

ESTUARY DEVELOPMENT - THE REGULATORY PROCESS

by

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The purpose of this report is to briefly examine some of the laws and regulatory programs which affect development in Oregon's estuaries and their adjacent wetlands. Development, in this sense, includes dredging, filling, bank stabilization, structures or other physical alterations to an estuary.

Many of the complexities in regulatory programs arise from the fact that the estuaries are "public trust" lands - lands which are managed by public agencies for the benefit of everyone. This issue will come up throughout the report, beginning with the section on proprietary rights in estuaries, on through the federal, state and local regulatory programs. The concept of the public's right to use estuarine areas for navigation, fishing and commerce is the basic premise which underlies any discussion of the way estuaries are managed.

This report begins by discussing the public trust doctrine and its application to Oregon estuaries. Following this, major federal and state laws affecting estuary development are outlined. Although many federal laws may come into play for specific circumstances, those chosen as consistently most relevant are:

- 1) National Environmental Policy Act
- 2) Section 10, Rivers and Harbors Act of 1899
- 3) Section 404, Clean Water Act
- 4) Fish and Wildlife Coordination Act
- 5) Coastal Zone Management Act

Certain other federal laws are briefly mentioned which may affect a project. The list is by no means exhaustive, but tries to cover the most important, frequently encountered laws.

The major State of Oregon laws discussed are:

- 1) Leasing and Sales of Submerged and Submersible Lands
- 2) Removal/Fill Law
- 3) Goal 16 - Estuarine Resources, State Land Use Planning Program

Again, other state laws exist which very often affect a project, but these three are most consistently encountered and have the greatest impact.

Local regulations are given only a cursory discussion as they vary so greatly along the coast. Some similarities are mentioned.

Procedures for obtaining a Corps of Engineers (COE) Section 10 or 404 Removal/Fill permit are next outlined. This is done in a step by step manner with statutory references, to simplify scanning regulations for pertinent procedural features.

The report concludes with an editorial comment on alternatives for improving the system of COE and DSL permits.

Ownership and Use Rights in Estuaries

The issue of ownership and use rights in lands underlying Oregon's estuaries is a complex one. The present situation arises from a combination of ancient civil and common law, as well as modern case and statutory law. As early as the 6th century A.D., Roman civil law considered public rights in waters and the seashore to be generally unrestricted as part of the "law of nature".¹ The influence of Roman law in England is generally agreed to have begun about the 12th century, stemming from the revival of Roman law at the University of Bologna, Italy.²

At common law, in England, title to the shore of the sea, its arms and the land under tidewater was vested in the king. Title to the property had two fundamental aspects, the jus privatum or private rights, and the jus publicum, or rights of the public to use the shore and arms of the sea for navigation and commerce. The acquisition of jus privatum by a subject could not interfere with jus publicum. In other words, whatever rights a private party may acquire in tidelands is subject to certain public rights of use.³

When the United States was formed, each state became the proprietor of lands beneath navigable waters, up to the high water mark, to hold in trust for the public's use for fishing and navigation.⁴ As additional states became part of the Union, they did so on "equal footing" and therefore ownership of lands beneath navigable waters passed to the states upon statehood.⁵ The issue of navigability is very important since only those lands beneath waters considered navigable under federal law at the time of statehood were passed to the states. In a very simplified version, "the division of waters into navigable and non-navigable is but a way of dividing them into public and private waters".⁶

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1. Althaus, Helen F. Public Trust Rights, U. S. Dept. of the Interior, U. S. Fish and Wildlife Service, 1978. page 1
 2. ibid, p. 379
 3. 35 OpAG 844, Sept. 17, 1971.
 4. Shively v. Bowlby, 142 US 1 (1894).
 5. Pollard v. Hagan, 11 L. ed 565 (1845)
 6. Lamprey v. Metcalf, 52 Minn. 181 (1893).

At English common law, the test for navigability was the ebb and flow of the tide. The U. S. Supreme Court made it clear that this test was insufficient for our country. In England, almost all major waterways are subject to tidal action, but in our country this is not the case. A different test must be applied to determine navigability.¹ However, because of the uncertainty in this area of law, the court realized that one simple formula could not be used in every case. Therefore, there are a variety of federal and state tests for navigability.²

For purposes of determining title to submerged lands, the federal test for navigability is primarily derived from an 1871 case. "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water"³

The statement applies to all waterways, not just rivers, as expanded by later courts. Courts also added the requirement that for title purposes, navigability must be tested at the time of statehood.⁴

When state and federal tests for navigability conflict, the federal test is controlling.⁵ Once federal tests have been used to determine navigability, state tests can be used to determine ownership questions since statehood.⁶

Common law and case law were the basis of ownership questions regarding submerged lands until 1953, when Congress passed the Submerged Lands Act.⁷ This Act arose from considerable dispute between the federal government and the states, particularly regarding resources in the three mile zone seaward from the states. This Act confirmed and codified that the states were proprietors of lands in the three-mile zone, lands beneath nontidal navigable waters up to ordinary high water (which were navigable at the time of the state's admission to the Union) and lands beneath tidal waters up to, but not above the line of mean high tide.⁸

1. The Daniel Ball, 77 US 557 (1871).

2. Althaus, supra, p. 121

3. The Daniel Ball, supra

4. Althaus, supra, p. 122

5. Utah v. United States 403 US at 10.

6. Althaus, supra, p. 126

7. 43 USC 1301 et seq.

8. 43 USC 1311 (a).

The line of mean high tide has been measured in various ways historically. In 1935, the US Supreme Court adopted, for use in federal questions, the US Coast and Geodetic Survey's 18.6 year mean high tide average.¹ The states are not uniform in their demarcation of the boundary between public and private lands. Some use mean high tideline, some mean low tideline, and some a line of vegetation. They are uniform, though, in designating a line and not an elevation as being the boundary. In practice, this line is often almost impossible to locate and has been termed an "invisible boundary".²

As an example of the difficulties which different definitions can cause, in California the boundaries of public trust tidelands are determined by reference to the mean high tideline using averages of the neap high tides. (Neap tides are those occurring during the first and third quarter of the moon, characterized by a less than average rise and fall.) The federal definition, which uses the mean of all the high tides generally results in a higher high tide line. This can be significant if a relatively flat tidal area is concerned. Ownership of the strip of land between the California tidelines and the federal tidelines, is therefore uncertain.³

Oregon law defines submerged lands as those lying below ordinary low water (OLW) and submersible lands as those between (OLW) and ordinary high water (OHW) on all navigable waters, tidal or nontidal.⁴ OLW and OHW are synonymous with mean low water (MLW) and mean high water (MHW).

Beginning in 1872, the Oregon legislature authorized the sale of submersible lands. Many acres were sold. The strip of submersible lands along the Coos, Coquille, Umpqua and Willamette Rivers was granted to riparian owners in 1874 and 1876, but this grant was repealed in 1878 for lands not already conveyed. Since that time, the only way the State of Oregon has disposed of title to lands under navigable waters was selling or leasing submersible lands prior to 1963, and since 1963 by a sale,

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1. Borax Consolidated v. City of Los Angeles, 296 US 10 (1935)
 2. Alfred A. Porro, Jr., "Invisible Boundary - Private and Sovereign Marshland Interests" 3 Nat. Res. Lawyer 512 (1970).
 3. Eikel, M. A., and Williams, W. S. "The Public Trust and the California Coastline". 6 The Urban Lawyer, 519, at 537 (1974).
 4. ORS 274.005 (7) and (8).

lease or exchange of its submerged and submersible lands.¹ Any land conveyed by the state is subject to the public trust.²

The Oregon Supreme Court stated this doctrine in referring to a grant made by the State to Corvallis & Eastern Railway Co. along the Willamette River in 1874. They indicated that the grant of private rights is always conditioned by the "paramount rights of navigation and commerce over the waters".³ The Court inferred that it would accept some interference with public rights in navigable waters where a substantial public benefit was conferred.⁴

In Oregon, the public's right of navigation is not limited to matters involving commercial use of the waters, but includes other uses which are incidental to the right of navigation such as fishing, hunting, boating, enjoyment of scenic beauty and other recreational uses.⁵

The inability of the states to rid themselves of the public trust except in limited circumstances, was discussed in a landmark turn of the century case by the U. S. Supreme Court. In the case popularly known as Illinois Central, the court set out the guidelines for very restricted circumstances under which public trust lands could be conveyed to private ownership, freeing the lands from the trust. They summed up discussion of the inalienable nature of the public trust lands by stating:

"The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining".⁶

In other words, lands can be granted away only if for a use which furthers the public interest, such as aids to commerce and navigation, or does not impair the public interest in the remaining lands.

1. Statement of the State Land Board Re: Leasing Program of State of Oregon. Feb. 12, 1979.
2. Paul J. Speck, "The Public Trust Doctrine in Oregon" In Oregon's Submerged and Submersible Lands, Advisory Committee to the State Land Board, 1969-1970.
3. Corvallis & Eastern Railway Co. v. Benson, 61 OR 359, at 372 (1912).
4. 35 Op AG 844, Sept. 17, 1971.
5. *ibid*, at 863
6. Illinois Central RR v. Illinois 146 US 387, at 455-456 (1892).

The Oregon Division of State Lands has management authority for state-owned lands and has statutory authority to sell, lease or exchange submerged and submersible lands.¹ By it's own administrative rules, the Division "reserves the right to reject any application for lease which would be contrary to state or federal law, these regulations, or would result in an unreasonable interference with the public rights of navigation, fishery and recreation".²

Modern Oregon case law also makes clear that sales or leases of submerged and submersible lands must take the public interest into account:

"In essence, the jus publicum is a nondelegable government obligation. Regardless of how the state may choose to convey its private title to submerged and submersible lands, such title, even in the hands of a private party, remains subject to the paramount power of the state to intervene on behalf of the public interest".³

Permanent filling of Oregon's submerged or submersible lands results in extinguishment of the public rights which existed.⁴ To receive a permit for filling, though, requires a rigorous examination of the merits of the project by the Division of State Lands (and a separate permit by the U. S. Army Corps of Engineers) to determine if it is in the public interest. Oregon's Removal/Fill Law⁵ restates aspects of the public trust doctrine. It provides that a permit for a fill shall be issued only if it "would not unreasonably interfere with the paramount policy of this state to preserve the use of it's waters for navigation, fishing and public recreation".⁶ It lists criteria against which proposals are evaluated, including, 1) public need, 2) conformance with sound policies of conservation, 3) existing public uses and 4) existing land use plans.⁷ Additionally, the law provides that a substantial fill for a non-water dependent use can be issued only if it is for a public use and would satisfy a public

1. ORS 274.915.

2. OAR 82-025 (1).

3. Brusco Towboat Co. v. State Land Board, 284 Or 627 (1978).

4. ORS 541.665.

5. ORS 541.605 - .695.

6. ORS 541.625 (2).

7. ORS 541.625 (2) a-d.

need that outweighs harm to navigation, fishery and recreation.¹ This law is a strong statement of Oregon's policy of recognizing and preserving public trust rights.

The public trust doctrine, although it has been developed and stated in many different forms throughout history, basically means that submerged and submersible lands of navigable waterways are burdened with a trust in favor of the public to use for navigation, fishery and commerce. The states are proprietors of this trust and, in most instances, regardless of who holds private title, public rights remain. Oregon has a strong history, both in case and statutory law, of upholding public trust rights.

Although many acres of Oregon's estuaries have been sold or granted away, the title to those lands consists of two aspects, the jus privatum, private rights, and the jus publicum, public rights. Only the private portion of the title is conveyed when the land is sold, public rights of navigation, fishery and commerce remain.

1. ORS 541.625 (3).

Introduction - Federal Laws

The federal government has a long history of laws pertaining to our nation's waterways. Earliest concerns were for navigation and commerce, but have broadened greatly over the years. Although states and local governments assert more influence in their own waterways now than in the past, the federal government still plays a key role in use decisions.

