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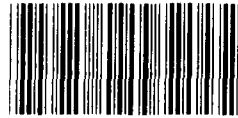
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Briefing Report to Congressional Requesters

JANUARY 1988

RESOURCE PROTECTION

Corps' Permitting of Louisville Floating Restaurant



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United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-229381

January 19, 1988

The Honorable James L. Oberstar
Chairman, Subcommittee on
Investigations and Oversight
Committee on Public Works and Transportation
House of Representatives

The Honorable William F. Clinger, Jr.
Ranking Republican Member
Subcommittee on Investigations and Oversight
Committee on Public Works and Transportation
House of Representatives

This briefing report responds to your September 10, 1987, request that we review the decision-making process used by the U.S. Army Corps of Engineers' (Corps) Louisville District Office in issuing a permit to allow a floating restaurant in the Ohio River at Louisville, Kentucky. You were concerned that the decision to grant the permit was unduly influenced by local development interests to the detriment of navigation safety. In addition, you asked us to comment on whether the decision should have been elevated to higher levels in the Corps and whether other federal agencies should have been involved in the decision process. The results of our work are summarized below and discussed in more detail in the succeeding sections.

Our review disclosed no evidence that the Corps was unduly influenced by development interests in arriving at its decision to grant the city of Louisville a permit for the floating restaurant. To the contrary, we found that the Corps followed its normal decision-making procedures and appears to have given the permit application a balanced review, using relevant information from knowledgeable sources. This permit application was controversial and generated considerable local interest both in favor of and against permit approval. Reflecting this strong local interest, the Corps received numerous comments during the public comment period. Development interests, arguing for the permit, claimed that the restaurant would help

revitalize the city's riverfront area and generate numerous jobs and economic activity. Permit opponents, especially barge operators who routinely navigate the river, argued that the restaurant would represent an unacceptable hazard to shipping. We found that the Corps, in performing its required public interest review, assured that all pertinent views were assessed to balance navigation safety and commercial development interests. Our review further disclosed that the project's development scheme changed considerably as a result of Corps' preliminary discussions and formal review.

Concerning the issue of whether the permit decision should have been elevated to higher levels in the Corps, we found that the Corps' operational guidelines delegate responsibility to the district engineer to make permit decisions on applications such as the floating restaurant. The guidelines prescribe elevation of decision responsibility only under five prescribed conditions, such as an official request by the head of another agency (e.g., the Environmental Protection Agency) or the governor of the state where work is to be conducted. None of the five conditions were applicable to the floating restaurant permit.

Finally, concerning the involvement of other federal agencies, we found that those agencies having jurisdictional interest relevant to the floating restaurant were aware of the permit application. Several agencies, notably the Department of the Interior's Fish and Wildlife Service and the Environmental Protection Agency, offered no comments. However, the U.S. Coast Guard's Office of Marine Safety actively participated in the application process. The Office of Marine Safety expressed initial concerns with the project's safety. After the applicant (the city of Louisville) made substantial modifications to its proposal in response to navigation safety concerns, the Office of Marine Safety concluded that while there can never be a guarantee of complete safety, the restaurant as ultimately positioned in the wharf area would not present an unreasonable navigation safety hazard.

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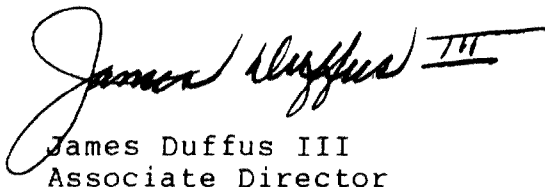
In performing our review of the permit decision, we obtained and analyzed relevant laws and Corps' regulations that set forth permit issuance requirements. We then examined all pertinent correspondence and records in the Corps' permit

files and reviewed the city of Louisville's waterfront development plans. We also discussed the issues surrounding the permit application with major participants in the application process. These included officials with the Corps' Louisville District Office as well as the Coast Guard's Louisville Office of Marine Safety, members of the Louisville Waterfront Development Corporation, and representatives of the Ohio River water transportation industry. We also interviewed an individual currently involved in legal action against the city of Louisville aimed at blocking the restaurant on grounds that it will violate several city ordinances unrelated to navigation safety. Finally, we visited the proposed restaurant site and examined time-lapse photographs of river traffic taken to help assess the project's potential effect on navigation safety. Our work was conducted in accordance with generally accepted government auditing standards.

