

THE REGULATORY PROCESS:
Enforcement of Section 404 of the Clean Water Act
by the U.S. Army Corps of Engineers, Portland District

by

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Internship Report

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INTRODUCTION

This report is based on a 15 month internship with the U.S. Army Corps of Engineers, Portland District, Regulatory Branch. The Branch's principal responsibility is implementation of Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act. As an intern, I served as a full time member of the Corps' regulatory staff and took part in both enforcement and permit evaluation decisions. In this role I met and worked with applicants and apparent violators and coordinated Corps' activities with Federal, state, and local government representatives. In addition, I served as an Environmental Specialist, responsible for defining Corps jurisdiction under both Section 10 and 404 and for evaluating and resolving environmental and regulatory issues.

To supplement my internship, I enrolled in coursework in Administrative Law, Water Resource Management, and Intergovernmental Relationships at Portland State University. My internship provided valuable experience in all three subjects and the classwork enabled me to identify flaws in the government system often overlooked by participants due to their close and subjective involvement.

The Corps approach to regulatory decisions making involves balancing a variety of issues and values to determine if permit issuance is in the public interest. In an academic context this approach seems reasonable and relatively easy to implement. In practice it is neither. Inherent conflicts between development and environmental interests, and the often conflicting goals, policies, and statutory authority of the governmental agencies involved create a real-world atmosphere where making fair, equitable and speedy decisions is almost impossible. This is especially true in the enforcement arena.

This report is divided into several sections. The first provides information on the current status of wetlands, the Corps' regulatory role, its statutory enforcement authority, and its interpretation of that authority. The next section describes the Portland District's enforcement structure and procedures. A case study detailing the District's treatment of an unauthorized activity has been presented to provide a sense of the Corps' approach to enforcement. Conclusions on the District's enforcement practices and recommendations to improve the program have been included.

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BACKGROUND

Status of Wetlands

When this nation was first established, the contiguous United States had an estimated 215 million acres of wetland (U.S. Fish and Wildlife Service, 1984). Today, wetlands, marshes, bog, swamps, bottomlands, and tundra constitute about 5 percent or 90 million acres of the lower 48 states and about 60 percent or 200 million acres of Alaska (Office of Technology Assessment, 1984). During the last 200 years, urbanization, agriculture, forestry, mining, and oil and gas extraction have resulted in loss of 30 to 50 percent of the wetlands in the contiguous United States. Between mid-1950 and mid-1970, approximately 11 million acres of wetlands were lost, or about 550,000 acres per year. Over the past 25 years, human activities have caused about 95 percent of the total wetland losses, with conversion for agriculture accounting for about 80 percent of the losses. Despite efforts to reverse this trend, wetlands are still disappearing at a rate of about 300,000 acres per year (Office of Technology Assessment, 1984).

Recently, the value of wetlands, with respect to water quality, flood protection, fish and wildlife habitat, and other functions have become important environmental and development issues. Although wetland scientists are developing and refining methodologies for determining wetland functions, notably the Adamus method (Adamus, 1983) and the Corps' Wetland Evaluation Technique (Adamus et al, 1987), it is difficult to assess wetland values in terms of dollars and cents. However, in some instances, a monetary value has been established for some wetland functions. For example, the U.S. Army Corps of Engineers (USACOE) has estimated that \$17 million in flood damages would result annually with the

elimination of wetlands in the Charles River Basin in Massachusetts (Office of Technology Assessment, 1984).

Increasing awareness of wetland values has generated a greater interest in wetland protection, particularly through regulation of use. Because of its authority under Section 404 of the Clean Water Act (CWA) to issue permits for the disposal of dredged and fill material in waters of the United States, including wetlands, the Corps of Engineers plays an important role in regulating wetland use.

The Corps' Regulatory Role

Until 1972, the Corps regulatory role was confined to protecting the navigability of the nation's waterways, under the authority of the Rivers and Harbors Act (RHA) of 1890 and later the RHA of 1899 (USACOE, 1986a). Under Section 10 of the RHA, the Corps has authority to issue permits for construction of certain structures on or over navigable waters, excavation or placement of material, and other work affecting the location, course, or capacity of a navigable water of the United States. Wetlands were not generally regulated.

Passage of Section 404 in the 1972 amendments to the Federal Water Pollution Control Act (FWPCA), subsequent judicial interpretation of the Corps' 404 jurisdiction, and the 1977 amendments to the FWPCA, renamed the Clean Water Act (CWA), changed that; the Corps has become an important actor in wetland protection.

The intended purpose of Section 404 was to prevent overlap between the newly created National Pollution Discharge Elimination System (NPDES) permit program administered by the U.S. Environmental Protection Agency (EPA), and the Corps'

traditional Section 10 permitting authority, while providing EPA with oversight responsibilities to ensure that environmental and water quality aspects of the Corps' permit review were not overlooked (Myhrum, 1979). Regardless of Congress' initial intent, the Corps must now authorize placement of fill and dredged materials in all waters of the United States, including wetlands adjacent to those waters and isolated wetlands with an association to interstate commerce.

As defined by the Corps, wetlands are "...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" (USACOE, 1986b).

Enforcement

Section 404 authorizes the Secretary of the Army to issue permits for discharge of dredged and fill material and to monitor and enforce permit conditions limiting permits. Under Sections 301, 308, and 309 of the CWA, EPA has the authority to take enforcement action in response to unauthorized activities (Pub.L. No. 95-217, 1976).

From 1972 until promulgation of the Corps' Interim Final Regulations on 25 July 1975, Section 404 was enforced by EPA under its own interim enforcement policy. On 1 June 1976, Stanley Legro, EPA's Assistant Administrator for Enforcement, issued a memorandum to EPA enforcement personnel that effectively vested the Corps with primary responsibility for enforcing Section 404 (Legro, 1976). Until that time, because the Corps had refused to recognize the geographic or regulatory extent of Section 404, the Corps had no involvement with activities occurring beyond traditionally defined navigable waters.

Section 404(s) outlines the Corps enforcement authority and establishes the penalties for violations of permit conditions. The Secretary of the Army is authorized to issue an order to require violators of permit conditions or limitations to comply or the Secretary shall bring civil action, including obtaining permanent or temporary injunctions. Judicial jurisdiction is given to the U.S. District Court for the district in which the defendant is located, resides, or is doing business (Pub.L. No. 95-217, 1976).

The 1977 amendments to the CWA set fines of not less than \$2,500 and not more than \$25,000 per day of violations, for willful or negligent violation of any limitation or condition of a Corps' permit. The upper limit for fines was raised to \$50,000 per day of violation, imprisonment of not more than two years, or both for violations committed after a previous conviction. Civil penalties are not to exceed \$10,000 per day of violation for any person who violates any condition or limitation of a permit (Pub.L. No. 95-217, 1976).

With the passage of the Water Quality Act in 1987, The Corps and EPA were given additional authority to levy civil penalties. A Memorandum of Agreement is presently being developed by the two agencies to help implement the new provisions. However, a recent Supreme Court decision [Tull v. United States, 481 U.S. 17 ELR 20667 (April 28, 1987)] that confirmed a defendant's right to have a jury determine liability has complicated implementation of the Corps' authority to levy fines. The Department of Justice is currently developing procedures necessary to comply with the Court's decision.

The rules and regulations published by the Corps in the Federal Register outline the policies and procedures for daily operations. Part 326 of the Corps' regulations explains the procedures and policies used in enforcement (USACOE, 1986b).

As stated in the preamble to the Corps' Final Rules, promulgated in 1986, the wording used to construct regulations is important. The word "should" is used by the Corps to provide flexibility to district engineers when determining the appropriateness of a specific action. The words "shall" and "will" are used to limit freedom of action and to require district engineers to act in a specific manner regardless of the appropriateness of the action (USACOE, 1986b). In other words, "should" establishes a discretionary authority while "shall" and "will" are non-discretionary or required.

In the Corps' rules published in 1982, the word "should" was used three times, "shall" or "will" were used 37 times, and "may" was used, to imply discretion, four times. "Should" was used once in 1982 to provide discretion in determining whether or not to request federal, state or local authorities to review and comment on the potential impacts of a completed, unauthorized project. "Should" is also used in two other situations involving statements of non-discretionary duties. One states that required inspections of authorized activities "...should be made on timely occasions..." (USACOE, 1982). The second states "where the district engineer determines there has been non-compliance with the terms or conditions of a permit, he should first contact the permittee and attempt to resolve the problem..." (USACOE, 1982). A typical 1982 use of "shall" is, "Immediately upon discovery of an unauthorized activity, the district engineers shall commence an investigation..." (USACOE, 1982).

Although district engineers were not prevented from making decisions, for example, regarding the severity of impacts, nothing in Part 326 published in 1982 states or implies that the Corps enforcement responsibilities are discretionary.

Section 326.1, titled "Purpose", of the 1986 regulations sets the tone for the Corps' present enforcement policy. This section states, in part, that

"Nothing contained in this Part shall establish a non-discretionary duty on the part of district engineers..." (USACOE, 1986b). Substituting "required duty" for "non-discretionary duty" eliminates the sentence's double negative and it becomes, nothing contained in this Part shall establish a required duty on the part of district engineers.

As explained in the regulation's preamble, this sentence was added for clarification and was the result of internal coordination (USACOE, 1986b). This statement was not included in the proposed rules of 20 March 1986 and consequently was not subject to public review or comment.

In addition to the clarification statement, the new regulations further soften the Corps' enforcement stance by using "should" about 25 times. "Will" is used 19 times, primarily to indicate procedures to be followed if a district engineer chooses to act. "Will" is used seven times in reference to after-the-fact (ATF) permit applications and is also used in the following manner, "District Engineers will, at their discretion..." (USACOE, 1986b). In the 1986 regulations, a typical use of "should" is, "District engineers should take steps to investigate suspected violations in a timely manner" (USACOE, 1986b).

These changes in wording do not represent a decision to change the direction of enforcement but are an attempt to legitimize current practice. Rather than making the Districts abide by existing language, the Corps made the language fit the existing behavior.

The increased flexibility provided by the 1986 regulations would be of less consequence if the Corps' program was consistent nationwide. However, the Corps tends to function as a loosely knit chain of semi-independent entities. In theory and practice, the independent nature of the Districts allows the Civil

Works arm of the Corps to respond to the unique development requirements and water resources present within a given district.

The same semi-autonomy is evident in the Regulatory Branch, ostensibly charged with enforcing a federal law, the purpose of which is to add uniformity and consistency to the treatment of a national problem. According to the Office of Technology Assessment (OTA), it is "Because of the nature of the Corps' organization..." that "...there is a great deal of variability in the manner in which the 404 program is implemented..." (Office of Technology Assessment, 1984). In addition, OTA notes that "Some districts were singled out by states for being outstanding in their implementation of the program, while some others were consistently criticized, especially for lack of action. For example, the State of Wyoming replied to the OTA survey by stating that "...the Omaha C.O.E. District appears not to be concerned about protecting anything, and runs an inefficient program..." (Office of Technology Assessment, 1984).

This variability also applies to 404 enforcement. Implementation of enforcement policy, like the rest of the program, depends on the individual attitudes and philosophies of the district engineer, the division chief, and the Regulatory Branch Chief toward development, governmental regulation of private property, and environmental protection. The flexibility added to the 1986 enforcement regulations will have little impact on a program being implemented effectively, unless a district engineer has little interest in enforcement, and wants to use his discretion to undercut an aggressive branch chief. In Districts already exhibiting little interest in enforcement, the increased discretion is more likely to support that position.

ENFORCEMENT IN THE PORTLAND DISTRICT

Overview

Administration of the Corps' regulatory responsibilities rests with the Regulatory Branch, a subdivision of the Planning Division. At present, the Regulatory Branch is divided into the Permit Evaluation Section and the Inspection and Environmental Section. Enforcement is the latter's responsibility.

The Portland District does not maintain an active surveillance program to detect violations. Instead the Corps depends on complaints received from the general public, environmental groups, and local, state and federal agency personnel. Normally, only complaints involving ongoing activities, well-known resources, or potentially controversial projects are subject to immediate inspections. Complaints involving completed work, sketchy information, or sites outside the immediate vicinity of the Corps' main or field offices are addressed when time is available to conduct inspections.

In most instances, violations are resolved by either voluntary compliance or by acceptance of an after-the-fact permit application. The Corps' stated policy is that once required initial restorative measures are taken, an AFT application will normally be accepted (USACOE, 1986b).

Staffing

The Portland District's enforcement staff is less than three full time employees. One part-time inspector works from the Coos Bay Field Office, a full-time inspector operates from Astoria and a Violation Coordinator is located at the Corps' main office in Portland.

The inspectors' duties include wetland determinations, verification of information presented in public notices, inspection of disposal sites, and applicant assistance. They also conduct compliance inspections on completed projects, and participate in field meetings with violators and agency representatives to obtain voluntary removal of illegal fill.

The part-time inspector at Coos Bay serves the southern coast. The Astoria-based inspector's territory includes the north and central coast, and is extended to other areas as needed. He is more involved in regulatory matters than the Coos Bay inspector. The Astoria inspector also makes periodic inspection trips through the Willamette River when accumulated complaints justify the trip, and assists in evaluating inspection reports generated by the Corps' contracted compliance inspection program. He also attempts to resolve ongoing violations in his territory, corresponds with violators and prepares Summaries of Violation, which is in effect the District's enforcement decision document.

