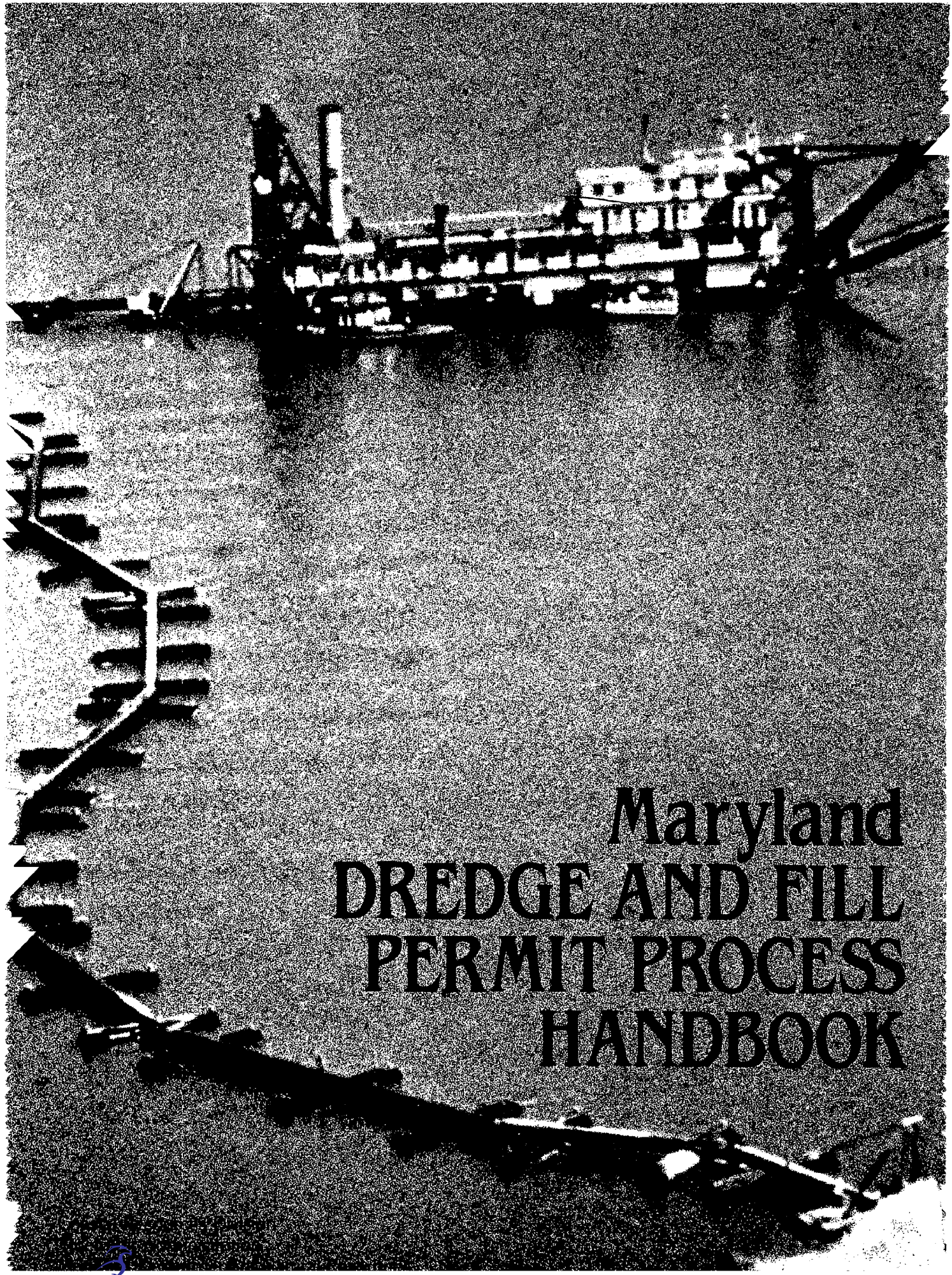

Maryland DREDGE AND FILL PERMIT PROCESS HANDBOOK

GPO

MARYLAND

DREDGE AND FILL PERMIT PROCESS HANDBOOK

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Natural Resources

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PART 1

AN OVERVIEW:

THE DREDGE AND FILL PERMIT REVIEW PROCESS FOR MARYLAND

INTRODUCTION

PURPOSE

The **MARYLAND DREDGE AND FILL PERMIT PROCESS HANDBOOK** brings together for the first time State and Federal procedures required in the review of private and public dredge and fill applications in the tidal waters of Maryland. Initiated through a work group composed of all Maryland agencies with dredge and fill-related responsibilities, this handbook is intended to promote more effective cooperation, understanding, and follow-through in the problem area of dredge and fill permit review. By having each agency's current procedures readily available to all, and by indicating the steps necessary to obtain such permits, agency staff may more easily anticipate and satisfy their permit review needs in matters of dredging justification, placement alternatives, and environmental and economic effects.