Development in Oregon's estuaries may involve many different federal laws, but those most commonly encountered are:

- 1) National Environmental Policy Act
- 2) Section 10, Rivers and Harbors Act of 1899
- 3) Section 404, Clean Water Act
- 4) Fish and Wildlife Coordination Act
- 5) Coastal Zone Management Act

Five other federal laws are briefly mentioned which may affect a certain proposal. These are:

- 1) Section 9, Rivers and Harbors Act of 1899
- 2) Section 401, Clean Water Act
- 3) Section 402, Clean Water Act
- 4) National Historic Preservation Act of 1966
- 5) Section 103, Marine Protection, Research and Sanctuaries Act

Many other federal laws exist which may be important in certain circumstances. Federal agency personnel will be aware of these and advise a permit applicant.

National Environmental Policy Act¹

This Act is considered the backbone of federal environmental legislation. The law creates a framework for federal decisions to ensure a methodical gathering and analysis of information on possible impacts of actions, as well as mandating consideration of alternatives. It is a major avenue of public involvement in significant federal actions. NEPA has three main provisions. First, it sets out a national environmental policy. Among other policy goals it declares the policy of the federal government, in cooperation with state and local governments, to "use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in harmony".² Second, the law directs all federal agencies to make their regulations consistent with this Act and to prepare an Environmental Impact Statement (EIS) on any "major federal action significantly affecting the quality of the human environment".³ The third provision of the Act sets up a Council on Environmental Quality (CEQ) in the executive office of the president to coordinate the efforts of the federal agencies.

The "major federal actions" which require preparation of an EIS are very broad, including direct federal action on a project, federal financial aid for a project, proposed agency rules or legislative proposals and federal licenses and permits.⁴ Within an estuary, the most common federal actions are permits from the Corps of Engineers (Sec. 10 and 404 permits). The first step by a federal agency proposing an action is determining if an EIS is required. In most cases an Environmental Assessment is prepared to determine if the action is "major" and has "significant impact".⁵ If not, the NEPA process stops with a finding of "no significant impact". If the action meets these criteria, the agency must determine if other federal agencies are involved. If more than one federal agency is involved, one must be designated as a "lead agency" in preparing the EIS.⁶

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1. 42 USC 4321 et seq.
 2. 42 USC 4331 (a)
 3. 42 USC 4332 (c)
 4. 40 CFR 1508.18
 5. 40 CFR 1501.4
 6. 40 CFR 1501.5

In 1978 CEQ rules implementing NEPA added a scoping process. This involves a meeting, or series of meetings between the lead agency and interested parties to decide which issues the EIS should emphasize. This arose from frequent criticism that the public did not have early enough input; by the time the draft EIS had been prepared, it was difficult to influence a proposal.¹ The scoping process is announced in the Federal Register. During the meetings, the issues which will be discussed in depth in the EIS are laid out, as well as those issues not considered significant.²

The lead agency prepares the draft EIS and distributes it for public comment. The EIS must contain a detailed statement addressing five points:

- 1) the environmental impact of the proposed action,
- 2) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- 3) alternatives to the proposed action,
- 4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- 5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.³

The agency must respond in the final EIS to all comments received. The final EIS accompanies the proposal during its agency review.

The NEPA process is basically a procedural, not substantive, one. It requires agencies to examine the environmental consequences of their actions, but does not require that the most environmentally acceptable alternative for a project be chosen. President Carter recognized this problem and issued Executive Order 11991 on May 23, 1977 directing the CEQ to adopt regulations for more effective implementation of NEPA. One of his specific goals was better decision making to carry out the purposes

1. Bass, Ron and Warner, Scott. Streamlining NEPA: A Look at the Council on Environmental Quality's new EIS Regulations. Environmental Comment. Aug. '79, pp 14-19.

2. 40 CFR 1501.7

3. 42 USC 4332 (c) i-v

of NEPA. The 1978 CEQ regulations written in response emphasize higher quality in environmental decisions, not just preparation of an EIS for its own sake. Among the many changes designed toward that end, the agencies are required to keep a concise public record indicating the agencies final decision, the most environmentally acceptable alternative, that all practicable measures to avoid or minimize environmental damage have or have not been adopted and the agencies program for monitoring and enforcing mitigation measures where applicable.¹ The complaint of the EIS being an end, rather than a means, will more likely be alleviated using these measures, since the agency is forced to identify the least damaging alternative and to, at least, consider mitigation.²

Because of the very broad language in the act, courts have been involved interpreting NEPA since its inception. Many of the court interpretations were incorporated into the 1978 CEQ regulations, such as a concise public record and early public involvement.

Section 10, Rivers and Harbors Act of 1899

The Corps of Engineers regulatory functions in navigable waters dates back to the Rivers and Harbors Act of March 3, 1899.³ The act states that no one may perform any work in a navigable waterway without approval of the Secretary of the Army.⁴ The authority to issue or deny Section 10 permits has been delegated from the Secretary of the Army to the Chief of the Corps of Engineers; most permit decisions are made at the District or Division Engineer level.⁵

1. 40 CFR 1505.2

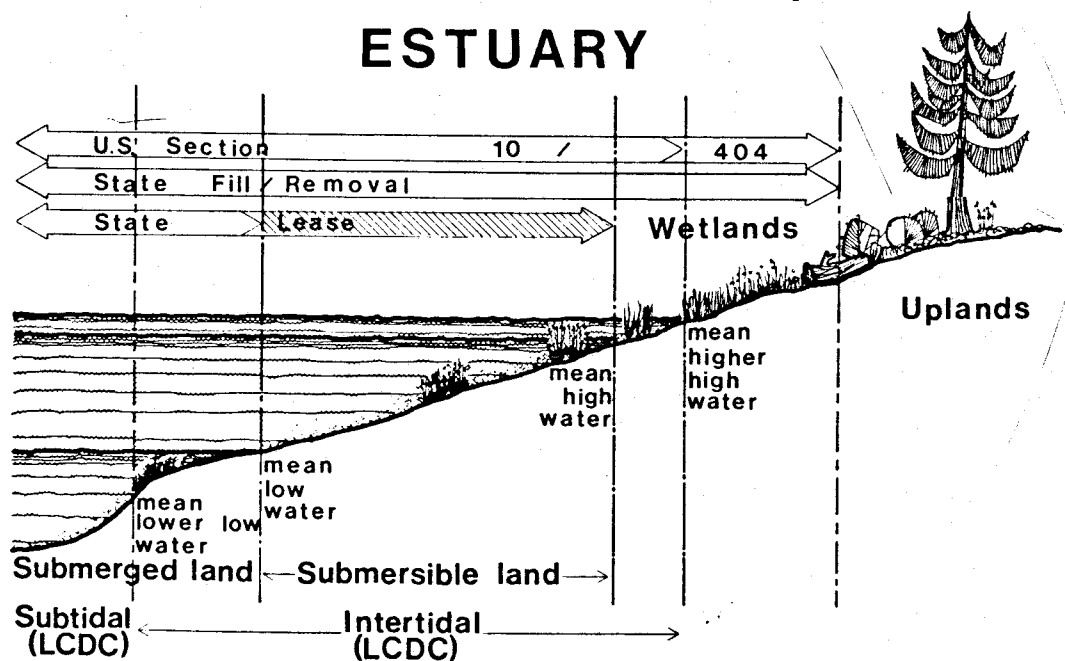
2. Bass and Warner, *supra*

3. 30 Stat 1151

4. 33 USC 403

5. Wood, Lance D. and Hill, John R. Jr. Wetlands Protection: The Regulatory Role of the U. S. Army Corps of Engineers. Coastal Zone Management Journal, Vol. 4, #4, 1978.

The jurisdictional limit of navigable waters has broadened greatly since 1899, mainly as a result of court challenges.¹ The present COE regulations give a general definition of navigable waters² related to past, present or future use for interstate commerce and ebb and flow of the tide, but make it clear that precise definitions are dependent on juricial interpretation.³ Nevertheless, a number of factors are outlined which guide in determining navigability.⁴ The use of the term "navigable waters" in this context should be clearly distinguished from its definition in Section 404 of the Clean Water Act. That legislation defines "navigable waters" as equivalent to "waters of the United States", a much broader definition.⁵ To keep the issue as clear as possible, the Corps of Engineers uses the term "navigable waters" in dealing with the jurisdiction of Section 10 permits, but always uses "waters of the United States" in referring to the jurisdictional limits of Section 404 permits.⁶ The following diagram depicts the jurisdictional differences between the permits in estuaries.



1. See Hoyer, W. Christian, Corps of Engineers Dredge and Fill Jurisdiction; Buttressing a Citadel under Siege, U. of Fla. Law Rev. Vol. 26, #1, Fall 1973 for a discussion of case law expanding the definition of "navigable waters."
2. 33 CFR 329.4
3. 33 CFR 329.3
4. 33 CFR 329.5 - 329.13
5. 33 USC 1362 (7)
6. 33 CFR 323.2

Not only has the limit of jurisdiction changed over the years, the subject matter dealt with in the permit review has broadened greatly, particularly in the last 15 years. Until 1968, the Corps' review gave primary or exclusive emphasis to the navigational effects of a proposal. Their public notices announcing the filing of permit applications defined the Corps' interest as being confined to issues of navigation, and requested comments from the public only on such issues.¹ Corps regulations were revised in 1968 and considerably expanded the public interest review for activities affecting navigable waters. Instead of just navigation, the Corps then had to consider "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, esthetics, ecology and the general public interest."² The public interest review now includes additional factors such as historic values, recreation, water supply and land use classifications.³

There are four different types of Corps permits: the commonly known individual permit, general permits, nationwide permits and letters of permission.⁴ The Section 10 permit system discussed throughout this report refers to individual permits. General permits authorize performance of certain activities in a specific geographic region after it is determined that only a minimal individual or cumulative adverse environmental impact will result. For instance, the Oregon Department of Transportation has a general permit for activities all of a similar nature in conjunction with road building. A nationwide permit serves the same function but on a national, not regional, basis. For an individual activity covered by a general or nationwide permit, no application need be made, only compliance with conditions of the permit.⁵ Letters of permission can be issued by the District Engineer without publication of a public notice if it is determined that the work is minor, will not have significant impact on environmental values, and no opposition is anticipated; for instance,

1. Our Waters and Wetlands: How the Corps of Engineers can help prevent their destruction and pollution. 21st report by the Committee on Governmental Operations, House Report 91-917, 91st Cong. 2nd Sess. March 18, 1970.
2. 33 CFR 209.120 (d) (1) The public review has since been expanded again and recodified in 33 CFR 320.4 (a).
3. 33 CFR 320.4 (a)
4. 33 CFR 320.1 (b)
5. 33 CFR 325.5

driving of one piling for attachment of a small floating dock.¹ However coordination with Fish and Wildlife agencies is still required. A letter of permission may only be used for activities regulated by Section 10, not Section 404; this distinction does not apply to general or nationwide permits.

For an explanation of the procedural steps involved in receiving an individual Section 10 permit, see the permit section of this report.

Section 404, Clean Water Act

Section 404 of the Federal Water Pollution Control Act of 1972 (renamed the Clean Water Act in 1977 amendments) called for a system of permits through the Army Corps of Engineers for the discharge of dredged or fill materials into navigable waters.²

Guidelines for issuance of permits were to be drawn up jointly by the Secretary of the Army and the Environmental Protection Agency; these are known as the Section 404 (b) (1) guidelines although they have the force of regulations.³ The COE can overrule the guidelines in the interest of economic impact on navigation, but EPA has the ultimate authority to prohibit the use of any area if the discharge of materials will have "an unacceptable adverse impact on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas".⁴

Initially the Corps asserted Section 404 jurisdiction only over traditionally navigable waters which were regulated by Section 10 permits. A lawsuit subsequently filed by the National Resources Defense Council and the National Wildlife Federation objected to the Corps limited interpretation of jurisdiction, arguing that the mandate of the overall 1972 Clean Water Act required that pollution be controlled at its source, regardless of traditional boundaries of navigation.⁵

1. 33 CFR 325.5 (b)

2. 86 Stat 816, at 884

3. 40 CFR 230 et seq.

