

PMFermiCOLNPem Resource

From: Olson, Bruce
Sent: Thursday, July 07, 2011 1:30 PM
To: FermiCOL Resource
Subject: FW: USACE CAA Guidance (UNCLASSIFIED)
Attachments: USACEGuidanceCAARules.pdf

Thanks.....

Bruce Olson
Environmental Project Manager
Nuclear Regulatory Commission
NRO/DSER/RAP2
301-415-3731

-----Original Message-----

From: Luff, Colette M LRE [<mailto:Colette.M.Luff@usace.army.mil>]
Sent: Monday, May 09, 2011 1:48 PM
To: Olson, Bruce
Subject: USACE CAA Guidance (UNCLASSIFIED)

<<USACEGuidanceCAARules.pdf>> Classification: UNCLASSIFIED
Caveats: NONE

Bruce,

Here is our guidance. Please note that I believe the reference to 40 CFR 91.853 on page 2, II.A. of the memo is an error and should be 40 CFR 91.153.

Classification: UNCLASSIFIED
Caveats: NONE

Hearing Identifier: Fermi_COL_NonPublic
Email Number: 1382

Mail Envelope Properties (6566BAEC3DB1314381965386524904EC357EE102F8)

Subject: FW: USACE CAA Guidance (UNCLASSIFIED)
Sent Date: 7/7/2011 1:29:40 PM
Received Date: 7/7/2011 1:29:44 PM
From: Olson, Bruce

Created By: Bruce.Olson@nrc.gov

Recipients:
"FermiCOL Resource" <FermiCOL.Resource@nrc.gov>
Tracking Status: None

Post Office: HQCLSTR02.nrc.gov

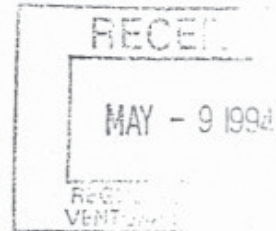
Files	Size	Date & Time
MESSAGE	625	7/7/2011 1:29:44 PM
USACEGuidanceCAARules.pdf		4254919

Options
Priority: Standard
Return Notification: No
Reply Requested: No
Sensitivity: Normal
Expiration Date:
Recipients Received:



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:



20 APR 1994

CECC-E

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDERS, AND DISTRICT COMMANDERS

SUBJECT: EPA's Clean Air Act (CAA) General Conformity Rule

1. In the Federal Register of November 30, 1993, the U.S. Environmental Protection Agency (EPA) published its final General Conformity Rule to implement Section 176(c) of the Clean Air Act (CAA) for geographic areas designated as "nonattainment" and "maintenance" areas under the CAA. EPA's final rule addresses how Federal agencies are to demonstrate that activities in which they engage conform with applicable, Federally-approved CAA state implementation plans. Because these agency conformity determinations can sometimes take considerable time and cost thousands of dollars to produce, and because failure to produce and sign an adequate conformity determination where one is required can create a serious legal vulnerability for a Corps project or permit, the Corps must ensure full and careful compliance with the new EPA Final Rule.

2. The enclosed guidance document has been prepared to assist Corps Divisions and Districts in understanding and complying with the subject rule. This guidance document is introductory in nature, and cannot be considered a substitute for careful reading of and compliance with the rule itself. (See 58 Fed.Reg. 63214 et seq.)

3. One of the primary subjects discussed in the enclosed guidance document is how the General Conformity Rule relates to the Corps regulatory program under Sections 9 and 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Ocean Dumping Act. As soon as practicable I intend to promulgate another guidance document providing more detailed instructions on how Corps personnel should deal with CAA conformity considerations regarding Corps Civil Works projects during the planning process, including preparation of CAA conformity determinations where that is necessary.

4. Although the attached document is rather "legalistic" in nature, it should be broadly distributed within the Corps family (e.g., counsel, regulatory, planning, operations, etc.). This guidance also contains important policy considerations, and thus has been fully coordinated with the Office of the Assistant Secretary of the Army (Civil Works) and with the Director of Civil Works.

5. My points of contact for this guidance are Lance Wood and Bill Sapp, CECC-E; their telephone number is (202) 272-0035.

FOR THE COMMANDER:

A handwritten signature in cursive script, appearing to read "Lester Edelman". The signature is written in dark ink and is positioned above the typed name and title.

