

SESSION SUMMARY: INSTITUTIONAL GRIDLOCK FOR DREDGING U.S. HARBORS

Terry Huffman,
Huffman & Associates, Inc.

Commercial port directors across the country have been encouraged by the present Administration's philosophical notion these days that the environment and economic goals are not mutually exclusive aspirations but inseparable and equally desirable pursuits. Although not publicly well-known, virtually all of the import and export products entering or leaving the United States do so through the nation's ports. However, anyone who has ever witnessed efforts by a major port to obtain permission to maintain shipping or expand shipping, transit and docking capacity, may still be skeptical of how rapidly this philosophical change is influencing the implementation of regulatory changes.

While dredging harbors and shipping lanes is relatively simple from an engineering standpoint, the sediment that must be dredged from the nation's ports is often contaminated with industrial/agricultural materials contributed upstream and fated by Newton's natural law (of gravity) to settle out in the harbors and shipping lanes of the port. At the Transportation Research Board's 1994 Annual Meeting, a remarkable concordance of views of some of the country's major port staffs, various regulatory administrators, and representatives of the environmental community suggested that the goals of ensuring the integrity of the nation's transportation process and its commercial activity are very clearly at what is referred to as "gridlock" with the protection goals of the regulatory process; the situation is caused by a complex maze of local, state and federal regulations with varying implementation policies focused at the local or watershed level, often without a comprehensive environmental goal, for a given proposed dredging project.

The permit approval process for a dredging project requires the project sponsor to develop an environmentally acceptable dredging and disposal plan formulated through studies which determine the feasibility of various dredging plan alternatives and mitigation plans designed to offset a variety of environmental impacts. The various plan alternatives, which must be technically, logistically, and economically feasible, are evaluated by federal, state and local agencies, and public comments are solicited and weighed relative to public interest issues during the official

comment period. Plans may then be further modified and, if found acceptable by the permitting agencies, permits for the project are issued.

Present program emphases include realizing both environmental and economic benefits through the regulatory process by protecting the nation's water resources, which include wetlands, implementing strong safeguards to protect our nation's water quality and associated values, and preventing significant threats to human health which can occur from contaminants. However, critics of the existing process are concerned that the efforts to "permit" a project, or monitor to ensure agencies, both during the permitting process and permit compliance phase, "follow the rules" in an objective and technically correct manner, are still impediments to a realistic process. Strong arguments against spending so much money on making sure the rules which are followed are fair and reasonable, and for better attainment, if not over-reaching attainment of environmental and transportation goals, were made during this discussion. This is in sharp contrast to the attainment of minimum or below minimum goals which many authorities presently perceive as the typical regulatory outcome. Regardless of one's affiliation, whether business, interest group, individual, or even government agency, one cannot overlook the fact that adequate cash flow to ensure participation in the regulatory process and project design and construction is the crux of success or failure of each port authority's desired goals.

Critical issues which must be faced in order to revamp and potentially expedite the permitting process are focused in two areas. First, minute levels of contaminants can be detected with today's capabilities, however, detection capabilities are much more advanced technologically than available methods of decontaminating sediments. As a result, order of magnitude increases in the cost of dredging projects result as ports which need to dredge accumulated sediments are required to adhere to ever more limited regulatory criteria.

Initiatives are underway to respond to some of the criticisms concerning scientific and technological strategies being employed by agencies to evaluate dredging projects. These include clearer guidance in

dealing with dioxin, a new manual for testing dredge sediments, and a national inventory of contaminated sites, according to David Davis, Environmental Protection Agency representative. Contaminated sediments have been identified as the primary constraint in the permitting process, and emphasis on a national program to clean up contaminated sediments and prevent new contaminants from entering hydrologic systems is imperative. Recent White House comments indicate pollution prevention in manufacturing and the development of sustainable agriculture have been targeted as key elements in reducing the contaminant sources that are afflicting ports presently.

