

Observations of the Portland District,  
U.S. Army Corps of Engineers Regulatory Policy System

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## ABSTRACT

My experiences with the U.S. Army Corps of Engineers (referred to as the Corps) has been an integral part of my formal education. My work with the Corps fulfills my internship requirement for my Masters Degree in Marine Resource Management. The work here has allowed me to use my academic knowledge and has exposed me to the inner workings of a political regulatory agency. The Corps has the responsibility to regulate, through a permit system, activities such as dredging, filling, and construction in most of the water systems of the United States as established under legislated authority. The authority for this is given in the River and Harbor Act, the Clean Water Act, and the Marine, Research, and Sanctuary Act. Under this authority, the Corps evaluates project proposals using specific public interest criteria and procedures developed in the regulations written to implement the laws. The Regulations are the primary basis for the Corps' regulatory policy. However, as I have observed working with many permit applications, the Corps' regulatory policy is more complex than that implied by the regulations. As a result the Corps makes decisions which are not necessarily in the best public interest, but are consistent with publicly accepted norms.

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## INTRODUCTION

Having a desire to effect a more environmentally, ecologically and socially acceptable use of our natural resources, I have pursued an education in natural resource management consisting of interdisciplinary studies in resource and social sciences. The Marine Resource Management Program, College of Oceanography, Oregon State University has provided a means to continue to explore and participate in resource management. It is through this program that I became involved as an intern with the U.S. Army Corps of Engineers (referred to as the Corps).

I have worked in the Regulatory Functions Branch of the Corps for over a year (from June 1982 through January 1984). The activities under the Corps' jurisdiction range from building structures in navigable waters such as docks or piers to placing fills in streams and wetlands. My major function was to process and evaluate permit applications within the Corps regulatory policy system. I would review applications for completeness, correspond by letter and telephone with the applicant, organize and conduct meetings, and try to resolve conflicts between project proponents and opponents. It is through this application of the Corps' policy system that I began to better understand the complexities of this system.

While all of the Corps' actions nationwide are guided by and subject to the formal regulations, as published in the Federal Register, many decisions appear to be contrary to those regulations and inconsistent with one another. Arguments can be made that permits are

issued for projects that are not in the public interest as defined in the regulations. In addition, the regulations are not consistently applied. Even within the same district office there are likely to be minor differences in handling applications such as variations in public notices and permit conditions. The Government Accounting Office (GAO) indicated decisions inconsistent with one another are often made between district offices. For example, one district will permit an activity while another district will deny a similar activity under similar circumstances.<sup>1</sup>

I have tried to resolve these issues of inconsistency and understand how decisions are made in the Portland District Office. It is apparent that the Corps' regulatory program is made up of more than just the formal written regulations. The inconsistent application of the regulations particularly nationwide is in part because of the variation in interpretation of these regulations. It is through this interpretation of policy that the Corps' regulatory program takes on its complex, and at times frustrating characteristics.

The point of this paper is to explain how the Corps' policy system is developed and applied. I will use my experiences from this office to describe and illustrate this. Whereas it is assumed that other Corps districts would interpret the written policy differently, the decision process would be similar.

## POLICY AND DECISIONS

Regulatory policy. The Corps' regulatory policy is the basis for decisions and in this sense policy and decisions are equivalent. Policy as it is used here is defined as a specific course of action. The Corps' regulatory policy, therefore, is a specific course of action taken to reach a decision to either issue or not issue a permit. Policy, in order to be an effective management tool, has to be as general and as specific as needed for the given situation. For the Corps with their given regulatory responsibilities, the regulatory policy has to be general enough to be applicable in all parts of the U.S. under varying environmental and political climates. It also has to be specific enough to result in decisions consistent with the goals set down in law.

In general, policy systems vary between simple and complex. In a simple policy system the policy is specific and constant. If in every case where proposed action "A" results in the same response "B" there is never a need for evaluation or decision. The process is practically automatic. In a simple policy system there is a specific course of action where for every situation there is one automatic way of dealing with it. Simple policy systems are quick and easy to handle. On the other hand, complex policy systems have many variables and therefore have many possible courses of action. The more complex a policy system is the more adaptable it is to variable conditions and situations. This is because more factors are considered and more criteria evaluated. Yet

the complex system is limited by a time consuming process and in many cases lack of reliable information. Most policy systems will fall between the most simple and the most complex.

Given a relatively simple situation of putting in a small float for an individual moorage on a navigable waterway, the thorough consideration of this would be difficult. Questions such as the following would have to be answered:

How does the float impact the physical, biological, and social environment?

Is productivity affected and will light penetration be affected?

