



Department of Energy

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APR 05 2000

Mr. James A. Saric, Remedial Project Manager
U.S. Environmental Protection Agency
Region V-SRF-5J
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

DOE-0533-00

Mr. Tom Schneider, Project Manager
Ohio Environmental Protection Agency
401 East 5th Street
Dayton, Ohio 45402-2911

Dear Mr. Saric and Mr. Schneider:

**THE DEPARTMENT OF ENERGY, FERNALD ENVIRONMENTAL MANAGEMENT PROJECT
POSITION ON WETLANDS FORMED INCIDENTAL TO CONSTRUCTION**

Enclosed is the Department of Energy's (DOE) position pertaining to wetlands formed incidental to construction. The DOE has committed to delineate and compensate for impacts to additional wetlands, which occurred after the approved wetland delineation in August 1993. This commitment to additional wetland mitigation is documented in the August 1997, Final Integrated Environmental Monitoring Plan. DOE has prepared the enclosed position to distinguish between wetlands formed incidental to construction and wetlands formed naturally. DOE is requesting concurrence from the U.S. Environmental Protection Agency (U.S. EPA) and Ohio Environmental Protection Agency (OEPA) for implementation of this position for dealing with the formation of wetlands from ongoing construction activities at the Fernald Environmental Management Project (FEMP) site.

If you have any questions, please contact Pete Yerace at (513) 648-3161.

Sincerely,

Johnny W. Reising
Fernald Remedial Action
Project Manager

FEMP:Yerace

Enclosure

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Mr. James A. Saric
Mr. Tom Schneider

cc w/enclosure:

- N. Hallein, EM-31/CLOV
- R. J. Janke, OH/FEMP
- K. Nickel, OH/FEMP
- E. Skintik, OH/FEMP
- P. Yerace, OH/FEMP
- G. Jablonowski, USEPA-V, SRF-5J
- T. Schneider, OEPA-Dayton (three copies of enclosure)
- F. Bell, ATSDR
- M. Schupe, HSI GeoTrans
- R. Vandegrift, ODH
- F. Hodge, Tetra-Tech
- D. Carr, Fluor Fernald/2
- J. D. Chiou, Fluor Fernald/52-0
- T. Hagen, Fluor Fernald/65-2
- F. Johnston, Fluor Fernald/52-2
- C. Straub, Fluor Fernald/65-2
- T. Walsh, Fluor Fernald/65-2
- E. Woods, Fluor Fernald/65-2
- AR Coordinator, Fluor Fernald/78

cc w/o enclosure:

- A. Tanner, OH/FEMP
- J. Harmon, Fluor Fernald/90
- S. Hinnefeld, Fluor Fernald/31
- ECDC, Fluor Fernald/52-7

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DRAFT
DOE-FEMP Position Paper
for
Wetlands Formed Incidental to Construction

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The U.S. Department of Energy (DOE) has committed to delineate additional wetlands, which occurred after the approved wetland delineation in August 1993. This commitment for additional wetland mitigation is documented in the August 1997 Final Integrated Environmental Monitoring Plan. As identified in each of the Operable Unit Records of Decision (ROD), approximately 10 acres of on-property wetlands will be impacted as a result of contaminated soil excavation. A mitigation ratio of 1.5:1 (1.5 acres of wetlands will be replaced for every one acre of wetland disturbance) was negotiated between DOE and the appropriate Agencies (U.S. EPA, OEPA, USFWS and ODNR). As a result of this agreement, 15 acres of wetlands must be established to compensate for the impacts during remediation. In a letter dated August 18, 1997, from the DOE to EPA and OEPA, DOE also committed to compensating for impacts to newly identified wetland areas. To date, DOE has committed to mitigation for additional impacts to or additional impacts anticipated to the wetland areas listed below which occurred after the 1993 wetland delineation. Mitigation for the following wetland areas (~ 1.9 acres) is in addition to the 10 acres identified in the RODs:

<u>Location</u>	<u>Wetland Acreage</u>
Northern Woodlot	0.3
Area 1, Phase II (East Field)	1.2
Southern Pines	0.37

DOE is requesting concurrence from the U.S. EPA and OEPA to distinguish between wetlands formed from ongoing construction activities at FEMP, and wetlands formed naturally. The following information presents the regulatory basis for the DOE's position on this matter:

