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ERIC L. TROSCLAIR

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08 JUL 30 PM 1:08
REGIONAL HEARING CLERK
EPA REGION VI

July 28, 2008

VIA FEDERAL EXPRESS

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region VI
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

RE: The Matter of Lafourche Parish, Respondent
Docket NO. CWA-06-2007-2725
Our file #2007-127

Dear Ms. Vaughn:

Enclosed is Respondent's Prehearing Exchange, which I request that you file into the suit record of the above captioned case. Please thereafter return a stamped copy of same to me.

I remain, with best wishes.

Yours very truly,



CHRISTOPHER H. RIVIERE

CHR/cw

enclosures

cc: David Gillespie, U.S. EPA, Region VI (w/encl)
Faye Smith, Lafourche Parish (w/encl.)

FILED
08 JUL 30 PM 1:08
REGIONAL HEARING CLERK
EPA REGION VI

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS**

**IN THE MATTER OF
LAFOURCHE PARISH
RESPONDENT**

▪
▪
▪ **DOCKET NO. CWA-06-2007-2725**
▪
▪

RESPONDENT'S PREHEARING EXCHANGE

The respondent, **Lafourche Parish**, through undersigned counsel, hereby files its Prehearing Exchange pursuant to a Prehearing Order, issued by the Administrative Law Judge and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination of Suspension of Permits, 40 C.F.R. Part 22. In the Order, the Administrative Law Judge instructed the Parties to file a Prehearing Exchange containing specific information. This document contains Respondent's responses to Prehearing Order.

A. WITNESSES:

The Respondent may call the following witnesses at the hearing:

Expert and Fact Witnesses

1. **Name:** Ray Cheramie
Title: Former Director of Public Works, Lafourche Parish Government

Mr. Cheramie worked for many years as the director of Public Works for the Parish of Lafourche. He will testify regarding the facts and circumstances of the work that is subject to this action and the inquiry which he undertook to determine that the site in question was in fact not located in a jurisdictional wetland.

2. **Name:** Cullen Curole
 Title: Former Parish Administrator, Lafourche Parish Government

Mr. Curole is the former Parish Administrator for the Parish of Lafourche. He will testify regarding the facts and circumstances of the work that is subject to this action and any inquiry which he undertook to determine that the site in question was not located in a jurisdictional wetland. He will also testify about his activities in dealing with the USACE and EPA, possibly as a rebuttal witness.

3. **Name:**
 Title: Records Custodian, Lafourche Parish Government

Personnel of the Lafourche Parish Government may be called to identify and/ or establish various records of the Parish of Lafourche and the absence or receipt of certain documents or records.

4. **Name:** Furcy J. Zeringue II (Under Cross Examination)
 Title: Botanist, USACE

Email: furcy.j.zeringue@usace.army.mil

- 5: **Name:** John Herman (Under Cross Examination)
 Senior Project Manager, Permitting, USACE

6. **Name:** Donna Mullins (Under Cross Examination)
 Title: Environmental Life Scientist, E.P.A.

7. **Name:** Kodi Babin (Possible Expert Testimony)
 Title:

Mr. Babin is a Senior Environmental Project Manager\ Biologist and is employed by T. Baker Smith Engineers. He will testify as an expert regarding his site analysis and his determination regarding the issue of whether or not the site at issue is a jurisdictional wetland subject to permitting requirements of the USACE.

8. **Name:** Charlotte Randolph
 Title: Parish President

Ms. Randolph is the President of Parish of Lafourche. He will testify regarding the facts and circumstances of the work that is subject to this action and any inquiry which he undertook to determine that the site in question was not located in a jurisdictional wetland. He will also testify about his activities in dealing with the USACE and EPA, possibly as a rebuttal witness.

9. **Name:** Gerald Breaux
 Title: Former Parish President

Mr. Breaux a former President of Lafourche Parish. He may be called as a witness in regard to facts surrounding the Matthews project should that matter be consolidated into these proceedings

10. **Name:** Steve Folse
 Title: Special Project Coordinator

Mr. Folse works as the Special Projects Coordinator for the Department of Public Works for the Parish of Lafourche. He will testify regarding the facts and circumstances of the work that is subject to this action and the inquiry which the Parish department of Public Works undertook to determine that the site in question was not located in a jurisdictional wetland. He will also testify regarding the facts surrounding the work performed at the site and the necessity for said project.

- 11. Name:** Kenny J. King (Possible Expert Testimony)
Title:

Mr. King is the Principal - Environmental Group\ Biologist and is employed by T. Baker Smith Engineers. He will testify as an expert regarding his site analysis and his determination regarding the issue of whether or not the site at issue is a jurisdictional wetland subject to permitting requirements of the USACE.

- 12. Name:** John Plaisance
Title: J. Wayne Plaisance, Engineer (Possible Expert Testimony)

Mr. Plaisance is a licensed Louisiana civil engineer. He may provide testimony regarding the facts and circumstances involved with the Matthews site project should that matter be consolidated into these proceedings.

- 13. Name:** Nick Matherne
Title: Coastal Zone Manager, Parish of Lafourche

Mr. Matherne works as the Coastal Zone Manager for the Department of Public Works for the Parish of Lafourche. He will testify regarding the facts and circumstances of the work regarding the Matthews project that is subject to this action should consolidation be allowed. He will also testify regarding the facts surrounding the work performed at the site and the necessity and urgency for said levee project as it relates to hurricane protection. Mr. Matherne will also testify regarding available ongoing coastal restoration projects available for consideration as a supplemental environmental project, as necessary.

14. **Name:** David Poincon
Title:

Mr. Poincon works in the Department of Public Works for the Parish of Lafourche. He will testify regarding the facts and circumstances of the work that is subject to this action and the inquiry which the Parish department of Public Works undertook to determine that the site in question was not located in a jurisdictional wetland. He will also testify regarding the facts surrounding the work performed at the site and the necessity for said project.

15. **Name:** Andree Usee
Title:

Mr. Usee works in the Department of Public Works for the Parish of Lafourche. He will testify regarding the facts and circumstances of the work that is subject to this action and the inquiry which the Parish department of Public Works undertook to determine that the site in question was not located in a jurisdictional wetland. He will also testify regarding the facts surrounding the work performed at the site and the necessity for said project.

16. **Name:** Representative of T. Baker Smith, Inc.
Title:

A representative of the engineering firm may be called to establish the foundation for certain documents should same be necessary.

17. **Name:** Representative of North Lafourche Levee District
Title:

The representative will provide testimony that the straight line waterway referred to by the USACE as "Bayou Cutoff" is in actuality a man made drainage canal identified as the Forty Arpent Canal. Said canal is in fact not a natural water body and is non-navigable. It is not a tributary to a jurisdictional waterway.

18. Any witness listed by the complainant.
19. Any rebuttal or impeachment witness, as required.

The Respondent respectfully reserves the right to amend its prehearing exchange to add or subtract witnesses.

B. EXHIBITS:

The Respondent may offer into evidence the following exhibits:

EXHIBIT NO. DESCRIPTION:

1. Relevant topographic maps of Lafourche Parish, Louisiana.
2. Relevant aerial photographs of Lafourche Parish, Louisiana.
3. Answer to Administrative Complaint.
4. Photographs of the site subject to this matter in globo depicting the area from Louisiana Highway 1 to the Forty Arpent Canal.
5. Hand drawn site sketch made by Furcy Zeringue, II (Government Exhibit 5).
6. Maps and Photographs from EPA.
7. Handwritten note (believed to be made by Furcy Zeringue, II) regarding water flow from site in Section 19.
8. Servitude documents (in globo) regarding the Rousse - Theriot outfall project.
9. Violation report form dated 2 March 2006.
10. Photographs and other documents contained within or referenced in the report of T. Baker Smith Engineers (to be produced when available).
11. The deposition of Furcy Zeringue, II taken July 23, 2008.

12. The deposition of John Herman taken July 23, 2008.
13. Clean Water Act Section 404 Settlement Penalty Policy.
14. USACE Wetlands Delineation Manual (Technical Report Y-87-1).
15. Joint Permit Application, Permit Number: P20071009 (07/16/2007).
16. Engineering documents of J. Wayne Plaisance, Inc., re: Mathews Canal March 2007.
17. John Herman email, November 6, 2007.
18. John Herman email, October 15, 2007 with photographs.
19. Lafourche Parish Penalty Calculation, June 23, 2008.
20. Wetland Enforcement Summary, updated June 10, 2008.

All of the exhibits listed above are attached hereto and incorporated herein by reference.

The Respondent respectfully reserves the right to amend its prehearing exchange to add or subtract exhibits and/or documents.

C. PLACE FOR HEARING AND ESTIMATED TIME NEEDED:

Pursuant to 40 C.F.R. §§ 22.19(d) and 22.21(d), the Respondent requests that the hearing be held Thibodaux, Louisiana. . Respondent estimates two (2) days will be needed to present its case.

D. ASSESMENT OF CIVIL PENALTY:

STATUTORY FACTORS

The Respondent, Lafourche Parish, objects to the recitation of statutory factors as outlined by the Agency, inasmuch as the site in question is not a jurisdictional wetland.

PENALTY CALCULATION

The Respondent, Lafourche Parish, objects to the penalty calculation proposed and as outlined by the Agency, inasmuch as the site in question is not a jurisdictional wetland.

E. PAPERWORK REDUCTION ACT APPLICABILITY

Not applicable to these proceedings.

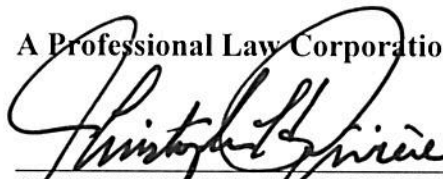
[LEFT BLANK INTENTIONALLY]

Dated this 28th day of July, 2008

Respectfully submitted;

LAW OFFICE OF CHRISTOPHER H. RIVIERE

A Professional Law Corporation



CHRISTOPHER H. RIVIERE (#11297)

ERIC L. TROSCLAIR (#30099)

103 West Third Street

Post Office Box 670

Thibodaux, Louisiana 70302-0670

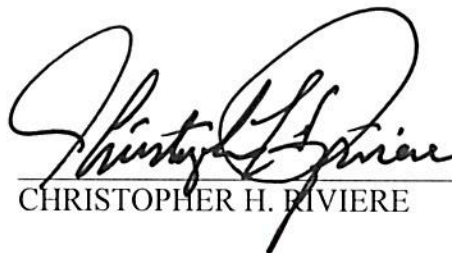
Telephone: (985) 447-7440

Facsimile: (985) 447-3233

ATTORNEYS FOR LAFOURCHE PARISH

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served on all counsel of record by Facsimile and/or First Class, United States Mail, properly addressed and postage prepaid, this 28th day of July, 2008.


CHRISTOPHER H. RIVIERE

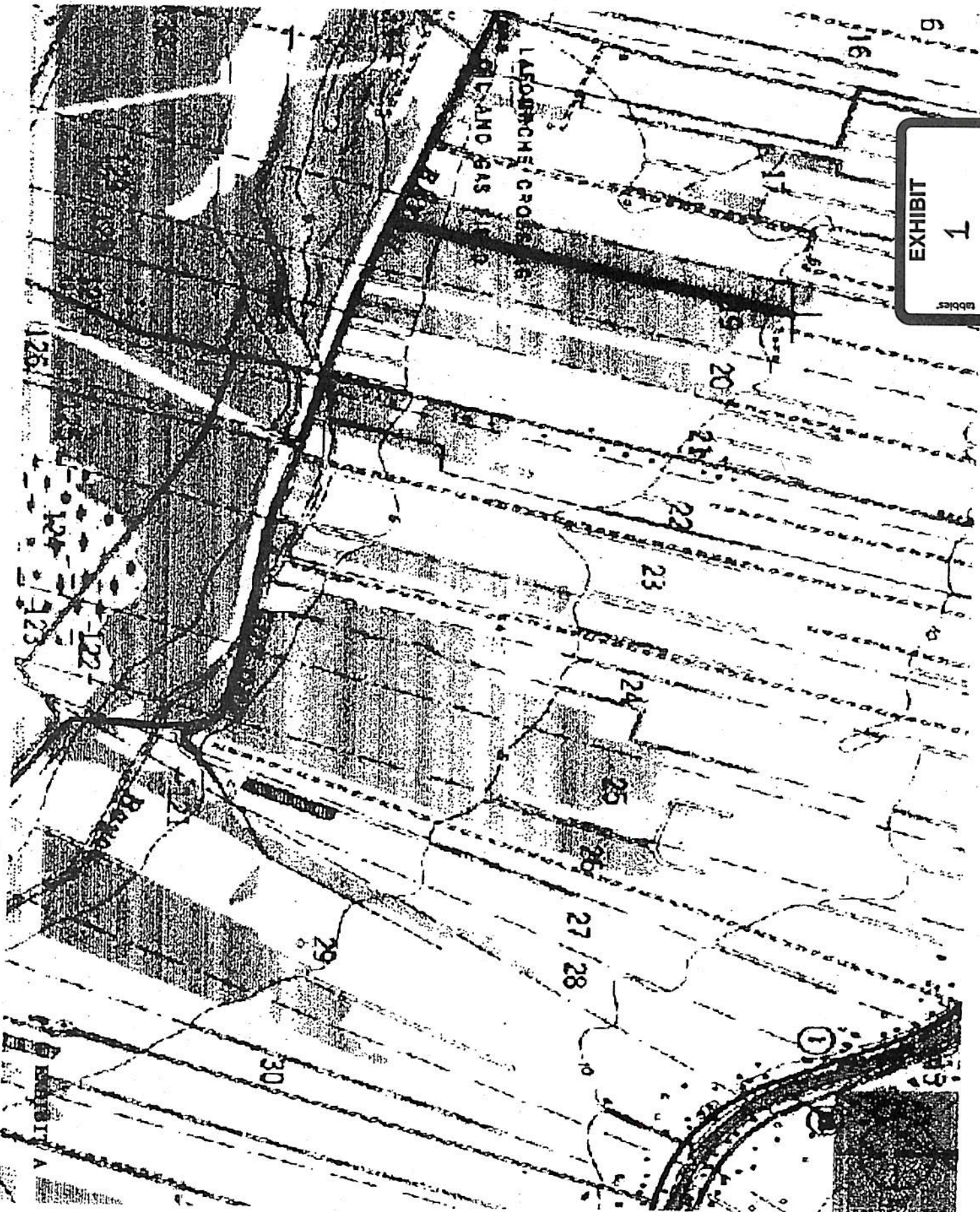


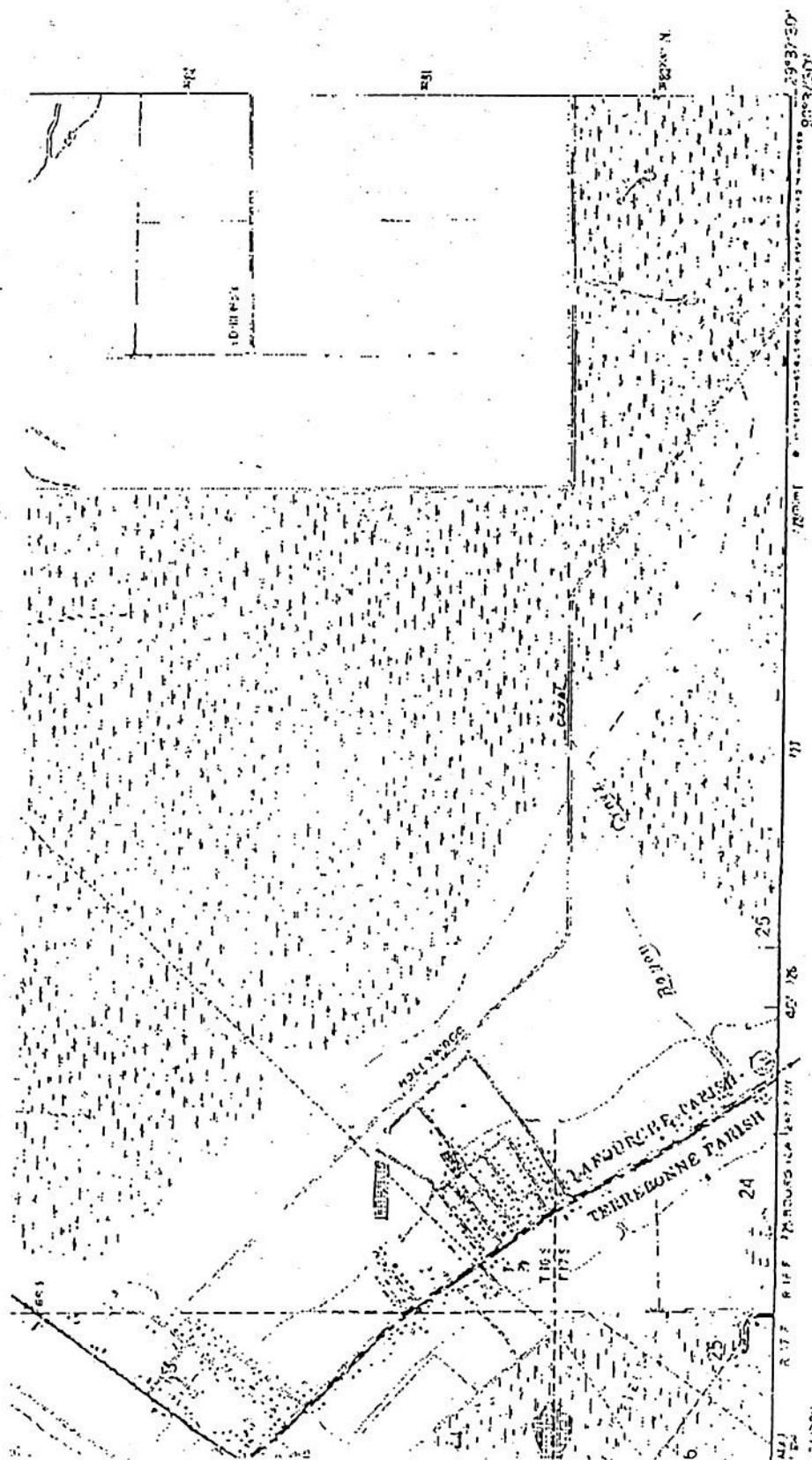
EXHIBIT
1

Sep 21 07 01:01p

DPU Raceland

9855377297

P. 1



ROAD CLASSIFICATION

Highway Lightly Unimproved State Road



SAVOIE, LA.

NOVEMBER 11, 1963
12937.5 - 12937.5

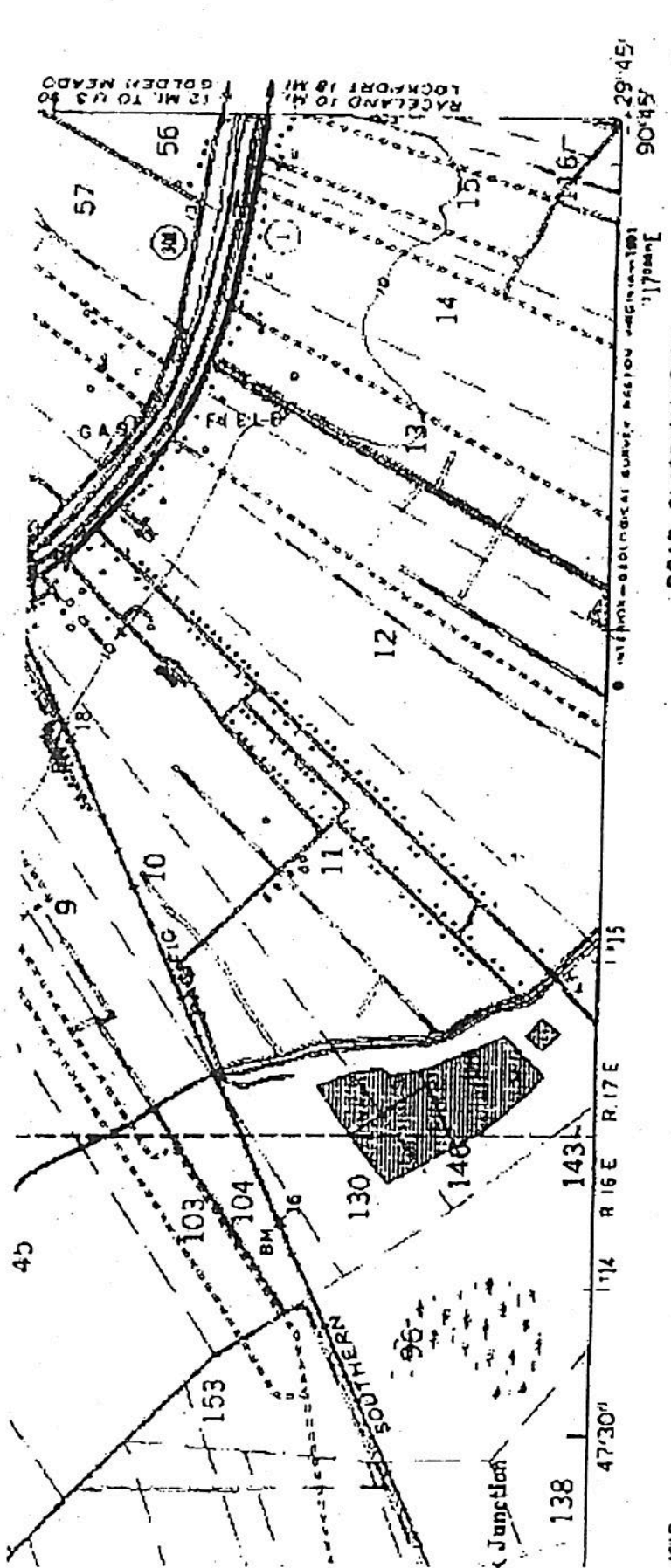
1963
PHOTO REPRODUCED 1974 AND 1980
DATA FROM 1963-1965

THIS MAP ACCURACY STANDARDS
4 COLORADO 8025, ORRISTON, VIRGINIA 22052
2 PUBLIC WORKS, RATION ROUGE, LOUISIANA 70001
AND SYMBOLS IS AVAILABLE ON REQUEST

Parish map shows a portion of the map in cooperation with
State of Louisiana Department of Transportation and Highways
1974 and 1978. Map issued 1980
This information is field checked

EXHIBIT B

214-1



MILE

ROAD CLASSIFICATION

- Primary highway - hard surface
- Secondary highway - hard surface
- Light-duty road, hard or improved surface
- Unimproved road
- Interstate Route
- U.S. Route
- State Route



QUADRANGLE LOCATION

Revisions shown in purple and woodland compiled from aerial photographs taken 1978. Map edited 1980. This information not field checked.

