FINAL APPEAL DECISION

Concerning Approved Jurisdictional Determination
Carr-Gottstein Properties
File No. 9-1996-0088
U.S. Army Corps of Engineers
Alaska Engineer District
Issued July 16, 2003

Review Officer: Ms. Martha S. Chieply, U.S. Army Corps of Engineers, Mississippi Valley Division

Appellant/Applicant: Carr-Gottstein Properties, Anchorage, Alaska

Appellant's Representative: Cynthia L. Taub, Esq., Steptoe & Johnson LLP, Washington D.C.

Authority: Section 404 of the Clean Water Act (33 U.S.C. § 1344) and 33 CFR Part 331

Receipt of Request for Appeal: September 11, 2003

Site Inspection Date: October 21, 2003

Approved Jurisdictional Determination Meeting Date: October 21, 2003

Background Information:

Carr-Gottstein Properties ("Appellant"),[1] through its counsel, Cynthia Taub, Esq., of Steptoe & Johnson LLP, is appealing an approved jurisdictional determination ("approved JD") issued by the Corps of Engineers' (the Corps') Alaska Engineer District (the "District") for a site referred to as the Iris Subdivision, Tract A ("the Site"). The Site is located within an area known as Connors-Strawberry Bog[2] in the western part of the Anchorage metropolitan area, immediately northwest of the intersection of Minnesota Drive and Raspberry Road.

Connors-Strawberry Bog is described as a concave patterned ground bog complex,[3] and it includes three sizeable lakes: Connors Lake,[4] Strawberry Lake, and Blueberry Lake. The Site is part of the largest of the three large tracts remaining from the original bog and is located south of Connors Lake and north of Strawberry Lake (about equidistant between the two) and west of Blueberry Lake.

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[1] Referred to in the RFA as "Carr-Gottstein Properties," but referred on the organization's own stationery as "Carr Gottstein Properties," and referred to elsewhere in the administrative record as "Carr-Gottstein Associates."
[2] Also sometimes referred to as "Conners Bog" or "Connors Bog."
[3] Enclosure to the June 6, 1997 Environmental Protection Agency letter entitled "EPA Concerns, Connors Bog 3 (Carr-Gottstein Properties)."
[4] Also sometimes referred to as Conners Lake.

The District's Timeline For Jurisdictional Determination reported that the Site had been assessed and found to be subject to the Corps' jurisdiction under Section 404 of the Clean Water Act (the "CWA")[5] for several projects since 1996. By letter dated March 10, 2002, Daniel Sauls, Esq., of Steptoe & Johnson LLP, requested that the District revisit its prior assertion of CWA jurisdiction over the Site in light of the United States Supreme Court's 2001 ruling in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (the "SWANCC decision"),[6] in which the Supreme Court had invalidated the Corps' so-called "Migratory Bird Rule."[7] In the past, the District had used the Migratory Bird Rule to support CWA jurisdiction over the Site. Enclosed with Mr. Sauls' letter was a technical report prepared by OASIS Environmental Incorporated (the "OASIS Report"),[8] which provided additional information regarding the Site and an evaluation of the Corps' jurisdiction over the Site. Mr. Sauls asserted that the Corps lacked CWA jurisdiction over the Site, "in sum [because] the site is an isolated, non-navigable intrastate wetland with no connection to interstate commerce [and] The wetland and the site are not adjacent to any navigable waters or any tributary of navigable waters."

By letter dated July 16, 2003, the District provided Mr. Sauls an approved JD,[9] finding the Site to be a "water of the United States" under the Corps' CWA jurisdiction. The cover letter essentially stated that the Site was *not* an isolated wetland, because it was "physically connected to Conners Lake as part of the Conners Bog." The cover letter further stated that the Corps had jurisdiction over "Conners Lake,"[10] because it had "recreational boating activities (navigation) and interstate tourism (commerce) taking place on it."

Ms. Taub (also of the Steptoe & Johnson firm) submitted a completed Request for Appeal (the "RFA") to the Corps' Pacific Ocean Division ("POD") on September 11, 2003,[11] challenging the District's approved JD for the Site. POD's Acting Commander appointed Ms. Martha Chieply to serve as Administrative Appeal Review Officer (the "RO") to assist POD's Division Engineer in reaching and documenting the Division Engineer's decision on the merits of the appeal. By letter dated September 30, 2003, the RO accepted the RFA and scheduled an approved JD meeting (also referred to herein as the "appeal conference"), as well as a site investigation. The site investigation and appeal conference were both held by the RO on October 21, 2003, in accordance with 33 CFR § 331.7(c) and (d), respectively.

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[5] 33 U.S.C. § 1344

[6] 351 U.S. 159 (2001)

[7] The Migratory Bird Rule was published in 1986, at 51 Fed. Reg. 41277.

[8] OASIS Environmental, Incorporated Technical Report, Evaluation of Clean Water Act Jurisdiction, Iris Subdivision, Tract A, Anchorage, Alaska, dated March 10, 2003.

[9] The District's approved JD included the referenced cover letter; a Basis for Jurisdictional Determination ("BJD") form dated July 15, 2003; a Regulatory Program Applicant Information Pamphlet; a Department of the Army permit application form; and a questionnaire. The Combined Notification of Appeal Options and Process ("NAP")/RFA form, dated July 16, 2003 was provided to Ms. Taub by facsimile on July 22, 2003.

[10] Connors Lake is sometimes referred to as "Conners Lake."

[11] Included in the RFA was a cover letter from Ms. Taub dated September 5, 2003; a copy of the District's NAP form; an eight-page document entitled "Reasons For Appeal of Jurisdictional Determination for Iris Subdivision, Anchorage, Alaska File Number: 1996-0088"; a copy of the District's July 16, 2003, approved JD letter; and a copy of the BJD form for Carr-Gottstein Properties, File #9-1996-0088, dated July 15, 2003.

Summary of this Final Appeal Decision:

The administrative record contains insufficient facts and analyses to support a determination whether or not the Site's wetlands are adjacent to open waters of the United States and therefore subject to the Corps' jurisdiction. In particular, additional documentation is needed to explain the existence (or non-existence) of various "divides" referred to at various places in the administrative record, including a so-called "Connors-Strawberry Divide," a so-called "ground-water divide" and a so-called "hydrologic divide," and to explain how any such divide(s) might affect the adjacency of the Site's wetlands to any open waters of the United States.

Additional facts and analyses are also needed regarding the possibility of use or susceptibility to use of Connors Lake in interstate or foreign commerce, the possibility that the Site's wetlands are jurisdictionally adjacent to nearby open waters of the United States other than Connors Lake, and the possibility of a physical/hydrological connection between the Site's wetlands and nearby open waters of the United States, for example, after rain events or during particularly wet seasons, that might constitute a significant nexus between the Site's wetlands and navigable waters.

This Final Appeal Decision remands the approved JD to the District for reconsideration. Upon remand, the District is also advised to obtain project-specific approval from the Corps' Headquarters prior to issuing any approved JD purporting to assert jurisdiction over Connors Lake or any other pertinent body of open water (or any wetlands adjacent solely thereto) based on any of the grounds listed in 33 CFR § 328.3(a)(3).

Information Received and Its Disposition During the Appeal Review:

In accordance with 33 CFR § 331.7(f), the appeal of an approved JD is limited to the information contained in the administrative record by the date of the Notification of Appeal Process ("NAP") for the approved JD, the proceedings of the appeal conference, and relevant information gathered by the RO. Neither Appellant nor the District may present new information not contained in the administrative record. However, both parties may interpret, clarify, or explain issues and information already contained in the record. In accordance with 33 CFR § 331.9(a), while reviewing and reaching a decision on the merits of an appeal, the Division Engineer can consult with or seek information from any person.

