." The USFWS Regional Director concluded that it was his agency's recommendation that the permit be ". . .held in abeyance." However, 21 days later, on July 29, 1988, the Region issued the final NPDES permit.

4 - CLEAN AIR ACT
ASBESTOS DEMOLITION AND RENOVATION PENALTIES
STATES OF IDAHO, OREGON, AND WASHINGTON

ALLEGATION

It was alleged that the Regional Administrator improperly interceded in the Clean Air Act asbestos demolition and renovation violation penalty setting process. It was also alleged that, as a result, the calculated penalty amounts proposed were significantly reduced and were inconsistent with EPA's civil penalty policy.

BACKGROUND

The February 16, 1984, civil penalty policy established deterrence as the most important goal of penalty assessment. The Clean Air Act stationary source civil penalty policy, dated March 25, 1987, provides guidance for determining the amount of civil penalties under Title I of the Clean Air Act. It states that ". . .for purposes of computing both the statutory maximum penalty and the minimum settlement amount, the period of non-compliance begins with the earliest provable day of violation and ends with the projected date of compliance." With respect to a violator's ability to pay, the policy states that: "The litigation team should assess this factor after commencement of negotiation with the source if the source raises it as an issue." It also states ". . .if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each other's experience and promote the fairness required by the Policy on Civil Penalties." (Emphasis added.)

Due to the uniqueness of asbestos demolition and renovation cases, EPA provided specific guidance in an asbestos demolition and renovation civil penalty policy. EPA's Office of Enforcement and Compliance Policy (OECM) distributed proposed revisions of the asbestos penalty policy on November 28, 1988. The final revised asbestos demolition and renovation civil penalty policy was subsequently issued on August 22, 1989. OECM intended that the draft policy be effective for all cases, referred or filed, where a settlement penalty position has not been presented to the named defendants. The policy was intended to produce a specific penalty amount, not a range. Thus, EPA's air and asbestos penalty policy, when adhered to, enables a Region to develop

penalty amounts which would effectively deter air asbestos pollution violations.

REVIEW RESULTS

Our review confirmed that the Regional Administrator improperly interceded in the air asbestos penalty setting process. As a result, the penalty amounts proposed by the Region were substantially below those contemplated by EPA's civil penalty policy. Our review of three specific air asbestos enforcement cases disclosed that EPA's civil penalty actions against the violators were weakened, even though there was a preponderance of evidence indicating recurring violations, and protracted asbestos exposure to humans. In this respect, the asbestos exposure to humans in the two school cases reviewed was particularly flagrant. Besides casting doubt on the credibility of the Region's air asbestos enforcement program, the Region's activities have resulted in delays in the referral of enforcement actions. This, in turn has required considerable Headquarters and regional staff hours to rectify.

Due to the staff's knowledge that the Regional Administrator would not accept high penalty amounts, the staff purposely calculated penalties substantially lower than the fines required by applicable EPA penalty policies. Thus, the staff ignored OECM directions that the 1988 draft penalty policy be utilized. When the lower penalties were calculated, the Regional Administrator would sign the referral. The referral was prepared for submission to the Department of Justice through OECM.

According to the Air Division management and staff, and Regional Counsel staff, it was common knowledge that the Regional Administrator did not like referrals to the Department of Justice, particularly those affecting entities in the State of Idaho. We were advised that it was an unwritten policy within the Air and Toxics Division that civil referral penalties should be calculated at the minimum amount possible. If the penalty amounts were too high, the Regional Administrator would not sign them. In this regard, we were advised by an Air Division employee that, "If we calculate the real penalty, Robie will pull the referral." As a result, we found that the Air and Toxics Division staff, in anticipation of the Regional Administrator's desire for lower penalties, took very conservative approaches to development of asbestos enforcement cases and corresponding penalties. When staff calculations of air asbestos violation penalties were rejected by the Regional Administrator as too high, the staff recalculated them at lower amounts to get them approved. Upon OECM's review of the penalty calculation, the referral package would invariably be rejected by OECM because the penalty amounts were too low compared to the appropriate penalty policy. The referral package, with OECM's detailed comments, would then be returned to the Region for recalculation. The Air Division staff, in conjunction with the Office of Regional Counsel staff, would recalculate the higher penalty amounts as suggested by OECM. The recalculations did not have to go through

the Regional Administrator for approval, and therefore, were normally transmitted as calculated.

During our interview with the Regional Administrator, he advised us that he did not believe that the EPA Nationwide Penalty Policy was appropriate for the "Northwest, except for the Puget Sound area." He also believed that the Region had a good enforcement record.

We concluded that the Region did not have internal control procedures in place to document how initial penalty amounts were developed or subsequently adjusted. The initial penalty calculation worksheets were not retained, and the reasons the penalties were reduced were not documented. The impact of the Regional Administrator's involvement in the establishment of the penalty amounts was only revealed from "incidental" scribbled notes and verbal testimony from the staff. Also, there was no evidence in the files that the Air and Toxics Division Director or the Air Programs Branch Chief made any attempt to assure that the penalty amounts were calculated in accordance with EPA's penalty policy.

We reviewed three specific asbestos enforcement cases in which the Region initiated a civil penalty referral action. The cases pertained to the Ralston Purina Building, State of Idaho; the Castle Rock School District, State of Washington; and George Fox College, State of Oregon. Each case is discussed in detail below as a means of showing the chronology of events; the extent of Regional Administrator involvement; the numerous changes to the penalty calculations; the involvement of OECM; and the extent of the environmental and human health problems caused by the asbestos violations. During our interview with the Regional Administrator, he advised us that he did not have any recollection of the Ralston-Purina Building case and only a vague recollection of the other two cases.

Ralston-Purina Building

The Ralston-Purina case involves, in part, the improper renovation and removal of two asbestos-covered boilers from the old Ralston-Purina Plant in Pocatello, Idaho, during the spring and summer periods of 1986. The owner, Phillips Industries, violated the written notice and numerous work practice requirements for an asbestos renovation operation. Asbestos debris, including an asbestos-covered door of one of the boilers was stripped from the boilers and left strewn around the grounds of the facility.

In early 1988, another project involving demolition work commenced at the site. During the demolition phase, three regional inspections were completed. The reports identified repeated violations and continually deteriorating conditions which were not corrected.

The Region's Air Division staff assigned to the case stated that, in early August 1989, they prepared three initial calculations for civil penalties against the owner and the demolition contractor in the amounts of $255,750, $185,750, and $104,000. It should be noted that the penalty calculation worksheets for these amounts were not available for review. Regional staff indicated that the worksheets were discarded when subsequent recalculations were completed. Such worksheets should have been retained pursuant to OECM's penalty policy. The staff advised us that it was their understanding that the Regional Administrator did not like high penalties, and having three calculations provided the staff with options for discussion. According to the staff, the differences in their calculations resulted from combining second and subsequent violations in order to arrive at lesser penalty amounts. We were advised that the penalty amounts were discussed within the Air and Toxics Division, and were perceived to still be too high and unlikely to be approved by the Regional Administrator. It was also indicated that, since the case was from the State of Idaho, the Regional Administrator's home State, he would not sign a referral to the Department of Justice for any high dollar amount.

The Air Division staff then calculated a revised penalty amount of $93,560, which represented a 63 percent reduction from the $255,750 initially calculated amount. In arriving at this reduced amount the regional attorney assigned to the case and program staff, utilized an old EPA penalty policy (rather than the current OECM penalty policy) and combined several violations. The staff also prepared a data sheet stating that "This figure is the lowest calculation possible considering the immense quantity of asbestos. . . the reoccurring violations (15 total), the economic savings from not complying with the regulations . . .and the continuing violation of a 113 Compliance Order. . . ." The staff treated the second and subsequent violations as first time viola-tions, enabling them to select a lower penalty figure of $10,000 each, although the correct penalty should have been calculated at $20,000 to $30,000 each.

On August 9, 1989, the Air and Toxics Division Director, the Regional Counsel, and the Air Programs Branch Chief briefed the Regional Administrator on this and five other referral actions. The meeting participants, that we interviewed, indicated that they did not have a clear memory of the details of the briefing. However, the project files contained the following comment from the briefing: "Penalty rejected by Regional Administrator. Must calculate a lower penalty. . . ." In this respect, the Branch Chief was reportedly told to try to get the penalty down to what the company and contractor were worth. Other notes in the project files indicated the Regional Administrator wanted the penalty on this case to be around $50,000, since he was concerned with the company and contractor's ability to pay a larger penalty. In addition, the Regional Administrator directed the Office of Regional Counsel to try to negotiate this lower penalty amount with OECM before he signed the referral. OECM rejected the Office of Regional Counsel's attempt to negotiate any

penalties, and advised the regional attorney assigned to the case that the penalty should be calculated using OECM's draft penalty policy. Using the draft policy, the attorney calculated a penalty amount in excess of $400,000. The penalty calculation was discussed at a meeting between the Regional Counsel, the Branch Chief, and Air Division staff. It was decided that since the new penalty policy was not yet issued, the Region should continue to use the old penalty policy, even though OECM directed them to use the draft policy. The major consideration in this decision was that the $400,000 amount would be too high for the Regional Administrator, since a $93,560 penalty had already been rejected. When the new asbestos penalty policy was issued on August 22, 1989, Air Enforcement staff purposely continued to use the old policy. They rationalized that the Regional Administrator would not allow the penalty to be referred in fiscal 1989, if they used the new policy.