How will the stream currents be affected?

Will it interfere with public use of the stream?

Will erosion on a neighbors property be increased?

Would the public use of the stream increase and if so what effect would that have?

Would the float affect the use of the nearby marina?

Would this float lead to other floats in this area and how many floats should be allowed?

What about the size of the float and is the float in the best location?

What alternatives are available?

What is the need for the float?

How does the public feel about it?

Plus other considerations.

The Corps' regulatory policy simplifies this situation by assuming

that moorages are reasonable and acceptable uses and only considers evaluating alternatives when the proposed activity would result in negative impacts that could be avoided. This limits the scope of the evaluation criteria. Even with simplification, however, the Corps' regulatory policy system remains rather complex.

Public Policy Systems. How the Corps policy system considers public interest factors and public input is comparable to many public policy systems. Many theories have attempted to explain the relative workings of public policy systems and identify perspectives used in evaluating the public interest. The Corps' policy system, like other public policy systems, displays characteristics which limit the ability to achieve optimum resource use in the public's interest and emphasize public opinion. These limitations are the result of lacking an objective method of evaluating the public interest factors. These public interest factors include "All factors which may be relevant to the proposal ...among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people."<sup>2</sup> Public policy systems which consider public interest and public input are complex and difficult to evaluate and many times the information needed to evaluate a project is not available.

Schubert describes in his public interest theory three perspectives which can be related to some extent to the Corps' system.<sup>3</sup> The three

perspectives are the idealist, the rationalist, and the realist. The idealist desires to clarify and establish clear values for the public interest criteria and believes that a decision in the public's interest is not necessarily perceived by the public. The rationalist feels that the public interest is achieved by following a set of rules in which public opinion is considered. The realist attempts to achieve compromise by mediating the desires of the various interest groups such as the environmentalists or the developers. For instance, in regulating wetland fills, the Corps' formal regulations state that no fill will be permitted unless it is water dependent (requiring a location on the water) and is in the public interest as evaluated by the public interest factors. Yet wetlands are filled for parking lots. The idealist, the environmental specialist, argues that this clearly is not in the public interest and is detrimental to the environment (even if the local population prefers filling the area). The realist, the chief of the office, decides that if the amount of fill is reduced then a parking lot can still be built and impact to the wetland can be reduced.

Described in a different way, Lindblom explains some of the limitations that exist for public agencies which consider public interest factors in performing their duties. He compares two systems one is idealistic and the other is realistic. He points out that the realistic system, greatly influenced by opinion, is the one most used (this applies to the Corps). He describes this process as "muddling through."<sup>4</sup>

Lindblom's idealistic system is referred to as the rational

comprehensive method. This system is based on unlimited knowledge with the ability to place specific values on criteria and explicitly compare those values to reach an objective decision on some public allocation of resource. Here he states that goals are clearly defined and policy to achieve goals is straight forward. In a limited way the Corps uses this idealistic type of system relative to permit processing procedures. A nationwide goal to reduce the amount of time it takes to issue a permit was recently established for the Corps. To do this the Portland District Office has established specific policies. These include shortening public review periods, coordinating actions with the state, and reducing the requests for additional information. These policies are then evaluated to be good or bad if they achieve the identified goal to reduce permit processing time. In this simplified example the policy is separate from the goal which is clearly defined, and the policy easily evaluated. Yet for the Corps policy system as a whole in the U.S. this system does not apply.

Lindblom states that the realistic policy system-- contrary to the idealistic-- cannot separate goals from policy and cannot clarify values. Is water quality a goal or a policy for the Corps, and what is its value? In this case it is both a means to maintaining a healthy ecosystem and an ends in and of itself. As a result there is no good way to determine if a policy is good by evaluating success in reaching goals. Goals and policy are one and the same; and therefore, good policy is determined by consensus and subject to political

influence. In addition, because of the difficulties in establishing clear goals and methods for evaluating and comparing criteria, the policy administrators selectively limit and weigh the criteria based on their personal perception of the policy question. They try to simplify a complex situation. As a result the Corps' policy does not necessarily optimize resource use in the public interest.

Subjectivity is part of the Corps' policy system, and decisions are influenced by opinion. Through the public notice process, facts and opinions on both sides of an issue can be presented. The individual members of the public are rarely involved, but are represented, rightly or wrongly, by the various Federal and state resource agencies such as the Environmental Protection Agency and U.S. Fish and Wildlife Service. Administrators and decision makers in the Corps are influenced by their social environment, including public opinion. In this way they reflect general public perspectives and the Corps policy and decisions actually reflect publicly accepted norms of resource management.