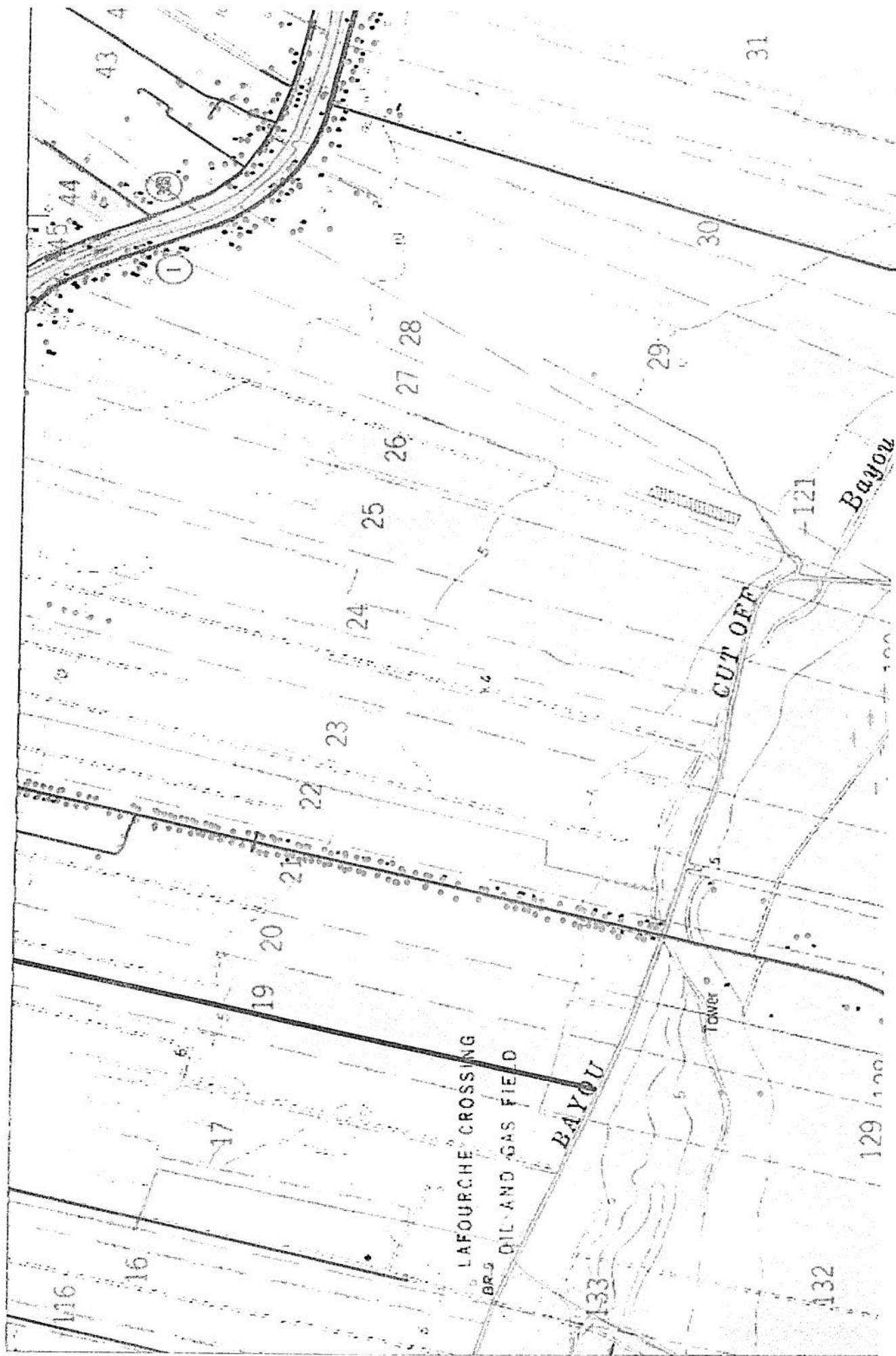
Purple line indicates extension of urban area

THIBODAUX, LA.

SE 1/4 THIBODAUX 15' QUADRANGLE
N 2945-W 9045/7.5
PHOTOINSPECTED 1983
1962

PHOTOREVISED 1980
DMA 7843 IV SE-SERIES V885

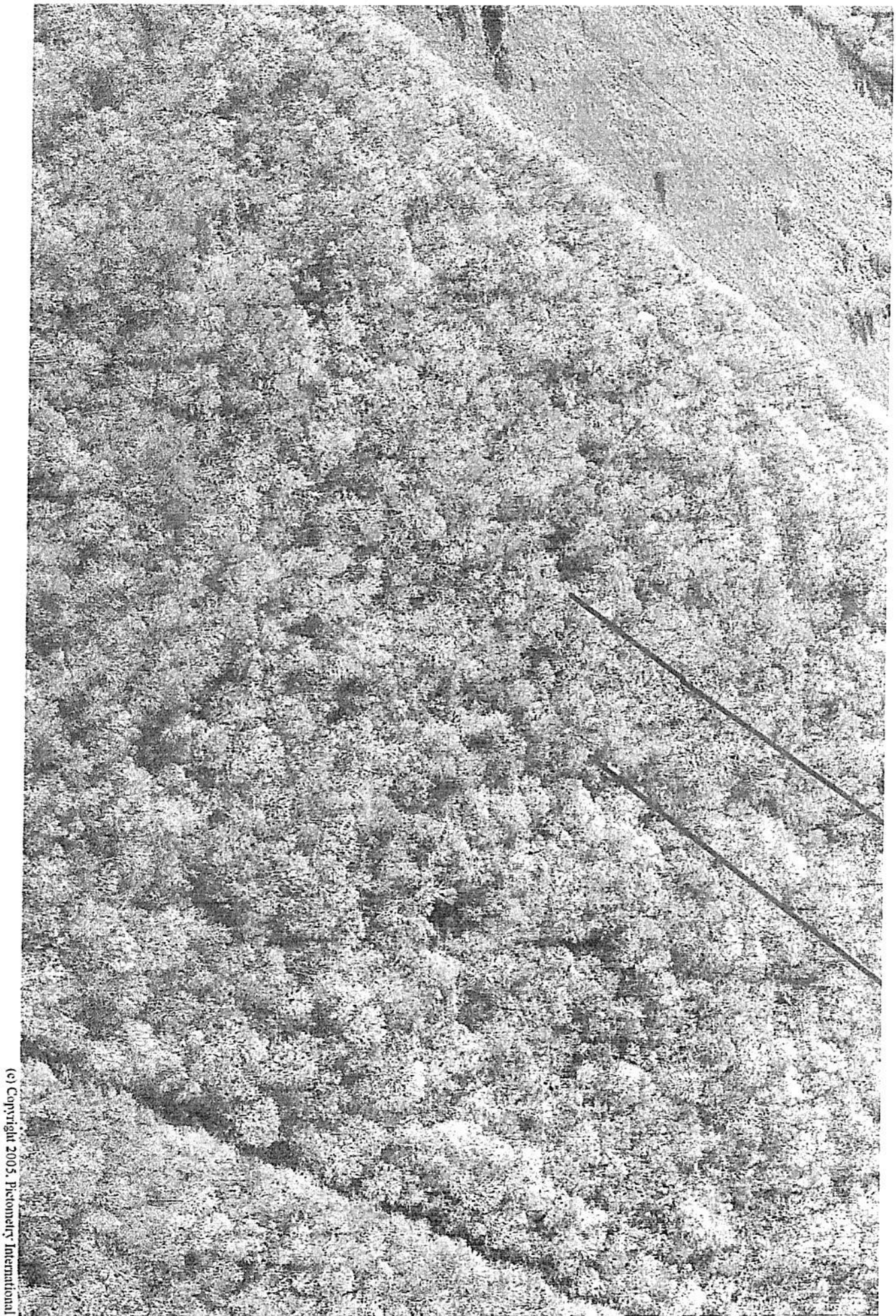
EXHIBIT B



EXHIBIT

2

bbles



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

07 SEP 21 PM 2:06
REGIONAL HEARING CLERK
EPA REGION VI

In the Matter of

Lafourche Parish

Respondent.

Docket No. CWA-06-2007-2725

Proceeding to Assess a
Civil Penalty Under Section 309(g)
Of the Clean Water Act

Answer to Administrative Complaint

I. STATUTORY AUTHORITY

1. On behalf of the Lafourche Parish Government (Parish), the Parish President, Charlotte Randolph does hereby acknowledge the Statutory Authority of the United States Environmental Protection Agency and its Administrator and recognizes its delegation of Director of the Water Quality Protection Division of EPA Region 6 in this complaint.

Again on behalf of the Parish, President Randolph does designate its Parish Administrator, Cullen Curole, JD, to prepare this answer and to receive service relating to these proceedings in accordance with 40 CFE Ch. 1 Section 22.5(c) (4). Mr. Cullen Curole may be called at (985) 446-8427 (office), cell (985) 665-7324 mailed to Post Office Drawer 5548, Thibodaux, LA 70302 and served at 402 Green Street, Thibodaux, LA 70301.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. Lafourche Parish does admit that at all times relevant to this action and the violations alleged herein, the Parish is a political subdivision of the State of Louisiana and a "person" as defined by Section 502(5) of the Act, 33 U.S.C. Section 1362(5).

3. Lafourche Parish does Admit the relevant law (Section 301 (a) of the Act, 33 U.S.C. Section 1311(a)) during the relevant time period.

4. Lafourche Parish does Admit the relevant law (Section 404 of the Act, 33 U.S.C. Section 1344 and recognizes the authority of the Secretary of the Army to issue permits.

5 & 6. Lafourche Parish does Deny the actions alleged in Paragraph 5 & 6 to the degree that it raises the question about whether the area in question should be considered

EXHIBIT

3

tabbies

jurisdictional wetlands in accordance with the Act. Maps utilized by the parish in preparation for the activity did not indicate jurisdictional wetlands. (Exhibit A & B)

7. Lafourche Parish does Admit that its activity included dredging a drainage outfall canal and placing the material adjacent to said outfall canal.

8. Lafourche Parish does Admit that equipment utilized by the parish in said activity might be considered a "point source" in accordance with the Act.

9. Lafourche Parish does Deny the statements made in paragraph 9 again to the degree that we raise the question about whether the area in question should be considered jurisdictional wetlands in accordance with the Act. Admittedly maps located at the parish's Department of Public Works are old and perhaps outdated; the maps utilized by the parish in preparation for the activity did not indicate jurisdictional wetlands. (Exhibit A & B)

10. Lafourche Parish does Admit that with regard to the activities referenced in paragraphs 5 & 6, the parish did not and does not have a permit authorizing the dredge works.

11. Lafourche Parish does Admit and acknowledge the relevant law with regard to "each unauthorized discharge" being recognized as a separate violation.

12. Lafourche Parish does Admit and/or acknowledge the relevant law with regard to the administrative penalties available in this sort of action. While recognizing that the penalty could be higher, the parish would like to take this opportunity to seek injunctive relief and request a reduction of the \$40,000 proposed fee. The current administration of the parish has attempted to cure and improve the ways and actions of the parish relevant to activity in wetlands. With this violation parish administrative officials are learning more about the degree and dimension of the problem within staff and reference material used in preparation for public works activities. The parish is updating mapping resources and the Parish President and I have directed staff to seek review and application any time activities are planned in areas that are even questionable with regard to jurisdictional wetlands.

I hereby certify that the above and foregoing information is true to the best of my knowledge, information and belief, and that it is not interposed for delay.

CULLEN CUKOLE, JD
LAFOURCHE PARISH ADMINISTRATOR
Bar Roll No. 24064

Photo # 2 @ 1200' south of LA 1, viewing south towards the Forty Arpent Canal

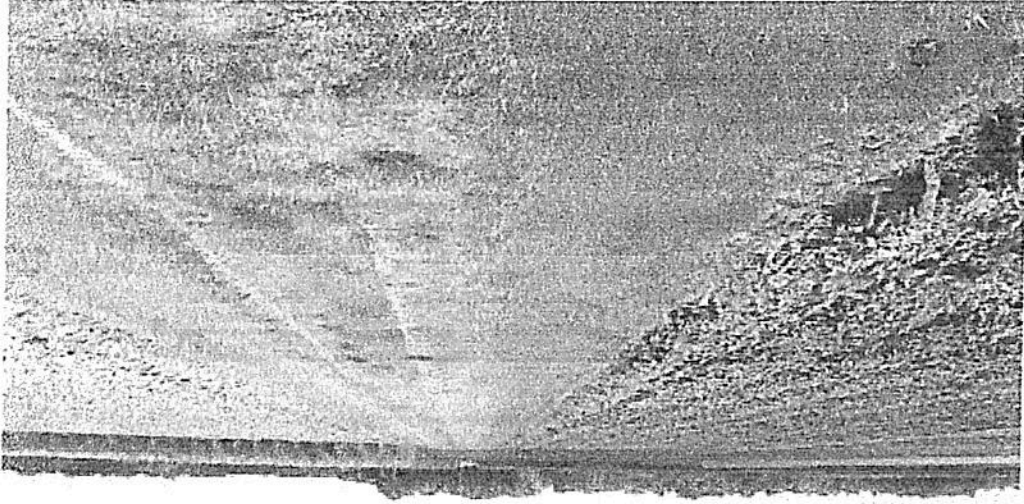


Photo # 1 @ 250' south of LA 1, viewing south towards Forty Arpent Canal

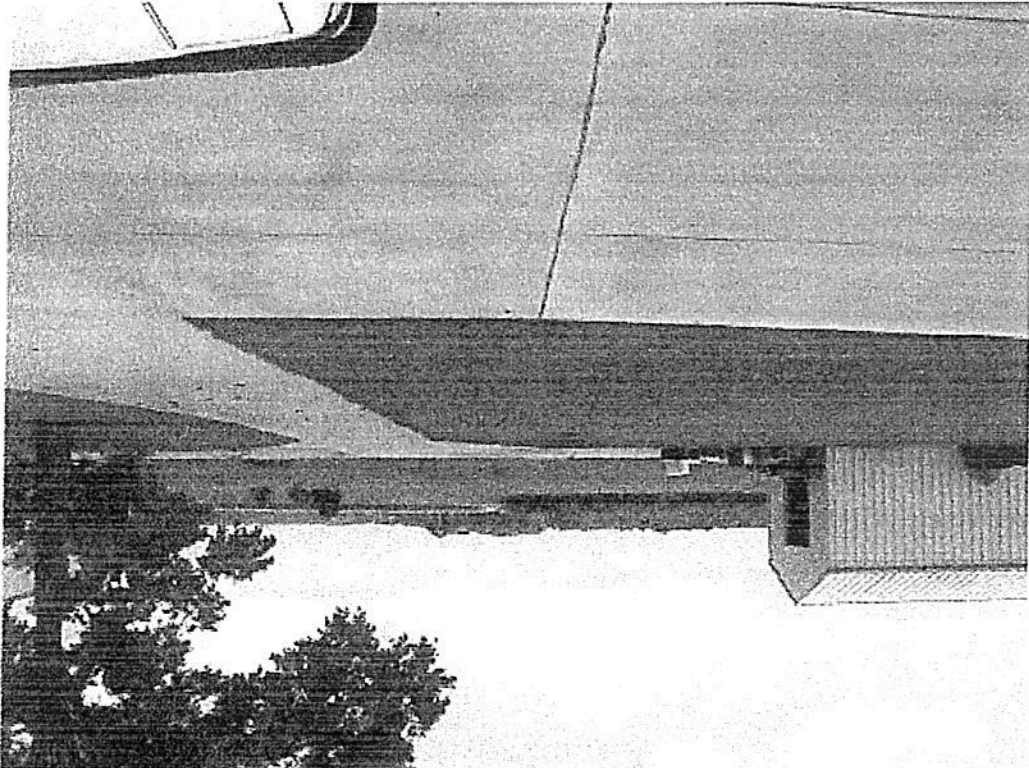


Photo # 4 @ 2800' south of LA 1, viewing south towards the Forty Arpent Canal

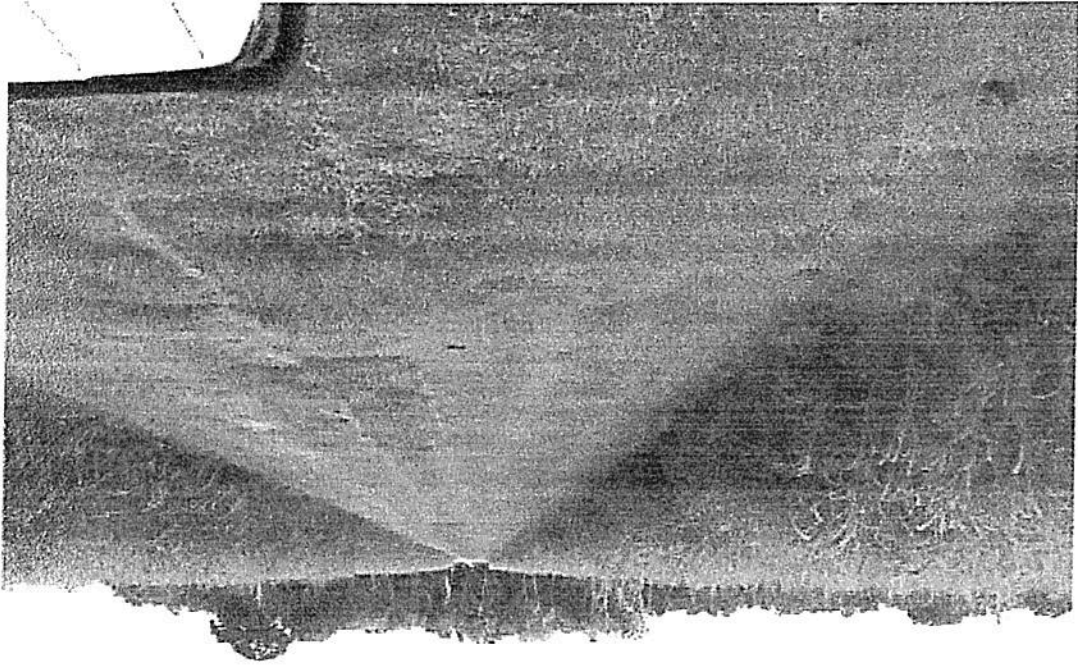
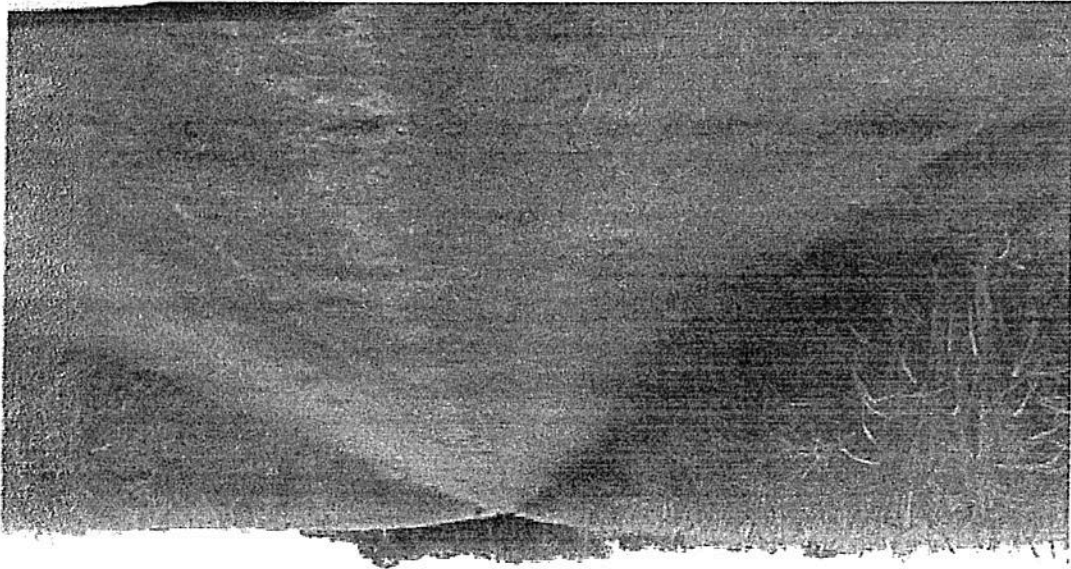