We provided a draft of this report to Corps' program managers for their review. These officials agreed with the report's content and suggested no changes.

As agreed with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 15 days from the date of this letter. At that time, we will send copies to interested parties and make copies available to others upon request. If you have any additional questions or if we can be of any further assistance, please contact me at (202) 275-7756.

Major contributors to this briefing report are listed in appendix I.


James Duffus III
Associate Director

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ABBREVIATIONS

CORPS	U.S. Army Corps of Engineers
OMS	U.S. Coast Guard, Office of Marine Safety
EPA	Environmental Protection Agency

SECTION 1

BACKGROUND AND PROJECT HISTORY

PERMIT PROCESS

The U.S. Army Corps of Engineers (Corps) is responsible for administering a regulatory program to protect and maintain the navigable capacity of the nation's waterways. It exercises this authority, in part, through its control over permits issued under two primary statutes. Section 10 of the Rivers and Harbors Act of 1899 requires the Corps to prevent unauthorized obstruction or alteration of navigable waters. Under Section 404 of the Clean Water Act, the Corps regulates the discharge of dredge and fill material into such waters.

Under Corps regulations, the district engineers in each Corps' district follow a three-step approach in evaluating permit proposals for major projects: pre-application consultation; formal review; and final decision making. During the pre-application period, the applicant and the Corps' district staff informally discuss the pros and cons of a proposal. No memorandums of discussion or other records are kept of these meetings. The process is designed to inform the applicant of factors that the Corps must consider in deciding to grant or deny a permit. Once the applicant has considered all factors and is satisfied with its application package, the application is submitted to the Corps for formal review.

At the formal project review stage, the Corps' district office assigns a project manager who is responsible for handling the application from receipt to final decision. The project manager prepares a public notice (which describes the proposal in detail); evaluates the resulting public comments and the project's effect upon the environment; and negotiates modifications as deemed necessary.

The final decision to accept or reject permit approval is based on the Corps' public interest review. Although not specifically defined in law or regulation, the public interest is generally understood to include broad consideration of all people that might be affected by the project seeking approval. During this review, the benefits and detriments of all factors relevant to the application are to be carefully evaluated and balanced. Factors considered in this review include the proposed project's economic effects, as well as its effects on water quality, navigation, safety, and the aesthetic character of the proposed site. Permit applications that are found, on balance, to be contrary to the public interest are supposed to be denied. Corps regulations require the permit review process to be completed within 60 days. In this context, the Corps has placed high

priority on speedy review and disposition of each application. In 1986, the Corps issued approximately 10,500 permits throughout the United States. Many applications are controversial and, as a result, generate strong support for, and fervent opposition to, Corps' permit approval. The March 1987 application for a floating restaurant in the Ohio River at Louisville, Kentucky, was one such controversial project.

PROJECT CHRONOLOGY

Through the Waterfront Development Corporation,¹ the city of Louisville has developed planning initiatives to revitalize its downtown riverfront area. In 1986, the Corporation proposed a floating restaurant and nightclub moored at the 4th Avenue city wharf to act as the cornerstone of this development strategy. The city's Board of Alderman accepted the "Louisville Waterfront Strategy" on November 12, 1985. Schilling Enterprises Inc., through successful bid, entered into a franchise agreement with the city of Louisville to operate the floating restaurant. Under the agreement, the "Islands" restaurant currently located at Newport, Kentucky, would be moved to the waterfront area in downtown Louisville. (See figures 1.1 and 1.2.) The restaurant itself is 500 feet long and 72 feet wide. Although the franchise agreement is with Schilling Enterprise, Inc., the city of Louisville is the sole applicant for the permit.