The Violation Coordinator is based in Portland. The Coordinator's territory includes all parts of Oregon not covered by either inspector but may include violations in an inspector's area. Although his duties include site inspections, he also prepares correspondence and decision documents, coordinates enforcement actions with Oregon Division of State Lands (ODSL), EPA, and other state and federal agencies, and meets with land owners and their representatives. In addition, the Violations Coordinator supervises the Contracted Compliance Inspection Program.

In an attempt to eliminate the backlog of active violations (the district recorded 51 violations as carryover from fiscal year (FY) 86 to FY 87), violation files are now being assigned to Project Managers. Project Managers are assigned

one violation in addition to their regular permit evaluation work load. They become involved only after an initial inspection indicates that an alleged violation exists, and then continue on the project until the violation is resolved. The Project Manager is also responsible for evaluation of an ATF application, should that be the selected method of resolution. Although Project Managers will, at any one time, work on a relatively small number of violations, the new procedure will keep six additional files active and help prevent the long periods of inactivity occasionally seen with enforcement actions.

Contracted Compliance Inspections

In the early 1980's, the Portland District reduced its inspection staff. To continue the inspections needed to insure that authorized projects are in compliance with permit drawings and special conditions or limitations, the Corps instituted a contracted inspection program. The program was initiated in FY 1985. One contract containing as many as four work orders is issued each year. During FY 85 and 86, 740 contracted inspections were conducted. Thus far, contracted inspections have concentrated on Section 10 activities and have had little involvement in 404 activities. The program has yet to include inspection or monitoring of mitigation projects, although the District hopes to extend the program to include inspections of 404 permits, and mitigation projects.

A contracted inspection is basically a structural inspection for size and orientation of docks, piers, marinas, bank protection and dredging projects. The inspector reports on percentage of work completed, the level of compliance with permit limitations, and prepares updated (red line) drawings if the completed project deviates from permit drawings. Inspection reports are submitted to the Corps for further evaluation and action.

Though contracted inspections sometimes disclose unauthorized activities, permit deviations, termed "minor violations", are more common. Minor violations usually result in a request for corrected drawings and subsequent modification of the permit. The major difficulties in resolving minor violations are obtaining accurate, up-to-date drawings from property owners and ensuring that the modification is coordinated with local governments charged with administering Willamette River Greenway and other local permit programs.

The quality of inspections varies. Until recently, one company has been awarded consecutive contracts. Because of promotions and demands for the inspector's skills elsewhere within the contractor's organization, the Corps' inspections are conducted by employees unfamiliar with the Corps needs, regulations, and mission. Consequently, while one work order may fulfill the Corps requirements, the next must be closely supervised and may be less adequate.

Nationwide, the Corps has let five contracts for compliance inspections. Of the five, two contracts have been cancelled. The Vicksburg District, on cancelling their contract, noted that they "experienced an unexpected information overload as a result of this contract". They also stated that future attempts would schedule contracted services to be compatible with available staff to act on contract output (Goad, 1985).

Geographic Coverage

Although placement of Corps inspectors in Portland, Astoria, and Coos Bay is a hold over from the Corps traditional authority in navigable waters, it does coincide with the majority of the state's water orientated development projects, major port activities, and the state's principle growth centers, Portland and

Washington County. Consequently, the Corps contends that the areas where violations are most likely to occur are adequately surveyed.

The Portland District has no real presence in eastern Oregon. Because of the time and distance involved in traveling to and conducting inspections in eastern Oregon, few are conducted. The Walla Walla District, although not charged with enforcement in Oregon, does help increase overall Corps presence in the northeastern portion of the state. Walla Walla does receive complaints, has conducted inspections, and provided well-prepared reports for the Portland District. In addition, enforcement activity in eastern Oregon is augmented by the District's close coordination with ODSL. ODSL does maintain a higher profile in this section of the state and has a more extensive network of contacts [e.g., Oregon Department of Fish and Wildlife (ODFW) biologists throughout the state] that are aware of changes within their territories and are more involved in local projects than are federal resource agency employees.

The Corps does not keep enforcement statistics by county, but other records indicate that the five counties with the highest number of reported violations since 1978 are Multnomah (45), Clatsop (36), Clackamas (26), Coos (24), and Tillamook (14). Washington and Lincoln Counties are tied for sixth place with 11 violations each. More than 90 percent of the Corps enforcement actions since 1978 have occurred west of the Cascade Range.

Violations tend to coincide with the location of Corps inspectors. ODSL reports similar clustering of violations around Salem. In addition, ODSL acknowledges that although it is more active in eastern Oregon, that part of the state receives limited attention (Bierly and Johnson, 1984; Bierly, 1987).

The Corps believes that the violation distribution supports their positioning of inspectors, and their higher presence around the state's ports, and indicates

that the major violation areas are covered. The Corps is undoubtedly correct with regard to Section 10 violations but assumes that Section 404 violations either do not occur east of the mountains or are insignificant.

Sources of Complaints

The District relies on the public to report apparent violations. The Corps annual reports and violation coding sheets list seven categories of complainants. The categories are Corps (A), USFWS (B), The National Marine Fisheries Service (NMFS) (C), Environmental Groups (D), Citizens (E), Coast Guard (F), and other (G). The "other" category includes violations reported by ODSL, ODFW, and EPA.

Discrepancies exist in statistics submitted by the Portland District for the Corps-wide annual reports. For example, the total violations picked up between 1978 and 1986 are 392, while the total number of complainants listed is 394. The total difference tends to be self-correcting. In 1978, the District reported 24 violations attributed to 33 complainants. In 1985, 59 violations were attributed to 52 complainants. In addition, no complaints were recorded for the "other" category in 1985 despite ODSL's enforcement activities.

The errors noted in the Corps records are minor and are bookkeeping or arithmetic errors. Similar mistakes were seen in the records submitted by other Districts within the North Pacific Division, and in Division records. At a national level, data returned to the Division in 1978 showed that over 400 violations were lost through an arithmetic mistake. Generally, Corps violation statistics indicate a lack of care and inattention to detail. Most likely, errors in violation reports are not discovered during supervisory reviews because of the nationwide emphasis placed on recording and reducing permit processing times.

Publicity

The Portland Regulatory Branch does not have an active program to inform the public of its jurisdiction of permit program. However, public meetings are occasionally held in cooperation with ODSL which results in limited exposure of some residents in certain areas to the Corps program. In addition, major permit actions may require Public Hearings and all individual permit applications are advertised in Public Notices. Unfortunately, Public Hearings and Public Notices normally reach only people with an interest in waterway development or specific projects.

Recently, the Portland District contacted every local government, city, and county involved in floodplain regulation and land use planning in an effort to stimulate local cooperation by referring applicants to the Corps. Less than ten inquiries were received in response to the several hundred letters sent. There is no way to determine if this effort has increased the number of applications submitted to the Corps or helped to decrease violations.

Generally, the District neither encourages or discourages contact with the press regarding violations or permit actions. Regulatory personnel, usually of supervisory level, respond to questions from the press regarding specific projects, but make no attempt to use the press to publicize regulatory activities.

The Corps makes no use of media advertisement. However, a recent cooperative effort with ODSL and EPA has produced posters to provide to local planning offices to help inform potential applicants about federal permitting requirements.

The Corps' 1982 regulations state "For the purpose of inspection of permitted activities and for surveillance of the waters of the United States for

enforcement of the permit authorities the district engineer will use all means at his disposal. All Corps of Engineers employees will be instructed to observe and report all unauthorized activities in waters of the United States" (USACOE, 1982). In the 1986 regulations, the Corps position was revised to read "To detect unauthorized activities requiring permits, district engineers should make the best use of all available resources. Corps employees; members of the public; and representatives of state, local, and other Federal agencies should be encouraged to report suspected violators" (USACOE, 1986b). The change in language represents an obvious weakening in the Corps position regarding surveillance and indirectly in their position regarding publicizing the program. Corps employees do report violations. Some are willing, on their own initiative, to take the time and trouble to uncover information to ensure that an accurate and complete complaint is filed. Undoubtedly, the involvement of Corps employees in discovery of unauthorized activities would increase if the Corps regulatory responsibilities were outlined in the Corps Weekly, an internal newsletter, or at the District Engineer's quarterly briefings.

Corps employees, involved with other agencies and members of the public preparing to work in waterways, do not routinely inform their clients about Corps permit requirements. Two recent violations, one involving the City of Beaverton, a Local Improvement District (LID), and Tri-Met and another involving the U.S. Forest Service (USFS) highlight the problem. Both violations may have been avoided had the violators' initial Corps contracts, the Flood Plain Studies Section and the Real Estate Division, informed their clients that a Corps' permit might be required prior to initiating their respective projects. The USFS violation involved relatively high levels of interagency coordination for about

two weeks, with a corresponding cost in time and money. The Beaverton violation has developed into and remains a complex ATF permit application that has been active for 16 months. The fact that the Corps assisted the City of Beaverton to analyze various fill scenarios without mentioning the potential need for a Corps' permit to complete the project has been discussed on several occasions during the permit evaluation procedures. Most recently this issue was noted, by the attorney for a property owner, who could be required to restore 3.4 acres of wetland in downtown Beaverton, during a meeting to resolve conflicts.

The Regulatory Branch, on the other hand, does communicate with other branches and sections within the District. Regulatory actions are advertised in Public Notices that are circulated to various Corps departments to determine if the proposed projects would impact Corps responsibilities, projects or other duties.

Generally, knowledge of the Corps' permit program, especially its 404 authority, is confined to the relatively small esoteric community of people interested in wetlands or water resources.

Methods of Resolution

The District's two principal methods of resolving violations are voluntary compliance and acceptance of an ATF application. A third method, legal action, is used infrequently.

Voluntary Compliance

Voluntary compliance usually occurs in small projects having no real development purpose and little or no economic significance. It is used in cases involving private property owners and businesses inadvertently committing

unauthorized activities. Nonetheless, the amount of effort required to obtain voluntary compliance may be substantial. The parties involved may be willing to remove an illegal fill during the initial site inspection after learning that their actions are in violation of federal law. Unfortunately, obtaining voluntary compliance may require several meetings, close coordination with EPA, ODSL, and County and agency representatives, and explanations of the difficulties and requirements confronted in the process of evaluating an application, for example, meeting floodplain regulations, expected mitigation requirements, the cost in fulfilling alternatives and need analysis requirements, and the cost in modifying the project if required. On-site meetings to delineate pull back boundaries and to discuss how the work should be conducted to limit additional adverse impacts may also be necessary.

Until publication of the Corps final regulations in November 1986, the District's policy with respect to voluntary restoration was complete removal. Partial removal required ATF authorization for the remaining fill. The new regulations state that "no permit application will be processed when restoration has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer" (USACOE, 1986b). Unlike other new discretionary powers giving the District Engineer (DE) authority to decide whether or not to act, this allows the DE to determine the extent of the action necessary. Like any discretionary power, it may be abused, but used with caution, it could aid in obtaining additional voluntary restorations with a small investment in time and effort in situations not involving important resources. However, this interpretation of the Corps regulations would result in some unauthorized fill remaining in place and would undoubtedly conflict with

EPA's and USFWS's mitigation policies. In practice, fills are not allowed to remain in place because of probable negative reaction from reviewing agencies who do not trust the Corps to protect their interests. In addition, informal agreements with violators might be deliberately or inadvertently misunderstood. Lacking a legal permit, the Corps has no ability to enforce the agreement.

~~After-the-fact Applications~~

In 1986, about 50 percent of the violations resolved in the Portland District were resolved by acceptance of ATF applications. Generally, this method of resolution involves larger projects constructed with a specific purpose, including that of non-water dependent speculative development, where, due to the economic significance of the project, voluntary restoration is not acceptable to the land owner and the resource damage is not considered by the Corps to be sufficient to warrant restoration by order. Acceptance of an ATF application for unauthorized work does not require a decision once the Corps determines that the work does not seriously jeopardize life, property, or important public resources. Recent changes in regulations allow the DE to make the above determination, rather than require that he make the determination.

In 1982, the Corps states that "the full public interest balancing process has been deleted from this Part 326, but remains in the after-the-fact evaluation phase of 33 CFR Part 325 thereby eliminating the duplication of that evaluation..." (USACOE, 1982). Thus, the Corps makes no determination relating to the acceptability of any unauthorized project prior to requesting an ATF application. This results in placing nearly all violations into the time consuming ATF evaluation process.

The following projects provide an example of the time required to evaluate a completed project:

a. Columbia Steel Casting (File No. 071-OYA-4-004778): Industrial development, date of initial Corps inspection 2 February 1983; date of ATF application request January 26, 1984; date of Corps decision 17 July 1987.

b. Milton Kropft (File No. 071-OYA-4-006501): 15 cubic yard recreational dam; date of initial Corps inspection 17 March 1986; date of ATF application request 11 June 1986; date of Corps decision 30 March 1987.

c. Marvin Coats (File No. 071-OYA-4-005898): Undefined fill; date of initial Corps inspection March 13, 1985; date of ATF application request February 18, 1986; date of Corps decision July 30, 1987. Jurisdiction over the site was eventually claimed by Oregon Department of Environmental Quality under CWA Section 401 as closure of a log pond.

