

Interagency Coordination in  
the Corps of Engineers Regulatory  
Regulatory Program

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1988

INTERAGENCY COORDINATION IN THE  
CORPS OF ENGINEERS REGULATORY PROGRAM

by

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Internship Report

Submitted to

Marine Resource Management Program  
College of Oceanography  
Oregon State University  
Corvallis, Oregon 97331

1988

in partial fulfillment of  
the requirements for the  
degree of

Master of Science

Internship: U.S. Army Corps of Engineers  
Portland District  
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## INTRODUCTION

This paper is the product of a 15 month internship with the U.S. Army Corps of Engineers. From July, 1985 through September, 1986, I served as an environmental specialist for the Portland District Regulatory Branch. My responsibilities included evaluating environmental impacts of work conducted in Oregon's waterways, through processing of permits under Section 404 of the Clean Water Act (CWA) (33 U.S.C.A. 1344) and Section 10 of the Rivers and Harbors Act (33 U.S.C.A. 403), to authorize the work. The permit process requires extensive coordination with many federal, state and local agencies and the general public. This report will describe the Corps' permit program and assess some aspects of interagency coordination at the federal level.

This report is divided into several sections. The first section provides background information on the Corps of Engineers regulatory authorities and the regulations under which they are administered. This is followed by a discussion of the Corps' procedural responsibilities under the Rivers and Harbors Act and the Clean Water Act. The next section addresses interagency Memoranda of Agreement (MOAs) which provide a formal process to resolve agency disagreements in the permit process. A case study illustrating the use of MOAs is given. Conclusions are then drawn about the basis for interagency disagreement and the practical usefulness of the MOAs, followed by recommendations for improved coordination. The appendix includes two regional permits I processed as a part of my internship.

## CORPS OF ENGINEERS REGULATORY AUTHORITIES

The Corps of Engineers' traditional responsibility is to maintain the navigability of the nation's waterways. Section 10 of the Rivers and Harbors Act of 1899 gave the Corps the authority to regulate work in navigable waters of the United States. "Navigable waters of the United States" is defined as "those waters subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce" (33 CFR 329.4, 1986). The law prohibits the obstruction or alteration of any navigable water, without authorization from the Department of the Army in the form of a permit from the Corps of Engineers. Such alteration or obstruction may be the construction of a structure in or over navigable waters, excavation or fill, or any work which affects the course, location, condition, or navigable capacity of such waters. (See figure 1 for a diagrammatic presentation of Corps Section 10 authority in navigable waters.) Corps regulations at 33 CFR 320-330 describe procedures for implementing Corps authority in navigable waters. Those procedures are discussed in the next section and are essentially similar to those followed in evaluating Section 404 permit actions.

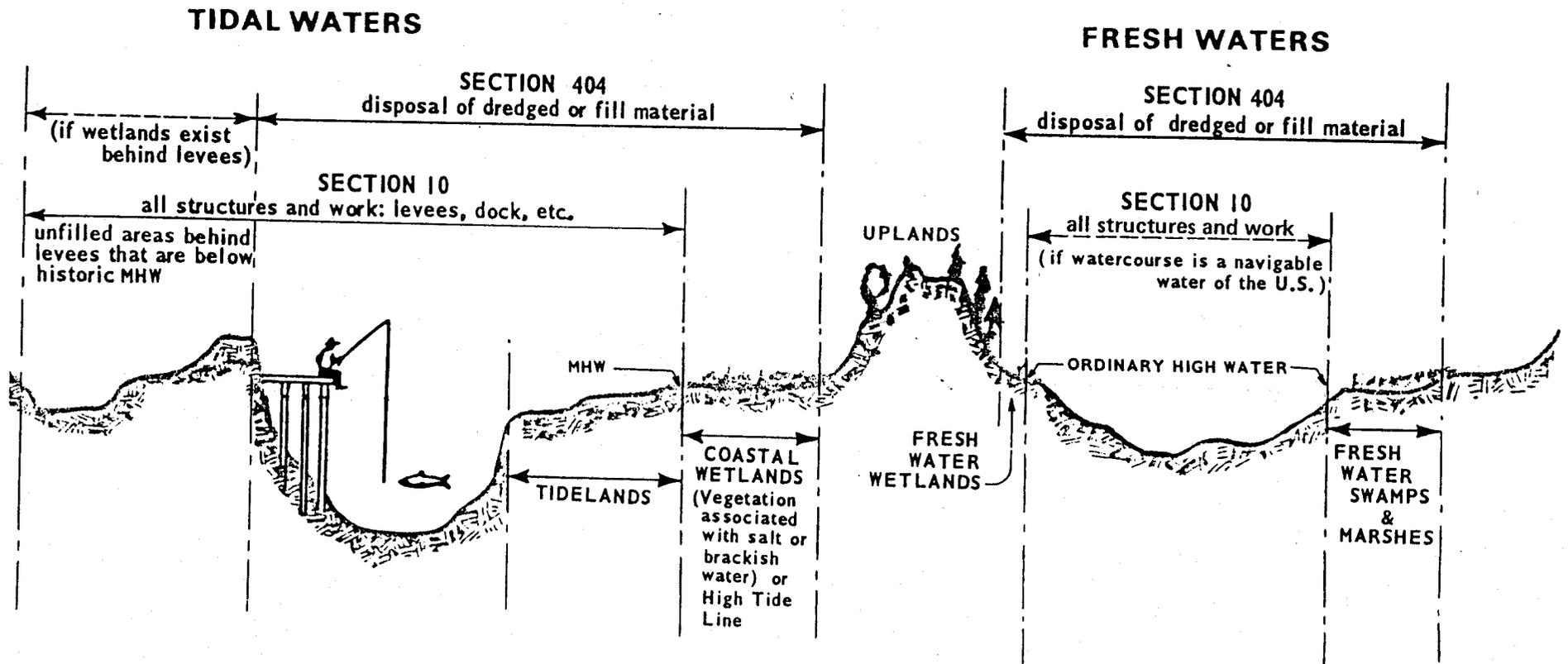
The Corps also has duties under the Clean Water Act. The Federal Water Pollution Control Act, currently called the Clean Water Act, was passed in 1972, and amended several times for the

purpose of protecting and improving water quality in waters of the United States. Waters of the United States includes the territorial seas and all waters, up to their ordinary high water mark, that are part of a surface tributary system to and including navigable waters of the United States (33 CFR 328.3, 1986). Corps permits are required to place fill in these waters (figure 1). Wetlands adjacent to these waters are also waters of the United States, and are recognized as a valuable natural resource.

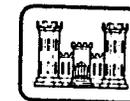
Wetlands have many beneficial functions. Typically, they are fairly low energy systems, which encourage deposition of sediments. This reduces stream turbidity and suspended solids, keeping waters clean. Dense wetland vegetation takes up large amounts of nutrients, which may have detrimental impacts when added to an aquatic system all at once, and releases them slowly. Wetlands also help control floods; they become inundated during flood stages of rivers, and those waters drain slowly back to the main channel, reducing flood severity. And last, wetlands provide excellent habitat for many life stages and species of animals. They provide rearing habitat and cover for juvenile fish, nesting and resting areas for migratory waterfowl, and feeding areas for innumerable species.

Effective implementation of Section 404 of the CWA can help preserve these important water quality functions of wetlands and other waters. Section 404 addresses the placement of fill material in such waters, and is the enabling legislation for the

# CORPS OF ENGINEERS REGULATORY JURISDICTION



NOTE:  
 IN ADDITION TO SECTIONS 10 AND 404 JURISDICTIONS,  
 THE CORPS REGULATES THE TRANSPORTATION OF  
 DREDGING MATERIAL FOR THE PURPOSE OF DISPOSING  
 INTO OCEAN WATERS (SECTION 103).



**United States Army  
 Corps of Engineers**

... Serving the Army  
 ... Serving the Nation

FIGURE 1

two sets of administrative regulations established to implement this section of the Act.

First, the statute charges the Environmental Protection Agency (EPA) with the responsibility to establish regulations, found at 40 CFR 230 and commonly known as the 404 (b)(1) guidelines, concerning restrictions on the discharge of dredged or fill materials into waters of the United States. Projects which include fill material must meet certain tests in order to comply with the guidelines. The four basic criteria are as follows:

- a. The discharge represents the least environmentally damaging practicable alternative and if in a special aquatic site, the activity associated with the discharge must have direct access or proximity to, or be located in the aquatic ecosystem to fulfill its basic purpose (40 CFR 230.10).

This guideline states that where the activity associated with a discharge which is proposed for a special aquatic site (wetlands, riffle and pool complexes, coral reefs, vegetated shallows, mud flats, and marine sanctuaries) is not water dependent, practicable upland alternatives are presumed to be available, unless clearly demonstrated otherwise. An alternative is "practicable" if it is available and capable of being done after taking into consideration existing technology, cost and logistics in light of the overall project purpose. All practicable alternatives which are not in a special aquatic site are presumed to have less environmental impact, unless clearly demonstrated otherwise. The burden of rebutting this presumption

is on the applicant, and constitutes the biggest obstacle to complying with the guidelines.

b. The activity does not appear to: 1) violate applicable state water quality standards or effluent standards prohibited under Section 307 of the CWA; 2) jeopardize the existence of Federally listed endangered or threatened species or their habitat; 3) violate requirements of any Federally designated marine sanctuary (40 CFR 230.10).

The second guideline ensures that a project is reviewed for compliance with other laws, both state and federal. In Oregon, the state Department of Environmental Quality (ODEQ) reviews each project which includes fill in a water of the United States, to determine compliance with water quality regulations promulgated under Section 401 of the Clean Water Act. Additionally, compliance with the Endangered Species Act, which is administered by the U.S. Fish and Wildlife Service (USFWS), and the Marine Protection Research, and Sanctuaries Act, partially administered by the National Marine Fisheries Service (NMFS), is determined. A project must comply with these laws to satisfy Section 404 (b)(1) guideline requirements.

c. The activity will not cause or contribute to significant degradation of waters of the United States including adverse effects on human health, life stages of organisms dependent on the aquatic ecosystem, ecosystem diversity, productivity and stability, and recreational, aesthetic, and economic values (40 CFR 230.10).

This guideline is fairly self-explanatory and quite comprehensive. In order to determine whether fill material meets this requirement, testing the material for contaminants may be

required. This guideline is very broad, allowing consideration of many public interest factors in determining impacts of a project.

d. Appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem (40 CFR 230.10).