Photo # 3 @ 2000' south of LA 1, viewing south towards the Forty Arpent Canal



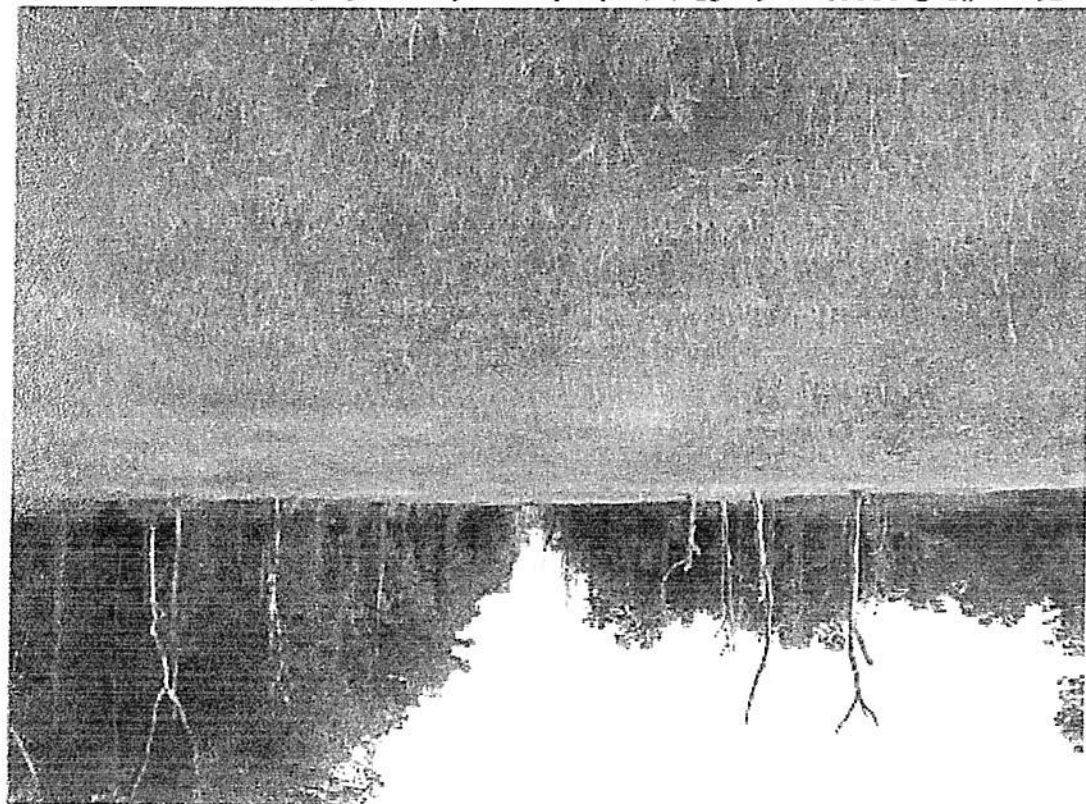


Photo #5 @ 3800' south of LA 1, viewing south towards the Forty Arpent Canal
Edge of tree line

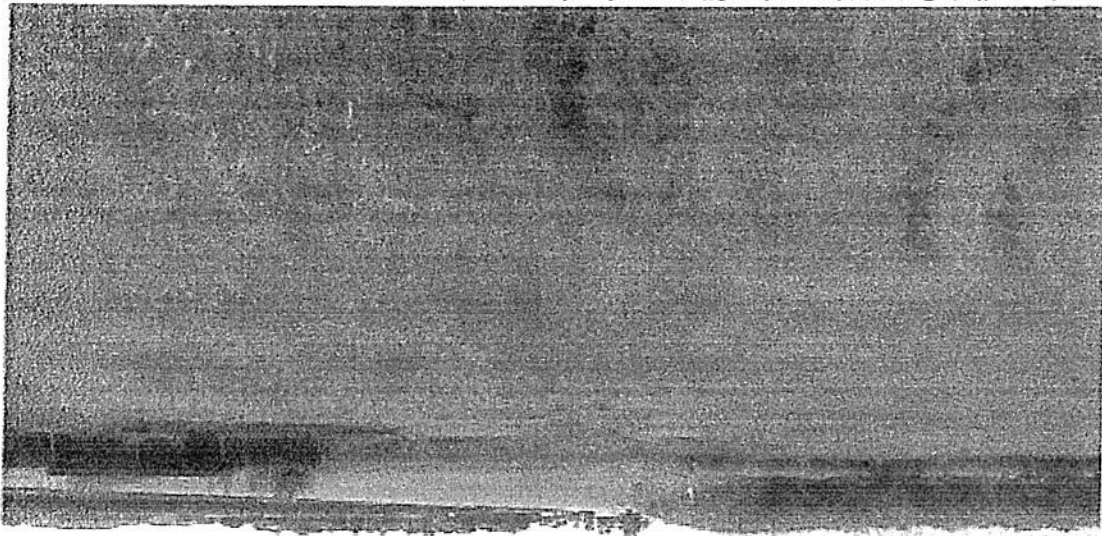


Photo # 6 @ 3800' south of LA 1, viewing north towards the LA 1

Photo # 11 @ 7300' south of LA 1, viewing south towards the Forty Arpent Canal

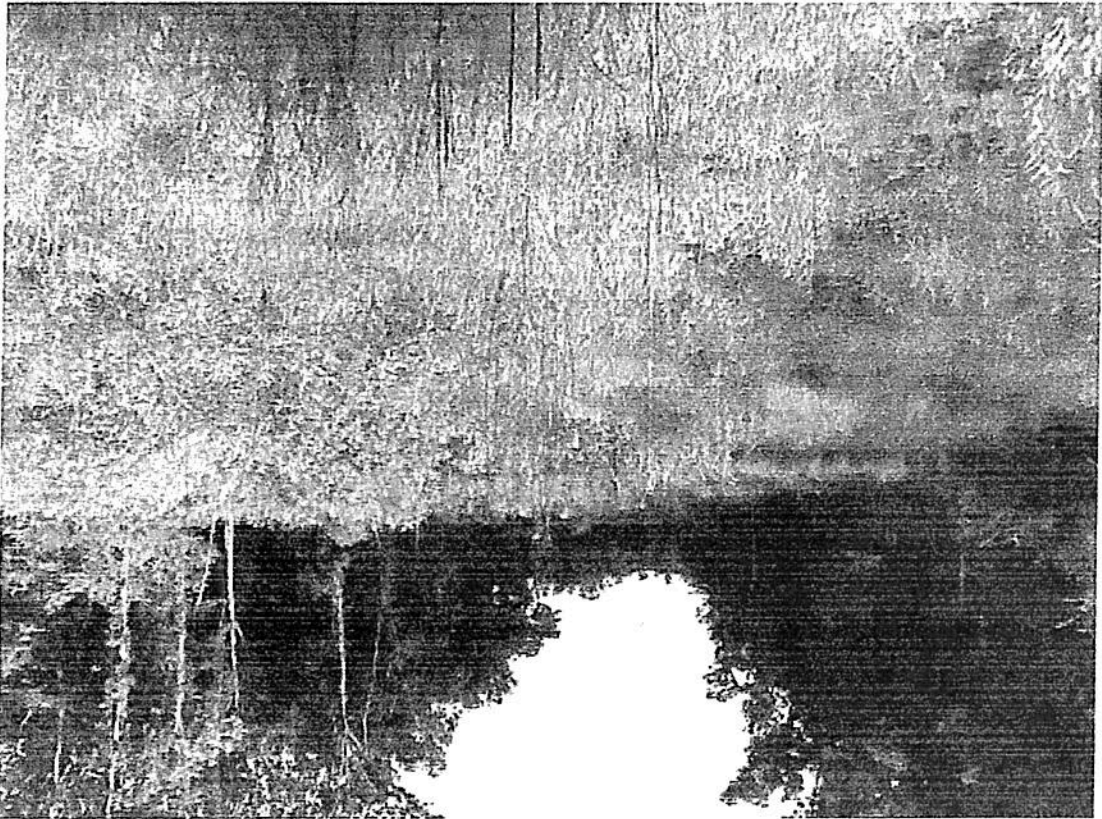


Photo #12 @ 7300' south of LA 1, viewing south towards the Forty Arpent Canal
The cease and desist location of ditch being constructed 700' north of Forty Arpent Canal



Photo # 8 @ 5200' south of LA 1, viewing south towards the Forty Arpent Canal

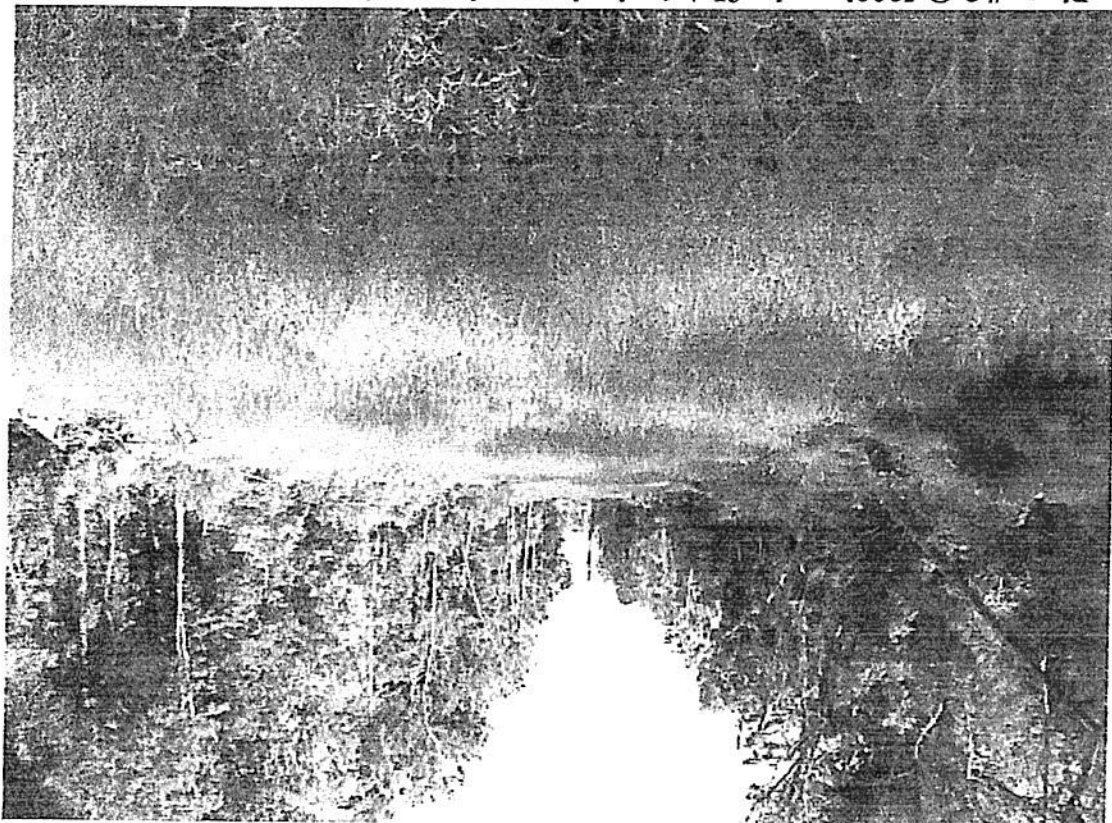
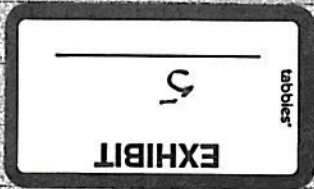


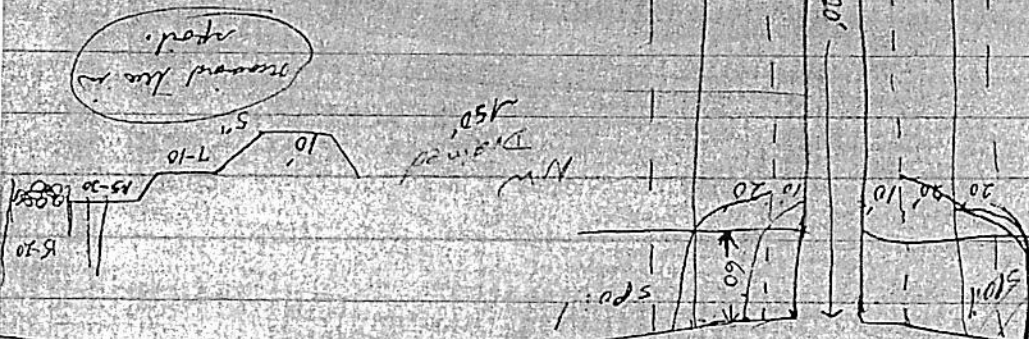
Photo # 7 @ 4700' south of LA 1 viewing south towards the Forty Arpent Canal





FSV - 3 MAR. 2016

40 Airport Canal



Excavation on site

DAE W00 - 501AR 2202 C-III

Lafayette Parish Public Works

E 21

Mocha tropin

First 1000' area

in remnant cleared area
Historical landscape

The site within

~8.65 ac - forested
100' x 3880'

~600'
0-6 - 10YR 4/2
10YR 5/6 mt. ~ 16%

Lizard tail

Green dragon

elderberry

Water oak

nutall oak

Bald cypress

sugarberry

Scrubo

Thompsonia kunthii

Alnus incana

Obvious signs of

subsurface

around older trees

PIP cypress

~2000'
0-4 - 10YR 3/1, 10YR 4/3
5 - 10YR 4/1, 10YR 5/2

Dark Red maple

brodiaea

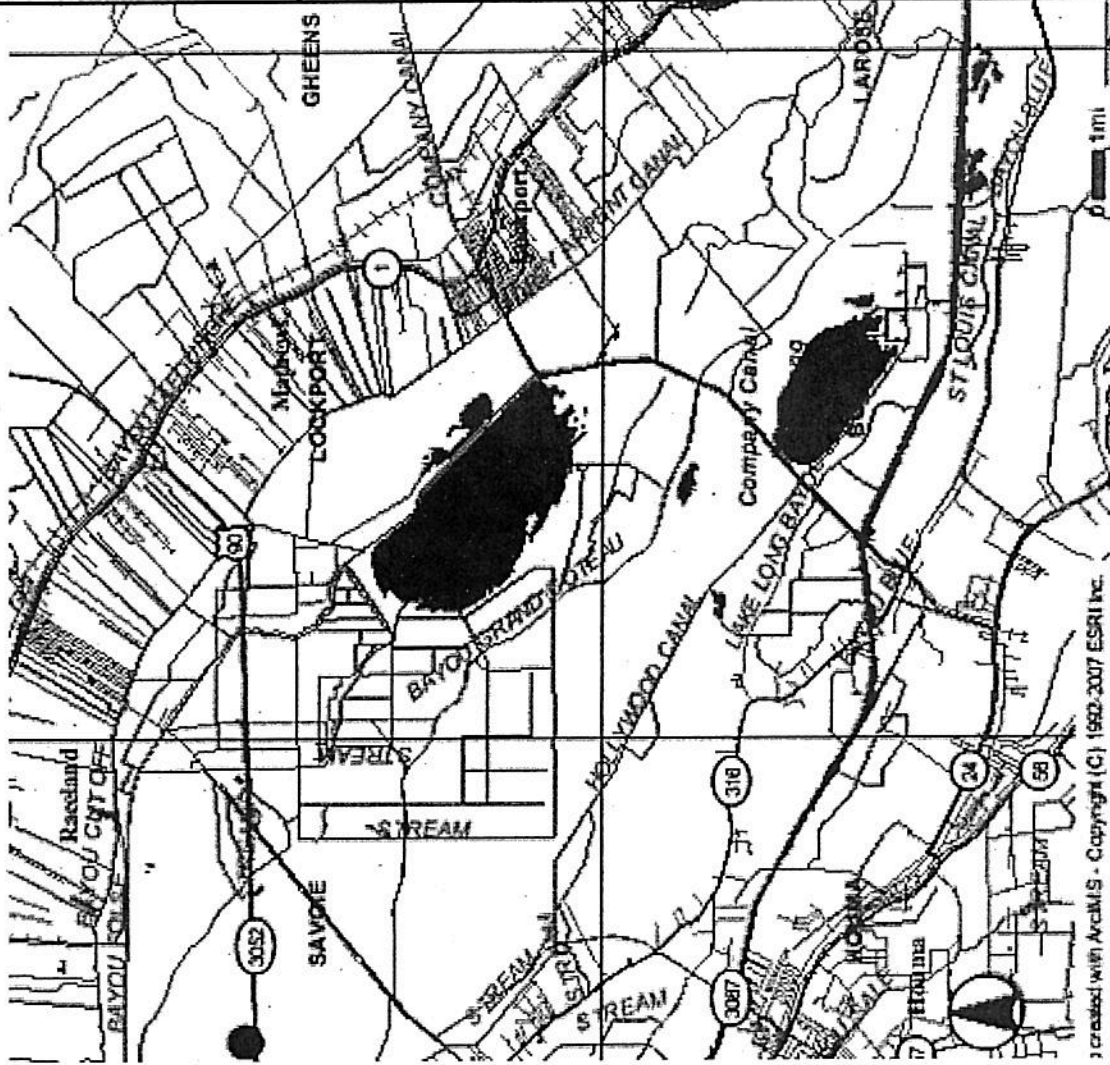
Spotted Lilly

Grounds (purple spots)

Conspicuous

Shrubbery with

lakefields Map

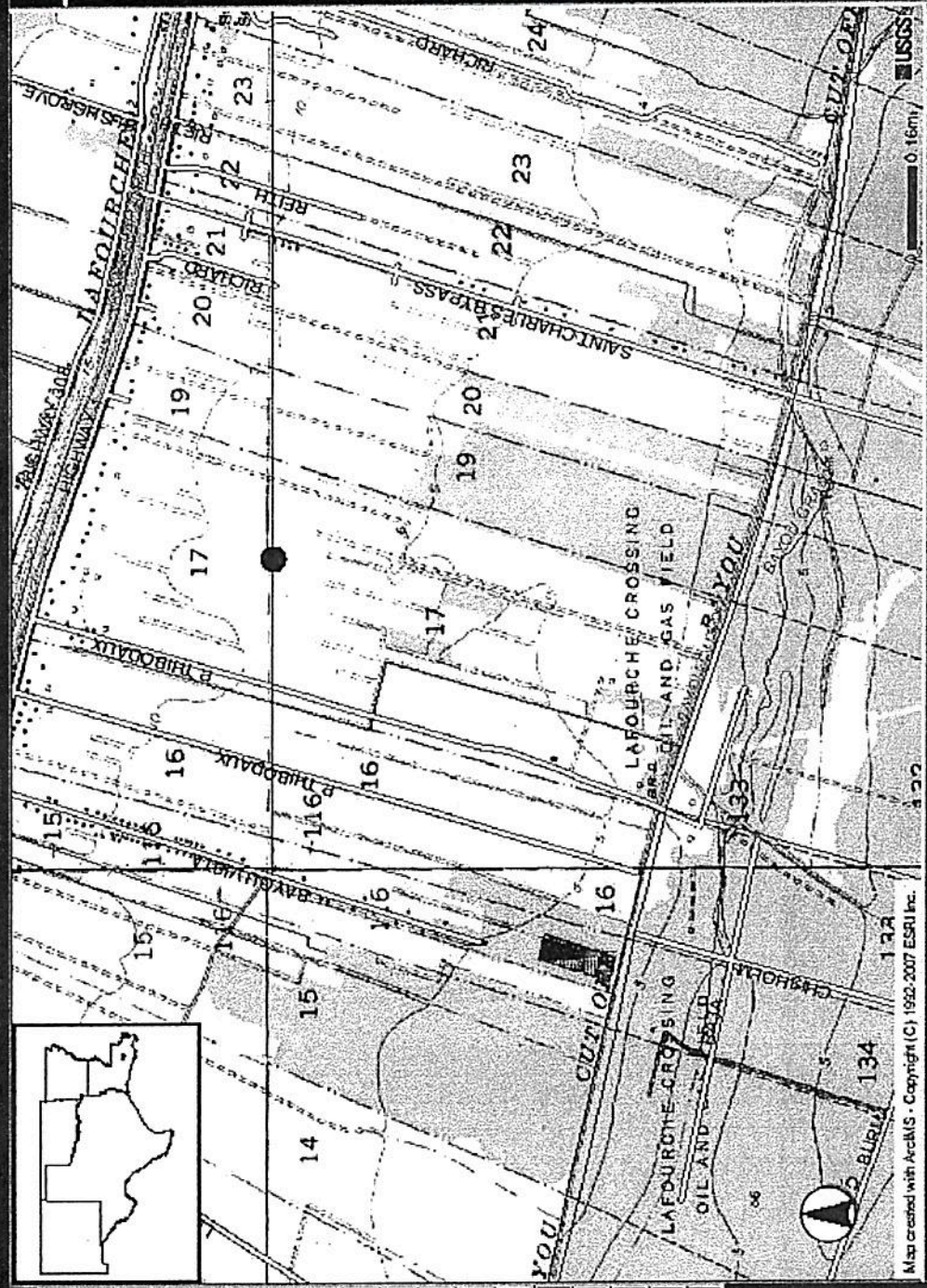


- Legend**
- Highway
 - USGS 1:24k Quadrangle
 - Street
 - Railway
 - River/Stream
 - Wild & Scenic River
 - water_name
 - Water Body
 - Managed Land
 - City



Water Quality Division IMS Site

Water Quality Division IMS **U.S. Environmental Protection Agency**



LEGEND	LAYERS
<input checked="" type="checkbox"/> Managed Land	<input checked="" type="checkbox"/> GNIS
<input checked="" type="checkbox"/> City	<input checked="" type="checkbox"/> USGS 1:24k Quadrangle
<input checked="" type="checkbox"/> State Boundary	<input checked="" type="checkbox"/> USGS 1:100k Quadrangle
<input checked="" type="checkbox"/> County/Parish Boundary	<input checked="" type="checkbox"/> USGS 1:250k Quadrangle
<input checked="" type="checkbox"/> Transportation	<input checked="" type="checkbox"/> Level 3 Ecoregions
<input checked="" type="checkbox"/> Institution	<input checked="" type="checkbox"/> Level 4 Ecoregions
<input checked="" type="checkbox"/> USGS	<input checked="" type="checkbox"/> PLSS
	<input checked="" type="checkbox"/> Land Cover
	<input checked="" type="checkbox"/> Tribal Lands
	<input checked="" type="checkbox"/> Impaired Water
	<input checked="" type="checkbox"/> County Demographics
	<input checked="" type="checkbox"/> Block Group Demographics
	<input checked="" type="checkbox"/> Block Demographics

Backgrounds
Visible
<input checked="" type="checkbox"/> Terraserver DOQ
<input checked="" type="checkbox"/> Terraserver DRG

Refresh Map

Help:

Active Layer: City

m Out

U.S. Environmental Protection Agency Water Quality Division IMS



Map created with ArcGIS - Copyright (C) 1992-2007 ESRI Inc.