According to the Corps' records, the Columbia Steel Casting ATF application was evaluated in about 166 days. However, the recorded processing time obviously does not reflect all of the time spent in evaluating the project. Conflicts developed at the Public Notice (PN) stage because of agency comments concerning the inadequacy of proposed mitigation and the extent of the requested additional fill. Conflict resolution was delayed due to changes in the company's economic condition which required reevaluation of development plans. A revised PN, issued in February of 1987, advertised a greatly reduced development scheme and an acceptable mitigation plan. No agency objections were received in response to the revised PN.

Issuance of the revised PN allowed the Corps to reset the processing time clock because new information was supplied and time keeping begins with receipt

of a complete application. Although the ATF process will have taken several years in real time, evaluation took only months in regulatory time.

Legal Action

The Portland District has not been involved in attempting to seek civil penalties for several years. Present regulations state that "For cases the District Engineer determines to be appropriate, he will recommend criminal or civil action to obtain penalties for violations..." (USACOE, 1986b). Appropriate cases include "...those which, in the District Engineer's opinion, are fulfill, repeated, flagrant, or of substantial impact" (USACOE, 1986b). Under previous regulations, criminal action was considered appropriate when "...facts surrounding the...activity revealed the necessity for punitive actions and/or when deterrence...is considered essential to the establishment or maintenance of a viable regulatory program" (USACOE, 1982).

Should the DE decide that civil penalties or legal remedies are warranted, the action, except in certain circumstances, is forwarded to the local U.S. Attorney with a litigation report, recommendations for restoration or mitigation, and the rationale supporting those recommendations (USACOE, 1986b). The decision to pursue legal action is made by the U.S. Attorney.

At an enforcement workshop held on 3 April 1986, Tom Lee, Assistant U.S. Attorney, noted that thousands of violations of Federal laws do not get prosecuted. The U.S. Attorney must make a judgement as to what cases will be prosecuted. During the investigation of the Jackson-Frazier Wetland violations, the Benton County District Attorney, in response to ODSL's request for criminal action against the violator, expressed reluctance to invest the time and effort

needed to prosecute an action that is a misdemeanor (USACOE, 1985). At both the state and Federal level, workload, budget, and available manpower must be considered before any commitment to legal action can be made.

Although Corps' annual reports record the number of cases submitted to Corps Headquarters and the U.S. Attorney, this does not mean that the violations were resolved by legal action. After referral, the U.S. Attorney may decide not to act and the cases are returned to the District for resolution by other means. The cases referred to counsel or higher authority are sometime inadvertently included as part of the annual resolution count and may contribute an additional error in Corps' data.

Cooperative Enforcement Efforts

The Corps' regulatory authority under Section 10 and Section 404 overlaps with ODSL's authority under the Oregon Removal-Fill Law, ORS, 541.605-541.695. A joint application program has been adopted to help avoid duplication and to streamline the permit process for applicants and agencies. The cooperative effort extends to enforcement actions but is less institutionalized, relying more on informal cooperation between staff. When coordination occurs, both agencies benefit by being able to use their resources more efficiently to save time and cut duplications. For example, when a complaint is turned into ODSL from the Portland area, ODSL can request that Corps employees make the initial contact and report their findings to ODSL. Even if the work is not a violation of Corps jurisdiction, the property owner becomes aware that the state may take action and they can make the final determination regarding the project in relation to their jurisdiction.

During a coordinated action, either agency may assume a lead position or work in close cooperation depending on the issues involved, the location, and the attitude of the property owner. The Jackson-Frazier Wetland violations began as a strong cooperative effort. The agencies made joint inspections and shared photographs and other resources. However, as the situation progressed, ODSL became more involved than the Corps. ODSL's procedures and jurisdiction were challenged while the Corps' authority was unchallenged or ignored. For relatively long periods, the Corps was inactive but was prepared to support the state if necessary.

Recent attempts to increase coordination via Quarterly Enforcement Meetings have been unsuccessful. Although meeting content was useful to clarify positions, update specific cases, delegate responsibilities, and coordinate certain actions, the meetings are not routinely held. Only two quarterly meetings were held in FY 86 and one in FY 87. Neither agency assumed or was assigned the duty to ensure that subsequent meetings were scheduled. Failure to institutionalize has allowed a good concept to be buried under workloads and other priorities.

Although EPA is authorized to conduct enforcement actions in response to unauthorized activities, the responsibility is primarily the Corps'. EPA and the Corps routinely coordinate during permit evaluation procedures. EPA reviews and comments on violations forwarded by the Corps. However, EPA's enforcement authority, under Section 309 of the CWA, is not usually brought into play in the Portland District except at the Corps request. Active involvement by EPA is normally requested only when the Corps is confronted by an unresponsive property owner, a controversial situation, or if there is damage to an important resource.

Conclusions and Recommendations

Although the interpretation applied to Section 404 by resource agencies, the courts, and segments of the public may have expanded Congress' original intent and resulted in increased regulatory jurisdiction for the Corps, corresponding budgetary and personnel increases, necessary to implement the program, have not been made.

Until recently, legislative support was also lacking. Provisions in the 1987 Water Quality Act, give the Corps and EPA direct authority to administratively levy civil penalties. This will allow the agencies to act more quickly on violations, independent of the Department of Justice. The Corps will be able to gain the attention of violators and the public, and to add a deterrent presently missing the Corps' ATF application policy. The Corps and EPA are currently developing a cooperative agreement for this new responsibility. However, the recent Supreme Court decision (Tull v. United States), requiring jury trials in situations where civil penalties are issued, has complicated the administration of these new powers.

A widespread program for public education is needed to inform citizens of the importance and value of wetlands, and the Corps' role in regulating their use. Increased public awareness is also critical to an enforcement program that relies on informants to locate and report violations.

There are several paths the Corps could take to inform the public that would not entail large expenditures. Corps' offices that give public assistance for floodplain and waterway projects could emphasize the need to contact the Regulatory Branch to determine need for Corps' permits. The Corps could increase the use of press releases that explain Corps regulatory actions, including

permits issued for large projects and enforcement activities that will delay projects important to the community. The Corps could use local television news programs to air footage on wetlands, their function and the regulatory program. Brief reports on violations that stall road projects and major developments would be especially useful, as would Corps involvement in aiding local planning and development activities like Portland's South Shore. Similar television news stories are aired every hunting season by ODFW to help hunters distinguish between waterfowl that may be hunted and those with no hunting season. Corps personnel could contact local newspapers to suggest articles on wetlands and the regulatory program.

The Corps' dependence on complainants for reports of violations might be more successful if the Corps made an attempt to notify complainants of the outcome of their complaint and the basis for that outcome. Personalized form letters acknowledging receipt of a complaint and explaining the investigatory process, followed by a letter at the conclusion of the investigatory process would confirm the fact that their report had generated some action.

The major drawback in increasing public awareness and interest in the Corps' program is, as the Vicksburg District discovered in its contracted inspection program, an increased workload. Any attempt to improve public involvement would result in a serious work overload for present staff. In the long run, this would be detrimental to public confidence in the Corps ability or willingness to act.

The geographic distribution of inspectors and field office does cover those portions of the state where large projects and consequently important violations are likely to occur. Working cooperatively with ODSL also helps extend the Corps

coverage of eastern Oregon. Although neither the Corps nor ODSL maintain a high profile in eastern Oregon, it is likely that violations involving important resources will be reported by ODFW field personnel or members of various environmental groups who, because of professional, scientific, or aesthetic reasons, are likely to visit areas like Miller Lake or Malheur Lake in Harney County and may also be aware of Corps and ODSL regulations.

Closer, more formal, cooperation with ODSL would help the Corps' enforcement program. Regularly scheduled quarterly meetings where responsibilities, agency roles, and agency positions are clearly outlined would be a start. Requiring Corps and ODSL staff to immediately inform their counterparts of complaints by telephone, begin coordination at that time by scheduling who will inspect the site and when, document that contact in the agencies violation file, and follow up by mailing the complaint report to ensure that both agencies begin at an equal footing. This would also help to institutionalize coordination. Modification of the Corps' coding sheet, which documents critical procedures, to include coordination between agencies would also help to ensure that coordination occurs. What must be avoided are unilateral assumptions that the other agency is not interested in the violation or would be unwilling to act, or that the violation is not in the other agency's jurisdiction.

Closer coordination with county and city government would also help extend the Corps' enforcement ability. It would also help avoid jurisdictional conflicts and contradictory requirements with respect to violations. However, close coordination with local government may be difficult to attain unless requested formally at a high administrative level and unless the benefits for each governmental level are obvious and clear. Each governmental level's goals,

responsibilities, and limitations must be explained and understood and each must be able to deliver on promises.

Corps enforcement actions tend to be time-consuming. Although it is in the best interests of all parties to resolve a violation quickly, some violators deliberately delay resolution, while others seem willing to do nothing rather than work efficiently toward a possible expensive restoration.

The recent addition of violations to the workload of project managers will help keep enforcement actions moving toward a conclusion. However, more is needed. The introduction of time limits, similar to those used during permit evaluations, is needed. These might require that a specific action be taken or a specific decision point be reached within a given time period; if not, it would have to be justified in annual and quarterly reports. This would prevent Corps staff from allowing violations to remain inactive for so long that it is difficult or embarrassing to seek resolution.

At present, the Corps and reviewing resource agencies envision the Corps enforcement role differently. The impression conveyed by Corps policy and actions is that it attempts to bring violators into the federal evaluation and permit system. The impression held by reviewing agencies is that the Corps' program should be an effective deterrent and should punish violators. The differing viewpoints result partly because the agencies have different responsibilities and legal mandates and partly because the reviewing agencies do not really understand the Corps enforcement policy, the legal restrictions under which the Corps labors, or the funding inadequacies which contribute to the Corps' unwillingness to be aggressive and promote legal challenges. An effort should be made to inform resource agency staff counterparts of the Corps'

violation coordinators and project managers, about Corps' national policy, and the legal, budgetary, staffing, and organizational shortcomings inherent in the Corps enforcement program. Equal time should be given to the agencies to explain their policies and responsibilities. It is clear that people work together more harmoniously and effectively when they understand the policies, responsibilities, and limitations of those with whom they must coordinate.

One of the greatest improvements that could be made in the Corps enforcement policy is precluded by its regulations. By accepting ATF applications in all but the most severe violations, the impression is given that the Corps is unwilling to act. This helps foster a "why bother" attitude among the staff members who work hard at resolving conflicts and modifying unconstructed projects. The Corps refusal to apply any evaluation criteria, for example, regarding the water dependency of unauthorized fills, serves to increase workload and consequently limits the effect of the Reagan Administration's regulatory relief program. It wastes time and money, and increases interagency conflicts and staff stress levels. Simple, straightforward criteria could be applied to most violations to determine whether or not it is reasonable to ever consider entertaining an ATF application. If, for example, a 404 fill violation could not pass a water dependency test or have a reasonable chance of passing such an evaluation, or if a fill has been placed for a non-specific purpose to be determined at some future date, then an ATF application should not be accepted, and restoration required.

If the current political administration supported an active enforcement policy, one would be in place. At present, the Corps' main focus is aimed at meeting the goals of President Reagan's program for regulatory relief. The full thrust of the Corps' present program is geared toward relieving the nation's

developers of what are perceived to be unnecessary regulatory burdens regardless of the effect on the program, personnel or resources. If enforcement was given a similar priority by the Executive Branch, then the Corps' program would be more effective. Changes cannot develop from the staff level of any bureaucracy, including the Corps, when leadership is unresponsive or restrained.