By using the old penalty policy, and by disregarding second and subsequent contractor violations, the staff was able to calculate a penalty of $51,710. The economic benefit derived by the violator's noncompliance was also reduced in the staff calculations by decreasing the amount of square feet of asbestos involved. The Regional attorney related, "We were already compromising ourselves to death here..." The responsible Air Division staff member attempted to reduce it to less than $33,000, in order to get the Regional Administrator's approval for the referral. However, the Regional attorney and other staff disagreed, and stated that $51,710 was the lowest penalty amount that should be presented to the Regional Administrator.

On September 26, 1989, the Regional Administrator signed the referral with a $51,710 penalty. This represented only 13 percent of the $400,000 that was calculated by the Regional attorney following OECM's penalty policy direction.

During their review of the referral, OECM rejected the Region's penalty calculation. They advised the Region to recalculate the penalty taking into account that the Region's calculation: (i) had used an outdated penalty policy; (ii) had not appropriately considered renovation violations; (iii) had not adequately considered continuous demolition violations; (iv) had not considered second and subsequent demolition violations; (v) had understated estimates of the number of units of asbestos; and (vi) had not considered that a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) violation was involved.

The Air Division staff generally agreed with OECM's comments. Accordingly, they calculated five different penalty amounts ranging from $182,280 to $458,780. The staff decided on $280,580 as the upper penalty amount, and after taking into account litigation practicalities, reached a bottom line figure of $145,580. On January 31, 1990, the Regional Counsel obtained a tentative approval from OECM that the $145,580 amount could be referred to the Department of Justice.

Castle Rock School District

This case involved air asbestos violations at the Castle Rock High School, Washington, during the replacement of its heating, ventilation, and air conditioning units. A consultant hired by the school advised them of the asbestos danger, and of the importance of adhering to all EPA and State rules regarding the renovation work. In June of 1988, the school district began contracting for the remodeling project, but told the contractors there was no asbestos in the project. The contractor, therefore, did not remove the asbestos ceiling insulation prior to the air conditioning system removal. As a result, friable duct wrap and spray-on ceiling insulation were released. During remodeling, the asbestos debris fell on furniture, fixtures, carpeting, and ceiling tiles inside the building. This resulted in the exposure of school employees, students, and contractor employees. Subsequently, some school employees were further exposed during the sweeping and vacuuming of the asbestos material. The asbestos exposure to the students lasted from July 13 through July 21, 1988.

On August 11 and 18, 1988, the Washington State Department of Labor and Industries performed inspections at the school and found numerous work practice violations. The school district then commenced an emergency cleanup of the building. The State referred the case to the Region for action because of the flagrant nature of the students' exposure. In February 1989, the Region conducted a follow-up inspection, and concluded that asbestos contamination at the facility continued through at least February 1989. In early August 1989, the responsible Air Division staff person and a Regional attorney developed a data sheet for the referral, and calculated penalties ranging from $47,500 to $116,670. It was believed that a range of penalties posed a better chance of being approved by the Regional Administrator.

On August 9, 1989, the Branch Chief and the Regional Counsel briefed the Regional Administrator on the case and the recommended penalty range. Based on our interviews, we found the results of this briefing were similar to that of the Ralston-Purina case. The Regional Administrator rejected the entire range of penalties as too high, and offered $25,000 as a maximum penalty. He reportedly did not want the community to have to be burdened by a large penalty, as well as the cleanup costs for the asbestos contamination. The EPA penalty policy was not considered in the Regional Administrator's actions. The Regional Administrator's position was not surprising, since the responsible Air Division staff person had indicated that she had preliminary discussions with him before the August 9, 1989, briefing. At that time, the Regional Administrator indicated that he did not want to refer the case.

At the direction of the Branch Chief and Regional Counsel, the Air Division staff recalculated the penalty to a lower amount to attempt to satisfy the Regional Administrator's demands. By combining violations and deleting violations, the penalty calculation was reduced down to $27,500. The Regional Administrator then signed and approved the referral for this amount.

Although the asbestos penalty policy was revised effective August 22, 1989, the Air Division staff did not revise the calculated penalty. Upon their review of the referral, OECM rejected it and advised the Region that "The facts as documented in the litigation report would support. . .additional claims and allegations. . . ." In addition, they advised the Region to recalculate the proposed settlement penalty taking into account these additional issues. The recalculation was not accomplished, since the civil referral case has been suspended, pending the completion of a criminal case against the school superintendent. In our opinion, the recalculated penalty will likely exceed the $116,670 originally calculated.

In the process of reducing the penalty, the overall complaint against the school district was lessened. The Region, instead of claiming continuing asbestos violations for the period July 13, 1988, through February 2, 1989, included only one day of violation in the referral. On this basis, and by reducing the number of violations involved, the Region was able to diminish the significance of the penalty amount. It should be noted that the civil referral is currently in suspension, pending the completion of a criminal case against the school district's superintendent.

George Fox College

This case involved the renovation of a library on the college campus in Newberg, Oregon. The renovation began November 23, 1987. It included the removal of basement pipe insulation and large sections of acoustical tile on three floors. These products contained friable asbestos. In response to an anonymous complaint, the Oregon State Department of Environmental Quality (the State) conducted an inspection on March 24 and 25, 1988. The State found the library open to the public with piles of asbestos debris and dust throughout three floors of the library. In addition, it was noted that the library had been used by students during the period November 23, 1987, through March 28, 1988, during the renovation activity. Violations of notifications, work practices, and disposal standards were identified. After the completion of another State inspection on March 28, 1988, the library was closed. The college started the clean up a few days later, completing the project on September 1, 1988. The State then initiated action to assess civil penalties for the violations of the State asbestos requirements. However, on the basis of a procedural technicality, the State's case was dismissed. The State was unhappy with the dismissal and commented that ". . .this was grave misinterpretation of their asbestos regulations and requested EPA take enforcement action. . . ."

In early August 1989, the Region's Air Division staff calculated a proposed penalty of $132,000. However, the basis for the calculation was not retained. On August 9, 1989, the Air Branch Chief and the Regional Counsel briefed the Regional Administrator on the referral and the recommended penalty of $132,000. The Regional Administrator reportedly rejected the recommended penalty as too high, and suggested a maximum penalty of $25,000.

The staff was directed by the Regional Administrator to recalculate a lower penalty. Although the staff believed the case was very serious due to student exposure over a 4 month period, they proceeded to calculate a reduced penalty as directed. They recalculated a $43,750 penalty amount by combining violations, and using the outdated penalty policy. The Regional Administrator subsequently signed the referral package and it was forwarded to OECM on September 30, 1989. On October 25, 1989, OECM rejected the Region's penalty amount and recommended several other changes. Consequently, the Region recalcu-lated the penalty amount at $131,250, and obtained OECM's approval to refer the case to the Department of Justice.

5 - CLEAN WATER ACT SECTION 304(L) LIST STATE OF ALASKA

ALLEGATION

It was alleged that the Regional Administrator approved the State of Alaska's (the State) "long" list of environmentally impaired waters submitted in accordance with section 304(L) of the Clean Water Act (the Act), although the list was incomplete. It was also alleged that the Region and the State came under intense political pressure from some industries to exclude certain waters from the list. The allegation also indicated that the Assistant Regional Administrator for the Alaska Operations Office (ARA-AOO) interceded with the Regional Administrator to persuade him to approve the incomplete list. The allegation indicated that because of the ARA-AOO's intervention, the Region's Water Division was removed from the decision making process of whether the Region would approve or disapprove the State's list.

BACKGROUND

Section 304(L) was added to the Clean Water Act as part of the Water Quality Act of 1987. The purpose of section 304(L) was to reinforce the identification and control of discharges of certain priority pollutants to all waters, and was a one-time program. Section 304(L) required that all States submit four lists to EPA that identified all waters affected by discharge of priority pollutants from either point or nonpoint sources by February 4, 1989. The four lists pertained to the following waters:

- Waters where water quality standards with State adopted numeric criteria for priority pollutants due to either point or nonpoint sources are not achieved. This list was known as the "mini" list.

- Waters which were impaired or were expected to be impaired by point or nonpoint source discharges of toxic, conventional, or nonconventional pollutants. This list should include all waters not meeting the goals of the Clean Water Act. This list was known as the "long" list.

- All waters which cannot achieve either numeric or narrative water quality standards due to discharges of priority pollutants from point sources. This list was known as the "short" list.

- For each water listed on the above short list, a determination of the point source of the discharge and the amount of such discharge.

Waters on the "mini" or "long" lists would also be included on the list of waters required by section 303(d), and would be the focus of the following additional control actions: National Pollutant Discharge Elimination System (NPDES) permits; section 319 management plans; and new water quality standards for toxic or nontoxic pollutants under section 303.

If EPA approved a State's submittal and determined that no additional public participation was necessary, the decision was final. If EPA disapproved a State's submittal, EPA was to work with the State to develop lists that were acceptable. In reviewing the State's lists, EPA was required to review documentation of how the lists were developed, the sources of information used, and the rationale for including or excluding items from the lists. Congress did not intend for States to develop water quality standards prior to listing, nor did it provide the time for lengthy monitoring and evaluation. The intent was to rely on existing information, other Federal or State agencies, and other sources to determine if the water should be listed. If there was reason to believe that the water was impaired or could be impaired, it was to be listed. This reliance on existing data and the wording of the Act imply the use of "best professional judgement" in determining if the waters should be included. Among specific items to be used in developing the lists were the Section 305(B) Water Quality Assessment Report and the Section 319 Nonpoint Source Assessment Report.