Secondarily, overwhelming concern regarding the arduous permitting process has been expressed at all levels of government. For example, Charles Roberts, Port of Oakland, identified a number of problems that, from his perspective, originate with the regulatory agencies. These problems include: a lack of staff accountability, lack of professional expertise due to rapid staff turnover, and an absence of management systems to keep the permitting process on track and moving at a timely pace. The number of involved or interested agencies with different statutory mandates and the lack of a formal mechanism for building consensus among these various parties has also been identified as a focal area of concern.

Another key problem is that present environmental laws and regulations were written before the concept of "sustainable development" became established! There are, therefore, limits on how far the existing regulatory process can be modified in order to encompass this new paradigm. If we, societally, are going to successfully inject this new concept into the existing regulatory process, it is going to have to arrive through a consensus by all stakeholders that we are working under a new set of principles for identifying project need, design and approval.

What changes need to be made? More focused leadership by the regulatory agencies who are involved with the process presently, particularly the Corps of Engineers, is a starting point. The Corps, as the final decision maker, should control the process with fair but firm deadlines, followed by a timely decision based upon the facts and consistent application of laws and regulations. To further improve the process, the Corps should focus on watershed/ecosystem area wide permitting programs in geographic areas where permit requests are high. In addition, a parallel review process needs to evolve at the state and local level where those entities have independent permit or certification authorities. Sequential decision making slows the permit decision process when one level of government waits for

the other to rule before moving on to the next step. Another required element is that the process include all stakeholders in a good faith discussion and exploration of each others' concerns, constraints and ideas. For their part, the regulatory/reviewing agencies generally agree there are problems with the permit process, but they do not believe them to be systemic, i.e., they are not inclined to redesign the system from scratch and prefer to look for ways to make it more responsive and, in appropriate cases, faster. The Corps, which processes over 100,000 permits each year under the Clean Water Act, recently received a 20% increase in its regulatory staff and regulatory budget, according to John Studt. This, along with a new initiative to increase the compensation for Corps regulatory staff, will hopefully, result in more timely processing of permits and decreased staff turnover.

The Fish and Wildlife Service is in the process of confronting similar issues, particularly with regard to closer management of the process, increasing staff skills, and building a consensus mechanism that includes all constituencies. Charles Carnella, National Marine Fishery Service, indicated (in the referenced session) that NMFS has staff problems also, with insufficient staff to give each project the attention it deserves. Finding an appropriate solution is crucial since it was recently stated by John Carey, Port of Mobile, that at least 8 federal and 27 state or local agencies are involved with one port project he administers, not to mention the number of private individuals and groups which may be involved in the permit process and its complexities.

An interagency working group on dredging is presently attempting to develop long-term management strategies for addressing dredging and disposal needs at the national and local levels. Proposed revisions to federal wetlands law, as suggested in Senate Bill 1304 (the Baucus-Chafee Bill) also include a number of features of interest to those who have found the permit process too slow in the past. Among them are a 90-day deadline within which agencies must act, and an administrative appeal process for permit applicants who are dissatisfied with the final decision of the permitting agency. The bill will also encourage greater state involvement by authorizing state programmatic permits, a device which could eliminate, or at least reduce, the perceived duplication of effort by federal and state permitting agencies.

Many of the features we may wish to have already been articulated by the interagency working group on wetlands policy, including:

- expanded partnerships with state/local entities;
- watershed/ecosystem approaches;

- wetland mitigation banking; and
- policies based on best scientific information

The interagency working group for harbors and port dredging projects will, undoubtedly, come up with additional suggestions.

Guidance for the program, however, must be clearly established, and it is at the local level where the most crucial tests of its satisfactory implementation will be administered. So, despite the best intentions and expertise in Washington, it is important for the ports, state and local government, and local environmental interests to become involved in shaping the coming debate on the resulting regulatory process. Local assumption of regulatory authority within watershed-based geographic limits with minimal federal oversight for attainment of agreed upon environmental standards is a likely new direction. However, participants in the local-federal regulatory partnership must be prepared for the reality that the energy required to go beyond the current polarized viewpoints and achieve a satisfactory resolution of the current regulatory problems at the local level far outreaches the amount of effort which federal government has and will be able to expend on this issue.