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APPENDIX A

The Jackson-Frazier Wetland Violations

CASE STUDY OF THE JACKSON-FRAZIER WETLAND VIOLATIONS

Introduction

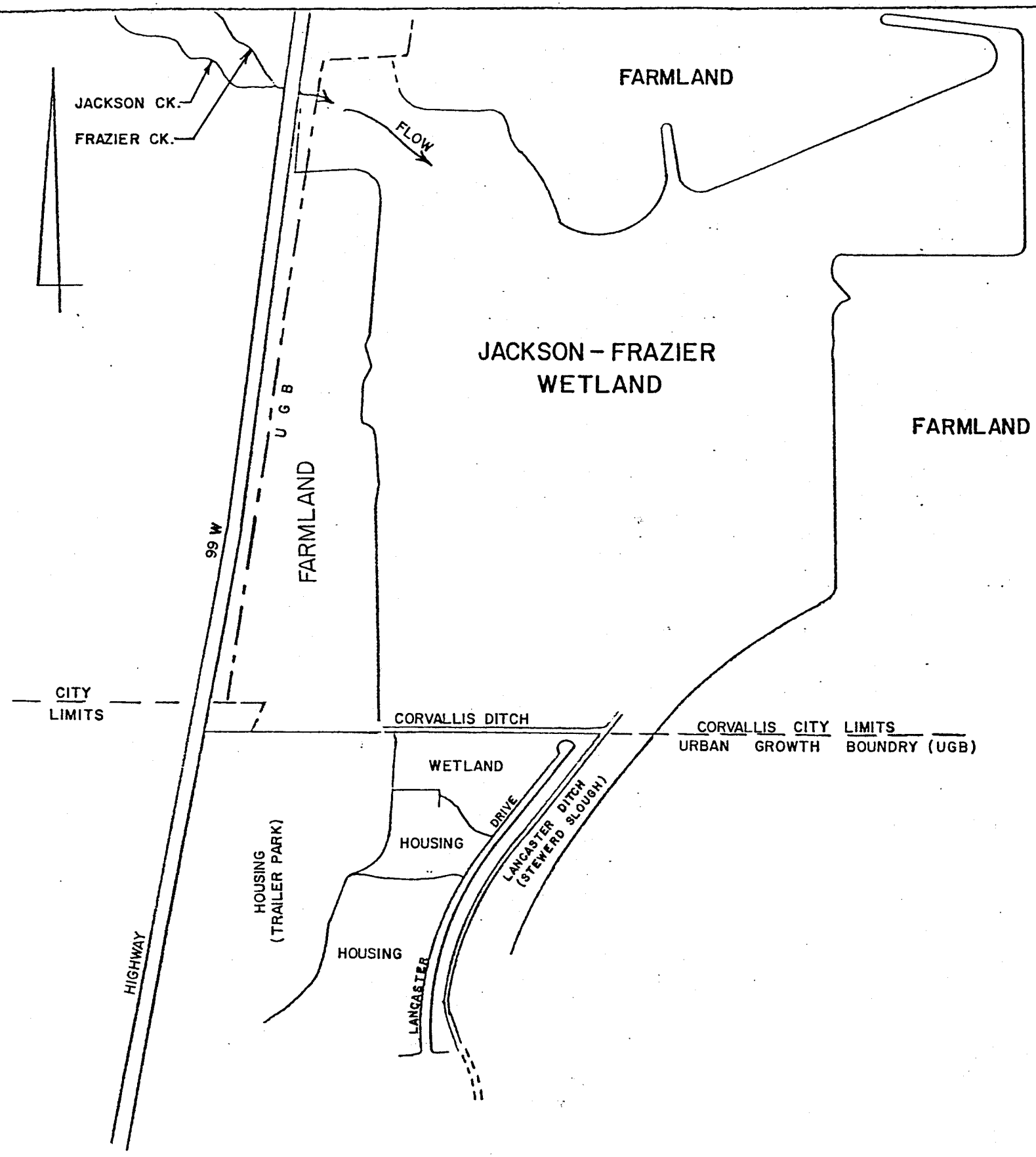
The Jackson-Frazier violation was a complex enforcement action involving two unauthorized fills. Both violations were discovered simultaneously and were investigated concurrently. However, the parties responsible and the purpose for each project were different.

To maintain narrative continuity, each violation is presented chronologically but separately. Explanations of the Corps' actions are provided where relevant.

The Jackson-Frazier Wetland

The Jackson-Frazier Wetland is a privately owned non-tidal, freshwater wetland of about 160 acres adjacent to Frazier Creek, a tributary of the Willamette River (Figure 1). The site is located just north of the City of Corvallis in Benton County, Oregon. The wetland is bounded on three sides by farmland and by the City's Urban Growth Boundary (UGB) to the south. Portions of the land to the south have recently been developed for housing. There remains a four acre undeveloped plot between the wetland and the housing development, which was recently purchased by the City for housing. City infrastructure, a road, and sewer and water lines, end at the UGB.

The site is zoned by Benton County as Exclusive Agricultural Use (EAU). However, various interests have attempted to change the zoning designation from EAU to one allowing development on one hand and to a designation requiring preservation as open space on the other. In addition, The Nature Conservancy was involved in an abortive attempt to purchase the wetland (1000 Friends of Oregon, 1985).



JACKSON-FRAZIER
WETLAND AND
VICINITY

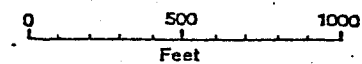


FIGURE 1

Although the site's EAU designation remains controversial, it was upheld by Oregon's Land Conservation and Development Commission (LCDC) on 5 February 1987 (Frenkel and Frenkel, 1987; Oregonian, 1987). Although under an EAU zoning classification the wetland may be farmed, any action involving placement of fill material must be permitted by the USACOE as required by Section 404 and by ODSL as required by Oregon's Removal-Fill Law.

The views of these agencies and those of EPA regarding agency requirements and evaluation procedures, should an application be submitted for development, are contained in Appendix B.

According to ODSL, the Jackson-Frazier Wetland is one of three sites, totaling less than 1,000 acres, containing wet prairie habitat associated with the floodplains of the Willamette River and its tributaries (Figure 2). It is estimated that the Willamette Valley once contained 125,000 to 150,000 acres of wet prairie. The remaining 1,000 acres constitute less than one percent of the habitat's original distribution (ODSL, 1986a).

ODSL notes that the wetland includes five of the ecological elements in Oregon's Natural Heritage Plan and contains four plants listed in Rare, Threatened and Endangered Vascular Plants in Oregon - An Interim Report (ODSL, 1986a). One plant, Bradshaw's desert parsley (Lomatium bradshawii), was proposed for listing as endangered by the U.S. Fish and Wildlife Service (USFWS) in the 21 November 1986 edition of the Federal Register (USFWS, 1986a).

The Dapp Violation

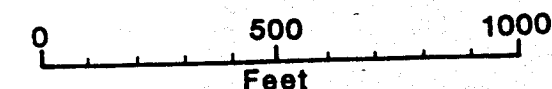
On 19 November 1985, the Corps received a complaint that the owner of the Jackson-Frazier wetland had disced, filled and constructed drainage ditches on the site without authorization (Figures 3 and 4). In light of the controversial

JACKSON-FRAZIER WETLAND

VEGETATION CLASSIFICATION

- 1 SEDGE / GRASS : 22.3 Acres.
- 2 SEDGE / RUSH : 20.3 Acres.
- 3 HERBACEOUS : 15.1 Acres .
- 4 SHRUB SWAMP : 45.1 Acres.
- 4A SHRUB SWAMP W/ BEAVER DAMS : 3.2 Acres.
- 5 FORESTED SWAMP : 28.8 Acres.
- 5A FORESTED SWAMP W/ FRUIT ORCHARD : 5.3 Acres.
- 6 OPEN WATER : 0.4 Acres.
- 7 UPLAND: 5.2 Acres.
- 8 SHRUB SWAMP/HERBACEOUS MIX : 4.5 Acres.
- 9 SPIKERUSH / CATTAIL : 5.3 Acres.
- 10 SEDGE-SHRUB : 11.4 Acres.
- 11 COMBINATION OF CLASSES 2, 9 : 2.9 Acres.

Scale 1:4800
1"=400Ft.



INTERPRETED FROM:

- 1) APRIL 1 1981, 1:48,000 CIR IMAGERY AND FIELD WORK BY NPP-OP-RF-2
- 2) ACRES OF CLASS 1 & 10 ALONG SOUTH END MEASURED TO MAP BORDER ONLY

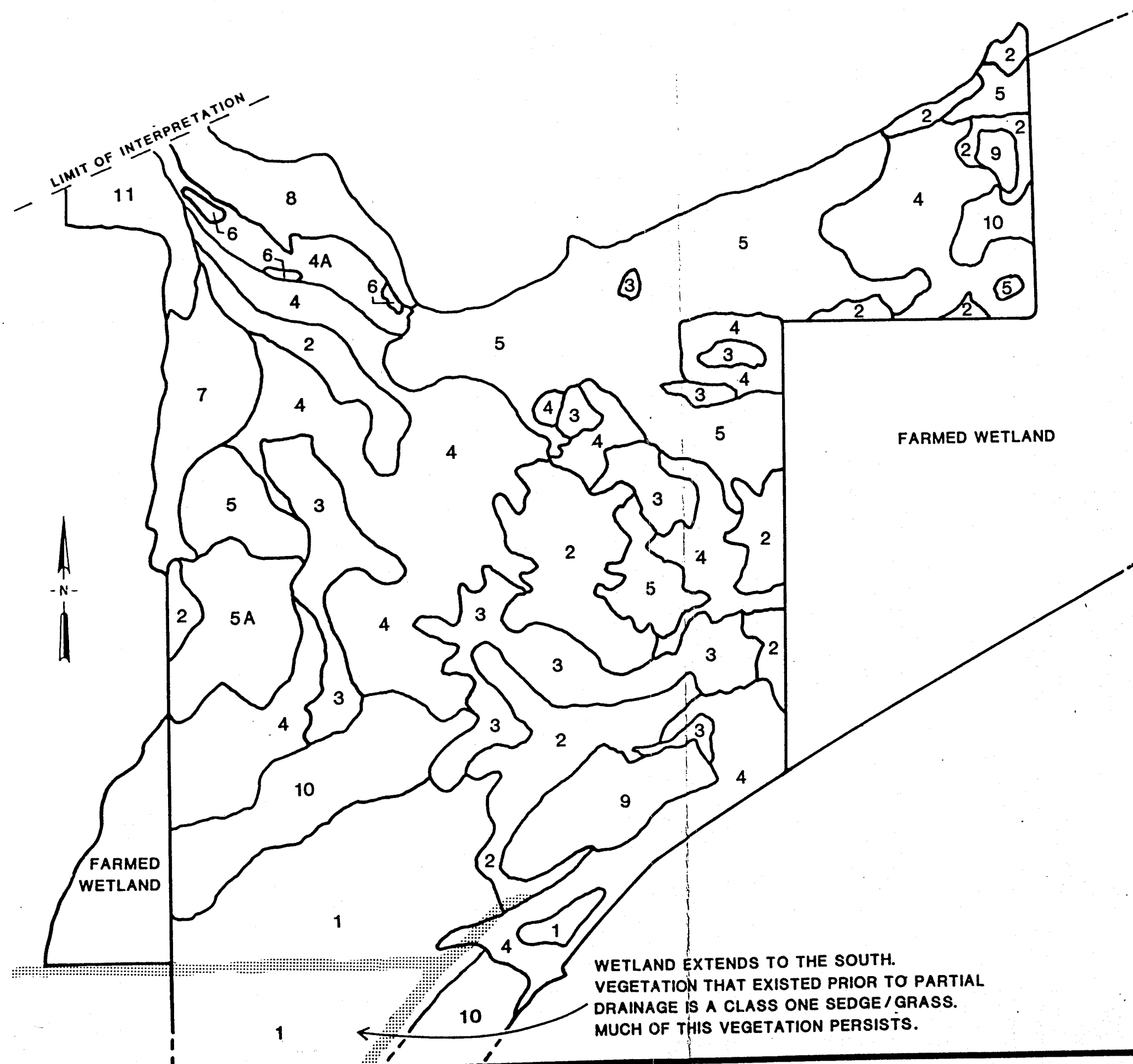


**US Army Corps
of Engineers**

Portland District

FIGURE 2

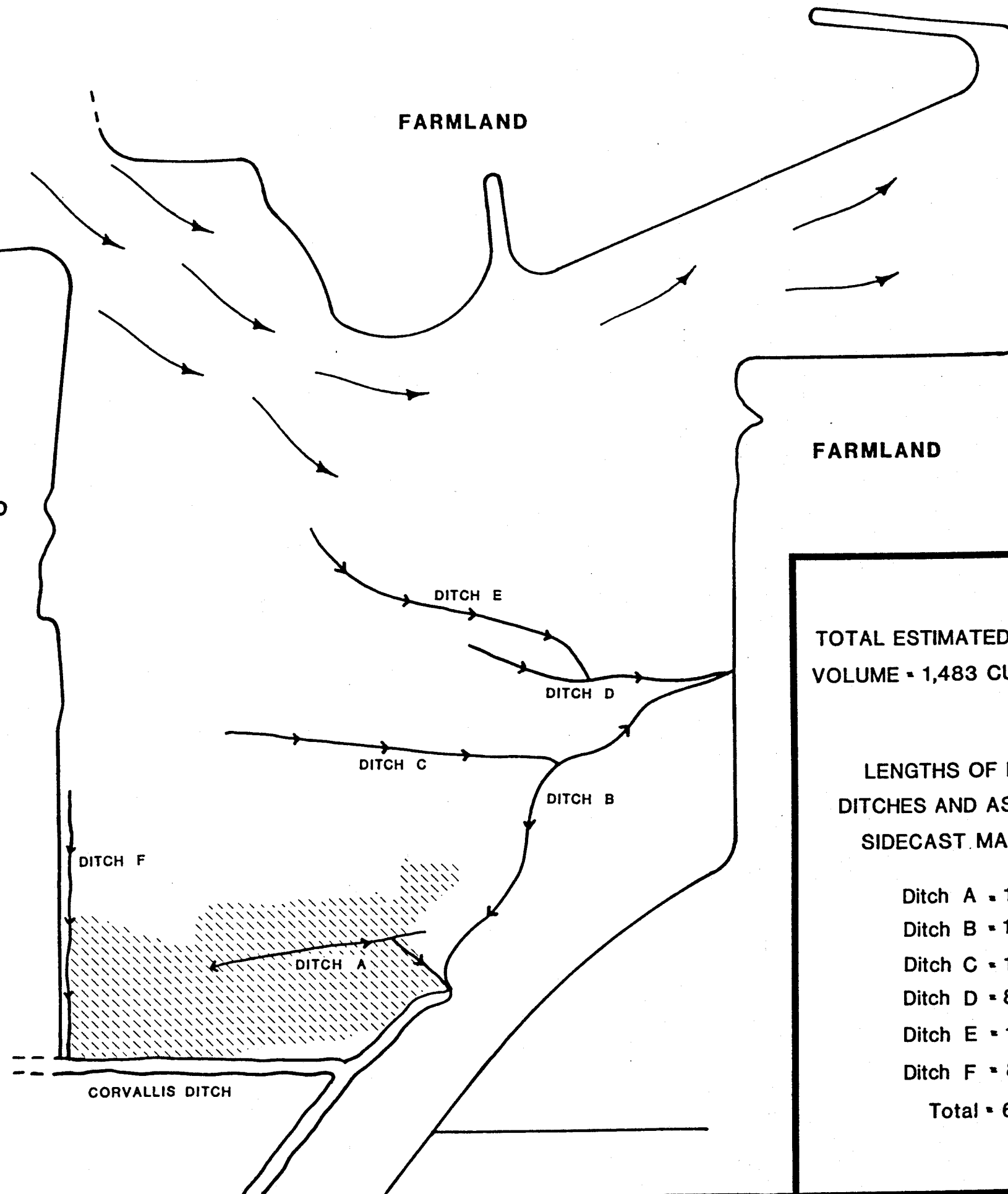
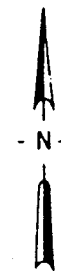
3/27/86



FARMLAND

FARMLAND

FARMLAND



TOTAL ESTIMATED SIDECAST
VOLUME • 1,483 CUBIC YARDS

LENGTHS OF RECENT
DITCHES AND ASSOCIATED
SIDECAST MATERIALS

Ditch A • 1002'
Ditch B • 1586'
Ditch C • 1140'
Ditch D • 875'
Ditch E • 1116'
Ditch F • 850'
Total • 6569'

JACKSON - FRAZIER WETLAND

Damage Overlay

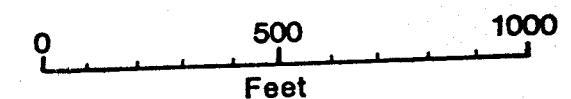
Data From
16 Dec. 1985 Site Visit
and O.D.S.L. Damage Map

Natural Drainage

Ditches Dug - Direction of Flow.