LESTER EDELMAN
Chief Counsel

Encl

EPA'S FINAL CLEAN AIR ACT GENERAL CONFORMITY RULE

I. INTRODUCTION.

In the Federal Register of November 30, 1993, the U.S. Environmental Protection Agency (EPA) published its final General Conformity Rule¹ to implement section 176(c) of the Clean Air Act (CAA)² for geographic areas designated as "nonattainment" and "maintenance" areas under the CAA. EPA's final rule addresses how Federal agencies are to demonstrate that activities in which they engage conform with applicable, Federally approved CAA state implementation plans.³ Because these agency conformity determinations can sometimes take considerable time and cost thousands of dollars to produce⁴, and because failure to produce and sign an adequate conformity determination where one is required can create a serious legal vulnerability for a Corps project or permit, the Corps must ensure full and careful compliance with the new EPA final rule.

EPA's final rule was promulgated to implement CAA section 176(c), which was added to the Clean Air Act in 1977⁵ to require that Federal agencies assure that activities they engage in are in conformance with Federally-approved CAA state implementation plans.⁶ This requirement is clearly triggered whenever a Federal

¹ 58 Fed. Reg. 63214 (November 30, 1993).

² Clean Air Act § 176(c), 42 U.S.C. § 7506 (1993).

³ 58 Fed. Reg. 63214 (November 30, 1993). Section 110 of the Clean Air Act requires that all states and the District of Columbia develop state implementation plans for EPA approval that provide detailed accounts of how the state will attain the National Ambient Air Quality Standards throughout the state. 42 U.S.C. § 7410 (1993).

⁴ The EPA estimated in its proposed rule that a conformity determination would cost approximately \$5,000, whereas an extensive conformity determination would cost \$50,000. 58 Fed. Reg. 13848 (March 15, 1993). Department of Defense estimates double the figures supplied by the EPA.

⁵ Pub. L. 95-95, § 176(c) (1977).

⁶ Section 176(c)(1) provides in relevant part that:

No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve,

(continued...)

agency engages in a Federal project, but it is also triggered whenever a Federal agency permits, licenses, funds, or approves a non-Federal undertaking. The Corps' Clean Water Act (CWA) section 404 permits, Rivers and Harbors Act of 1899 Section 10 permits, and Ocean Dumping Act Section 103 permits fall under this latter category.

II. APPLICABILITY.

A. EXEMPTIONS AND PRESUMPTIONS. As you study the final rule and its preamble, the first general subject to consider is the "applicability" of the rule. The new rule applies generally to Federal actions except for those covered by EPA's transportation conformity rule⁷, actions with associated emissions below the de minimis levels specified at 40 CFR 91.853, certain classes of actions designated at 40 CFR 91.853 as exempted or presumed to conform, and actions that the new rule "grandfathers" at 40 CFR 91.850. A number of Corps activities may fit within the long list of "exempted" or "presumed to conform" activities. For example, note the specific exemption provided for maintenance dredging and debris disposal actions.

B. GRANDFATHER CLAUSE. As you consider the "grandfather provision", remember that it describes the specific circumstances where a Federal action need not comply with the new general conformity rule, but the Corps might nevertheless have to create and sign a CAA conformity determination to show compliance with the statutory mandate of CAA Section 176(c). However, that conformity determination would not have to comply with the specific procedural requirements of the new EPA regulation. Also note that the second basis provided in the rule for grandfathering, i.e., the three-part requirement of 40 CFR 93.150(c)(2), requires that an environmental analysis had to be commenced prior to January 31, 1994, or that a contract to develop a specific environmental analysis was awarded prior to January 31, 1994. The reference in that section to the date of December 30, 1993, was an error. The EPA has since corrected that date to January 31, 1994, by publishing the correction in the Federal Register, i.e., January 31, 1994. Moreover, that same section requires that a CAA conformity

⁶(...continued)

any activity which does not conform to an implementation plan after it has been approved or promulgated under section 110. . . . The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency or instrumentality.

C.A.A. § 176(c)(1), 42 U.S.C. § 7506 (1993).

⁷See 40 CFR Part 51, subpart T.

determination demonstrating compliance with the statutory mandate of CAA Section 176(c) be signed by March 15, 1994.

C. ATTAINMENT VERSUS NON-ATTAINMENT AREAS. Also regarding applicability, note that the new CAA General Conformity Rule applies only to Federal actions in CAA non-attainment areas and in those attainment areas subject to maintenance plans required by CAA Section 175A (i.e., "maintenance areas"; see 58 Fed. Reg. 13841) . EPA has announced its intentions to do another rulemaking at a later date describing how CAA Section 176(c) will be applied to CAA attainment areas, in general.