Policy Levels. The Corps regulatory policy system within the Portland office can be broken down into three policy levels:

1. The formal and written policy level of the Corps, the regulations.
2. The office policy level as reflected in the decisions and statements originating from the district offices.
3. The administrative policy level, the working policy, as reflected in the actions taken by the staff processing an applications.

The first policy level represents the formal policy of the U.S. Army Corps of Engineers. The second and third level of policy are the interpretive policy levels which are based on the formal written policy. They are the implementation of the laws passed by Congress to regulate the aquatic resources of the United States.

The written policy level of the Corps, policy level one, is law and consists of the regulations written under the authority of the Clean Water Act, the River and Harbor Act, and the Marine, Research, and Sanctuary Act. The regulations provide specific procedures for accepting and evaluating applications for permits, identifying acceptable and unacceptable activities, defining areas of jurisdiction, processing illegal non-permitted activities, and issuing permits for approved activities. The regulations are subject to changes and modifications to improve the implementation of the Congressional Acts provided those changes are consistent with the intent of Congress. These changes are usually the results of changing public attitude. In 1975 the court determined, after suits were filed by environmental groups, that the intent of Congress was not being followed by the Corps in setting their jurisdictional boundaries for section 404 of the Clean Water Act, and thereby more clearly defined the Corps' jurisdiction.<sup>5</sup>

Whereas the regulations specify ways of dealing with various issues, they are not so specific as to provide the absolute answer to the question whether to issue or deny a specific permit application. As has been shown with the example of the individual moorage, it would be impractical to consider all the possible situations and factors and

include them in the regulations. The regulations are only the first step in the regulatory policy simplification process. They implement the legislated goals and policies by defining workable guidelines. They are adaptable to many possible complex situations. They require that the public interest factors, coordinated with other legal consideration, be used to determine if the activity should be permitted. The general policy in evaluating permits is stated in the regulations:

"The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest."<sup>6</sup>

The proposed projects are reviewed in regards to need, alternatives (when resource use conflicts exist), and the total impacts to the public interest.

The written policy level, the regulations, provide the criteria with which a proposal is to be evaluated yet provides no acceptable method of comparing the different criteria. Therefore, the application

of the regulations to make a decision is subject to interpretation. As stated by Lt Col. John R. Hill Jr. of the office of the Chief of Engineers of the Corps at a symposium concerning regulation of wetland use, the regulations "are sufficiently flexible to permit alteration and destruction of wetlands where the public interest compels it". However, "In the real world these questions (whether an activity is water dependent, has feasible alternatives, has unacceptable impacts, and is in the public interest) usually cannot be answered categorically yes or no."<sup>7</sup>

The district office policy level, policy level two, is the official application of the formal and written policy level within the Corps' district boundaries. The permit decisions in each district are based on this policy level. This policy level is implemented and influenced by the decision makers within the office. In the Portland District, the Chief of the Regulatory Functions Branch and the Chiefs of the two sections under him set office policy through their interpretation of the regulations. They influence and shape policy in the way that they issue permits, respond to the public, and review and guide the work of the office staff.

The decision maker selectively values criteria from his perspective. This selection is influenced by experience, training, public input, and staff influence. The decision maker considers the input from the administrative policy level, level three, in the form of staff reports. He also is guided by the formal written policy of the Corps through the regulations and directives from the main

office in Washinton D.C. Since the office policy is the official district office policy and is subject to review the decision maker is more cautious and considerate of the implications of his actions.

The last level of policy is the administrative policy level, level three. This is the working policy level of the Corps and is the first application of the Corps' written policies to specific proposed development. The determination of jurisdiction, permit needs, acceptable proposals, project impacts to the public interest and how to process the application are all made at the administrative policy level by the office staff as guided by the decision makers.

The staff member will influence decisions through the working policy level in the way that he conducts meetings, words correspondence and researches and presents factual information. For instance an individual staff member may be concerned over the environmental impacts that a proposed fill may have. In evaluating that proposal, the staff person will selectively limit the public interest criteria which he perceives to be most valuable, the environmental criteria. Whereas another staff member may perceive the value and need for this fill to provide additional playground space for the neighborhood. He would selectively limit the public interest criteria to those which emphasize the positive social value. As a result the administrative policy level is influenced by the individuals working on the application.

