

REGULATORY INFLUENCE OF THE CORPS OF ENGINEERS PERMIT BRANCH IN TEXAS

RANDY L. PITRE, Permit Branch, Galveston District, U.S. Army Corps of Engineers, Galveston, TX 77553

Abstract: The enforcement of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act has been delegated to the Permit Branch of the Corps of Engineers. The scope of the jurisdiction of the Permit Branch is discussed as well as the procedures of enforcement of Federal Regulations. The methods and problems of resolving an unauthorized fill activity in waters of the United States is discussed. The influence of public interest in issuing a permit in an environmentally sensitive area is discussed through a case history. The influence of public interest in issuing permits and the broad reaching jurisdiction of the Corps Permit Branch will experience changes through the forthcoming legislative sessions.

Proc. Ann. Conf. S.E. Assoc. Fish & Wildl. Agencies 35:700-706

The coastal wetlands of Texas comprise about 774 km² and are an important resource area on the Texas coast (Godfrey et al. 1973). Gosselink et al. (1974) discussed fishery production, aquacultural development, waste assimilation, and total "life-support" monetary values of wetlands and estuaries of the South Atlantic and Gulf coasts. However, tidal wetlands are lands which are particularly vulnerable to capricious development (Odom 1970), because many of the real values of the wetland are not recognized, or accrue some distance from the wetland itself.

Two federal laws which govern the use of waters of the United States and wetlands are the Rivers and Harbors Act of 1890 and the Federal Water Pollution Control Act of 1972. Beginning with the Rivers and Harbors Act of 1890 (subsequently replaced by the 1899 Act, 33 U.S.C. Section 401-466n), the Corps' sole criterion for deciding whether or not to grant a permit was the potential impact on navigation. Congress, in its deliberations on the 1958 Fish and Wildlife Coordination Act, noted: "More seriously, existing law has no application whatsoever to the dredging and filling of bays and estuaries in navigable waters under permit from the Corps of Engineers. This is a particularly serious deficiency from the standpoint of commercial fishing interest." However, Congress did not change the 1899 Act.

The Clean Water Act began in 1972 as the Federal Water Pollution Control Act Amendments with Section 404 adding new procedures and emphasis for the discharge of dredged or fill material. However, the Corps did not believe the law expanded the definition of the waters subject to Section 404 beyond those subject to navigability. In 1975, the Federal District Court for the District of Columbia, in *NRDC v. Callaway*, 392 F. Supp. 685 (D.C. District Court 1975), ordered the Corps to expand its legal definition of the waters subject to Section 404 jurisdiction. The expansion took place in 3 phases. The 1st phase, which took effect on 25 July 1975, added the wetlands adjacent to Section 10 waters. Phase II, which took effect 11 September 1976, picked up the 1st order tributaries to Section 10 waters including their adjacent wetlands and natural lakes larger than 5 acres. All other

tributaries and their adjacent wetlands were included in Phase III, which took effect on 1 July 1977.

Section 404 was never designed to protect wetlands but rather to control the discharge of 2 types of pollutants into the nation's waters, these being dredged material and fill. The 1972 Act does not even mention wetlands. The 1977 Amendments mention wetlands only in defining the waters subject to transfer of Section 404 to the states. Wetlands outside of Section 10 waters can be destroyed by excavating, draining, flooding, clearing, or shading without the need for a Section 404 permit so long as those activities do not include the discharge of dredged or fill material into the wetland. Considering these limitations, the role Section 404 has played in protecting wetlands is remarkable.

JURISDICTION

The 1899 Act was enacted to protect navigation and the navigable capacity of the nation's waters. Section 10 regulates certain types of structures or work in or affecting navigable waters of the United States, which are prohibited unless permitted by the Corps. The term "navigable waters of the United States" means those waters that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.