III. REQUIREMENTS OF THE NEW RULE.

To fully understand the requirements of the rule, you must carefully study both the rule itself and the explanatory guidance provided in the preamble. In the near future, the Office of the Chief Counsel expects to provide additional guidance that will assist Corps personnel who must prepare CAA conformity determinations, especially for Corps planning studies, feasibility reports, and the like. In this guidance, I only wish to emphasize a few important aspects of the rule, to ensure understanding of those matters throughout the Corps, for both our projects and our regulatory responsibilities.

A. CONFORMITY DETERMINATIONS. The basic requirement of the General Conformity Rule is stated at 40 CFR 93.150(b): "A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken." (emphasis added). Obviously, to implement that mandate we must turn to the definition of "Federal action" provided at 40 CFR 93.152:

Federal action means any activity engaged in by a[n] ... agency ... of the Federal Government, or any activity that a[n] ... agency ... supports in any way, provides financial assistance for, licenses, permits, or approves.... Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval."

B. DIRECT EMISSIONS. Regarding what air emissions must be considered in a CAA conformity determination, the rule defines two classes: direct emissions, and indirect emissions. The definition of "direct emissions" is straightforward: "Direct emissions" means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action." (40 CFR 93.152)

C. INDIRECT EMISSIONS. In contrast, the definition of "indirect emissions" needs careful study: "indirect emissions"

means those emissions of a criteria pollutant or its precursors that: (1) Are caused by the Federal action but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and (2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." (40 CFR 93.152; emphasis added.) Note that the second, limiting part of that definition is crucial, since the underlined words provide essential restrictions on how far the Corps' responsibilities extend regarding documenting and controlling indirect emissions. Those restrictions from the rule's definition of "indirect emissions" are especially important, given the General Conformity Rule's broad, "but for" definition of the term "caused by": "Caused by, as used in the terms 'direct emissions' and 'indirect emissions,' means emissions that would not otherwise occur in the absence of the Federal action."⁸ This definition of the term "caused by" can be characterized as a "but for" approach to the concept of causation, because, standing alone, it would require the Corps to take responsibility for all indirect emissions that would not occur without (i.e., "but for") the Corps permit or project. If the General Conformity Rule did not contain the various limiting provisions discussed herein, that "but for" approach to defining "caused by" would have made the Corps responsible for dealing with potential emissions that might not occur "but for" the Corps project or permit, but which might be substantially removed in time and/or distance from the Corps action; those emissions would be almost impossible for the Corps to predict, document, or control through mitigation measures.

Consequently, it is of considerable importance to the Corps Civil Works program that everyone understand and make proper use of the restrictions noted above in the definition of "indirect emissions" when deciding whether or how we need to prepare a CAA conformity determination. Of course, the Corps must consider the "direct emissions" caused by our proposed project or activity, or by the specific activity requiring a Corps permit. However, the final General Conformity Rule does not require the Corps to document or analyze any "indirect emissions" unless we determine that it would be practicable for the Corps to control them, and that the Corps would maintain control over them due to a continuing Corps program responsibility. As we shall discuss later, we expect that the Corps will not be legally required under the General Conformity Rule to analyze, document, and seek mitigation measures for indirect emissions for many Corps project-related actions, and for the vast majority of actions requiring Corps permit authorization, since often it will not be practicable for the Corps to control such emissions, and frequently the Corps will not have a continuing program responsibility to maintain control over them.

⁸ 40 CFR 913.152 (1994).

The logic behind the limitation on what "indirect emissions" the Corps must analyze, document, and seek mitigation measures to reduce, is explained in the preamble to EPA's rule, as follows:

The EPA does not believe that it is reasonable to conclude that a Federal agency "supports" an activity by third persons over whom the agency has no practicable control--or "supports" emissions over which the agency has no practicable control, based on the mere fact that, if one inspects the "causal" chain of events, the activity or emissions can be described as being a "reasonably foreseeable" result of the agency's actions.