The levels of policy presented here as observed in the Portland District Office combine to produce the Corps' regulatory policy system. The policy levels of the Corps can be compared in a limited way to the

rules, referees, and players on a sports team. The rules provide the guidelines as to how to play the game, establishing ways of evaluating winners and losers, and ways of enforcing the rules. These would be the regulations for the Corps (or level 1). The referees would be the decision makers (or level 2). They would have to interpret the rules relative to varying situations and circumstances and make decisions on how to regulate and guide the playing of the game. The players are the staff members (or level 3), also knowing the rules but practicing and playing the game to the best of their abilities and at times testing the rules and the referees interpretation of them. The game is played within the scope of the rules; however it will vary depending on the players and referees as they interrelate and influence each other.

Permit examples. To illustrate the application of the levels of policy to a permit action, the McIntosh Slough project, will be briefly described. This example was chosen because it was somewhat controversial and shows how the Portland District office reached a decision.

McIntosh Slough is a small estuarine channel in the Umpqua Estuary. The Port of Umpqua at Reedsport, Oregon applied to fill about 2.5 acres of this channel to increase the port's land surface area. This proposal had been considered a couple of years earlier but was withdrawn because the applicant did not provide for adequate mitigation for the losses to the estuarine resources, and because a specific use for the site had not been established. The use of a fill site like this one generally has to be water dependent or water related (needing to be

located on the water).

The Port reapplied after satisfying the state agencies that the fill was necessary and the use water related. They resubmitted their application with mitigation proposals to offset losses to the estuary from the fill. This application was accepted and the public notice processed. Comments were received from the Federal resource agencies objecting to the project because the applicant's proposed mitigation was not satisfactory. The processing continued, however, as a mitigation plan was negotiated and eventually accepted. A permit was issued over nine months after the public notice was distributed.

The three levels of policy interacted throughout the processing of this application. As the Environmental Specialist on the project, I coordinated the environmental evaluation of the fill as well as the review of the mitigation proposals. I worked with the Permit Coordinator to ensure that the applicant complied with the formal written policy and our district policy. Both of us working together constituted the administrative or working policy level. Further interaction continued at the district office policy level as we had many discussions with the decision makers, the office chiefs, on dealing with the applicant concerning the Corps authority to require mitigation. The way in which the mitigation plan developed reflect these interactions.

My initial evaluation of the proposed fill and mitigation determined that the fill might not be used for water dependent activities and that the mitigation was not acceptable. I coordinated a

meeting with the applicant and the state and Federal agencies to discuss these points. At that meeting it was agreed by consensus that the fill was justified as needed for water related activities. (The applicant had received a coastal zone goal exception from the Department of Land Conservation and Development to allow a water related fill.) The mitigation plans proposed by the applicant were determined to be not acceptable by all state and Federal agencies. The meeting ended with a number of suggestions being made for acceptable mitigation sites and proposals. Among those sites suggested was Steamboat Island.

As suggested at the meeting, the applicant began to develop a new mitigation proposal to be located on Steamboat Island, property which is owned by the Port of Umpqua. The state indicated that they would require mitigation for 1.1 acres of intertidal habitat at the fill site. I also informed the applicant that the Corps would require mitigation for two acres of intertidal and subtidal habitat. (This deviated from district policy which has not consistently required mitigation in terms of creating, enhancing or re toring estuarine habitat, particularly in excess of the state requirements.) Another onsite meeting was held. At that time it was decided that a permit would be issued if an acceptable mitigation plan was prepared. The specific site was selected for creation type mitigation, and the applicant could then prepare the detailed plans to be submitted to the Corps and Oregon Division of State Lands. The applicant was informed that the mitigation proposal should simulate the habitats that were being lost from the fill and if possible improve upon them.

The applicant prepared a number of proposals in succession each one having less quantity and quality than that requested by the state and myself. This process of negotiations went on for months until the applicant finally submitted a plan acceptable by the state. This plan was still less than what I felt was acceptable yet as I discussed it with the temporary Chief of the Regulatory Functions Branch, I was told that the Corps would accept the proposal.

Not satisfied that the mitigation plan was acceptable, I prepared a report indicating my assessment of the mitigation plan and showing why it was not satisfactory. Again I discussed this project with the temporary chief of the branch. I suggested a number of ways to improve the mitigation plan; he agreed that improvements could be made and suggested that I ask the applicant to consider some modification to the plan. Again this process of negotiating took many months. Through some carefully worded letters and additional meetings a proposal was finally made which I accepted.

The plan submitted by the Port included creating approximately 1.8 acres of intertidal and subtidal marsh and mudflat habitat. The negotiation process took over nine months. Yet at the very end of the process the Port claimed they had made a mistake and had intended to only create 1.25 acres in their mitigation plan. It was decided, however, that the permit would be issued and include the mitigation plan for the larger amount. The Port signed the permit indicating their acceptance of the terms and conditions included in that permit (with the greater amount of mitigation).