Different methods were used by States to arrive at candidates for inclusion on the section 304(L) lists. The candidate list for Alaska was developed by the Region's Water Division staff, and provided to the State to review. The State submitted the "short" and "mini" lists on February 23, 1989. However, a "long" list was not submitted. The State supplemented the lists on April 12, 1989, but still did not submit the "long" list. Instead, the State indicated that it would submit a "suspect" list for waters that were not confirmed to be impaired, but were thought to be impaired. The State cited difficulties in objectively separating point source and nonpoint source contributions for the placer mining and timber harvesting industries as the reasons for not providing a "long" list. The State was advised by the Water Division staff that no distinction was necessary between waters impaired by point and nonpoint sources for the "long" list, and that a suspect list was not authorized. On May 26, 1989, the State submitted its "long" list. The list did not include any waters affected by placer mining or timber harvesting activities. The Regional Administrator approved the section 304(L) lists submitted by the State on June 9, 1989. On June 16, 1989, the State submitted a "suspect" list, the majority of which were waters affected by either placer mining or timber harvesting.

REVIEW RESULTS

Our review confirmed that the State's section 304(L) "long" list of environmentally impaired waters (the list) approved by

the Regional Administrator was incomplete, and did not comply with the intent of the Act. The Act required that all environmentally impaired or potentially impaired waters in the State be included on the list. However, the approved list included only 35 of 147 environmentally impaired or potentially impaired waters listed in the State's Water Quality Assessment Report (section 305(B) report). A total of 112 waters were, therefore, not subjected to the scrutiny and time limitations imposed by the Act. The submission of the list was a one-time requirement and there was no provision for change once it was approved.

We also substantiated that the Water Division was removed from the Region's final decision making process relating to the list. The Water Division had previously concluded that the State's list should be disapproved because all impaired waters were not included. While Water Division staff indicated that there was pressure from industries to exclude certain waters from the list, we were unable to confirm the extent of such pressure. However, in our interview with the ARA-A00, he indicated that he was aware of the State's reluctance to list waters affected by the placer mining and timber industries.

The extent of the ARA-A00 involvement in the decision making process leading to the Regional Administrator's approval of the State's list is not completely clear. The Water Division Director advised us that he had specifically discussed the State's list with the ARA-A00. The Water Division Director also confirmed that the Regional Administrator removed the Water Division from the decision making process on the State's list. The interviews also established that subsequent to the Water Division's removal, the ARA-A00 became involved in the decision making process. Interviews with Water Division staff indicated that the ARA-A00 was instrumental in the Regional Administrator's approval of Alaska's section 304(L) lists as submitted. The Water Division staff expressed their opinion that the ARA-A00 agreed with the State's perspective that a complete list was not worth the public controversy that would result by including waters affected by placer mining and timber harvesting activities, unless there was defensible evidence of impairment. In our interview with the ARA-A00, he denied any major involvement with the State's lists. During an interview with the Regional Administrator, he stated that he could not recall his involvement with the Alaska section 304(L) list. He indicated that he would normally be advised by the ARA-A00 on matters pertaining to Alaska.

Section 304(L) required the States to use existing and available information in development of the list, and to submit a description of the information used to identify the waters included. One of the existing information sources specifically mentioned was the section 305(B) report. However, the State's list did not include any of the waters identified in the section 305(B) report as impaired or threatened by placer mining or timber harvesting activities. It should be noted that the State's section 305(B) report, submitted in November 1988, listed

placer mining and timber harvesting as two of the four major causes of water pollution in the State. Yet, in submitting its list, the State justified its decision not to include waters affected by placer mining and timber harvesting as follows:

1. ". . .it is premature to include a number of nonpoint source-affected waterbodies on the Long List where questions remain as to whether impairment occurs. We expect that completion of the 319 assessment will result in a number of additional waterbodies being documented as impaired."

2. ". . .inclusion on the Long List indicates that a waterbody or defined segment of a waterbody violate one or more criteria of the Alaska Water Quality Standards. This was verified either through confirmable data collected by the department or where a reasonable expectation existed of acquiring confirmable data from other parties."

3. "The enclosed Long List differs significantly from the preliminary list given EPA in that the department's 1988 305(b) report, which included both 'impaired' and 'threatened' waterbodies. The Long List includes only those waterbodies that are confirmed to violate one or several water quality standards. This is a stronger test than that applied to the 305(b) preliminary list, which included those waterbodies thought to be impaired using best professional judgement in many cases where monitoring data did not exist."

The criteria used to determine waters to be included on the list required that waters not meeting the goals of the Act be listed. It did not require that the waters had to exceed water quality standards, or that impairment of the waters had to be documented. Instead, the list provided for the use of best professional judgement, based on existing information.

The approved Alaska section 304(L) list included only 35 of 147 environmentally impaired or potentially impaired waters. The State and the AOO suggested that one reason for this was their belief that other waters could be added to the list in future cycles. This position was incorrect, and did not recognize the fact that the development of the list was a one-time attempt to identify waters affected by primary pollutants.

As indicated above, the State did not include a number of waters affected by placer mining and timber harvesting industries. However, it is interesting to note that on June 16, 1989, one week after the list was approved by the Regional Administrator, the State submitted a "suspect" list to the Water Division. The State's letter transmitting the "suspect" list

indicated that it was provided as a supplement to the section 304(L) "long" list in order to identify waters needing further investigation to determine if water quality violations existed. This list included 112 waters, which the State indicated needed further investigation to determine if any water

quality standard violations existed. The majority of waters on this list were affected by placer mining or timber harvesting. The "suspect" list included the pollutant sources. The waters on this list were the same waters that had been previously identified by the Water Division as waters that should be included in the section 304(L) list. We consider the list to be meaningless since it did not meet the intent of the Act, but appeared to be an after-the-fact attempt to recognize the additional waters. In our opinion, this submission by the State is a further indication that the Water Division was correct in its initial finding that the State's list was incomplete. It also raises a question about the State's motives for initially excluding these 112 waters from the list. The approach taken by the State and the Regional Administrator's approval of the incomplete list allows the excluded waters to circumvent the control strategies and time schedules required under section 304(L).

6 - CLEAN WATER ACT-SECTION 304(L) LIST STATE OF IDAHO

ALLEGATION

It was alleged that the Regional Administrator approved the State of Idaho's (the State) "short" list of environmentally impaired waters, although he was aware that the list did not comply with the requirements of section 304(L) of the Clean Water Act (the Act).

BACKGROUND

Section 304(L) was added to the Act in 1987. The purpose of this section of the Act was to reinforce the identification and control of discharges of certain priority pollutants to all waters and was a one-time program. It required that all States submit four lists to EPA that identified all waters affected by discharge of priority pollutants from either point or nonpoint sources by February 4, 1989. The four lists consisted of: (i) a "mini" list, which identified waters where State water quality standards were violated by discharge of priority pollutants by either point or nonpoint discharges; (ii) a "long" list, which identified waters that were impaired or expected to be impaired by point or nonpoint discharges of toxic, conventional, or nonconventional pollutants; (iii) a "short" list, which identified all waters that could not achieve water quality standards due to discharge of priority pollutants from point sources; and (iv) a list showing the specific point source of the discharge and the amount of such discharge for each water identified on the "short" list. Section 304(L) applied to all States; however, because the State of Idaho had not adopted any numeric criteria for priority pollutants, they were not required to list any waters on the "mini" list.

EPA was required to review documentation of how the four section 304(L) lists were developed; the sources of information used; and the rationale for including or excluding items from the lists. The States were to rely on either existing information, or readily available information from other sources to develop the lists. Based on this information, the applicable EPA Regional Administrator either approved or disapproved the lists. If EPA approved the State's submittal and determined that no additional public participation was necessary, the decision was final. If EPA disapproved a State's submittal, EPA was to work with the State to develop lists that were acceptable.

For waters listed on an EPA approved "short" list, an individual control strategy was to be prepared to eliminate or control the discharge by no later than June 4, 1992. If EPA

initially disapproved a "short" list, the deadline was extended to no later than June 4, 1993.

The State's candidates for the "short" list were prepared by a contractor hired by EPA. The contractor identified three waters and point source dischargers as candidates for the "short" list. Based on additional information available at the Region, one of the candidates was subsequently dropped. However, the State informed EPA in its submittal on April 14, 1989, that it did not have any waters or point sources for the "short" list.

REVIEW RESULTS

Our review concluded that the Regional Administrator did not comply with the requirements of section 304(L) of the Act because he failed to disapprove the State's "short" list of environmentally impaired waters (the list). The Regional Administrator was unwilling to disapprove the State's section 304(L) list, even though it violated the requirements of the Act. The Water Division had previously advised the Regional Administrator that the list should be disapproved, because it did not include all environmentally impaired waters and documented point source dischargers. The Regional Administrator's authorities in the section 304(L) process were quite specific and provided for only an "approval" or "disapproval" of the list. However, in an attempt to circumvent the requirements of section 304(L), the Region's letter transmitting the list to EPA Headquarters was written in a manner that avoided disapproval of the State's section 304(L) list. The letter merely transmitted the list without an approval or disapproval. The list failed to identify all impaired waters and known point source dischargers of priority pollutants. This delayed the implementation of corrective action plans to control environmental damage that the discharge of these pollutants may be causing to the waters of the State.

When the Water Division was informed that the State would not list any waters or point source dischargers on a "short" list, the Water Division did not agree. The State indicated that it did not believe it had defensible data to support the listing of these waters and point sources on the "short" list. At that time, the Water Division concluded that there were valid reasons for including two waters and point source dischargers in order to meet the requirements of the Act. These two waters and point source dischargers are discussed below.

One of the candidates, identified by the contractor, for the "short" list was a pulp and paper mill owned by Potlatch Corporation that discharges into the confluence of the Snake and Clearwater Rivers at Lewiston, Idaho. The Snake River serves as a large portion of the border between the States of Idaho and Washington.