In fact, achievement of the clean air goals is not primarily the responsibility of the Federal government. Instead, Congress assigned that responsibility to the State and local agencies.... Where the Federal control over the resultant emissions is relatively minor, the problem is likely caused by multiple pollution sources and a solution may be impossible unless it is directed at all the contributing sources. This role is given to the State and local agencies by Congress and should not be interpreted as the Federal agencies' role under section 176(c).⁹

IV. CORPS IMPLEMENTATION OF THE EPA GENERAL CONFORMITY RULE.

A. CORPS PROJECTS VERSUS NON-FEDERAL ACTIVITIES NEEDING CORPS PERMIT AUTHORIZATION.

From a legal point of view, many of the limitations on Corps responsibilities for documenting and mitigating for indirect emissions (as discussed above) apply to both Corps Civil Works projects and to Corps regulatory program actions regulating non-Federal activities. Nevertheless, there are some significant distinctions that must be made, as a practical matter, regarding how often and in what circumstances the Corps will voluntarily choose to go beyond our strict legal obligations under the General Conformity Rule regarding CAA analyses of indirect emissions. As we explain at some length hereinafter, for practical reasons, policy reasons, and legal reasons, we are not required to, and thus we will not, prepare CAA conformity determinations for the vast majority of the approximately 100,000 activities that we must authorize yearly through the Corps regulatory program. We intend to assert and make full use of the various exemptions and limitations written into the General Conformity Rule that apply to our regulatory program, which exemptions and limitations will usually lead us to conclude that the emissions we are responsible for fall below the de minimis exemption level. Among the many reasons why this approach is necessary and appropriate is the fact

⁹58 Fed. Reg. 63220 (November 30, 1993)

that we must provide relatively expeditious decisions for non-Federal activities that require Corps permit authorization, and because all of the non-Federal activities that require Corps permits are fully subject to the CAA authorities of the U.S. EPA and of the state and local governments.

In contrast, some Corps water resource development projects go through lengthy planning processes, with full-scale NEPA Environmental Impact Statements, coordination with numerous state and Federal agencies, etc. Moreover, many of our water resource development projects are subject to litigation brought by project opponents. Consequently, wherever it is practicable and appropriate, the Corps will go beyond our strict legal obligations under the General Conformity Rule, and we will prepare CAA conformity determinations that consider indirect emissions that would follow from our project, even where it is debatable whether we could "practicably" control those indirect emissions, and even where it is debatable whether the Corps has a continuing program responsibility to control those indirect emissions. In other words, we should err on the side of caution in writing CAA conformity determinations for large-scale Corps projects, and in coordinating those determinations with the U.S. EPA and with state and local clean air agencies. However, whenever the Corps does voluntarily choose to go beyond our obligations under the General Conformity Rule while preparing a CAA conformity determination, the fact that we are voluntarily going beyond our understanding of our legal obligations must be clearly stated in our public documentation.

When the Corps prepares a CAA conformity determination for a Corps project in the planning stage, and in that conformity determination we voluntarily address all indirect emissions that would be "caused by" our project, that will provide us the valuable opportunity to demonstrate that any short-term increase in emissions from project construction will be entirely or partially offset by decreases in long-term, "without project condition" emissions, due to increased efficiencies (for example, through more efficient port operations from a port improvement project). Also, when we prepare a CAA conformity determination that deals with all indirect emissions that can reasonably be said to be "caused by" our project, our project can be presented to the state CAA authority and specifically approved as part of the state implementation plan, along with any necessary state revisions to that SIP necessary to accommodate the Federal project and all associated indirect emissions. Development and coordination of our CAA conformity determination should be undertaken as early as possible in the planning stage for a large-scale or litigation-prone Corps project. The resulting documentation will be extremely useful to help defend our project from potential litigation challenging compliance with the CAA. On the other hand, for small-scale Corps projects, covered only by environmental assessments and findings of no significant impact, and where no CAA-related litigation can be anticipated, we can probably rely only on the

exemptions found in the General Conformity Rule, and need not necessarily prepare a full-blown CAA conformity determination voluntarily addressing various indirect emissions. Please feel free to consult the points of contact provided in this guidance if you are in doubt about whether a particular Civil Works activity should be covered by a CAA conformity determination voluntarily covering indirect emissions.