Prior to the appeal conference, the District provided the RO a copy of the administrative record that had been compiled as of the NAP date, July 16, 2003. That administrative record has been considered in reaching this Final Appeal Decision.

By e-mail dated October 16, 2003, the RO provided the District (with a copy to Ms. Taub) a list of eight written questions directed to the District, for discussion at the appeal conference. The RO directed no written questions to Appellant. Exhibit 1 in the Memorandum for the Record of the appeal conference (the "appeal conference MFR") contains the eight questions that the RO directed to the District.

During the appeal conference, the District provided a written response to the RO's eight questions. The District's written response is Exhibit 3 in the appeal conference MFR. The District's written response, and further discussion of those questions at the appeal conference, as well as general discussions at the appeal conference documented in the appeal conference MFR, have all been considered in reaching this Final Appeal Decision.

During the appeal conference, the District provided the Basis for Jurisdictional Determination ("BJD") form for the Carr-Gottstein Properties, File # 9-1996-0088, dated 15 July 2003 (Exhibit 4 in the appeal conference MFR). The BJD form inadvertently had been left out of the administrative record; however, the BJD form has been considered in reaching this Final Appeal Decision.

During the appeal conference, the RO provided two Administrative Appeal Process Flowcharts. Those flowcharts are Exhibit 2 in the appeal conference MFR.

After the appeal conference, and after the RO had reported her findings to the POD Division Engineer, POD requested a copy of the report referred to at various places in the administrative record as "Environmental Services Limited, 1985," (the "1985 Environmental Services report" herein).[12] The District provided POD a copy of an excerpt from that report (Attachment A to this Final Appeal Decision). That excerpt from the 1985 Environmental Services report has also been considered in reaching this Final Appeal Decision.

The RO provided Ms. Taub and the District copies of all information received during the appeal process, except for the excerpt from the 1985 Environmental Services report referred to in the preceding sentence, which is appended hereto as Attachment A.

Reasons for Appeal Stated by Appellant in the Request for Appeal:

Appellant's reasons for appeal are set out in numbered sections in the RFA. Those numbered reasons are set out and addressed below, in series.

Appellant's Reason I for Appeal: "Connors Lake is not Waters of the United States."

FINDING: The administrative record contains insufficient facts and analyses to determine whether this reason has merit.

ACTION: The District needs to provide additional facts and analyses to determine whether Connors Lake should be considered jurisdictional "waters of the United States."

DISCUSSION:

[12] The full title of that report is "Summary Report / Biophysical and Land Use Analysis with Master Plan Recommendations for Connors-Strawberry Bog / For Municipality of Anchorage Division of Property Management and C.B.S., Inc., Anchorage, Alaska / By Environmental Services Limited, Anchorage, Alaska, 30131-020, July, 1985."

The approved JD was grounded on the District's allegation that the Site's wetlands, in accordance with 33 CFR § 328.3(a)(7), are "adjacent to waters...identified [as 'waters of the United States'] in paragraphs (a)(1) through (6) of 33 CFR § 328.3." Therefore, to sustain CWA jurisdiction on that basis alone, Connors Lake must be one of the six types of waters identified in 33 CFR § 328.3(a)(1) through (6). The type of water identified by the District on the BJD form was the type of water described in § 328.3(a)(3)(i), essentially including, in the context of this appeal, all "intrastate lakes...or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters...which are used or could be used by interstate or foreign travelers for recreational or other purposes."

The administrative record indicates that Connors Lake is an entirely "intrastate lake," apparently having no permanent surface streams flowing into it or from it. In this regard, the District referred to maps and aerial photos in the administrative record that show it to be an entirely intrastate waterbody, and the OASIS Report submitted by Appellant states that the Site and the wetland that the Site occupies are entirely within the State of Alaska and within the Municipality of Anchorage.[13] There are also, however, indications in the administrative record that Connors Lake is navigable-in-fact and that it is used in interstate and/or foreign and commerce. For example, the administrative record contains evidence that portions of the waters of Connors Lake within the municipally-managed Connors Lake Park are utilized by organized, commercial foreign tour groups for wildlife watching, boating, and other recreational activities. Therefore, depending upon what additional facts may be adduced by Appellant and the District, a reasonable argument might be made that the waters of Connors Lake "are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," thus meeting the criteria of 33 CFR § 328.3 (a)(1) for "waters of the United States," as well as meeting the catch-all criteria of 33 CFR § 328.3 (a)(3)(i), which include "all other waters such as intrastate lakes...[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes." In other words, depending upon the significance of the interstate or foreign commerce that might occur or be possible on Connors Lake, Connors Lake might be both an "(a)(1) water" and an "(a)(3) water."

On remand, the District should supplement the administrative record to demonstrate the full range of past, present and potential uses of Connor Lake (or any other water that might be found to be "adjacent to" the Site's wetlands) in interstate and/or foreign commerce.

Appellant's Reason II for Appeal: "The Iris Subdivision [the Site] is Not Adjacent or Connected to Connors Lake."

FINDING: The administrative record contains insufficient facts and analyses to determine whether this reason has merit.

ACTION: The Alaska District should provide documentation to show definitively whether the Site's wetlands are adjacent to or physically/hydrologically connected to Connors Lake, or to some other jurisdictional waters of the United States.

[13] See page 4 of the OASIS Report.

DISCUSSION:

The gist of Appellant's argument here is captured in Appellant's statement in the RFA that, even if Connors Lake is properly deemed "waters of the United States," it "is more than 1,900 feet away from the Site [and] there is no direct contact or physical connection between the Lake and the Site." The gist of the District's argument, on the other hand, is captured in the District's written response to the RO's Question No. 2, asking the District to provide the "rationale for establishing that the subject wetlands are adjacent to Conner's Lake." The District's written response was: "Connors Lake is the center of the bog[,] with the subject property part of the vegetative mat surrounding it. The vegetative mat is a continuous, unbroken wetland from and including the subject property to Connors Lake." Thus, both parties' positions on the "adjacency" issue focus exclusively on Connors Lake, which is natural because that is the way the District first framed the issue in the approved JD. Substantial evidence in the administrative record; however, suggests that a threshold question must first be asked—i.e., whether the waters of Connors Lake are the only open waters of the United States to which the Site's wetlands can be considered "adjacent."

Although various statements in the administrative record describe Connors-Strawberry Bog as a "bowl," several hydrological contour maps included in the record seem to indicate that Connors-Strawberry Bog is actually more in the nature of a "saddle" between two watersheds—i.e., a saddle separating the Fish Creek watershed to the North, which appears to include Connors Lake and Lake Spenard, and the Campbell Creek watershed to the South, which appears to include Strawberry Lake and Lake Campbell, with the center line of the saddle running at an elevation of about 78 feet near to or across the Site. Both Campbell Creek and Fish Creek flow into Cook Inlet, which is beyond question a navigable water of the United States. Quoting directly from a "Permit Evaluation and Decision Document" apparently signed by the District on August 25, 1998 (the "1998 Decision Document"), [14] an excerpt of which is also part of the administrative record, Appellant in its RFA describes a "northeast-southwest drainage divide" that seems to separate the northwest "Connors" side of this figurative Connors-Strawberry Bog saddle from its southeast "Strawberry" side:

> An indistinct northeast-southwest drainage divide, located 300 to 800 feet north of the project site, hydrologically separates this bog. Surface and groundwater flow north of this divide historically moved toward Connors Lake and Lake Spenard, while movement on the south side was toward Strawberry Lake and Campbell Creek (Environmental Services Limited, 1985). The construction of Raspberry Road disrupted flow to the south of the proposed project site; this road construction substantially altered the bog's drainage pattern in the vicinity of the proposed project such that the construction of the proposed facilities in this wetland location just north of Raspberry Road would not likely further alter the bog's drainage pattern.[15]

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[14] I.e., Department of the Army Permit Evaluation and Decision Document, Application No. 4-960088, "Connors Bog 3," signed August 25, 1998.