¹The Waterfront Development Corporation is a public corporation created in 1986 by the city of Louisville, Jefferson County, and the state of Kentucky. The purpose of the corporation is to promote the acquisition, implementation, and financing of the redevelopment of the Louisville waterfront.

Figure 1.1: "Islands" Restaurant

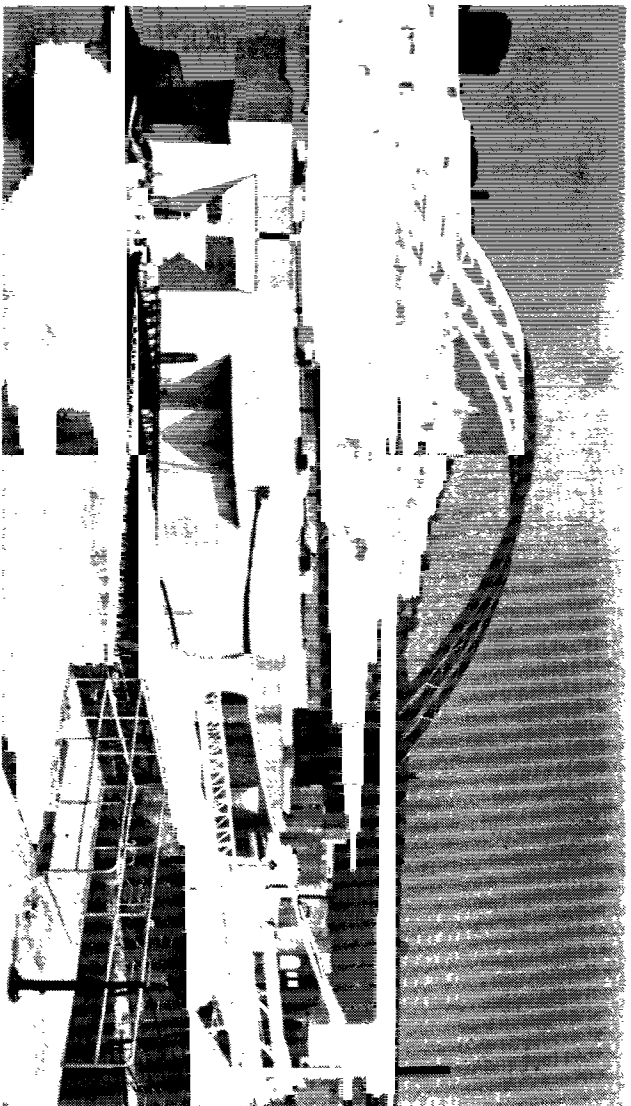
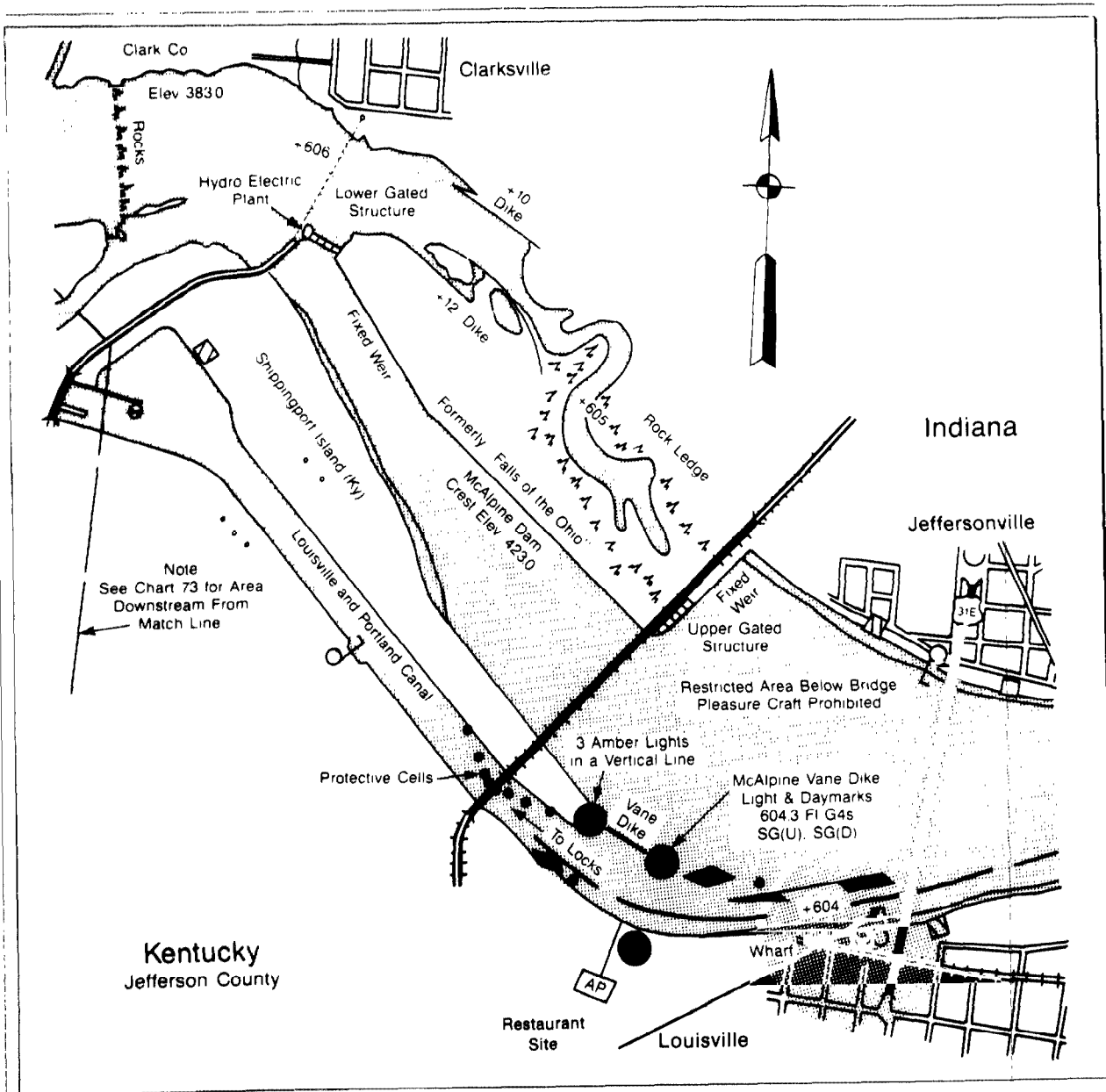


