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Improvements Needed in the Corps of Engineers' Regulatory Program for Protecting the Nation's Waters

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Improvements Needed In The Corps Of Engineers' Regulatory Program For Protecting The Nation's Waters

The Corps of Engineers has a broad mandate to protect and conserve the Nation's waters by approving only those activities (i.e., dredging, filling, construction, etc.) that are in the public interest.

While some elements of local discretion are necessary in a program of this nature, inconsistencies and variances between the operations of the Corps' districts have been of such magnitude as to hamper the establishment of an effective nationwide program. The headquarters and districts will have management and evaluation difficulties until the Corps

- defines the geographical boundaries of the program,
- provides for consistency by the districts in interpreting and applying regulations and guidelines,
- defines the methods to be used to achieve results expected from the program, and
- provides for periodic program evaluation.

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

COMMUNITY AND ECONOMIC
DEVELOPMENT DIVISION

B-114885

The Honorable
The Secretary of the Army

Dear Mr. Secretary:

We recently completed a review of the effectiveness of the Corps of Engineers' regulatory activities, as related to permits authorized under Section 10 of the River and Harbors Act of 1899 and under Section 404 of the Federal Water Pollution and Control Act Amendments of 1972. Our review included permit actions during the period of July 1, 1974, through September 30, 1976, as well as subsequent policy changes.

Sections 404 and 10 give the Corps a broad mandate to protect, enhance, and conserve the Nation's waters by approving only those activities that are in the public interest. The means by which this is to be achieved have not been clearly identified. Failure to establish specific criteria and guidance has resulted in significant differences in the methods and emphasis given by Corps districts in carrying out various program operations.

We were unable to measure the effectiveness of the program because the Corps had not (1) defined the geographical boundaries of the regulatory program, (2) provided for more consistency between districts in interpreting and applying regulations and guidelines, (3) defined methods to be used to achieve expected program results, and (4) provided for periodic evaluation of the program.

We performed the review at the Corps headquarters in Washington, D.C. and at district offices in New York, Detroit, Galveston, New Orleans, and Jacksonville. We also discussed the program with officials from the Environmental Protection Agency (EPA), the Department of Interior's Fish and Wildlife Service, and the Department of Commerce's Office of Fisheries (formerly the National Marine and Fisheries Service) and talked with industrial and environmental groups, and with various State agencies in New York, Michigan, Texas, Louisiana, and Florida.

NEED TO IDENTIFY GEOGRAPHICAL
BOUNDARIES OF THOSE AREAS
SUBJECT TO REGULATORY CONTROL

Corps regulations define, in general terms, geographic areas subject to regulation under its sections 10 and 404 regulatory authorities. Corps districts are responsible for identifying specific geographic areas subject to regulation in their districts, but few have done so. Instead, the districts identify areas on a case-by-case basis upon receiving applications and requests for jurisdictional decisions or upon asserting jurisdiction in cases where work was performed without a Corps permit.

The lack of specifically defined geographical areas causes problems for the Corps and other agencies which assist the Corps in reviewing applications and making knowledgeable, informed decisions and also subjects the public and others to possible innocent violations. We found that most reported violations involved individuals who performed work without Corps permits. Because these individuals were, in most cases, unaware that the areas where they were working required a permit, the Corps usually approved an "after-the-fact" permit.

For example, in the Detroit District a property owner replaced a bulkhead to protect his residential property from erosion after the original bulkhead had been damaged by high waters. Apparently the applicant did not know that the area was subject to Corps regulation. In explaining the circumstances, the applicant noted that the replacement was made to a structure that had been in place for over 50 years. After lengthy permit processing, involving 13 months from the time the violation was reported, the property owner was issued a permit.

A Jacksonville District case illustrates how Corps personnel and other State and Federal agencies responsible for evaluating permits made erroneous decisions because of lack of clear designation of areas subject to regulation. A Corps inspector reported a violation involving unauthorized placement of fill in an area near the Santa Fe River. Subsequent evaluations by other concerned State and Federal Agencies confirmed the Corps inspector's contention that the fill site appeared to meet vegetative descriptions of a wetland area and appeared to be a periodically flooded area, therefore requiring a Corps permit. The property owner disagreed and refused to apply for a permit. The district submitted the case to the U.S. Attorney and requested maximum fines or penalties.