[15] 1998 Decision Document, section entitled "Currents, circulation or drainage patterns." It is not clear from the administrative record whether the "proposed project site" referred to in the 1998 Decision Document was exactly the same as the Site addressed in this appeal.

In fact, an aerial photograph included in the administrative record, which photograph apparently was also included as "Figure 3" in the 1985 Environmental Services report referred to in the quotation from the 1998 Decision Document above (excerpt at Attachment A hereto) has a line marked on it, just north of the Site, and running in a northeast-southwest direction, labeled "Connors-Strawberry Divide." That photograph also has marked on it a "Storm Drain" system that begins just south of Raspberry Road and flows south past Strawberry Lake. This indicates that after a significant rain event or during a particularly rainy season water would tend to flow south from the vicinity of the Site's wetlands, toward the east-west barrier of Raspberry Road, which also forms the southern boundary of the Site, as opposed to northward to Connors Lake. It appears that Raspberry Road (fronting the Site on the south) might be a total barrier to such southward flow from the vicinity of the Site's wetlands, trapping such water at or near the Site, except that Raspberry Road is traversed by two culverts just east of the Site. Indeed, this potential southward flow of water from the vicinity of the Site's wetlands, and the existence of those south-flowing culverts under Raspberry Road, is documented in the District Project Manager's own MFR dated June18, 2003, which is also part of the administrative record. That MFR states:

> Three 24" culverts are shown on the Raspberry [R]oad As-built [drawing] from Alaska DOT. They flow south continuing the wetland along Northwood [Avenue]. A site investigation on 17 June 2003 found two culverts[,] and flow was south.
>
> I checked the municipality storm water maps and determined that a major storm sewer runs south along the east side of Northwood Avenue and empties into Campbell Creek (see attached photos). The first intake is 500 feet south of Raspberry [R]oad.

The photos attached to this MFR also indicate a southward drainage pattern from the vicinity of the Site's wetlands, through the culverts under Raspberry Road, and on toward Campbell Creek, in part through a storm sewer system that collects water just south of Raspberry Road and passes Strawberry Lake on its way south.

The 1985 "Environmental Services" report referred to above, an excerpt from which was located for POD only after the appeal conference had been conducted,[16] was not originally included in the administrative record. However, it contains a narrative description that seems to clarify and explain the aerial photograph labeled "Figure 3" included in the administrative record (a photograph that apparently was also included as an exhibit in the 1985 Environmental Services report). That excerpt from the 1985 Environmental Services report (Attachment A hereto) states on page 5, in relevant part, as follows:

> HYDROLOGY
>
> Connors-Strawberry Bog is an isolated, perched or surficial wetland. Connors and Strawberry Lakes lie in the lower north and south ends of the bog respectively and represent surface expressions of the water table in the bog.

[16] A copy of that excerpt from the Environmental Services report is Attachment A to this Final Appeal Decision.

> Topography and the pattern of strangs and flarks (alternating higher ridges and elongated depressions), referred to as the Patterned Ground Complex in this report, indicate slow surface and shallow subsurface flow occurs towards both Connors and Strawberry Lake. Therefore, an indistinct drainage divide exists from the southeast corner of the old municipal landfill southwestward, joining a scattered string of spruce bog islands (MOA 1973; aerial photos). This indistinct divide is shown in Figure 2.

This description in the 1985 Environmental Services report, which also appears to have been relied upon by the District[17] and by the EPA in making its comments,[18] suggests several important facts: (1) Connors Lake lies at the "lower" north end of the bog, and Strawberry Lake lies at the "lower" south end of the bog; thus the bog has two "lower ends," north and south; and (2) there is a "drainage divide" located somewhere in the bog between them. This, of course, draws into serious question the District's conclusory statement that "Connors Lake is the center of the bog," even though it might still be true that there is "unbroken wetland from and including the subject property to Connors Lake." The photograph in the administrative record labeled "Figure 3" (Attachment B hereto) is not exactly the same photograph as the one labeled "Figure 2" referred to in this excerpt from the 1985 Environmental Services report (Attachment A); however, both photographs appear to be from that same 1985 report,[19] and both photographs, which have "water table elevation" contour lines superimposed, [20] convey much the same information regarding possible drainage patterns. Specifically, both "Figure 2" (in Attachment A) and "Figure 3" (Attachment B) depict a "Connors-Strawberry divide" located just north of the Site at an elevation of 78 feet or more, as well as a "Storm Drain" system starting just south of Raspberry Road, near the culverts under that road in the vicinity of the Site, and flowing south past Strawberry Lake toward Campbell Creek. Both photographs also depict Connors Lake with a surface elevation below 76 feet, and Strawberry Lake with a surface elevation below 74 feet.

These indications of a southward flow pattern from the vicinity of the Site's wetlands were seemingly questioned (although not entirely contradicted) by the District's statement at the appeal conference, during a discussion about the possible hydrological connection between the Site and Connors Lake, to the effect that "the hydrological connection was discussed on page 3 of the Lounsbury...Report." Actually, page 3 of the so-called "Lounsbury Report," a "Wetlands Assessment" that is included in the administrative record,[21] appears to discuss only drainage *from* the Raspberry Road storm drain system *into* the bog. Significantly, it does not appear to discuss flows *from* the bog, or whether such flows might ultimately be north toward Connors Lake or south toward Strawberry Lake and Campbell Creek. However, page 1 of the Lounsbury Report, which apparently was referred to by neither party at the appeal conference, does contain the following statement:

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[17] See, e.g., the 1998 Decision Document, quoted above.

[18] See, e.g., the first page of the Enclosure to the June 6, 1997 Environmental Protection Agency letter entitled "EPA Concerns, Connors Bog 3 (Carr-Gottstein Properties)."

[19] The photograph in the administrative record is labeled "from Summary Report Biophysical and Land Use Analysis with Master Plan recommendation for Connors-Strawberry bog, July 1985, ESL," clearly the same 1985 Environmental Services report. The Pacific Ocean Division still does not have a complete copy of the 1985 Environmental Services report with its "Figure 3," but has only an excerpt of that report, including its "Figure 2."

[20] Both photographs include the following legend for their contour lines: "Water Table Elevation (inferred)."

[21] I.e., the report in the administrative record entitled "Wetlands Assessment of Tract A, Iris Subdivision, Anchorage, Alaska," prepared for Lounsbury and Associates, Inc. by HPR Engineering, Inc.," dated August 1992.

> The parcel [i.e., the Site] probably neither detains storm water or improves water quality. This is because it sits along a natural drainage divide and because natural surface runoff is diverted away from this property.

This statement from page 1 of the Lounsbury Report adds to the body of evidence that there is some kind of "divide" either on or very close to the Site and that there is at least potentially some "natural surface runoff" from the Site, although this statement does not specifically indicate whether that flow might be north toward Connors Lake or south toward Strawberry Lake and Campbell Creek (or both, if the Site truly "sits along" the natural drainage divide). However, "Appendix A" attached to the Lounsbury Report is a contour map[22] (Attachment C to this Final Decision) which depicts the "Subject Property" [i.e. the Site] with a line drawn just *south* of the Site, which line is indicated in the legend to be the "Ground water divide - approximately located," along with arrows showing the "Generalized direction of ground-water movement" pointing northwest away from the Site, toward Connors Lake. This, of course, contradicts the conclusion suggested in many of the other materials referred to above, i.e., that natural surface runoff from the Site would tend to be southward, toward Strawberry Lake and Campbell Creek.[23] In any event, the record seems clear that Connors Lake to the north has a surface elevation of less than 76 feet, that Strawberry Lake to the south has a surface elevation less than 74 feet, and that there is some sort of "divide" between them with an elevation of 78 feet or more in the approximate vicinity of the Site.