Figure 1.2: Map of the Ohio River, Louisville



In accordance with Corps regulations, the city, as the permit applicant, began pre-application consultation with the Corps' Louisville District in November 1986. After reviewing the proposal, Corps officials informed the city's agents (from the Waterfront Development Corporation) that the permit would probably receive considerable opposition because the proposed restaurant site would be close to the path that towboat captains use in the Ohio River's channel to line up entry into the canal leading to the McAlpine Locks. Corps officials further suggested that the city solicit comments from the U.S. Coast Guard and the water transport industry before submitting their application. During subsequent meetings, city agents decided to revise the application by relocating the restaurant to a safer position along the wharf. While supporting the relocation, the Corps nonetheless continued to suggest consultation with water navigation interest groups.

Consequently, in January 1987, city agents met with representatives from the Ohio River Ice Committee, a group of water transport firms that operate along the Ohio River. The committee stated that the proposed facility would be a hazard to navigation since it would attract pleasure boat traffic and congestion to one of the most dangerous areas on the Ohio River. The committee also discussed the numerous accidents that have occurred in the area, including the 1972 accident in which a chlorine barge became lodged in the lower dam gates of McAlpine Dam.

Despite industry's expressed concerns, in March 1987 the city of Louisville submitted a formal application to the Corps for a permit which included the floating restaurant and nightclub and an associated docking facility for approximately 36 pleasure boats. The application also requested that a vehicle drop off and walkway area be constructed along the waterfront for use by sightseers, fisherman, and local pedestrian traffic.

On April 1, 1987, the Corps issued a public notice (87-KY-061) that described the purpose and description of the application. The notice requested that public comments be provided within 24 days. During the comment period, the Corps conducted analyses of vessel transport and navigation on the Ohio River at Louisville using models and time-lapse photography. To further evaluate safety issues, Corps officials, including the district engineer, visited the restaurant's current location at Newport, Kentucky, to inspect the facility.

In response to navigation safety concerns raised by the Corps following its analyses and by various respondents during the public comment period, the applicant announced additional revisions to the application on May 8, 1987. These changes would reduce the width of the emergency walkway on the riverside of the restaurant from 12 feet to 9 feet and lower or remove eight of the existing concrete bumpers on the city wharf, thus allowing the facility to be moored 12 feet closer to the wharf. These modifications would reduce the

restaurant's protrusion into the river from 72 to 60 feet and thereby considerably reduce the restaurant's intrusion into the channel.

On May 26, 1987, the Corps' Louisville District issued the permit for a floating restaurant to the city of Louisville with the following special conditions:

- The permit denies authorization for recreational craft docking privileges at either the restaurant itself or the proposed promenade upstream.
- The permittee will have a towboat available for emergency conditions within one-half hour of need after river levels reach 13 ft. on the McAlpine Locks and Dam's upper gage.
- The permittee will be responsible for operating a marine band radio to keep abreast of emergency conditions.
- The permittee must clearly mark and light the upstream property line.

SECTION 2

EFFECT OF DEVELOPMENT INTERESTS ON THE PERMIT DECISION-MAKING PROCESS

While there is some evidence that sponsors of the floating restaurant project used political leverage to enhance local support for, and reduce local opposition to, the permit application, our review disclosed no evidence that undue pressure from the city of Louisville or development interests affected the Corps' decision-making effort. To the contrary, we found that the Corps followed its procedural requirements in administering the public interest review and made its permitting decision accordingly. Prior to formal permit application, the Corps met with project sponsors and earmarked features in the design that would likely be troublesome when evaluated according to their public interest review. It then sought and obtained public comments on the permit application. Supplementing this process, the Corps conducted additional modeling studies and performed time-lapse photography to obtain additional safety information. Based on the preliminary discussions, public comments, and the Corps' internal analyses, the project was substantially revised from the original proposal before the permit was approved. As a result, the project as ultimately approved, while undoubtedly not risk free, appears to have received a balanced review by the Corps, using relevant information from knowledgeable sources.

ALLEGATIONS OF POLITICAL LEVERAGE

The floating restaurant permit application was controversial in the Louisville community. As the permit applicant, the city government was highly committed to permit approval. Other elements of the community strongly opposed the project. Principal among the opponents were the water transport industry and a local hotel and restaurant operator.

Corps officials told us that the city government may have used some political influence to increase public support for the project. They said the local press reported that restaurant opponents swamped the Corps with correspondence opposing the floating restaurant during the early portion of the comment period. They said the city responded by encouraging the business community and state and local elected representatives to write letters supporting the project. Through our review of public responses, we verified that a substantial portion of proponent mail arrived near the end of the comment period.

Representatives from the water transport community contended that city officials attempted to discourage local opposition to the project. After the permit was officially issued, transport

industry representatives said city officials contacted their members and asked them to cease further opposition. These representatives also told us some of their members were discouraged from participating in our review.