A joint study by EPA Headquarters and the pulp and paper industry disclosed that pulp and paper mills were a significant source of dioxin discharge. As a result of this study, EPA issued a national directive requiring that all pulp and paper mills be included on the "short" lists. Despite this directive, the State did not include the Potlatch mill on its "short" list. All of the other pulp and paper mills in the Region were on the "short" lists submitted by the States of Oregon and Washington. It is interesting to note that one of the discharge pipes from the Potlatch mill was only a few feet from the State of Washington's border. As a result, the State of Washington included the Potlatch mill on its "short" list with the annotation "for information only."

The other candidate, identified by the contractor, was a mining operation on the south fork of the Coeur d'Alene River, known as the Hecla Lucky Friday Mine. The Water Division also had sufficient documentation to warrant the inclusion of the mine on the State's "short" list, and previously advised the State of this fact. However, discussions with State personnel indicated that they did not agree with the Water Division on this issue. The State commented that industry representatives had advised them to "have all the T's crossed and I's dotted" before including any industry on the "short" list. Apparently, this impacted the State's decision not to include the Coeur d'Alene River and the mine on the "short" list.

The Water Division advised the State that their "short" list would be disapproved, if they did not revise the list to include the above two waters and point sources. The State continued to disagree and refused to revise its list. As a result of the State's omissions, the Water Division prepared a draft letter for the Regional Administrator's signature informing the State that the "short" list would be disapproved. The Regional Administrator objected to the letter, and informed the Water Division Director that he would not disapprove anything done by the State. This resulted in numerous meetings between the Water Division staff and the Regional Administrator to discuss the inadequacies of the State's "short" list and the EPA national directive requirements. Subsequently, the Regional Administrator reluctantly agreed that the Potlatch mill and the waters it affected should be added to the "short" list. He continued to refuse to include the Lucky Friday mine and its affected waters. At this point, the Water Division Director withdrew his opposition to Idaho's section 304(L) list. Although the Regional Administrator agreed that the mill should he included, he refused to sign the transmittal letter to EPA Headquarters stating that the "short" list was disapproved. Accordingly, the Region prepared a transmittal letter that attempted to circumvent the section 304(L) requirements by avoiding any reference to approval or disapproval, and instead stated that the "short" list was "Supplemented by EPA to add following...water body: Clearwater/Snake Rivers...source: Potlatch Pulp Mill." The Regional Administrator signed the transmittal letter with this language on June 9, 1989. The official decision notice, which was attached

to the transmittal letter, indicated that the "short" list was disapproved but it was unsigned. It was eventually signed by the acting Deputy Regional Administrator, who was formerly the Water Division Director.

During our interview with the Regional Administrator, he stated that he had nothing to do with the Idaho section 304(L) list. He advised that the Water Division Director and staff made all decisions regarding the list and related transmittal to Headquarters. While the Regional Administrator's comments are acknowledged, they are inconsistent with the other information that we obtained related to the allegation areas.

7 - LEGISLATIVE ENVIRONMENTAL IMPACT STATEMENT ARCTIC NATIONAL WILDLIFE REFUGE STATE OF ALASKA

ALLEGATION

There were several allegations made concerning the Region's review of the Department of Interior's draft Legislative Environmental Impact Statement (LEIS) for the Arctic National Wildlife Refuge (ANWR). The specific allegations were as follows:

1. The Regional Administrator was responsible for transferring the principal reviewer responsibility for the LEIS in the middle of the review process, from the Region's Environmental Evaluation Branch (the Branch) to the Alaska Operations Office (AOO). According to the allegation, this resulted in the Region's draft comment letter on the LEIS failing to address the consequences and alternatives to oil development, and other significant areas of environmental concern. Also, an initial draft comment letter prepared by the Alaska Operations Office allegedly did not contain an overall environmental rating.

2. The Regional Administrator advised that he wanted to give the LEIS an overall rating that was no harsher than "Environmental Concerns".

3. In the middle of the LEIS review, a branch chief and a section chief were reassigned without advance notice or explanation.

4. The Regional Administrator requested the firing of the regional employee that prepared a chronology of events for the ANWR site; which was obtained by a Seattle newspaper under the Freedom of Information Act.

BACKGROUND

Congress created 16 wildlife refuges in the State of Alaska under Public Law 96-487, the Alaska National Interest Lands Conservation Act (ANILCA). ANWR is one of these wildlife refuges. Each of the refuges is managed for specific purposes. The purposes of ANWR are to: conserve fish and wildlife populations and habitats in their natural diversity; fulfill the international treaty obligations of the United States with respect to fish and wildlife in their habitats; provide the opportunity for continued subsistence use by local residents; and ensure, to the maximum extent practicable, water quality and necessary water quantity within the refuge.

Section 1002(h) of ANILCA directed the Secretary of the Department of the Interior to prepare a report to Congress containing "...the recommendations of the Secretary with respect to whether further exploration for, and the development and production of, oil and gas within the coastal plain (of ANWR) should be permitted, and, if so, what additional legal authority is necessary to ensure that the adverse effects of such activities on fish and wildlife, their habitats, and other resources are avoided or minimized."

Section 1003 of ANILCA states that "Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to the production of oil and gas from the range shall be undertaken until authorized by an Act of Congress."

The Department of Interior prepared the LEIS in conjunction with its ANWR report to Congress (the ANWR report was required by section 1002(h) of the ANILCA). EPA is responsible for reviewing both the draft and final LEIS. EPA's LEIS review is normally conducted by Headquarters' staff due to national significance and public interest. For the ANWR LEIS, Headquarters assigned Region 10 the principal reviewer responsibility due to (i) the Region's experience in reviewing petroleum related activities in the State of Alaska; and (ii) the fact that the proposed activities would occur exclusively within the Region's geographical area.

EPA guidance for conducting Environmental Impact Statement (EIS) reviews is contained in EPA Manual 1640. The Manual defines a principal reviewer as a person designated to coordinate the review of the action and to prepare the EPA comment letter. The principal reviewer is responsible for ensuring that: (i) the views of other involved EPA offices are adequately represented in the comment letter; and (ii) the comment letter is consistent with Agency policy, and reflects all applicable EPA environmental responsibilities.

The Region's normal procedure is to assign a staff person in the Water Division as the principal reviewer of an EIS. The principal reviewer is responsible for consolidating the issues and discussing them with Regional management, including the Regional Administrator, if required. Subsequently, the reviewer normally drafts the comment letter for review and signature. Depending on the nature and complexity of the EIS, associate reviewers may also be assigned.

REVIEW RESULTS

Our conclusions on the allegations are limited to the extent that the Region's records on its decision making process during the review of the LEIS were deficient. In this regard, there was a lack of documentation as to the assignment of review responsibilities and the preparation of the comment letter. In addition, our interviews with regional management and staff frequently

resulted in inconsistent information. However, it is our opinion that the Region did not manage its review of the LEIS in a manner appropriate to the environmental significance of the area. The Region also did not assure that potentially significant environmental concerns were fully presented in EPA's comment letter to the Department of the Interior.

Our conclusions with respect to the individual allegations follow.

Allegation 1

Transfer of Principal Reviewer Responsibility

When the Region was assigned the LEIS review in November 1986, it followed normal procedures and assigned a principal reviewer from the Branch. At about that time, an associate reviewer was also apparently assigned from the AOO. In mid-January 1987, or about three weeks before the final comment letter was issued to the Department of the Interior by the Regional Administrator, the principal reviewer responsibility was transferred to the AOO. Up to that time, or for about two months, the Branch had fulfilled the principal reviewer responsibility. The transfer of responsibility was not officially conveyed to staff in either the Branch or the AOO. There was a great deal of confusion with respect to the transfer of responsibility. The transfer occurred within a couple of days after a briefing provided by the Branch's principal reviewer to the Regional Administrator. The principal reviewer's briefing was critical of the LEIS. According to the principal reviewer, she believed that the LEIS was sufficiently deficient to be rated "Environmentally Unsatisfactory".

During our interview, the Water Division Director advised that the transfer had occurred. The Water Division Director also stated that this was the only instance that he could recall in which an operations office in Region 10 fulfilled the principal reviewer role in an EIS type review. It is interesting to note that the AOO had apparently never before functioned in a principal reviewer capacity on an EIS and was inexperienced in that role.

During our interview with the ARA AOO, he advised that his office had been assigned principal reviewer responsibility at the beginning of the LEIS review. The ARA-AOO's comments are inconsistent with the Water Division Director's position as well as that of Water Division staff. Our interview with the Regional Administrator confirmed that he made the assignment to the AOO after the mid-January briefing. The Regional Administrator indicated that he made the transfer in order to utilize the AOO's expertise, and because he did not consider the Branch's principal reviewer to be objective.

While the principal reviewer responsibility was transferred, no explanation or notification of the reassignment was given to

the regional staff. This is most evident from the AOO staff members' response to a January 29, 1987, memorandum that the Branch sent to them. On February 4, 1987, the AOO advised the Branch that "AOO recently received a memo...indicating that the function of principal reviewer for the referenced document was located in this office...The principal reviewer function remains with EEB." This position was contrary to the statement made by the ARA-AOO that it was agreed at the beginning of the process that his office would serve as the principal reviewer for the LEIS. In the meantime, the Branch staff also continued to perform work on the LEIS, including discussions with Headquarters up to the time of the Regional Administrator's comment letter, that participation was informal and was performed without the knowledge of the Regional Administrator.