The OASIS Report (submitted with Mr. Sauls' March 10, 2002, letter) notes in several places that "Connors Bog is isolated from other wetlands and streams in the area and has little influence on surface water runoff or ground water recharge as noted by previous investigators."[24] The OASIS Report also refers to "very low rates of flow" for "shallow ground water."[25] However, "little influence" is not the same as "no influence"—and "low rates of flow" are not the same as "no rates of flow"—especially after heavy rain events or during particularly wet seasons. The record is simply not clear as to which navigable waters (if any) such flows might affect, or what effect any such flows or runoff might have on any such waters. Appellant seems to concede that there could be *some* surface and/or groundwater "flow" from the Site's wetlands; however, the administrative record does not clearly document whether any hydrologic connections exist which, in the event pollutants were placed in the Site's wetlands, could allow those pollutants ultimately enter jurisdictional waters of the United States or affect their ecosystems. In short, the administrative record does not clearly document whether there is a

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[22] The contours on this map are described by the legend: "Potentiometric contour—shows altitude at which water level would have stood in tightly cased wells. Contours are approximately located. Contour interval is 2 feet. Datum is sea level."

[23] Since the OASIS Report (submitted by Appellant) on page 6 states: "Groundwater...occurs under water-table conditions at or near the surface and thus saturates the surfacial material in much of the lowland area. Locally, this saturated, near-surface zone is very thin." Therefore, it is assumed, for purposes of this Final Appeal Decision, that hydrological contour maps of the Connors-Connors Bog region also closely reflect surface topography.

[24] OASIS Report, pp. 6 and 7.

[25] OASIS Report, p. 6.

"significant nexus" between these wetlands and navigable waters, of the kind found by the U.S. Supreme Court in United States v. Riverside Bayview Homes.[26]

In support of Appeal Reason II, Appellant in the RFA refers to the District's earlier 1998 Decision Document, citing certain sections of that document (i.e., the sections entitled "Currents, circulation or drainage patterns," "Flood control functions," "Aquifer recharge," and "Water quality").[27] Appellant asserts that these sections indicate that development of the Site "would have no adverse effect on the hydrology or ecology of the surrounding wetlands of Connors Bog, much less on the more distant Connors Lake," and that they support a finding that the approved JD was in error. However, the question of what effect a particular activity might have on waters of the United States and the question of whether the proposed activity site is within jurisdictional waters of the United States are two entirely separate inquiries. Information regarding the anticipated impacts from a specific proposed activity in waters of the United States is considered during the Corps' public interest review process and any special evaluation required by the type of activity, such as compliance with the CWA Section 404(b)(1) guidelines. In other words, even if the Site's wetlands in this instance were determined to be within jurisdictional waters of the United States, Appellant during the public interest review would still have an opportunity to submit the findings from the 1998 Decision Document as evidence of potential impacts (or lack of impacts) that might result from the deposit of dredged or fill material on those wetlands during and after the proposed development.

Appellant's Reason III for Appeal: **"The District Was Required to Obtain Headquarters Approval Prior to Issuing This Jurisdictional Determination."**

FINDING: This reason for appeal seems to have partial merit.

ACTION: The District should seek formal, project-specific Headquarters approval prior to asserting jurisdiction over any wetland adjacent solely to Connors Lake or any other body of water, when jurisdiction over that body of water is based on any of the grounds listed in 33 CFR § 328.3(a)(3).

DISCUSSION:

Appellant here is referring to the agency guidance contained in a Joint Memorandum from the Administrator of the Environmental Protection Agency and the Acting Assistant Secretary of the Army (Civil Works) dated January 10, 2003 (the "Joint Memorandum").[28] The Joint Memorandum was published in direct response to the U.S. Supreme Court's so-called "SWANCC" decision,[29] in which the Supreme Court invalidated the Corps of Engineers' so-

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[26] 474 U.S. 121 (1985). See, also, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 351 U.S. 159, 167 (2001) ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes.")

[27] The RFA's references to "Aquifer recharge: 'NA'" and "Water quality: No impact would be expected on water quality," are not found in the excerpt from the 1998 Decision Document in the administrative record.

[28] Published in the Federal Register on January 15, 2003, at 68 Fed. Reg. 1991 et seq.

[29] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 351 U.S. 159 (2001).

called "Migratory Bird Rule." That Joint Memorandum contains the following absolute prohibition:

> In view of SWANCC, neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule."[30]

While Connors Lake is certainly "intrastate," it apparently is not "non-navigable." Moreover, the District is not purporting to use any of the factors listed in the "Migratory Bird Rule" as a basis for asserting CWA jurisdiction. Therefore, the absolute prohibition in the Joint Memorandum does not apply in this instance. On the other hand, the Joint Memorandum goes on to state that even after the SWANCC decision "isolated intrastate waters" (which Connors Lake apparently is) remain subject to CWA jurisdiction if they are "capable of supporting navigation by watercraft" and if they are "traditional navigable waters" (defined as those waters meeting the criteria of § 328.3(a)(1) cited above), even if they do not form part of a continuous waterborne highway.[31] Thus, even though Connors Lake appears from the evidence in the administrative record to be a "navigable water of the State of Alaska," as opposed to a "navigable water of the United States,"[32] it appears that Connors Lake might still comprise jurisdictional waters of the United States under the CWA, due to watercraft navigation on it by foreign and/or interstate travelers.

In short, there is documentation in the administrative record that indicates Connors Lake is an intrastate water that is navigable-in-fact and is used for navigation in interstate and foreign commerce, and thus, if that "commerce connection" is strong enough factually, Connors Lake might be considered "waters of the United States" under a literal reading of 33 CFR § 328.3(a)(1).

Significantly, however, the District on the BJD form did not check the box that would have indicated the Site's wetlands were adjacent to "a waterway which is currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce"—i.e., an (a)(1) water. By checking that box the District would have given Appellant notice that it should fully address such matters, both in its RFA and at the appeal conference.[33] Instead, the District on the BJD form checked only the box that indicated the Site's wetlands were adjacent to a "water such

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[30] 68 Fed. Reg. 1991, 1996.

[31] Footnote 2 of the Joint Memorandum states that traditional navigable waters are not limited to those regulated under Section 10 of the Rivers and Harbors Act of 1899; traditional navigable waters include waters which, although used, susceptible to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne highway.

[32] See, e.g., United States v. Appalachian Electric Power Company v. United States, 311 U.S. 377, 406 (1940). A "navigable water of the United States," as opposed to a mere "navigable water of the State" is also subject to regulation under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403).

[33] In fact, Appellant in its RFA did allege that Connors Lake had "little recreational allure, let alone impact on interstate commerce" and mentioned "interstate commerce" several times, but it is unknown what facts and arguments Appellant might have raised if the District had alleged the Corps had jurisdiction over Connors Lake as an (a)(1) water. Furthermore, according to the appeal conference MFR, at the appeal conference "Ms. Taub noted that the [(a)(1)] box was not checked on the basis form, and therefore such a basis (navigability of the Lake) was not at issue in this case."

as an intrastate lake....[w]hich...could be used by interstate or foreign travelers for recreational or other purposes..."—i.e., only an (a)(3) water)—although, in its written responses to the RO's Question No. 1, the District stated that Connors Lake was "a water of the U.S. under 33 CFR 328 (a)(1) *and* (a)(3)" (italics added).

This brings us to the portion of the Joint Memorandum actually quoted by Appellant in the RFA, which forms the basis for Appellant's Reason III for Appeal. That quotation from the Joint Memorandum is as follows:

> In view of the uncertainties after SWANCC concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)-(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.