We discussed the issue of direct political influence on this permit with numerous Corps officials. These officials said no city representatives or other development interests had attempted any undue influence over its permitting decision. Corps officials said they met with city officials on many occasions both prior and subsequent to permit application but that these meetings were held to discuss project mapping and construction details for the public notice description, and other administrative requirements.

With respect to indirect influence, Corps officials told us that it was not unusual for an applicant to organize public support in an effort to influence Corps decision making. Since public opinion and sentiment are factors considered in the Corps' public interest review, affected and interested parties often make comments that endorse or condemn project proposals. In this sense, Corps officials said the kind of efforts made in behalf of this project were routine and did not impinge upon its permitting decision.

CORPS PERMIT PROCESSING REQUIREMENTS FOLLOWED

The Corps' evaluation and subsequent issuance of the floating restaurant permit involved a detailed review of many factual considerations in accordance with Department of the Army regulations (33 CFR 320-330) and instructions issued by the Chief of Engineers and the Ohio River Division Engineer. The Corps' permit evaluation process contains safeguards that are designed to ensure objectivity in the evaluation process. Probably the single most important safeguard ensuring the Corps' objectivity is the public interest review. The public interest review requires the careful weighing and balancing of all factors relevant to each case so that no one specific factor (e.g., economic considerations) will dominate the ultimate decision to grant or deny the permit.

The Corps used the public interest review process to weigh the probable impacts of the floating restaurant permit. Through careful balancing of relevant factors, the district engineer evaluated expected benefits and detriments of the proposal. The crux of the review process in this case was to balance navigation safety concerns with those of local development interests. To aid its decision making, the Corps considered responses that were forwarded during the public notice comment period. Because of the great interest in the restaurant proposal, both proponents and opponents of the permit submitted correspondence to the Corps. The Corps received letters of support from state and local officials, as well as Louisville's business community and private citizens.

Letters of opposition came from various members of the Ohio River water transportation community and the owner of a hotel adjacent to the permit location, among others.

Our review of comments forwarded to the Corps during the comment period (April 1 - 24, 1987) indicates that 58 comments were received, of which 27 respondents supported the project, 28 were opposed, and 3 were nonvoting comments. Navigation safety considerations were the primary reason cited in most letters that opposed the proposal. Other suggested adverse impacts included aesthetics, specifically, having a nightclub and drinking establishment in the community. Proponents overwhelmingly cited the economic benefits of the proposal and revitalization of the city's waterfront area as their major project benefits. Other letters of support cited dining opportunities and facility aesthetics as endorsements of permit approval.

As required by Corps' procedures, another important aspect of the Corps' public interest review is the environmental assessment report. Environmental factors considered in this review included land use, historical and archaeological considerations, air quality, aesthetics, noise, general ecology and biological factors. Based upon this assessment, the district engineer found that an environmental impact statement was not required and the permit did not have an adverse effect on the human environment. Also, according to the district engineer's statement of findings, an evaluation of the economic impact on navigation and anchorage was not required and there was no indication that the permit would violate Clean Water guidelines.

The Corps performed several special analyses to address concerns that the restaurant would have an adverse effect on navigation operations at the site of the facility. The Corps analyzed a physical model of navigation conditions at its Vicksburg, Mississippi, center and filmed boat passage through the adjacent channel for 10 days, using time-lapse photography. The results indicated that barge traffic would not generally be affected by the restaurant if it was located behind the existing bridge pier as proposed in the revised permit application. During the 10 days of time-lapse photography, barge traffic routinely passed safely through the middle of the channel, never maneuvering too close to the proposed restaurant site.

PROPOSED PROJECT SUBSTANTIALLY
MODIFIED BEFORE PERMIT APPROVED

As a result of the Corps' preliminary discussions with project sponsors and its formal project application review process, the floating restaurant project as ultimately approved was much different from the original applicant proposal. These modifications included

- repositioning the restaurant to a safer location on the river,
- reducing the restaurant's protrusion into the river by 12 feet, and
- eliminating the associated marina and docking facility.