- LEGEND**
- LAYERS**
- ☒ Managed Land
 - ☒ City
 - ☒ State Boundary
 - ☒ County/Parish Boundary
 - ☒ Transportation
 - ☒ Institution
 - ☒ USGS
 - ☒ GNIS
 - ☒ USGS 1:24k Quadangle
 - ☒ USGS 1:100k Quadangle
 - ☒ USGS 1:250k Quadangle
 - ☒ Level 3 Ecoregions
 - ☒ Level 4 Ecoregions
 - ☒ PLSS
 - ☒ Land Cover
 - ☒ Tribal Lands
 - ☒ Impaired Water
 - ☒ County Demographics
 - ☒ Block Group Demographics
 - ☒ Block Demographics

- Backgrounds**
- Visible
- ☒ Terraserver DOQ
 - ☐ Terraserver DRG

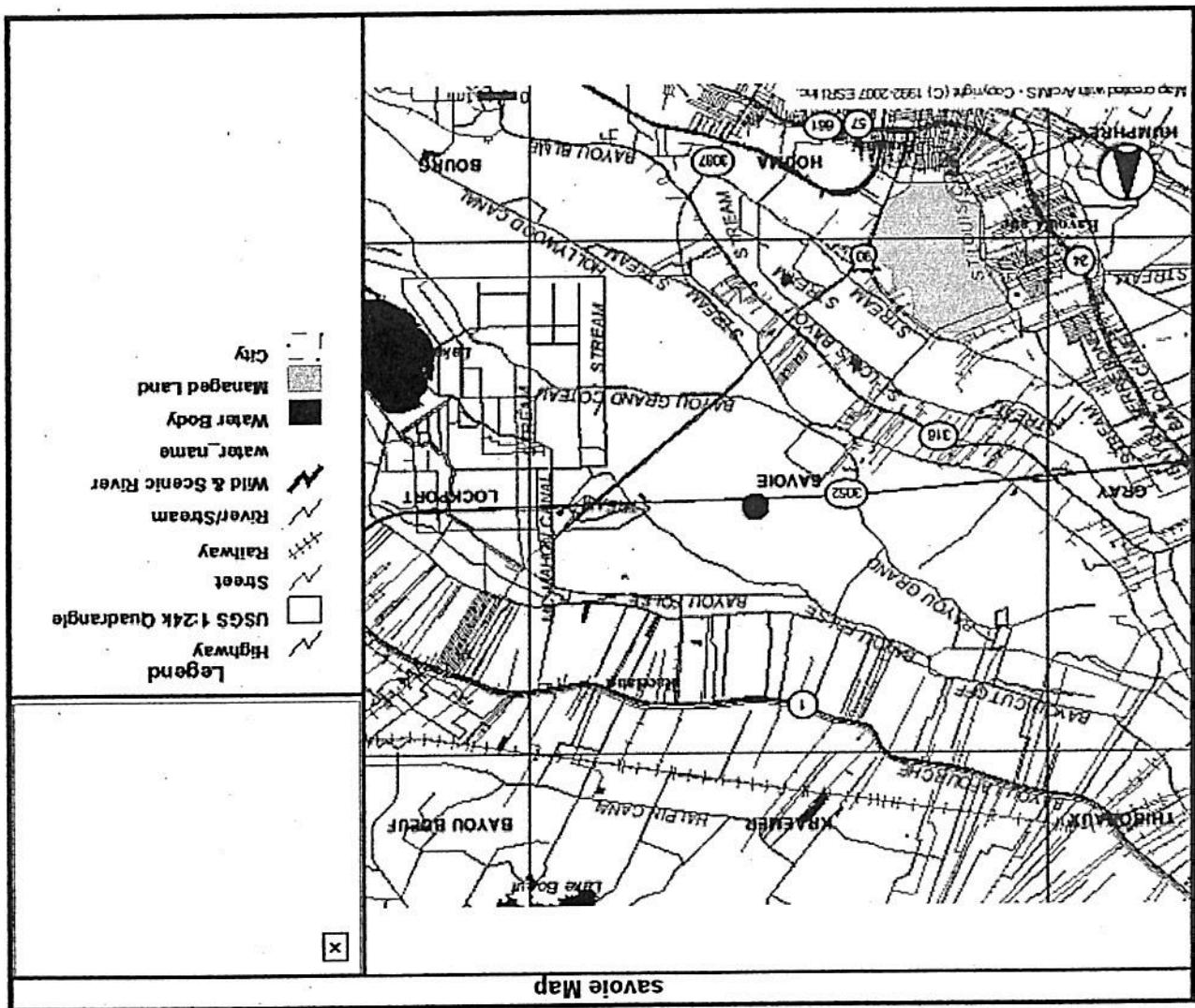
Refresh Map

Help:

Active Layer: City

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review	om in	om out	Zoom	nActive	viour	Pan	entify	uery	uffer	elect	Selected	rint	TO	rdinate	dress	unty	City
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2011-10-01 14:03
2011-10-01 14:03

2011-10-01 14:03
2011-10-01 14:03

FROM: (Name of the person who sent the message)

TO: (Name of the person who received the message)

DO NOT use this form as a RECORD of messages. It is only for your own use.

Section 19

Company
Carol
Interconnect
Lafayette
Bayer

REMARKS

DESCRIPTION	DATE	REMARKS
Company	10/1/11	Interconnect
Carol	10/1/11	Lafayette
Bayer	10/1/11	Interconnect
Interconnect	10/1/11	Interconnect
Lafayette	10/1/11	Interconnect
Interconnect	10/1/11	Interconnect

Bayer - Interconnect

2011-10-01 14:03
2011-10-01 14:03

Bayer - Interconnect



P.O. Drawer 5548 • Thibodaux, LA 70302 • Telephone 985.446.8427
Thibodaux 800.834.8832 Fax 985.446.8459 • Raceland 800.794.3160 Fax 985.537.7707

MAILED

1-18-06

Department of Public Works

January 17, 2006

Harris & Manan Theriot
116 Hangar Dr.
Thibodaux, LA. 70301
Attn: Harris & Manan

Dear Mr. & Mrs. Theriot:

Please find enclosed a copy of the servitude agreement for the following project:

To operate and maintain the attached drainage and maintenance servitude plus the width of the ditch.

This agreement has been recorded with the Clerk of Courts, Parish of Lafourche, and as you will note, the first page has the document instrument COB and Folio numbers.

Your cooperation in this matter has been greatly appreciated.

Thanking you, I remain,

Sincerely,

Steve Folse
Steve Folse
Special Project Coordinator

CC: File

SFMra



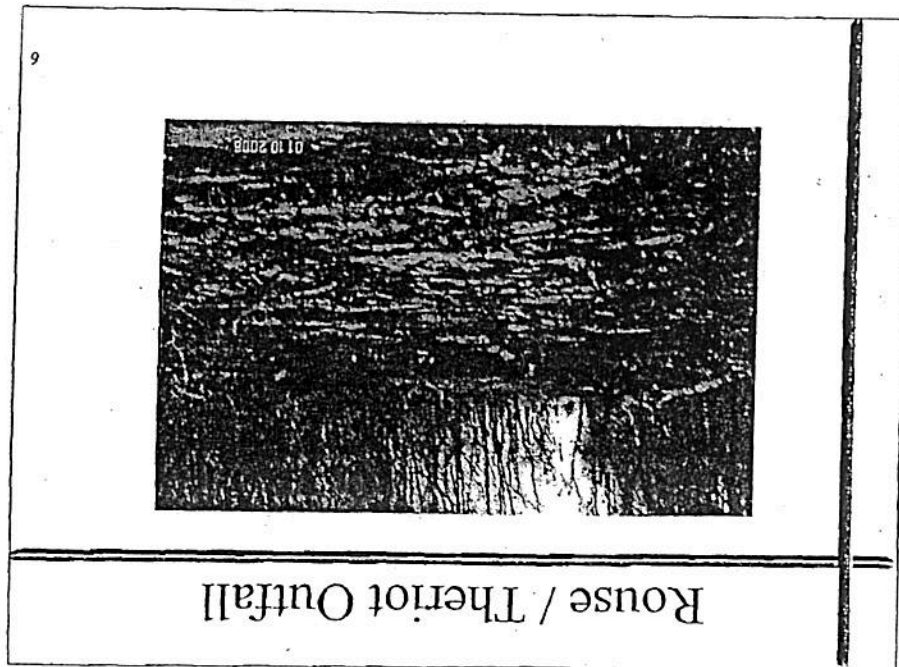
Charlotte A. Randolph
Tyronne Williams
Michael Delarte
Michael Marbeme
Tommy Lussaigne
Parish President
District 1
District 2
District 3
District 4

Mark Arzenboffer
Lindel Toups
Phillip Gouaux
Brent Callais
Daniel Lorraine
District 5
District 6
District 7
District 8
District 9

Approximately 100
acres of sugarcane
production.

- 1) About 150 acres
- 2) About 12 homes

Construction of new Outfall now off of LA 1-St. Charles community.
It drains?



Rouse / Theriot Outfall

6

1/10/06
Slide #6



P.O. Drawer 5548 • Thibodaux, LA 70302 • Telephone 985.446.8427
Thibodaux 800.834.8832 Fax 985.446.8459 • Raceland 800.794.3160 Fax 985.537.7707

MAILED
1-18-06

Charlotte A. Randolph, Parish President
Department of Public Works

January 17, 2006

Anthony & Joyce Rouse
1612 Hwy. 1
Thibodaux, LA. 70301
Attn: Anthony & Joyce

Dear Mr. & Mrs. Rouse:

Please find enclosed a copy of the servitude agreement for the following project:

To operate and maintain the attached drainage and maintenance servitude plus the width of the ditch.

This agreement has been recorded with the Clerk of Courts, Parish of Lafourche, and as you will note, the first page has the document instrument COB and Folio numbers.

Your cooperation in this matter has been greatly appreciated.

Thanking you, I remain,

Sincerely,

Steve Folse

Steve Folse
Special Project Coordinator

CC: File

SFWra

Charlotte A. Randolph
Tyrone Williams
Michael Delatte
Michael Marherne
Tommy Lussaigne
Parish President
District 1
District 2
District 3
District 4

Mark Atzenhoffer
Lindel Toups
Phillip Gonnoux
Brent Callais
Daniel Lorraine
District 5
District 6
District 7
District 8
District 9



P.O. Drawer 5543 • Thibodaux, LA 70302 • Telephone 985.446.8427
Thibodaux 800.834.8832 Fax 985.446.8459 • Raceland 800.794.3160 Fax 985.537.7707

Charlotte A. Randolph, Parish President
Department of Public Works

January 17, 2006

Tim & Cindy Acosta
1616 Hwy. 1
Thibodaux, LA 70301
Attn: Tim & Cindy

Dear Mr. & Mrs. Acosta

Please find enclosed a copy of the servitude agreement for the following project:

To operate and maintain the attached drainage and maintenance servitude plus the width of the ditch.

This agreement has been recorded with the Clerk of Courts, Parish of Lafourche, and as you will note, the first page has the document instrument COB and Folio numbers.

Your cooperation in this matter has been greatly appreciated.

Thanking you, I remain.

Sincerely,

Steve Folse
Steve Folse
Special Project Coordinator

CC: File

SFMWra

Charlotte A. Randolph
Tyronne Williams
Michael Delarte
Michael Matherne
Tommy Lasseigne
Parish President
District 1
District 2
District 3
District 4

Mark Atzenhoffer
Lindel Toups
Phillip Gouaux
Brent Callais
Daniel Lorraine
District 5
District 6
District 7
District 8
District 9

MAILED
1-18-06



402 Green Street • P.O. Drawer 5548
Thibodaux, LA 70301 • Thibodaux, LA 70302
Telephone 985.446.8427 • 800.834.8832 • Fax 985.449.4012

Michael Matherne, Council Chairman

Sheila Boudreaux, Council Clerk

INTEROFFICE MEMORANDUM

TO: Wendy Arcement,
Department of Public Works

Cullen Curole,
Parish Administrator

FROM: Ella Dupre,
Assistant Council Clerk

THROUGH: Sheila Boudreaux,
Council Clerk

DATE: Tuesday, December 27, 2005

RE: Ordinance No. 3705

The Lafourche Parish Council convened in regular session on December 13, 2005, enacted Ordinance No. 3705 (see attached), as it pertains to approving the attached Setvitude Agreement between Anthony J. Rouse, Joyce G. Rouse, Timothy J. Acosta, Cynthia R. Acosta, Harris J. Theriot, Jr., Marian Sue R. Theriot and the Lafourche Parish Council, and authorizing the Parish President to sign, execute and administer said agreement.

Said ordinance was finally adopted on December 21, 2005 and will become effective on January 8, 2006.

Attachment

Charlone A. Randolph
Tyrone Williams
Michael Delarte
Michael Matherne
Tommy Lassaigne
Parish President
District 1
District 2
District 3
District 4

Mark Aizenhoffer
Lindel Toups
Phillip Gouaux
Brent Callais
Daniel Lorraine
District 5
District 6
District 7
District 8
District 9

The following ordinance was introduced by Dr. Tommy Lasseigne in regular session convened on November 22, 2005.

PROPOSED ORDINANCE

The following ordinance, having been previously introduced and published, was offered for final adoption by Dr. Tommy Lasseigne, seconded by Mr. Michael Delatte.

ORDINANCE NO. 3705

ORDINANCE APPROVING THE ATTACHED SERVITUDE AGREEMENT BETWEEN ANTHONY J. ROUSE, JOYCE G. ROUSE, TIMOTHY J. ACOSTA, CYNTHIA R. ACOSTA, HARRIS J. THERIOT, JR. MARIAN SUE R. THERIOT AND THE LAFOURCHE PARISH COUNCIL; AND AUTHORIZING THE PARISH PRESIDENT TO SIGN, EXECUTE AND ADMINISTER SAID AGREEMENT.

BE IT ORDAINED, by the Lafourche Parish Council, convened in Regular Session on December 13, 2005, that:

SECTION 1.

WHEREAS, proper drainage is a fundamental necessity in ensuring the Health Safety and Welfare of the people of Lafourche; and

WHEREAS, access to private properties is often necessary in the maintenance of drainage channels; and

WHEREAS, the Department of Public Works is requesting right of way agreement in the name of area of Ward 3, Councilmatic District 4, Lafourche Parish.

WHEREAS, the Administration requests authority to sign these agreements in support of daily operations with private landowners;

THEREFORE BE IT ORDAINED, that the Lafourche Parish Council does approve the attached servitude agreement with Anthony J. Rouse, Joyce G. Rouse, Timothy J. Acosta, Cynthia R. Acosta, Harris J. Theriot, Marian Sue R. Theriot and authorizes the Parish President to sign, execute and administer said agreement.

SECTION 2. If any provision or item of this ordinance or the application thereof is held invalid, such invalidity shall not effect other provisions, items or application of this ordinance which can be given affect without the invalid provisions, items or application, and to this end the provisions of this ordinance are declared severable.

SECTION 3. All Ordinances by the Lafourche Parish Council conflicting with or inconsistent with the provisions of these regulations are hereby repealed.

SECTION 4. This Ordinance shall be published in the Official Journal of the Lafourche Parish Council in the manner provided by law.

SECTION 5. This Ordinance, having been submitted in writing, having been read and adopted by sections at a public meeting of said council, was then submitted to an official vote as a whole, the vote thereon being as follows:

YEAS:

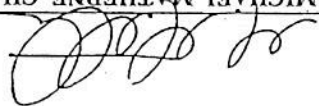
Mr. Tyrone Williams
Mr. Michael Delatte
Mr. Michael Mathern
Dr. Tommy Lasseigne
Mr. Mark Aizenhoffer
Mr. Lindel Toups
Mr. Phillip Gouaux
Mr. Brent Callais
Mr. Daniel Lorraine

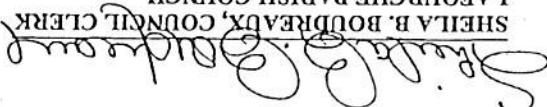
NAYS:


None

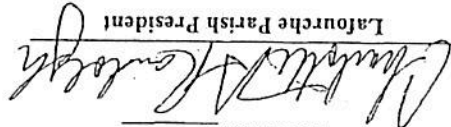
None

SECTION 6. This Ordinance shall become effective on the tenth day after final publication.


MICHAEL MATHERN, CHAIRMAN
LAFOURCHE PARISH COUNCIL


SHEILA B. BOUDREAU, COUNCIL CLERK
LAFOURCHE PARISH COUNCIL

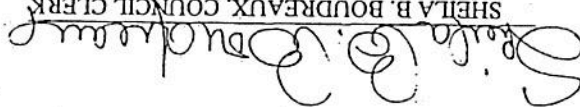
Delivered to the Parish President on
12/20, 2005, at 9:30 p.m.
APPROVED: 

RETURNED:

Lafourche Parish President

Returned to the Council Clerk on
12/21, 2005, at 3:30 p.m.

I, SHEILA B. BOUDREAU, Council Clerk for the Lafourche Parish Council, do hereby certify that the foregoing is a true and correct copy of Ordinance No. 3705, enacted by the Assembled Council in Regular Session on December 13, 2005, at which meeting a quorum was present, and was finally adopted on Dec. 21, 2005.

GIVEN UNDER MY OFFICIAL SIGNATURE AND SEAL OF OFFICE THIS 21st DAY OF December, 2005.


SHEILA B. BOUDREAU, COUNCIL CLERK
LAFOURCHE PARISH COUNCIL

DATE PUBLISHED: 12/29/05

DATE EFFECTIVE: 1/8/06

Lafourche Parish Recording Page

Vernon H. Rodrigue
CLERK OF COURT
PO BOX 818
303 W 3rd St
Thibodaux, LA 70302
(985) 447-4841

Received From :
LAFOURCHE PARISH COUNCIL
P. O. DRAWER 5548
THIBODAUX, LA 70302-0000

First VENDOR

ROUSE, ANTONY J

First VENDEE

PARISH OF LAFOURCHE

Index Type : Conveyance

Type of Document : Right Of Way

Book : 1633

Page : 381

Inst Number : 995451

Recorded Information

I hereby certify that the attached document was filed for registry and recorded in the Clerk of Court's office for
Lafourche Parish, Louisiana

On (Recorded Date) : 01/05/2006

At (Recorded Time) : 4:06:19:000 PM




Doc ID - 020584970007



Return To :
LAFOURCHE PARISH COUNCIL
P. O. DRAWER 5548
THIBODAUX, LA 70302-0000

Do not Detach this Recording Page from Original Document

DATE: 11/5/04
 REC. BY: #995451
 PAGE # 381
 BOOK # 1633
 APPROVED BY: 
 11

THIS SERVITUDE AGREEMENT, made and executed this _____ day of _____, 2005, by and between ANTHONY J. ROUSE, JOYCE G. ROUSE, TIMOTHY J. ACOSTA, CYNTHIA R. ACOSTA, HARRIS J. THERIOT, JR. and MARIAN SUE R. THERIOT hereinafter called the "Grantor(s)" and the Parish of Lafourche, through its Parish Council (hereinafter called the "Grantee").
 WITNESSETH THAT for the good and valuable considerations of this donation, the Grantor's, do hereby grant unto the Grantee, his/her successors and assigns, the right, liberty and authority to enter upon and to operate and maintain a maintenance servitude of a drainage canal in over and upon the following described land situated in the Parish of Lafourche, State of Louisiana, to-wit:

A certain tract of land situated in the Parish of Lafourche, State of Louisiana, on the right descending bank of Bayou Lafourche, at a distance of six (6) miles below the City of Lafourche, measuring one (1) arpent more or less, front on Bayou Lafourche by a depth of forty (40) arpents. Bounded above by Francois H. Bergeron, formerly but now Louis L. Boudreaux, and below by Theogene Thibodaux, together with all the buildings and improvements thereon and all right, ways, privileges and servitudes thereunto belonging or in anywise appertaining, Rouse property.

