



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

AUG 24 1998

Regulatory Branch



Whatcom County Public Works
ATTN: Mr. Andreas Kammereck
5280 Northwest Drive, Ste C
Bellingham, Washington 98226-9098

Reference: 98-4-01779
Whatcom County
Public Works

Gentlemen:

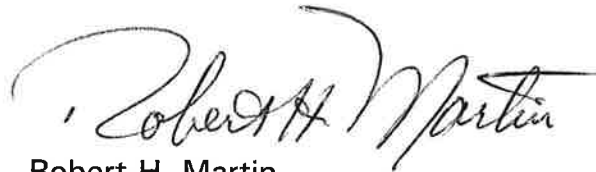
The U.S. Army Corps of Engineers (Corps) has no regulatory jurisdiction over Phase 1 of the Swift Creek Management Plan described in your recent permit application and shown on the enclosed revised drawings. The work involves excavating the Swift Creek channel bed, temporarily stock piling the material on the existing stock-pile areas next to the creek, and eventually removing of all the stock-piled material/levees. The work will take place in and next to Swift Creek between it's confluence with the Sumas River and Goodwin Road near Everson, Whatcom County, Washington. No excavated material is to be placed outside of the existing stock-pile areas or within the existing creek channel.

Some form of permit is normally required for the discharge of dredged or fill material, including excavation, into any water of the United States, including wetlands. However, based on a recent court ruling, incidental fallback of material during excavation from non-navigable waters of the United States is not regulated by the Corps. At this time, the Corps is determining if they will appeal the Court of Appeals decision. However, we do not believe a stay will be placed during any review of the appeal and, therefore, the Corps would not have jurisdiction over incidental fallback. A history of the of the excavation rule and subsequent court cases is enclosed for your information. Based on your description of how the work will be performed, your project does not involve the placement of fill into waters of

the United States and the excavation consists of incidental fallback only. Therefore, I have determined no permit is required and have canceled your permit application.

While the work may proceed without authorization from the Corps, other local and state permits may still be necessary. If you have any questions, please contact Muffy Walker, telephone (206) 764-6915.

Sincerely,

A handwritten signature in black ink that reads "Robert H. Martin". The signature is written in a cursive style with a large, sweeping initial "R".

Robert H. Martin
Chief, Application Review Section

Enclosures

Department of the Army Permit Requirements for Excavation in Non-Navigable Waterbodies and Wetlands

Some form of Department of the Army (DA) permit is normally required for any work involving the placement of fill material into any water of the United States, including wetlands. Waters of the U.S. include all streams, rivers, lakes, ponds, wetlands, and tidal waterbodies.

A DA permit is also required for construction of any structure, excavation, or dredging in navigable waterways. Navigable waterways include all tidal waterbodies and certain non-tidal waterbodies that have already been determined as navigable. A list of navigable waterways in Washington can be obtained from the Corps Seattle District Regulatory Branch.

Currently, no permit is required for excavation from non-navigable waterways, including wetlands, provided that the material is removed cleanly from the waterbody and placed on uplands or otherwise outside any waters of the U.S. The following discussion provides a brief background of federal regulatory requirements for excavation from waterbodies.

History

On August 23, 1993, the Corps issued regulations that expanded DA permit requirements to all excavation activities in non-navigable waters of the U.S. The new regulations are commonly referred to as the Excavation Rule. One key element of the Excavation Rule determined that "incidental fallback" of material during excavation from non-navigable waters of the U. S. constitutes a discharge of fill material that would therefore bring the work under Corps jurisdiction according to Section 404 of the Clean Water Act. Incidental fallback occurs when the excavation technique involves equipment like a clamshell or front-end loader making a clean pass or "bite" at the bottom material, and depositing the excavated material into the bed of a dumptruck or somewhere outside of the aquatic environment, with very little of it falling back (incidental fallback) into waters of the U.S.

The American Mining Congress subsequently challenged the Excavation Rule in U.S. District Court. On January 23, 1997, the U.S. District Court for the District of Columbia ruled that the Excavation Rule went beyond the authority of the Corps by requiring a Section 404 permit for those excavation activities where the only discharge of fill material into a waters of the U. S. comes from incidental fallback, effectively removing DA permit requirements for those types of excavation activities.

Enclosure

On June 25, 1997, the U.S. Circuit Court for the District of Columbia granted a stay of the District Court decision pending the Corps' appeal of the District Court decision to the U.S. Court of Appeals for the District of Columbia. The stay allowed the Corps to continue to implement the Excavation Rule while the on-going legal case was resolved.

On June 19, 1998, a three-judge panel of the U.S. Court of Appeals for the District of Columbia affirmed the earlier District Court decision. The Court of Appeals also vacated the earlier stay of the District Court decision, thereby removing Section 404 jurisdiction over excavation where incidental fallback is the only discharge of fill material to the waters of the U.S.

By August 3, 1998, the U.S. Department of Justice (on behalf of the Corps) must decide if it will appeal the Court of Appeals decision. Even if the appeal occurs, the Corps does not believe that the stay will be restored, and, therefore, the Corps would not have jurisdiction over incidental fallback during the appeal.

How Your Project May Be Affected

Certain excavation activities may be affected by the judicial rulings on the Excavation Rule. Those projects that are accomplished such that the gravel bar material would be removed directly from the bar into a dumptruck or to uplands (i.e. with only incidental fallback or incidental deposition of fill material into non-navigable waters of U.S.), then you would not need a DA permit for the work.

Excavation within navigable waterbodies have always and still require a DA permit. Likewise, sidecasting excavated material within a non-navigable water of the U.S. waterward of the line of ordinary high water (OHW) or within wetlands, pushing it around with a bulldozer, and sloppy disposal practices involving substantial discharges into waters are all actions that still require a DA permit. In general, most gravel bar scalping projects involve some form of grading or temporary stockpiling that is not considered incidental fallback and would require a DA permit, regardless of the recent developments on the Excavation Rule.

Enclosure