The final decision and policy for the McIntosh Slough fill proposal was the result of the interrelationship of each level of Corps policy. Written policy level called for a determination of need and use of the fill, an evaluation of public interest factors, and conditioning the permit to minimize resource impacts. The administrative policy level guided by the written policy level emphasized the need for mitigation. I negotiated with the applicant through many months and presented arguments for certain regulatory actions to the decision maker. The office policy level considered the supporting information for mitigation from the resource agencies, myself, and the input from the Port. They eventually made the decision to support a mitigation plan greater than the state requirements and issue a permit. This was relatively a new step for the Portland District, but the office never explicitly required a specific acreage of mitigation, and it is not clear how this office would enforce the permit if the quantity of mitigation was less than agreed to in the permit.

In this decision process for McIntosh Slough, policy became simplified through selectively limiting considerations, but it was not easy. Policy became a matter of consensus, and factual evaluations of public interest criteria did not occur. The decision to fill was made in the minds of those working with the project, provided proper mitigation action was taken. Up to that point in the process, the policy considerations were quite limited and relatively simplified. The final decision was, therefore, based on the comparison of resource values as interpreted by the staff and decision maker. The decision

made here is probably not the best decision due to lack of full consideration of public interest factors and the effects of balancing the varying views and opinions. However the decision was within the scope of acceptable public resource management actions, and in some respects has influenced district level policies.

## CONCLUSION

The Corps policy and decisions result in resource management which is within the publicly accepted norms. The policy system results in decisions which are consistent within a limited range and is buffered from rapid changes or large deviation from the norm. The characteristics of the Corps decisions are the result of the complex policy system. The greater the subjective elements, the greater the variability will be and hence the greater the potential for inconsistency. This is seen in the various decisions between districts where many of the policy factors are weighted differently due to the differences of personnel and their perspectives.

In order to reach a decision in the best public interest, the most up-to-date and objective evaluation of the public interest factors must be made. However, first the ability to obtain the best economic, best social, and best environmental input is limited because of the lack of expertise of staff and the lack of real knowledge. Second the ability to compare the information, if it were available, is poor. Therefore, to function as a resource manager, the Corps relies on subjective inputs. This greatly increases the complexity of the policy system. The policy and decision now become subject to influence by public opinion and persuasion. There is not, in many cases, proof that one policy is better than another. There is lack of agreement on values for criteria among experts in the various disciplines and the public is not generally well-informed. Therefore, the decisions made are not necessarily the best and many times the best decision is simply not

known. It is only through improved resource management techniques and public acceptance of those techniques that decisions will approach the best decisions in the public interest.

Changes are occurring, however, in terms of resource management methods and the public's awareness of the importance of the resources. This change is being reflected in the Corps' policies and decisions. The changes are slow but perceptible. As ways of dealing with ambiguities are improved and more sophisticated management tools are developed and used the better the decisions will become. Decisions made this year based on policy should be different than those made five years ago based on a different policy. Mitigation is one example of changing public awareness. Although the concept has been discussed for over ten years, it has only recently become incorporated into the policy system at the interpretation policy levels. Changes that first show up in the interpretation policy levels and become common practice do eventually show up in the written policy level. Mitigation, in fact, has explicitly been included in the new regulations which are being rewritten in Washington D.C. (not yet in effect). In addition the policy statement in the new regulations has been changed to reflect common practice at the interpretation policy levels. It states that all proposals not detrimental to the public interest will be permitted. This compares to the existing statement that no permit will be issued unless proposals are in the public interest. This recognizes the difficulties in evaluating projects to be in the public interest and actually states the more commonly used interpretation of the

regulations.

In the future the Corps policy system will continue to change. Positive gains have been made with the inclusion of explicit authority to require mitigation. I would expect that there will continue to be improvements in this area as well as attempts to deal with cumulative impacts. Again the system is not perfect nor ever will be, yet it does perform a necessary function in establishing standards to manage public resources.

FOOTNOTE PAGE

- 1 United States General Accounting Office. p.5, A discussion of different considerations and outcomes for proposed similar projects in different Corps Districts.
- 2 Department of Defence. Federal Regulations from 33 CFR 320.4 (a).
- 3 Glendon Schubert. As discussed in the article "Is there a Public Interest Theory."
- 4 Charles E. Lindblom. As discussed in the article "The Science of Muddling Through."
- 5 Claudia Copeland. Cited in this article on p.2 NRDC vs Callaway 392 F. Supp. 685 (DDC 1975).
- 6 Department of Defence. Federal Regulations 33 CFR 320.4 (a).
- 7 Lt. Col. John R. Hill Jr. Symposium Proceedings p.130.

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