Comment Letter on the LEIS

An initial draft comment letter was prepared by the AOO and submitted by the Region to EPA Headquarters for review on January 29, 1987. This initial draft did not address the consequences and alternatives to oil development, and several other objections considered significant by the Branch. Also, this draft comment letter did not contain an overall environmental rating.

Another draft comment letter was submitted to Headquarters for review on February 4, 1987. This draft also did not address the consequences and alternatives to oil development, and several other environmental concerns considered significant by the Branch. The draft included an overall environmental rating of "Environmental Concerns" on the development alternative of primary interest (i.e., Full Oil Leasing). Headquarters review of this draft recommended some significant changes. With respect to the overall environmental rating, Headquarters recommended that a more critical rating of "Environmental Objection-Insufficient Information" be given to the LEIS.

The EPA final comment letter to the LEIS was signed by the Regional Administrator on February 6, 1987. It included an environmental rating of "Environmental Objection-Insufficient Information." However, our comparison of the final letter with the concerns initially expressed by the Branch and Headquarters review comments disclosed that some specific concerns were not addressed. During our interview with the Regional Administrator, he stated that he believed that all environmental concerns were covered in the final comment letter and attachments accompanying the letter.

The final comment letter and attachments failed to convey the importance of ANWR's environmental issues concerning fish and wildlife habitats, and other resources. Instead, the Region justified the absence of any substantive comments with the following statement: "...EPA did not expect the document to contain the level of detail normally found in project-specific impact statements. That level of detail would be provided later

in subsequent impact statements if Congress were to approve, as a matter of policy, that the leasing should proceed." It should be noted that there is some question about whether subsequent impact statements could be required. In this regard, the draft LEIS specifically stated that this LEIS would be the only environmental document submitted on all pre-leasing decisions, stipulations, and any required mitigation.

Illustrations of specific areas of environmental concerns considered significant by the Branch but not adequately addressed in the final comment letter are presented below.

Mitigation. The mitigation issue was not adequately addressed in the final comment letter. This area was only briefly mentioned in the final comment letter, although a significant mitigation issue existed which was not commented on. Specifically, the ANWR project violated the Department of Interior's own policy on mitigation. In this respect, the caribou calving area had been classified by the Fish and Wildlife Service as a "Resource Category - 1", the highest classification given by the Fish and Wildlife Service. The goal for such a resource was "no loss of existing habitat value." The only acceptable mitigation in this category was the avoidance of impacts.

Loss of Habitat. The LEIS commented that construction and operation of oil production facilities would result in the total loss of 32 percent of the most critical core caribou calving habitat in the area. These projections translate into the complete loss of habitat value for more than 78,000 acres within the Resource Category 1 area. This habitat loss was not addressed in the Region's final comment letter.

Oil Prices and Offshore Oil Sites. The final comment letter did not comment on the oil prices used to compute the value of ANWR reserves. Branch staff had advised they considered them overstated. There was also a lack of analysis of offshore oil sites as alternatives to development of the ANWR site.

Allegation 2

Overall Environmental Rating

We could not confirm whether the Regional Administrator advised that he wanted to give the LEIS an overall rating that was no harsher than "Environmental Concerns (EC)." However, in a chronology of events prepared by the Water Division's principal reviewer, she noted that "Management indicated there was no way we were going to rate this EIS Environmental Objectives (EO), maybe EC." As discussed earlier, the initial draft comment letter prepared by the AOO and sent to Headquarters by the Region did not include any overall environmental rating. The February 4, 1987, draft comment letter that was sent to Headquarter's for review contained this proposed rating. As indicated previously,

Headquarters advised that they considered an "Environmental Objections" rating necessary for the "Full Leasing Option" alternative presented in the LEIS. During our interview, the Regional Administrator stated that he had no predisposition on a rating for this LEIS.

Allegation 3

Staff Reassignments

A section chief was reassigned at about the time the final comment letter was issued on February 6, 1987. According to the Section Chief, the reassignment was made on short notice and he was not advised of the reason for the change. The Section Chief believed that the transfer was accom-plished because of his objection to the Region's handling of the LEIS. During our interview of the Water Division Director, he confirmed that he transferred the Section Chief to a less visible position. The Director stated that the transfer was not based solely on the Section Chief's performance during the LEIS review, but on his performance over an extended period of time.

A branch chief resigned her position in the Region at about the time of the final comment letter. She cited the Region's actions on the LEIS as her reason for leaving. She stated that she was being intentionally excluded from discussions with the Water Division Director and the Regional Administrator on this LEIS. For this reason, she believed she could no longer function effectively in her position and resigned.

Allegation 4

Request for Firing of an Employee

We did not develop any information to support the allegation that the Regional Administrator requested that the regional employee that prepared a chronology of events for the ANWR site be fired. The employee is currently employed in the Region's Water Division.

8 - NATIONAL ENVIRONMENTAL PROTECTION ACT-EIS AND CLEAN WATER ACT-SECTION 404 WETLANDS PERMIT NAVY HOMEPORTING, STATE OF WASHINGTON

ALLEGATION

The allegation suggested that the Regional Administrator influenced the Region's final decision which concluded that the Supplemental Environmental Impact Statement (SEIS) for the Navy's plans to build a homeport for its carrier battle group in Everett, Washington met basic National Environmental Policy Act (NEPA) requirements.

It was also alleged that the Region had significant environmental concerns about the project's proposed disposal site for dredge material, and its effects on a dungeness crab breeding habitat. It was further alleged that the Region was aware of other alternative sites with less severe environmental impacts, but did not discuss these sites in its final response to the SEIS and section 404 dredge permit application (under the Clean Water Act). In spite of these environmental concerns, it was alleged the Region did not oppose the section 404 permit; thus giving up its authority to further impact the project. This left the decision on the section 404 permit to the Army Corps of Engineers (the Corps), the U.S. Navy, and the Washington State Department of Ecology (the State) for assuring proper handling of dredge material expected from the work necessary to homeport the carrier battle group in Everett.

BACKGROUND

In 1985, the Navy prepared a draft environmental impact statement discussing its plans to build a permanent homeport for a carrier battle group in Everett, Washington. To accommodate the Navy vessels, extensive dredging of the harbor's East Waterway would be required. It was the Navy's intent to dredge approximately 3.3 million cubic yards of sediment from the East Waterway and dispose of the dredged material at a site in Port Gardner Bay at depths of 300 to 400 feet. The area to be dredged had been a repository for industrial wastes and a two to six foot deep layer of thick "soup" covered the bottom of the waterway. About one-third of the dredged material was expected to contain contaminants such as heavy metals and hazardous waste materials. The Navy proposed to dispose of the contaminated sediment from the dredging operation by use of a disposal technique called Confined Aquatic Disposal. This disposal method had been successfully used at depths of less than 100 feet. However, the Navy modified this technique for use at depths of 300 to 400 feet. The Navy called the new procedure Revised Application Deep Confined Aquatic Disposal. The revised technique provided for

the dumping of contaminated sediment into a defined aquatic environment followed by placement of a layer of clean sediment on top of the contaminated sediment. Theoretically, the clean sediment would "cap" and isolate the contaminated material from the marine environment.

The original site selected by the Navy for disposal of the contaminated dredge material was an environmentally sensitive area that served as a breeding ground for dungeness crabs and other bottom dwelling marine life. The dungeness crab population is the largest in the Puget Sound area, and protection of this area was considered critical to the continued health and survival of the dungeness crab population.

Under the National Environmental Policy Act of 1969 (NEPA), major actions significantly affecting the quality of the environment are to be coordinated between agencies having jurisdiction by law or special expertise on the environmental issues. Accordingly, the Navy was required to prepare an Environmental Impact Statement (EIS) for the homeporting project. As a result of comments from interested parties to the original EIS, the Navy subsequently prepared a supplemental EIS. The basic purposes of an EIS are to:

1. Provide decision makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of the environmental consequences.

2. Provide the public with information and opportunity to participate in gathering information concerning the environmental impact of the project.

Additionally, the Navy was required to apply for a permit under section 404 of the Clean Water Act (the Act). Section 404 of the Act establishes the basic requirements for protection of wetlands. The Act also authorizes delegated States to assume certain responsibilities that can directly affect the issuance of section 404 permits. Under section 401 of the Act, delegated States are required to issue a water quality certification or a waiver of certification before the Corps may issue a section 404 permit.

A brief chronology of the key events which occurred under the Navy homeporting project are discussed below:

- September 26, 1985. The Navy submitted a draft EIS and an application for a section 404 permit to the Corps.

- November 14, 1985. The Region commented on the draft EIS and section 404 application, and indicated that the EIS did not contain sufficient information for the section 404 evaluation.

The Region recommended a supplemental EIS be provided. As a result, the Corps notified the Navy that the application was inadequate and that a SEIS needed to be submitted.

- July 15, 1986. The Navy submitted a draft SEIS.

- September 2, 1986. The Region commented on the draft SEIS, and indicated that several major issues needed to be resolved. Specifically, the Region objected to (i) the site selected for deposition of the dredged material; (ii) the potential unauthorized greywater discharge from the ships; (iii) tributyltin (TBT) contamination from the ship hulls, which may have significant long term toxic effects on the water; (iv) the location selected for loading and unloading the fuel barge; and (v) the proposed air pollution analysis which was inadequate to predict air quality. The Region concluded that it was unable to support issuance of the section 404 permit, and rated the EIS as "Environmentally Unsatisfactory-Insufficient Information."

- December 15, 1986. The Region issued its comments on the final SEIS, and indicated that it fulfilled the basic NEPA requirements. It further commented that the Region would no longer object to the section 404 permit, if certain monitoring concerns were included in the Corps permit.