The purpose of the Section 404 program is to ensure that the chemical and biological integrity of waters of the United States is protected from unregulated discharges of dredged or fill material that could permanently alter or destroy the character of these invaluable natural resources. The term "waters of the United States" means the territorial seas, coastal and inland waters, lakes, and streams that are navigable, including adjacent wetlands; and tributaries to navigable waters including adjacent wetlands. Wetlands include those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

Many areas such as mudflats and sandflats, while not covered with vegetation, do not fit within the definition of wetlands, but are inundated with sufficient frequency and regularity to be included as part of the aquatic resource. These areas fall within Section 404 jurisdiction by including the areas covered by spring high tides and other high tides that occur with periodic frequency. The 25 July 1975 regulation established a cutoff point, referred to as the headwaters, for each river and stream defined as a water of the United States. Headwaters defined as a point on the stream at which a median flow of 5 cu ft/ sec. occurs.

ENFORCEMENT

The Corps has delegated the responsibility of enforcing Section 10 and Section 404 regulations to its Permit Branch. The Permit Branch is involved with processing permits for activities and determining if permitted or unpermitted activities are in compliance with Federal Regulations. The Permit Branch generally employs individuals of various backgrounds including archaeology, biology, engineering, and geology.

Department of the Army authorization to conduct a specific activity in waters of the United States generally requires an Individual permit. An applicant must

submit detailed drawings and other specific information when making application for a permit. Information provided is placed on public notice for 30 days to allow various federal and state wildlife and conservation agencies as well as the interested public to comment on the proposed activity. If no opposition to the proposed activity is received or if the opposition is resolved by the applicant the permit is generally issued within 90 days of applying. General permits are obtained through the same procedures as the Individual permit; however, General permits involve large areas where the proposed activities are considered to involve only specific sites and no adverse cumulative environmental impact.

Department of the Army authorization can also be obtained by "Nationwide permits," which have been designed to provide authorization for projects that have little or no adverse environmental impact on waters of the United States. Examples of activities that are authorized by Nationwide permit are; minor road crossings that involve less than 200 cu. yds of fill material below the plane of ordinary high water, pipelining through wetlands, fill placed incidental to the construction of bridges, and marine harvesting devices such as crab-traps. Authorization through a Nationwide permit is received as soon as it is determined that the proposed project falls within the guidelines of the permit.

Field investigations are generally required to determine if an unpermitted activity requires a permit or a permitted activity is in violation of requirements of the permit. Field investigations are conducted by on-site visits and aerial flights. Photographs, actual measurements of work performed, extent of wetlands, determination of the tidal range or mean high water, soil consistency, and drainage of a site are all considered during a field investigation. Information utilized to discover unauthorized activities generally is obtained from the public, other federal and state agencies, and Corps of Engineers personnel during their normal field activities. A cease and desist order is generally issued to stop unpermitted work when it has been determined that an activity is in violation of Federal Regulations. The U. S. Fish and Wildlife Service, National Marine Fisheries Service, Environmental Protection Agency, and Texas Parks and Wildlife Department are requested to comment on violations along the Texas coast. Many unauthorized activities do receive After-the-Fact permits when the work performed does not have adverse environmental impact. When comments from the various other agencies indicate that the project has or will have adverse impact on the environment, restoration of the area impacted is generally requested.

The U. S. Department of Justice through the local U. S. Attorney's Office is often requested to assist in obtaining resolution of unauthorized activities. Fines of up to \$2,500.00/day can be assessed for violations of the cease and desist order. Civil charges are generally enacted against 1st-time offenders who fail to comply with Federal Regulations. However, criminal charges may be enacted against repeated violators. Fines of up to \$1,600.00/acre have been assessed for filling of coastal wetlands; however, restoration of the impacted area is optimum in resolving a case. Mitigation by creating wetlands from a suitable upland area is satisfactory in some instances for obtaining authorization for the fill.

Permit Action

Described here is the involvement of public interest on issuing of a permit in an environmentally sensitive area. The permit authorized the dredging of 850,000 cu.

yds. of material from the Neches River, along an 8,000-foot reach, for roadway approach fills for a proposed new State Highway 87 bridge across the Neches River, at about 5 mi northeast of Port Arthur, Texas. Most of the approach fill will be placed in wetlands and shallow water areas. Also, a 50-foot by 10-foot work canal will be dredged through wetlands parallel to the proposed bridge. The project will fill a total of 29 acres of wetland and dredge 11.5 acres to impact a total area of 40.5 acres of brackish wetland and open water habitat.