B. THE CORPS REGULATORY PROGRAM.

One crucial aspect of this guidance involves how we expect all Corps offices to implement the CAA General Conformity Rule regarding non-Federal activities requiring authorization under the Corps regulatory program. Of course, if another Federal agency requires a Corps permit for one of its activities or projects, that Federal agency is fully responsible for ensuring compliance with CAA Section 176(c), and the Corps can adopt and rely upon that agency's conformity determination, or upon whatever waiver or presumption under the CAA General Conformity Rule that agency believes will satisfy CAA Section 176(c). However, for non-Federal activities, the Corps must take responsibility for whatever CAA conformity determination may be necessary. Nevertheless, for the reasons explained hereinafter, the new rule and its preamble clearly indicate that the vast majority of activities needing Corps permit authorization will not require a CAA conformity determination, because practically all of those activities will fall below the de minimis threshold levels for emissions specified at 40 CFR 93.153.

C. SCOPE OF ANALYSIS. One feature of EPA's final General Conformity Rule that clearly demonstrates that the Corps will not have to perform many conformity determinations is the rule's definition of the term "Federal action". The final rule's definition clearly distinguishes between large Federal projects, such as a Federally funded and Federally controlled military base, versus non-Federal undertakings that simply require a Federal permit. Oftentimes in the latter case, the Federal agency only has to permit a minor part, portion, or phase of a much larger non-Federal undertaking. To reflect the limited Federal responsibility under the CAA derived from such Federal permits, the EPA definition of "Federal action" indicates that, in complying with section 176(c), Federal regulatory agencies are only responsible for analyzing the emissions resulting from the "part, portion, or phase" of the non-Federal undertaking that they permit. To deal with this important point, the EPA added the following sentence to the final rule's definition of "Federal action":

Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of

the non-Federal undertaking that requires the Federal permit, license, or approval.¹⁰

As you can see, the legal principle behind the quoted sentence is the same principle that supports the "narrow scope of analysis" approach for our NEPA documents reflected at Appendix B of 33 CFR Part 325, paragraph 7.b. and the "permit area" approach used to limit Corps responsibilities in Appendix C, implementing the National Historic Preservation Act.¹¹ The rule of administrative law and practice created by the sentence just quoted from EPA's definition of "Federal action" is that, for the limited and particular purposes of the CAA Conformity Rule and for every Corps CAA conformity determination for a Corps regulatory action under this rule, the Corps will always use a narrow "scope of analysis" for purposes of CAA Section 176(c), even if we choose to use a broader scope of analysis for purposes of NEPA, the public interest review, or the 404(b)(1) analysis for that same permit case.

This narrow scope of analysis for purposes of the CAA conformity analysis is always appropriate, for several reasons. For example, the Corps regulators have no expertise or authority allowing them to evaluate or control air emissions from the larger, overall projects, such as a shopping center, that may require a Corps permit for one phase or portion of that larger project (e.g., placement of fill material on which part of the shopping center will later be constructed and operated). In contrast, the state and EPA clean air authorities have broad, general authority, expertise, and responsibility to evaluate and control air emissions from the larger, overall projects, such as shopping centers, regardless of whether part of all of such a shopping center happens to be constructed on fill material permitted by the Corps of Engineers.

D. CONFORMITY DETERMINATIONS FOR CORPS PERMITS CASES WILL BE NECESSARY VERY RARELY. The sentence quoted above from EPA's definition of "Federal action" may well be the most important provision of the General Conformity Rule relating to the Corps regulatory program, because this provision, in conjunction with the restrictive language discussed above from the definition of "indirect emissions", means that very rarely will the Corps have to prepare a CAA conformity determination document for a Corps regulatory action. The reasons for this conclusion are reflected in the following case example, provided by EPA in the preamble of the final General Conformity Rule. In this example, the EPA shows the close relationship between the sentence quoted above from the definition of "Federal action" and the restrictive language from the definition of "indirect emissions", as follows:

¹⁰ 58 Fed. Reg. 63248 (November 30, 1993).

¹¹ 55 Fed. Reg. 27000 (June 29, 1990)

[In the final rule] the definition of "Federal action" is revised by adding the following sentence to the end of the definition in the [proposed rule]: Where the Federal action is a permit, license, or other approval for some aspect of a nonfederal undertaking, the relevant activity is the part, portion, or phase of the nonfederal undertaking that requires the Federal permit, license or approval. The following examples illustrate the meaning of the revised definition.