All agencies agree that coordination is highly desirable while respecting the mandates of each agency. This handbook helps fulfill that need.

The handbook is arranged in a format for use by personnel directly involved with dredge and fill activities and is composed of the following sections:

(1) An overview of the dredge and fill permit process which operates in Maryland.

(2) A summary of the permit process as derived from every agency involved in this process at the federal, state, and local levels.

(3) Detailed information regarding each agency's role in the permitting process, its legal mandates, regulations and/or guidelines which the agency has published pursuant to its legal mandates, as well as any informal arrangements or operating procedures.

BACKGROUND

Dredging operations are a frequently occurring and important activity in Maryland coastal waters. The effects of this activity range from environmental effects to socio-economic effects which help shape the economy of the entire region. The term dredging incorporates the related activities of dredging, channelization, fill and dredge material deposition. The term also embraces both "new" dredging activities (i.e., the activity in question involves the removal of material from an area which has not been dredged before) and "maintenance" dredging (i.e., the activity involves the removal of material which has been accumulated or deposited into a previously dredged location). Dredging, fill, and related projects encompass a variety of activities as shown in Table 1.

Dredging activities in Maryland usually occur in navigable waters, and dredged material deposition is not customarily authorized in open water and vegetated wetland areas. Such waters are valuable for a multitude of diverse interests, including navigation, commerce, recreation, habitat, breeding, spawning for many species of fish and wildlife, and food for the nation's population.

Prior to the 60's, wetlands generally had been perceived as wastelands, inhabited primarily by mosquitoes and other pests. As a result, it is estimated that about one-third of the nation's wetlands have been destroyed over the last 70 years, and in some states the loss exceeds 50

percent (EPA, 1979). These wetlands have generally been converted for agricultural use, residential and commercial development, landfills, and garbage dumps. However, the valuable functions of wetlands and estuarine ecosystems in providing habitat, breeding, spawning, and nursery grounds for various aquatic and terrestrial organisms, most notably waterfowl, shellfish, and fish, has become increasingly recognized by all parties, public and private, over the past two decades.

This increased awareness of the value of open waters, wetlands, and estuarine ecosystems has been translated into various forms of legislative action to regulate environmental, public health, and safety aspects of dredging and deposition operations. As a consequence, the current dredge and fill permit process is a complex procedure involving several agencies from each level of government, reviewing and making recommendations on proposed changes to the Maryland shoreline and waters.

While general public concern for water quality and preservation of wetlands and estuarine ecosystems has grown, development pressures, both private and public, have continued. Property adjacent to open space or water is highly desirable, lending itself equally well for commercial, residential, and recreational development. The degree of activity in the Maryland coastal zone has been documented by the Department of Natural Resources (Eberhart, 1980). The available data reveal that the permitting process for coastal zone-related activities is a substantial undertaking. During the six-year period from 1973 to 1978, 5,684 permits were issued in Maryland. New and maintenance dredging during the seven-year period from 1973 to 1979 accounted for 687 projects. Channelization projects amounted to 75 permits involving 1,361,259 cubic yards of material during that same period. Fill and dredged material deposition activities totaled 2,727 projects involving 71.5 million cubic yards of material (Eberhart, 1980).

The time and effort required to evaluate permit applications in the coastal zone is highly variable, reflecting the large variances in project size, and complexity. The most recent data available for time required to process permit applications by the Baltimore Districts of the Corps of Engineers reveal that the evaluation of a permit application can range from 2 to 60 weeks.

TABLE 1

PERMIT ACTIVITY BY STRUCTURE/ALTERATION TYPE IN THE CHESAPEAKE BAY: 1973-1979

STRUCTURE/ALTERATION TYPE	TOTAL NUMBER OF PERMITS GRANTED	TOTAL NUMBER OF STRUCTURE/ ALTERATIONS APPROVED
Pile	2,988	20,686
Pier	3,933	6,040
Bulkhead	1,869	1,962
Fill	1,848	1,848
Buoy	433	1,810
Jetty or Groin	472	1,698
Riprap	822	1,005
Dredging (New)	888	888
Spoil Disposal	610	610
Dolphin	68	406
Building	236	251
Boat Ramp	206	210
Discharge Pipe	105	169
Maintenance Dredging	115	115
Aerial Crossing	61	109
Bridge	89	89
Pipeline	65	75
Channelization	71	71
Submerged Cable	53	69
Crab Impoundment	38	38
Marine Railroad	25	34
Intake Pipe	20	32
Dam	17	17
Fence	14	14
Tunnel	5	10
Intake Structure	5	5
Artificial Reef	3	3
Wave Gauge	1	1
Duck Blind	1	1
New Structure Subtotals	15,061	38,266
Repair Activities	628	672
Temporary Structures	89	99
TOTALS	15,778	39,037