Subsequently, another Corps inspector visited the area during a period of flooding and found that it was not affected

by high waters. The property owner had been correct--his activity was not subject to Corps permit requirements. The district withdrew its request for legal action.

Corps headquarters officials are aware of the lack of specifically defined geographical areas to be regulated. We recognize that defining the areas has been complicated by the 1975 court decision expanding Corps permit jurisdiction to "all waters of the United States." However, until the Corps requires districts to specifically define regulatory boundaries, the Corps inspectors and reviewing agencies will have difficulty making knowledgeable, informed decisions and innocent violations of the regulatory program will continue. We believe that the Corps' headquarters office needs to take a more aggressive posture in ensuring that regulatory boundaries are defined and in providing uniform guidance to its districts.

GUIDANCE FOR EVALUATING PERMIT APPLICATIONS CAN BE IMPROVED

In reviewing a permit application, the district regulatory branch determines the type permit required and

- if a section 10 permit is required, applies regulations developed by the Corps;

- if a section 404 permit is required, applies the same Corps regulations, as well as guidelines developed by the Environmental Protection Agency (EPA).

Corps regulations and EPA guidelines provide for many different types of considerations to be made in evaluating permit applications. In implementing the regulatory program, districts differed in their interpretation and application of certain of these considerations. Because of these differences, applicants submitting similar permit proposals are subjected to different degrees of regulation and different decisions, and evaluation of the overall regulatory program is difficult.

We believe that the Corps headquarters should provide additional guidance to the districts in the following areas.

Better guidance needed for reviewing permit applications in wetlands

Corps regulations and EPA guidelines both discourage activities having detrimental effects on important wetlands. Corps regulations provide that no permits are to be issued in important wetland areas unless the public interest requires

otherwise or unless the benefits of the proposal outweigh the damages. EPA guidelines provide that discharge of dredge material in wetlands is not to be permitted unless there are no less damaging alternative sites or unless other alternatives are not practicable. Discharge of fill material in wetlands is not permitted unless the applicant clearly demonstrates the proposed activity is wetland dependent or that other alternatives are not practicable. For both dredge and fill material to be discharged in wetlands, there must be no unacceptable adverse impact on aquatic resources.

Although the five districts considered wetlands protection as an objective of the section 404 program, different methods were employed by the districts to achieve that objective. For example, the method used by the New Orleans District was to review alternatives to ensure that applicants used the most feasible and least damaging dredging methods and disposal locations. In instances where there appeared to be no less damaging alternatives, however, the district generally approved the activity proposed. There were no denials of any wetland applications in this district during our review period. In the Jacksonville District, however, officials advised us that the district followed a policy of allowing either no fill in wetlands or very minimal fill. Minimal fills which were authorized, involved only wetland areas defined as nonproductive or of very little benefit. Approximately 42 percent of the district's denials involved wetland applications.

Differences in the applications of wetland protection measures caused unequal treatment of applicants desiring to perform work in wetland areas. For example, in commenting on several proposed oil and gas production activities in wetlands, the New Orleans District concluded that it was not feasible to lessen environmental damage to wetlands by requiring applicants to drill and explore multiple locations from a single site (directional drilling). Thus, the district approved dredging canals to each drilling location. In one case in which the district approved a permit to construct a barge canal in wetlands for the purpose of drilling an exploratory oil well, the activity involved dredging approximately 27,000 cubic yards of material. Subsequently, additional wells were drilled involving seven extensions to the original canal and an additional 156,000 cubic yards of dredge material. In approving the additional plans, the New Orleans District accepted the applicant's contention that directionally drilling the additional wells from a single site was not feasible because it would result in both increased costs and difficulties in controlling the drilling direction and angle.

In the adjoining Galveston District, however, an applicant proposed to construct a road through a wetland area to a proposed drilling site within the area. District officials recommended that the applicant revise his proposal and directionally drill to the proposed site from an existing roadway and drilling pad. Subsequently, the applicant agreed to the district's recommendation, thereby incurring considerable expense to avoid damage to wetlands.