The subject area is vegetated with *Spartina cynosuroides*, a productive intertidal species; *Phragmites communis* and *Spartina spartinae*, both high marsh species; *Spartina patens* and *Juncus roemerianus*, productive wetland species. The open water areas are important nursery grounds for various commercial species including; white shrimp (*Penaeus setiferus*), blue crab (*Callinectes sapidus*), spotted seatrout (*Cynoscion nebulosus*) and red drum (*Sciaenops ocellata*). The subject area contained very few roads and was basically in a natural state.

The existing bridge had only a 22-foot roadway with no emergency parking. The proposed bridge is planned to be 54 ft in width with emergency parking on each side and would be able to handle 2 lanes of traffic in both directions if the existing bridge should be closed for a period. The existing bridge was designed to carry 4,000 vehicles per day; however, it now carries over 14,000 vehicles per day. Between 1 January 1970 and 1 November 1977 there have been 280 traffic accidents on the bridge and its approaches through the wetland. In these 280 accidents, 12 people were killed, 137 were injured and there were 204 with property damages only. The existing bridge was completed in 1938 and by 1962 it was apparent to the local public that an additional bridge was needed.

In January 1976, the U. S. Fish and Wildlife Service (USFWS) objected to the project, in a letter, on the grounds that it would cause an adverse impact on the area's important fish and wildlife habitat. They suggested that a causeway be constructed on piling for the entire length of the roadway through the wetland. However, this would require the structure to be 4.8 mi in length instead of 1.8 mi and cost an additional \$30,000,000. They also suggested that the new bridge be constructed up stream from the existing one and that this would result in 9 acres less wetland to be filled. However, property owners at the upstream location objected primarily because of residents that would have to move and a docking facility for fuel tankers would be in close proximity to the proposed bridge.

On 14 May 1978 the applicant submitted the application to the Galveston District Permit Branch, and by 13 June 1978 the Public Notice was issued. Local authorities and agencies supported the project totally. On 9 August 1978 the National Marine Fisheries Service (NMFS) indicated that the proposed site would adversely impact wetlands, and they recommended that the permit not be issued unless the proposed bridge was moved upstream of the existing bridge. The USFWS, in an 18 July 1978 letter, recommended that before the permit plans are approved that the plans should show openings for water interchange across the existing and proposed road rights-of-way, any work canal dug to facilitate the construction of the proposed bridge should be located on the upstream side of the bridge site and that no waste material from the work canal or other operations be deposited in wetlands.

The applicant revised the plans to include USFWS's modifications on 22 September 1978. On 10 October 1978 the District Engineer notified the NMFS of

the intention to issue the permit unless the NMFS requested that the decision be referred to a higher authority. On 18 October 1978 the NMFS declined to request referral to a higher authority and on 3 November 1978 the applicant received Department of the Army authorization for the proposed work.

Compliance Action

This describes the action taken by the Galveston District Permit Branch to resolve an unauthorized dredge and fill activity. The Unauthorized activity was located in Hayes Ridge Lake which is north of the Gulf Intracoastal Waterway in Brazoria County, Texas. The wetland was vegetated with primarily *Spartina alterniflora* with some *Distichlis spicata* and *Juncus roemerianus*. The unauthorized activity consisted of constructing a 6,000- × 18-ft road through the wetland for access in a coastal oil field. The fill material for the road was obtained by dredging borrow pits on each side of the road. The borrow pits were 18 ft. wide and 1 to 3 ft. deep and extended the entire length of the road. The road displaced 2 acres of estuarine habitat with 21,000 cu. yds. of fill. The road also isolated 240 acres of wetland habitat from tidal circulation. The subject area is an important nursery ground for commercial finfish and shellfish species and also an important winter and summer habitat for some species of waterfowl and migratory birds.

The activity was discovered on 8 August 1975 by personnel of the Galveston District Permit Branch during an aerial flight of the surrounding area. On 18 August 1975 the violator was sent a cease and desist order. The violator responded by stating that the area was not tidally influenced and the work was started prior to the Corps' jurisdictional phase-in date of 25 July 1975. On 15 September 1975 personnel of the Permit Branch investigated the site by boat and found a small slough connecting to the Gulf Intracoastal Waterway. Tide gauges were set in the subject area and it was determined to receive tidal waters from the previously discovered slough.