The final guideline introduces the idea that mitigation can be utilized to offset impacts of a project. Mitigation can include avoiding, minimizing or rectifying the project impacts, possibly by reducing the size of the development or redesigning it to minimize filling. Compensatory mitigation can also be used to mitigate project impacts by creating wetlands, or other lost aquatic resources, from an upland area, or enhancing an existing wetland to improve its functional values.

Clearly, EPA's guidelines are meant to discourage the unnecessary alteration or destruction of wetland and water areas as contrary to the public interest, and the Corps has acknowledged this in their regulations (33 CFR 320.4 (b), 1986). The guidelines give EPA an important oversight role in the 404 program.

The Corps of Engineers is responsible for administering the CWA Section 404 permit program, through issuing or denying permits for the discharge of dredged or fill material into waters of the United States. Corps regulations for the Section 404 program (33 CFR 320-330) detail the procedures which must be followed in evaluating permit applications. The basis for issuing or denying a permit is the public interest review of that project, which includes project compliance with the 404 (b)(1) guidelines.

Because the Corps is charged with administering the 404 program, it must determine whether proposed projects comply with the EPA guidelines, as well as its own regulations. Like most regulations, however, EPA's 404 (b)(1) guidelines are written so that they can be interpreted in several ways. The Corps and EPA, given the same facts about a project, frequently come to very different conclusions regarding compliance with the guidelines.

The fact that EPA prepared the guidelines for subsequent Corps interpretation creates inherent conflict in administration of the 404 program, and sets the stage for problems in inter-agency relations. This will be more fully discussed later.

#### **CORPS ADMINISTRATION OF THE REGULATORY PROGRAM**

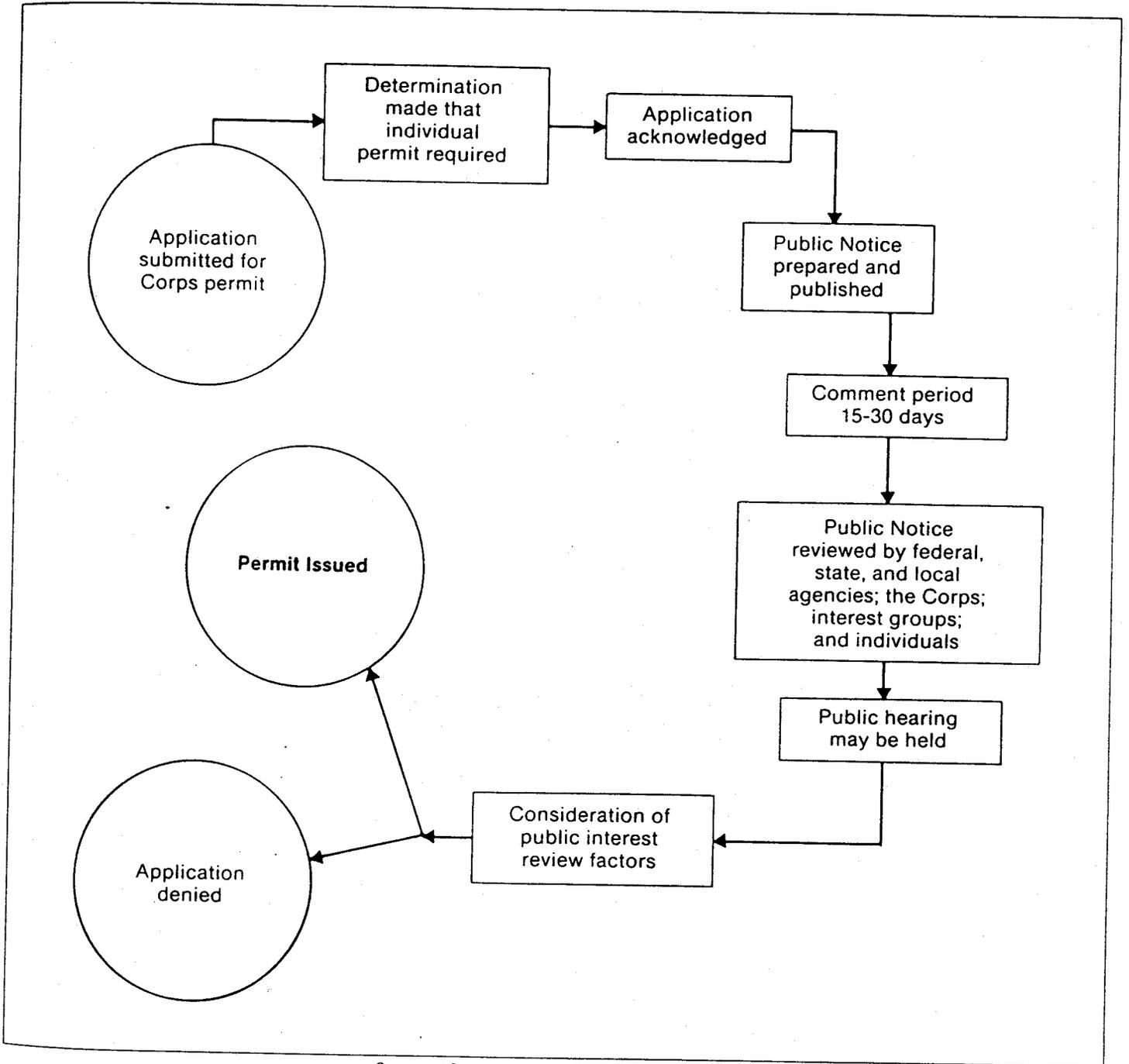
Frequently, an applicant will come to the Corps prior to submitting a permit application in order to get information that might reduce permit processing time and conflicts. The pre-application meeting can take place at the project site, or at the monthly State-Wide Interagency Meeting (SWIM). This provides the opportunity for interagency communication early in the process. Many of the agencies involved in the permit process, such as EPA, USFWS, NMFS, ODEQ, the Oregon Division of State Lands (ODSL), and Oregon Department of Fish and Wildlife (ODFW) send representatives to attend the meeting and comment on the project.

This early opportunity for agency input gives the applicant an idea of what information is necessary to complete his

application, basic permitting procedures (figure 2), and what agency concerns are. On-site meetings can be particularly productive, because agency personnel can see the site to be impacted, tell the applicant what the most environmentally sensitive areas of the site are (so he can avoid them) and begin formulating ideas for on-site mitigation measures. Problems which may arise in the permitting procedure, especially for controversial projects, can be identified, and the applicant can begin resolving them immediately. Once the applicant has this basic information, he is better prepared to begin the application process, and the agencies are better prepared to make constructive comments when the project is being evaluated through the Corps permit process.

The formal process for issuing permits under Section 10 or Section 404 begins when a project proponent submits an application and drawings describing the project. The application contains information about the applicant, project location and purpose, and a detailed description of the project. The Corps project manager, who takes the application from receipt through permit issuance, (or denial) first determines whether the project is within the Corps' jurisdiction. If the project involves work in navigable waters, then a Section 10 permit for the work is necessary. If the project entails fill below the level of ordinary high water (or below the high tide line in tidal areas), or in adjacent wetlands, then a Section 404 permit must be issued. It may be

**Application Evaluation Process**



Source: U.S. Army Corps of Engineers

FIGURE 2

necessary to complete a "wetland determination" of the project area in order to determine whether the Corps has jurisdiction over the project. The project manager uses his knowledge of wetland vegetation, soils and hydrology to determine whether an area is a wetland.

A project may require authorization under both Sections 10 and 404. If the project is within Corps jurisdiction, the project manager reviews the application to ensure it is complete. The application is not complete until there is enough information about the project to publish a public notice.

The public interest review is initiated when the permit application public notice goes out. The idea behind the public notice process is to exchange information and get comments, pro or con. As a tool for disseminating and collecting additional facts, the public notice forms the heart of interagency coordination for Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

Clearly defined procedures are followed during the public interest review. The public notice includes all relevant facts about the fill project, including information about the applicant, location and purpose of the project, a description of the proposed work, engineering/design drawings, and any other important information.

The notices are sent to all individuals, organizations and agencies which have indicated an interest in receiving them. The

National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the Environmental Protection Agency, as well as the state resource agencies routinely receive all public notices issued by the Corps. The federal and state resource agencies are particularly involved during this phase of the permit process. Any individual, group, or governmental organization objecting to, or having additional information which may bear on the decision to issue or deny a permit, may submit comments to the Corps. Comments must be received by the Corps within a set time period, usually 20 or 30 days as specified in the public notice, and typically include information regarding the environmental value of the proposed development area, the likely impacts of development, and requests for additional information regarding any part of the project. Suggestions may be given as to how the work might be accomplished in a more environmentally sensitive manner.

All comments are considered by the Corps in reaching a permit decision and become part of the administrative record. Comments submitted by the federal agencies carry particular weight in the Corps decision process. For instance, EPA comments on water quality and U.S. Fish and Wildlife Service comments on habitat value are carefully considered because those agencies have experts on those resource issues. Likewise, the Oregon Land Conservation and Development Department is looked to for opinions on Coastal Zone Management Act compliance, and local governments provide recommendations on land use and floodplain issues. However,

recommendations made by any respondent, including citizens, may be added as a condition of the permit. The comments often lead to less environmentally damaging projects. The applicant may be requested to respond to or rebut public notice comments, to provide the Corps with additional information on which to base a decision.

The District Engineer, through the Regulatory and Resource Branch, evaluates each project in light of the comments received as they pertain to the public interest, and in accordance with the 404 (b)(1) guidelines. The Corps evaluation of project effects is part of the decision document, which includes the project description, environmental assessment and a statement of findings. The permit is then issued or denied. The Corps alone is responsible for reaching a decision on the merits of the project, including the determination of compliance or non-compliance with the 404 (b)(1) guidelines.

The exchange of information brought about by the public notice review has many benefits. It provides an opportunity for experts in the fields of fisheries and wildlife, water quality, floodplain functions and other areas to evaluate projects for potential impacts. When potential impacts are identified, they can be more easily avoided, and a more informed permit decision can be made.

The public notice process also opens the door for disagreements between agencies. The various reviewers evaluate

the impact of the project narrowly with respect to fisheries issues, wildlife concerns, floodplain problems or water quality concerns. The Corps, on the other hand, has the responsibility to evaluate projects for many public interest factors, including economics, land use, private property concerns, mineral and energy needs and generally the needs and welfare of the people. These evaluation factors often directly conflict with one another, and it is up to the Corps to decide whether the reasonably foreseeable detriments of the project outweigh their benefits.