We believe the above differences demonstrate the need for criteria and guidance for evaluating permit applications involving wetlands. This would help to avoid varying interpretations by the districts and would aid management in ensuring that uniform application of the criteria is being achieved. Without such consistency and uniformity, applicants desiring to perform similar work in different wetland areas are not assured of uniform treatment, and the wetlands do not receive uniform protection.

Guidance needed for making cumulative impacts assessments

According to regulations, evaluation of permit applications is to include consideration of the probable impact of each application in relation to the cumulative effect created by other existing and anticipated structures or work in the general area. Although requiring this consideration, neither the regulations nor management directives specifically provide means for identifying and evaluating cumulative effects.

In a 1976 in-house Corps study, districts identified the evaluation of cumulative impacts of proposed works as a major district problem. The study showed that this was due to a lack of methods or data to perform cumulative impact assessments. Varying methods are used by districts in determining cumulative effects.

In an application requesting approval to construct a recreational housing area, the Jacksonville District considered the precedents which might be set and the possibility of a proliferation of similar structures if the permit was approved. These factors, interpreted as cumulative impacts, plus the district finding that the success of this activity did not depend on its being in the wetlands, resulted in permit denial.

The Galveston District, on the other hand, approved a similar application. The district evaluators recognized that there were impacts on the environment but concluded that cumulative impacts could not be estimated because no specific environmental studies had been done in the area.

For a similar application, the New Orleans District found that canal dredge and fill for recreational housing in wetlands would pose serious cumulative and environmental effects on the ecosystem; however, it approved the application based on economic benefits to be derived. Although the New Orleans District identified construction of recreational housing in wetlands as an activity causing serious cumulative impacts, most applications were approved without noting whether cumulative impacts were considered. We noted also, that this district is in the process of issuing a general permit 1/ for recreational housing.

The Galveston District noted, in response to an in-house Corps questionnaire, that dredging sand and shell for industrial uses caused serious cumulative impact. Of the 10 sand and shell dredging applications processed in the Galveston District during our review period, however, six were approved, two were withdrawn by the applicants, and two were denied because of the adverse impact on fish and wildlife.

In the two cases denied, the district reported that the cumulative impacts were unknown. In one of the cases approved, on the other hand, the Galveston District reported that no adverse cumulative impacts were anticipated; however, according to the district's permit branch, the district has no means for assessing cumulative impacts.

Although the five districts recognized that certain types of activities cause serious cumulative impacts, applications for these activities are usually approved. The districts either do not determine cumulative impacts required by regulation or they use different criteria to determine them. We believe that additional guidance from Corps headquarters on how to make cumulative impact assessments would prove to be a valuable tool for each district to use in protecting the waters in its jurisdiction.

Better guidance needed for use
of general and blanket permits

The Corps has adopted special procedures (general permits) and certain districts have adopted other procedures (blanket permits) to reduce workloads and make the regulatory program more administratively manageable. These procedures eliminate the need for individual approval of all permit applications. The general permit is used in four of the five

1/See p. 7 for description of general permits.

districts we reviewed, the blanket permit in three of the five. We believe that the Corps can put the general permit to more widespread use; however, the Corps needs to reexamine the use of the blanket permit to determine its effectiveness in protecting the public interest.

The general permit

Under this procedure a district issues a single permit, after public review and comment, to authorize many similar activities which individually and cumulatively are determined to have only minimal environmental impacts. Examples of how districts use general permits are presented below.

The New York District issued a general permit for submarine and aerial cables. As a result, applicants proposing to undertake this type of work notify the district engineer of their plans and proceed with the work. In the Jacksonville District, on the other hand, a utility company submitted 100 applications for aerial power cables which were already in place. Since the Jacksonville District has no general permit for power cables, the district will have to issue public notices and evaluate and consider public comments on each of these applications.

Jacksonville District issued a general permit for private piers in October 1975. District officials estimated that 400 piers were constructed under the general permit through September 30, 1976, without evaluation and processing. The New Orleans District, on the other hand, does not have a general permit for piers and has individually processed several hundred applications for private piers even though none of these applications was denied.