A certain tract of land, situated in the Parish of Lafourche, State of Louisiana, on the right descending bank of Bayou Lafourche at a distance of about six (6) miles below the City of Lafourche, measuring one half (1/2) arpent in width fronting on Bayou Lafourche, by a depth of forty (40) arpents. Bounded above by property of Estate of August Thibodaux, formerly, now Anthony J. Rouse, and below by the property sold to Paul Joseph Thibodaux, now or formerly, together with all the buildings and improvements thereon and all rights, ways, and servitudes thereon and thereto belonging, Acosta property.

A certain tract of land situated in the Parish of Lafourche, State of Louisiana, at about six (6) miles below the City of Thibodaux, on the right descending bank of Bayou Lafourche, measuring three quarters (3/4) of an arpent front along the public paved highway paralleling Bayou Lafourche by a depth of forty (40) arpents, bounded in front by the said paved highway, above by property of Theogene Thibodaux and below by property of Joseph Thibodaux, together with all the buildings and improvements thereon and all the rights, ways, privileges and servitudes thereunto belonging or in anywise appertaining, Theriot property.

Said above Rouse and Acosta parcel will be for a right of passage at the discretion of the land owner. The Acosta parcels and the Theriot parcel shall be for a drainage and maintenance servitude commencing at three thousand six hundred (3600') feet south of public paved highway No. 1, more or less, thence in a southerly direction to the forty arpent canal. The property line between the Acosta and Theriot shall be the center of ditch. Servitude width will be the width of the ditch plus twenty (20') feet west on Acosta parcel and width of ditch plus twenty (20') feet east on Theriot parcel.

It is further understood that this grant is not a conveyance of the full ownership of the property herein described and the parties herein specifically agree that the servitude may only be used by the Parish, its agents, employees, and/or assigns, for the maintenance and operation of said facilities, and is not intended as a servitude of passage for the general public.

Grantee to indemnify Grantor against, and to release, protect, and hold Grantor's harmless, from any claim or damages on account of bodily or personal injury, including death, to any person whomsoever, and any loss of or damage to any property whatsoever, arising out of the construction, maintenance, or operation of Grantee's facilities located on the premises herein described and granted; provided, however, that Grantee shall not be responsible for any claims or damages on account of bodily or personal injury, including death, to any person whomsoever, or for any loss of or damage to any property whatsoever, caused by the sole negligence of Grantor's, its agents, servants, employees, officers, invites, and/or licensees.

TO HAVE AND TO HOLD the aforesaid servitude unto the Grantee, their successors or assigns, so long as the Grantee, his successors or assigns, shall continue to use said servitude.

IN WITNESS WHEREOF, the GRANTOR has hereunto signed his name this 16th day of November, 2005, and Wendy Arment together with Steve Folsom, witnesses, in Lafourche Parish, Louisiana.

WITNESSES:

Mr. Mr.
Wendy Arment
Mr. Mr.
Wendy Arment
Mr. Mr.
Wendy Arment
Mr. Mr.
Wendy Arment
Mr. Mr.
Wendy Arment
Mr. Mr.
Wendy Arment

GRANTOR:
ANTHONY J. ROUSE
[Signature]

JOYCE G. ROUSE
[Signature]
TIMOTHY ACOSTA

CYNTHIA R. ACOSTA
[Signature]

HARRIS J. THERIOT
[Signature]

MARIAN SUE R. THERIOT
[Signature]

Before me, Notary Public, came and appeared Steve Folse, who declared that he witnessed the signature of ANTHONY J. ROUSE, JOYCE G. ROUSE, CYNTHIA R. ACOSTA, HARRIS J. THERIOT and MARIAN SUE R. THERIOT, to the foregoing servitude agreement and that THEY signed the agreement as THEIR free and voluntary act, for the Parish of Lafourche.

Sworn to and subscribed before me on this 5th day of JANUARY, 2006

Billy J. Pitre
Notary ID #14931
My notarial commission is for life.

[Signature]
NOTARY PUBLIC

IN WITNESS WHEREOF, the GRANTEE has hereunto signed her name this 3rd day of JANUARY, 2006, together with Steve Folse and Ella Dupre, witnesses, in Lafourche Parish, Louisiana.

GRANTEE: PARISH OF LAFOURCHE
[Signature]
Charlotte A. Randolph
(President)

WITNESSES:
[Signature]
[Signature]

Before me, Notary Public, came and appeared Steve Folse, who declared that he witnessed the signature of Charlotte Randolph, Parish President, to the foregoing servitude agreement and that the said Charlotte Randolph signed the agreement as her free and voluntary act, for the Parish of Lafourche.

[Signature]

Sworn to and subscribed before me on this 5th day of JANUARY, 2006

[Signature]
NOTARY PUBLIC

Billy J. Pitre
Notary ID #14931
My notarial commission is for life.

ANTHONY J. ROUSE ET UX

TIMOTHY ACOSTA ET UX

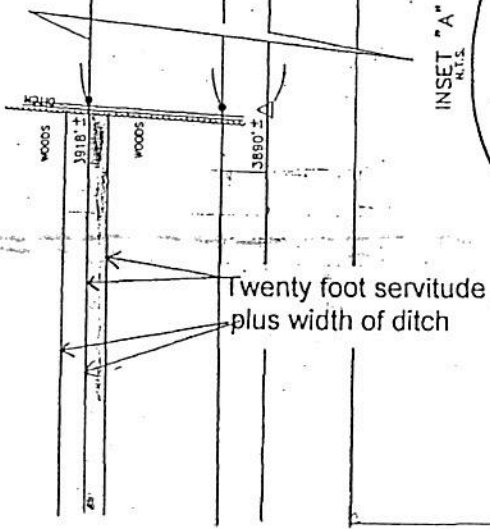
HARRIS JOSEPH THERIOT, JR. ET UX

SURVEY OF PROPERTY BELONGING
TO HARRIS JOSEPH THERIOT, JR. ET UX LOCATED IN
SECTION 19, T15S-R17E
LAFOURCHE PARISH, LA.

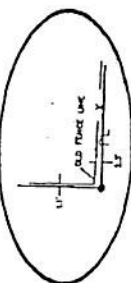
THIS IS TO CERTIFY THAT THIS SURVEY WAS DONE BY ME OR UNDER MY DIRECT SUPERVISION
AND CONTROL, THAT THE SURVEY WAS DONE IN ACCORDANCE WITH THE LATEST RECENT AMERICAN
STANDARDS OF PRACTICE FOR LAND SURVEYORS AS SET
FORH BY THE STATE OF LOUISIANA, BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS
AND LAND SURVEYORS, AND THAT THE ACCURACY SPECIFICATIONS AND POSITIONAL TOLERANCES
ARE IN ACCORDANCE WITH SUBSTANTIAL AREA SURVEYS INDICATED IN THE ABOVE STANDARDS.

DATE: APRIL 30, 1987

APPROVED: *Allen R. Woodward*
ALLEN R. WOODWARD, P.L.S.
1021 SAVANNE RD.
HOUMA, LA. 70309



INSET "A"
N.T.S.



- LEGEND:
- △ DENOTES 3/4" C.I.P. SET
 - DENOTES 3/4" C.I.P. FND. WITH 3" I.P. ON TOP
 - DENOTES 3/4" C.I.P. FND.
- DISTANCE MARKS USED FOR PLATE PORTED
AND MONUMENTS ARE LOCATED IN THE
TO ALLOW PASSAGE, TRACT AND LOCATED ON
THE SURVEY. THE SURVEY WAS DONE IN
SECTION 19, T15S-R17E LAFOURCHE PARISH,
LOUISIANA DATED 1/21/83 BY ALLEN R. WOODWARD.
A COMPLETE MAP PROVIDED FOR MOORE CORPORATION
COMP. BY ALBERT BUREL T15S-R17E DURING 1986.
- THIS SURVEY WAS NOT CONDUCTED TO SHOW THE LOCATION
OF ANY EXISTING SERVITUDES OR EASEMENTS. THE
ATTRIBUTIVE CONVEYANCE AND/OR ACQUISITION OF CONVEYING
PROPERTY WHICH MAY AFFECT SAID PROPERTY EXCEPT
AS OTHERWISE NOTED HEREON.

FORTY ARPENT CANAL



"Cullen L. Curole"
<CuroleCL@lafourchegov.org>
07/16/2007 04:08 PM

To Donna Mullins/R6/USEPA/US@EPA
cc
bcc
Subject FW: Rouse/Therolt

History: This message has been forwarded.

Ms Mullins

Attached is correspondence and photos from David Poincoin. His explanation of the reasoning he did not apply for a permit and photos that illustrate an area that would support a vehicle and the equipment at all times of the year. David lives within a few miles of this site.

Please let me know if you have any questions. I would like to speak with you prior to your issuing a formal response. If you think it necessary, I would love to come up to Dallas to visit or we would be happy to give you a tour of the area here in Lafourche.

Thanks,
Cullen

Tell Ms Beverly (Ethridge) hello.

From: David P. Poincoin
Sent: Monday, July 16, 2007 3:54 PM
To: Cullen L. Curole
CC: Arlene M. Toups; Crystal D. Chiasson
Subject: Rouse/Therolt

Cullen,
Ray asked I make these changes and email this to you.

Arlene,

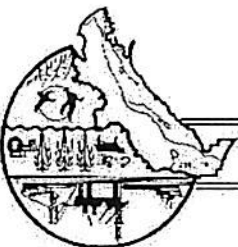
This is what I've got. Rouse_Therolt Outfall.doc Rouse Therolt Acosta.doc



Lafourche Parish Government

Department of Public Works

P.O. Box 320 • Raceland, Louisiana 70394
Telephone (985) 537-7603 • Fax (985) 573-7297



United States Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Attention: Donna Mullins 6WQ-EM
Dallas, Texas 75202-2733

Dear Ms. Mullins,

In reference to Violation Number MVN-2006-1353-SZ also known as the Rouse/Theriot outfall canal and given the location being to the northern end of Lafourche Parish it was not considered by Public Works to be thought of as wetlands. Contour lines on quadrangle maps published by the Geological Survey photo-revised in 1980 and photo-inspected in 1983 denote elevations of land to be at a ten (10') foot elevation or higher near the Bayou Lafourche ridge and five (5') foot near the center and forty arpent line/canal.

Attached you will find photos numbered, measured distances from Bayou Lafourche and notes on direction of view. Should you need any additional information, please feel free to contact myself.....

ANTHONY J. ROUSE ET UX

TIMOTHY ACOSTA ET UX

HARRIS JOSEPH THERIOT, JR. ET UX

SURVEY OF PROPERTY BELONGING
TO HARRIS JOSEPH THERIOT, JR. ET UX LOCATED IN
SECTION 19, T15S-R17E
LAFOURCHE PARISH, LA.

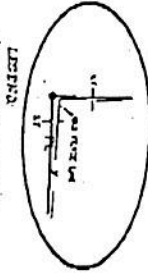
THIS SURVEY WAS MADE BY THE SURVEYOR AND HIS ASSISTANTS IN THE FIELD AND THE RESULTS ARE HEREBY CERTIFIED TO BE TRUE AND CORRECT. THE SURVEYOR IS NOT RESPONSIBLE FOR ANY ERRORS OR OMISSIONS IN THIS SURVEY.

DATE: APRIL 20, 1997
APPROVED: *John P. Winkler*
ALICE E. WINKLER, P.E.
1001 STANLEY RD.
MOBILE, AL 36688



Twenty foot servitude
plus width of ditch

INSET "A"



LEGEND

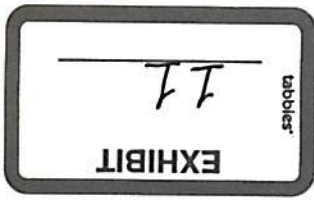
- △ DEMOTES 3/4" C.I.P. SET
- DEMOTES 3/4" C.I.P. IND. WITH 3" L.P. ON TOP
- DEMOTES 3/4" C.I.P. FINE

THE SURVEYOR HAS BEEN ADVISED THAT THE PROPERTY IS NOT SUBJECT TO ANY EASEMENTS OR RIGHTS OF WAY. THE SURVEYOR HAS ALSO BEEN ADVISED THAT THE PROPERTY IS NOT SUBJECT TO ANY OTHER INTERESTS OR CLAIMS.

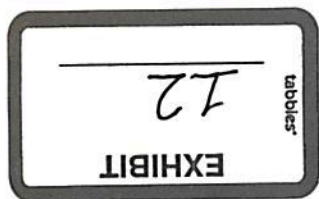
FORTY ARPERT CANAL



**T. BAKER SMITH
REPORT DOCUMENTS
TO BE PRODUCED
WHEN AVAILABLE**



DEPOSITION TO BE
PRODUCED AFTER
TRANSCRIPTION
IS RECEIVED



DEPOSITION TO BE
PRODUCED AFTER
TRANSCRIPTION
IS RECEIVED

**CLEAN WATER ACT SECTION 404
SETTLEMENT PENALTY POLICY**

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CLEAN WATER ACT SECTION 404 SETTLEMENT PENALTY POLICY

I. INTRODUCTION

This document sets forth the policy of the U.S. Environmental Protection Agency ("EPA" or "Agency") for establishing appropriate penalties in settlement of an administrative or civil judicial penalty proceeding against a person who has violated Sections 301 and 404 of the Clean Water Act ("CWA" or "Act")¹ by discharging dredged or fill material into wetlands or other waters of the United States without Section 404 permit authorization, or in violation of a Section 404 permit.² This policy implements the Agency's *Policy on Civil Penalties* and the companion document, *A Framework for Statute Specific Approaches to Penalty Assessments*, both issued on February 16, 1984, with respect to these types of violations. This settlement penalty policy should be read in conjunction with other applicable policies, such as the *Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act* (SBR-EPA Policy) (May 28, 1996), *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (EPA Audit Policy) (April 11, 2000), and the *EPA Supplemental Environmental Projects Policy* (SEP Policy) (May 1, 1998).

EPA brings enforcement actions to require alleged violators to promptly correct their violations and to remedy any harm caused by those violations.³ As part of an enforcement action, EPA also seeks substantial monetary penalties, that recover the economic benefit of the violations plus an appropriate gravity amount that will deter future violations by the same violator and by other members of the regulated community. Penalties help to ensure a level playing field within the regulated community by ensuring that violators do not obtain an unfair economic advantage over competitors who have complied with the Act. At the same time,

¹ 33 U.S.C. § 1311(a), 33 U.S.C. § 1344.

² EPA may currently seek civil penalties up to \$27,500 per day per violation in the federal district courts under Section 309(d), or may seek an administrative law judge under Section 309(g) for the unauthorized discharge or dredge or fill material into waters of the United States, or violation of a Section 404 permit. 33 U.S.C. § 1319(d) and (g). These figures reflect a 10% increase from the amounts set forth in the CWA as provided for under the Civil Monetary Penalties Adjustment Rule in the near future. See footnote 10 below for further discussion.

³ For a discussion of the policy and procedures regarding EPA and Army Corps of Engineers ("Corps") implementation of Section 404 enforcement responsibilities see "Memorandum of Agreement Between the Department of the Army/Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act" (January 19, 1989). This document is available on the Internet at: <http://www.epa.gov/OWOW/wetlands/regs/enfmoa.html>.

EPA's policies provide for adjustments based on a violator's good faith efforts to comply (or lack thereof) and inability to pay a penalty.

The need to deter violations and remedy any harm caused by such violations is especially evident with respect to the discharge of dredged and/or fill material into waters of the U.S., particularly wetlands and other special aquatic sites.⁴ Wetlands are a vital yet increasingly threatened natural resource.⁵ Wetlands act as natural sponges, providing flood protection and storm damage control and facilitating groundwater recharge. They furnish habitat for myriad plants and animals, including many endangered species, and provide billions of dollars to the national economy each year from fisheries and recreational activities such as hunting and bird watching.⁶ Wetlands also perform a vital role in maintaining water quality by trapping sediments and other pollutants before they reach streams, rivers, and other open-water bodies.⁷ Other special aquatic sites, such as mud flats and vegetated shallows, as well as open bodies of waters such as rivers, lakes, and streams also provide important functions and values. Discharges of dredged or fill material into waters of the U.S. may result in destruction of, or serious degradation to such waters. Given the significant values provided by such waters, it is all the more important to assess adequate penalties to deter future Section 404 violations and thereby help to achieve the goal of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸

This policy sets forth how the Agency generally expects to determine an appropriate settlement penalty in CWA Section 404 cases. In some cases, the calculation methodology set forth here may not be appropriate, in whole or in part. In such cases, with the advance approval of the Office of Enforcement and Compliance Assurance ("OECA"), an alternative or modified approach may be used.

A. Purpose

This policy is intended to provide guidance to EPA staff in calculating an appropriate penalty amount in settlement of civil judicial and administrative actions involving Section 404 violations and related violations (e.g., failure to comply with a Section 308 request or a Section

⁴ See 40 C.F.R. 230.2(q-1) (Special aquatic sites include sanctuaries and refuges, wetlands, mudflats, vegetative shallows, coral reefs and riffle and pool complexes).

⁵ See e.g., U.S. Fish and Wildlife Service: Report to Congress: Wetlands Losses in the United States 1780's to 1980's (1990).

⁶ See e.g., U.S. Fish and Wildlife Service: Wetlands of the United States: Current Status and Recent Trends (1984).

⁷ See e.g., *U.S. v. Deaton*, 209 F.3d 331 (4th Cir. 2000).

⁸ 33 U.S.C. § 1251(a).

309(a) order with respect to such a violation). The guidance is designed to promote a more consistent national approach to assessing settlement penalty amounts, while allowing EPA staff flexibility in arriving at specific penalty settlement amounts in a given case. Subject to the circumstances of a particular case, this policy provides the lowest penalty figure that the Federal Government should accept in settlement. The Federal Government reserves the right to seek any amount up to the statutory maximum where settlement is not possible, as well as where circumstances warrant application of a higher penalty than what would be provided for under this settlement policy.

This policy is meant to accomplish the following four objectives in the assessment of penalties for Section 404 violations. First, penalties should be large enough to deter noncompliance, both by the violator and others similarly situated. Second, the penalties should help ensure a level playing field by making certain that violators do not obtain an economic advantage over others who have complied in a timely fashion. Third, penalties should generally be consistent across the country to promote fair and equitable treatment of the regulated community. Finally, settlement penalties should be based on a fair and logical calculation methodology to promote expeditious resolution of Section 404 enforcement actions and their underlying violations.

B. Applicability

This policy applies to all CWA Section 404 civil judicial and administrative actions filed after the signature date of the policy, and to all such pending cases in which the government has not yet transmitted to the defendant or respondent a proposed settlement penalty amount. This policy revises and hereby supersedes the December 14, 1990 Guidance, "Clean Water Act Section 404 Civil Administrative Penalty Actions: Guidance on Calculating Settlement Amounts." Except as provided in Section II below, this policy is not intended for use by EPA, violators, administrative judges or courts in determining penalties at hearing or trial. This policy does not affect the discretion of Agency enforcement staff to request any amount up to the statutory maximum allowed by law.⁹ Finally, this policy does not apply to criminal cases that may be brought for the unauthorized discharge of dredged or fill material in violation of the CWA.

⁹ Because of the requirements of 40 C.F.R. §22.14(a) (4), administrative complaints filed under Part 22 must have either the amount of the civil penalty that the Agency is proposing to assess, and a brief explanation of the proposed penalty, or where a specific penalty demand is not made, a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority in Section 309(g)(3) applicable for each violation alleged in the complaint. Regional enforcement staff should follow the guidance provided on this subject in "Guidance on the Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act," issued January 19, 1989, and in "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act," issued May 28, 1996.

C. Statutory Authorities

The Clean Water Act provides EPA with various enforcement mechanisms for responding to violations of Sections 301(a) and 404 for discharging without, or in violation of, a Section 404 permit. Under Section 309(a), the Agency is authorized to issue an administrative compliance order (AO) requiring a violator to cease an ongoing unauthorized discharge, to refrain from future illegal discharge activity, and to remove unauthorized fill and/or otherwise restore the site. Section 309(g) of the Act authorizes EPA to assess administrative penalties for, among other things, discharging dredged or fill material into waters of the United States without a Section 404 permit or in violation of a Section 404 permit. Section 309(g) establishes two classes of administrative penalties, which differ with respect to procedure and maximum assessment, for such violations. A Class I penalty, provided for under Section 309(g)(2)(A), may not exceed \$11,000 per violation, or a maximum amount of \$27,500. A Class II penalty under Section 309(g)(2)(B) may not exceed \$11,000 per day for each day during which the violation continues, or a maximum amount of \$137,500.¹⁰

EPA may also seek injunctive relief, criminal penalties (fines and/or imprisonment), and civil penalties through judicial action under CWA Sections 309(b), (c) and (d), respectively. Under these provisions, the Agency may refer cases to the Department of Justice (DOJ) for civil and/or criminal enforcement. Under Section 309(d), EPA may seek civil penalties of up to \$27,500 per day per violation in the federal district courts, for CWA violations including the unauthorized discharge of dredged or fill material into waters of the United States, violation of a Section 404 permit, or violation of a Section 309(a) administrative compliance order.