#### **MEMORANDUM OF AGREEMENT**

Although the Corps alone has the "final word" on issuance or denial of a permit, other federal agencies--NMFS, USFWS, and EPA -- can have significant influence on a permit decision through their Memoranda of Agreement (MOAs) with the Corps. The MOAs provide a formal process for resolving agency objections to projects where the Corps has decided to issue a permit. Each step in the MOA process must be completed within a specified time-frame; still the entire process and may take as long as four months.

Though the MOAs with the agencies were negotiated separately, they have similar procedural components (Figure 3). In most cases, a federal resource agency response to the public notice that recommends denial of the permit or that special conditions be attached to issuance, will initiate MOA procedures. These

Memorandum of Agreement Between  
the Environmental Protection Agency and the  
Department of Army

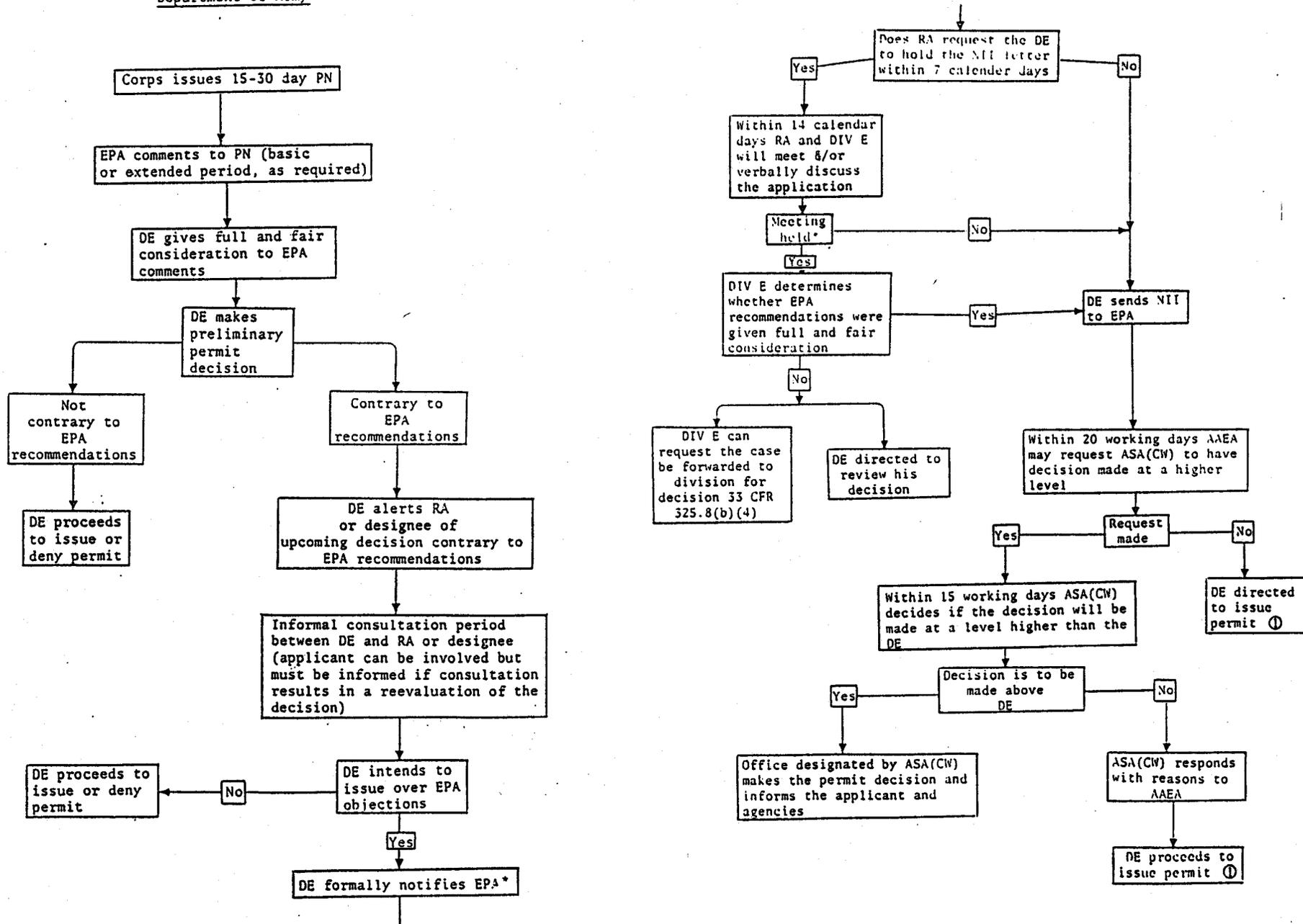


FIGURE 3

concerns must be submitted within the public notice comment period, and be within the agency's area of expertise to qualify for MOA "elevation" status. Informal consultation is then initiated in an attempt to resolve the issues. Normally, this involves incorporation of agency recommendations in the Corps decision (for instance, by adding special conditions) or through some compromise. This informal consultation is conducted at the staff level, and involves the Corps project manager and individual commenting on behalf of the resource agency.

If the Corps disagrees and determines that agency recommendations need not be incorporated into the permit, a copy of the decision document is sent to the agency, detailing the Corps position on project impacts, their magnitude and appropriate mitigation. The reasons for finding the project in the public interest, without incorporating resource agency recommendations, are also explained in the document. The objecting agency may request a two week delay before formal MOA procedures begin, to discuss specifics in the Corps decision document. Usually, this coordination takes the form of a meeting between the Division Engineer and the appropriate official of the dissenting agency. At this point in the MOA process, as at any point in the process, the agency can satisfy itself that its point has been made, or, conversely, the Corps can decide to include the agency recommendation by adding a condition to the permit, or by denying the permit. If some agreement is not achieved, formal MOA procedures are used to resolve objections.

The District Engineer officially notifies the agency in writing of his intent to issue the permit over their objections. The agency then has 20 working days to request the Assistant Secretary of the Army for Civil Works (ASACW) to have the final permit decision elevated to a higher level. The agency may let the 20 days pass without making that request, and the permit is issued. If the agency requests elevation within the allotted period, the ASACW reviews the case for up to 15 days, and may then designate the higher office which will make the decision. Usually, it is the Division Engineer. Alternatively, he may deny the request for elevation and the District Engineer issues the permit without incorporating agency recommendations. The ASACW will elevate the decision on a permit for only three reasons: insufficient coordination between agencies; significant new information; or the need for high level review of policy issues involved. As long as the Corps has a reasonable basis for its decision and none of the above issues is involved, the decision will not be elevated.

In practice, if the Corps has made a decision, there is little the agencies can do to reverse it. However, they can delay a project while MOA procedures are being implemented, a process that can take several weeks to four months. At any time during the MOA procedures, the applicant, who has been made aware of agency concerns, may agree to have agency recommendations made conditions of his permit, so as to prevent delay in permit

issuance. In other words, if an applicant needs to begin his project before completion of elevation procedures, he can decide to acquiesce to agency demands in order to expedite the permit process.

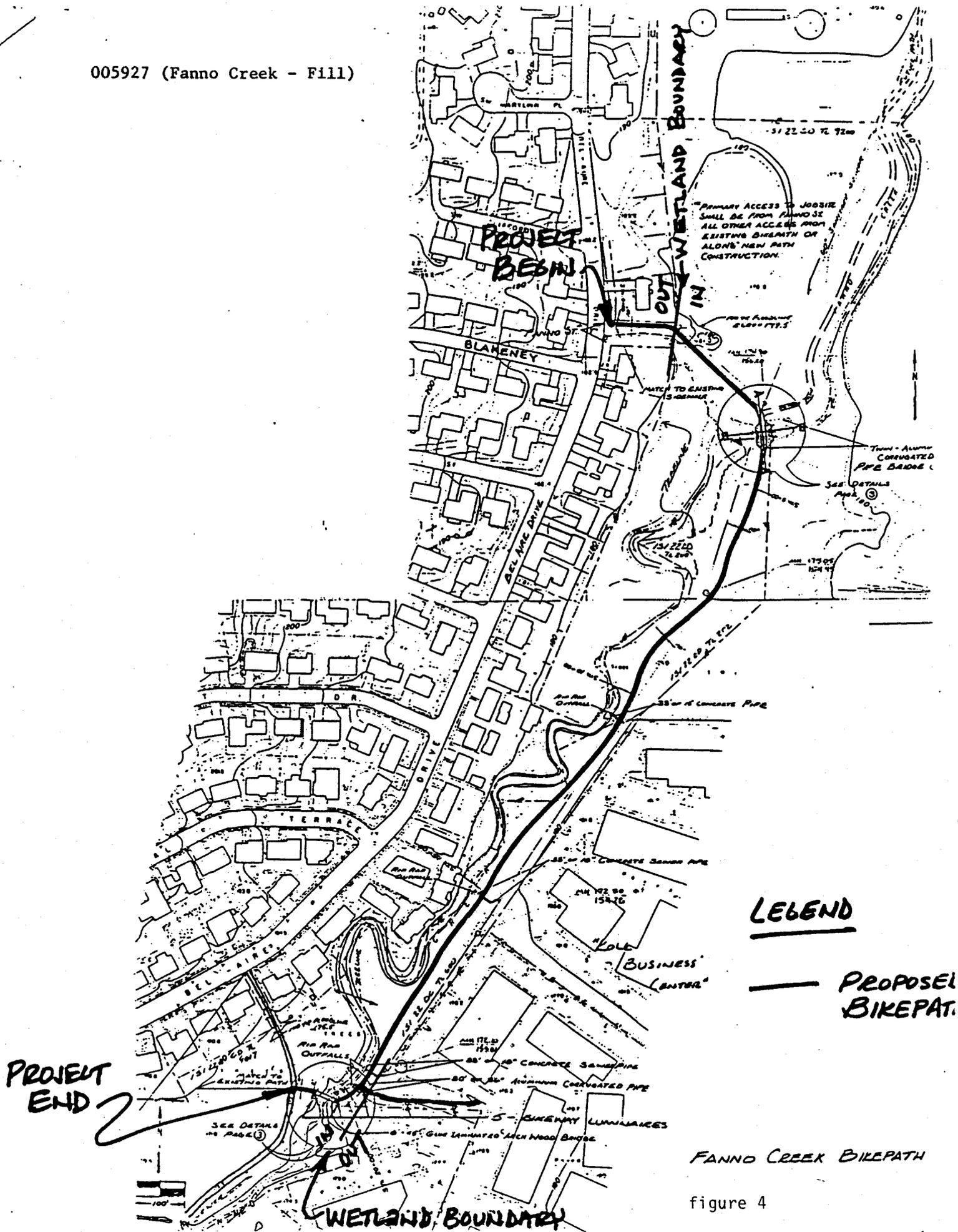
To summarize, the MOAs do force close coordination and meaningful consideration of resource agency comments. Implementing MOAs consumes a lot of time and manpower at all levels. Because of this, the Corps and reviewing agencies take great pains to compromise and work out acceptable agreements. They want to avoid the MOA process if possible.