4. 33 USC 1344 (c)

5. Kirschten, J. Dicken, Corps Wetland Control Survives Trip Through Legislative Swamp, National Journal, Vol. 8, #43, October 23, 1976, pp 1506-1512, at 1508

The federal judge concurred and ordered the Corps to issue new regulations. In his order, the judge held that the term navigable waters "as used in the water act . . . is not limited to traditional tests of navigability".¹ Accordingly, the Corps published new regulations which incorporated a three step phase-in from regulating disposal activities in just the traditionally navigable waters to the much broader "waters of the U. S."² The term "waters of the US" includes the traditionally navigable waters, those subject to tidal action and susceptible for use in interstate commerce, as well as tributaries and wetlands.³

Extensive debate occurred in Congress concerning these jurisdictional limits.⁴ As a result, amendments in 1977 clarified several points. The amendments retained broad limits of jurisdiction, but exempted normal farming and silviculture activities.⁵ Two important new provisions were added: authority to issue general permits for groups of similar activities with impacts of a minimal nature,⁶ and procedures for delegation of 404 programs to states, although no states have yet accepted the 404 role.⁷

The 404 (b) (1) Guidelines⁸ carry out the purpose of the Clean Water Act: to restore and maintain the chemical, physical, and biological integrity of the Nation's Waters.⁹ To accomplish that objective, the Guidelines consider the total aquatic ecosystem. Since all parts of the system are related and a change in one part can affect other areas, they emphasize the importance of wetlands to the aquatic environment and specify methods of preventing or minimizing impacts from the discharge of dredged or fill material on wetlands. Evaluation of alternatives to a proposed action and possible testing of material to be discharged are methods used to evaluate potential impacts.¹⁰

Procedural steps for obtaining a Section 404 permit are described in the Permit section of this report.

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1. NRDC v. Calloway, 392 F. Supp. 685 (D.D.C. 1975)
 2. 33 CFR 323.3 (a)
 3. 33 CFR 323.2
 4. Kirschten, supra
 5. 33 USC 1344 (f)
 6. 33 USC 1344 (e)
 7. 33 USC 1344 (g)
 8. 40 CFR 230 et seq.
 9. 33 USC 1251
 10. 44 FR 182 Guidelines for Specification of Disposal Sites for Dredged or Fill Material, EPA, Sept. 18, 1979.

Fish and Wildlife Coordination Act

The original Fish and Wildlife Coordination Act (FWCA) was adopted in 1934 but considerably strengthened by amendments in 1946 and particularly in 1958. The role of the FWCA is to ensure that fish and wildlife resources are considered equally and coordinated with other features of water-resource development programs.¹ This includes federal permit programs for modification of any stream or body of water.² The Act mandates consultation with the U. S. Fish and Wildlife Service (USFW) in the Department of Interior, and the state agency which administers wildlife resources, by any federal agency, public or private agency under federal permit or license whenever a body of water is proposed or authorized to be "modified for any purpose whatever".³ The USFW and the state wildlife agency must examine the proposals with a view to conservation of fish and wildlife resources as well as providing for the development or improvement of those resources.⁴

The Director of USFW stated the purpose succinctly:

"Quite simply, the thrust behind the Act is that damage to fish and wildlife resources is to be avoided whenever possible and that new losses are to be mitigated to make up for the habitat losses resulting from project implementation".⁵

The report of the Secretary of the Interior (USFW) on a proposal must be as specific as is practicable with respect to recommendations for fish and wildlife conservation and development and also the "damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for those damages".⁶ Full consideration is to be given to the report of USFW as well as any state agency report in the project plans.⁷

1. 16 USC 661

2. 16 USC 662 (a)

3. *ibid*

4. *ibid*

5. Comments by Lynn Greenwalt, USFW. Coordination Act Oversight Hearings before House Subcom. on Fisheries and Wildlife Conserv. and the Env. of the Comm. on Merchant Marine & Fish. 95th Cong. 2nd Sess. (July-Aug 1978) (Ser 95-55) p. 311 of 699 p.

6. 16 USC 662 (b)

7. *ibid*

One of the primary concepts of the Act is mitigation for fish and wildlife habitat lost through water-development projects. It is important to note the differences between the broad concept of mitigation here and the narrower statutory provisions for mitigation in the Oregon Removal/Fill Law. Oregon's law deals only with alteration to intertidal or tidal marsh areas, whereas in this Act any habitat destroyed in the course of water-development projects may be subject to compensation measures. The USFW has recommended mitigation procedures on federally-funded water development projects since the FWCA was amended in 1958. Generally, though, mitigation was connected only to major projects and then only when pre-project assessment established the amount of funds required for mitigation and made that request part of the initial project appropriation measure.¹ For private permits, it is becoming increasingly common for mitigation procedures which comprise more than just scaling down a project to be recommended by USFW.²

In 1977, USFW distributed a new handbook to aid their field representatives in developing uniform methods for measuring a project's effects on fish and wildlife resources. These "Habitat Evaluation Procedures", or HEP, represent a radical departure from the earlier, traditional methods of basing mitigation on a monetary evaluation of certain types of activities lost, such as hunting and fishing days. The HEP procedure takes into account the values of the land chosen for mitigation in terms of habitat available compared to that which will be lost.³

Because the HEP procedure is a break from tradition, it has not yet been adopted by all of the federal agencies involved in water-development projects. To achieve maximum utility, the procedure must be accepted by all federal agencies concerned.⁴

Congressional oversight hearings in 1978 addressed the problem of incorporating mitigation early in the planning process. Early involvement was stressed: "Getting into the process early on is extremely important because the adjustments that may later be traumatic ones can be made only when they are quite painless."⁵

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- 1) "An analysis of the concept of mitigation as used in decision making and estuarine management." May 1979. Blomberg, George V., Institute of Marine Studies, University of Washington
 - 2) Personal communication, Ian McKee, USFW, Portland District Office
 - 3) Greenwalt, Coordination Act Oversight Hearings (supra) p. 313
 - 4) *ibid*, p. 314
 - 5) *ibid*, p. 311

The FWCA, when passed in 1958, was a major break with the traditional approach of evaluating water resource development. The Corps of Engineers has incorporated the coordination procedures mandated by this Act into their permit procedures for Sec. 10 and 404 permits.¹ The FWCA, among other laws and executive orders, helped give rise to the expanded public interest reviews by the Corps of Engineers.²

Coastal Zone Management Act³

This act grew out of national concern for the fate of our coastlines. Conflicting pressures for use of the coastlines came from a broad spectrum of interests, compounded by the fact that nearly 50% of our population lives within 50 miles of the ocean or Great Lakes.

The 89th Session of Congress (in 1966) commissioned three separate reports to study estuaries and coastal areas. Two of these were particularly influential in the subsequent passage of the CZMA. The National Estuarine Pollution Study⁴ and the Stratton Commission Report⁵ both recommended management strategies for coastal areas recognizing states as the focal point for any program. The Stratton Commission Report kept the idea of a Coastal Zone Management Act alive through the 90th and 91st sessions of Congress and thus, perhaps most directly contributed to passage of the Act in 1972.⁶ The decidedly pro-development tenor of the Stratton Commission Report, though, was not reflected in the final version of the CZMA. Instead the Act stresses management of coastal resources and, although development is mentioned in the national policy statement, it does not get as much emphasis in later sections of the act as the protection concept.⁷

1) 33 CFR 320.4 (c)

2) Our Waters and Wetlands: How the Corps of Engineers can help prevent their destruction and pollution. 21st report by the Committee on Government Operations. House Report 91-917, 91st Cong. 2nd Session, March 18, 1970.

3) 16 USC 1451 et seq

4) Commissioned by the Clean Water Restoration Act of 1966 (80 Stat 1246)

5) Commissioned by the Marine Resources and Engineering Development Act of 1966 (80 Stat 203)

6) Zile, Zigurds L. A Legislative-political history of the Coastal Zone Management Act of 1972. Coastal Zone Management Journal, Vol. 1, No. 3, 1974, pp 235-274

7) Ditton, R. B., Seymour, J. L. and Swanson, Gerald. Coastal Resource Management. Lexington Books. 1977 p. 78

The CZMA set up a system of funding for states to prepare coastal management programs. It encourages, but does not require the states to be involved, but all of the thirty eligible states and five territories have received some grant monies. As of January 1981, 25 of the states and territories had programs approved by the Office of Coastal Zone Management.¹ Most of the others were in varying stages of preparing plans.

Each state program must address nine requirements:²

- 1) identification of boundaries of the coastal zone within that state,
- 2) permissible land and water uses,
- 3) inventory and designation of areas of particular concern in the coastal zone,
- 4) means the state will use to regulate land and water uses,
- 5) broad guidelines on priority of uses,
- 6) description of state's organizational structure for implementing the program,
- 7) a planning process for protection of and access to beaches,
- 8) a planning process for energy facilities in the coastal zone, and
- 9) a planning process for assessing and controlling shoreline erosion.

Grants for development of state programs began at 2/3 federal funding in 1972 and raised to an 80% federal share in the 1976 amendments.³

Grant monies for implementation of approved programs also began at a 2/3 federal share in 1972 and increased to an 80% federal share in the 1976 amendments.⁴ Eligibility requirements for implementation grants changed considerably in the 1980 amendments to the Act. Now, up to 30% of implementation grants are to be devoted to activities which will result in significant improvements in meeting national objectives.⁵ In turn, the amendments replaced the section on national objectives, making them much more specific to assist states in developing and implementing programs. The objectives are broken down into nine basic areas to be addressed by state plans.⁶ They overlap very little with the nine elements mentioned above for state programs since most of the above requirements have been, or are being accomplished by states.

1) Office of Coastal Zone Management, NOAA, CZM Information Exchange, Jan 1981.

2) 16 USC 1454 (b) (1-9)

3) 16 USC 1454 (c)

4) 16 USC 1455 (a)

5) 16 USC 1455 (a) (3)

6) 16 USC 1452

Besides grant monies, the principal inducement for state involvement centered around federal consistency requirements of the Act.¹ Basically, this says that any federal development project, federal funding or federal license or permit must be consistent, to the maximum extent practicable, with a state's coastal management program. In Oregon, the Department of Land Conservation and Development determines if a federal action or permit is consistent with the OCMP. In doing so, they consider whether the proposal is consistent with local comprehensive plans, as well as other aspects of Oregon's program.

Oregon's CMP received federal approval in 1977, the second in the nation to be approved. It consists of the Statewide Land Use Planning Goals, local acknowledged comprehensive plans, and a variety of state statutes, such as the Forest Practices Act and the Removal/Fill law. Because the OCMP is tied directly into the Statewide Land Use Planning Program, local governments prepare comprehensive plans which address all the state planning goals, including the four goals which relate directly to the coast. When local plans are acknowledged by the state, they become the basis for determining consistency of state and federal actions.

The preceding five federal laws are considered in almost any permit for estuarine development. Following are some additional federal laws which may be involved. This list is not intended to be comprehensive, only to point out those laws most commonly encountered.

Section 9, Rivers and Harbors Act of 1899.²

The original act prohibited the construction of any dam, dike, bridge or causeway in or over any traditionally navigable waterway without the consent of Congress and approval of plans by the Corps of Engineers. This procedure is still true for dams and dikes, but the Corps of Engineers authority with respect to bridges and causeways was transferred to the Coast Guard, Department of Transportation in 1966.³ If dredged or fill material is deposited in conjunction with building a bridge or causeway, a Corps of Engineers Section 404 permit is also required.

Section 9 permits in Oregon estuaries are issued through the Seattle

1) 16 USC 1456

2) 33 USC 402

3) 49 USC 1155g (6) (A)

District of the Coast Guard. A letter of application is submitted, along with appropriate authorization, in the case of a public agency funding a bridge, and a statement of presumed consistency with the OCMP. A public notice is issued for 30 days. Comments must be requested from EPA, NMFS, USFW and the State (including water quality certification from the state). DLCD must confirm consistency with Oregon's CMP. After comments are received, all applications are submitted to Washington, DC for a final decision.¹

Section 401, Clean Water Act²

This act requires certification by the State (in Oregon, the Department of Environmental Quality) for a federal permit by a non-federal applicant for any activity which may result in discharge of a pollutant into the waters of the United States. The certification must indicate that any discharge for the construction, or subsequent operation of a facility, must comply with applicable effluent limitations and water quality standards. If the recommendations are not acted upon in the approval of an application, the agency must lay out why they were not.

Section 402, Clean Water Act³

Under this Act, any discharge of a pollutant from a point source into U. S. waters is prohibited unless made pursuant to a National Pollutant Discharge Elimination System (NPDES) permit. This permit system is administered by EPA or by a state agency which has been delegated permit program authority by EPA (in Oregon, the Department of Environmental Quality).