Asserting jurisdiction over such waters based on such grounds is exactly what the District appeared to be doing in the approved JD, as explicitly stated by the District in the BJD, even though there was some discussion about the navigability-in-fact of Connors Lake at the appeal conference and in the administrative record, including discussion regarding its actual navigation by interstate and foreign travelers. In response to the RO's Question No. 7 essentially asking why the District had not followed the Joint Memorandum's guidance—i.e., "Did the Alaska District seek formal project-specific Headquarters' approval prior to asserting jurisdiction?" and, "If not, why?"—the District's written answer was: "Connors Lake was established as an (a)(3) water prior to the requirement to obtain HQ approval." This ties into the RO's Question No. 4, asking that the District "provide a rationale for establishing that Connors Lake is a water of the United States," to which the District's written answer was:

> In August 2001, after the SWANCC decision, the district made a determination that Connors Lake was an (a)(3) Jurisdictional Water because it is used for recreational boating and tourists from other states and foreign countries pay money to come to this lake to photograph wildlife. Lately a cybercam was set up to allow people to view the loons on the internet.

At the appeal conference, the District's current project manager explained essentially that "the project manager prior to him had already determined [the (a)(3)] connection before [those at Headquarters] were asking [for] additional coordination." These answers, of course, do not fully explain the fact that the District's approved JD was not issued until July 16, 2003, more than six months after the cautionary guidance in the Joint Memorandum had been published in the Federal Register. Furthermore, the District's written answer to the RO's Question No. 4 did not raise the navigability-in-fact of Connors Lake (i.e., the "(a)(1)" qualities of Connors Lake) as a reason it had not sought project-specific Headquarters approval in this instance.

In a sense, both Appellant in its RFA, and the District in its written answer to the RO's Question No. 4 were right, and in a sense both were wrong. Contrary to what Appellant indicates in the RFA, the Joint Memorandum does *not* state that field staff are "required to obtain" Headquarters approval to assert jurisdiction based on grounds listed in 33 CFR § 328.3(a)(3)—it only states that field staff "should seek" such approval. On the other hand, asserting jurisdiction over wetlands adjacent to Connors Lake primarily on the basis of visitation

at Connors Lake by interstate or foreign travelers (whether for recreational boating or wildlife photography on-site, or loon-watching over the internet) appears to be the type of situation that begs for project-specific Headquarters approval under the cautionary guidance of the Joint Memorandum.

Although the Joint Memorandum was published only after the District's project manager had already determined Connors Lake to be an (a)(3) water, the District should still comply with the Joint Memorandum's guidance. One purpose of that guidance seems to be to require a specific Washington-level review before asserting CWA jurisdiction over any waters where the basis for CWA jurisdiction is that their degradation might "affect" interstate or foreign commerce (i.e., (a)(3) waters), as opposed to waters that themselves ultimately might be "used" as channels in interstate or foreign commerce (e.g., (a)(1) waters and their tributaries). As discussed above, depending upon what additional evidence of commercial navigation on Connors Lake (or lack thereof) might be adduced on remand, Connors Lake may (or may not) be both an (a)(1) water which could be "used" in interstate or foreign commerce and an (a)(3) water degradation of which could "affect" interstate or foreign commerce. This seemingly fine distinction, particularly in light of other recent caselaw testing the limits of the Federal Government's jurisdiction over "navigable waters" under the CWA and the Oil Pollution Act[34]—including one Fourth Circuit Court of Appeals case cited in Appellant's RFA that determined 33 CFR § 328.3(a)(3) to be facially invalid in four Mid-Atlantic states[35]—has serious "takings" and other Constitutional implications. Therefore, the District should be very cautious about asserting CWA jurisdiction grounded substantially on 33 CFR § 328.3(a)(3), without first submitting the matter for project-specific Headquarters approval—and without compiling as complete an administrative record as possible to justify that jurisdictional determination—regardless of when the Site's jurisdictional classification might originally have been established by the District.

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[34] See, e.g., Riverside Bayview Homes, Inc., 374 U.S. 121 (1985); Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001); Rice v. Harken Exploration Company, 250 F.3d 264 (5th Cir. 2001); United States v. Eidsen, 108 F.3d 1336 (11th Cir. 1997); Brace v. United States, 51 Fed. Cl. 649 (2002); Colvin v. United States, 181 F. Supp. 2d 1050 (E.D.Cal. 2001); United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001); United States v. Lamplight Equestrian Center, Inc. 2002 U.S. Dist. LEXIS 3694, 2002 WL 360652, 54 ERC 1217 (E.D. Ill. 2002).

[35] The Fourth Circuit Court of Appeals in United States v. Wilson, 133 F.3d 251 (4th Cir. 1997), held 33 CFR § 328.3(a)(3) to be facially invalid in 1997; a subsequent joint EPA/Corps of Engineers guidance memorandum dated May 29, 1998, states that the Fourth Circuit's decision in the Wilson case is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit (i.e., outside the states of Maryland, Virginia, North Carolina, and South Carolina).

CONCLUSION: For the reasons stated above, I conclude that the administrative record, as currently developed, contains insufficient facts and analyses to determine whether Appellant's Reasons I or II for Appeal have merit, and I conclude that Appellant's Reason III for Appeal has only partial merit. Accordingly, the approved Jurisdictional Determination is remanded to the Alaska Engineer District, for reconsideration consistent with this Final Administrative Decision.

_____
Date

_____
Robert L. Davis
Brigadier General, U.S. Army
Division Engineer

Attachments:

Attachment A: Excerpt from the 1985 Environmental Services Report, including "Figure 2"
Attachment B: "Figure 3" from the 1985 Environmental Services Report
Attachment C: Contour map from Appendix A to the Lounsbury Report