In a 17 September 1975 letter the U. S. Fish and Wildlife Service stated that damage would result to the aquatic habitat from the work, and they recommended that the area be restored to its original configuration. By letter dated 22 September 1975 the U. S. Environmental Protection Agency stated that legal action should be taken in order to protect the wetlands.

In December 1975 the violator was requested to breach the road with 2 25-ft cuts. On 25 February 1976 the 2 breaches were inspected and found to meet the specifications requested. In a report dated 31 March 1976 to the U. S. Attorney for the Southern District of Texas, the District Engineer recommended that prosecution be deferred against the violator and that the violator apply for a permit for the fill road. The violator submitted the application to complete the fill road on 7 June 1976. However, the USFWS recommended that bridges be constructed across the breaches and that another breach should be included. The USFWS also stated that culverts would not be acceptable to allow complete water movement and that if the bridge recommendation was not accepted that the entire road should be removed.

The violator failed to accept the bridge proposal and on 7 December 1977 the District Engineer informed the violator that the permit application had been denied. The violator agreed to restore the area to its natural ground contours.

Restoration of the wetland was conducted with the utilization of a marsh buggy dragline and a turbidity curtain to reduce silting of the surrounding wetlands. The fill material was removed and placed in the existing borrow ditches and thereby restored the area to its natural ground elevation. This allowed tidal waters to inundate the area again. Removal of the fill was completed by 24 March 1978. A field investigation conducted on 16 April 1981 determined that revegetation was complete and vegetation present was representative of the surrounding wetlands.

DISCUSSION

The Corps starts each permit application for work in waters of the United States with a balanced scale. Through its own review and comments received from the public and interested agencies, the balance is loaded on both the issue and deny sides. The Corps tries to run a dynamic program, changing the weight given to a specific public interest factor as the public needs and sentiments change. The program is one which reflects the national concern for both the protection and utilization of water resources.

For the past few years, considerable weight has been assigned to the protection of wetlands. Energy development has been gaining weight on the other end of the balance. Food and fiber production are also gaining interest. We saw a rapid gain in the attention given to cultural and historic values on the deny side, but this appears to not be expanding. Water supply and conservation are already major factors out West. This may find itself on the issue or deny side depending on the nature of the proposal. Water quality and fish and Wildlife values continue to be of great interest to the public.

Not only do the advantages given to the public interest factors change in time but they vary considerably geographically. The regional influence of the public interest process is a very important aspect of the Corps' regulatory program. It is achieved through the district engineers who make practically all permit decisions. The balancing process may vary even within a District. Wetlands are far more prevalent in the eastern portion of the Galveston District which includes some of western Louisiana, than along the Mexican border. This is influenced in the type of fill permits which are issued in the above-mentioned areas.

Those who think that the Clean Water Act mandates that the Section 404 permit program be primarily aimed at environmental protection, and particularly wetland preservation, may risk the total loss of the protection now afforded in wetlands. The expanded Section 404 program now reaches into millions of acres of private lands never before subject to federal regulation. This is extremely evident in the types of violations that are discovered through compliance actions. If adequate recognition is not given to the rights of property owners, the federal protection of non-navigable waters may be lost. Legislation to substantially modify the Section 404 program was introduced in the 96th Congress and narrowly defeated. Senator Tower, a Republican from Texas, has introduced a bill to eliminate Phase II and III waters and it has already passed the Senate. Moreover, permit denials are being challenged in the courts. A reasonable, balanced, nonexpansive and flexible approach to the Section 404 program is critical to its survival.

LITERATURE CITED

- District of Columbia District Court. 1975. Natural Resources Defense Council, Inc. v. Calloway, 392 F. Supp. 685.
- Godfrey, C. L., G. S. McKee, and H. Oakes. 1973. General soils of Texas. Texas Agric. Exp. Sta., College Station.
- Gosselink, J. G., E. P. Odum, and R. M. Pope. 1974. The value of the tidal marsh. Center for Wetland Resources Publ. No. LSU-SG-74-03. La. St. Univ., Baton Rouge. 30pp.
- Odum, W. E. 1970. Insidious alteration of the estuarine environment. Trans. Amer. Fish. Soc. 99:836-847.