In all the cases above, the work was considered minor by the district involved. The general permits resulted in less time and paperwork for the applicants and reviewing agencies and demonstrated the effectiveness with which district operations can be carried out. We believe the Corps should pursue the possibilities of expanding the role of the general permit in all districts to ensure uniform treatment of applicants and more economy and efficiency of operations.

The blanket permit

Specific authority for issuing blanket permits is not provided for in Corps regulations. According to an official of one district, authority was "probably" provided by Corps headquarters in the late 1940s. Headquarters officials stated that they were aware of the use of blanket permits but that

there was no specific authorization sanctioning this method of issuing permits.

Under the blanket permit concept, an applicant applies for a permit to conduct a variety of oil and gas exploration and production activities within a large geographical area. After public notice issuance and consideration of comments and potential impacts, the district issues a blanket permit. The permit does not identify the specific location, nature, or type of activity which is to be undertaken.

Individual districts determine the length of time for which blanket permits are issued. The New Orleans District issued blanket permits for 10-year periods, Galveston District 3 years, and Jacksonville District approximately 9-year periods.

New Orleans District officials, apparently deciding it was necessary to review individual actions under section 404, have recently changed their blanket permit policy to exclude section 404 actions from the blanket permit authority. The Jacksonville District also does not use blanket permits for authorizing section 404 activities. The Galveston District policies, on the other hand, do not exclude section 404 activities from the blanket permit, and officials at this district stated that no changes to this policy were currently being considered.

We believe that the continued use of blanket permits is questionable because (1) the permit does not identify the specific location, nature, or type of activity to be undertaken and (2) there appears to be no authority for the use of this type of permit. In a December 2, 1977, letter we asked the Chief of Engineers to identify any authority for blanket permit use, and to inform us of any actions which are taken regarding these permits.

Guidance needed to ensure
consistent treatment of violators

Most violations reported by the five districts we visited involved failure of individuals to obtain required permits. The ultimate disposition of these issues usually resulted in "after-the-fact" permits. During the 27-month review period, four of the districts resolved from 87 to 99 percent of the violations in this manner. As shown on the next page, however, the Jacksonville District resolved only 55 percent by issuing permits.

Reported Violations
July 1, 1974 to September 30, 1976

<u>Resolution of proved violations</u>	<u>New Orleans</u>	<u>Galveston</u>	<u>New York</u>	<u>Detroit</u>	<u>Jacksonville</u>
Number of "after-the- fact" permits issued to violators	172	74	117	440	115
Number of fines	8	15	0	14	37
Number of restorations required (note a)	2	3	15	63	96
6 Percent resolved by fines or restoration	6	23	11	15	63
Percent resolved by issuing an "after-the-fact" permit with or without fines	99	96	89	87	55

a/Restorations involve a requirement that the violator return the impacted area to a condition existing before the unauthorized activity took place.

Districts are inconsistent in their treatment of violators. These inconsistencies exist within as well as among districts. The following examples illustrate some of the differences found.

- In the New Orleans District, two individuals were aware of the need for a permit but did not obtain one for the dredging operations they performed. One individual was fined (\$1000) and one was not.
- In the Galveston District, a violator was required to remove, fill, and restore the area along a 120-foot drainage canal. In the New Orleans District, another violator was not required to remove fill and restore the area along a 1.4 mile drainage canal. (Both violators were issued after-the-fact permits.)
- In the Detroit District, about 200 violation cases were closed without permit fines or restoration. This was due to (1) the cases being about two years old, (2) the possibility that the violations may have been corrected, and (3) the inspectors reports being inadequate.

We also found that Corps guidance does not specify whether program emphasis should be placed on permit processing, monitoring and enforcing, or whether each function should be given equal emphasis. Currently, the districts differ considerably in their interpretation of the importance of these functions. For example:

- Galveston District has no one assigned to the monitoring function, whereas the other four districts have over 20 percent of their staffs dedicated to this function; and
- Detroit District devotes about 50 percent of its staff to processing and evaluating permits, whereas the other four districts devote from 20-34 percent to this function. Two of these four districts had about the same workload and staffing as Detroit.

We believe that the Corps needs (1) to improve its guidance for handling violations so that permit violators can be treated more uniformly and equitably and (2) to identify the emphasis to be placed on program functions.