While the Region withdrew from the EIS and section 404 permit processes, other Federal agencies, including the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), continued to object to issuance of the section 404 permit. Both agencies threatened to escalate the issue to the Council on Environmental Quality. In order to satisfy the concerns of these Federal agencies and the State, the Corps and the Navy initially agreed to negotiate a stringent monitoring program. The program was to be designed to evaluate the effects of the revised Confined Aquatic Disposal Method during phase I of the project, as suggested in EPA's final comments. When the final section 404 permit was issued, it did not incorporate the monitoring condition which EPA had considered essential in its final comments. It soon became apparent to the other agencies, and to other interested parties as well, that the Navy had no intention of implementing a stringent monitoring program. As a result, a number of environmental groups filed a lawsuit, as a means of overturning the Corps' decision to issue the permit. Subsequently, in August 1988, the United States District Court, Western Division issued a permanent injunction. The injunction stated that, if the dredging continued as planned, there was significant risk of major "irreparable environmental damage." Additionally, the section 404 permit issued by the Corps under section 404 of the Act was "set aside" by the court. The court praised the FWS and the NMFS for "standing tall" to protect the environment from serious harm. The interested parties are now trying to reach an accord with the Corps and the Navy which would allow the project to proceed with adequate environmental safeguards.

REVIEW RESULTS

Our review did not corroborate the allegation concerning any undue influence by the Regional Administrator. In this regard, the Regional Administrator noted that the homeporting project was well along when he arrived at the Region. He commented that he believed that a good environmental decision was made on this project.

The Water Division Director accepted full responsibility for the Region's position on the homeporting project in the final response to the SEIS and section 404 permit application. However, the Region had significant environmental concerns at the time it advised the Corps that it would not oppose the section 404 permit application. Also, the Region's comments on the final SEIS did not discuss alternative sites, although it was aware of sites with less severe environmental impacts from dredge material disposal. With these environmental concerns, it is unclear why the Region gave up its opposition to the section 404 permit application and its authority to further impact the process. The reasons for the reversal of the Region's initial position that it could not support issuance of the section 404 permit and recision of its unsatisfactory rating on the SEIS were neither adequately documented, nor supported by available project information.

Our review disclosed that the Region's position significantly changed on the environmental acceptability of the Navy homeporting project between the time of its review of the draft EIS, draft SEIS, and the final SEIS. In responding to the initial draft EIS in November 1985, the Region commented that it contained insufficient information because of its potential adverse effect on a fertile dungeness crab breeding area and rated the EIS as Environmentally Unsatisfactory. Although the proposed site was subsequently relocated, it was still adjacent to the crab breeding area. For this reason, the Water Division staff, the FWS, and the NMFS continued to disagree with the proposed site. The Region also recommended that an SEIS be performed. As a result, the Corps required the Navy to perform a SEIS. However, in its September 2, 1986 comments, the Region also noted several major concerns with the draft SEIS. It also rated the project as "Environmentally Unsatisfactory-Insufficient Information." The Region stated that ". . .if the final Supplemental EIS does not modify the proposal to utilize confined aquatic disposal of the contaminated material at the Deep Delta Site as the proposed action, EPA will have to seriously consider referring the matter to the Council on Environmental Quality. . . ." This conclusion was based primarily on the lack of information available on the proposed method of dredge material disposal and its potential impact on the dungeness crab and bottom fish resources in the area proposed for deposition of the contaminated waste. Although there were several other items of concern, the potential decimation of the dungeness crab habitat was the most critical issue.

The Region's response to the final SEIS, dated December 15, 1986, stated that "The SEIS for the most part accurately identifies the environmental impacts associated with the various project alternatives. As such, we believe the SEIS generally fulfills basic NEPA responsibilities." The Region's final response also contained six conditions which it considered essential, and suggested that they be included into the Corps' section 404 permit. These conditions were: (i) require compliance with dredging and disposal monitoring requirements and standards; (ii) prohibit dredging and disposal until monitoring program was incorporated into the section 404 permit; (iii) no dredging and disposal until sediment analysis performed; (iv) no second phase dredging and disposal until the revised disposal technique has been demonstrated to be effective in isolating contaminants from the aquatic environment; (v) no ship with tributyltin on its hull will be allowed to be moved until a monitoring plan has been developed and is in place; and (vi) all fueling barge loading and unloading should occur within the confines of the East Waterway. According to Water Division staff, these conditions were not incorporated into the section 404 permit issued by the Corps.

The change in the Region's position from opposing issuance of a 404 permit to agreeing to a permit with certain conditions appeared to be based on two factors. First, most of the environmental concerns, other than site location, were resolved to the satisfaction of the regional staff. Second, the Navy agreed to move the dredge disposal site to a location slightly away from the highest concentration of dungeness crab. However, the disposal site remained adjacent to the crab breeding area. The final EPA comment letter on the SEIS recognized the continued threat to the crab population, and noted that "...the proposed disposal site is located adjacent to the high value crab area. As such, there is a risk of significant adverse impacts to the crab and bottom fish resources in Port Gardner if the technology does not perform as proposed." Information in the Region's files indicated that the Corps had actually tested the revised confined aquatic disposal technique with unsatisfactory results. In the tests, the deposited material drifted over a large area before it settled. The Corps claimed the same result could not occur on this project due to the difference in the marine environment. They explained the proposed site had lower speed currents and less tidal impact. Our interviews with regional staff confirmed their continued environmental concern about the acceptability of the proposed dredge material disposal method so close to the crab breeding area. They were not satisfied that the Corps' explanation resolved their concerns. Accordingly, the Region's change in position on the SEIS and the 404 permit does not seem to reconcile with their environmental concerns.

In addition, the Region's response to the final SEIS did not comment on use of an alternative site. Instead, the Region accepted the proposed dredge material disposal site on speculation that an effective monitoring program would be established. The Water Division staff and FWS had proposed Smith Island as a

practical alternative with the least potential for an adverse environmental impact. However, this alternative was not considered in the Region's final response to the SEIS.

During our interview with the Water Division Director, he indicated that he believed his staff had voluntarily changed their objections to the location of the project site. He also indicated that they accepted the use of the revised disposal technique which the State would require the Navy to implement on a phased approach basis. However, in our discussions with Water Division staff, they indicated that the change in their position on the project was made in recognition that Water Division management would not support the staff recommendation for an alternative disposal site. In essence, the staff took the position that, since they could not influence the decision on the site, they would attempt to achieve the least environmentally damaging project acceptable to regional management. The staff advised they continued to be opposed to the project because: (i) there were significant gaps in the information provided by the Corps in support of the project; (ii) the dredge disposal method was unproven; (iii) the monitoring plan was lacking; and (iv) there were uncertainties on the effect of the project on marine life and water quality in the Puget Sound area. The position of the regional staff is best summarized by the staff person initially responsible for the review of the Navy home-porting project under section 404 of the Act. In reviewing the Region's comment letter on the final SEIS before its issuance, he stated "I do not believe that this draft accurately reflects the appropriate EPA position on project compliance with 404(b)(1) Guidelines and, therefore, does not constitute fulfillment of our responsibilities under the Clean Water Act."

The Water Division Director also advised us that he and the Regional Administrator had decided to support the project based on assurances provided by the Navy and the Corps on the use of the revised disposal method. According to the Division Director, the assurances were made verbally. There was no written documentation supporting these assurances.

Upon the Region's issuance of its final comment letter on the SEIS and 404 permit application, the Region gave up its authority to further impact the project. Although the Region's final response supported a stringent monitoring program by no longer objecting to the permit, it did not have any authority to assure that an effective monitoring program was initiated. Also, regional staff advised us that they were directed by the Water Division Director not to provide further assistance in the monitoring aspects of the project. The Division Director indicated that this role was a function of the delegated State agency. Accordingly, development of the monitoring program was left to the Navy, the Corps, other Federal agencies, and the State. In order to get the project underway, the other Federal agencies and the State agreed to allow the Corps to issue the section 404 permit without including the monitoring requirements suggested by the Region in their final comment letter.

Purportedly, the Corps and the Navy gave assurances that the monitoring program would be established. However, subsequently, the Navy changed its mind about establishing the monitoring program. This eventually led to a lawsuit by a number of environmental groups. The U.S. Western District Court stated that "the Corps and the Navy failed to satisfy their NEPA obligations because they did not provide 'a environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of the environmental consequences'." The court also ruled that they failed to provide "the public with information and an opportunity to participate in gathering information'." The U.S. Court concluded that "...the court must set aside as arbitrary and otherwise not in accordance with law the Corps finding that RADCAD would not result in any significant degradation."

9 - CLEAN WATER ACT-SECTION 404 WETLANDS PERMIT NISQUALLY FISH HATCHERY STATE OF WASHINGTON

ALLEGATION

It was alleged that the Regional Administrator interceded in the Army Corps of Engineers (the Corps) section 404 wetlands permit review process for the Nisqually Fish Hatchery (the hatchery). According to the allegation, this resulted in favorable treatment by the Region on the permit application. It was also alleged that substantial efforts were made by the Region's Water Division Director to circumvent normal procedures in the review of the hatchery permit. In addition, it was suggested that the Region's final comment letter to the Corps did not ensure adequate protection of an important wetland area.

BACKGROUND

Planning for the Nisqually Fish Hatchery began in 1980 with a joint request to Congress for Federal funding from the Nisqually Indian Tribe and the State of Washington. Funding for feasibility studies and design was made available in fiscal 1981 through a line item under the Fish and Wildlife Service (FWS) budget. The feasibility study found that the Clear Creek site was suitable for a hatchery facility. In this regard, Clear Creek has been acclaimed as a prime location for a salmon hatchery. Specifically, it has a high quality water; a sufficient quantity of water; a location near a tribal fishery; and is a potential contributor to other treaty and non-treaty sport and commercial fisheries in the Puget Sound area. In addition, the hatchery site is located on Federal property. Subsequent congressional appropriations were made to FWS in fiscal years 1986, 1987, and 1989 for phased construction of the hatchery.