National Historic Preservation Act of 1966⁴

This Act set up National Register of historic places, established a program of grants to states for up to 50% of the cost of preparing historic surveys and plans, and established an Advisory Council on Historic Preservation which must have an opportunity to comment whenever an object on the National Register is subject to the expenditure of public funds or federal licensing.

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- 1) 33 CFR 114
 - 2) 33 USC 1341
 - 3) 33 USC 1342
 - 4) 16 USC 470

Section 103, Marine Protection, Research and Sanctuaries Act¹

Authorizes the Secretary of the Army, through the Corps of Engineers, to issue permits for transportation of dredged material to be dumped in the ocean. The selection of disposal sites is in accordance with criteria developed jointly by the Secretary of the Army and EPA. EPA can prevent issuance of a COE Permit if it will unacceptably impact municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas.²

1) 33 USC 1413
2) 33 CFR 320.3 (h)

Introduction - State Laws

Oregon has a history of being progressive in environmental protection laws. Oregonians recognized early on the value of estuaries and wetlands and adopted strong laws to ensure consideration of those values prior to any alteration taking place there. The three state laws which are considered to have the most impact on estuarine development, and which will be discussed in more detail are:

- 1) Leasing and Sales of Submerged and Submersible Lands
- 2) Removal/Fill Law
- 3) Goal 16, Estuarine Resources of Statewide Planning Goals

Leasing and Sales of Submerged and Submersible Lands

Leasing and sales of submerged and submersible lands have a long history in Oregon. The Tideland Sales Act of 1872 authorized the first sales for submersible lands;¹ authorization for leases came in 1907.² Leasing and sales of submerged lands were first authorized in 1963. Many changes have occurred to bring these statutes to their present form, both changing legislative direction and incorporation of evolving case law. Such cases as the landmark Illinois Central R R v. Illinois³ limited state's disposal of lands burdened with a public trust.⁴

The present law authorizes DSL to sell, lease or trade submerged or submersible lands,⁵ although sales must be confirmed by the State Land Board.⁶ DSL Administrative Rules established leasing procedures including terms, rates and application requirements.⁷ Criteria for review are included as well as an important reservation clause which allows DSL to reject any application contrary to state or federal law or which would cause an unreasonable interference with the public rights of navigation, fisheries or recreation.⁸

Submerged and submersible lands are seldom sold but commonly leased for private use, such as for docks or log rafts. Charges to the lessee are to compensate the public for the value of the private or exclusive use of state owned trust lands.⁹ Sales and leases must pass stringent reviews as to their merits and must be in the public interest.

The Oregon Supreme Court recently upheld DSL's leasing authority for all permanent structures on or over state-owned submerged or submersible lands, whether or not the structures were present prior to the existence of the leasing program.¹⁰

1) Laws of Oregon 1872, p. 129-133

2) Laws of Oregon 1907, p. 206-221

3) 146 US 387 (1892)

4) See Proprietary Rights Chapter for a further discussion of public trust

5) ORS 274.915

6) ORS 274.040 (2) (b)

7) OAR 141-82-005 to 035

8) OAR 141-82-025

9) Statement of the State Land Board Re: Leasing Program of Oregon, Feb. 12, 1979, p. 5

10) Brusco Towboat et al v. Oregon Division of State Lands 285 OR 197 (1978)

Lease Rates are at least \$150 per acre per year for the first acre in a lease area and \$90 per acre per year for each additional acre. Rates are based on the number of acres leased, the appraised value of adjacent uplands, and the number of slips and their occupancy rates for marinas and moorages. Lease terms are based on the time required to amortize the use but may be reviewed every five years to adjust rental rates.¹

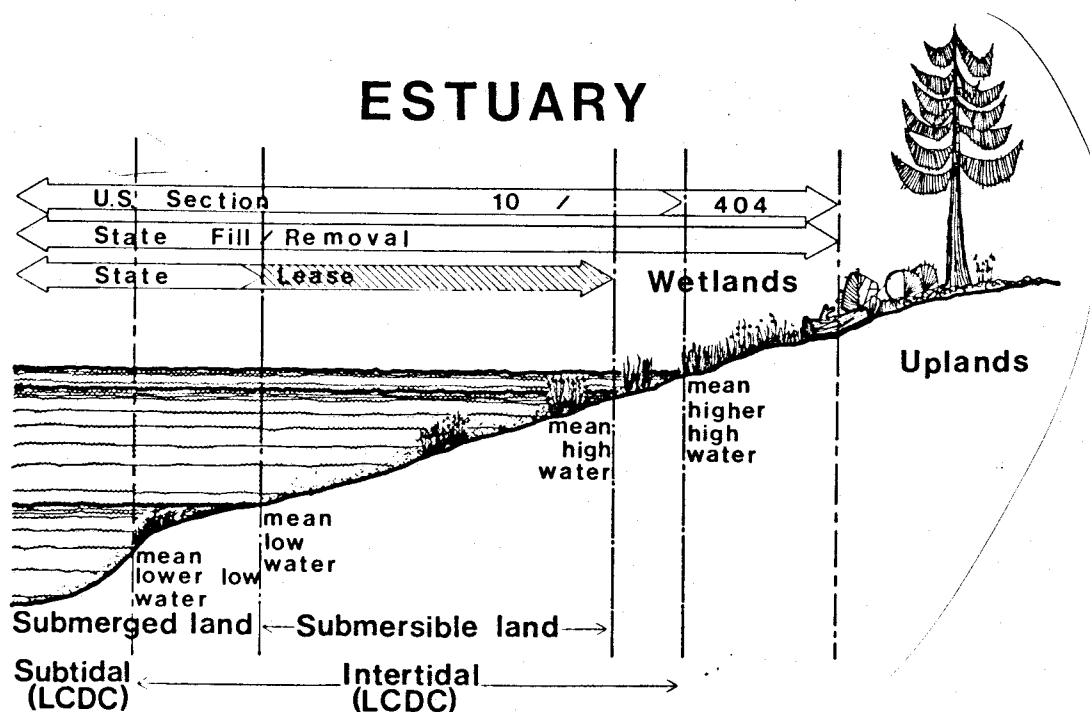
In practice, almost every lease application is preceded by either a DSL Removal/Fill permit, a Corps Section 10 or 404 permit, or both since most projects require dredging or construction in water to carry out their proposed use. Therefore most issues in the reservation clause, such as other state or federal laws and public trust rights, have been analyzed prior to the lease and are not considered again. A lease is issued after a decision is reached on a Removal/Fill permit or a Corps permit. The lease cannot be used to delay issuance of a state or federal dredge or fill permit.

1) State Land Board, Policy Memorandum, December 18, 1975

Oregon Removal/Fill Law

The State Removal/Fill Law¹ originated in two segments in the Oregon Legislature. A law regulating removal of material from waterways passed in 1967,² primarily in response to concern over aggregate removal, and was amended in 1971 to add regulations for filling in waterways³ to respond to public concerns over destruction of wetlands. The law requires a permit for removal of 50 or more cubic yards of material at one location in any calendar year, or the filling of 50 or more cubic yards of material at one location at any time.⁴

The Division of State Lands (DSL) administers the permit program. Usually a project which requires a permit under this law also requires a Section 10 or Section 404 permit from the Corps of Engineers. The most obvious area of jurisdictional difference is that the Removal/Fill law requires a permit for dredging in waters not defined as navigable but the Corps rules do not. Less obvious are differences between upland limits of jurisdiction. The definition of wetlands is not identical in DSL and Section 404 rules.⁵



1) ORS 541.605 - 541.695

2) Oregon Laws 1967, Ch. 567

3) Oregon Laws 1971, Ch. 754

4) ORS 541.605 (5) and (10)

5) OAR 141-85-100 (26) and 40 CFR 230.3 (t)

When permits are required from both agencies, a joint application form is filled out and submitted concurrently to the Corps and to DSL. DSL holds the application until receipt of the Corps public notice, then circulates the state and federal permit applications together to state and local agencies and interested parties. DSL serves as the state clearinghouse for Corps public notices. Responses from the notices, as well as statutory provisions, are used by DSL to determine whether or not to issue a permit.

The statutory provisions for issuance of dredge permits differs from that for a fill. DSL "shall" issue a permit for removal of material if it is determined that the application "will not be inconsistent with the protection, conservation, and best use of the water resources of this state".¹ Within the agencies administrative rules several more requirements for dredging permits are laid out, such as possible reclamation plans, hydraulic studies, and dredge disposal plans.² The Director of DSL may require an applicant to submit a written statement for either a dredge or fill application outlining their opinion as to the positive public and private benefits which their project would have on the social and economic framework of the area.³ The effect of the project on the public rights of navigation, recreation and fisheries must be included. The regulations, though, do not indicate that the director must use this information in determining permit issuance, nor does the issue of public need come up in any other context in a dredging permit.

Requirements for a fill differ significantly from that for material removal. Because a fill so obviously and finally removes an area from the estuarine aquatic ecosystem, which is managed as a public trust by the DSL, it is carefully evaluated in terms of it's benefits to the public. The considerations for a fill permit are preceded in the law by a statement of the "paramount policy of this state" which is "to preserve the use of its waters for navigation, fishing and public recreation".⁴

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1. ORS 541.625 (1).
 2. OAR 141-85-205.
 3. OAR 141-85-205 (7).
 4. ORS 541.625 (2)

The first criteria for consideration by the Director of DSL is public need for the fill.¹ Administrative rules elaborate on this idea, requiring the applicant to show a public benefit from the fill² and whether and how much fill is really necessary.³

For fill permits, heavy reliance is placed on the local land use plan. The state permit consistency rule⁴ requires consistency for a dredge or fill permit with a local plan which has been acknowledged by LCDC but the Removal/Fill law goes further, requiring consistency for a fill permit with any "duly enacted" zoning or land use plan.⁵ This mandated consideration of local plans for fill permits prior to the existence of LCDC. Since most plans are just now in the process of being acknowledged, the Removal/Fill law has, for many years, given local governments considerable authority in their waterways.

For both dredge and fill permits, the Director of DSL may consult with anyone that is affected by the issuance or denial of a permit; this can be state, federal or local agencies, as well as private groups or individuals.⁶ If necessary to aid in reaching a decision, the Director may order a public hearing, but this is discretionary and is not a right of the applicant or interested parties.⁷ The applicant can appeal a denied permit or conditions on a permit.⁸ Any other party with a legally protected interest who is adversely affected may also appeal the issuance of a permit.⁹

The 1979 session of the Oregon Legislature amended the Removal/Fill law to require mitigation for filling or removing any material in an intertidal or tidal marsh area of an estuary.¹⁰ This concept of mitigation was first adopted in Goal 16, Estuarine Resources, of the Statewide Planning Goals in 1977. As part of the goal, mitigation was not clearly enough defined, no guidance was given for administration and no process for exemptions existed. These problems with mitigation in its original form prompted the Legislature to adopt much more specific guidelines for

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1. ORS 541.625 (2) (a).
 2. OAR 141-85-205 (b) and (c).
 3. OAR 141-85-205 (b) and (a).
 4. OAR 660-301.
 5. ORS 541.625 (2) (d).
 6. OAR 141-85-205 (a).
 7. OAR 141-85-205 (11).
 8. ORS 541.625 (5).
 9. ORS 541.627
 10. ORS 541.626

mitigation projects and to delegate authority for the program to DSL, since they already handled state dredge and fill permits.¹ DSL is presently in the process of writing administrative rules to make the mitigation program in Oregon more formalized, giving much more guidance to anyone proposing alteration of intertidal or tidal marsh areas.

The 1979 amendment defines mitigation as the "creation, restoration or enhancement of an estuarine area", an expansion from its original definition in Goal 16 of creation or restoration only.² The law requires mitigation as a condition on permits for filling or removal of material from an intertidal or tidal marsh area, but does allow a waiver by the Director of DSL in limited circumstances.³

Alternatives are being explored for how to best handle mitigation for small projects. One of the most promising is mitigation banking. This consists of areas set aside and restored to estuarine productivity in advance of their use for development project mitigation, then drawn upon when needed. The bank could be in private ownership or an entity such as a port district. The Division of State Lands is currently writing regulations covering mitigation banking.