#### **CASE STUDY OF MOA PROCEDURES**

On July 12, 1985, the City of Beaverton, Oregon applied for a permit to construct a 2000-foot long bikepath in wetlands adjacent to Fanno Creek. The bikepath was planned as an extension of an existing bikepath/recreation area (Figure 4). The path included 430 cubic yards of gravel bedding and asphalt, and thus was subject to Corps jurisdiction under Section 404. The path itself would cover one half acre of wetlands, and mowing a 5-foot strip on either side of the path would impact another 1/2 acre.

As mitigation for wetland impacts, excavation of a 1/2 acre pond from an old stilling pond near the bikepath was proposed. The stilling pond already had some wetland characteristics, but it completely dried out during the summer. The applicant proposed enhancing the area to provide a year-round marsh environment,

005927 (Fanno Creek - Fill)



**LEGEND**

**PROPOSED BIKEPAT.**

FANNO CREEK BIKEPATH

figure 4

coordinating the details of the project with the Oregon Department of Fish and Wildlife. In addition, planting trees between the path and Fanno Creek was proposed to provide for wildlife and to serve as a visual buffer.

A description of the project area is necessary to fully evaluate the project's compliance with 404 (b)(1) guidelines. Fanno Creek and its wetland area were in a fairly natural state at the time of application. Except for a water main that had been placed years before, the area had been little disturbed. However, this natural area is a thin strip (as narrow as 50 feet), between a residential area and a business park. Primary wetland values included flood and water quality control, and habitat value for songbirds and occasional pheasants. It is considered a high quality urban wetland, which is becoming increasingly rare in the Portland metropolitan area.

The public notice for this project was issued on September 19, 1985 and sent to all interested parties, including adjacent property owners and the resource agencies. Most of those who commented, including ODFW and NMFS, considered the work to be minor in nature, with little adverse impact on resources. For those agencies that responded with objections, concern centered around the quantity and quality of mitigation, and the possible existence of alternatives which were less environmentally damaging.

The U.S. Fish and Wildlife Service considered the area to be resource category II, a wetland of "high value for evaluation

species and relatively scarce on a national or regional basis". Their stated policy objective required them to seek mitigation wherein no net loss of wetland functions and values occurs. They had no objection to the project provided the applicant developed and implemented a mitigation plan that offset impacts to the water filtration and flood storage values, and provided a 1:1 replacement of the habitat area which would be lost, one acre (Figure 5).

The City revised its mitigation plan in coordination with the USFWS and ODFW. The new plan proposed excavating the stilling pond to create a one acre pond, with a nesting island. USFWS indicated that this new proposal resolved their concerns with regard to the project.

EPA responded to the public notice with four objections (EPA, 1985). First, they opposed issuance of the permit because a less environmentally damaging practicable alternative to the project existed. They felt that Bel Aire Drive, which runs parallel to the proposed path alignment, and was currently used by bicyclists, could continue to fulfill the primary purpose of the bikepath, i.e. as a transportation route. Since there was a less environmentally damaging practicable alternative to the proposed project, EPA believed it did not meet the requirements of the 404 (b)(1) guidelines.

Second, they stated the project would have significant adverse impacts to wetland functional values such as sediment

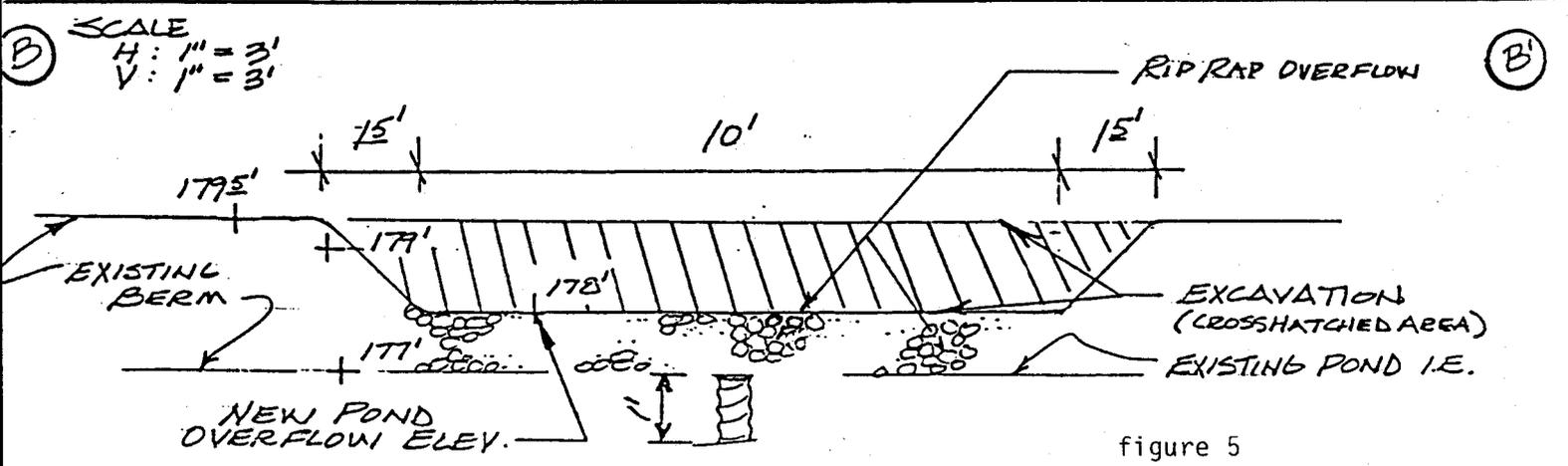
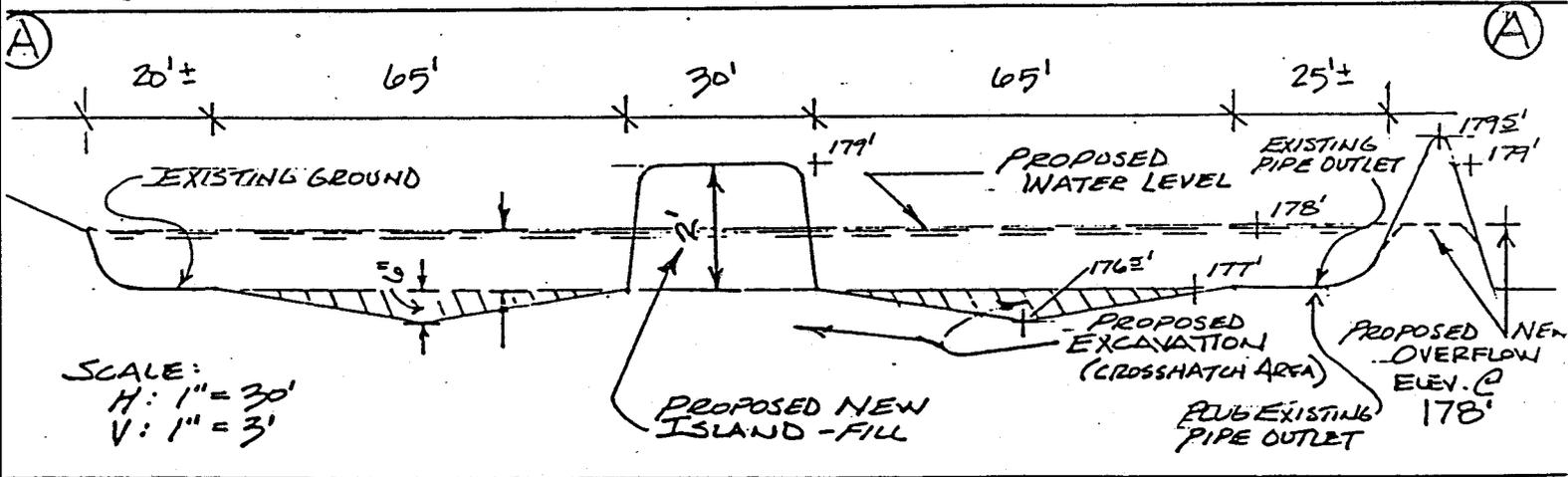
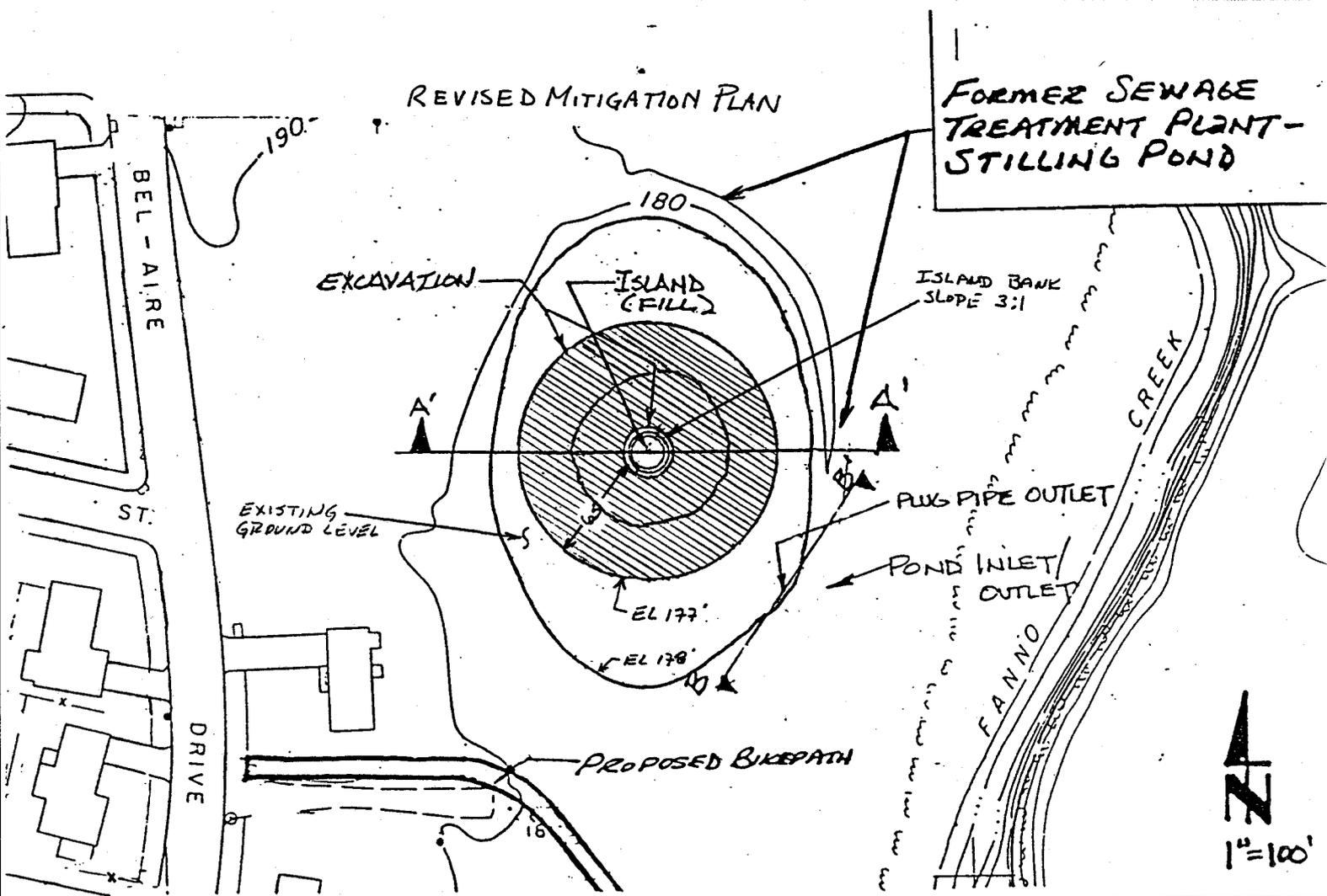