An Environmental Assessment (EA) was prepared by FWS and the Nisqually Tribe for the proposed hatchery. The EA, dated June 1989, recognized that a section 404 permit would be required because of dredge and fill activities in regulated wetlands. The project also would require a water quality certification under section 401, and a National Pollutant Discharge Elimination System (NPDES) permit for operation of the facility.

On June 20, 1989, the Nisqually Tribe applied for a section 404 permit to construct the hatchery. The Corps issued the public notice for the Nisqually Fish Hatchery permit on August 11, 1989. The 156 acre site included 48.3 acres of wetlands, encompassing free flowing streams, ponds, emergent marshes, and forested wetland habitats. The construction of dikes and dams for the hatchery involved filling 7.3 acres of

wetlands. The two resulting forebays (impoundments) would inundate an additional 13.6 acres of wetlands and isolate 1,700 feet of viable salmon spawning habitat. The proposed mitigation included a 20 by 2,000 foot spawning channel to mitigate the loss of up-stream salmon spawning habitat. In addition, 8 acres of wetlands were to be naturally established on the dikes and shallow areas of inundated uplands on the periphery of the forebays.

Regional staff had been aware of the proposed project since 1988, but relied on the other resource agencies to assure that the necessary steps in the project review process were fulfilled. The regional staff initially believed that an Environmental Impact Statement (EIS) would be prepared on the project. Therefore, the regional staff did not become involved in the early stages of the project. In fact, it was not until the public notice was issued on August 11, 1989, that the Region became significantly involved in the project.

After reviewing the public notice, the Region, on August 28, 1989, submitted a request to the Corps for additional information on the project's impacts. The Region also requested that the permit be "...held in abeyance for a time sufficient to allow the applicant to supply this information for resource Agency review. If the information is not supplied in the allocated time, we request this permit be denied." Although the requested information was not received, the Region dropped its opposition to the project, as confirmed in a letter to the Corps from the Water Division Director dated December 14, 1989. The letter included a suggestion encouraging the Corps to negotiate additional compensation to mitigate the loss of the wetlands.

As of February 1, 1990, the Corps had not approved the section 404 permit for the Nisqually Fish Hatchery. The Corps representatives advised us that the mitigation proposal to offset wetland losses remained inadequate, and that they were continuing to negotiate for additional mitigation. The Corps representatives advised us that the Region's expertise and support were sorely missed in this process.

Section 404 of the Act established the basic requirements for protection of wetlands. The implementing regulations are set forth in 33 CFR 320 through 330 and in 40 CFR 230 through 233. The provisions of 40 CFR 230 are particularly important, since they contain the guidelines established by EPA for the Corps to use in evaluating proposed section 404 projects. These guidelines were developed pursuant to section 404(b)(1) of the Act. In addition, section 404(q) of the Act requires the Corps to enter into agreements with various Federal agencies, which would minimize to the maximum extent practicable, duplication, needless paperwork, and delays in issuance in permits.

The EPA and the U.S. Army, at both the national and local levels, have entered into specific agreements which govern implementation of various aspects of the program. In November

1985, the EPA Administrator and the Secretary of the Army entered into a Memorandum of Agreement (MOA) implementing the requirements of section 404. The MOA established the roles of each Agency; a process to resolve conflicts at the local level; and a process of escalation of conflicts when disagreements could not be resolved. If, after following the MOA process, the Corps and EPA continue to disagree over the issuance of a section 404 permit, the provisions of section 404(c) give EPA the authority to veto the project.

REVIEW RESULTS

We found no evidence to support the allegation that the Regional Administrator interceded in the decision making process on the hatchery permit application. Our review of the Region's project records disclosed that there was an absence of documentation supporting the basis for the Region's decision on the hatchery permit application. However, our interviews with Water Division personnel did not support the allegation that the Regional Administrator interceded.

The Water Division Director accepted full responsibility for the Region's decision. While several decisions with respect to early involvement in the permit process were attributable to the Water Division staff, the Division Director made the final decision to drop EPA's opposition to the project. This decision was made even though the Water Division's staff and the Corps continued to oppose the project. The Division Director's decision was based on his opinion that any additional effort would be wasted.

It is the opinion of Water Division staff that the Division Director allowed the normal section 404 permit review process to be circumvented. The Region had several opportunities to minimize the impact of the degradation of wetlands by the hatchery project, but did not adequately fulfill its responsibilities under the section 404 permit process. In this regard, the Region did not assure that: (i) project alternative measures were adequately considered; (ii) effective mitigation measures were required; or (iii) environmental impact reviews were completed. As a result, the Clear Creek wetlands area may be unnecessarily subjected to significant degradation or destruction contrary to the intent of the Act.

The Water Division staff advised us that they felt betrayed by the Division Director's action to withdraw from the permit process, and believed that political pressure had been exerted by the Nisqually Tribe. One staff member stated, in a memorandum to the Water Division Director, that "We were told that if this had been any other applicant we would have recommended permit denial, but could not do so with the Nisqually Tribe."

The Region's withdrawal from the permit process left the Corps standing alone in its opposition to the permit. The Corps is currently continuing to deliberate over the Nisqually Fish Hatchery permit application.

Water Division Director Decision

During our interviews, the Water Division Director accepted full responsibility for the decision to cease the Region's participation in the permit review process. The decision to "bow out" of the section 404 permit process was apparently made during a November 1, 1989, meeting with Nisqually Indian Tribe representatives, the Corps, and the FWS. The Water Division staff believes that the Region's decision to withdraw from the permit process resulted, in part, from political pressure from the Nisqually Tribe. At that time, the Division Director decided to rely on the FWS and the Corps to work out additional mitigation for the loss of the wetlands. It was the Division Director's opinion that the project was "a done deal" no matter what position the Region took. His decision was based on the fact that the construction contracts had already been awarded, and the project was ready to go. He also believed that the loss of wetlands and associated habitat would be offset by the fact that the hatchery would provide 150,000 salmon per year. Further, it was the Water Division Director's opinion that the Region had already missed its opportunity to affect the course of the project during its early stages. This decision was confirmed in his letter to the Corps, dated December 14, 1989.

The Division Director's position is not shared by the Water Division staff. The staff continues to be concerned with the availability of alternatives, particularly the consideration of upland construction. They are also concerned with the effect of the Hatchery's effluent on Clear Creek's water quality. There is also a question on the hydrologic changes that are expected to result from hatchery construction and their effect on the remaining wetlands. Finally, the staff questions the inadequacy of the proposed mitigation.

Project Alternatives

The Region dropped consideration of project alternatives early in its review process. The Region's initial comment letter to the Corps on this project, dated August 28, 1989, requested only an analysis of habitat restoration as a possible alternative to construction. The Region never questioned the applicant's analysis of alternative designs or sites that could have avoided wetland impacts. When we inquired about possible design changes for the project that could have avoided the wetlands, the current Chief of the Water Division's Environmental Evaluation Branch indicated that the possibility was never brought up in discussion. The Branch Chief's conclusion was that the alternatives issue just "fell by the wayside."

During the course of our review, we identified one possible reason why the subject of project alternatives for such an environmentally sensitive project were not explained. The Chief of the Water Division's Resource Assessment Section was reluctant to require additional information necessary to be able to make alternative analysis assessment reviews because he believed that the project was water dependent. Our review disclosed this conclusion was incorrect, since the FWS did not consider the hatchery a water dependent project. In an October 17, 1988, letter relating to the project, the FWS stated that "Nonwater-dependent wetland fills such as this are routinely opposed by the Service."

Mitigation Measures

The Region attempted to address the value of the Clear Creek wetlands, and the potential primary and secondary impacts to the drainage system in its initial comment letter. However, the Region never considered the information provided by the applicant in this area to be adequate to assess wetland impacts, or to judge the proposed mitigation plan. The Region did not continue to emphasize the importance of the information as a means of assessing impacts and designing a suitable mitigation plan. The Region's final comment letter did not recommend that this detailed mitigation information should be provided as a condition of permitting. As a result, the proposed mitigation plan did not offset primary impacts, or effectively address the potential secondary impacts that are likely to occur.

The Region indicated that it expects to address potential water quality problems during the NPDES permit process, after the facility is constructed. We do not believe that such an approach is consistent with the Region's responsibilities under the section 404 permit process.

Environmental Impact Reviews

In the early stages of the permit process, the Region did not take advantage of its opportunities under the National Environmental Policy Act (NEPA) and the Clean Water Act to protect this valuable resource. For example, the regional staff did not participate in the process conducted by the FWS to ascertain whether an EIS would be required. Such participation was important, since it would have provided the Region with an opportunity to ensure that the required studies sufficiently addressed all wetland and water quality concerns. The Region's participation in this process could have led to a full EIS on the project rather than the more limited Environmental Assessment.

A full EIS should have provided the Region with information as to how the project could be designed with the least environmental damage. It would have detailed the primary and secondary impacts of the project; justified the mitigation plan; and assessed water quality impacts. According to Water Division

staff, none of the above areas were adequately addressed in the section 404 permit which the Region reviewed.

The Corps is currently deliberating over the Nisqually Fish Hatchery permit application without any input from the Region, except for its suggestion that additional wetland compensation be sought. By leaving the Corps to stand alone as a Federal agency in the permit process, there was an increased vulnerability of the Clear Creek wetland area to degradation or destruction.