TABA

SUMMARY REPORT

BIOPHYSICAL AND LAND USE ANALYSIS WITH MASTER PLAN RECOMMENDATIONS FOR CONNORS-STRAWBERRY BOG

FOR
MUNICIPALITY OF ANCHORAGE
DIVISION OF PROPERTY MANAGEMENT

AND
C.B.S., INC.
ANCHORAGE, ALASKA

BY
ENVIRONMENTAL SERVICES LIMITED
ANCHORAGE, ALASKA
30131-020
JULY, 1985

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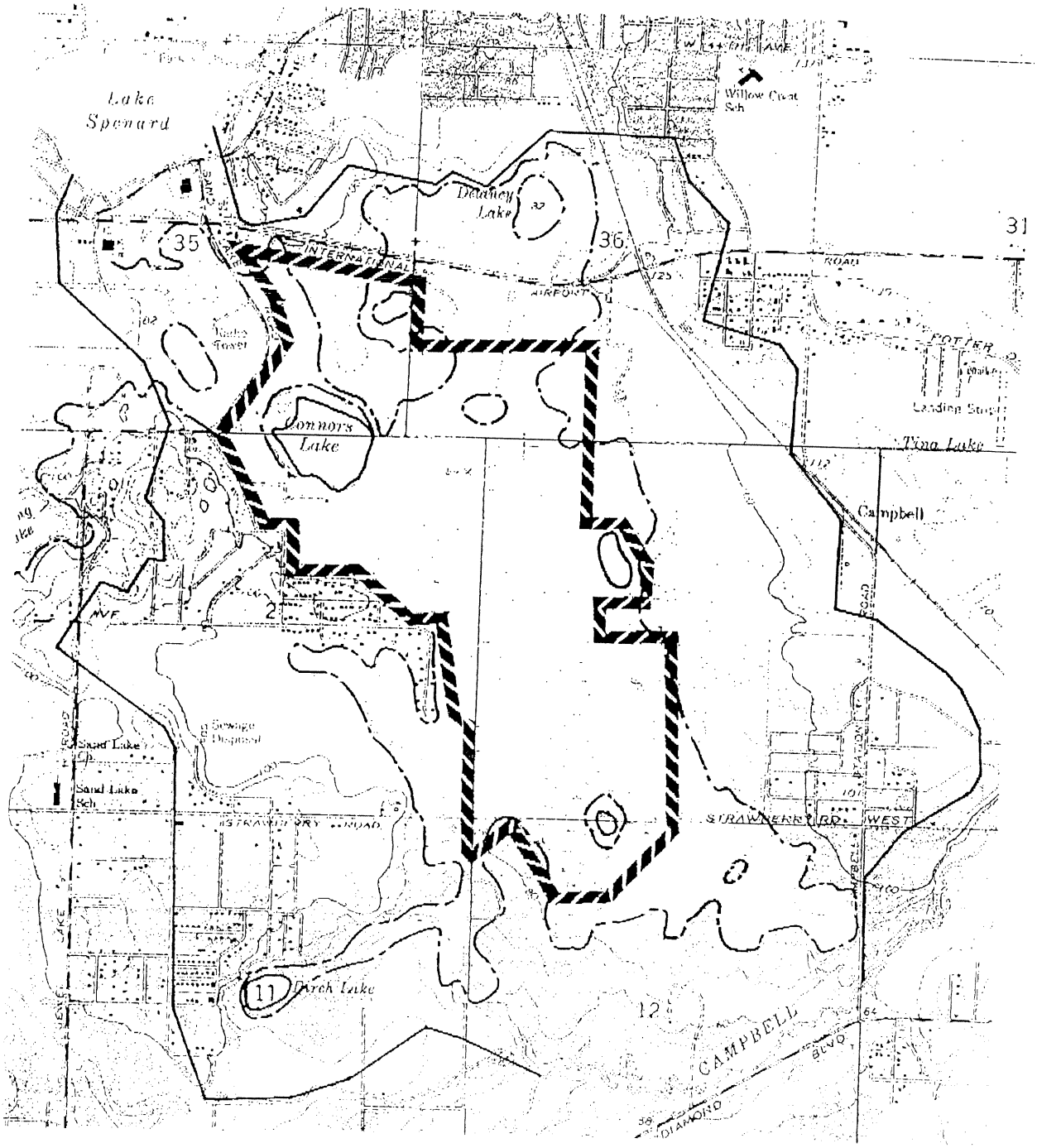
Figure 1. Study Area, Original Wetlands and Drainage Basin



Study Area

Original Wetlands Boundary, Former Lakes

Original Drainage Basin, Existing Lakes

The original drainage basin occupied an area of 4½ to 5 square miles, approximately half of which was peat bog wetland surrounded by gently sloping wooded lands to the east and west (USGS 1967; aerial photos). Urbanization has effectively reduced the size of the drainage basin and isolated it into separate sub-basins.

The bog surface in the study area slopes from 84 feet MLW at the southeast corner of the old Municipal landfill west and northwest towards Connors Lake at a current water elevation of 75.1 feet (Glass 1985) and south and southwest towards Strawberry Lake at 73.1 feet (MOA 1973).

Thick peat accumulations occur over much of the wetland and are underlain by a porous sand and gravel layer which overlays an impervious 50 to 200 foot layer of Bootlegger Cove clay (Schmoll and Dobrovolny 1972). Recent evidence indicates that this clay is less than 15 feet thick near the Jewel Lake-International Airport Road intersection and becomes less impervious to the northwest of the study area (Ulery and Updike, 1983). The peat thicknesses range from less than 3 feet in the spruce-birch uplands north of Connors Lake to 5 to 12 feet in the sedge-shrub bog and Patterned Ground Complex from the landfill south to Strawberry Lake (Glass 1985; S&S Engineers 1983). Peat thickness in the bog is greatest towards the center in a east-west direction, and towards the south in a north-south direction.

Soils conditions in the bog do not preclude development although thicker peat depths in some areas would require special construction techniques such as excavation and backfill or pile support through surcharged fill. Development costs on these soils would limit construction to commercial or industrial projects.

HYDROLOGY

Connors-Strawberry Bog is an isolated, perched or surficial wetland. Connors and Strawberry Lakes lie at the lower north and south ends of the bog respectively and represent surface expressions of the water table in the bog.

Topography and the pattern of strangs and flarks (alternating higher ridges and elongated depressions), referred to as the Patterned Ground Complex in this report, indicate slow surface and shallow subsurface flow occurs towards both Connors and Strawberry Lake. Therefore, an indistinct drainage divide exists from the southeast corner of the old municipal landfill southwestward, joining a scattered string of spruce bog islands (MOA 1973; aerial photos). This indistinct divide is shown in Figure 2.

Approximately half of the 4½ square mile drainage basin was wetland extending from Spenard Lake almost to Campbell Creek. Gently sloping uplands bordered the wetland on the east and west and drained generally

towards the bog and southward (USGS 1967; MOA 1973). The original drainage basin, wetlands, and direction of surface flow are shown in Figure 1. No natural streams or springs feed or drain the wetland. Therefore, it is effectively self-contained and relies on precipitation falling directly over the drainage basin for water input (Fugro 1980).

Runoff and subsurface flow from this large drainage area helped maintain Connors Lake and Strawberry Lake at full water levels of about 77.5 and 76.0 feet MLW respectively (MOA 1973). The flarks (depressions) in the Patterned Ground Complex were generally wet with standing water throughout the summer months.

However, as urbanization encroached on the wetland, runoff from upland areas was diverted by ditches and storm sewers. Road and sewer line construction also effectively isolated the wetland into sub-basins and lowered water levels. Several smaller lakes and wetland areas were drained and filled. These impacts began about 25 years ago, with the most significant effects taking place since 1970.

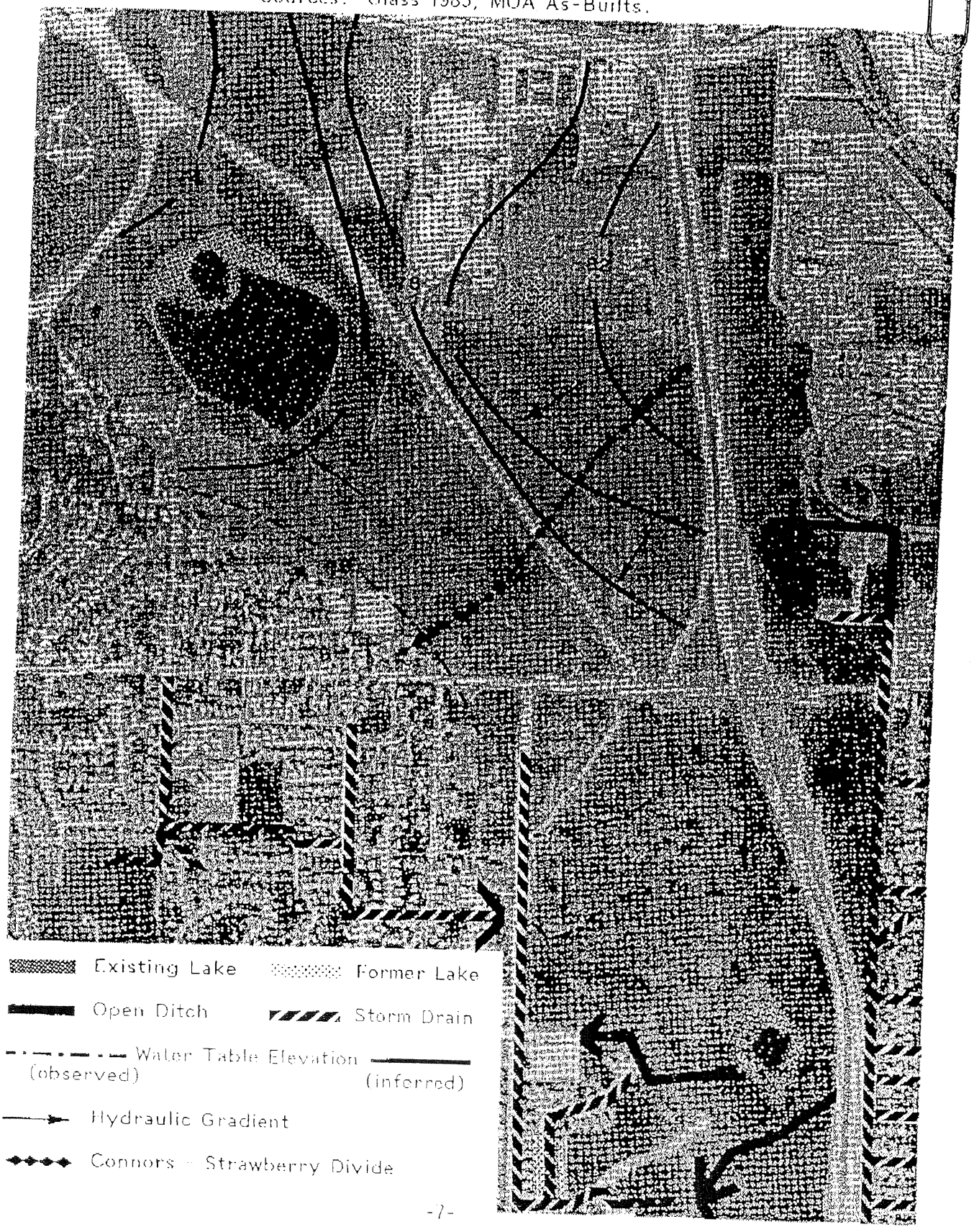
Figure 2, Hydrology & Storm Drainage, shows the ditching and storm sewers currently draining surrounding areas and points out the ponds which have been drained or filled. It also shows water table elevations and the direction of water movement through the bog. See the "Impact of Development" section which follows for more details on the affects of urbanization on the hydrologic circulatory pattern.