figure 5

entrapment, nutrient uptake, and wildlife habitat. In regard to wildlife value, EPA noted that increased use by people (and their pets) would create significant disruption.

Their third basis for objection had to do with possible future impacts, under the guise of "improvements" to the path for safety reasons. An accident or crime committed on the path could justify the City's placement of night lighting or major removal of vegetation. This would have severe impacts to wildlife at the project site.

Finally, EPA argued that cumulative impacts had not been adequately addressed. The path is a continuation of an existing network of paths, and future extensions to the system are in the planning stages. The cumulative impacts of all of these projects on Fanno Creek and adjacent wetlands is a required part of the Corps evaluation process.

EPA requested that the permit be denied on the basis of non-compliance with the 404 (b)(1) guidelines because available practicable alternatives existed. They indicated they would seek elevation of the permit decision if the permit were issued. At that point, the Corps requested that the applicant provide information regarding three alternatives, to rebut the presumption that upland or less environmentally damaging alternatives to the project alignment existed.

The first alternative suggested the City of Beaverton locate the bikepath adjacent to the Koll Business Center parking lot, at

the top of the existing fill. This alternative was rejected by the City for several reasons. Purchase of a 10 foot wide strip of land on which to place the path would cost nearly \$30,000, if Koll Company was willing to sell it. An easement would be equally difficult to obtain. Additional cost would likely be incurred to provide fencing between the path and parking lot for Koll property security. This alternative would remove landscaping vegetation required by City ordinance, adding cost to the applicant for removal and planting of new vegetation. Furthermore, the bikepath would be located at the top of a steep 10 foot slope, creating a safety hazard for cyclists. A safety railing would have to be installed at extra cost to the City. The City estimated the cost of this alternative at \$40,000 over the \$60,000 cost of the proposed path. This alternative was deemed too expensive to be practicable.

The second alternative suggested placing additional fill next to the parking lot to raise the bikepath out of the wetland. This would keep path users farther from the creek and avoid the cost of obtaining Koll Company land. This alignment would run directly over the sanitary sewer line which had been placed in the wetland. Putting the path on significant quantities of fill would require the City to raise the manholes and add to maintenance and repair costs. The additional fill would also be expensive. This alternative would cost the city nearly \$30,000 over the proposed path. From an environmental standpoint, the alternative would

cover more wetland area than the proposed path because the toe of the fill would be much wider than the 10 foot path; it was not necessarily a less environmentally damaging alternative, and from an economic standpoint, not acceptable to the applicant.

The final alternative considered was the no-action alternative. This alternative was obviously possible in terms of cost, technology and logistics, but the applicant felt it did not meet the overall project purpose which they defined as a "recreational trail that is separated from traffic...which permits passive use of the natural habitat." Part of the project purpose was to be a part of a system of similar pathways. The bikepath system serves to promote and enhance recreation by improving access to parks and open spaces for the residents of Beaverton.

With the applicant's analysis of alternatives, the Corps felt it had sufficient information to make a permit decision in favor of issuance. The decision document addressed each of EPA's four concerns. The Corps disagreed with EPA's assertions of unacceptable direct and cumulative wetland impacts, especially in light of the proposed mitigation plan. They dismissed EPA's concern that future measures might be needed to improve safety of the path as speculative. Finally, the Corps agreed with the applicant's assessment that no less environmentally damaging practicable alternative to the project existed. They therefore concluded that the project complied with the 404 (b) (1) guidelines.

The Corps advised EPA informally of its intent to issue to permit, and sent a final draft copy of the decision document, initiating formal MOA procedures. EPA rebutted the decision document in a formal position paper, and the Corps addressed issues raised in it in a supplement to the original decision document. This additional exchange of agency views is not part of the MOA procedure, but is consistent with the agency policies for coordination and openness.

The Regional Administrator of EPA, in accordance with the MOA, requested a two week delay in the formal "Notice of Intent to Issue" the permit, so that he could meet with the Division Engineer within that time to discuss the project. At that meeting, the Corps and EPA did not come to an agreement with regard to the permit decision. However, EPA did state that it did not intend to request elevation of the permit decision, although they did forward the file to their Washington D.C. office for review. Satisfied that they had made their point, EPA sent official written word that they would not ask the ASACW to review and elevate the case several weeks later, and the Corps issued the permit.

The process took about seven weeks. The project was delayed long enough to make construction that summer impossible. The project was completed one year later in August, 1987.

## CONCLUSIONS AND RECOMMENDATIONS

The preceding discussion and example illustrate the mechanics of the Corps permit process and how other federal, state and local agencies are involved. Overlapping jurisdiction and areas of concern clearly make interagency communication throughout the permit process critical. Thorough and timely coordination reduces duplication, minimizes conflict and speeds the permit process.

Unfortunately, the permit system does not run smoothly most of the time. For a variety of reasons, communication between agencies is difficult and complete agreement about a project or its impacts nearly impossible to obtain. The root of these frequent disputes are the ambiguities built into the laws and regulations governing the Corps permit program. Differences in each agency's missions and policies also contribute to problems in communication. Finally, simple misunderstanding by resource agency personnel of Corps' responsibilities and decision making factors also prevent effective communication and a smoothly run program. Each of these factors will be more thoroughly discussed in the rest of this section.

### Legislative Ambiguities

A primary reason for differences in opinion which lead to difficulty in coordination is the ambiguity written into both the Clean Water Act and its administrative regulations. Ambiguous

legislation is no accident. Issues are often settled by the legislators using language that both sides can accept, though each may have different ideas as to what it means, a fact that often sacrifices the coherence of a law (Quarles, 1976). This is clearly illustrated by a recent letter from several legislators (Chaffee et al, 1987) involved in writing the Clean Water Act to the Assistant Secretary of the Army for Civil Works.

The Congressmen made it clear that they agree with EPA's interpretation of the guidelines. They believe the mitigation techniques of avoiding, reducing and compensating for impacts should be applied sequentially. They also indicated that this section of the Clean Water Act was indeed written to protect wetlands. And finally, they stated that EPA's interpretation of the guidelines should be binding on the Corps. Naturally, if these views could have gotten out of committee and passed votes in Congress, they would have been clearly expressed in the legislation. However, compromises in language were probably agreed upon so that the bill could move along and not die in committee. Consequently, the Clean Water Act was passed with ill-defined goals and guidance from Congress.

Clear legislative goals or mandates are crucial for effective implementation of a law. Statutory objectives which are clear and consistent serve as an indispensable aid in program evaluation (Sabatier and Mazmanian, 1983), and naturally promote agency agreement and more constructive coordination in implementation of

the law. Further, a Congress with clear environmental goals in mind for implementation of Section 404 of the Clean Water Act should have assigned the program to an agency which would give the program high priority and be more supportive of statutory objectives (Sabatier & Mazmanian, 1983), which are clearly environmental in nature. Giving the Section 404 program to the Corps probably was inconsistent with the underlying purpose of the legislation (maintaining water quality), and institutionalized communication barriers and disputes. These could have been avoided with clearer statutory language and selection of more supportive implementing agency.

At the Corps district level, little can be done about the lack of clear and consistent 404 goals and policies. Barring amendment of the CWA, the only other solution to this problem would be for the leaders of the agencies involved in the Corps program to meet to develop policies that all can support, and publish them as joint regulations governing the Section 404 program. This approach is a possible vehicle to promote communication, reduce conflict and ultimately reach agreement in how the law should be implemented. The outcome agreed upon in such policy negotiations is more likely to result in effective implementation of a program because it will have the support of those most closely affected (Bingham, 1981). This, however, is a long term approach and would be difficult to achieve; no quick, short term solution seems feasible.

## Policy Issues

The importance of clear, explicit legislation becomes more clear when one takes a look at the often ambiguous or skewed interpretations made by administrative agencies. The real impact of policies is often determined not by how the legislation is worded when it emerges from Congress, but rather how those who implement the policy interpret the legislation (Lieber, 1975).

Understanding the Corps mission and its policies helps explain many of the conflicts that arise between environmental agencies and the Corps. The Corps' regulatory mission is to issue permits. Within the Corps of Engineers, policy can play as important a role in permit decisions as statutes or codified regulations. Policy is made at many levels. The Reagan administration has set a goal of reducing the regulatory burden on the public, as part of its philosophy of limiting Federal government involvement in private ventures and letting the free market economy run unhindered. Keeping the federal government out of "taking" litigation is another reason for this policy. The Presidential Task Force on Regulatory Relief initiated reforms to implement administration policy. The Assistant Secretary of the Army for Civil Works, an appointed official, is responsible for carrying out the policies of the administration by applying them to the Corps' permit program.