These changes were made in an effort to reduce the navigation safety concerns presented by the water transport industry.

Corps officials acknowledge that there can never be absolute certainty that a navigation accident will not occur at the site of the floating restaurant. Despite the numerous applicant modifications, the water transport industry continues to oppose the project for safety reasons. We believe the Corps took reasonable measures to balance navigation safety and commercial development considerations in the permit. Our conclusion is supported by the Coast Guard's Office of Marine Safety (OMS) in Louisville. OMS officials told us that the special conditions and revisions made to the original permit application reduced chances of a navigation mishap from occurring and that, as a result, it believed the Corps' decision to grant the permit was reasonable.

SECTION 3

APPROPRIATENESS OF THE LEVEL

OF PERMIT DECISION MAKING

The Corps is a highly decentralized organization. Corps headquarters in Washington D.C., is responsible for issuing overall policies and guidelines and maintaining broad performance statistics. Most day-to-day regulatory authority, however, rests with each district engineer who operates under the general guidance of a division engineer.¹

Under this structure, Corps regulations vest the decision to issue or deny permit applications, such as for the floating restaurant, to each district engineer. This authorization also allows the district engineer to modify, suspend, or withdraw permits without approval from higher Corps authorities. According to these regulations, the district engineer can refer an application to the division engineer for higher level review only under one of the following five conditions.

- The elevation is requested in writing by the head of a federal agency and accepted by the Secretary of the Army pursuant to existing memorandums of agreement or understanding.
- The recommended permit decision is contrary to the written position of the state in which the work is to be performed.
- The permit application decision involves substantial doubt about the applicability of laws, regulations, or policies.
- Elevation is requested by higher level authority within the Corps.
- The district engineer is precluded from acting on an application by laws and regulations.

¹The Corps' field structure is made up of 36 districts and 11 divisions.

None of these conditions were present in the floating restaurant permit application.

Corps officials told us that permit elevation is extremely rare. In fact, according to Corps headquarters records, from 1982 through 1985 only 12 cases out of more than 48,000 permit issuances nationwide² were elevated from the district engineer level.

²This total includes standard permits, which are processed through the public interest review process including public notice and receipt of comments, and letters of permission, in which a letter identifies the permittee, authorized work and location, and statutory authority.

SECTION 4

INVOLVEMENT OF OTHER FEDERAL AGENCIES

IN THE APPLICATION APPROVAL PROCESS

In addition to the public interest review, external safeguards are designed into the Corps' evaluation of permit applications to ensure objectivity. For instance, Section 404(c) of the Clean Water Act allows the EPA to prohibit an application from becoming a permit if the EPA Administrator determines that discharges into a site will have unacceptable adverse effects on municipal water supplies, wildlife, or recreation areas. Further, as required by Section 404(q) of the Clean Water Act, the Corps has entered into interagency agreements with EPA, and the Departments of the Interior, Agriculture, Commerce, and Transportation. Under these agreements, if another federal agency wishes to comment on a proposed permit action, the district engineer must consider that agency's position and supporting documentation. The intent of the agreements is to ensure that the agencies' views are fully considered by the Corps in making final permit decisions.

Regarding the case of the floating restaurant permit, several agencies had jurisdictional interest related to matters relevant to the project. These agencies included EPA, the Fish and Wildlife Service in the Department of Interior, and the U.S. Coast Guard in the Department of Transportation. Both the Fish and Wildlife Service and EPA were aware of the floating restaurant permit, but neither offered comments.

The Coast Guard did, however, become actively involved in the permit process. It expressed serious safety concerns about the project as originally proposed. However, once the project's placement was substantially revised and other special conditions (as discussed on page 14) were applied to the application, it was more comfortable with the permit decision. The Commander of the Coast Guard's OMS in Louisville, told us that the modifications to the application appear to remove the navigation hazard posed by the original location. He concluded that although no structure is immune from collision, the revisions to the application and special conditions attached to the permit reduce the risk of accident to an acceptable level.

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