For purposes of calculating a penalty under Sections 309(d) or (g), a violation begins when dredged or fill material is discharged into waters of the United States without a Section 404 permit and continues to occur each day that the illegal discharge remains in place. With respect to a violation of a Section 309(a) compliance order, a violation begins when the order is violated and continues each day until the order is complied with.

¹⁰ The Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat. 1321), mandates that EPA adjust its civil monetary penalties for inflation every four years. Thus, the maximum penalty figures cited in this guidance reflect the initial ten percent increase from the amounts set forth in the Act. For violations occurring before January 30, 1997, the maximum penalty amounts the Agency may seek are those specified in the Act. The Agency is preparing to issue a revision to the Civil Monetary Adjustment Rule in the near future. After the effective date of the rule, the maximum penalties available are expected to be as follows: for civil judicial penalties under 309(d) - \$30,500 per day per violation, for Class I administrative penalties - \$12,000 per day per violation, \$30,000 maximum; for Class II penalties - \$12,000 per violation, \$152,500 maximum.

D. Statutory and Settlement Penalty Factors

Section 309(d) of the CWA sets forth the following penalty factors that district court judges are to use when determining an appropriate civil penalty: "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. Section 1319(d).

Section 309(g)(3) addresses the factors to be considered when determining an appropriate administrative penalty amount. It states that the Agency "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require," 33 U.S.C. Section 1319(g)(3).

The penalty assessment factors in Sections 309(d) and 309(g) are substantively the same, and not in conflict. The references in Section 309(d) to "good faith efforts" and in Section 309(g)(3) to "culpability," for example, although oriented to different types of behavior, both measure the non-compliant conduct of the violator. Other factors, such as economic benefit, history of violations, and such other matters as justice may require, are essentially identical, and the remaining factors are just restatements of each other. Consequently, the penalty calculation methodology drawn from the statutory factors and set forth below can be applied to both administrative and judicial civil enforcement cases.

E. Choice of Forum

The application of this penalty settlement policy, through the calculation of an appropriate bottom-line penalty amount, is one factor for Agency personnel to consider when choosing an appropriate forum.¹¹ The case development team¹² should apply this policy to help determine whether to seek a penalty administratively or judicially. If the bottom-line penalty calculated under this policy exceeds the maximum penalty that can be achieved in an administrative proceeding, EPA should refer the matter to the Department of Justice for judicial enforcement.¹³ Cases should also be referred to DOJ where court ordered injunctive relief is

¹¹ OECA intends to issue additional guidance in the near future on determining the appropriate response for Section 404 violations.

¹² For purposes of this guidance, the case development team refers to the Agency 404 technical and legal staff responsible for developing and pursuing a particular administrative or judicial enforcement action.

¹³ For further guidance on choosing between administrative and judicial enforcement options, see "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies," (August 28, 1987), which was attachment 2 to the August 28, 1987 "Guidance Documents and Delegations for

necessary to remedy a violation, or where the violator has failed to comply with an administrative compliance order or consent order.

II. ADMINISTRATIVE PENALTY PLEADING GUIDANCE

In complaints filed in civil judicial cases, the United States' general practice is not to request a specific proposed penalty, but instead to paraphrase the Clean Water Act in reciting a request for a penalty "up to" the statutory maximum. This is sometimes referred to as "notice pleading" for penalties. In contrast, in administrative complaints the Agency may use either a form of notice pleading or make a specific penalty request. See 40 C.F.R. 22.14(a)(4) (64 Fed. Reg. 40138, 40181 (July 23, 1999)). When including a specific penalty request in an administrative complaint, the Agency litigation team may elect to adapt the settlement methodology in Part III of this policy (Minimum Settlement Penalty Calculation) to establish a definitive penalty request in an administrative complaint.¹⁴

In using Part III of this policy to establish a specific penalty request in an administrative complaint, the litigation team should, after reasonable examination of the relevant facts and circumstances of the case (including any known defenses), make the most favorable factual assumptions, legal arguments, and judgments possible on behalf of the Agency. Because the specific penalty amount proposed in an administrative complaint will, for all practical purposes, be the most the Agency will be able to seek at a hearing (unless the complaint is subsequently amended) and will provide a starting point for settlement negotiations, such an administrative penalty request should be higher than the bottom-line settlement penalty amount calculated under Part III of this policy. Although appropriate for settlement calculations, the Adjustments in Part III.C. should not be applied to reduce the specific penalty amount requested in an administrative complaint.

The proposed administrative penalty amount should be consistent with the statutory factors identified in Section 309(g), because those factors would ultimately provide the basis for the penalty assessment of the presiding officer or administrative law judge.¹⁵ In any Class II administrative complaint under Section 309(g)(2)(B), the Agency litigation team should take into account the requirements of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), P.L. 104-121 (1996), if the respondent qualifies as a small business under that

Implementation of Administrative Penalty Authorities Contained in 1987 Clean Water Act Amendments."

¹⁴ Although this policy provides general guidelines on how EPA may select an appropriate penalty amount in an administrative complaint, it does not direct when an Agency litigation team should use penalty pleading and when it should plead for a sum certain.

¹⁵ In administrative cases under Part 22, the Agency is required to provide "[t]he amount of the civil penalty which is proposed and a brief explanation of the proposed penalty." 40 C.F.R. §22.14(a)(4)(i). In contrast, a settlement figure calculated under this policy and its supporting documentation are not subject to such disclosure requirements.

statute. SBREFA by its terms does not apply to non-Administrative Procedures Act ("non-APA") cases, and thus would not apply to Class I cases brought under Section 309(g)(2)(B).¹⁶

III. MINIMUM SETTLEMENT PENALTY CALCULATION

The case development team shall calculate the minimum settlement penalty for a Section 404 enforcement action consistent with the following formula (set forth in more detail in Attachment 1), and the factors described in this section:

Penalty = Economic Benefit + (Preliminary Gravity Amount +/- Gravity Adjustment Factors) - Litigation Considerations - Ability to Pay - Mitigation Credit for SEPs

The result of this calculation will be the minimum penalty amount that the government will accept in settlement of the case, in other words, the "bottom-line penalty" amount. As new or better information is obtained in the course of litigation or settlement negotiations, or if protracted litigation or settlement discussions unduly extend the final compliance date and/or the penalty payment date, the "bottom-line" penalty should be adjusted, either upwards or downwards as necessary, consistent with the factors laid out in this policy, and subject to Headquarters concurrence in appropriate cases. Each component of the penalty is discussed below. The results of these calculations should be documented as dollar amounts on the "Worksheet for Calculating Section 404 Settlement Penalty," included as Appendix A. This calculation should be supported by a memorandum describing the rationale and basis for the data. As a general matter, the Agency should always seek a penalty that, at a minimum, recovers the economic benefit of noncompliance plus some amount reflecting the gravity of the violation.

A. Determining the Economic Benefit Component

Consistent with EPA's February 1984 *Policy on Civil Penalties*, every effort should be made to calculate and recover the economic benefit of noncompliance.¹⁷ Persons who violate the CWA by discharging dredged and/or fill material without Section 404 permit authorization or in violation of a permit may have obtained an economic benefit by obtaining an illegal competitive advantage ("ICA"), or as the result of delayed or avoided costs, or by a combination of these or other factors. Taking into account ICA may be particularly appropriate in situations where on-site restoration is not feasible (e.g., where restoration would result in greater environmental damage), and a permit would not likely have been issued for the project in question. In such cases, the Agency may consider recovering the commercial gain the violator realized from illegally filling in the wetland or other water. The objective of calculating and recovering

¹⁵ For a more extended discussion of SBREFA, see "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act" (May 28, 1996).

¹⁷ See *Policy on Civil Penalties*, February 16, 1984, at 3.

economic benefit is to place violators in no better financial position than they would have been had they complied with the law.

The BEN computer model should be used to calculate the economic benefit gained from delayed or avoided compliance costs.¹⁸ Economic benefit should be calculated from the date of the initial violation, (i.e., the date of the initial discharge of dredged or fill material). As a general rule, there should be no offset in an economic benefit calculation, in a delayed or avoided cost scenario, for costs the violator incurs as a result of undertaking the illegal activity (i.e., in the context of a 404 violation this would be the amount the violator spent to perform the original unauthorized dredging or filling activities), since, as specified in the BEN User's Manual, credit is only appropriate for cost savings that "are both documented and related to compliance."¹⁹

Because a violator may have obtained more than one type of economic benefit from its noncompliance, the case development team should ensure that the amount calculated represents the total economic benefit wrongfully obtained.²⁰ Examples of other types of economic benefit may include delayed or avoided permitting fees and associated costs (e.g., information collection and consultant fees), increased property values, profits from the temporary or permanent use of property, or other illegal competitive advantage to the extent that the gain would not have accrued but for the illegal discharge.²¹

B. Determination of the Gravity Component

Removal of the economic benefit of noncompliance generally places violators in the same position they would have been in had they complied with the Act. Therefore, both deterrence and fundamental fairness are served by including an additional element to ensure that

¹⁸ The BEN model is found on the Agency's web site at <http://www.epa.gov/occa/datasys/dsm2.html> along with the BEN User's Manual. EPA currently does not have an economic benefit model for calculating economic benefit from illegal competitive advantage. For further information on the use of the BEN model and guidance in its use, or for help in calculating ICA, contact the Financial Issues Helpline at (888) 326-6778. Since as a general rule all 404 civil judicial cases are deemed nationally significant, Headquarters and the Regions will consult on the appropriate determination of economic benefit in such cases. In administrative cases, when considering under what circumstances various costs may offset economic benefit, the Regions will need to consult with Headquarters.

¹⁹ BEN User's Manual, (September 1999), at 3-11.

²⁰ If an initial calculation of economic benefit yields a zero or negative result, the case development team should ensure that all possible forms of illegal competitive advantage have been analyzed and included if appropriate. (Where the economic benefit calculation yields a negative number, a zero should be entered in the minimum settlement penalty calculation for the economic benefit component.)

²¹ Additional examples include gains generated from such uses as agriculture (e.g., profits from the sale of crops), logging, aquaculture, receipt of a loan, rent or lease payments, mining of sand and gravel, or from the early use of a recreational site (e.g., golf course or ski resort), which the violator gained prior to ceasing operation or removing the unlawful discharge or otherwise restoring the property.

violators are adequately penalized.²² The following gravity calculation is based on a methodology that provides a logical scheme and uniform criteria to quantify the gravity component of the penalty based on the environmental and compliance significance of the violation(s) in question.

Preliminary Gravity Amount = (sum of A factors + sum of B factors) x M

M (Multiplier) = \$500 for minor violations with low overall environmental and compliance significance, \$1,500 for violations with moderate overall environmental and compliance significance, and \$3,000-\$10,000²³ for major violations with a high degree of either environmental or compliance significance. Given the highly fact specific nature of 404 cases, this policy provides broad ranges for the factors set out below to afford the case development team broad discretion to assess the appropriate penalty in a given circumstance.

"A" FACTORS: ENVIRONMENTAL SIGNIFICANCE

Factors

Value Assigned

I. Harm to Human Health or Welfare

0-20

The case development team should consider whether the discharge of dredged or fill material has adversely impacted drinking water supplies, has resulted in (or is expected to result in) flooding, impaired commercial or sport fisheries or shellfish beds, or otherwise has adversely affected recreational, aesthetic, and economic values. The case development team should also consider whether the discharge has otherwise endangered the health or livelihood of persons by virtue of the chemical nature of the discharge (i.e., has the discharge resulted in a violation of any applicable toxic effluent standard or prohibition under section 307 of the CWA, in the release of a hazardous substance under 40 C.F.R. 117 or Subtitle C of RCRA,²⁴ or in an imminent and substantial endangerment under Section 504 of the Safe Drinking Water Act, Section 7003 of RCRA, or Section 106 of CERCLA).²⁵ The greater the actual or potential threat to human health or welfare, the higher the value the case development team should assign to this factor. If the discharge has resulted in an imminent and substantial endangerment, the highest value for this factor should be used.

²² See *Policy on Civil Penalties*, February 16, 1984, at 3.

²³ Looking at the totality of the circumstances, the case development team should use its best professional judgment to decide what amount to use as a multiplier for a such violations. For egregious violations with extreme environmental consequences, a higher value in this range should be used as a multiplier.

²⁴ 42 U.S.C. § 6973.

²⁵ 42 U.S.C. § 9606.

2. Extent of Aquatic Environment Impacted

0 - 20

Although the size (acreage) of a violation is not dispositive of the environmental significance of the violation (i.e., a small impact to a unique or critical water may have high environmental significance), all other factors being equal, the greater the acreage of waters filled or directly impacted, the higher the value the case development team should assign to this factor. Staff should consider how large the acreage impacted is in the case under consideration compared to other violations observed within the same watershed, regionally or nationally.²⁶

3. Severity of Impacts to the Aquatic Environment

0 - 20

The case development team should consider the overall impact of a defendant's discharges to waters of the United States.²⁷ Staff should also consider as part of this factor the extent to which the discharge of dredged or fill material has caused (or has threatened to cause) adverse impacts to, or destruction of waters of the United States, including the extent to which the discharge has impaired the flow or circulation or reduced the reach of waters of the United States, or has caused or contributed to violations of any applicable water quality standard. Under this factor, the case development team should also consider whether the violation has resulted in adverse impacts to life stages of aquatic life and other wildlife dependent on aquatic ecosystems, or has adversely impacted or destroyed wildlife habitat, including aquatic vegetation, waterfowl staging or nesting areas, and fisheries. The greater the risk of harm or actual impact to aquatic ecosystems, the higher the value the case development team should assign to this factor. If a defendant's violation has resulted in harm to an endangered or threatened species, or impacted endangered species habitat, or has otherwise significantly impacted ecosystem diversity, productivity, or stability, a value in the highest end of the range should be used.

4. Uniqueness/Sensitivity of the Affected Resource

0 - 20

The case development team should consider whether the affected ecosystem is nationally or regionally limited, of a type that has become rare due to cumulative impacts (e.g., Pocombin, vernal pools), or is relatively abundant. The more scarce the impacted ecosystem, the higher the value that staff should assign for this factor. Moreover, if the discharge occurred into any of the following, the case development team should generally assign a higher value to this factor: a site determined to be unsuitable under 40 C.F.R. 230.80; an area identified as having a Section 404(c) prohibition or restriction; a Section 303(d) impaired water; an area within the boundary

²⁶ In areas where there has been a substantial historic cumulative loss of waters of the United States, or in arid areas where acreage of waters is a small portion of the natural landscape, a high value should be assigned to even small acreage fills.

²⁷ As part of this factor, the case development team should also consider the temporary loss of wetlands functions and values.

of an Advance Identification of Disposal Areas (ADID); an outstanding natural resource water under a state anti-degradation policy; areas designated as federal, state, tribal, or local protected lands; or an area established as a restored or enhanced wetland under an approved mitigation plan.

5. Secondary or Off-Site Impacts

0 - 20

The case development team should consider to what extent the discharges caused, or threatened to cause, secondary or off-site impacts such as erosion and downstream sedimentation problems, nuisance species intrusion, wildlife corridor disruption, etc. The greater the amount of secondary impacts, the higher the value that should be assigned.

6. Duration of Violation

0 - 20

The case development team should consider the duration of the violation under this factor. Consideration should be given both to the length of time that the discharge activity occurred in waters of the U.S., and the length of time that dredged or fill material has remained in place in such waters. Generally, the longer the duration of the initial discharge activity, and/or the longer dredged or fill material has remained in place compared to other violations in the same watershed, regionally or nationally, the higher the value that should be assigned to this factor.

Mitigating Factors for Environmental Significance

It is possible in some wetlands cases for a violator to undo, or largely undo, the continuing environmental harm resulting from violations -- although past loss of functions and values cannot be restored. In cases in which the original wetland or other water is restored, or will be restored under an enforceable agreement, Agency enforcement staff may reduce the amount determined from the preliminary gravity calculation for Environmental Significance (i.e., by reducing the values assigned to one or more of the Environmental Significance factors). This offset should generally not be used in cases where off-site mitigation is undertaken in lieu of on-site restoration of the violation.²⁸ Wherever possible, the case development team should seek complete on-site restoration of the aquatic areas impacted.²⁹ In determining the gravity amount for environmental significance, the case development team should focus on the net impairment of the wetlands or other waters after remediation is completed, rather than on the costs of the remediation to the violator. In addition, even where complete restoration occurs, the temporary loss of functions and values should still be considered in determining the Environmental Significance amount, unless those temporary losses have already been fully

²⁸ Where an after-the-fact has or will be issued for the discharge, the preliminary gravity amount may be reduced where the loss of waters is fully mitigated.

²⁹ See "Injunctive Relief Requirements in 404 Enforcement Actions" (September 29, 1999).

mitigated. Staff should also consider whether there is a risk that restoration may fail or be less than fully successful over time, when considering whether a reduction should be made for this factor.

"B" FACTORS: COMPLIANCE SIGNIFICANCE

Factors

Value Assigned

1. Degree of Culpability

1 - 20

The case development team should evaluate the overall culpability of the defendant (i.e., the degree of negligence, recklessness, intent or responsibility involved in committing the violation). The greater the degree of culpability, the higher the value that should be assigned to this factor.³⁰ The principal criteria for assessing culpability are the violator's previous experience with or knowledge of the Section 404 regulatory requirements, the degree of the violator's control over the illegal conduct, and the violator's motivation for undertaking the activity resulting in the violation.

The criterion for assessing the violator's experience with or knowledge of the Section 404 program is whether the violator knew or should have known of the need to obtain a Section 404 permit or of the adverse environmental consequences of the discharge prior to proceeding with the discharge activity. The greater the violator's knowledge of, experience with, and capability to understand the Section 404 regulatory requirements, and the greater the violator's ability to avoid the illegal conduct, the greater the culpability. Examples of circumstances demonstrating greater culpability include previous receipt of a Section 404 authorization or a prior independent opinion of the need for a permit or of permit requirements. In such circumstances, a value in the highest end of the range should be used.

With regard to the violator's control over the unlawful conduct, there may be some situations where the violator bears less than full responsibility or may share the liability for the occurrence of a violation. The case development team should assess the degree of culpability of each violator with respect to the violations in question.

Finally, the motivation for the violation may be a factor evidencing greater culpability. If the violator has sought to obtain a windfall profit by destroying waters of the U.S. (e.g., by converting wetlands to uplands) through conscious or negligent disregard of the Section 404 permitting program, culpability should be considered high even though the violator will not in

³⁰ The case development team should separately consider the violator's "recalcitrance" as specified in the "Additional Adjustments to Gravity" section below, and should adjust the penalty accordingly based on the level of recalcitrance present (i.e., the violator's refusal or unjustified delay in preventing, mitigating, or remedying a violation or in otherwise failing to cooperate).

fact realize those profits and may have had little previous experience with the Section 404 program.

2. Compliance History of the Violator

0 - 20

The case development team should consider whether the defendant has a history of prior Section 404 violations including unpermitted discharge violations, permit violations, or a previous violation of an EPA administrative order. The greater the number of past violations and the more significant the violations were, the higher the value that should be assigned to this factor. The earlier violations need not relate to the same site as the present action. Prior history information may be obtained not only from EPA experience with the violator, but also from appropriate Corps Districts, other federal agencies' knowledge and records, and the violator's responses to Section 308 requests for information.

3. Need for Deterrence:

0-20

The case development team should consider the need to send a specific and/or general deterrence message for the violations at issue. Staff should consider the extent to which the violator appears likely to repeat the types of violations at issue and the prevalence of this type of violation in the regulated community. The greater the apparent likelihood of the violator to repeat the violation, or the more prevalent the violation at issue in the general community, the greater the need for a strong deterrent message and the higher the value that should be assigned to this factor.

ADDITIONAL ADJUSTMENTS TO GRAVITY

After establishing the preliminary gravity amount above, the case development team may adjust this amount to reflect the recalcitrance of the violator and other relevant aspects of the case as provided for below. In addition to the gravity adjustments discussed below, there may be situations where the gravity component may also be adjusted under EPA's Audit Policy.³¹

Recalcitrance Adjustment Factor: The "recalcitrance" adjustment factor may be used to increase³² the penalty based on a violator's bad faith, or unjustified delay in preventing,

³¹ See "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" 65 Fed. Reg. 19618 (April 11, 2000).

³² Once a violator has been informed of a violation, a prompt return to compliance is the minimum response expected, therefore, no downward adjustment is provided for by this policy for efforts made to come into compliance after being informed of a violation. (As discussed above, a prompt restoration of the violation would be a basis for lowering the gravity amount by reducing the Environmental Significance of the violation). Where a violator has made "good faith efforts to comply with the applicable requirement" prior to being given notice of the violation by the government, see Section 309(d), this fact may be taken into account by providing a lower value for

mitigating, or remedying the violation in question. As distinguished from culpability, which relates to the violator's level of knowledge of the regulatory program and responsibility for a given violation, recalcitrance under this policy relates to the violator's delay or refusal to comply with the law, to cease violating, to correct violations, or to otherwise cooperate with regulators once specific notice has been given and/or a violation has occurred. If a violator is, or has been, recalcitrant, the case development team may increase the penalty settlement amount accordingly. This factor applies, for example, to a person who continues violating after having been informed of his violation, fails to provide requested information, or physically threatens government personnel. If the defendant has violated either an Army Corps of Engineers' cease and desist order or an EPA administrative order, or failed to respond to an EPA Section 308 information request, staff may account for this violation by using this factor.³³ The more serious the bad faith demonstrated or unjustified delay engendered by the violator, the higher the recalcitrance adjustment should be. Applying the recalcitrance factor may result in a recalcitrance gravity adjustment of up to 200 percent (200%) of the preliminary gravity amount. This factor is applied by multiplying the total preliminary gravity amount by a percentage between 0 and 200.