Assume, for example, that the [Corps] issues a permit and that permitted fill activity represents one phase of a larger nonfederal undertaking; i.e., the construction of an office building by a nonfederal entity. Under the conformity rule, the [Corps] would be responsible for addressing all emissions from that one phase of the overall office development undertaking that the [Corps] permits; i.e., the fill activity at the wetland site. However, the [Corps] is not responsible for evaluating all emissions from later phases of the overall office development (the construction, operation, and use of the office building itself), because later phases generally are not within the [Corps'] continuing program responsibility and generally cannot be practicably controlled by the [Corps].¹²

The conclusion to be drawn regarding the preamble's case example is that the Corps almost certainly would not have to prepare a CAA conformity determination for that permit action described in the preamble, because the direct emissions from the fill activity would be relatively minor, and thus in all probability they would fall below the de minimis levels exempted by 40 CFR 93.153. Moreover, in this example one cannot identify any indirect emissions for which the Corps would be responsible.

E. "PART, PORTION, OR PHASE" OF A LARGER UNDERTAKING. The preamble for the final rule provides several other important explanatory passages that accurately describe the limited nature of the responsibilities the Corps must fulfill as we operate our regulatory program in compliance with EPA's General Conformity Rule. As the EPA states in the preamble, the "inclusive definition" that EPA had published for public comment in the proposed rule to define the term "indirect emissions" would have been overly burdensome and inappropriate for regulatory programs that might have to "document the air quality affects from tens of thousands of public and private business activities each year, even where the associated Federal action is extremely minor."¹³ The EPA

¹² 58 Fed. Reg. 63227 (November 30, 1993).

¹³ 58 Fed. Reg. 63219 (November 30, 1993).

goes on to use the Corps in an illustration of this point by explaining that:

[T]he Army Corps of Engineers estimates that 65,000 of their regulatory actions would have required a conformity review in 1992 under the inclusive definition. The [Corps] permits are often limited to a small portion of a much larger project and, thus, may not be the best mechanism to review the larger project: e.g., one river crossing for a 500 mile gas pipeline or a half-acre wetland fill for a twenty acre shopping mall.¹⁴

As the EPA explains here, it would be impractical to force a Federal regulatory agency like the Corps to do potentially time-consuming and costly air quality analyses when the activity that agency permits may be a very minor aspect of a much larger non-Federal undertaking, and when that specific activity needing a Corps permit may have little or no effect on air quality.

F. CONTINUING PROGRAM RESPONSIBILITY. The EPA also used the Corps in an illustration to explain the phrase "continuing program responsibility" in the definition of the term "indirect emissions". In their example the EPA explains that only if the Corps were to impose conditions on a permit as part of its responsibilities under its regulatory program and these permit conditions, in and of themselves, would lead to an increase in the air emissions caused by the activity, would the Corps be required to include the air emissions caused by its permit conditions in our CAA conformity analysis.¹⁵ However, the preamble to EPA's rule makes clear that normally the Corps is not responsible for indirect emissions related to activities needing Corps permits:

j. Exclusive definition [for the term "indirect emissions"]-- types of Federal actions not covered. The following types of Federal actions, among others, are not covered by the conformity rule under the exclusive definition approach [i.e., the approach adopted in the final rule]....(3) Certain indirect emissions related to a [Corps of Engineers] permit for the discharge of dredged or fill material. The indirect emissions from development activities related to [Corps] permit actions are not subject to the continuing program responsibility of the [Corps], or cannot be practicably controlled by the [Corps].¹⁶

The EPA preamble also recognizes that the Corps has an explicit exemption from the conformity rule where:

¹⁴ 58 Fed. Reg. 63219 (November 30, 1993).

¹⁵ 58 Fed. Reg. 63220 (November 30, 1993).

¹⁶ 58 Fed. Reg. 63224 (November 30, 1993).

The indirect emissions from development activities related to [Corps] permit actions are not covered where such emissions are not subject to the continuing program responsibility of the [Corps], or cannot be practicably controlled by the [Corps].¹⁷

The EPA then goes on in the preamble to explain the changes in the definition for the term "indirect emissions" that EPA adopted in its final General Conformity Rule (i.e., the "exclusive" definition). Again it uses the Corps in an illustration. The EPA points out that conformity analyses are not required when Federal actions are incidental to later development by private parties. As the EPA states:

...this approach would not require a conformity analysis for certain Federal actions that are necessary for, but incidental to, subsequent development by private parties. For example, the exclusive definition does not generally require that a [Corps] fill permit needed for a relatively minor part, portion, or phase of a twenty acre development on private land would somehow require the [Corps] to evaluate all emissions from the construction, operation, and use of that larger development.¹⁸
(emphasis added)