(Eberhart, 1980)

TERMS AND DEFINITIONS

The definitions of a number of key terms associated with the permitting of dredging and fill operations are presented below. Additional terms and definitions can be found in the regulations of the various agencies presented in the Appendices.

It is important to note that the term ''wetlands'' can cover a broad range of natural environments. Wetlands are generally defined as areas that are inundated or saturated by surface or groundwater at a frequency or 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. The Maryland Wetlands Act defines wetlands to include all lands under tidal waters as well as those containing vegetated tidal marsh or swamp as State or Private Wetlands.

Wetlands regulated under Maryland and Federal laws are not always identical. In certain locations the Federal jurisdiction extends beyond that of State laws.

KEY TERMS AND DEFINITIONS - FEDERAL

• Navigable Waters of the United States

These waters are administratively defined to mean the waters of the United States that are subject to the ebb and flow of the tide, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce up to the head of navigation. A determination of navigability, once made, applies laterally over the entire surface of the water body to the ordinary high water mark (OHWM). The OHWM for inland fresh waters is the line on the shores established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank shelving; character of the soil; destruction of terrestrial vegetation; the presence of litter; or other appropriate means that consider surrounding areas. The head of navigation is determined by the Corps' District Engineer.

Navigable waters of the United States are subject to Federal regulatory jurisdiction for certain activities under Sections 9 and 10 of the River and Harbor Act of 3 March 1899.

Navigable waters of the United States in Maryland include all tidal tributaries of the Chesapeake Bay in Maryland, to their mean high water marks, the coastal back bays and their tidal tributaries to their mean high water marks, the territorial seas off Maryland's Atlantic coastline (3-mile limit), the Potomac River within its ordinary high water marks to the Willis Creek Bridge in Cumberland, in areas above the head of tide, and the Susquehanna River, above tide within its ordinary high water marks from Conowingo Dam to the Pennsylvania border.

• Waters of the United States

"The Federal authority to regulate discharges of dredged or fill material, pursuant to Section 404 of the Clean Water Act, pertain to all waters of the United States. These waters are administratively defined to include:"

(1) All Navigable Waters of the United States as defined above. (Note: Since the Territorial Seas are Navigable Waters of the United States, there is no need to repeat it as being a distinct water of the United States).

(2) All tributaries to "navigable waters of the United States" including adjacent wetlands; man-made drainage and irrigation ditches excavated on dry land are not included.

(3) Interstate waters and their tributaries, including adjacent wetlands.

(4) Other waters of the United States, such as isolated wetlands and lakes, intermittent streams, prairie potholes.

The Corps of Engineers would like to emphasize the differences in jurisdictional area and activities regulated under both Section 404 of the Clean Water Act and Section 10 of the River and Harbor Act. It is their experience that some of the subtle differences between the statutes cause considerable confusion. Section 404 applies to all waters of the United States but only regulates the discharge of dredged or fill materials into them. On the other hand, Section 10 applies only to Navigable Waters of the United States, but regulates many types of construction activities including the act of dredging. e.g., One may dredge in a non-tidal marsh without a Corps permit provided dredged material placement is on uplands.

• Nationwide Permits

Nationwide permits are Department of the Army authorizations that were incorporated in and issued by the final regulations (published July 9, 1977). The purpose of these nationwide permits is to allow non-controversial, environmentally insignificant activities to continue with a minimum of governmental interference. The nationwide permits authorize certain structures, discharges, and/or work affecting "navigable waters of the United States" throughout the nation. Experience with these nationwide permits indicates that there is sometimes great difficulty interpreting certain of these nationwide authorizations. It is advisable that before proceeding with any work in waters described in this handbook, contact with the Corps District Office be made to confirm the project's coverage under one of these blanket authorizations.

Following is a list of activities which are permitted by Federal Regulations for purposes of Section 10 of the River and Harbor Act of 1899, provided that no interference with navigation results:

(1) Placement of aids to navigation by the U.S. Coast Guard.