The Corps has worked hard to reduce the regulatory burden imposed on the public by the Section 10 and Section 404 permit

program. One of the outcomes has been that many nationwide and regional permits have been issued for minor work; each of these permits authorizes a certain type of discharge into waters of the United States or navigable waters, and projects which qualify for such permits undergo a minimum of federal review. Another method of reducing regulatory burden is to decrease permit processing times; the Corps' regulations emphasize issuing permits in the shortest possible time, by requiring each step of the permit process to be completed within a certain time-frame. For instance, public notices must be issued within 15 days of receiving a completed application (33 CFR 325.2 (d)). The Corps has set a goal of issuing most permits within 60 days, because applicants are due a timely decision. Management at the district and branch levels also reinforce the importance of short processing times. The result of minimizing federal review of projects and speeding up issuance of permits is that facts which may be important to the permit decision may be overlooked.

Other policy is handed down from the Chief of Regulatory Branch, at Corps headquarters in Washington D.C. A short policy paper, entitled "The Art of Regulating", written by B.N. Goode (1987), calls permit decision delay a "sin" and instructs permit project managers, "if you have a zone of discretion on a jurisdictional issue, and you usually do, choose on the side that results in the least regulation." He also reminds us that the 404 program is not an environmental protection program; otherwise,

congress would have assigned it to EPA. It is not a wetland protection measure, he claims, because vast amounts of wetlands are lost through activities not regulated by the Corps under the program, such as farming and silviculture. These attitudes affect decision making by project managers, and may cause projects that are within Corps permit jurisdiction to be bypassed.

Contrasting Corps and EPA interpretations of the 404 (b)(1) guidelines can illustrate why conflicts arise in the permit process. EPA believes that the types of mitigation-- avoiding, reducing, rectifying and compensating for impacts-- should be considered in a step-wise manner. For instance, if practicable, an applicant should avoid or minimize impacts to the aquatic environment before being allowed to compensate for resource loss through creating new or enhancing existing wetlands. EPA's interpretation is based on their environmental protection mission. Their view is that natural wetlands most often "work" better than man made-ones, and consequently require mitigation that offsets all project impacts. No net loss of aquatic site functional values is EPA's goal. The Corps, on the other hand, believes that any type of mitigation may be utilized to offset impacts, and requires only as much mitigation as it takes to ensure the project is in the public interest. Some loss of natural value is acceptable, provided the overall benefits of the project outweigh the detrimental impacts.

There is disagreement about "alternatives" analysis as well. The Corps feels that mitigation can be employed to make a project

the most practicable alternative. EPA, on the other hand, believes that mitigation should be considered only after it has been determined that the project is the least damaging alternative.

These differing interpretations give a pro-development slant to the Corps view in determining whether a project complies with the 404 (b)(1) guidelines or is in the public interest. Obviously, these policies can come into conflict with the federal resource agencies missions of environmental protection. This is why the 404 (b)(1) guidelines are so controversial. The fact that an environmental agency wrote them and the Corps implements them, points out dramatically how agency policy can lead to disagreement about the "correct" interpretation of some regulations. Had EPA been assigned the responsibility to administer Section 404, (or the Corps been assigned to write the 404 (b)(1) guidelines), the resulting program would have been very different.

Needless to say, the 404 (b)(1) guidelines are a principal source of contention between the Corps and EPA. Conflicts between the agencies arise at all levels, from the implementing staffs to Washington, D.C. Little can be done about this source of conflicts at the local level. The Corps needs to point out to EPA that interpretation of the guidelines is the Corps' responsibility and that Corps decisions are not subject to EPA policy.

Conflicting policies also lead to standing disagreements between the Corps and other agencies. For instance, the USFWS

routinely recommends denial of permits for new houseboat moorage spaces, which are subject to Corps jurisdiction only under Section 10 of the Rivers and Harbors Act. They deem houseboats a non-water-dependent use of public waterways with potentially serious cumulative impacts. They believe water-dependent uses to be more appropriate for waterfront development. The USFWS thus initiates elevation procedures on all such permit applications. This has occurred 5 times during the period April 1987 to February 1988, never getting beyond discussions with the division engineer.

On the other hand, the Corps believes houseboat moorages to have minor impacts, like other moorage structures, and Corps policy states that the Corps shouldn't override local zoning and land use planning by determining the appropriateness of the use, unless significant issues of federal interest, such as endangered species, are involved (33 CFR 320.4(j)(2), 1986). Furthermore, according to Corps regulations, water dependency is not an evaluation criteria under Section 10 of the Rivers and Harbors Act. The Corps believes it is appropriate to issue such permits. This is obviously a policy disagreement, which may benefit from high level review.

Initiating MOA procedures on every houseboat moorage permit seems a waste of agency time and effort, since the agency positions are already clear. These policies have been discussed at the division level, and the outcome of future houseboat permits which are elevated to that level is a foregone conclusion: the

Corps at the Division level believes it is appropriate to issue houseboat permits over the objections of USFWS for the reasons described above. USFWS threats to enter into the MOA procedures serve only to delay permit issuance, not to change the outcome of the permits or make those projects more environmentally sound. To close the issue, the Corps could encourage the USFWS to elevate one houseboat permit to the ASACW. Should the Corps then decide that the policy involved in issuing houseboat permits is appropriate, the matter should be dropped at the district level. This is not to say that USFWS should stop opposing houseboat moorages, for that is their stated policy. Rather, they should stop initiating elevation procedures and turn their efforts to other issues of importance to them. Sometimes the best that can be done in such cases is agree to disagree.

These examples of policy conflicts illustrate how interagency communication can be hindered in implementation of the 404 program. The result is ineffective implementation of a regulatory program. To avoid this, Sabatier and Mazmanian (1983) note the importance of having implementing agency leaders promulgate policies committed to statutory objectives. The action agency must also be consistent in developing and applying enforcement of the law. The Corps' emphasis on regulatory reform and other policies ignores the important environmental goals of the legislation and shows that the Corps may not be sufficiently committed to the environmental aspects of the law. The Corps'

sporadic, inconsistent enforcement of the law (Flynn, 1988) is another indication of this lack of commitment.

The Corps apparent lack of commitment to environmental aspects of the law leads quite predictably to the resource agencies strong counteracting policy positions. While the outcomes of these conflicts may balance out to reasonable implementation of the 404 program, interagency staff communication continues to break down on individual projects, making the permit process difficult, frustrating for all involved, and very time-consuming.

#### **Educational Issues**

Another problem in effective coordination is misunderstanding by resource agencies of Corps laws and regulations. For instance, a public notice response by NMFS on a moorage proposal, regulated only under section 10 of the Rivers and Harbors Act, recommended the project meet the requirements of the 404 (b)(1) guidelines. This clearly demonstrates a lack of knowledge of the Corps' regulatory powers. The Corps has no authority to require such compliance.

The Corps naturally responded to this concern in the decision document. But the Corps needs to go further to keep this type of misunderstanding from recurring, by educating the staff members of their agencies. At present, this is done one-on-one by staff members. A more effective method would be to conduct seminars for

resource agency personnel, describing Corps authorities, jurisdiction and regulations. This type of training should also be available from the resource agencies themselves for staff involved in the permit program, but apparently it is not. Another way to accomplish this type of education is to implement MOA procedures when such comments to public notices are received. This would effectively draw higher level officials at the resource agencies into the permit process and make them aware that their staff could benefit from some training.

A related issue is when agencies respond to public notices with comments outside their area of expertise and authority. Frequently, NMFS and USFWS comment on a project's compliance with the 404 (b)(1) guidelines, an area of the law which is not their responsibility. Another example of this is a NMFS response to a project for a small amount of dredging and flow lane disposal, which conveyed concern not about the project effects on fishery resources, but with water quality. They requested extensive sediment tests to determine whether the material was suitable for in-water disposal, and threatened elevation if the recommendations were not implemented. However, the sediments in question had undergone initial tests and been found by EPA and ODEQ, which do have authority to regulate water quality, to be clean enough for such disposal. Corps regulations state that certification by the State agency empowered to certify compliance of a project under provisions of Section 401 of the CWA will be considered conclusive

(33 CFR 320.4). In addition, concerns outside the commenting agency's area of expertise do not have elevatable status. Again, improved training would seem to be an answer to this type of problem. Elevation procedures could not be used to bring this matter to light, because agencies may not elevate a permit decision based on concerns outside their areas of expertise.

Two recommendations that are not directly related to interagency coordination, but are important, merit airing in this paper. First, the MOAs amount to an opportunity for administrative appeal of permit decisions for the resource agencies. However, an equal opportunity for such appeal is not afforded applicants. At present, their first step in trying to reverse a Corps decision is through the courts. It seems, to make be equitable, that the Corps should set up some type of system to review permit decisions when appropriate. The drawbacks to this, of course, are that such an appeal process would involve additional time, cost and staffing. The benefits would be improved coordination and perhaps a better working relationship with the private sector.

The second point has to do with the fact that ODSL is negotiating with EPA for transfer of 404 program responsibilities in non-navigable waters to the State of Oregon. Since EPA is often dissatisfied with Corps interpretations of the 404 (b)(1) guidelines, this would seem to be an excellent opportunity for EPA to gain more influence in permit decisions. With the Corps

running the program, EPA's only leverage in permit decisions comes through the MOA process. Transfer of the program to the state would require that Oregon and EPA have a separate MOA. EPA could require more consistent interpretations of the 404 (b)(1) guidelines in their MOA with ODSL.

Clearly, there are significant problems with interagency coordination and communication in implementation of the Corps' regulatory program. Eliminating the barriers to effective communication will require the cooperation of both the resource agencies and the Corps. Education, discussion of policy issues at high levels, and developing more of an atmosphere of trust between the agencies at the local level is needed. Better interagency coordination would mean a smoother, more cooperative permit process, faster processing times, better environmental analysis and protection, and overall, a more effective regulatory program.

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40 CFR 230. Environmental Protection Agency, 1981.

## APPENDIX

### General Permits

As part of the Corps policy to reduce the regulatory burden on the public, the Corps has issued 26 nationwide permits and the Corps districts are authorized to issue regional permits. These general permits authorize certain categories of minor work with a minimum of federal review. If a project falls within the scope of the general permit, it is authorized provided it does not have a significant impact on a public review factor. A project to be authorized under a general permit is not circulated for review in a public notice; the Corps merely evaluates it for compliance with provisions of the general permit and for potential significant impacts. If the project fits within the scope of the permit and more than minimal impacts are not identified, the applicant is informed that the project is authorized.