Area of Vegetation
Removal and Soil Surface
Scraping.
Total Area = 13.6 Acres

Scale
1:4,800
1" = 400 Ft.



US Army Corps
of Engineers
Portland District

FIGURE 3

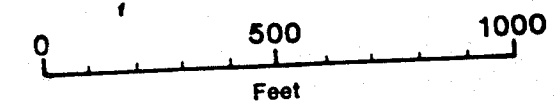
3/26/86

JACKSON-FRAZIER WETLAND

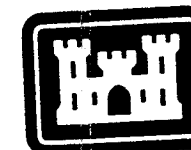
VEGETATION CLASSIFICATION

- 1 SEDGE / GRASS
- 2 SEDGE / RUSH
- 3 HERBACEOUS
- 4 SHRUB SWAMP
- 4A SHRUB SWAMP W/ BEAVER DAMS
- 5 FORESTED SWAMP
- 5A FORESTED SWAMP W/ FRUIT ORCHARD
- 6 OPEN WATER
- 7 UPLAND
- 8 SHRUB SWAMP/HERBACEOUS MIX
- 9 SPIKERUSH / CATTAIL
- 10 SEDGE-SHRUB
- 11 COMBINATION OF CLASSES 2, 9

Scale
1 : 4800
1" = 400 Ft.



1) INTERPRETED FROM 16 DEC. 85 FIELD WORK
BY NPP-OP-RF-2, O.D.S.L. DAMAGE MAP, AND
CIR IMAGERY DATED 1 APR. 1981, 1:48000



US Army Corps
of Engineers

Portland District

FIGURE 4

3/28/86

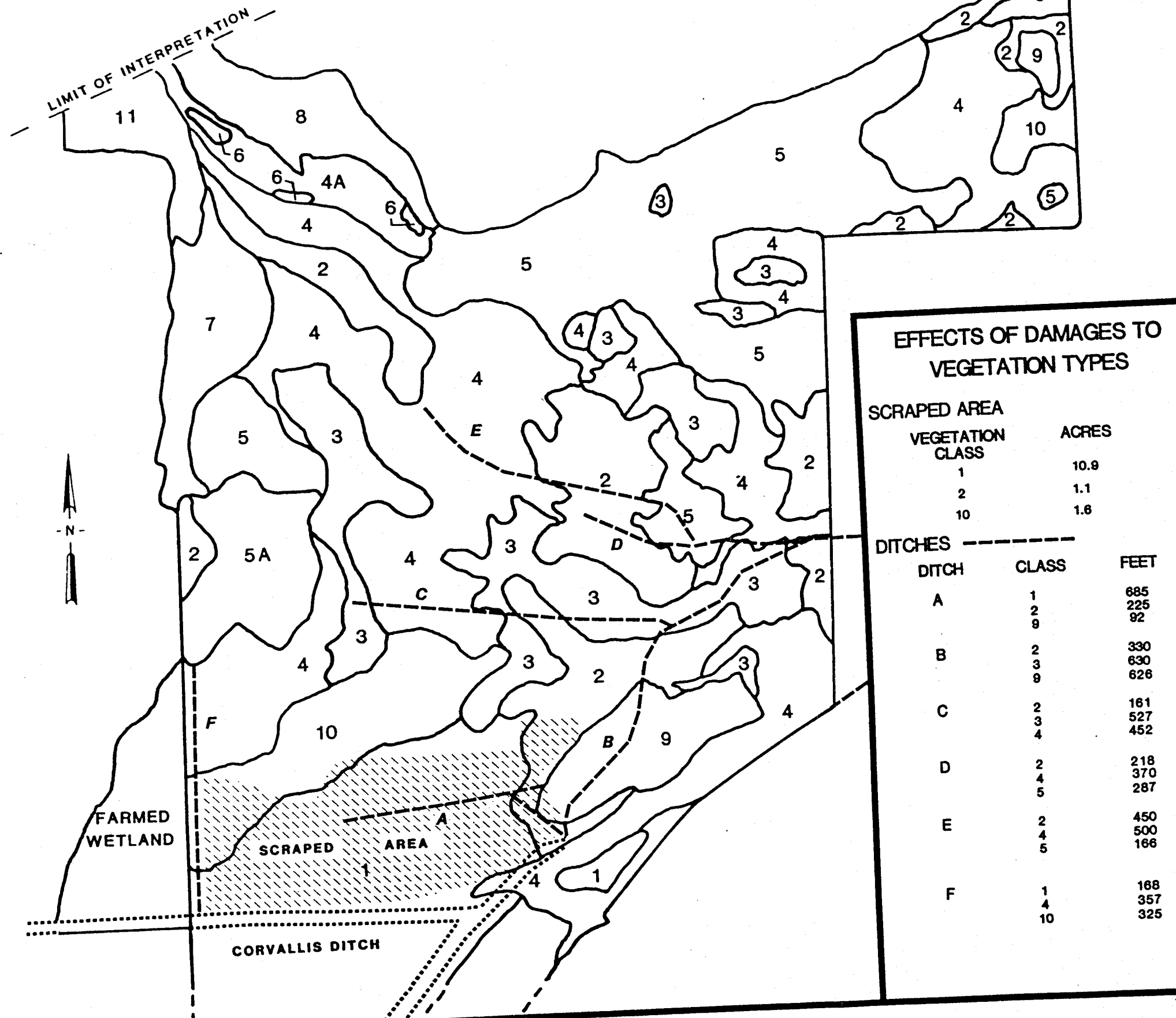
EFFECTS OF DAMAGES TO VEGETATION TYPES

SCRAPED AREA

VEGETATION CLASS	ACRES
1	10.9
2	1.1
10	1.8

DITCHES

DITCH	CLASS	FEET
A	1	685
	2	225
	9	92
B	2	330
	3	630
	9	626
C	2	161
	3	527
	4	452
D	2	218
	4	370
	5	287
E	2	450
	4	500
	5	166
F	1	168
	4	357
	10	325



land use planning decisions made in regard to the site and its significance, the Corps and ODSL initiated a joint enforcement action.

A site inspection, conducted the following day, disclosed a long ditch and berm, the Corvallis Ditch, running along the southern border of the wetland and a area of about 17 acres that had been disced or plowed. A second ditch was found running through the eastern side of the site. Dirt and vegetation excavated from this ditch had been sidecast into wetlands on either side of the ditch. Several small drainages intersected the main north-south ditch which, at its northern end, was fed by another recently excavated ditch.

The initial inspection established that violations of both federal and state law had been committed. The site, based on vegetation and soil saturation, was wetland and the sidecast material constituted fill under Section 404.

In addition, the discing operation appeared to fall under the guidelines of Corps' Regulatory Guidance Letter (RGL) 85-4. The RGL was issued in response to the Fifth Circuit Court of Appeals' decision in Avoyelles Sportmen's League v Marsh, 715 F2d 897 (5th CIR. 1983), regarding 404 jurisdiction over landclearing activities. The RGL states in part, "...landclearing activities with mechanized equipment such as backhoes or bulldozers with shear blades, rakes, or discs constitute point source discharges which must be authorized by a Corps individual or general permit if ... the activity would involve ... leveling the land; and the activity is not exempted..." (USACOE, 1985a).

During the site inspection, the Corps' Violation Coordinator met and interviewed Alan Dapp, the property owner. Mr. Dapp stated that he did not believe his property was a wetland and that he was preparing the land for spring planting. He also stated that he was unaware that a Corps permit was required for the work and that the area was just like that on which he had constructed

apartments in 1985. Mr. Dapp contended he placed no fill when constructing the apartments (USACOE, 1985b).

The Corps was notified on 22 November 1985 that ODSL was requesting Peter Sandrock, Benton County District Attorney, to bring criminal charges against Mr. Dapp for violations of the state Removal-Fill Law (ODSL, 1985c). On 26 November 1985, as outlined in their regulations (USACOE, 1982), the Corps notified Mr. Dapp that his work was an apparent violation of Section 404. Notification took the form of a cease and desist order. In it the Corps identified its statutory authority, the location of the work, and the work conducted. In addition, the letter requested Mr. Dapp's explanations as to why the work was conducted without authorization (USACOE, 1985d).

The Corps cease and desist order provides formal notification to the property owner that the Corps is investigating an apparent violation of Federal Law. The term "apparent" is routinely used until the Corps investigation is complete and a decision document written. The Corps, by requesting the property owner's explanations, provides the opportunity to rebut the accusation. Although failure to provide the requested information is not an infraction in itself, as is the case when an alleged violator fails to respond to an EPA order issued under the authority of Section 309 of the CWA, it does require the Corps to make a decision based on a one-sided record. Depending on the particular property owner, this response may be the only opportunity to present the owner's position. On its part, the Corps is always willing to discuss the situation and possible methods of resolution.

In response to ODSL's request for criminal prosecution, a meeting was held with Peter Sandrock and Larry Small, Oregon State Police Investigator for the District Attorney. Both emphasized that state agency representatives be

sensitive to the concept of trespass during their investigation (USACOE, 1985c). Although state employees, unlike Corps employees, may enter property, without the owner's permission, to investigate apparent violations, evidence gathered without warrant would probably be challenged in a criminal court case.

Mr. Sandrock also noted that Dapp's intent would have to be established. To obtain a criminal conviction, the state would have to prove that Dapp had intended to violate the Removal-Fill Law. In his public statements, Dapp expressed his determination to challenge land use planning and to use his property as allowed under the EAU classification.

Another of Sandrock's points may help explain why violations do not often result in either criminal or civil action. The District Attorney expressed reluctance to invest the time and effort needed to prosecute a misdemeanor. Sandrock, like any administrator, must determine office priorities and attempt to make efficient and effective use of the resources available (USACOE, 1985c).

On 12 December 1985, at the request of Dapp and his attorney, Bill Moshofsky, a meeting was held to clarify each party's position. Mr. Dapp expressed concern over two issues. First, the existence of a federal interest and second, the definition of wetlands.

With respect to a federal interest in Mr. Dapp's property, Moshofsky did not understand how Dapp's actions could negatively affect interstate or foreign commerce. Burt Paynter, Chief of the Environmental and Inspection Section, explained that since the wetlands impacted were adjacent to a tributary to a navigable water, the Willamette River, a direct federal interest existed. Paynter also explained that a federal interest could also be derived from use, by migratory waterfowl of a waterbody or wetland isolated from the surface tributary system (USACOE, 1985e).

During the meeting, Dapp stated that he was not convinced that he had conducted work in a wetland. Because portions of the site annually dried out and because the property had a clay soil base, he disputed the site's wetland classification, though it was identified as such by local wetland experts, and staff from Benton County, Oregon Department of Land Conservation and Development (DLCD), ODSL, USFWS, EPA, and the Corps. According to Dapp, clay soil could not meet the saturated soil requirements for wetlands because clay is impermeable to water and thus could not become saturated (USACOE, 1985e).

Mr. Dapp also contended that he was being singled out for prosecution at the prompting of various environmental groups. He attempted to justify this position by noting that the Corps had not notified the City that it had committed a violation by constructing the Corvallis ditch. Mr. Paynter informed Dapp that the ditch and berm were being investigated (USACOE, 1985e).

In Mr. Dapp's reply to the Corps' cease and desist order, Bill Moshofsky basically reiterated the position expressed during the 12 December meeting. In addition, Moshofsky stated that he considered the laws and regulations defining Corps' jurisdiction to be difficult to read and apply, ambiguous, vague, and generally unpublished. He also contended that Mr. Dapp was unaware of the Corps' claim of jurisdiction over the property (Moshofsky, 1985).