Guidance needed to provide better information in public notices

The Corps uses public participation as a key element in evaluating the interest of the public and as a basis for making decisions on activities under the regulatory program. However, we found cases where public notices of regulatory activities did not provide enough information for the public to make informed comments. We noted that, in many of the 92 public notices we reviewed, pertinent information such as the type of area to be impacted was not given.

In the New York District, a public notice described a project as involving 24,000 cubic yards of fill in "an irregularly shaped area with a offshore face." The Corps used this description in the public notice and the public was not informed that wetlands were involved. The only comment received from the public stated that the public notice did not provide adequate information upon which to form an independent judgement.

In the New Orleans District, a public notice described a proposal as maintenance of a 23,400-foot levee system, constructed with 219,000 cubic yards of dredged material. The notice stated that the levee system was to be used to protect land for agricultural purposes. Although aware that the entire 600 acre area involved wetlands which would be destroyed, the district did not provide this information in its public notice. In contrast, Jacksonville District public notices generally describe the nature and amount of wetlands involved in describing proposed activities.

We believe that the Corps should institute measures to ensure that the districts are providing the public with information to evaluate proposed activities.

IMPROVEMENTS NEEDED IN IDENTIFYING METHODS OF ACHIEVING EXPECTED PROGRAM RESULTS

The methods to be used in achieving expected regulatory program results need to be spelled out more specifically. Expected results of the Corps' program are protection, enhancement, and conservation of the Nation's waters. However, the details of how these expected results are to be attained have not been identified so that they could be applied uniformly nationwide. Such uniformity is hampered due to

--changes in laws and varying interpretations of those laws,

--ambiguity in EPA guidelines and Corps regulations in describing how the program is to be carried out, and

--the Corps' decentralized management of the program.

We recognize that, due to the above factors and conflicting public concerns, the Corps' regulatory program has become more complex to implement and administer.

The original program under Section 10 of the Rivers and Harbors Act of 1899 was to ensure, by issuing permits, that navigable waterways were not obstructed. The sole criterion for permit issuance was that the proposed work not impede or obstruct navigation.

During recent years, supplementary legislation and judicial interpretations have required that the Corps consider various "public interest" factors in evaluating proposed activities, and section 404 of the 1972 Federal Water Pollution Control Act Amendments added another permit for regulating the discharge of dredge or fill material.

Because of this legislation and court decisions, the Corps issued regulations in 1973 recognizing for the first time the Corps' regulatory responsibilities under the 1972 amendments. The Corps issued revised regulations in July 1975 after litigation on the 1972 act resulted in an expansion of the Corps' jurisdiction under section 404 of the regulatory program.

The Corps' 1975 regulations and subsequent regulations issued in July 1977 were unclear in indicating how some regulated activities were to be evaluated. For example, there was no indication as to the weight to be assigned in arriving at a decision when navigation and water quality interests conflict. Also when energy development needs conflict with wetlands protection goals, there is no clear indication of how the conflict is to be resolved.

Corps management recognizes that differences exist in the specific methods applied and decisions rendered by individual districts. Different districts' methods are actually viewed, according to a Corps headquarters official, as a good way to regulate because individual districts are "fine-tuned" to their respective areas and interests. Although different decisions are rendered by two districts evaluating similar proposals, both decisions, according to this official, meet the Corps' concept of public interest. Corps headquarters, according to this same official, does not view these decisions as problems but as indicators of district responsiveness to area needs.

We recognize that local interest considerations are very important; however, these interests may not always be synonymous with the overall interests of the nation. In fact, Corps regulations and EPA guidelines have not clearly identified how the local and national interests are to be protected nor the methods to be used to reconcile conflicting interests.

In the absence of clearer definitions, the Corps may be performing functions that either need no regulation or could be more appropriately handled by the local or state authorities. Also individual districts could be approving activities which are not in the national interest.

We believe that the Corps needs to provide additional guidance to the districts as to methods to be used to achieve expected program results. If the Corps is unable to reconcile the conflicting interests involved or is unable to design a methodology for balancing the local and national interests, then it should request additional guidance from the Congress. In any event, interpretation of program requirements should not be left to individual Corps districts.