Another interesting feature of the 1979 amendments to the Removal/Fill law limits substantial fills for nonwater-dependent uses to public uses where the public need for the project is found to outweigh harm to navigation, fisheries and recreation.⁴ This resulted from an Oregon Supreme Court decision which clarified that fills do not need to be for water-related uses, but that public need for the fill "outweighs the detriment to use of the waters in question for navigation, fishing or recreational purposes . . .".⁵

The permit chapter further clarifies the procedural steps in a Removal/Fill permit.

Goal 16, Estuarine Resources

Goal 16, Estuarine Resources, is one of 19 goals in Oregon's State-wide Land Use Planning Program. The first land use laws in Oregon passed

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1. Bob Cortright, "Why Mitigation", Oregon Lands, August 1979, Vol. 2, No. 8
 2. ORS 541.626 (1)
 3. ORS 541.626 (4)
 4. ORS 541.625 (3)
 5. Morse v. Oregon DSL, 285 OR 197 (1979)

in 1969; in the 1973 legislature, the Land Conservation and Development Commission was created. LCDC has authority to pass regulations, called goals. The first 14 goals went into effect January 1975, the Willamette River Greenway Goal in 1976, and four Coastal Goals in January 1977. Each of the 19 goals must be incorporated, when applicable, into city or county comprehensive plans.¹ The local governments write plans, then submit them to LCDC for acknowledgement or approval that they meet goal requirements.

Goal 16 most directly influences development in estuaries. The Coastal Goals, written two years after the original 14 goals, contain much more specific requirements than the earlier goals. Major categories within Goal 16 include: overall statement, inventory requirements, comprehensive plan requirements and implementation requirements.

The overall statement consists of general policy directions and indicates that LCDC shall classify each Oregon estuary in order to assure diversity among them. This classification was completed for 21 of Oregon's 22 major estuaries in November 1977.² The four classifications are: 1) natural - an estuary with no maintained channel or jetty and generally surrounded by rural uses, 2) conservation - an estuary with no maintained channel or jetty but adjacent to urban areas, 3) shallow-draft development - an estuary with a maintained jetty and an authorized channel of 22 feet or less, 4) deep-draft development - an estuary with a maintained jetty and a channel greater than 22 feet.

Also included in the overall statement are four criteria for dredging or filling in estuaries. These shall be allowed only if:

- 1) required for navigation or other water-dependent uses that require an estuarine location; and
- 2) a public need is demonstrated; and
- 3) no alternative upland locations exist; and
- 4) adverse impacts are minimized as much as possible.

The section on inventory requirements lays out information which should be included in an estuarine inventory and indicates that common inventory standards and techniques should be employed.

1. ORS 197.175

2. OAR 660-17-015

Requirements for comprehensive plans are next discussed in the goal. The two major requirements are division of each estuary into management units and establishment of use priorities for each management unit. What management units will be applied depends upon the classification of the entire estuary. Natural estuaries will have only natural management units. Conservation estuaries shall have both natural and conservation management units. Shallow and deep draft development estuaries shall have natural, conservation and development management units. The goal indicates the type of areas to be designated in each of the management units. For example, significant fish and wildlife habitat shall be in a natural management unit; less significant habitat, and oyster and clam beds shall be in conservation management units. Beyond these broad requirements for management units, the local governments have flexibility to add more management units and draw the appropriate boundaries.

Establishing priorities within management units is also done in the local comprehensive plan. The goal gives general priorities, the highest for uses which maintain the integrity of the estuarine ecosystem.

The implementation requirements of the goal include eight basically unrelated items. These are:

- 1) impact assessment for actions not addressed in the plan,
- 2) local governments shall recognize existing state and federal ✓ resource laws which affect water quality and sedimentation in estuaries,
- 3) minimum fresh water flow rates for estuaries shall be considered,
- 4) mitigation required for dredging or filling in intertidal or ✓ tidal marshes,
- 5) dredge spoil disposal plans shall be prepared, ✓
- 6) community docks shall be encouraged over single purpose docks and piers,
- 7) areas appropriate for restoration shall be identified, and ✓
- 8) state agencies must review their procedures to assure compliance ✓ with this goal.

This goal mandated much more local involvement in management of estuaries than had previously existed. It gives many specific requirements for preparation and implementation of comprehensive plans to assure a degree of uniformity among coastal plans, but allows for much local flexibility. Implementation of local plans varies greatly, but commonly is accomplished through zoning ordinances or performance standards.

Local Laws

Local governments have historically taken a small role in activities within waterways in their own jurisdictions. Oregon's Statewide Land Use Planning Program and Removal/Fill Law have changed that, the former mandating preparation of local comprehensive plans and the latter requiring consideration of local plans in decisions on fill permits in waterways.

Local plans must address all applicable statewide planning goals; in coastal jurisdictions this includes the four coastal goals, Goals 16 - 19. Goal 16, Estuarine Resources, includes many requirements for estuarine planning and directs local governments to divide estuaries into management units and assign use priorities to each.

Most local plans are at or near completion and are being reviewed for acknowledgement by DLCD.

Because of Goal 16, plans for estuaries along the Oregon coast address similar concerns but, because of the great variety among estuaries and communities, the documents are very different. Each will have management units and priorities, and some method of implementation.

Implementation is commonly by zoning ordinances, standards for review, or some combination of these. Often local permits are required for activities in estuaries, in addition to state and federal permits. In other cases, local jurisdictions review the state and federal permits against their own criteria to determine if the activity is consistent with the local plan.

Acknowledged local plans give a major role to local jurisdictions in activities occurring in estuaries. The Coastal Zone Management Act requires that federal permits are consistent with the state coastal management program, which in Oregon includes local plans. Therefore, activities inconsistent with the local plan will not be approved at the state and federal levels.

Permit Processes

Corps of Engineers Section 10 or 404 permit steps

1. Receipt of completed application. Preliminary Environmental Assessment (EA) and draft Public Notice (PN) prepared to determine scope of review and preliminary determination of need for Environmental Impact Statement (EIS).
2. Public Notice prepared within 15 days must indicate:
 - a) statutory authority
 - b) name and address of applicant
 - c) location
 - d) brief description of activity
 - e) diagrams
 - f) other government authorizations required
 - g) preliminary statement on need for EIS
 - h) comment time (usually 30 days)
 - i) other relevant information
 - j) evaluation factors (33 CFR 325.3 (a & b))
3. Distribution of PN (33 CFR 325.3(c))
 - a) Oregon Division of State Lands - serves as a clearinghouse for state and local agencies and interested parties.
 - b) federal agencies
 - c) post offices or other public places
 - d) newspapers (at discretion of District Engineer)
4. Receipt of Comments from agencies and individuals, generally within 30 days, in unusual circumstances can be up to 75 days (33 CFR 325.2 (d)). Agency comments:
 - a) USFW - memo of agreement with Corps (40 FR 31341 (1975)).
If disagreement on permit issuance, resolution at higher levels.
 - b) NMFS - no memo of agreement as with USFW, but their input is essentially weighed as strongly in their area of expertise.
 - c) EPA - has authority to deny particular sites for 404 permits. EPA, or appropriate state agency, gives water quality certification as may be required on a project by the Clean Water Act (33 CFR 325.2 (b) (1)).

- d) Sites or buildings on the National Register of Historic Places require special consideration by federal agencies (33 CFR 325.2 (b) (3)).
 - e) State - if within coastal zone, letter from governor confirms compliance with Oregon Coastal Management Program (33 CFR 325.2 (b) (2)); if outside coastal zone, state response given great weight (33 CFR 320.4 (j)). Compliance with Oregon's Removal/Fill Law and response of local governments included in state response.
5. Final determination of need for EIS (33 CFR 325.2 (a) (4))
- a) if no EIS necessary, a FONSI (Finding of No Significant Impact) is prepared and permit review continues.
 - b) if EIS required applicant is advised, must submit necessary information and document is prepared by COE. Permit is held until completion of EIS process.
6. Preparation of Final Environmental Assessment for permits with no EIS required (33 CFR 325.2 (a) (4)). Agency and public comments are included in assessment. It gives the expected environmental impacts of the project.
7. Public hearings
- a) Section 10 permits only - a public hearing will be held upon written request if District Engineer determines sufficient public interest exists (33 CFR 327.4 (c)).
 - b. Section 404 permits - A public hearing will be held when it will assist in making decisions on a permit (33 CFR 327.4 (a)). A public hearing will always be held upon written request unless District Engineer determines issues raised are insubstantial or no valid interest will be served by such hearing 33 CFR 327.4 (b)
8. Evaluation of Permit - no permit granted unless found to be in the public interest (33 CFR 320.4 (a)(1)) all relevant factors must be considered - among these are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people (33 CFR 320.4 and 33 CFR 325.11).

9. Findings of Fact (FOF) (33 CFR 325.2 (a) (b) prepared on all applications - includes probable effect of proposed work on public interest
10. Permit approval or denial
 - a. approval - 1) can be approved, or conditionally approved, at District level, or can be forwarded to higher levels in cases of dispute between agencies (33 CFR 325.2 (a)(b) and 33 CFR 325.8 (d)), 2) two copies of permit sent to applicant for signature, 3) permit must be returned and signed by issuing official before it is valid.
 - b. denial - (33 CFR 325.2 (a) (7)1) can be denied at District level, or forwarded to higher level for denial, 2) applicant notified in writing of reasons for denial.

Division of State Lands
Removal/Fill Permit Steps

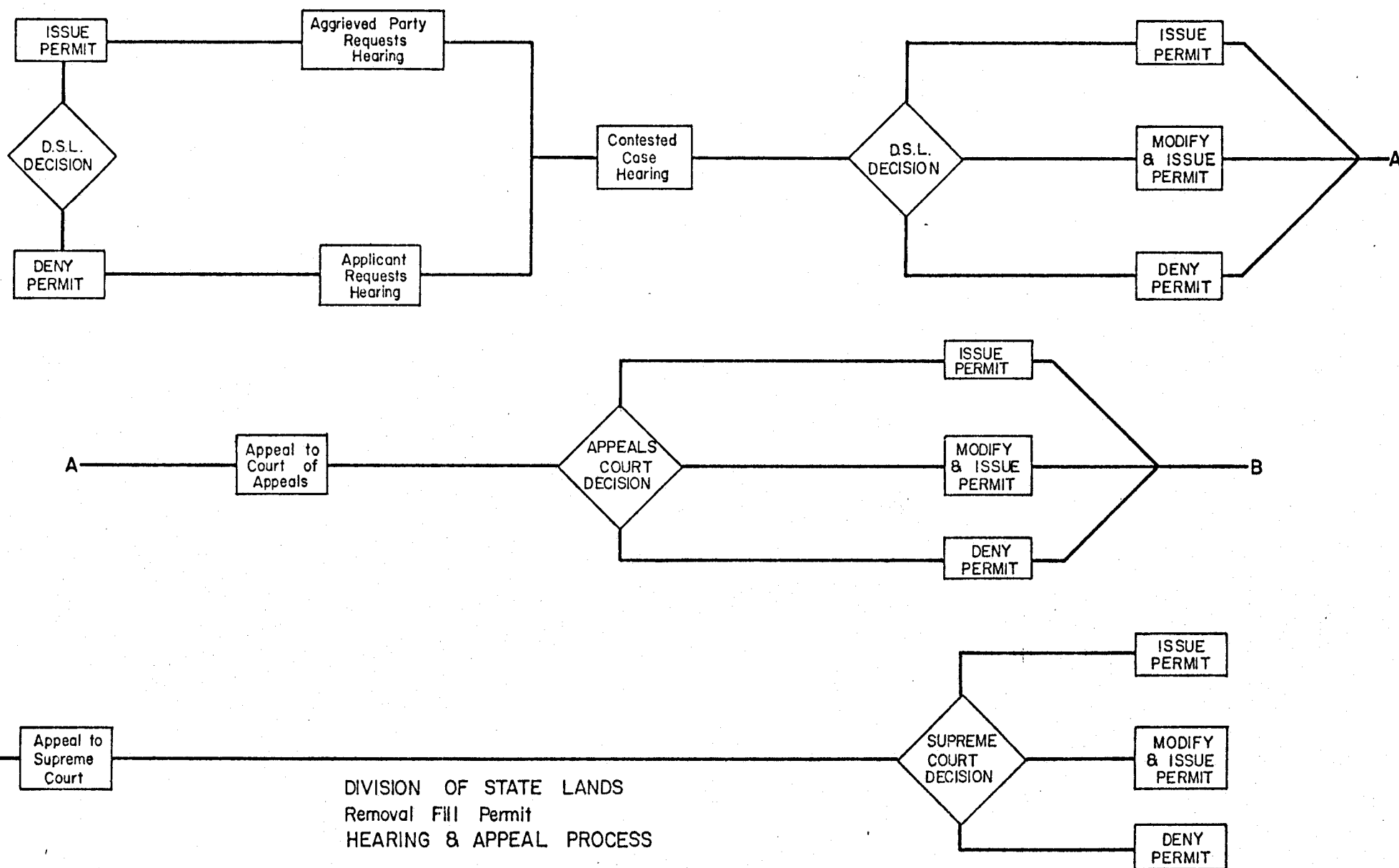
1. Receipt of Completed Application and Fee, including necessary diagrams and explanation.¹ DSL first determines that they have jurisdiction over the project.
2. Public Notice. If a Corps Sec. 10 or 404 permit is also required, DSL waits for the Corps PN, then routes it jointly with State notice. Routed independently if no Corps permit.
3. Distribution of PN. An average of 30 PN's sent out for each permit to:
 - 1) state agencies as appropriate
 - 2) local government agencies as appropriate
 - 3) private organizations expressing an interest
 - 4) private individuals who have expressed an interest
4. Receipt of Comments from PN within 45 days.² If an agency or other unit of government, requested to comment on an application does not do so within 45 days, DSL assumes no objection. For the applicable local or government agency though, a letter of approval is required.³
5. Public Hearing. At their discretion, DSL may hold a public hearing to aid in making a decision on a permit.⁴
6. Evaluation of Permit. Permits evaluated against basic policy of state⁵ and specific policies for dredging and filling.⁶ Comments also considered in evaluation process.
7. Resolution of Conflicts. Whenever possible, conflicts should be resolved prior to permit issuance to limit appeals.
8. Decision on Permit. Permit can be approved, conditionally approved, or denied.
 - a) if denied, applicant and all those who commented are notified. Applicant notified of right of appeal.⁷
 - b) if approved or conditionally approved, applicant notified. Permits valid for one year.⁸