Here the EPA explains that the "activity" contemplated under section 176(c) in many cases is properly limited to the particular "part, portion, or phase" of a non-Federal action that is actually permitted by the regulatory agency (i.e., the Corps). As the EPA goes on to explain:

The person's [i.e., permit applicant's] activities that fall outside the Federal agency's continuing program responsibility to control are subject to control by state and local agencies.¹⁹

As indicated above, generally speaking the Corps does not have a continuing program responsibility to measure, monitor, control, or mitigate for air emissions that may result from the construction or operation of a non-Corps facility (such as a shopping center, factory, or non-Federal port), even though some part, portion, or phase of that facility requires a permit from the Corps. Under the CAA, the state and local clean air authorities have full responsibility and authority to deal with those emissions, and to prevent or condition the construction of the non-Federal facility as necessary to deal with those air emissions. Under the General

¹⁷ 58 Fed. Reg. 63224 (November 30, 1993).

¹⁸ 58 Fed. Reg. 63222 (November 30, 1993).

¹⁹ 58 Fed. Reg. 63222 (November 30, 1993)

Conformity Rule the Corps (1) must consider direct emissions from only the particular part, portion, or phase of the larger, non-Federal facility that we permit; and (2) we must consider indirect emissions from that same part, portion, or phase, and then only to the extent that we can practicably control them, and have a continuing program responsibility to control them.

G. CORPS DOCUMENTATION OF COMPLIANCE WITH CAA SECTION 176(C)

For any permit case where the Corps reasonably determines that the emissions from the particular "part, portion, or phase" of a larger, non-Federal undertaking, needing a Corps permit, would fall below the de minimis threshold levels of 40 CFR 93.153, the Corps will not have to conduct a technical analysis to document that the emissions from the proposed undertaking would not exceed the de minimis thresholds. This conclusion is supported by the following example taken from EPA's preamble to the General Conformity Rule:

Example 4: Where a [Corps of Engineers] permit is needed to fill a wetland so that a shopping center can be built on the fill, generally speaking, the [Corps] could not practicably maintain control over and would not have a continuing program responsibility to control indirect emissions from subsequent construction, operation, or use of that shopping center. Therefore, only those emissions from the equipment and motor vehicles used in the filling operation, support equipment, and emissions from movement of the fill material itself would be included in the analysis. If such emissions are below the de minimis levels described below for applicability purposes (section 51.858), no conformity determination ... would be required for the issuance of the ... permit.²⁰

The same point is made elsewhere in the preamble to the General Conformity Rule, as follows:

Most Federal actions result in little or no direct or indirect air emissions. The EPA intends such actions to be exempted under the de minimis levels specified in the rule and, thus, no further analysis by the Federal agency is required to demonstrate that such actions conform.... Further, the EPA believes that Federal actions which are de minimis should not be required by this rule to make an applicability analysis. A different interpretation could result in an extremely wasteful process which generates vast numbers of useless conformity statements. Paragraphs (c)(1) and (2) of Section 51.853 are added to the final rule to provide that de minimis actions are exempt from the requirements of this rule. Therefore, it is

²⁰ 58 Fed. Reg. 63223 (November 30, 1993).

not necessary for a Federal agency to document emissions levels for a de minimis action.²¹

Although we expect that the vast majority of activities needing Corps permits will not need CAA conformity determinations for the reasons explained above, nevertheless, for any permit case where litigation can be anticipated if the Corps issues the permit, the permit administrative record should explain our limited CAA responsibilities under the CAA General Conformity Rule, and the basis for our conclusion that the relevant emissions would be de minimis. That explanation often may need to include a discussion of why it would not be "practicable" for the Corps to control certain specified indirect emissions, and why the Corps does not have a continuing program responsibility to control such indirect emissions, and why our CAA responsibilities are limited to the particular "part, portion, or phase" of a larger undertaking requiring Corps permit authorization.

V. CONCLUSION.

Because of the various provisions discussed above, we expect that very few Corps permit actions will require CAA conformity analyses, and that our CAA conformity determinations will normally conclude that the air emissions relevant to our permit action are safely below the final rule's de minimis levels. It seems that the only time that the Corps will have to do a full-scale CAA conformity determination in a permit case is when the emissions associated with the particular activity needing the Corps permit, or the particular activity required by Corps permit conditions (e.g., the placement of the fill, or the construction of the structure in the water, or the actual dredging and disposal operation, or implementation of the required mitigation plan) are so substantial that those emissions would exceed the de minimis thresholds by themselves. This conclusion flows logically from the provisions discussed above from EPA's final rule and preamble, based in part on the principle of limited Corps responsibilities under the CAA.