The project, as proposed, has also caused environmental concern from the State of Washington. The State has expressed concern about the project's impact on native fish populations that use Clear Creek and stated that "Without in-line treatment of the effluent, the lower 1/4 mile of Clear Creek will be unsuitable for sustaining the last of the Clear Creek late-run chum population. This represents the decimation of a native stock for purposes of artificial propagation of non-native stocks."

10 - CLEAN WATER ACT-SECTION 404 WETLANDS PERMIT PICKERING FARMS INDUSTRIAL PARK STATE OF WASHINGTON

ALLEGATION

An allegation was made that the Regional Administrator improperly reacted to concerns from external sources in connection with the Region's decision on the Army Corps of Engineers (the Corps) section 404 wetlands permit for Pickering Farms Industrial Park. In this respect, the Region originally opposed the permit and recommended to the Corps that it be denied. Subsequently, the Region withdrew its recommendation to deny the permit. It was alleged that the Region's change in position occurred after a telephone call to the Regional Administrator from a representative of a proposed tenant of the new industrial park.

BACKGROUND

The Pickering Farms development provided for construction of a 138 acre industrial park in an area previously used as a greenbelt by nearby residential communities. The proposal to establish the industrial park was vigorously resisted by area residents. The development of the wetlands at this site has been a controversial issue, even before the Region's involvement in the project. The developer, Pickering Farms Associates, had previously filled a 0.9 acre wetland under the Corps' Nationwide General Permit 26. Under this permit, the Corps could, in certain circumstances, approve wetlands development when less than ten acres was involved. The Region subsequently noted that the developer could have easily avoided filling the 0.9 acre wetland with no additional cost to the project. In November 1988, the developer submitted another request to fill an additional 3.3 acres of isolated wetland under the provisions of National General Permit 26. The Region and the U.S. Fish and Wildlife Service (FWS) objected to the use of the Nationwide Permit 26 in this instance, and asked the Corps to require the developer to submit a section 404 application for the project. The Corps concurred and the normal section 404 permit process began.

On February 6, 1989, the Region responded to the permit application and urged that the permit be denied. The Region's primary objection to the permit was the developer's failure to demonstrate that alternative measures were not available. The requirements of 40 CFR 230.10(a)(3) specifically require that, prior to filling a wetland for a purpose which is not water dependent, an applicant must demonstrate that there are no

practicable alternatives available. Without such a demonstration, practicable alternatives are assumed to be available. The Region also contended that the mitigation measures offered by the developer to offset the loss of the subject wetlands were insufficient. Based on these concerns, the Corps provided the Region with an alternatives analysis prepared by the developer on September 8, 1989. On November 7, 1989, the Region responded to the Corps that it continued to have a problem with the developer's review of available alternatives, but concluded that it would "defer to your judgement as to the appropriate next step on issuance of this permit." This essentially ended EPA's participation in the decision making process at this site.

REVIEW RESULTS

Our review established that the Regional Administrator gave directions to the Water Division Director that had a direct impact on the Region's decision to withdraw its recommendation to deny the section 404 permit. The Water Division Director actually signed the final letter withdrawing the Region's recommendation and deferring to the Corps judgment on whether to issue a permit. According to the Division Director, he changed the Region's position after being directed by the Regional Administrator to "get the permit resolved." During our interview with the Regional Administrator, he acknowledged that he probably made the statement. He explained that he would make such comments as a part of his normal process of attempting to get a permit resolved in a timely manner. We believe that the Regional Administrator's comment had a direct bearing on the Water Division Director's decision to withdraw its objections to the permit. In this regard, the Division Director indicated that he interpreted the Regional Administrator to mean that the Region should withdraw its recommendation that the permit be denied. The Regional Administrator's directions occurred after a telephone call from a representative of a potential tenant to the proposed industrial park. The tenant, a children's hospital, considered the industrial park to be the preferred site for its new hospital. The Water Division Director also personally met with the potential tenant.

Prior to the reversal of its position, the Region consistently maintained that the developer had not properly considered all available alternatives. There was nothing in the project files indicating that the Region's concerns on the available alternatives were alleviated. It should be noted that the regional files on the decision making process on this permit were incomplete, and did not adequately document the basis for the decision. We, therefore, had to obtain information on the chronology of events from the Water Division Director and divisional staff.

The Water Division Director stated that his decision to withdraw objections to the permit took into account that his Environmental Evaluation Branch (EEB) staff had assured him that the subject wetlands were not of high value. We confirmed that

the EEB staff made this comment. However, we also established with the EEB staff that one of the first objectives of the Act is to save the wetland, regardless of its quality, if a practicable alternative is available. Further, we concluded there was not a proper consideration of alternatives. In this respect, the Region did not obtain information from the Corps or the developer demonstrating that there was not a readily available practicable alternative to this site.

Discussions with Corps personnel indicated that they were disappointed with the Region's decision to defer to the Corps on the issuance of the permit. As a result of this decision, all pressure to deny the permit was placed directly on the Corps staff. As of the date of our review, the Corps was continuing to withhold its approval of the permit. The Corps is concerned that the developer may be degrading the wetlands in question without the permit. At this point, the main obstacle to the Corps issuance of a permit continues to be the developer's failure to adequately consider alternative solutions prior to destruction of the wetlands.

11 - CLEAN WATER ACT-SECTION 404 WETLANDS PERMIT LAKE WASHINGTON RIDGE STATE OF WASHINGTON

ALLEGATION

It was alleged that, as a result of intervention by the Regional Administrator, the Region did not initiate appropriate action to elevate its disagreement with the Army Corps of Engineers (the Corps) section 404 wetlands permit for Lake Washington Ridge (the Project). In the allegation, it was suggested that a former Regional Counsel called the Regional Administrator and asked for his intercession to get the section 404 permit approved. The Region originally advised the Corps that the fill placement to be used at the site would cause serious environmental degradation, and that the proposed mitigation measures were inadequate. The Region requested that the permit be denied. Subsequently, the Region modified its position, and wrote the Corps that, while it continued to object to the issuance of the permit, it did not intend to elevate this case if the permit was issued.

BACKGROUND

The project was initiated when a developer applied for a section 404 permit under the Clean Water Act (the Act) to fill 2.43 acres of wetlands on Lake Washington Ridge. The ridge is located in an urban residential area in Renton, Washington, a suburb of Seattle. The stated purpose of the project was to construct the second phase of a housing project on a 25.8 acre site. As part of this construction, it was proposed that 2.43 acres of wetlands be filled for street construction and for building on 11 of the 41 lots to be developed in this phase. Both the Region and the U.S. Fish and Wildlife Service (FWS), objected to this wetlands project. On the basis of their objections concerning environmental degradation and the inadequacies of the proposed mitigation measures, the Corps was able to negotiate additional mitigation for the project. As a result, the wetlands area to be filled was reduced to 1.95 acres through the realignment of the road and by elimination of two housing lots. However, the Region and FWS continued to urge the Corps to deny the permit. In its final letter to the Corps on this permit, dated October 30, 1989, the Region modified its position and stated that "...we believe the Seattle District improperly applied the section 404(b)(1) Guidelines because it appeared to accept, without independent evaluation, the applicant's statements and conclusions with respect to basic project purpose, the practicability of alternatives, and to some extent, the significance of the impacts. Accordingly, EPA continues to object to the issuance of this permit...Due to the shortage of staff available to address this and other issues, we do not intend to elevate this case pursuant to the 404(a) MOA." The final section 404 permit was subsequently issued by the Corps.

REVIEW RESULTS

We found no evidence to support the allegation that the Regional Administrator used undue influence or otherwise interfered in the normal decision making process on the project. In addition, we did not find any evidence that the former Regional Counsel discussed this project with the Regional Administrator. Our review concluded that the decision on the permit for this project was made solely by staff in the Water Division's Environmental Evaluation Branch. There was no indication of any pressure from either the Regional Administrator or the Water Division Director concerning this particular project. While the Corps' issuance of this permit allows for a definite loss of a valuable and unique urban wetland area, we concluded that the decision not to elevate the project for higher level review was within the Region's area of discretion.

The Region's files for the project did not document or justify the basis for the Region's final action. Through interviews with Water Division personnel, we did not obtain any indications that the Regional Administrator interjected himself into the normal decision making process on this project. Water Division personnel advised that the final regional decision on the project was made below the Water Division Director level.

Within the Water Division, the Water Resources Assessment Section Chief, the Environmental Evaluation Branch's current Chief, and their staffs concurred that a valuable and unique urban wetland was lost as a result of the project. They also agreed that the Region's final decision not to escalate the disagreement with the Corps over the issuance of the permit was made solely by the Branch Chief, and that they supported the decision. The Branch Chief and Section Chief stated that they could not recall any communication with either the Regional Administrator or the Water Division Director on this project.

The section 404 program provides the Corps with a wide margin of discretion on whether or not to approve a particular permit. Many factors may contribute to the decision to issue or deny a permit. These factors include the value of the wetland as a wildlife sanctuary, uniqueness, location, community needs and desires, property owners' rights of development, the purpose of the development, availability of alternatives, and value of any offsetting mitigation measures.

Considering these factors, the Region decided not to elevate its disagreement with the Corps' intention to issue the permit due to the small size (1.95 acres) of the wetland involved. The regional staff recognized that the wetland, due to its location and quality, was valuable to the community. However, the staff indicated that they had to carefully choose the permits in which they wanted to challenge the Corps, since the escalation process was resource intensive. In addition, the staff indicated that if they attempted to escalate every 404 permit disagreement with the Corps, the process could lose its effectiveness.