The Corps initially claimed regulatory jurisdiction over the wetland in 1984. At that time, Dr. Robert Frenkel of Oregon State University, as a result of the local planning and zoning controversy, requested that the Corps outline its 404 jurisdiction over the site (Frenkel, 1984). The Corps, after inspecting the site, replied that a Department of the Army permit would be required prior to initiation of any filling activity (USACOE, 1984). A copy of this determination was eventually sent to Terry Morgan, Dapp's attorney at that time. Mr. Morgan

also met with Corps representatives in 1984 to clarify the Corps jurisdiction. At this time, however, the Corps had not conducted a wetland determination. The jurisdictional claim was based on vegetation, hydrology, literature review, and the general acceptance that the area was a wetland.

The Corps began a wetland determination in response to Dapp's actions. The initial inspection indicated only that the site appeared to be a wetland. At that time, an accurate accounting of wetland plant species or their extent was not made. Because Dapp showed no inclination to accept the site's wetland character, the Corps was required to conduct a detailed wetland determination that would, if necessary, withstand judicial scrutiny.

The Corps Survey Branch's files of aerial photographs were researched to help document the condition of the wetland in 1977, when the Corps assumed 404 jurisdiction over wetlands adjacent to tributaries of navigable rivers. More recent photographs were used to determine the existing gradations of wetlands and uplands.

During the interagency site inspection held on 16 December 1985, Brian Lightcap, Corps wetland specialist, began laying out preliminary baselines and characterizing the soils. Lightcap returned to the site on 26 December 1985 with Bill Clement of the Survey Branch to gather ground truth data for use in photographic interpretation and to map the work conducted. During this trip, additional baselines and reconnaissance stations were established and correlated to enlarged aerial photographs. At each station, soils were examined and analyzed using a Munsell Color Chart, compared to the Benton County Soils Survey for identification and to Oregon's list of hydric soils. Plant associations were also recorded, as was an estimate of the percentage of hydrophilic vegetation at each station and a general description of the area surrounding each station.

This information was related to the aerial enlargements by Bill Clement and to previous analytical work conducted in the wetland.

Over the next several months Clement and Lightcap worked together to construct an inventory of wetland habitats found onsite and a map delineating the location and the amount, in the area and linear feet, of work conducted by Dapp (Figures 2, 3, and 4). The Corps wetland determination included the farmed areas surrounding the site and the undeveloped portions of land to the south.

Agencies responded to the Corps' request for comments regarding interim restoration measures on the basis of site inspections, and their own information and records. The Oregon Department of Fish and Wildlife (ODFW) recommended replacement of the sidecast material into the ditches (ODFW, 1985). USFWS provided the Corps with information concerning the site's Resource Category, their conclusion that the disced area would restore naturally, and several options for repairing damage resulting from the ditches (USFWS, 1985). EPA chose to postpone decisions concerning restoration measures until the Corps provided its wetland determination and maps.

Eventually, EPA combined information obtained from the Corps with that developed by ODSL. While the Corps was completing its wetland determination, ODSL had issued a contract to Scientific Resources, Inc. (SRI) to conduct a wetland impact analysis. The purpose of the analysis was to document hydrological and physical changes, describe surface and ground water hydrology, determine wetland boundaries and habitat types and review literature relevant to the wetland. ODSL's contracted work provided a more complete picture of the impacts of Dapp's and the City's activities than did the Corps' and allowed ODSL staff to concentrate on legal and administrative questions rising from Dapp's challenge of ODSL's jurisdiction and procedures.

Apart from the observable damage, the ODSL report indicated that the ditching caused a substantial loss of ground water along the shallow clay-topsoil horizon. ODSL estimated that de-watering would be more efficient with time and would occur earlier in subsequent growing seasons (ODSL, 1986b).

On the basis of this report and other information developed by the Corps, a restoration plan, acceptable to each agency, was formed. ODSL assumed the lead role in the development of the restoration plan with the two federal agencies commenting informally.

While ODSL and the federal agencies were establishing their positions, Mr. Dapp was attempting to do likewise. Bill Moshofsky contacted James Hecker, District Conservationist for the Soil Conservation Service (SCS) and requested SCS assistance in conducting a soil and vegetation analysis of Dapp's property. Dennis Peters, Regional Wetlands Coordinator for USFWS, was also involved in the analysis. On the basis of a SCS/USFWS site inspection, SCS concluded that the property's soils were hydric and that the site consisted of wetland types II, III, VI, and VII, as defined by USFWS. Mr. Hecker informed Moshofsky that SCS could not provide technical assistance for work in these wetlands (SCS, 1986).

ODSL issued its proposed order requiring restoration of the wetland on 19 May 1986. EPA and the Corps issued final orders requiring identical restoration measures on 10 June and 24 June respectively. The orders required that the main ditch be completely backfilled in places and plugged at intervals in other locations. Small feeder ditches were to be plugged at intervals. For the most part, the work could be conducted using earth moving equipment. However, in one area, the work was to be done by hand. Because of the level of saturation and the compressibility of the soil, it was believed that the treads or tires of heavy equipment would cause additional damage by creating tracks

which would promote continued draining. This belief was justified since similar small ditches were noted during site inspections.

The restoration work was to be completed between 1 August and September 15, 1986. No provisions for monitoring the restoration work were included in the orders.

Unlike Oregon's Removal-Fill Law, the Corps' program has no provisions for administrative appeal. Consequently, an order issued by the Corps is reviewable only through judicial appeal. The ODSL order was "proposed" because the property owner has the right to appeal through the agency's Contested Case Hearing procedures. A Proposed Order becomes final if no hearing is requested within 20 days or if the property owner fails to appear for the scheduled hearing. Judicial review of an administrative ruling is normally denied until all avenues of obtaining relief administratively have been exhausted and the agency's ruling is finalized. Dapp formally requested a Contested Case Hearing on 29 May 1986 and had earlier attempted to appeal ODSL's jurisdictional determination in Circuit Court (Marion County Cir. Court Case Number 86C-11511). However, the appeal was suspended pending completion of administrative appeal procedures.

During the spring and summer, ODSL and the Oregon Attorney's General's staff were occupied with the details of Dapp's appeal, including selection of a hearings officer, providing public notice, and selecting and scheduling a suitable hearing site. At Dapp's request, the hearing was rescheduled at least once and was eventually cancelled in favor of a negotiated settlement.

Negotiations between ODSL and Dapp's representative, John DiLorenzo, changed only that part of the restoration work to be conducted by hand. As a result of negotiation, this work could be conducted by light earthmoving equipment. In addition, ODSL agreed to refrain from seeking civil penalties and Dapp agreed to

drop his court proceeding but not to surrender his right to appeal ODSL's jurisdictional claim at a future time (Feldbruegge-Hedric, 1986). With the Formalization of the negotiated settlement, Peter Sandrock notified Mr. Dapp that criminal charges would be dropped (Sandrock, 1986). The negotiated settlement allowed restoration work to proceed without further delay. The work was conducted under the direction of Ken Bierly, ODSL, on 25 September 1986. A Corps observer was also on-site during restoration (USACOE, 1986a).

With the completion of the restoration work, both ODSL and the Corps considered the violation closed. EPA, however, issued an amendment to its restoration order on 10 November 1986. This amendment set monitoring requirements to insure that the restoration was successful (EPA, 1986). Inspections of the restoration work have been inconclusive. Although EPA is involved in negotiations with Dapp's representative over additional restorative work and monitoring requirements, it is unlikely that either ODSL or the Corps will take further action.

The Corvallis Violation

The second violation occurring in the Jackson-Frazier Wetland involved the construction of a ditch and berm by the City of Corvallis for flood protection purposes. The ditch, running along the southern boundary of the wetland, was first noticed during the site inspection held in response to the complaint that Alan Dapp had placed fill (Figures 3 and 4). At that time, Dapp stated that the City was responsible for construction of this ditch.

From the Corps' point of view, it was obvious that the Corvallis Ditch was a completed project. The amount of vegetation on the berm indicated that the work had been conducted several growing seasons ago and therefore, there was no need

to immediately address the work. Information obtained during the Dapp investigation would help determine the impact of this ditch and the Corps position with respect to resolution of the City's violation. The Corps' general policy when evaluating the actions of state and local governments is that the work is usually conducted in the public interest. Since the ditch had been in place for several years, there appeared to be little likelihood that immediate restoration would be required to prevent serious degradation of a public resource.

On 13 January 1986, the Corps notified the City that its work was being investigated as an apparent violation of the CWA. The Corps' letter to Corvallis was of the same format as that sent to Mr. Dapp.

The City contended that the ditch had been constructed to eliminate the threat of flood damage to recently constructed infrastructure and to private property. Although City Utility and Transportation Services officials were aware of the Corps' permit program, having obtained permits for the work in local creeks and streams, they stated that they were unaware of the site's wetland designation.

As in the Dapp violation, the Corps solicited and received comments and recommendations for responsible agencies. ODSL, USFWS, ODFW, and Benton County provided comments concerning the Corvallis ditch. All agencies noted the need or possible need for flood protection for properties located south of the wetland. USFWS recommended that the ditch be backfilled and replaced with an impermeable berm or with a shallow ditch and berm to the south. The agency's aim was to provide flood protection by containing water within the wetland rather than draining the water or at least to limit the ditches capacity to drain water (USFWS, 1986b).

In its response, ODSL stated that its analysis indicated that the Corvallis Ditch contributed significantly to groundwater decline within the wetlands. In addition, ODSL noted that the Corvallis Drainage Master Plan Technical Supplement (1981) recommended that flood protection for the Village Green Development be obtained by constructing a levee to contain floodwaters (ODSL, 1986c).

The efficiency of the Corvallis Ditch in de-watering the wetland is also evident in the recovery of the plant, Bradshaw's desert parsley, that Mr. Dapp had attempted to eliminate. ODSL had contracted Jimmie Kagen of the Nature Conservatory to evaluate the natural restoration of the disced area north of the ditch (Bierly, 1987). When contacted, Kagen noted that although about 50 percent of the desert parsley growing on this site had been destroyed, a healthy population still existed. Kagen estimated that the Corvallis Ditch was having a positive impact on this particular plant by making the ground drier and therefore, more favorable for growth (Kagen, 1986).

In his response, Jeffrey Condit, Benton County Counsel, supported the City's contention that the wetland characteristics of the area at or south of the UGB had been largely overlooked. He noted that the principal focus of the land use controversy was on the main body of the wetland rather than on its southern fringes. Condit also noted that information concerning the Corvallis Ditch was absent from Benton County's 1984 ESEE analysis. Mr. Condit also pointed out that both the city and local home owners had legal recourse to prevent complete restoration which would endanger their property (Condit, 1986).

In an effort to develop an equitable resolution, the Corps and ODSL met with Scott Olsen from the City. During the meeting, several concerns and options for resolution were discussed. Mr. Olsen expressed concern that a berm would direct water toward the trailer park located to the west and might cause flooding in

adjacent farmlands. The City would have to survey the area to determine if either would occur. A concern raised by agency personnel was the impact flooding might have on habitat diversity within the wetland. Neither agency wished to create a new environment and the effects of water impounding behind a berm were uncertain.

Simply relocating the ditch to the south was difficult because a water transmission line ran under the existing berm and then paralleled Lancaster Drive (Figure 1). The existing ditch ran perpendicular to Lancaster Drive about 100 feet north of the cul-de-sac and connected to Lancaster Ditch (also known as Seward Slough) (Figure 1). Moving the ditch south would require that water flow under the street to reach Lancaster Ditch. Either option would result in additional expense to the City and partial demolition and reconstruction of Lancaster Drive (USACOE, 1986b).

Mr. Olsen agreed to submit plans for a shallow ditch and berm by the end of May. He hoped to begin construction by late August or early September since it was necessary to work before the local rainy season began (USACOE, 1986b).

To resolve the violation, the Corps elected to accept an ATF application requesting authorization for the ditch and berm (USACOE, 1986). The City submitted an application on 22 August and was notified that additional information would be required before the Corps' evaluation could proceed.

On 27 August, ODSL, stating that their regulations prevented processing an ATF application, issued a restoration order containing modifications to the City's proposal. ODSL required the City to add three fabric covered, rock check dams to prevent scour, to decrease the ditch's incline, and to riprap its confluence with the Lancaster Ditch (ODSL, 1986d).

The Corps, to expedite restoration, followed the state's lead and issued a restoration order on 19 September. Although the Corps can issue a restoration order rather than evaluate an ATF application, the ATF procedure is preferred. Whenever possible, the Corps will subject a project to its public interest and 404(b)(1) guideline reviews. Evaluation under these criteria allow comments from other agencies and interested parties in response to a Public Notice that often bring out conflicts and unanswered questions. The ATF process is more time consuming than a restoration order, however, it allows the violator/applicant the same consideration provided any other applicant. Should the ATF application be denied, the Corps has developed as complete, fair, and impartial a record as possible and charges of inconsistent or arbitrary decision making are less likely to occur.

Restoration was completed on 25 September, the same day the restoration was conducted by Alan Dapp. With the completion of the new ditch, both the Corps and ODSL ended their enforcement actions.

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APPENDIX B
Agency Positions Regarding Development
in the Jackson-Frazier Wetland

June 18, 1986

Operations Division (NPPOP-R-2)

Subject: Jackson/Frazier Wetland

Mr. Jeffrey Condit
Benton County Office of County Counsel
180 N.W. 5th Street
Corvallis, Oregon 97330

Dear Mr. Condit:

This letter is in response to your May 6, 1986 letter regarding the relationship between the Corps' regulatory authority under Section 404 of the Clean Water Act and Benton County's proposal to resolve the Jackson/Frazier wetland issue through Land Use Planning. It is the response we promised in our May 16, 1986 interim reply to you.