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1. OAR 141-85-205 (8)
 2. OAR 541.625 (8)
 3. OAR 141-85-205 (1) (q)
 4. OAR 141-82-205 (11)
 5. ORS 541.610)
 6. ORS 541.625)
 7. OAR 141-85-205 (12)
 8. OAR 141-85-305 (1)

9. Appeal. Applicant can appeal permit denial or conditions, conducted as a contested case hearing. Appeals from the final order of a contested case hearing can be taken to the Court of Appeals.¹ Any person aggrieved by approval of a permit may file for a hearing. This will be held if director of DSL finds the person has a legally protected interest which is adversely affected. Proceeds as contested case hearing.² See Diagram 1 for a depiction of the appeal process.

1) ORS 541.625 (5)

2) ORS 541.627



Analysis and Recommendations

In first examining the Corps Section 10 and 404 permit process and DSL's Removal/Fill permit process, the two seemed so obviously duplicative that it should be a simple task to make recommendations which could streamline the system. This, of course, begins with the assumption that the system needs streamlining. This assumption is derived from concerns voiced by both persons who had applied for permits and from agency personnel involved in some phase of estuary development. As research continued, however, it became clear that the complex regulatory processes could not be easily simplified. Differing jurisdictions between agencies, various statutory mandates, fragmentation of resource responsibility among agencies and genuine concern for the health of the estuarine resource made suggestions for major change particularly difficult, with effects often reaching far beyond estuaries.

Another basic problem is the differing perspective of federal and state agencies. Federal agencies are charged with looking at the national interest, often broader concerns than those of state agencies. The state and national interest are not necessarily identical.

The three schemes considered for streamlining the process of Section 10 and 404 permits and Removal/Fill permits in estuaries were:

- 1) Discontinue Removal/Fill permits, DSL would continue to be state clearinghouse for Corps permits and comment on those permits.
- 2) Enabling legislation to allow delegation of both Section 10 and 404 permit processing to states with approved programs. This would expand DSL's role considerably.
- 3) Leave existing system intact, but provide techniques to better assist permit applicants. Suggested are permit assistance centers and joint federal-state permit processing.

Of these three suggestions, the third is recommended for several reasons:

- Eliminating one of the permits, either federal or state, would probably not result in any significant reduction in processing time, paperwork or manpower.
- Federal legislation to enable delegation of Corps permits in navigable waters is a very remote possibility.

- Existing system provides greater checks for protection of resources. Detailed discussion of the three suggestions will further elaborate on choice of the third alternative.

1. Deleting the DSL Removal/Fill permit. At the time R/F came into law, the Corps' permit process included only Section 10 permits with a much narrower scope of review, primarily navigation concerns. So it seemed that what started with a real need in the past may not be as needed today since the Corps now provides an environmental, public interest review. While this may, in fact, be the case, other reasons preclude recommending this alternative:

- A) State review still required. Since the primary lands in question are "public trust" lands under state proprietorship, DSL would still be obligated to ensure that the use of these lands is in the best interest of Oregon residents and the public in general. This necessary state function can either be handled through a permit system, as it now exists, or by DSL review and comment on Corps permits. To accomplish this review and comment would require not only staff and time but standards on which to base comments. Essentially the same process would be carried out as occurs today, just no permit issued, and no state fees collected.
- B) State clearinghouse function still necessary. DSL is the logical agency as a state clearinghouse for these Corps permits since state owned lands are often involved. To provide a unified, comprehensive, state response the clearinghouse must do more than shuffle papers, they must substantively ensure that the state response adequately addresses all legitimate state and local concerns. So, again, even if an actual permit is not issued by DSL, their function would be almost as broad.
- C) Consistency determinations. Presently for a Corps permit in the coastal zone, the state must concur with the applicant's determination of consistency with the OCMP. DLCD makes the final determination, but in many of those cases, a Removal/Fill permit is also involved. If the R/F permit is denied, then the Corps permit is automatically inconsistent with the OCMP. When

the R F permit is approved, it essentially forms the basis for a consistency determination by DLCD. R/F permit approval does not guarantee consistency but it does indicate to DLCD personnel that a comprehensive review of many relevant issues has already occurred. On the other hand for Corps permits with no R/F counterpart (such as Section 10 permits for structure in navigable waters), DSL comments as any other agency, then sends the whole packet of information to DLCD, an agency not set up to be in the regulatory business. Without any R/F permits, this would likely be the way all federal consistency determinations would be made.

- D) State concerns not as adequately represented. This argument is based on the contention that state interests and national interests are often not identical. Issues that are validly a concern of the State of Oregon may not be considered by federal agencies. Under the present system, DSL personnel work very closely with ODFW field agents. The field agents visit most sites of permit requests which often neither DSL or COE have the personnel to do. Because of this, the state permit often contains conditions relating to timing of work or cumulative impacts which may be difficult for the Corps to determine. Without a state permit, these concerns could still be voiced to the Corps, but would be only one of many agency comments and not have the clout which a permit holds. There would be no way to ensure that the recommendations would be included as conditions on the Corps permit.
- E) Areas of non-overlapping jurisdiction. Since jurisdictional limits of DSL and Corps permits are not identical, deleting either system will leave some areas unprotected. Deleting the R/F permits would mean removal activities in non-navigable waters would no longer be subject to any permit. Transferring this function to another state agency, such as the Department of Geology and Mineral Industries, is possible but the issues involved in mining in a waterway are so different than those they currently handle on dry lands, it would not be easily accommodated.

Upland limits of jurisdiction can also be a problem. The Corps regulations exempt farming and silvicultural activities; DSL exempts those activities covered by the State Forest Practices Act. This, plus varying definitions of wetlands may result in some instances where either a Corps or DSL permit applies, but not both. Cutting out either of the systems would mean lesser protection for the wetland resource.

2. Delegate Corps Section 10 and 404 permits to the state.

Federal enabling legislation would be required patterned after laws which enable delegation of EPA's NPDES point-source pollution permits to states. Legislation already exists to delegate Section 404 permit programs to states, but only in non-navigable waters. Because it does not include major waterways, and because no federal monies are provided, no states have accepted 404 programs. This proposal would allow delegation of all Corps Section 10 and 404 permits to the states in both navigable and non-navigable waterways.

The law would be patterned after the above two and contain certain basic features:

- EPA would review and approve state's program. (EPA instead of COE, since the Corps would be removed from environmental review).
- Copies of all permit applications routed to EPA, who solicits other federal agency response.
- EPA must notify state within 10 days if a federal response will be made.
- Certain agreed upon categories of permits not subject to federal review.
- Federal veto authority patterned after present Section 404 delegation language.¹

In theory, this concept seems promising. States would have authority to issue or deny permits, but a method still exists to

1) 33 USC 1344 (j)

handle federal concerns. The federal government approves the state program and even has specific veto authority. This would allow the Corps to maintain their role protecting navigability - historically their major concern. It seems that duplication of effort should be reduced by having only a state permit, but this may not happen.

While there are a number of positive points to this alternative, it is not recommended for the following reasons:

- A) Politically infeasible. The federal government in general, and the Corps of Engineers in particular, is extremely unlikely to relinquish any control over navigable waterways. Based on the Commerce clause of the U. S. Constitution, the federal government has pre-emptive authority over navigation in navigable waters. All title to lands below the high water mark of navigable waters is subject to the navigation servitude, whereby the federal government controls and determines if navigation is being hindered.

Navigation servitude and other broader powers of the commerce clause have repeatedly and strongly expressed the role of the federal government in navigable waters since the late 1800's. Delegation of the power of the Corps in this area, even though a federal agency would retain veto authority, seems an unlikely action of Congress.

- B) No manpower reduction. The Corps would have a smaller role in permits, but would still need reviewers for navigation concerns. EPA, though, would need a greater staff to review state programs and permits and work more closely with other federal agencies. The DSL would also require a larger staff for processing, review and mediation with agencies. Any reduction in personnel in one agency would probably be made up in another agency.

1) Althaus, H., Public Trust Rights, U. S. Fish and Wildlife Service, 1977, p. 131.

- C) Time required just as great. Presently the DSL permit takes up to 45 or 90 days for Removal or Fill permits, but may be as low as 30 days. The Corps permit usually takes at least 90 days because of built in review times. If the state handled Section 10 and 404 permits it would take at least as long for processing as the Corps now takes since the same federal agencies would be involved. So, no savings to the applicant in time would occur.
- D) No Environmental Impact Statement review. All federal permits are reviewed to determine if they are significant actions requiring an EIS. This law was designed to provide maximum public knowledge and input into governmental activities. With a permit program at the state level, no EIS requirements would apply. This would allow less public involvement in decision-making for major activities.
- E) Interstate concerns difficult to handle. Waterways which run between states or form the boundaries of states are a particular problem with state permit programs. This is addressed in the laws enabling delegation of NPDES and Section 404 programs with a complicated mediation at the federal level. This is a major drawback to state programs since so many of our nations primary waterways run between states. In Oregon, our largest estuary, the Columbia River, would be subject to this problem.
- F) Potentially less protection of resources. Delegation of Section 10 and 404 permit authority to Oregon today would probably not be a problem, but could be in the future. State agencies are often more vulnerable to political shifts in the wind than federal agencies and priorities can be rather quickly changed. Even though the state would have a federally approved program with federal veto authority, it is reasonable to assume that veto power would be used in more flagrant, important cases, possibly not in cases of cumulative impact or little known impacts. The present dual system provides excellent checks and balances, to the benefit of the natural resources.

3. Streamline existing system

The present permit system is cumbersome for applicants but, after going through the above reasoning, major changes in the laws and permit process are not recommended. Instead, techniques designed to make it easier for applicants to work within the existing framework are recommended.