Nevertheless, the practical necessity that the Corps will use a "narrow scope of analysis" to limit our requirements under the CAA conformity rule must not lead the Corps necessarily to use such a narrow scope of analysis for purposes of the Corps' other responsibilities under other aspects of the public interest review or the 404(b)(1) Guidelines. Because the Corps has ample discretion to adopt and use a broader scope of analysis for purposes of NEPA, the Endangered Species Act, etc., we will not use the CAA conformity determination as an excuse or occasion to reduce our more wide-ranging reviews and responsibilities under those other statutes and regulations.

²¹58 Fed. Reg. 63228-63229 (November 30, 1993).

The Corps' very limited expertise, authority, and continuing program responsibilities regarding air emissions fully justifies our using a narrow scope of analysis for purposes of compliance with CAA Section 176(c). In contrast, our broader, traditional responsibility, authority, and expertise to regulate activities affecting aquatic resources will often justify our using a broader scope of analysis to consider effects of a proposed undertaking on aquatic resources, endangered species, etc. Thus, for any particular permit case, the Corps will implement the CAA General Conformity Rule by focusing on only the specific part, portion, or phase of the larger undertaking that requires our permit authorization. Nevertheless, we often will consider all direct and indirect effects of the larger undertaking when evaluating effects on the aquatic environment.

Corps Headquarters points of contact for this guidance are Lance Wood and Bill Sapp of the Office of the Chief Counsel (CECC-E); their telephone number is (202) 272-0035. However, non-counsel Corps employees should only contact them in conjunction with district/division counsel to ensure proper coordination.

DISTRIBUTION:
COMMANDER,
LOWER MISSISSIPPI VALLEY DIVISION, ATTN: CELMV
MISSOURI RIVER DIVISION, ATTN: CEMRD
NEW ENGLAND DIVISION, ATTN: CENED
NORTH ATLANTIC DIVISION, ATTN: CENAD
NORTH CENTRAL DIVISION, ATTN: CENC
NORTH PACIFIC DIVISION, ATTN: CENPD
OHIO RIVER DIVISION, ATTN: CEORD
PACIFIC OCEAN DIVISION, ATTN: CEPOD
SOUTH ATLANTIC DIVISION, ATTN: CESAD
SOUTH PACIFIC DIVISION, ATTN: CESP^{D-OC}
SOUTHWESTERN DIVISION, ATTN: CESWD
MEMPHIS DISTRICT, ATTN: CELMM
NEW ORLEANS DISTRICT, ATTN: CELMN
ST. LOUIS DISTRICT, ATTN: CELMS
VICKSBURG DISTRICT, ATTN: CELMK
KANSAS CITY DISTRICT, ATTN: CEMRK
OMAHA DISTRICT, ATTN: CEMRO
BALTIMORE DISTRICT, ATTN: CENAB
NEW YORK DISTRICT, ATTN: CENAN
NORFOLK DISTRICT, ATTN: CENAO
CHICAGO DISTRICT, ATTN: CENCC
DETROIT DISTRICT, ATTN: CENCE
ROCK ISLAND DISTRICT, ATTN: CENCR
ST. PAUL DISTRICT, ATTN: CENCS
ALASKA DISTRICT, ATTN: CENPA
PORTLAND DISTRICT, ATTN: CENPP
SEATTLE DISTRICT, ATTN: CENPS
WALLA WALLA DISTRICT, ATTN: CENPW
HUNTINGTON DISTRICT, ATTN: CEORH
LOUISVILLE DISTRICT, ATTN: CEORL
NASHVILLE DISTRICT, ATTN: CEORN
PITTSBURGH DISTRICT, ATTN: CEORP
JACKSONVILLE DISTRICT, ATTN: CESAJ
MOBILE DISTRICT, ATTN: CESAM
SAVANNAH DISTRICT, ATTN: CESAS
LOS ANGELES DISTRICT, ATTN: CESPL
SACRAMENTO DISTRICT, ATTN: CESP
ALBUQUERQUE DISTRICT, ATTN: CESWA
FORT WORTH DISTRICT, ATTN: CESWF
GALVESTON DISTRICT, ATTN: CESWG
LITTLE ROCK DISTRICT, ATTN: CESWL
TULSA DISTRICT, ATTN: CESWT