The following information is a general summary of the Corps' procedures and regulations for evaluation of applications to place fill in waters of the United States. Waters of the United States is defined at 33 CFR 323.2(a) (Enclosure 1). Without a completed application, accompanied by supporting data, such as a clearly identified need to locate a project in waters of the United States, a mitigation plan, alternatives analysis, and any other information essential to complete an evaluation of the impact on the public interest, the Corps cannot provide a definitive answer to the question of whether any specific part of the wetland could be authorized for development.

Section 404 of the Clean Water Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for a public hearing, for the discharge of dredged or fill material into the waters of the United States. Applications for authorization to place dredged or fill material in these waters, including wetlands, are evaluated in accordance with the Corps public interest review procedures, which involves weighing and balancing all relevant factors affecting the public interest. Among those factors are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.

Applications are also evaluated in accordance with guidelines developed by the Environmental Protection Agency in compliance with Section 404(b)(1) of the Clean Water Act (40 CFR 230). A primary purpose of the guidelines is to maintain and to facilitate restoration of the chemical, biological, and physical integrity of the waters of the United States by controlling discharges of dredge and fill material. A fundamental precept of the guidelines is that dredged or fill material shall not be discharged into the aquatic ecosystem, unless it can be demonstrated that the discharges will not have unacceptable adverse impacts either individually or cumulatively.

The public interest review and the 404(b)(1) guidelines, together, form the core of the evaluation process. Once all aspects of the public interest have been considered, if a project does not conform to the guidelines, the application will be denied.

The following broad restrictions must be applied to the evaluation of discharges of dredged or fill material:

1. No discharge will be permitted if there is a less environmentally adverse, practicable alternative; where the activity associated with a discharge into a special aquatic site does not require access or proximity to or siting within a special aquatic site to fulfill its basic purpose, practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.

2. No discharge will be permitted if:

- a. it is inconsistent with applicable State water quality standards;
- b. it violates applicable toxic effluent standards;
- c. it jeopardizes a threatened or endangered species;
- d. it violates requirements imposed to protect any designated marine sanctuary.

3. No discharge will be permitted which will cause or contribute to significant degradation of waters of the United States.

4. No discharge will be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts. In addition to giving full consideration to the comments of responsible Federal and State agencies regarding mitigation, the Corps considers the following elements of mitigation during the public interest review:

a. measures which would avoid losses to fish and wildlife resources;

b. measures to minimize impacts by limiting the degree and magnitude of the action and its implementation;

c. measures which rectify the impacts by repairing, rehabilitating or restoring the affected area;

d. measures to reduce or eliminate impacts on resources by preservation and maintenance operations during the life of the action; and

e. measures to compensate for fish and wildlife losses which remain when the measures listed above have been applied.

The evaluation of an application to place fill in a wetland includes a consideration of the factors and criteria listed above, and of the unique characteristics and uses which identify the specific public interest in the affected area. The decision on the permit application is made by balancing the benefits which reasonably may be expected to accrue from the proposal against its reasonably foreseeable detriments. While the Federal regulations do not absolutely prohibit filling wetlands, they have been designed to protect the functions which wetlands perform that are important to the public interest. Some of those important functions are described at 33 CFR 320.4(b) (Enclosure 2). After completing the public interest review on an application, the Corps may decide to grant the permit as requested, grant a permit for an alternative with less environmental impacts (e.g., a smaller fill than requested), grant a permit with mitigating conditions, or deny the permit.

In those waters of the United States that are not navigable waters of the United States, the Corps only regulates the placement of dredged or fill material. Most wetlands fall into this category. While other agencies may regulate some of the other activities you mentioned, such as vegetation removal or

herbicide spraying, the Corps has no authority to regulate them unless they require or result in the placement of dredged or fill material.

In general, our experience has been that the development of wetlands for non-water dependent uses, such as housing, does not receive favorable review from Federal and State resource agencies or by the public. Consequently, we must look very hard at the availability of practicable alternatives in upland areas. We must be certain that the benefits of a development in a wetland will clearly outweigh the losses, and that those losses will be sufficiently mitigated if a permit is warranted. Given the uniqueness of the Jackson/Frazier wetland, the interest of the public in that area, the availability of upland areas for housing development, and the probable difficulty of adequately mitigating for the loss of important wetland values to satisfy the public interest, we estimate that there is a low probability that Federal approval would be granted for building a housing development in the wetland.

We hope that the above information assists you in your effort to complete land use planning for the Jackson/Frazier wetland area. If you have any additional questions, contact Burt Paynter at the above address or call (503) 221-6995.

Sincerely,

G. A. Newgard
Chief, Regulatory Branch

Enclosures

Copies Furnished:
Oregon Division of State Lands
Environmental Protection Agency



U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

JUL 14 1986

REPLY TO
ATTN OF: M/S 423

CORPS OF ENGINEERS

JUL 14 1986

PORTLAND, OREGON

Jeffrey G. Condit
County Counsel
Benton County
180 NW 5th Street
Corvallis, Oregon 97330

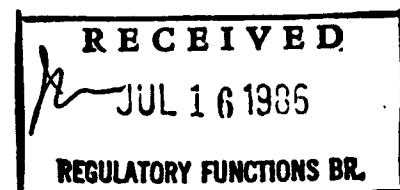
RE: Jackson/Frazier Wetland Development

Dear Mr. Condit:

This letter is in response to your letter of May 6, 1986, requesting information on our agency's responsibilities and position regarding any development on the Jackson/Frazier wetland. You also asked several questions concerning wetlands regulation in general.

We refer you to the Corps of Engineers letter of June 18, 1986, for answers to most of your questions. That letter provides an excellent summary of some of the regulatory requirements of Section 404 of the Clean Water Act. We would like to stress the point made in the Corps' letter that fills in wetlands for non-water dependent projects are allowed only if the applicant can demonstrate there are no practicable less environmentally damaging alternatives that do not involve aquatic sites. Even then, the fill is allowed only if an adequate mitigation plan (approved by the federal and state resource agencies) is agreed to by the applicant and made a condition of the 404 permit. This mitigation must replace the functions and values of the adversely affected wetland habitat. This is consistent with both the 404(b)(1) Guidelines and the EPA Region 10 Mitigation Policy (enclosed).

Where significant resource values may be adversely affected, Section 404(c) of the Clean Water Act allows EPA to deny or restrict the use of special aquatic sites for disposal of dredged or fill material regardless of the Corps decision on the 404 permit. We are investigating the possibility of undertaking such an action for the Jackson/Frazier Wetland. We have not yet made a decision on this issue. The regulation governing this action is found at 40 CFR 231 (enclosed). It should be noted that such a procedure has rarely been used and is presently considered a last resort to protect an imminently threatened special aquatic site. If EPA decides to invoke Section 404(c), we will follow all the regulatory requirements, which include the requirement for a public notice and, if warranted, a public hearing. It is unlikely such a decision would be made prior to resolution of the alleged Clean Water Act violation on the property owned by Mr. Alan M. Dapp.



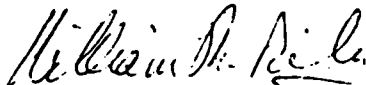
I will attempt to answer your questions on conflicting activities prohibited in wetlands absent a Section 404 permit. The 404 regulations only cover the placement of fill or dredged material in wetlands. They do not regulate removal of vegetation, herbicide spraying or grazing. The regulations were designed to protect both the ecological and hydrological characteristics from the adverse impacts of the placement of dredged or fill material. Vegetation removal may be regulated by the U.S. Fish and Wildlife Service under the Endangered Species Act. Vegetation removal would be covered under Section 404 if it resulted in more than minimal discharge of fill material to the wetland.

Herbicide spraying is covered under the Federal Insecticide, Fungicide and Rodenticide Act via pesticide application requirements. There are herbicides registered for use in waters of the United States. As long as an applicator uses them in accordance with label requirements compliance with federal statutes will be assured. However, the elimination of vegetation in the Jackson/Frazier wetland will not affect applicability of Section 404 of the Clean Water Act. The reason for this is that the area would still be considered a wetland because under "normal" circumstances it would support "a prevalence of vegetation typically adapted for life in saturated soil conditions" [40 CFR 230.3(t)]. Filling the wetland would still require a Section 404 permit.

Finally, federal regulation does not control grazing. However, if a feed lot were established on the land, a National Pollutant Discharge Elimination System permit would be required from the Oregon Department of Environmental Quality for the effluent discharge.

I hope that this letter adequately answers your questions. If you have any further questions or concerns, please contact Gary Voerman of my staff at (206) 442-8513.

Sincerely,



William M. Riley, Chief
Water Resources Assessment Section

Enclosures

cc: COE-Portland
USFWS-Portland
NMFS
ODFW
ODSL
DLCD
ODEQ
Alan Dapp

CORPS OF ENGINEERS

JUL 14 1986

PORTLAND, OREGON

U.S. Environmental Protection Agency - Region 10

404 Mitigation Policy

Purpose and Need

This document establishes EPA Region 10 policy on mitigating adverse environmental impacts of projects permitted under Section 404 of the Clean Water Act (33 U.S.C. §1251 et seq.). This policy will: (1) help ensure consistent mitigation recommendations, allowing the Corps of Engineers and 404 applicants to anticipate EPA recommendations and plan for mitigation early in the permit process; (2) help avoid project delays and ensure proper consideration of aquatic resources prior to 404 application submittals; (3) provide guidance to Region 10 personnel during project review. This policy incorporates sufficient flexibility to allow variations in mitigation recommendations as required by differences in individual project proposals. This mitigation policy will be modified as necessary to reflect compliance with new laws, national EPA policy or significant new information.

Authority

This policy is established in accordance with the following major authorities:

A. Clean Water Act (33 U.S.C. §1251 et seq.)

1. Section 1251: "The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter . . .
(1) It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985...."

B. The §404(b)(1) Guidelines (40 CFR Part 230) developed pursuant to §1344(b)(1) of the Clean Water Act.

1. 40 CFR §230.1(c): "Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern."
2. 40 CFR §230.10(a): "...no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem ..."
3. 40 CFR §230.10(b): "No discharge of dredged or fill material shall be permitted if it . . . causes or contributes . . . to violations of any applicable state water quality standard; . . . Violates any applicable toxic effluent standard . . . Jeopardizes the continued existence of species listed as endangered or threatened, or results in likelihood of the destruction or adverse modification of a habitat which is determined . . . to be critical habitat."

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4. 40 CFR §230.10(c): "... no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States."
 5. 40 CFR §230.10(d): "... no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem ..."
- C. The National Environmental Policy Act (42 U.S.C. §4321 et seq.) states, in part, "The Congress authorizes and directs that, to the fullest extent possible ... all agencies of the Federal Government shall ... Identify and develop methods and procedures...which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations ..."
- D. Environmental Protection Agency Statement of Policy on Protection of Nation's Wetlands (38 FR 10834; March 10, 1973):
- "Policy (b) It shall be the Agency's policy to minimize alterations in the quantity or quality of the natural flow of water that nourishes wetlands and to protect wetlands from adverse dredging or filling practices, solid waste management practices, siltation or the addition of pesticides, salts, or toxic materials arising from nonpoint source wastes and through construction activities, and to prevent violation of applicable water quality standards from such environmental insults."

Scope

This policy applies to all EPA Region 10 reviews of activities permitted by the Corps of Engineers under §404 of the Clean Water Act (33 U.S.C. §1344) and to EPA review of any other projects involving the discharge of dredged or fill material into waters of the United States. This policy, however, will not be used to approve permits for discharges of dredged or fill material which will cause or contribute to significant degradation of the waters of the United States, consistent with the requirements of 40 CFR §230.10(c) or for projects not otherwise in compliance with the §404(b)(1) Guidelines.

Definition

EPA Region 10 hereby adopts the definition of mitigation given in the CEQ regulations at 40 CFR §1508.20:

"Mitigation includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

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(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensation for the impact by replacing or providing substitute resources or environments."

Mitigation Policy Statement

EPA Region 10 will actively promote and support mitigation for all projects subject to Section 404 of the Clean Water Act, in accordance with the hierarchical system envisioned in the CEQ regulations (§1508.20), the U.S. Fish and Wildlife Service Mitigation Policy, the §404(b)(1) Guidelines (40 CFR §230.10), EPA national policy and the policy set forth below. Recommendations will be consistent with, but not limited to, the mitigative actions specified in subpart H of the §404(b)(1) Guidelines (40 CFR §§230.70-230.77). All mitigation plans must be implemented prior to or simultaneous with any construction activities.

I. EPA will seek mitigation in the following sequence:

- A. EPA will actively promote project alternatives which avoid all adverse environmental impacts associated with the proposed action, consistent with 40 CFR §230.10(a). For proposed discharges of dredged or fill material for nonwater-dependent activities in special aquatic sites, the burden of proof shall be on the applicant to demonstrate that practicable, less environmentally damaging alternatives are not available. For all other proposed discharges, EPA will request information demonstrating the proposed action is the only available practicable alternative. In the absence of this information, EPA will recommend denial or modification of the §404 permit.
- B. EPA will actively promote alternatives which reduce or minimize adverse environmental impacts. This may include recommendations to reduce the amount and extent of fill (or dredging), and to modify the timing and methods of construction.
- C. For unavoidable adverse environmental impacts in waters of the United States, EPA will actively promote and support compensation by complete, in kind replacement of aquatic site functional values or the provision of substitute resources or environments of equal or greater value. In developing recommendations, EPA will give great weight to the resource categories and mitigation goals listed in the mitigation policy of the U.S. Fish and Wildlife Service (Federal Register, vol 46, no. 15, pages 7644-63, January 23, 1981).