The purpose of such permits is to reduce duplication of government review. Most projects authorized by regional permit are also reviewed by the state under their Removal-Fill Law, with many of the same decision factors. These permits not only ease the regulatory burden on the public, but also have the effect of reducing the regulating burden on the federal government. If all projects now authorized by general permits had to be processed by individual permit procedures, the workload of the Corps regulatory staff would easily double, and reviewing agencies would spend much

of their time reviewing minor projects. Regional and nationwide permits allow the Corps and other federal agencies to spend the bulk of their regulatory efforts on projects with more significant environmental impacts.

During my tenure at the Corps, I processed two regional permits, using processing procedures similar to that of individual permits described earlier in the paper. Provided a project falls within the scope of the permits, it is authorized, subject only to approval by the Oregon Division of State Lands, which processes applications for work under the State Removal-Fill Law.

The regional permit for bank protection on the coast resulted primarily from an episode of severe erosion at Waldport, Oregon. During an 8 month period, the Corps processed 8 individual permits for erosion protection there, as well as several from other areas on the coast. Many of these could have been authorized by regional permit, had one been in place. The Corps is now able to handle such permit actions quickly, without resorting to emergency procedures.

The Federal Highway Administration (FHA) regional permit is similar to one issued to the Oregon Department of Transportation. The FHA funds and constructs highway projects which often require Department of the Army permits. Some of these actions are minor and can now be authorized with a minimum of time and effort expended.

The text of the regional permits follow.

APPLICATION NO.: 071-OYA-2-006370

EFFECTIVE DATE: 21 August 1986

EXPIRATION DATE: 31 August 1991

DEPARTMENT OF THE ARMY  
REGIONAL PERMIT

A Regional permit for placement of fill material for erosion protection along the Pacific Ocean shoreline within the State of Oregon upon the recommendation of the Chief of Engineers, pursuant to Section 404 of the Clean Water Act (P.L. 95-217) and Section 10 of the River and Harbor Act of 3 March 1899, is hereby issued by authority of the Secretary of the Army by the:

District Engineer  
U.S. Army Engineer District, Portland  
Corps of Engineers  
P.O. Box 2946  
Portland, Oregon 97208-2946

to authorize the discharging of up to 5,000 cubic yards of fill material below the level of high tide that has received prior approval in the form of all the following State authorizations, when applicable:

a. Permit from Oregon Division of State Lands pursuant to the Oregon Removal/Fill Law (ORS 541.605 to 541.695),

b. Permit from Oregon Department of Transportation, Parks and Recreation Division pursuant to the Oregon Ocean Shore Law (ORS 390.605 - 390.770),

c. Certification of compliance with Oregon's Coastal Zone Management Program (Coastal Zone Management Act of 1972), and concurrence with such certification to reflect consistency with local comprehensive plans and ordinances.

Those applications for the placement of fill of less than 50 cubic yards, and that do not qualify for a nationwide permit, will be evaluated by the District Engineer to ascertain that they meet the other requirements of this regional permit before the activity is allowed to proceed.

The purpose of each individual fill will be erosion protection of existing roadways, streets, bridges, residences, outfall structures, or property.

### Operating Procedure:

The Oregon Division of State Lands (ODSL) and the Oregon Department of Transportation, Parks and Recreation Division will accept applications for fill permits which may qualify for authorization under this regional permit. An application will not be considered complete until all information describing the project, as shown on the attached sample drawings, has been provided. After insuring that applications are complete, ODSL will send for review, all copies of permit requests to (1) the U.S. Army Engineer District, Portland (Corps), (2) U.S. Fish and Wildlife Service, (3) U.S. Environmental Protection Agency, and (4) U.S. National Marine Fisheries Service. ODSL will provide a 30-day review to these Federal agencies. ODSL will also send notifications of individual activities to the State Historic Preservation Officer, the Oregon Department of Fish and Wildlife, the Oregon Department of Environmental Quality, the Oregon Department of Land Conservation and Development, and other appropriate State and local agencies.

The Corps will review each individual notification of an activity, proposed for authorization under this general permit, to insure compliance with Section 10 of the River and Harbor Act of 3 March 1899, and with the guidelines promulgated by the Environmental Protection Agency pursuant to Section 404(b)(1) of the Clean Water Act. When an activity might not comply with the 404(b)(1) guidelines, it will be withdrawn from this regional permit process. An application will also be withdrawn from the regional permit process when a Federal agency writes directly to the Corps during the 30-day review period, expressing a concern within its area of expertise that an individual activity may cause more than minimal environmental impacts or may contribute to more than minimal cumulative impacts. Such written notification shall specify the resources or species that would be impacted by the activity, describe the impacts that will be more than minimal, and state the reason those impacts are not acceptable.

When an application is withdrawn from this regional permit process, the Corps will notify the applicant and the State in writing with copies going to the reviewing Federal agencies. Activities withdrawn from the regional permit process will be processed as individual applications in accordance with 33 CFR 325.2. This regional permit is subject to the following General and Special Conditions.

#### General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension, or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions k. and l. hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act (33 U.S.C. 1344), the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92-532, 86 Stat. 1052), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or a candidate species for the federal threatened or endangered list, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

j. That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

k. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

l. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

m. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

n. That if and when the permittee desires to abandon the activity authorized herein, he must restore the area to a condition satisfactory to the District Engineer.

o. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

p. That if the permittee, during prosecution of the work authorized herein, encounters a previously unidentified archeological site (Indian Historic) or other cultural resource within the area subject to Department of the Army jurisdiction, he shall immediately notify the District Engineer.

Special Conditions:

a. This permit shall apply only to those discharges where the necessary State permits pursuant to the Oregon Removal/Fill Law (ORS 541.605 to 541.695) and the Ocean Shore Law (ORS 390.605 to 390.770) have been secured when required. Those discharges that are less than 50 cubic yards of fill and do not require a State Fill Permit, will be evaluated to ascertain that they meet all the other requirements of this regional permit before the activity is allowed to proceed.

b. This permit shall only apply to fills placed for erosion protection below the level of the high tide line of the Pacific Ocean adjacent to the Oregon Coast shoreline, exclusive of special aquatic sites.

c. Bank protection shall consist only of clean, durable rock riprap.

d. The slope of riprap shall be no steeper than 1.5 feet horizontal to 1 foot vertical.

e. Care will be taken to prevent any petroleum products, chemicals or other deleterious materials from entering the water.

f. No material shall be placed in excess of the minimum needed for erosion protection.

g. All areas along the bank, disturbed or newly created by the construction activity, will be seeded, sodded, and/or revegetated with native or European grass, shrubs and trees, or given some other equivalent type of protection against possible future erosion.

h. When the District Engineer has been notified by a fishery agency that a permittee's discharge of dredged or fill material is adversely affecting fish or wildlife resources or the harvest thereof, and the District Engineer subsequently directs remedial measures, the permittee will comply with such directions as may be received to suspend or modify the activity to the extent necessary to mitigate or eliminate the adverse effect as required.

i. Work in the waterway will be done in a manner so as to minimize turbidity increases in the water, which tend to degrade water quality and damage aquatic life.

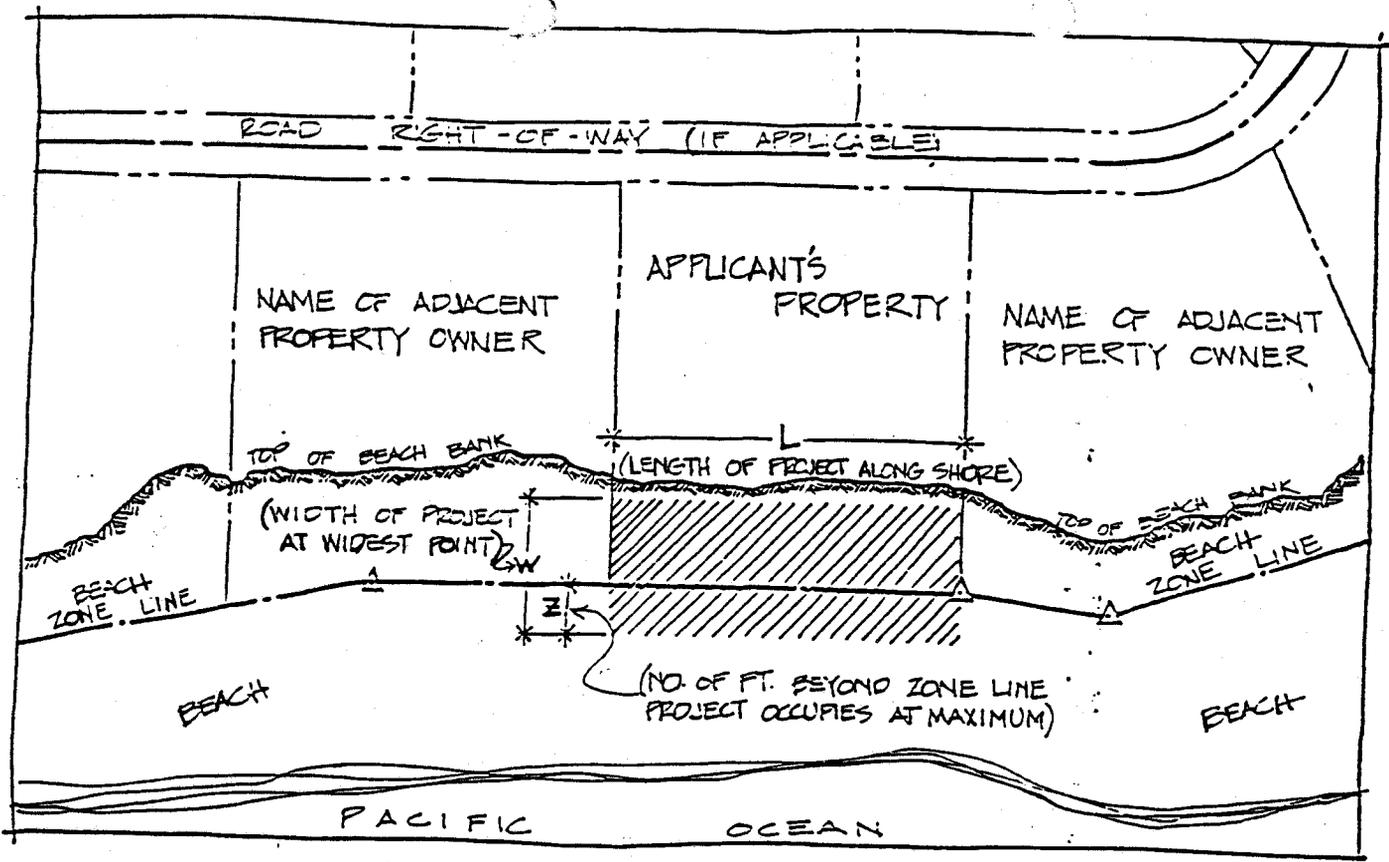
j. This permit shall become effective on the date of the District Engineer's signature.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