Quick Settlement Adjustment Factor: In order to provide an extra incentive for violators who make efforts to achieve an efficient and timely resolution of violations, and in recognition of a violator's cooperativeness, EPA may reduce the preliminary gravity amount by 10 percent (10%) in administrative enforcement actions. This factor may only be applied if the case development team expects the violator to settle promptly and if the violation(s) at issue have or will be fully remediated. As a general rule, for purposes of this penalty reduction, in Class I administrative enforcement actions, a "quick settlement" is one in which the violator signs an administrative penalty order on consent within four months of the date the complaint was issued or within four months of when the government first sent the violator a written offer of settlement, whichever is earlier. For Class II administrative cases the controlling time period is six months. If the violator does not sign the administrative consent agreement within this time period, the adjustment generally should not be made available. If this reduction has been taken but the violator fails to settle quickly, this reduction should be withdrawn and the settlement penalty increased accordingly.

Other Factors as Justice May Require: This consideration encompasses factors that operate to reduce a penalty settlement amount, as well as factors that operate to increase a penalty settlement amount. Not every relevant circumstance can be anticipated ahead of time. An example of a mitigating factor is a circumstance where a violator has already paid a civil penalty for the same violations at issue in a case brought by another plaintiff. These costs may

the "Degree of Culpability" factor.

³³ In the alternative, a separate gravity calculation may be performed for such violations.

be considered when determining the appropriate penalty settlement.³⁴ Of course, the remaining settlement figure should be of a sufficient level to promote deterrence. Litigation considerations should not be double counted here.

C. Additional Reductions for Settlements

Inability to Pay: If the violator has raised the issue of inability to pay the proposed penalty, the Region should request whatever documentation is needed to ascertain the violator's financial condition.³⁵ Any statements of financial condition should be appropriately certified.³⁶ In order to promote settlement, EPA personnel should employ the Agency's ability to pay computer programs: ABEL, INDIPAY and MUNIPAY.³⁷ ABEL analyzes ability to pay claims from corporations and partnerships; INDIPAY analyzes claims from individuals; and MUNIPAY analyzes such claims from municipalities, towns, sewer authorities and drinking water authorities. Where the violations are egregious, or the violator refuses to comply with the law, the team may consider a bottom line that could affect the economic viability of the violator.

Litigation Considerations: Certain enforcement cases may have mitigating factors that could be expected to persuade a court to assess a lower penalty amount. The simple existence of weaknesses or limitations in a case, however, should not automatically result in a litigation consideration reduction of the bottom line settlement penalty amount.³⁸ EPA may reduce the

³⁴ If the defendant has previously paid civil penalties for the same violations to another plaintiff, this factor may be used to reduce the amount of the settlement penalty by no more than the amount previously paid for the same violations.

³⁵ For a discussion of what financial documents the Agency should seek, see Guidance on Determining a Violator's Ability to Pay a Civil Penalty, December 16, 1986, codified as General Enforcement Policy Compendium document PT.2-1. For further guidance on this issue and model interrogatories, contact the Financial Issues Helpline at (888) 326-6778.

³⁶ E.g., tax returns must be signed, and as a precaution, the litigation team should have the defendant/respondent fill out IRS form 8821, which authorizes the IRS to release tax information directly to the EPA. In that way, the Agency can verify the information in the tax returns.

³⁷ These models are available on the Agency's web site at <http://www.epa.gov/oeca/datasys/dsm2.html>. Because ABEL, MUNIPAY, and INDIPAY are limited in their approach, many entities that fail the analysis may still be able to afford to achieve full compliance and pay the entire penalty. Therefore, it is essential to examine the violator's other potential resources, such as from liquidation of certificates of deposit and money market funds, before reducing a bottom line penalty for inability to pay. It is recommended that a financial analyst/economist be contacted to review financial information to determine if a violator truly has an inability to pay a penalty. For further guidance in this area, contact the Agency's Financial Issues Helpline at (888) 326-6778.

³⁸ In many situations, the circumstances of a particular case are already accounted for in the penalty calculation. For example, the gravity calculation will be less in those circumstances in which the period of violation was brief, the exceedances of the limitations were small, the pollutants were not toxic, or there is no evidence of

amount of the civil penalty it will accept at settlement to reflect weaknesses in its case where the facts demonstrate a substantial likelihood the government will not achieve a higher penalty at trial.

Adjustments for litigation considerations may be taken on a factual basis specific to the case. Before a complaint is filed, the application of certain litigation considerations may be premature, as the Agency may not have sufficient information to fully evaluate litigation risk including evidentiary matters, witness availability, and equitable defenses. Reductions for these litigation considerations are more likely to be appropriate after the Agency obtains an informed view, through discovery and settlement negotiations, of the strengths and weaknesses in its case. Pre-filing settlement negotiations are often helpful in identifying and evaluating litigation considerations, especially regarding potential equitable defenses, and thus reductions based on such litigation considerations may be appropriately taken before the complaint is filed.

Possible Litigation Considerations: While there is no universal list of litigation considerations, the following factors may be appropriate in evaluating whether the preliminary settlement penalty exceeds the penalty the Agency would likely obtain at trial:

- Troublesome facts and/or uncertain legal arguments such that the Agency faces a significant risk of not prevailing in the case or obtaining a nationally significant negative precedent at trial;
- Known problems with the reliability or admissibility of the government's evidence proving liability or supporting a civil penalty;
- The credibility, reliability, and availability of witnesses;³⁹
- The informed, expressed opinion of the judge assigned to the case, after evaluating the merits of the case;
- The record of the judge in any other environmental enforcement case presenting similar issues;

environmental harm. The economic benefit calculation will also be smaller when the violator has already returned to compliance, because the period of violation will be shorter. Such mitigating circumstances should not be double counted as reductions for litigation considerations.

³⁹ The credibility and reliability of witnesses relates to their demeanor, reputation, truthfulness, and impeachability. For instance, if a government witness has made statements significantly contradictory to the position he is to support at trial, his credibility may be impeached by the respondent or the defendant. The availability of a witness will affect the settlement bottom-line if the witness cannot be produced at trial.

- Statements made by federal, state or local regulators that may allow the respondent or defendant to credibly argue that it believed it was complying with federal requirements;
- The development of new, relevant case law;
- Penalties awarded in the same judicial district in other Section 404 enforcement cases.

Not Litigation Considerations: In contrast to the above potential litigation considerations, the following factors should not be considered litigation considerations:

- A generalized view to avoid litigation or to avoid potential precedential areas of the law;⁴⁰
- A duplicative use of elements included or assumed elsewhere in the penalty policy, such as inability to pay, “good faith”⁴¹, lack of recalcitrance, or a lack of demonstrated environmental harm;⁴²
- Off-the-record statements by the court, before it has had a chance to evaluate the specific merits of the case;
- The fact that the water of the United States in question is already polluted or that the water can assimilate additional pollution.⁴³

⁴⁰ A generalized desire to minimize litigation costs is not a litigation consideration.

⁴¹ The efforts of the violator to achieve compliance or minimize the violations after EPA or a state has initiated an enforcement action do not constitute “good faith” efforts. If such efforts are undertaken before the regulatory agency initiates an enforcement response, the settlement penalty calculation already includes such efforts. This penalty policy assumes all members of the regulated community will make good faith efforts to both achieve compliance and remedy violations when they occur. See also f.n. 32.

⁴² Courts have considered the extent of environmental harm associated with violations in determining the “seriousness of violations” pursuant to the factors in Section 309(d), and have used the absence of any demonstrated or discrete identified environmental harm to impose less than the statutory maximum penalty. Proof of environmental harm, however, is neither necessary for liability nor for the assessment of penalties.

⁴³ See, e.g., Natural Resources Defense Council v. Texaco Refining and Mktg., 800 F. Supp. 1, 24 (D. Del. 1992).

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Supplemental Environmental Projects ("SEPs") are defined by EPA as environmentally beneficial projects that a violator agrees to undertake as part of a settlement, but is not otherwise legally obligated to perform. Favorable penalty consideration is given because the SEP provides an environmental benefit above and beyond what is required to remedy the violation(s) at issue in the enforcement action. In determining whether a proposed SEP is acceptable under Agency policy, as well as the appropriate penalty offset for a SEP, Agency enforcement staff should refer to the "EPA Supplemental Projects Policy."⁴⁴ Use of SEPs in a particular case is entirely within the discretion of EPA in administrative cases, and EPA and the Department of Justice in judicial cases. In determining the real cost of a SEP to a violator, the litigation team should use the PROJECT model.⁴⁵

SEPs are particularly encouraged in the Section 404 program if the SEP results in protection of a wetland resource or other special aquatic site. For example, purchase and dedicated use of buffer land around a wetland helps ensure the survival of wetland resources, and is an appropriate and valuable SEP, as is upland land acquisition lying in wetland mosaics. In addition, deeding over wetlands in perpetuity for the purpose of conservation promotes program interests and the goals of the Clean Water Act. It should be noted that restoration of any area of the violation, or any mitigation in the form of injunctive relief to remedy such violations (including mitigation for the temporal loss of wetlands functions and values), does not constitute a SEP.

V. DOCUMENTATION, APPROVALS, AND CONFIDENTIALITY

Each component of the minimum settlement penalty calculation (including all adjustments), as well as subsequent recalculations, should be clearly documented in the case file along with supporting materials and written explanations. In any case not otherwise subject to Headquarters concurrence, in which a settlement penalty in a Section 404 enforcement action may not comply with the provisions of this policy or where application of this policy appears inappropriate, the penalty must be approved in advance by Headquarters.

Except as provided in Section II, documentation and explanation of a particular penalty calculation constitute confidential information that is exempt from disclosure under the

⁴⁴ See "Issuance of Final Supplemental Environmental Projects Policy," Memorandum from Steven A. Herman to Regional Administrators (April 10, 1998). This policy is also available on the Internet at: <http://www.epa.gov/oeca/sep/sepfinal.html>.

⁴⁵ This model is very similar to the BEN computer model, and like the other models, it is available on the Agency's web site at <http://www.epa.gov/oeca/datasys/dsm2.html>. For further information on the model and guidance in its use, contact the Financial Issues Helpline at (888) 326-6778.

Freedom of Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client and attorney-work product privileges. While individual settlement penalty calculations under this policy are confidential documents, this policy is a public document that may be released to anyone upon request. In the conduct of settlement negotiations, the Agency may choose to release portions of the case-specific settlement calculations. Such information may only be used for settlement negotiations in the case at hand and may not be admitted into evidence in a trial or hearing, as provided by Rule 408 of the Federal Rules of Civil Procedure.

The policies and procedures set forth in this document and the accompanying attachment are intended for the guidance of government personnel. They are not intended, and cannot be relied on, to create any rights, defenses or claims, substantive or procedural, enforceable by any party in litigation with the United States. The policies set forth in this document do not have the force of law and are not legally binding on Agency personnel. The Agency reserves the right to act at variance with these procedures and to change them at any time without public notice.



US Army Corps
of Engineers



WETLANDS RESEARCH PROGRAM

TECHNICAL REPORT Y-87-1

CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL

by

Environmental Laboratory

DEPARTMENT OF THE ARMY
Waterways Experiment Station, Corps of Engineers
PO Box 631, Vicksburg, Mississippi 39180-0631



January 1987
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<p>This document presents approaches and methods for identifying and delineating wetlands for purposes of Section 404 of the Clean Water Act. It is designed to assist users in making wetland determinations using a multiparameter approach. Except where noted in the manual, this approach requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland. The multiparameter approach provides a logical, easily defensible, and technical basis for wetland determinations. Technical guidelines are presented for wetlands, deepwater aquatic habitats, and nonwetlands (uplands).</p> <p>Hydrophytic vegetation, hydric soils, and wetland hydrology are also characterized, and wetland indicators of each parameter are listed.</p> <p style="text-align: right;">(Continued)</p>				
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Methods for applying the multiparameter approach are described. Separate sections are devoted to preliminary data gathering and analysis, method selection, routine determinations, comprehensive determinations, atypical situations, and problem areas. Three levels of routine determinations are described, thereby affording significant flexibility in method selection.

Four appendices provide supporting information. Appendix A is a glossary of technical terms used in the manual. Appendix B contains data forms for use with the various methods. Appendix C, developed by a Federal interagency panel, contains a list of all plant species known to occur in wetlands of the region. Each species has been assigned an indicator status that describes its estimated probability of occurring in wetlands. A second list contains plant species that commonly occur in wetlands of the region. Morphological, physiological, and reproductive adaptations that enable a plant species to occur in wetlands are also described, along with a listing of some species having such adaptations. Appendix D describes the procedure for examining the soil for indicators of hydric soil conditions, and includes a national list of hydric soils developed by the National Technical Committee for Hydric Soils.

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PREFACE

This manual is a product of the Wetlands Research Program (WRP) of the US Army Engineer Waterways Experiment Station (WES), Vicksburg, Miss. The work was sponsored by the Office, Chief of Engineers (OCE), US Army. OCE Technical Monitors for the WRP were Drs. John R. Hall and Robert J. Pierce, and Mr. Phillip C. Pierce.

The manual has been reviewed and concurred in by the Office of the Chief of Engineers and the Office of the Assistant Secretary of the Army (Civil Works) as a method approved for voluntary use in the field for a trial period of 1 year.

This manual is not intended to change appreciably the jurisdiction of the Clean Water Act (CWA) as it is currently implemented. Should any District find that use of this method appreciably contracts or expands jurisdiction in their District as the District currently interprets CWA authority, the District should immediately discontinue use of this method and furnish a full report of the circumstances to the Office of the Chief of Engineers.

This manual describes technical guidelines and methods using a multi-parameter approach to identify and delineate wetlands for purposes of Section 404 of the Clean Water Act. Appendices of supporting technical information are also provided.

The manual is presented in four parts. Part II was prepared by Dr. Robert T. Huffman, formerly of the Environmental Laboratory (EL), WES, and Dr. Dana R. Sanders, Sr., of the Wetland and Terrestrial Habitat Group (WTHG), Environmental Resources Division (ERD), EL. Dr. Huffman prepared the original version of Part II in 1980, entitled "Multiple Parameter Approach to the Field Identification and Delineation of Wetlands." The original version was distributed to all Corps field elements, as well as other Federal resource and environmental regulatory agencies, for review and comments. Dr. Sanders revised the original version in 1982, incorporating review comments. Parts I, III, and IV were prepared by Dr. Sanders, Mr. William B. Parker (formerly detailed to WES by the US Department of Agriculture (USDA), Soil Conservation Service (SCS)) and Mr. Stephen W. Forsythe (formerly detailed to WES by the US Department of the Interior, Fish and Wildlife Service (FWS)). Dr. Sanders also served as overall technical editor of the manual. The manual was edited by Ms. Jamie W. Leach of the WES Information Products Division.

The authors acknowledge technical assistance provided by: Mr. Russell F. Theriot, Mr. Ellis J. Clairain, Jr., and Mr. Charles J. Newling, all of WTHG, ERD; Mr. Phillip Jones, former SCS detail to WES; Mr. Porter B. Reed, FWS, National Wetland Inventory, St. Petersburg, Fla.; Dr. Dan K. Evans, Marshall University, Huntington, W. Va.; and the USDA-SCS. The authors also express gratitude to Corps personnel who assisted in developing the regional lists of species that commonly occur in wetlands, including Mr. Richard Macomber, Bureau of Rivers and Harbors; Ms. Kathy Mulder, Kansas City District; Mr. Michael Gilbert, Omaha District; Ms. Vicki Goodnight, Southwestern Division; Dr. Fred Weinmann, Seattle District; and Mr. Michael Lee, Pacific Ocean Division. Special thanks are offered to the CE personnel who reviewed and commented on the draft manual, and to those who participated in a workshop that consolidated the field comments.

The work was monitored at WES under the direct supervision of Dr. Hanley K. Smith, Chief, WTHG, and under the general supervision of Dr. Conrad J. Kirby, Jr., Chief, ERD. Dr. Smith, Dr. Sanders, and Mr. Theriot were Managers of the WRP. Dr. John Harrison was Chief, EL.

Director of WES during the preparation of this report was COL Allen F. Grum, USA. During publication, COL Dwayne G. Lee, CE, was Commander and Director. Technical Director was Dr. Robert W. Whalin.

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CONVERSION FACTORS, NON-SI TO SI (METRIC)
UNITS OF MEASUREMENT

Non-SI units of measurement used in this report can be converted to SI (metric) units as follows:

<u>Multiply</u>	<u>By</u>	<u>To Obtain</u>
acres	0.4047	hectares
Fahrenheit degrees	5/9	Celsius degrees*
feet	0.3048	metres
inches	2.54	centimetres
miles (US statute)	1.6093	kilometres
square inches	6.4516	square centimetres

* To obtain Celsius (C) temperature readings from Fahrenheit (F) readings, use the following formula: $C = (5/9) (F - 32)$.

CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL

PART I: INTRODUCTION

Background

1. Recognizing the potential for continued or accelerated degradation of the Nation's waters, the US Congress enacted the Clean Water Act (hereafter referred to as the Act), formerly known as the Federal Water Pollution Control Act (33 U.S.C. 1344). The objective of the Act is to maintain and restore the chemical, physical, and biological integrity of the waters of the United States. Section 404 of the Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into the waters of the United States, including wetlands.

Purpose and Objectives

Purpose

2. The purpose of this manual is to provide users with guidelines and methods to determine whether an area is a wetland for purposes of Section 404 of the Act.

Objectives

3. Specific objectives of the manual are to:
- a. Present technical guidelines for identifying wetlands and distinguishing them from aquatic habitats and other nonwetlands.*
 - b. Provide methods for applying the technical guidelines.
 - c. Provide supporting information useful in applying the technical guidelines.

* Definitions of terms used in this manual are presented in the Glossary, Appendix A.

Scope

4. This manual is limited in scope to wetlands that are a subset of "waters of the United States" and thus subject to Section 404. The term "waters of the United States" has broad meaning and incorporates both deep-water aquatic habitats and special aquatic sites, including wetlands (Federal Register 1982), as follows:

- a. The territorial seas with respect to the discharge of fill material.
- b. Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including their adjacent wetlands.
- c. Tributaries to navigable waters of the United States, including adjacent wetlands.
- d. Interstate waters and their tributaries, including adjacent wetlands.
- e. All others waters of the United States not identified above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not a part of a tributary system to interstate waters or navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

Determination that a water body or wetland is subject to interstate commerce and therefore is a "water of the United States" shall be made independently of procedures described in this manual.

Special aquatic sites

5. The Environmental Protection Agency (EPA) identifies six categories of special aquatic sites in their Section 404 b.(1) guidelines (Federal Register 1980), including:

- a. Sanctuaries and refuges.
- b. Wetlands.
- c. Mudflats.
- d. Vegetated shallows.
- e. Coral reefs.
- f. Riffle and pool complexes.

Although all of these special aquatic sites are subject to provisions of the Clean Water Act, this manual considers only wetlands. By definition (see paragraph 26a), wetlands are vegetated. Thus, unvegetated special aquatic

sites (e.g. mudflats lacking macrophytic vegetation) are not covered in this manual.

Relationship to wetland classification systems

6. The technical guideline for wetlands does not constitute a classification system. It only provides a basis for determining whether a given area is a wetland for purposes of Section 404, without attempting to classify it by wetland type.

7. Consideration should be given to the relationship between the technical guideline for wetlands and the classification system developed for the Fish and Wildlife Service (FWS), US Department of the Interior, by Cowardin et al. (1979). The FWS classification system was developed as a basis for identifying, classifying, and mapping wetlands, other special aquatic sites, and deepwater aquatic habitats. Using this classification system, the National Wetland Inventory (NWI) is mapping the wetlands, other special aquatic sites, and deepwater aquatic habitats of the United States, and is also developing both a list of plant species that occur in wetlands and an associated plant database. These products should contribute significantly to application of the technical guideline for wetlands. The technical guideline for wetlands as presented in the manual includes most, but not all, wetlands identified in the FWS system. The difference is due to two principal factors:

- a. The FWS system includes all categories of special aquatic sites identified in the EPA Section 404 b.(1) guidelines. All other special aquatic sites are clearly within the purview of Section 404; thus, special methods for their delineation are unnecessary.
- b. The FWS system requires that a positive indicator of wetlands be present for any one of the three parameters, while the technical guideline for wetlands requires that a positive wetland indicator be present for each parameter (vegetation, soils, and hydrology), except in limited instances identified in the manual.

Organization

8. This manual consists of four parts and four appendices. PART I presents the background, purpose and objectives, scope, organization, and use of the manual.

9. PART II focuses on the technical guideline for wetlands, and stresses the need for considering all three parameters (vegetation, soils, and hydrology) when making wetland determinations. Since wetlands occur in an intermediate position along the hydrologic gradient, comparative technical guidelines are also presented for deepwater aquatic sites and nonwetlands.