II. EPA will recommend no net loss of aquatic site functional value for all projects. EPA will actively promote and support in kind aquatic site replacement in close proximity to the project site. Functional values will be calculated using the Habitat Evaluation Procedures of the U.S. Fish and Wildlife Service (1981 or as subsequently amended), the Method of Wetland Functional Assessment of the Federal Highway Administration (March 1983 or as subsequently amended), any subsequent professionally-recognized aquatic site assessment document and/or the best professional judgment of designated representatives from EPA and appropriate state and federal resource agencies.

While EPA will seek a one-for-one aquatic site functional values replacement, this may often translate into a greater than one-for-one acreage ratio because: (1) success rates of creation, enhancement and restoration projects are often less than 100% and (2) there is a transition interval for creation and enhancement projects before they fully provide their intended functions. There may also be circumstances under which a replacement acreage ratio of less than one-for-one is acceptable due to the higher functional values of the replacement aquatic site.

- III. EPA will actively promote the inclusion of mitigation as an integral part of projects permitted under §404 of the Clean Water Act, either as part of the project description or as a condition of the §404 permits unless it is clear that the permitting authority (the State or Corps of Engineers) can revoke or suspend the permit for failure to implement the acceptable mitigation. EPA will consider elevation under §404(q) of the Clean Water Act for all projects proposed for permitting by the State or Corps of Engineers, which do not meet the mitigation requirements of the §404(b)(1) Guidelines or this policy.
- IV. EPA will require information as delineated in 40 CFR §230.11 in order to evaluate the environmental impacts of and mitigation required for dredge and fill projects. EPA will then evaluate project compliance with the §404(b)(1) Guidelines. If the project does not include appropriate and practicable steps to minimize potential adverse impacts on the aquatic ecosystem, EPA will recommend denial of the §404 permit and shall state the reasons, in writing, to the permitting authority and the applicant. Where feasible, EPA will also recommend steps that may be taken to bring the project into compliance with the §404(b)(1) Guidelines, including appropriate mitigation.
- V. EPA will automatically consider prohibiting the specification of the area as a disposal site pursuant to §404(c) of the Clean Water Act and, when appropriate, shall prepare the reports necessary for taking such action for aquatic sites with significant resource values (e.g., U.S. Fish and Wildlife Service Resource Category I; local, tribal, state or federally designated significant aquatic habitats; and EPA identified high priority aquatic sites). The Regional Administrator will recommend action under §404(c) unless it can be demonstrated that the discharge of dredged or fill material will not have unacceptable adverse environmental impacts.
- VI. EPA will maintain sufficient flexibility in its approach to allow for innovative solutions to compensate for unavoidable adverse impacts. In some circumstances, it may be desirable from an ecological perspective to mitigate one kind of aquatic site functional loss with a different aquatic site functional gain. The final recommendation will favor that alternative or mitigation plan which provides the greatest benefits to the functional values of the aquatic site.

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VII. EPA does not subscribe to any resource value tradeoff calculation that may be provided in the scientific or regulatory literature. The ecological characteristics of each aquatic site are unique and can only be mitigated by resource value judgments tailored to the site. EPA will cooperate with other resource agencies in developing site-specific mitigation plans and will abide by mitigation decisions made by resource agency representatives, provided such decisions are consistent with the §404(b)(1) Guidelines and other statutory or regulatory requirements. EPA may recommend different or additional mitigative actions.

VIII. EPA will use where feasible the following functions and values in assessing project impacts and requiring compensation:

- Groundwater Recharge and Discharge
- Flood Storage and Desynchronization
- Shoreline Anchoring and Dissipation of Erosive Forces
- Sediment Trapping
- Nutrient Retention and Removal
- Food Chain Support
- Habitat for Fisheries
- Habitat for Wildlife
- Active Recreation
- Passive Recreation and Heritage Value

IX. EPA will actively pursue, through its authority under sections 308 and 309, mitigation and appropriate penalties for violations of §301 of the Clean Water Act in the following sequence:

- A. Complete site restoration (removal of dredged or fill material with appropriate functional value replacement) and civil or criminal penalties.
- B. Creation of a functionally equivalent aquatic site nearby (on-site, in-kind replacement) with civil or criminal penalties.
- C. Creation of a functionally equivalent aquatic site or other aquatic site (out-of-kind replacement) at a distant (functionally separated) site with civil or criminal penalties. Recommendations may include aquatic site enhancement in conjunction with or in lieu of aquatic site creation.
- D. Contribution to a mitigation banking fund of sufficient magnitude to purchase an aquatic site of comparable quality (i.e., functional value) to that lost to the unauthorized fill, with civil or criminal penalties.

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- E. Appropriate civil or criminal penalties. The magnitude of the penalty should be based upon the value of the lost resource and the previous knowledge of the applicant. Where feasible, resource values will be based upon the contribution of the aquatic site over its natural lifetime to ecosystem functioning.
- X. EPA will actively promote and support monitoring and maintenance for all mitigative actions for aquatic site creation, enhancement or restoration. The period of monitoring will be determined on a case-by-case basis in consultation with appropriate state and federal resource agencies, and will be of sufficient length to adequately assess, and assure project success.
- XI. EPA will actively promote and support site restoration for abandoned projects in order to minimize long-term adverse environmental impacts. Recommended actions could include, but are not limited to, fill removal, vegetative plantings, fish restocking, and creation of functionally equivalent wildlife habitat. Site restoration must be a part of the project, a condition of the permit or the subject of an agreement between the applicant and an appropriate state or federal resource agency.
- XII. EPA will actively promote and support pre-permit mitigation agreements between applicants and appropriate state and federal resource agencies for projects otherwise in compliance with the §404(b)(1) Guidelines. These agreements must provide for complete replacement of aquatic site functional values. EPA will recommend that such agreements be made a condition of the §404 permit.
- XIII. EPA will actively promote and support the preservation of existing aquatic resources separate from any specific project proposals. When reviewing projects for compliance with the §404(b)(1) Guidelines, preservation of aquatic resources will not be considered mitigation for aquatic functional values to be damaged by construction projects. Such a policy would sanction an irretrievable net loss of aquatic resources.
- XIV. EPA will actively promote and provide technical support for research on unproven but promising mitigation methods.
- XV. EPA will recommend pilot studies for any mitigative action which has not been scientifically demonstrated to be successful and/or about which there is significant resource agency uncertainty. The pilot studies must be completed, the results reviewed, and the mitigation plan accepted as viable by EPA and appropriate state and federal resource agencies before EPA will agree to the proposed discharge.
- XVI. EPA will recommend and actively promote the fee title transfer of mitigation sites to the state or federal resource agency with management responsibility for the created or preserved aquatic resource.

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- XVII. EPA will actively promote and support mitigation banking and will provide technical assistance to federal and state agencies seeking to establish a banking program. EPA will not support the use of a mitigation bank to justify a project which is not otherwise in compliance with the §404(b)(1) Guidelines.
- XVIII. EPA will coordinate mitigation activities with the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, the Corps of Engineers, and appropriate tribal, state and local agencies in order to maximize consensus and avoid duplication of effort.
- XIX. EPA will work with the Corps of Engineers and appropriate federal, state, tribal and local agencies to identify in advance acceptable dredged material disposal sites and appropriate mitigation pursuant to 40 CFR §230.80.
- XX. EPA will actively promote pre-application conferences and field inspections to develop acceptable mitigation proposals, including the exploration of reasonable alternatives which avoid or minimize adverse environmental impacts on the aquatic ecosystem.


Ernesta B. Barnes
Regional Administrator

SEP 4 1985
Date

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JUL 14 1986

PORTLAND, OREGON

Environmental Protection Agency

Tuesday
October 9, 1979

Part III

Environmental Protection Agency

Denial or Restriction of Disposal Site;
Final Rule

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Division of State Lands

1600 STATE STREET

1445 STATE STREET, SALEM, OREGON 97310 PHONE 378-3805

September 4, 1986

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Mr. Jeffrey G. Condit
Benton County Counsel
180 NW 5th Street
Corvallis, Oregon 97330

Dear Mr. Condit:

Your letter of May 6, 1986 requested background information regarding the state removal-fill law and asked specific questions concerning a proposed Benton County zone change within the Jackson Frazier wetland. Your request was recently reiterated by Gary Munsterman during a meeting with the Department of Land Conservation and Development staff to discuss your proposed plan amendment. It is my understanding the proposed amendment would extend the city's urban growth boundary to include a portion of the Jackson-Frazier wetland, and would zone portions of the wetland as "RM" allowing medium density residential development on the site.

You ask specifically whether or not the Division of State Lands would grant a permit authorizing fill or alteration within 45 acres of wetland located on tax lots 100 and 600. It is difficult for the Division to respond to the proposed plan and zone change without knowing the circumstances under which development would occur, the type of proposed project, and the magnitude of the development. We can only speculate that development in this area would require fill and drainage diversion. If our assumption is accurate, there would be direct loss of filled wetlands (nearly 30% of the Jackson-Frazier wetland area). In addition to direct impacts, filling would potentially have adverse hydrological effects on remaining wetland areas. As a result of our investigation of the recent Removal-Fill violation that occurred in the area, the division has obtained considerable information about the biological and hydrological characteristics of the site.

The parcels proposed for RM zoning include a 45 acre mix of forested, emergent, scrub-shrub and open water wetland habitats according to the Jackson-Frazier Creeks Wetland Impact Analysis prepared for the Division of State Lands by an independent biological consulting firm. Several ecological investigators have determined the entire Jackson-Frazier wetland complex to be of high ecological value both from the present and historical perspectives. When this data is considered in light of our program standards and approval criteria, it is unlikely that a permit could be issued for any extensive filling or alteration of the wetland.

Since 1974, the Division's administrative rules have included fresh water wetlands within the definition of "waters of this state." This provision is currently contained in OAR 141-85-010(14). The state's Removal-Fill Law jurisdiction over fresh water wetlands was affirmed by an Attorney General's Opinion in 1979 (OP-7755).

The Removal Fill Law authorizes the director of the Division of State Lands to issue permits for removal or filling more than 50 cubic yards of material within the waters of the State of Oregon. Applications for permits are evaluated against criteria contained in statutes (ORS 541.610 and ORS 541.625) and interpreted by administrative rules (see OAR 141-85-040, 141-85-045, and 141-85-050).

The policy of the removal-fill law is found in ORS 541.610(1) which requires:

"The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. Unregulated filling in the waters of this state for any purpose, may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Division of State Lands, and implement control of the removal of material from the beds and banks or filling of the waters of this state."

This policy is further developed in administrative rules that prohibit the director from issuing permits which would, "individually or collectively . . . cause significant degradation of . . . aquatic life and habitat; functions of the aquatic ecosystem; or recreational, aesthetic and economic values of the water resources of the state," (see OAR 141-85-050). In this respect, Oregon State standards for fills are consistent with section 404(b)(1) of the Clean Water Act which is administered by the Corps of Engineers.

In addition, ORS 541.625(3) of the Removal-Fill Law provides:

"In determining whether or not a permit shall be issued, the director shall consider the following:

- (a) The public need for the proposed fill and the social, economic or other public benefits likely to result from the proposed fill. When the applicant for a fill permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.

- (b) The economic cost to the public if the proposed fill is not accomplished.
- (c) The availability of alternatives to the project for which the fill is proposed.
- (d) The availability of alternative sites for the proposed fill.
- (e) Whether the proposed fill conforms to sound policies of conservation and would not interfere with public health and safety.
- (f) Whether the proposed fill is in conformance with existing public uses of the waters or uses of adjacent land.
- (g) Whether the proposed fill is consistent with a duly enacted zoning or land use plan for the area where the proposed fill is to take place.
- (h) Whether the proposed fill is for streambank protection."

Several of the above criteria would be particularly difficult to satisfy for an applicant proposing to place fill in the Jackson-Frazier wetlands. These permit criteria would apply to the wetland portions regardless of the zoning designation of the area.

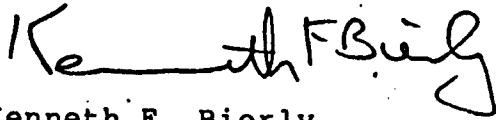
Our procedures require division staff to obtain a clear understanding of the project including the availability of alternative sites or methods of filling, before rendering any opinion concerning a proposed project. Before a permit decision can be made, the division must receive an application containing a specific proposal, giving details of the proposed construction methods, location of fills, removals, and other information (see OAR 141-85-025). In reviewing an application, the division could be guided by the policy and standards set forth in the Removal-Fill Law (ORS 541.605 et. seq.), and our administrative rule.

However, I can assure you if the Division were to receive such an application, we would act expeditiously to provide the city, the county, and the applicant a coordinated state and federal response should the proposed activity be consistent with the local land use plan.

Thank you for this opportunity to comment and please let me know if I can be of further assistance.

Thanks in advance.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Kenneth F. Bierly', with a stylized flourish at the end.

Kenneth F. Bierly
Environmental Permits Section

KFB/jb
1005f

cc: Burt Paynter, Corps of Engineers ✓
Gary Voerman, EPA
Gary Munsterman, Benton County
Jack Pace, City of Corvallis