Suggestions which will be discussed here are:

- permit assistance centers
- joint federal-state permit processing

A) Permit assistance centers. The major consideration in this paper is estuaries, but this concept can be applied to permits for all waterways of the state. Centers should be established (at least one in the Willamette Valley and one on the coast) for the sole purpose of assisting potential permit applicants. Knowledgeable personnel should have listings of all federal, state and local permits and coordinating procedures, and be able to inform clients which will be needed in a particular project. Cases will arise, particularly in wetlands, where there is uncertainty about what permits are needed. Then the applicant is referred to the appropriate agency. For many situations, though, necessary permits can be quickly determined and necessary forms dispensed.

Assistance center staff should not only hand out forms, but work with applicants to ensure that necessary environmental and economic information will be presented as well as design data.

They should have a close working relationship with agency personnel and be able to refer potential applicants to appropriate people to resolve possible problems at the earliest stage.

Knowledge of local regulations is most difficult since each city and county varies and since they change so much more often than state or federal regulations. Basic plan

and ordinance data could be available at an assistance center, but this is not as vital as complete state and federal permit information since applicants generally have much easier access to local requirements.

A toll-free telephone should be provided and well advertised in local planning offices and other appropriate places. The system will not work without referrals; the basic problem exists in the first place since most potential applicants are unaware of what permits are required and where to go for help.

In times of tight economies and budget cuts, a proposal which suggests setting up a new office with new people is not likely to be met with much favor. In all likelihood, though, if permits received by DSL and the Corps are more complete and have taken into account a broader range of issues at the time of application, processing time and private costs will be decreased. This would be particularly true in cases where objections would obviously have been raised but are worked out early by the applicant contacting the right people and making necessary revisions. In the present system, objections are generally not resolved until after public notice is sent out. Early resolutions may not change things considerably from the viewpoint of agency personnel, but saving time can make or break an applicant's proposal.

This type of positive management can work to build respect for the laws and their purpose while achieving environmentally sound development.

- B) Joint federal-state permit processing. The State of Oregon and Portland District Corps of Engineers should seriously consider adopting a permit processing procedure similar to that employed by the Norfolk, VA, District COE. (See Appendix A for Norfolk COE procedures). This is a formal joint processing program for Section 10 and 404 permits and could also include DSL's R/F permit, since the relevant issues are

usually much the same. A monthly meeting is held with federal and state agency personnel present, often those with sign-off authority on permits. The applicant's presence is invited to respond to questions and more clearly explain any items necessary. A Corps representative has visited the site prior to the meeting and usually taken slides which are shown at the meeting. Minor, non-controversial permits can be quickly handled. Final Environmental Assessment and Findings of Fact are prepared within 14 days of the meeting and the permit sent out for signature. Controversial permits necessarily go through more lengthy review. Processing time is obviously reduced for noncontroversial permits, but also for controversial permits since agencies have had an opportunity to discuss, and begin to resolve, differences. The meeting also provides a forum for pre-application review of projects of significant magnitude.

DSL presently coordinates a regular meeting of state and federal agency personnel entitled SWIM - State Waterway Improvement Managers. This meeting is generally held monthly at the USFWS office in Portland. The meeting, though, is very different from the Norfolk meeting in that it is designed essentially to allow agency discussion of controversial items, and preapplication review of significant projects. It is not a forum for all permits and has no formalized review procedures such as Norfolk.

Most of the time saving which would be realized under a system such as this would be with the Corps of Engineers permit. Generally DSL is able to more rapidly process non-controversial permits since they do not have the number of statutory review and coordination procedures that the Corps has. The Corps often takes 90 - 120 days to process non-controversial permits. Any system which could reduce this time, not contribute greatly to agency workloads, and maintain resource protection, would definitely be in an applicant's best interests.

Direct duplication of Norfolk's procedures may not be applicable in Oregon, but the system should be closely examined with an eye to reducing processing time, particularly for minor permits. A key to making this work well in Oregon is to ensure involvement by local governments since consistency determinations begin there.

Appendix A

Interagency Joint Processing Procedures
Norfolk, Virginia District, Corps of Engineers

INTERAGENCY JOINT PERMIT PROCESSING MEETING

Norfolk District Corps of Engineers

A. Objectives:

1. Reduce processing time
2. Improve communication through personal contact
3. Reduce administrative paperwork
4. Provide forum for pre-application review of projects of significant magnitude
5. Reduce the number of agencies visiting project sites

B. Representatives:

1. Norfolk District, Corps
2. Baltimore District, Corps
3. Fish and Wildlife Service, DOI
4. National Marine Fisheries Service, NOAA
5. Environmental Protection Agency
6. State Regulatory and Advisory Agencies:
 - a. Virginia Marine Resources Commission (Regulatory)
 - b. Virginia State Water Control Board (Regulatory)
 - c. Bureau of Shellfish Sanitation (Regulatory)
 - d. Virginia Institute of Marine Science (Advisory)

C. Corps Responsibility Prior to Meeting:

1. Site visit by Waterways Inspection Section (WIS) specialist to access impacts of proposal; identify modification or alternatives which will minimize adverse impacts; and take appropriate photographs of project site.

2. Aerial photographs are obtained by WIS of each project site when desirable and/or available.

3. Preliminary agenda is prepared two weeks in advance of formal meeting and sent to all participants. The agenda packet includes copy of the public notices or applications and drawings.

4. All Regulatory Functions Branch personnel meet (pre-coordination meeting) one week prior to formal meeting to thoroughly discuss applications on the agenda. Usually the Chief of RFB, Permits, and Waterways Inspection Section, as well as the project coordinator and field specialist are present. The project and/or field coordinator presents all available pertinent information and recommends and defends action to be taken on the application. From the discussion, a Corps unified preliminary decision is reached on each application. The decision may be denial, approval, approval with modification, alternatives or identification of additional information required.

5. The final agenda is sent to all participants. This may include any deletions or additions of applications on preliminary agenda.

D. Conduct of Interagency Joint Permit Processing Meeting:

1. Corps chairs the meeting: Chief of Permits and WIS alternate every month in this position.

2. Applications are discussed in the order that they appear on the agenda. For each application, the group is briefed by the specialist who visited the site and/or the project coordinator. In conjunction with each presentation, slides of the project sites are shown. The Corps preliminary decision concerning action on each application is presented to the group.

3. Comments are then received on each application from all agencies present. Representatives of the Federal advisory agencies have the authority to verbally provide their agencies position on the application. Requests for denials, when not in concurrence with the Corps decisions, are submitted in writing within a specified time frame.

E. Responsibilities of RFB Personnel:

1. Project coordinators are responsible for:

- a. Providing copies of public notices on application to the Corps Joint Processing Coordinator ten days prior to pre-monthly meeting.
- b. Recording the agencies comments on Standard Form.
- c. Submitting the completed forms (minutes) to the Joint Processing Coordinator no later than noon the day after the meeting.

2. Joint Processing Coordinator is responsible for:

- a. Consolidating public notices and permits into an agenda package and forwarding the package to participating agencies two weeks prior to the Joint Meeting.
- b. Providing final agenda after pre-coordination meeting to all participants.
- c. Sending minutes of the Joint Processing Meeting to all agency participants for verifications of comments.

STANDARD OPERATING PROCEDURE

- A. Purpose: The purpose of this document is to outline the major events in the permit process, the maximum allowable time limit on each event, and the responsibilities of each staff member of the Regulatory Functions Branch with respect to each aspect of the permit program.
- B. Applicability: These guidelines are applicable to all personnel in the Regulatory Functions Branch. Any significant deviation from these procedures must be approved by the Chief, Regulatory Functions Branch.
- C. Reference: 33 CFR 320-340
- D. Procedures: When a permit application is received by the Permits Section, Regulatory Functions Branch, each action described herein will take place within the specified time frame. Progress on selected activities will be monitored through the computerized "Internal Reporting System". The activities to be monitored are assigned numbers in the left margin of the SOP. These numbers correspond to the numbered activities depicted on the accompanying "Flow Chart of Permit Processing Activities for Norfolk District RFB". A record of progress on all numbered events will be noted on the "Active Projects Status Report" which will be distributed monthly. The staff member listed beside each activity is accountable for that activity.
- In cases involving any legal matters, the Project Coordinator will inform the Office of Counsel in writing of any pertinent developments.
- In cases involving Federal Projects, all proceedings will be closely coordinated in writing with the Chief, Engineering Division.
- In no case will the elapsed time between "receipt of permit application" (action item No. 1.0) and "approval of public notice" (action item No. 3.3) exceed 15 calendar days (reference 33 CFR Sec. 325.1).
- In no case will the elapsed time between the "approval of the public notice" (action item 3.3) and the District Engineer's decision (action items No. 7, or number 5.5.1) exceed 90 calendar days except in those cases described in 33 CFR Section 325.

APPLICATION RECEIPT

* The following actions will take place within 2 days.

- 1.0 RFB Secretary - Upon receipt of a permit application the Secretary of the Regulatory Functions Branch will record the basic

application information in the permits log book, stamp the application with the "date received" and open a file for that application and then give the file to the Permits Section Chief.

Permits Chief - Upon receiving the application file, the Permits Section Chief will review the file and determine if the application falls within the purview of the -

- o Clean Water Act Amendments of 1977
- o River & Harbor Act of 1899
- o Marine Protection Research & Sanctuaries Act of 1972
- o General Permit Requirements
- o Nationwide Permit Requirements

If the Permits Chief can determine the jurisdiction of the application from the information submitted by the applicant, he will do so and will then assign the case to a Project Coordinator.

The Permits Chief will note the Coordinator's identification number, applicable laws, and the date on the folder. If necessary he will provide written directions for the Project Coordinator and will enclose them in the application file. The Permits Chief will then return the file to the Secretary of the Regulatory Functions Branch.

RFB Secretary - Upon receiving the application file from the Permits Chief, the RFB Secretary will enter the appropriate application data into the computerized "Internal Reporting system". The Secretary will then make a copy of the application material and prepare a second file. The original file will be given to the assigned Project Coordinator and the copy will be given to the Waterways Inspection Section (WIS) Chief.

The Secretary will also send a preprinted "post card of acknowledgement" to the applicant.

UNCLEAR JURISDICTION

* If the jurisdiction of the application is unclear, the following actions will take place within 14 days of when the Permits Chief determines that the application cannot be categorized based on the available application material.

Permits Chief - The Permits Chief will give the application to the WIS Chief.

WIS Chief - The WIS Chief will assign the case to a Field Coordinator.

Field Coordinator - The Field Coordinator will perform a site investigation and report on the proposed project. During the site visit, the Field Coordinator will gather information of sufficient detail to enable the Permits

Chief to determine the jurisdiction of the case, the Project Coordinator to complete the public notice; and the Field Coordinator to prepare the assessment.

Permits Chief -

The Permits Chief will then categorize the application based on the field reconnaissance, assign the case to a Project Coordinator, note his/her identification number on the file, write any specific instructions on the folder, and give the file to the RFB Secretary.

CLEAR JURISDICTION

- * The following actions will take place in the Waterways Inspection Section within 12 days (14 days in the field offices). While the site visit may be initiated before the public notice is prepared, the timing of the site visit must not interfere with the 15 day time limit on issuance of the public notice.

WIS Chief -

If the jurisdiction of the application is clear, once the WIS Chief receives the folder he will review it and assign the case to a Field Coordinator. He will write the Coordinator's identification number on the folder, date it and give it to the designated Field Coordinator.

2.0 Field Coordinator -

Once the Field Coordinator receives the folder, he will schedule and conduct a site visit of the project area. In the course of this field visit, he will field check the application for accuracy and gather assessment information. All notes and findings will be handwritten, copied, and filed in the application folder and the copies given to the assigned Project Coordinator.

- * The following actions will take place in the Permits section within 1 day:

Project Coordinator - Once the Project Coordinator receives the folder, he will review the application and make a preliminary decision as to its completeness. (If the application is complete, he will issue a public notice in accordance with the procedures and the time restraints established by actions 3.1 through 3.3. If the application is determined incomplete, he will follow the procedures and time restraints established by action 2.1 through 2.2.)

- * The following interactions between Waterways Inspection and Permits Section will take place within 2 days of the site visit report completion:

3.0 Project Coordinator - The Project Coordinator, on consultation with the Field Coordinator, will determine whether or not the application is complete. If a final determination is made that the application is complete, the Project Coordinator will issue a form letter to the applicant.