PERIODIC EVALUATION CAN IMPROVE MANAGEMENT OF THE PROGRAM

Program evaluation is a fundamental part of effective program administration and we believe that responsibility for evaluations should rest with agency management. However, we found that the Corps has not performed an evaluation of the regulatory program.

The current program relies on individual district approaches and considerations, and program diversity is accepted. This makes program evaluation difficult especially in some of the areas previously discussed, such as wetlands protection and cumulative impact assessment. The Corps has not yet established a basis for periodically evaluating the overall level of program effectiveness.

Since evaluation is an integral part of program administration, we believe the Corps should establish a requirement for periodic program evaluation. The Corps needs these evaluations to assess the program and to provide data for better management direction and control.

CONCLUSIONS

The Corps' regulatory program is difficult to manage and evaluate because of its ambiguity, size, diversity, and

the variety of approaches the Corps districts use in carrying it out.

While some elements of local discretion are necessary in a program of this nature, the inconsistencies and variances between the operations of the five districts we reviewed were of such magnitude that they hamper the establishment of an effective nationwide program. The headquarters and districts will have management and evaluation difficulties until the Corps accomplishes the following:

- Defines the geographical boundaries of the regulatory program. Until this is accomplished, it will be difficult for Corps inspectors and reviewing agencies to make knowledgeable, informed decisions, and innocent violations of the regulatory program will continue.
- Provides for additional guidance to the districts to aid them in (1) achieving expected program results and (2) interpreting and applying regulations and guidelines, specifically concerning wetlands, cumulative impact assessments, violations, public notices, and general and blanket permits. This can minimize differences in treatment of applicants and provide a better basis for overall evaluation of the program.

Accomplishment of the above will provide more consistent management of the program; however, there also needs to be a mechanism set up for overall and district program evaluation.

RECOMMENDATIONS

We recommend that the Secretary of the Army provide for improved management and control of the Corps' regulatory program by directing the Corps headquarters office to:

- Take a more aggressive posture in ensuring that regulatory boundaries are defined and in providing additional guidance for districts to use in defining geographic boundaries.
- Provide additional guidance to the districts for evaluating permit applications that involve wetlands, making cumulative impacts assessments, using general and blanket permits, handling violations, and providing information to the public on proposed projects.
- Provide additional guidance to the districts as to the methods to be used to achieve expected program results.

--Establish a requirement for and specific guidance to conduct periodic program evaluations.

AGENCY COMMENTS

We did not request formal comments from the Secretary of the Army or the Corps of Engineers but did obtain oral comments from the Corps. The Corps officials generally agreed with the facts of the report. They stated that there are differences in district operations; however, these differences do not necessarily constitute problems but are indicative of district responsiveness to area needs.

PENDING LEGISLATION CONCERNING THE REGULATORY PROGRAM

The Conference Committee of the House Committee on Public Works and Transportation and the Senate Committee on Environment and Public Works recently agreed on a bill (H.R. 3199 - the Clean Water Act of 1977) to amend the Federal Water Pollution Control Act. The bill passed Congress on December 15, 1977, but had not been signed by the President as of December 19, 1977.

The bill allows the Secretary of the Army to transfer permitting authority to the States for controlling discharge of dredged or fill material into navigable waters within the State 1/ providing the Governor so desires and the State plan is approved by the Environmental Protection Agency (in consultation with the Secretary of the Army and the Director, Fish and Wildlife Service).

We believe our recommendations will be applicable under such legislation because problems identified in this report will continue to exist. Furthermore, differences in program operations may be even more pronounced because of the diversity of State management.

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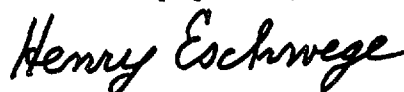
As you know, Section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to

1/"* * * (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) * * *"

the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agencies' first request for appropriations made more than 60 days after the date of the report.

We are sending copies of this report to the four committees to set in motion the requirements of section 236. Copies are also being sent to cognizant legislative committees; the Acting Director, Office of Management and Budget; the heads of Departments or Agencies directly involved and the Governors of the fifty States.

Sincerely yours,

A handwritten signature in cursive script that reads "Henry Eschwege".

Henry Eschwege
Director

Enclosures - 40

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