10. PART III contains general information on hydrophytic vegetation, hydric soils, and wetland hydrology. Positive wetland indicators of each parameter are included.

11. PART IV, which presents methods for applying the technical guideline for wetlands, is arranged in a format that leads to a logical determination of whether a given area is a wetland. Section A contains general information related to application of methods. Section B outlines preliminary data-gathering efforts. Section C discusses two approaches (routine and comprehensive) for making wetland determinations and presents criteria for deciding the correct approach to use. Sections D and E describe detailed procedures for making routine and comprehensive determinations, respectively. The basic procedures are described in a series of steps that lead to a wetland determination.

12. The manual also describes (PART IV, Section F) methods for delineating wetlands in which the vegetation, soils, and/or hydrology have been altered by recent human activities or natural events, as discussed below:

- a. The definition of wetlands (paragraph 26a) contains the phrase "under normal circumstances," which was included because there are instances in which the vegetation in a wetland has been inadvertently or purposely removed or altered as a result of recent natural events or human activities. Other examples of human alterations that may affect wetlands are draining, ditching, levees, deposition of fill, irrigation, and impoundments. When such activities occur, an area may fail to meet the diagnostic criteria for a wetland. Likewise, positive hydric soil indicators may be absent in some recently created wetlands. In such cases, an alternative method must be employed in making wetland determinations.
- b. Natural events may also result in sufficient modification of an area that indicators of one or more wetland parameters are absent. For example, changes in river course may significantly alter hydrology, or beaver dams may create new wetland areas that lack hydric soil conditions. Catastrophic events (e.g. fires, avalanches, mudslides, and volcanic activities) may also alter or destroy wetland indicators on a site.

Such atypical situations occur throughout the United States, and all of these cannot be identified in this manual.

13. Certain wetland types, under the extremes of normal circumstances, may not always meet all the wetland criteria defined in the manual. Examples include prairie potholes during drought years and seasonal wetlands that may lack hydrophytic vegetation during the dry season. Such areas are discussed in PART IV, Section G, and guidance is provided for making wetland determinations in these areas. However, such wetland areas may warrant additional research to refine methods for their delineation.

14. Appendix A is a glossary of technical terms used in the manual. Definitions of some terms were taken from other technical sources, but most terms are defined according to the manner in which they are used in the manual.

15. Data forms for methods presented in PART IV are included in Appendix B. Examples of completed data forms are also provided.

16. Supporting information is presented in Appendices C and D. Appendix C contains lists of plant species that occur in wetlands. Section 1 consists of regional lists developed by a Federal interagency panel. Section 2 consists of shorter lists of plant species that commonly occur in wetlands of each region. Section 3 describes morphological, physiological, and reproductive adaptations associated with hydrophytic species, as well as a list of some species exhibiting such adaptations. Appendix D discusses procedures for examining soils for hydric soil indicators, and also contains a list of hydric soils of the United States.

Use

17. Although this manual was prepared primarily for use by Corps of Engineers (CE) field inspectors, it should be useful to anyone who makes wetland determinations for purposes of Section 404 of the Clean Water Act. The user is directed through a series of steps that involve gathering of information and decisionmaking, ultimately leading to a wetland determination. A general flow diagram of activities leading to a determination is presented in Figure 1. However, not all activities identified in Figure 1 will be required for each wetland determination. For example, if a decision is made to use a

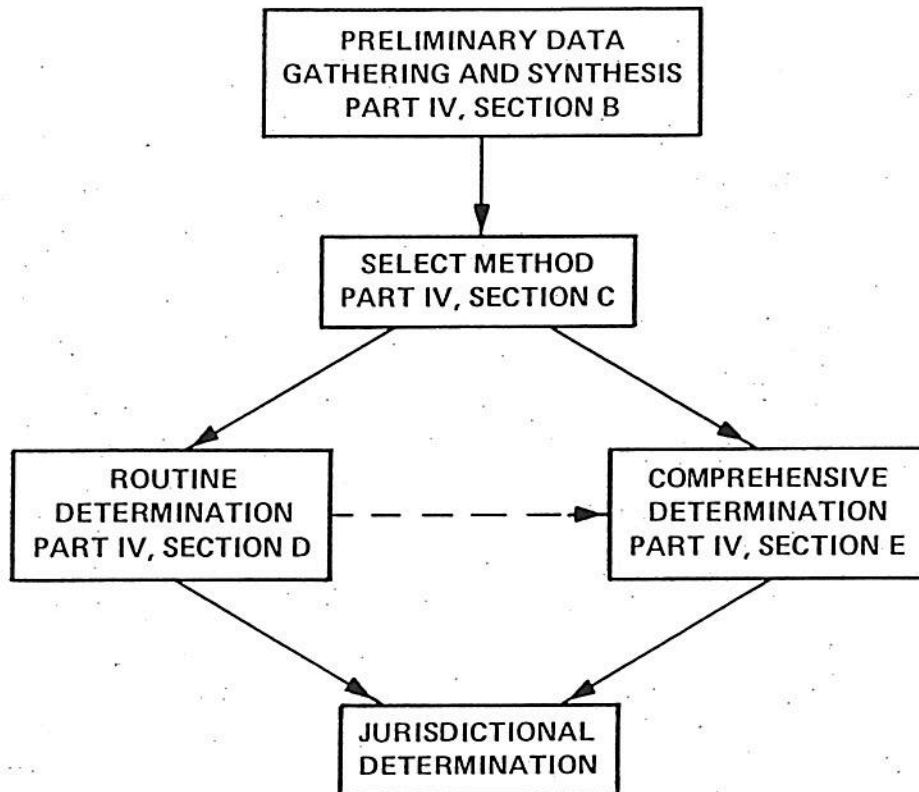


Figure 1. General schematic diagram of activities leading to a wetland/nonwetland determination

routine determination procedure, comprehensive determination procedures will not be employed.

Premise for use of the manual

18. Three key provisions of the CE/EPA definition of wetlands (see paragraph 26a) include:

- a. Inundated or saturated soil conditions resulting from permanent or periodic inundation by ground water or surface water.
- b. A prevalence of vegetation typically adapted for life in saturated soil conditions (hydrophytic vegetation).
- c. The presence of "normal circumstances."

19. Explicit in the definition is the consideration of three environmental parameters: hydrology, soil, and vegetation. Positive wetland indicators of all three parameters are normally present in wetlands. Although vegetation is often the most readily observed parameter, sole reliance on vegetation or either of the other parameters as the determinant of wetlands can sometimes be misleading. Many plant species can grow successfully in both

wetlands and nonwetlands, and hydrophytic vegetation and hydric soils may persist for decades following alteration of hydrology that will render an area a nonwetland. The presence of hydric soils and wetland hydrology indicators in addition to vegetation indicators will provide a logical, easily defensible, and technical basis for the presence of wetlands. The combined use of indicators for all three parameters will enhance the technical accuracy, consistency, and credibility of wetland determinations. Therefore, all three parameters were used in developing the technical guideline for wetlands and all approaches for applying the technical guideline embody the multiparameter concept.

Approaches

20. The approach used for wetland delineations will vary, based primarily on the complexity of the area in question. Two basic approaches described in the manual are (a) routine and (b) comprehensive.

21. Routine approach. The routine approach normally will be used in the vast majority of determinations. The routine approach requires minimal level of effort, using primarily qualitative procedures. This approach can be further subdivided into three levels of required effort, depending on the complexity of the area and the amount and quality of preliminary data available. The following levels of effort may be used for routine determinations:

- a. Level 1 - Onsite inspection unnecessary. (PART IV, Section D, Subsection 1).
- b. Level 2 - Onsite inspection necessary. (PART IV, Section D, Subsection 2).
- c. Level 3 - Combination of Levels 1 and 2. (PART IV, Section D, Subsection 3).

22. Comprehensive approach. The comprehensive approach requires application of quantitative procedures for making wetland determinations. It should seldom be necessary, and its use should be restricted to situations in which the wetland is very complex and/or is the subject of likely or pending litigation. Application of the comprehensive approach (PART IV, Section E) requires a greater level of expertise than application of the routine approach, and only experienced field personnel with sufficient training should use this approach.

Flexibility

23. Procedures described for both routine and comprehensive wetland determinations have been tested and found to be reliable. However,

site-specific conditions may require modification of field procedures. For example, slope configuration in a complex area may necessitate modification of the baseline and transect positions. Since specific characteristics (e.g. plant density) of a given plant community may necessitate the use of alternate methods for determining the dominant species, the user has the flexibility to employ sampling procedures other than those described. However, the basic approach for making wetland determinations should not be altered (i.e. the determination should be based on the dominant plant species, soil characteristics, and hydrologic characteristics of the area in question). The user should document reasons for using a different characterization procedure than described in the manual. *CAUTION: Application of methods described in the manual or the modified sampling procedures requires that the user be familiar with wetlands of the area and use his training, experience, and good judgment in making wetland determinations.*

PART II: TECHNICAL GUIDELINES

24. The interaction of hydrology, vegetation, and soil results in the development of characteristics unique to wetlands. Therefore, the following technical guideline for wetlands is based on these three parameters, and diagnostic environmental characteristics used in applying the technical guideline are represented by various indicators of these parameters.

25. Because wetlands may be bordered by both wetter areas (aquatic habitats) and by drier areas (nonwetlands), guidelines are presented for wetlands, deepwater aquatic habitats, and nonwetlands. However, procedures for applying the technical guidelines for deepwater aquatic habitats and nonwetlands are not included in the manual.

Wetlands

26. The following definition, diagnostic environmental characteristics, and technical approach comprise a guideline for the identification and delineation of wetlands:

- a. Definition. The CE (Federal Register 1982) and the EPA (Federal Register 1980) jointly define wetlands as: 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. Wetlands generally include swamps, marshes, bogs, and similar areas.
- b. Diagnostic environmental characteristics. Wetlands have the following general diagnostic environmental characteristics:
 - (1) Vegetation. The prevalent vegetation consists of macrophytes that are typically adapted to areas having hydrologic and soil conditions described in a above. Hydrophytic species, due to morphological, physiological, and/or reproductive adaptation(s), have the ability to grow, effectively compete, reproduce, and/or persist in anaerobic soil conditions.* Indicators of vegetation associated with wetlands are listed in paragraph 35.

* Species (e.g. *Acer rubrum*) having broad ecological tolerances occur in both wetlands and nonwetlands.

- (2) Soil. Soils are present and have been classified as hydric, or they possess characteristics that are associated with reducing soil conditions. Indicators of soils developed under reducing conditions are listed in paragraphs 44 and 45.
- (3) Hydrology. The area is inundated either permanently or periodically at mean water depths ≤ 6.6 ft, or the soil is saturated to the surface at some time during the growing season of the prevalent vegetation.* Indicators of hydrologic conditions that occur in wetlands are listed in paragraph 49.
- c. Technical approach for the identification and delineation of wetlands. Except in certain situations defined in this manual, evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination.

Deepwater Aquatic Habitats

27. The following definition, diagnostic environmental characteristics, and technical approach comprise a guideline for deepwater aquatic habitats:

- a. Definition. Deepwater aquatic habitats are areas that are permanently inundated at mean annual water depths > 6.6 ft or permanently inundated areas ≤ 6.6 ft in depth that do not support rooted-emergent or woody plant species.**
- b. Diagnostic environmental characteristics. Deepwater aquatic habitats have the following diagnostic environmental characteristics:
 - (1) Vegetation. No rooted-emergent or woody plant species are present in these permanently inundated areas.
 - (2) Soil. The substrate technically is not defined as a soil if the mean water depth is > 6.6 ft or if it will not support rooted emergent or woody plants.
 - (3) Hydrology. The area is permanently inundated at mean water depths > 6.6 ft.
- c. Technical approach for the identification and delineation of deepwater aquatic habitats. When any one of the diagnostic characteristics identified in b above is present, the area is a deepwater aquatic habitat.

* The period of inundation or soil saturation varies according to the hydrologic/soil moisture regime and occurs in both tidal and nontidal situations.

** Areas ≤ 6.6 ft mean annual depth that support only submergent aquatic plants are vegetated shallows, not wetlands.

Nonwetlands

28. The following definition, diagnostic environmental characteristics, and technical approach comprise a guideline for the identification and delineation of nonwetlands:

- a. Definition. Nonwetlands include uplands and lowland areas that are neither deepwater aquatic habitats, wetlands, nor other special aquatic sites. They are seldom or never inundated, or if frequently inundated, they have saturated soils for only brief periods during the growing season, and, if vegetated, they normally support a prevalence of vegetation typically adapted for life only in aerobic soil conditions.
- b. Diagnostic environmental characteristics. Nonwetlands have the following general diagnostic environmental characteristics:
 - (1) Vegetation. The prevalent vegetation consists of plant species that are typically adapted for life only in aerobic soils. These mesophytic and/or xerophytic macrophytes cannot persist in predominantly anaerobic soil conditions.*
 - (2) Soil. Soils, when present, are not classified as hydric, and possess characteristics associated with aerobic conditions.
 - (3) Hydrology. Although the soil may be inundated or saturated by surface water or ground water periodically during the growing season of the prevalent vegetation, the average annual duration of inundation or soil saturation does not preclude the occurrence of plant species typically adapted for life in aerobic soil conditions.
- c. Technical approach for the identification and delineation of nonwetlands. When any one of the diagnostic characteristics identified in b above is present, the area is a nonwetland.

* Some species, due to their broad ecological tolerances, occur in both wetlands and nonwetlands (e.g. *Acer rubrum*).

PART III: CHARACTERISTICS AND INDICATORS OF HYDROPHYTIC
VEGETATION, HYDRIC SOILS, AND WETLAND HYDROLOGY

Hydrophytic Vegetation

Definition

29. Hydrophytic vegetation. Hydrophytic vegetation is defined herein as the sum total of macrophytic plant life that occurs in areas where the frequency and duration of inundation or soil saturation produce permanently or periodically saturated soils of sufficient duration to exert a controlling influence on the plant species present. The vegetation occurring in a wetland may consist of more than one plant community (species association). The plant community concept is followed throughout the manual. Emphasis is placed on the assemblage of plant species that exert a controlling influence on the character of the plant community, rather than on indicator species. Thus, the presence of scattered individuals of an upland plant species in a community dominated by hydrophytic species is not a sufficient basis for concluding that the area is an upland community. Likewise, the presence of a few individuals of a hydrophytic species in a community dominated by upland species is not a sufficient basis for concluding that the area has hydrophytic vegetation.

CAUTION: In determining whether an area is "vegetated" for the purpose of Section 404 jurisdiction, users must consider the density of vegetation at the site being evaluated. While it is not possible to develop a numerical method to determine how many plants or how much biomass is needed to establish an area as being vegetated or unvegetated, it is intended that the predominant condition of the site be used to make that characterization. This concept applies to areas grading from wetland to upland, and from wetland to other waters. This limitation would not necessarily apply to areas which have been disturbed by man or recent natural events.

30. Prevalence of vegetation. The definition of wetlands (paragraph 26a) includes the phrase "prevalence of vegetation." Prevalence, as applied to vegetation, is an imprecise, seldom-used ecological term. As used in the wetlands definition, prevalence refers to the plant community or communities that occur in an area at some point in time. Prevalent vegetation is characterized by the dominant species comprising the plant community or communities. Dominant plant species are those that contribute more to the character of a plant community than other species present, as estimated or

measured in terms of some ecological parameter or parameters. The two most commonly used estimates of dominance are basal area (trees) and percent areal cover (herbs). Hydrophytic vegetation is prevalent in an area when the dominant species comprising the plant community or communities are typically adapted for life in saturated soil conditions.

31. Typically adapted. The term "typically adapted" refers to a species being normally or commonly suited to a given set of environmental conditions, due to some morphological, physiological, or reproductive adaptation (Appendix C, Section 3). As used in the CE wetlands definition, the governing environmental conditions for hydrophytic vegetation are saturated soils resulting from periodic inundation or saturation by surface or ground water. These periodic events must occur for sufficient duration to result in anaerobic soil conditions. When the dominant species in a plant community are typically adapted for life in anaerobic soil conditions, hydrophytic vegetation is present. Species listed in Appendix C, Section 1 or 2, that have an indicator status of OBL, FACW, or FAC* (Table 1) are considered to be typically adapted for life in anaerobic soil conditions (see paragraph 35a).

Influencing factors

32. Many factors (e.g. light, temperature, soil texture and permeability, man-induced disturbance, etc.) influence the character of hydrophytic vegetation. However, hydrologic factors exert an overriding influence on species that can occur in wetlands. Plants lacking morphological, physiological, and/or reproductive adaptations cannot grow, effectively compete, reproduce, and/or persist in areas that are subject to prolonged inundation or saturated soil conditions.

Geographic diversity

33. Many hydrophytic vegetation types occur in the United States due to the diversity of interactions among various factors that influence the distribution of hydrophytic species. General climate and flora contribute greatly to regional variations in hydrophytic vegetation. Consequently, the same associations of hydrophytic species occurring in the southeastern United States are not found in the Pacific Northwest. In addition, local environmental conditions (e.g. local climate, hydrologic regimes, soil series, salinity, etc.)

* Species having a FAC- indicator status are not considered to be typically adapted for life in anaerobic soil conditions.

Table 1
Plant Indicator Status Categories*

Indicator Category	Indicator Symbol	Definition
OBLIGATE WETLAND PLANTS	OBL	Plants that occur almost always (estimated probability >99%) in wetlands under natural conditions, but which may also occur rarely (estimated probability <1%) in nonwetlands. Examples: <i>Spartina alterniflora</i> , <i>Taxodium distichum</i> .
FACULTATIVE WETLAND PLANTS	FACW	Plants that occur usually (estimated probability >67% to 99%) in wetlands, but also occur (estimated probability 1% to 33% in nonwetlands). Examples: <i>Fraxinus pennsylvanica</i> , <i>Cornus stolonifera</i> .
FACULTATIVE PLANTS	FAC	Plants with a similar likelihood (estimated probability 33% to 67%) of occurring in both wetlands and nonwetlands. Examples: <i>Gleditsia triacanthos</i> , <i>Smilax rotundifolia</i> .
FACULTATIVE UPLAND PLANTS	FACU	Plants that occur sometimes (estimated probability 1% to <33%) in wetlands, but occur more often (estimated probability >67% to 99%) in nonwetlands. Examples: <i>Quercus rubra</i> , <i>Potentilla arguta</i> .
OBLIGATE UPLAND PLANTS	UPL	Plants that occur rarely (estimated probability <1%) in wetlands, but occur almost always (estimated probability >99%) in nonwetlands under natural conditions. Examples: <i>Pinus echinata</i> , <i>Bromus mollis</i> .

* Categories were originally developed and defined by the USFWS National Wetlands Inventory and subsequently modified by the National Plant List Panel. The three facultative categories are subdivided by (+) and (-) modifiers (see Appendix C, Section 1).

may result in broad variations in hydrophytic associations within a given region. For example, a coastal saltwater marsh will consist of different species than an inland freshwater marsh in the same region. An overview of hydrophytic vegetation occurring in each region of the Nation has been published by the CE in a series of eight preliminary wetland guides (Table 2), and a group of wetland and estuarine ecological profiles (Table 3) has been published by FWS.

Classification

34. Numerous efforts have been made to classify hydrophytic vegetation. Most systems are based on general characteristics of the dominant species occurring in each vegetation type. These range from the use of general physiognomic categories (e.g. overstory, subcanopy, ground cover, vines) to specific vegetation types (e.g. forest type numbers as developed by the Society of American Foresters). In other cases, vegetational characteristics are combined with hydrologic features to produce more elaborate systems. The most recent example of such a system was developed for the FWS by Cowardin et al. (1979).

Indicators of hydrophytic vegetation

35. Several indicators may be used to determine whether hydrophytic vegetation is present on a site. However, the presence of a single individual of a hydrophytic species does not mean that hydrophytic vegetation is present. The strongest case for the presence of hydrophytic vegetation can be made when several indicators, such as those in the following list, are present. However, any one of the following is indicative that hydrophytic vegetation is present:*

- a. More than 50 percent of the dominant species are OBL, FACW, or FAC** (Table 1) on lists of plant species that occur in wetlands. A national interagency panel has prepared a National List of Plant Species that occur in wetlands. This list categorizes species according to their affinity for occurrence in wetlands. Regional subset lists of the national list, including only species having an indicator status of OBL, FACW, or FAC, are presented in Appendix C, Section 1. The CE has also developed regional lists of plant species that commonly occur

* Indicators are listed in order of decreasing reliability. Although all are valid indicators, some are stronger than others. When a decision is based on an indicator appearing in the lower portion of the list, re-evaluate the parameter to ensure that the proper decision was reached.

** FAC+ species are considered to be wetter (i.e., have a greater estimated probability of occurring in wetlands) than FAC species, while FAC- species are considered to be drier (i.e., have a lesser estimated probability of occurring in wetlands) than FAC species.

Table 2
List of CE Preliminary Wetland Guides

<u>Region</u>	<u>Publication Date</u>	<u>WES Report No.</u>
Peninsular Florida	February 1978	TR Y-78-2
Puerto Rico	April 1978	TR Y-78-3
West Coast States	April 1978	TR-Y-78-4
Gulf Coastal Plain	May 1978	TR Y-78-5
Interior	May 1982	TR Y-78-6
South Atlantic States	May 1982	TR Y-78-7
North Atlantic States	May 1982	TR Y-78-8
Alaska	February 1984	TR Y-78-9