*W. B. Paynter*

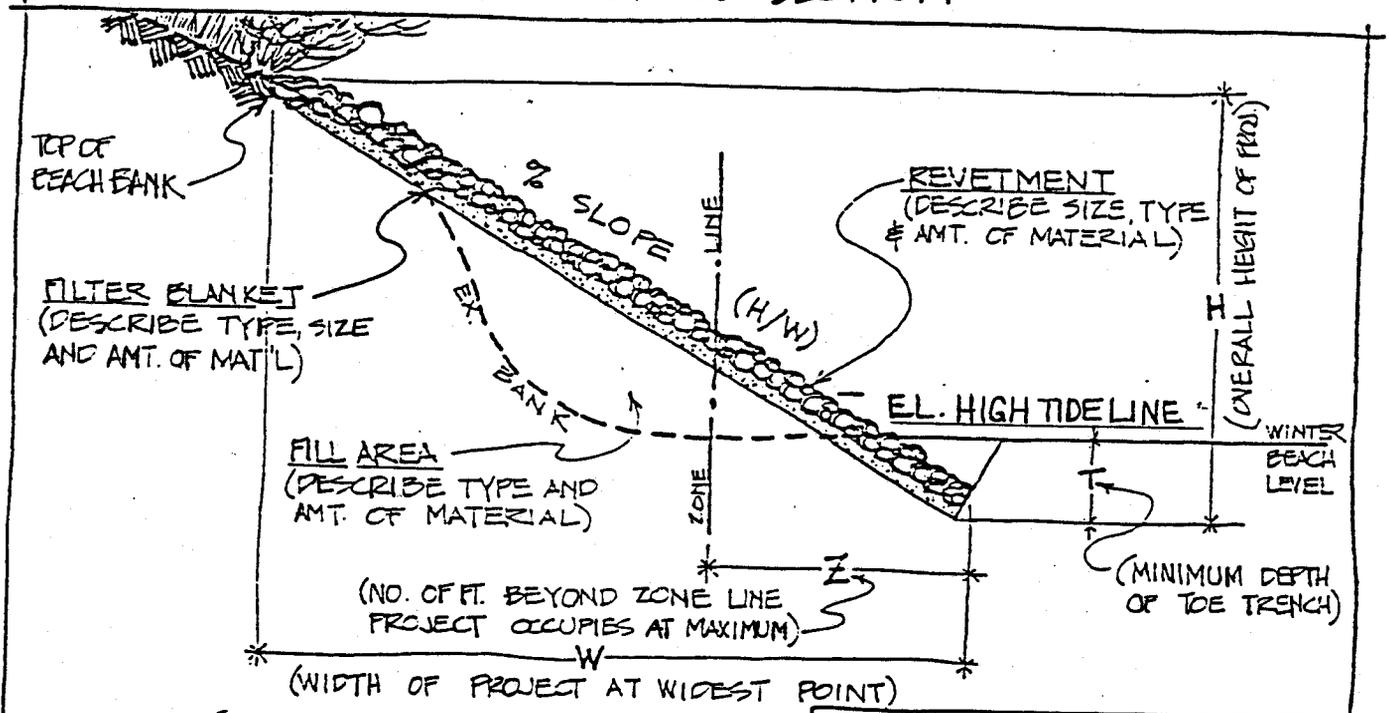
*21 Aug 1986*  
Date

for GARY R. LORD  
Colonel, Corps of Engineers  
District Engineer  
U.S. Army Corps of Engineers



SAMPLE PLAN VIEW

SAMPLE CROSS SECTION



APPLICANTS NAME  
ADDRESS  
CITY , COUNTY DATE

APPLICATION NO.: 071-OYA-2-006593  
EFFECTIVE DATE: 17 December 1986  
EXPIRATION DATE: 31 December 1991

DEPARTMENT OF THE ARMY  
REGIONAL PERMIT  
DISCHARGE OF DREDGED OR FILL MATERIAL

A Regional permit to authorize the placement of dredged or fill material in navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the River and Harbor Act of March 3, 1899 (33 U.S.C. 403); and discharge dredged or fill material into waters of the United States pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344); is hereby issued by the

District Engineer  
U.S. Army Engineer District, Portland  
Corps of Engineers  
P.O. Box 2946  
Portland, Oregon 97208-2946

to the U.S. Department of Transportation, Federal Highway Administration (FHA), referred to as permittee, to discharge dredged or fill material as defined by Special Condition a. in those waters defined by Special Condition b. subject to the following conditions:

Operating Procedure:

Thirty days prior to commencement of work, the Federal Highway Administration will send for review, notifications of all individual activities which may qualify for authorization under this regional permit and reference previous coordination, Environmental Assessments, or Environmental Impact Statements that have been prepared for that activity. Each notification will contain a description of the project and expected impacts; i.e., a delineation of the wetlands or shallow water habitat impacted, such that acreages can easily be calculated; a specification of the volume of dredged and/or fill material to be used; and a description of any proposed mitigation. Copies of such notification of individual activities shall be sent to: (1) U.S. Army Engineer District, Portland (Corps); (2) U.S. Fish and Wildlife Service; (3) U.S. Environmental Protection Agency; (4) U.S. National Marine Fisheries Service; (5) U.S. Coast Guard; (6) Oregon Division of State Lands; (7) State Historic Preservation Officer; (8) the Oregon Department of Fish and Wildlife; (9) the Oregon Department of Environmental Quality; and (10) the Oregon Department of Land Conservation and Development.

The Corps will review each notification of an individual activity, proposed for authorization under this regional permit, to insure compliance with the guidelines promulgated by the Environmental Protection Agency pursuant to Section 404(b)(1) of the Clean Water Act. When an activity might not comply with the 404(b)(1) guidelines, it shall be withdrawn from this regional permit process. An application shall also be withdrawn from the regional permit process when any Federal or state resource agency writes directly to the Corps during the 30-day review period, expressing a concern within its area of expertise that an individual activity may cause more than minimal environmental impacts or may contribute to more than minimal cumulative impacts. Such written statements shall specify the resources that would be impacted by the activity, describe the impacts that would be more than minimal, and state the reason why those impacts would not be acceptable.

When an application is withdrawn from this regional permit process, the Corps will notify the applicant and the State in writing with copies going to the reviewing Federal agencies. Activities withdrawn from the regional permit process will be processed as individual applications in accordance with 33 CFR 325, and normal referral procedures will apply as established in Memoranda of Agreement between the Corps and other Federal agencies.

1. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions i. and j. hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein, if, during their construction or operation, they involve any discharge of pollutants into waters of the United States or ocean waters, shall be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act (33 U.S.C. 1344) or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of their effective date, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not adversely affect a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

i. That this permit does not obviate the requirement to obtain state or local assent as required by law for the activity authorized herein.

j. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

k. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

l. That any modification, suspension, or revocation of this permit shall not be the basis of any claim for damages against the United States.

m. That this permit does not authorize or approve the construction or improvement of any particular structures that may require specific authorization or approval by the Congress or other agencies of the Federal Government.

n. That if and when the permittee desires to abandon the activity authorized herein, he must restore the area to a condition satisfactory to the District Engineer.

o. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

p. That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the District Engineer.

#### Special Conditions

a. This permit shall apply only to the deposit of up to 5,000 cubic yards of dredged or fill material for each individual project, for the purpose of new highway construction, or for the purpose of improvement of an existing highway, road, street, or bridge, which would have an expected minimal adverse impact on water quality and the aquatic system, both individually and cumulatively. The volume of material authorized, herein, shall be that dredged or fill material deposited; (1) below the elevation of ordinary high water and in adjacent wetlands or; (2) below the elevation of the high tide and in adjacent wetlands in those areas affected by the tide.

b. This permit shall apply to all waters of the United States within the State of Oregon, as defined under the authorities of Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (P.L. 95-217).

c. This permit shall apply only to those discharges which are authorized by the necessary fill permit pursuant to the Oregon Removal/Fill Law (ORS 541.604 to 541.695).

d. The discharge of fill material and associated construction actions shall comply with the requirements of Executive Orders 11988 (Floodplains) and 11990 (Wetlands).

e. All equipment and debris from the operation shall be removed prior to inundation by high water.

f. All construction debris shall be disposed of in such a manner that it cannot enter into the waterway.

g. This permit does not authorize interference with any existing or proposed Federal project and the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

h. No attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

i. The permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the

waterway to its former condition. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

j. The discharge shall be carried out in conformity with the EPA guidelines established pursuant to Section 404(b)(1) of the Clean Water Act and published in 40 CFR 230.

k. The discharge shall consist of suitable material free from toxic pollutants in toxic amounts.

l. The fill created by the discharge shall be seeded, sodded, revegetated, or given some other equivalent type of protection and properly maintained to prevent erosion and other non-point sources of pollution both during construction and after project completion.

m. The discharge of dredged or fill material shall not occur in waters identified in the Nationwide River Inventory until formal consultation has been initiated and approval has been received from the National Park Service.

n. The discharge shall not be located in the proximity of a public water supply intake. If this prohibition is not feasible, alternative solutions will be presented to the District Engineer for his approval.

o. The discharge of fill material shall not occur in areas of concentrated shellfish production.

p. The discharge shall not occur on a property described in the latest published version of the National Register of Historic Places nor listed in the latest published version of the Register as being eligible for inclusion therein without first coordinating such actions through the State Historic Preservation Officer.

q. Customary project records or appropriate summarizations shall be made available to the District Engineer upon request.

r. When the District Engineer has been notified by the Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fisheries Service, or Oregon Division of State Lands that a permittee's discharge of dredged or fill material is adversely affecting fish or wildlife resources or the harvest thereof, and when the District Engineer subsequently directs remedial measures, the permittee shall comply with such directions as may be received to suspend or modify the activity to the extent required to mitigate or eliminate the adverse effect.

s. The discharge of dredged or fill material shall not occur in areas designated as estuarine management units in acknowledged comprehensive plans unless the discharge is for maintenance or protection of an existing structure or an exception under the local comprehensive plans has been adopted by the appropriate local authority and approved by the Department of Land Conservation and Development.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

x Mark Browning  
PERMITTEE

12-11-86  
DATE

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

G. Newgard  
FOR GARY L. LORD, COLONEL,  
GARY R. LORD  
Colonel, Corps of Engineers  
District Engineer

17 December 1986  
DATE