The wetland now relies solely on precipitation falling directly on the wetland itself, except for a minor amount of surface runoff from an older subdivision southwest of Connors Lake and runoff from a portion of Minnesota Drive. Precipitation, slow subsurface flow and evapotranspiration determine the bog's water budget and lake levels.

Surface and subsurface flow across the flat topography of the bog and through the peat and sand soils is very slow due to gradients of 0.3% or less. Lake levels at Connors Lake now appear to fluctuate with precipitation, with a lag time of approximately one year. Prior to construction of the sewer interceptor in 1970, lake levels remained full, regardless of annual precipitation.

Because Connors-Strawberry Bog is an isolated drainage basin, it provides only minor hydrologic functions. The bog does not provide flood storage or control, serve as a water supply or ground water recharge area. The bog's water quality function is limited since little urban runoff now feeds the area.

Figure 2. Connors-Strawberry Bog Hydrology and Storm Drainage
Sources: Glass 1985, MOA As-Builts.



TAB B

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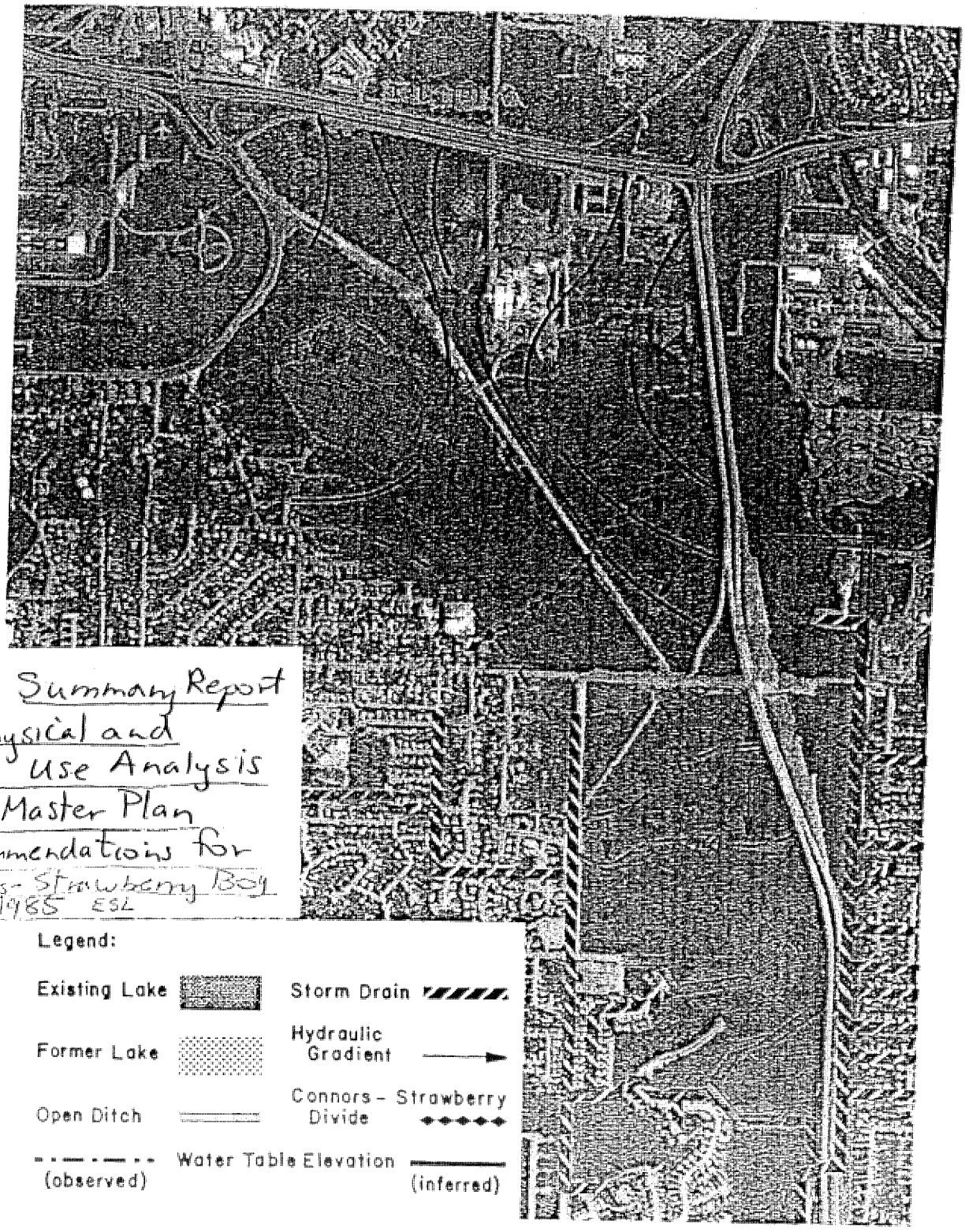
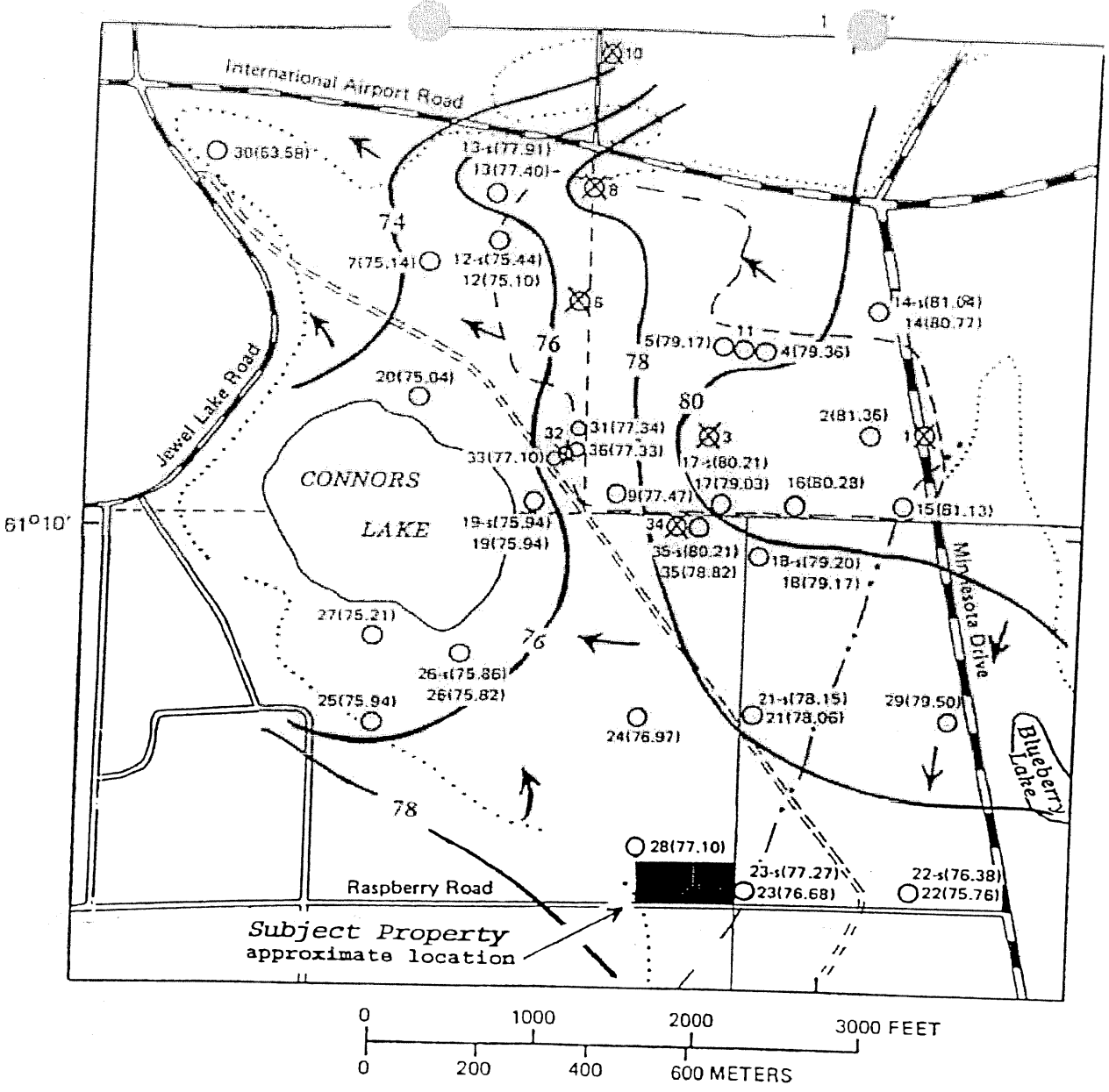
Figure 3. Hydrology and Storm Drainage