Wetlands Formed Incidental to Construction

It is the position of DOE that suspect wetlands formed incidental to construction at FEMP are not considered to be "Waters of the United States" and as such, are exempt from mitigation as a result of being dredged or filled. FR Vol.51, No. 219, Thursday, November 13, 1986, Page 41217, Section 33 CFR 328.3 (attached) provides categories of waters not considered to be a "Water of the United States" which includes: *Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or*

excavation operation is abandoned and the resulting body of water meets the definition of the waters of the United States. (Attachment)

Wetland Areas Exempt From Wetland Mitigation

Wetlands formed incidental to construction activities (e.g., excavation, infrastructure installation, stormwater retention) related to remediation of FEMP which are anticipated to be dredged or filled from clean-up technologies (e.g., field implementation of technologies in support of each operable unit as specified in each operable unit record of decision) and/or ecological restoration activities are not subject to mitigation in accordance with Section 404 of the Clean Water Act. Wetland areas formed incidental to construction, which are not impacted from clean-up activities, will be evaluated for compatibility and contribution to the proposed area-specific restored ecosystem during ecological restoration design.

Wetland Areas Subject to Wetland Mitigation

Wetlands which are naturally formed (without assistance from construction activities), in addition to those identified in the approved 1993 Wetland Delineation Report, will be considered "Waters of the United States" subject to mitigation requirements in accordance with Section 404 of the Clean Water Act. Each wetland area which has formed naturally will be evaluated using the three parameter (hydrophytic vegetation, hydric soils, hydrology) approach outlined in the 1987 Army Corps of Engineers Wetland Delineation Manual or the most currently accepted methodology. The impact to these wetlands will be compensated through our wetland mitigation approach as outlined in our March 20, 1998, letter (DOE-0385-98) and the Natural Resource Restoration Plan. A permit information summary will also be prepared for each impacted wetland to comply with substantive permitting and regulatory requirements mandated under wetland applicable, relevant and appropriate requirements identified in various Operable Unit Records of Decision.

As a future note: those wetland areas which are caused incidental to construction but will not be impacted from implementation of activities related to clean-up technologies and/or ecological restoration will be considered "abandoned" per the exemption definition. Any future activities conducted after implementation of all clean-up and restoration work will be subject to mitigation requirements if they impact these "abandoned" wetland areas.

L-S Document 248758 FEDERAL REGISTER

11/13/86 [L-S document 248758, 51 FR 41206, 6224 lines]

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Final rule.

LEGI-SLATE Report for the 106th Congress Thu, February 18, 1999 7:55am (EDT)

Search of the Federal Register to Find 1 Document . . .

In FR vol. 51, 1986

Under Rules and Regulations

AND With Reference in the Caption to 'CORPS OF ENGINEERS'

11/13/86 [L-S document 248758, 51 FR 41206, 6224 lines]

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Final rule.

SUMMARY: We are hereby issuing final regulations for the regulatory program of the Corps of Engineers. These regulations consolidate earlier final, interim final, and certain proposed regulations along with numerous changes resulting from the consideration of the public comments received. The major changes include modifications that provide for more efficient and effective management of the decision-making processes, clarifications and modifications of the enforcement procedures,

modifications to the nationwide permit program, revision of the permit form, and implementation of special procedures for artificial reefs as required by the National Fishing Enhancement Act of 1984.

EFFECTIVE DATE: January 12, 1987.

Section 328.3: Definitions. This section incorporates the definitions previously found in Sec. 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

of "waters of the United States" includes waters in dry land which are excavated or diked and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 25 CFR 248.3(b)).

The term "Navigable waters of the United States" has not been added to this section since it is defined in Part 329.

A number of comments were received concerning the proposed change to the definition of the terms "adjacent" and the proposed definitions for the terms "inundation," "saturated," "prevalence," and "typically adapted." A number of commenters believed that these terms may better define the scope of jurisdiction of the section 404 program, but such definitions should more rightfully be within the province of the Environmental Protection Agency in order to remain consistent with the

opinion of Benjamin Civiletti, Attorney General (September 5, 1979). These definitions would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time.

To respond to requests for clarification, we have added a definition for "tidal waters." The definition is consistent with the way the Corps has traditionally interpreted the term.

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