If the application is not considered complete, the Project Coordinator will be responsible for interacting with the applicant through the actions and time restraints established by items 2.1 through 2.2.

REQUEST FOR ADDITIONAL INFORMATION

- *2.1 Within 3 days of the time the application is declared incomplete:

Project Coordinator - If the application materials (drawings, etc.) are inadequate, the Project Coordinator will communicate with the applicant by phone to request the required additional material.

The Project Coordinator will write the specific requirements on a form letter which requests that the information be sent to the Corps within 45 days.

- *2.1.1 If no information, or inadequate information is received from the applicant: within 1 day of the expiration of the 45 day applicant response period, the following action will take place.

Project Coordinator - If the applicant does not respond within the allotted 45 days, the Project Coordinator will issue another form letter informing the applicant that he has an additional 30 days to submit the requested information or his application will be considered by the Corps to be "withdrawn".

- *2.1.2 If no information, or inadequate information, is received from the applicant, within 1 day of the expiration of the 30 day applicant response period, the following action will take place.

Project Coordinator - The Project Coordinator will declare the application "withdrawn". He will issue a form letter of explanation to the applicant and then will note the withdrawal on the "Active Project Status Report" and close out the file.

- *2.2 When the Project Coordinator determines that all requisite information has been received from the applicant he will note the date that the complete information was received on the "Active Projects Status Report". He will then declare the application complete (see 3.0) and send a form letter to the applicant.

PUBLIC NOTICE & PRELIMINARY ASSESSMENT

- * The next 2 series of actions involve the preparation of a Preliminary Assessment (by the WIS) and the preparation and distribution of a Public Notice (by the Permits Section). Each section will have a file of requisite application materials and so these activities will

take place simultaneously. All numbered activities which WIS completes must be reported at once to the Project Coordinator in charge of the respective application. The Project Coordinator will then note these milestones on the "Active Projects Status Report".

PUBLIC NOTICE

- *3.1 The following actions will take place within 2 days of the time the Project Coordinator reviews the application and makes a preliminary decision as to its completeness:

Project Coordinator - The Project Coordinator will prepare a Draft Public Notice, date it, and submit it to the Typing Supervisor.

- *3.2 The following actions will take place within 2 days.

Typing Supervisor - The Typing Supervisor will see that the Public Notice is typed.

Project Coordinator - The Project Coordinator will determine which mailing list is appropriate for the case and the RFB Secretary will advise the ADP Supervisor.

ADP Supervisor - The ADP Supervisor will prepare the mailing list.

- *3.3 The following action will take place within 4 days of the time the Public Notice is typed:

Project Coordinator - The Project Coordinator will send the notice through the chain of command for approval and the required signatures.

- He will then send the typed and signed notice to "reproduction".

- He will retrieve the copied notices from "reproduction" and submit them to Mailing and Records to be sent.

- * The Public has a maximum of 30 days to comment on the Public Notice. 15 days Public Notice may be issued on approval of the Chief, Permits Section. Time extensions for response to any public notice by Federal, State, and local agencies and the general public will only be granted upon approval by the Chief, Permits Section.

PRELIMINARY ASSESSMENT

- *4.0 The following action will take place within 10 days of the time the application is considered complete.

Field Coordinator - The Field Coordinator will prepare the Preliminary Assessment.

- *4.1 The following action will take place within 5 days of the time the Field Coordinator submits the Preliminary Assessment to typing.

Typing Supervisor - The Typing Supervisor will type the Preliminary Assessment and return it to the Field Coordinator.

Field Coordinator - The Field Coordinator will review and sign the Preliminary Assessment and give it to the WIS Chief.

WIS Chief - The WIS Chief will review and sign the assessment and give it to the Project Coordinator.

Project Coordinator - The Project Coordinator will be responsible for seeing that his projects are put on the agenda for the earliest possible State/Federal meeting.

The Joint Processing Coordinator will xerox all Preliminary Assessments for distribution for the State/Federal meeting.

PREPARATION FOR STATE/FEDERAL MEETING

- * Prior to each Federal/State Meeting, the Project Coordinator working with the RFB Chief, the Permits Chief, the WIS Chief, and the Field Coordinator will develop a Corps position on each application on the agenda for the upcoming meeting.

5.0 STATE/FEDERAL MEETING

CONTROVERSIAL VS. NON-CONTROVERSIAL APPLICATIONS

If the Corps' position is approved and endorsed in the State/Federal Meeting, one set of procedures will ensue. This course of action is presented first as (NON-CONTROVERSIAL). If the case meets with substantial disagreement, and controversy results, the course of events will correspond to the outline presented in the second case described (CONTROVERSIAL).

NON-CONTROVERSIAL

- *6.0 Within 14 days of the State/Federal Meeting:

Project Coordinator - The Project Coordinator will prepare a Final Environmental Assessment, a Statement of Findings and a Permit and will give them to the Typing Supervisor.

- *6.1 Within 4 days of receipt of the materials:

Typing Supervisor - The Typing Supervisor will see that the Final Environmental Assessment, the Statement of Findings and the Permit are typed and returned to the Project Coordinator.

- 7.0 Within 2 days of receipt of the typed material:

Project Coordinator - The Project Coordinator will send the permit through the chain of command to the Applicant who will sign and return the Permit.

8.0 If the Applicant returns the signed Permit within 30 days the Training Supervisor has 2 days to send the permit to the DE for issuance.

7.1 If the Applicant does not return the signed Permit within 30 days the Project Coordinator will prepare and send a "gig" letter.

CONTROVERSIAL APPLICATIONS

If, in the course of the State/Federal Meeting, no acceptable compromise can be reached and the application proves to be controversial, the following actions will be taken:

*5.1 Within 7 days of the State/Federal Meeting:

Project Coordinator - The Project Coordinator will organize a meeting to formulate a preliminary "Plan of Action". The meeting will involve the Chief of the Regulatory Functions Branch, the Chief of the Permits Section, and the Chief of the Waterways Inspection Station.

* Within 5 days of the "Plan of Action" meeting:

Project Coordinator - The Project Coordinator will prepare a "Position Summary Memorandum".

* If, in the course of the "Plan of Action" meeting, the group decides that additional information is required from the applicant, the following actions will take place within 2 days.

5.1.1 Project Coordinator - The Project Coordinator will contact the Applicant by phone and follow up by sending the Applicant a form letter requesting that additional information be sent within 45 days.

* If the Applicant fails to respond within 45 days, 1 day following the expiration of the 45-day applicant response period:

Project Coordinator - The Project Coordinator will telephone the Applicant and explain that the response period is extended 30 days. He will follow up the phone call by sending a form letter of confirmation to the Applicant.

* If the Applicant fails to respond within 30 days, 1 day following the expiration of the 30-day application response period:

Project Coordinator - The Project Coordinator will declare the Application to be withdrawn, will note that status on the "Active Projects Status Report", and will close the file.

- 5.2 If the Applicant does respond within the allotted time period the Project Coordinator will note the date on the "Active Projects Status Report" and will provide the information to the Permits Chief as necessary for the refinement/revision of the Corps position on the respective controversial application. The Project Coordinator will furnish the supplemental information to the Federal Environmental Agencies and attempt to design an acceptable course of action. If an acceptable action can be agreed upon, a position summary will be prepared and the application will be processed as a non-controversial action. However, if an agreement cannot be reached, the application will continue to be processed as a controversial action. This process may take from 10-30 days to complete (monthly meeting, in writing, or telephonically).

* Within 1 day of receipt of all required information:

Project Coordinator - The Project Coordinator will prepare "Position Summary Notes."

DISTRICT ENGINEER: OPTIONAL SITE VISIT

* Once the Position Summary Notes are prepared:

RFB Chief - The RFB Chief will contact the District Engineer to schedule a site visit if the District Engineer so desires.

DRAFT DECISION REPORT

*5.3 Within 15-20 days of final coordination with the Federal environmental agencies and a decision reached on Corps position:

Project Coordinator - The Project Coordinator will prepare a Draft Decision document and submit it to the Typing Supervisor.

*5.3.1 Within 5 days of receipt of the Draft Decision:

Typing Supervisor - The Typing Supervisor will see that the Draft Decision document is typed, and will then submit the typed Decision to the Chief of Permits.

* Within 2 days of receiving the typed document:

Chief of Permits - The Chief of Permits will review the decision, make any comments, and return the Draft to the Project Coordinator for revision.

FINAL DECISION REPORT

*5.4 Within 2 days of receiving the reviewed draft Decision from the Chief of Permits:

Project Coordinator - The Project Coordinator will respond to comments, prepare a Final Decision Report, and submit it to the Typing Supervisor.

*5.4.1 Within 2 days of receiving the Final Decision Report from the Project Coordinator:

Typing Supervisor - The Typing Supervisor will see that the Final Decision Report is typed and will submit the typed document to the Project Coordinator

* Within 1 day of receiving the typed Final decision from the Typing Supervisor:

Project Coordinator - The Project Coordinator will submit the Final Decision Document to the District Engineer.

DECISION: TO ISSUE/TO DENY

Within 2 days of the time the District Engineer receives the Final Decision Report, he will:

5.5' Forward his report to NAD if the decision is to issue the permit.

5.5.1 Notify the applicant if his decision is to deny the permit.

5.5.2 Return report to RFB with comments if the District Engineer's decision is contrary to the recommendations of RFB or if additional information is required.

TABLE 1

COMPONENTS OF THE "COMPUTERIZED" INTERNAL REPORTING SYSTEM
FOR NORFOLK DISTRICT ARMY CORPS OF ENGINEERS
PERMIT REVIEW PROCESS

1. File Opened & Post Card of Acknowledgement Sent.
2. Site Visit
 - (2.1) Request for Information Sent (45 Days)
 - (2.1.1) Request for Information Sent (30 Days)
 - (2.1.2) No Response from Applicant (Application Withdrawn)
 - (2.2) Adequate Response Received from Applicant within Allotted Time
- 3.0 Application Determined to be complete (Form Letter Sent)
- 3.1 Draft Public Notice Prepared
- 3.2 Public Notice Typed
- 3.3 Public Notice Mailed
- 4.0 Preliminary Assessment Prepared
- 4.1 Preliminary Assessment Typed
- 5.0 State/Federal Meeting
 - (5.1) Preliminary Plan of Action Formulated
 - (5.1.1) Request for Information Sent (45 Days)
 - (5.1.2) Request for Information Sent (30 Days)
 - (5.1.3) No Response from Applicant (Application Withdrawn)
 - (5.2) Adequate Response Received from Applicant within Allotted Time
 - (5.3) Draft Decision Report Prepared
 - (5.3.1) Draft Decision Report Typed
 - (5.4) Final Decision Report Prepared
 - (5.4.1) Final Decision Report Typed
 - (5.5) Decision Report Forwarded to NAD for Permit Approval
 - (5.5.1) Permit Denied
 - (5.5.2) Permit Returned to RFB for Additional Information
- 6.0 Final Environmental Assessment, Statement of Findings & Permit Prepared
- 6.1 Final Environmental Assessment, Statement of Findings & Permit Typed
- 7.0 Permit Sent to Applicant
 - (7.1) Gig Letter Prepared & Sent
- 8.0 Permit Issued

Appendix B

Commonly Used Abbreviations

CEQ - Council on Environmental Quality
CFR - Code of Federal Regulations
COE - Corps of Engineers
CZMA - Coastal Zone Management Act
DLCD - Department of Land Conservation and Development
DSL - Division of State Lands
EIS - Environmental Impact Statement
EPA - Environmental Protection Agency
FR - Federal Register
FWCA - Fish and Wildlife Coordination Act
HEP - Habitat Evaluation Procedures
LCDC - Land Conservation and Development Commission
MHW - Mean High Water
MLW - Mean Low Water
NEPA - National Environmental Policy Act
NMFS - National Marine Fisheries Service
NPDES - National Pollutant Discharge Elimination System
OAR - Oregon Administrative Rules
OCMP - Oregon Coastal Management Program
OHW - Ordinary High Water
OLW - Ordinary Low Water
ORS - Oregon Revised Statutes
R/F - Removal/Fill Law
USC - United States Code
USFW - United States Fish and Wildlife Service