from Summary Report Biophysical and Land Use Analysis with Master Plan Recommendations for Connors-Strawberry Bay July 1985 ESL



EXPLANATION

76	Potentiometric contour--shows altitude at which water level would have stood in tightly cased wells. Contours are approximately located. Contour interval 2 feet. Datum is sea level.
	Generalized direction of ground-water movement.
	Ground-water divide--approximately located.
	Approximate extent of International Airport Road Sanitary Landfill.
	Boundary of Connors Bog.
18-s(79.20) 18(79.17)	Observation well and number. Number in parentheses is altitude of water surface in feet above sea level. Where two numbers, top is from shallow well and bottom is from deeper well at same location.
8	Destroyed observation well and number.

Figure 3.–Observation wells, water table and inferred directions of ground-water movement, August 1, 1984.

From: Glass, Roy L., 1986, "Hydrologic Conditions in Connors Bog Area, Anchorage, Alaska," U.S. Geological Survey water resources investigation report no. 86-4044.

STAFF SUMMARY

I. FROM: PD SUBJECT: Carr-Gottstein Administrative Appeal

II. TO: POD-DE CLASSIFICATION: U SUSPENSE: DATE: 23 March 04

III. Summary of Action Requiring Coordination:

1. **ISSUE**. Carr-Gottstein Properties through its counsel, Cynthia Taub, Esq., of Steptoe & Johnson LLP, appealed an approved wetland jurisdictional determination ("approved JD") issued by the Alaska District (the "District") for a site referred to as the Iris Subdivision, Tract A ("the Site"). The Site is located within an area known as Connors-Strawberry Bog, The bog is sited in the western part of the Anchorage metropolitan area, immediately northwest of the intersection of Minnesota Drive and Raspberry Road.

2. **DISCUSSION**: By letter dated 10 March 2003, Daniel Sauls, Esq., of Steptoe & Johnson LLP, requested that the District revisit its prior assertion of CWA jurisdiction over the Site, because he asserted the site was an isolated wetland (in light of the United States Supreme Court's 2001 ruling in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (the "SWANCC decision")). By letter dated 16 July 2003, the District informed Mr. Sauls, that the Site was a "water of the United States" subject to the Corps' regulation under the (Clean Water Act (CWA). The District determined that the Site was *not* an isolated wetland, because it was "physically connected to Conner's Lake as part of the Conner's Bog." The District asserted that "Conner's Lake," was a jurisdictional water of the United States because it had "recreational boating activities (navigation) and interstate tourism (commerce) taking place on it." On 11 September 2003, Ms. Taub submitted a Request for Appeal (the "RFA") to POD, challenging the District's approved JD for the Site. Ms. Martha Chieply, the appointed Review Officer ("RO"), accepted the appeal on 30 September 2003. The site investigation and appeal conference were both held by the RO on 21 October 2003 in Alaska.

Ms Chieply's and Office of Counsel's review of the administrative record found insufficient facts and analyses to support the District's wetland jurisdictional determination: (1) The record did not clearly demonstrate whether or not the Site's wetlands are adjacent to open waters of the United States and therefore subject to the Corps' jurisdiction; and (2) the record was unclear regarding the possibility or susceptibility of use of Connor's Lake in interstate or foreign commerce, the possibility that the Site's wetlands are jurisdictionally adjacent to nearby open waters of the United States other than Connor's Lake, and the possibility of physical/hydrological connection between the Site's wetlands and nearby open waters of the United States. As a result of relying on the proximity of the site to Connor's Lake, the District was required also to make a determination that the degradation of Connor's Lake, an apparently isolated intrastate water body, could affect interstate or foreign commerce. As such, the District did not seek approval of HQUSACE to exert jurisdiction over Connor's Lake based on use by interstate or foreign travelers for recreational or other purposes, as recommended by HQUSACE guidance.

Continued on next sheet.

IV. Action Officer: Mike Lee

TELEPHONE NUMBER: Ext. **DIRECTORATE/OFFICE CHIEF**:

V. Coordination				**VI. Command Section Staffing**		
Office	Concur	Non-Concur*	Date	**Office**	**Approval**	**Disapproval**
				EX		
				DD		
				DE		
				Command Section Remarks		
				VII.		
OC						

*Non-concurrences require comment

CEMVD Form 914 **Proponent (CEMVD-DE)**

NOV 02

This Final Appeal Decision remands the approved JD to the District for reconsideration. Upon remand, the District is asked to (1) review possible hydrologic connections of the Site to traditionally navigable waters, and (2) obtain project-specific approval from HQUSACE of the District intends to assert jurisdiction over the Site because of its adjacency to Connor's Lake or any other pertinent body of open water determined to be jurisdictional waters of the United States based on the interstate or foreign commerce criteria listed in 33 CFR § 328.3(a)(3).

3. **RESOURCE IMPACT**: Regulatory Appeals.

4. **RECOMMENDATION:** Sign the appeal decision and the letter to Ms.Taub.