(2) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water has already received a Section 10 permit.

(3) Repair, rehabilitation, or replacement of any previously authorized currently serviceable structure, or of any currently serviceable structure constructed prior to the requirement of a Section 10 permit. (No deviation from the originial plans is authorized).

(4) Marine life harvesting devices, such as pound nets, crab traps, eel pots, and lobster traps.

(5) Staff and tidal gages, water recording devices, water quality testing and improvement devices, and similar scientific structures.

(6) Structures or work completed before December 18, 1968, or located in navigable waters over which the District Engineer has not asserted jurisdiction.

- ## Corps General Permit

Included in the Corps programs for exercising permit jurisdiction under both Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act is the general permit program. General permits are issued for certain clearly described categories of structures, discharges, and/or work, when those activities are substantially similar in nature, causing only minimal adverse cumulative effect on the environment. General permits are for specific regions of the country. Individual activities authorized by such permits do not require individual permit processing; therefore, approval may be issued in a short time.

- ## Individual Permit

Any dredge or fill activity exempted by a nationwide or general permit must obtain an individual permit from the regional district.

It is recommended that the applicant check with the district Corps of Engineers office to confirm the exemption of the proposed activity.

KEY TERMS AND DEFINITIONS STATE OF MARYLAND

- ## State Wetlands

"State wetlands" means any land under the navigable waters of the state below the mean high tide, affected by the regular rise and fall of the tide. Wetlands of this category which have been transferred by the state by valid grant, lease, patent or grant confirmed by Article 5 of the Declaration of Rights of the Constitution shall be considered "private wetland" to the extent of the interest transferred.

- ## State Wetlands License

The authorization necessary from the Maryland State Board of Public Works to perform any dredge or fill activities in those areas defined as State Wetlands.

- ## Private Wetlands

"Private wetlands" means land not considered "state wetland" bordering on or lying beneath tidal waters, which is subject to regular or periodic tidal action and supports aquatic growth. This includes wetlands, transferred by the state by a valid grant, lease, patent, or grant confirmed by Article 5 of the Declaration of Rights of the Constitution, to the extent of the interest transferred.

- ## Private Wetland Permit

The authorization necessary from the Secretary of the Department of Natural Resources to perform any dredge or fill activities in those areas defined as Private Wetlands.

- ## Dredge Material

Material that is excavated or dredged from waters of the State of Maryland.

- ## Dredging

"Dredging" means the removal or displacement, by any means, of soil, sand, gravel, shells, or other material, whether or not of intrinsic value, from any state or private wetlands.

- ## Fill Material

Any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.

- ## Filling

Filling means either:

(a) The displacement of navigable water by the depositing into state or private wetlands of soil, sand, gravel, shells, or other materials; or

(b) The artificial alteration of navigable water levels by any physical structure, drainage ditch, or otherwise.

Filling includes storm drain projects which flow directly into tidal waters of the state. It does not include drainage of agricultural land.

THE ROLE OF GOVERNMENT AGENCIES

A summary of required agency actions in the Maryland dredge and fill permit review process is presented in Table 2 and illustrated in Figures 1 and 2. The permit review process includes three levels of government, Federal, state, and local, and can involve anywhere from 10 to 16 different agencies. The process follows two distinct paths - one for the State review and one for the Federal review, as shown in Figures 1 and 2, and applicants must apply concurrently to receive authorization for a dredge or fill project. Although not required to do so, the Corps of Engineers will not issue a permit until a favorable State review is completed.

FEDERAL

The U.S. Army Corps of Engineers is the lead agency at the Federal level and coordinates the input from the state and local agencies, special interest groups, and the general public. At the Federal level the Corps coordinates the input of the following agencies which must, by law, be consulted in the review process:

(1) U.S. Environmental Protection Agency (EPA).

(2) U.S. Fish and Wildlife Service, Department of the Interior (USFWS)(DOI).

(3) National Marine Fisheries Service, U.S. Department of Commerce (NMFS)(DOC).

In addition to these three agencies, the Corps will coordinate its activities with the U.S. Coast Guard if a bridge or causeway is involved or if the project involves a matter related to navigation safety.

If the project involves or can impact National Park lands then the input of the National Park Service of USDOC will be integrated with the input of the USFWS.

The Corps has developed a joint agency review process which is a very efficient mechanism to coordinate the input of the various agencies while expediting the review process. This joint review group, which is administered by the Corps, includes the following agency representation:

(1) Corps of Engineers

(2) Environmental Protection Agency

(3) United States Fish and Wildlife Services

(4) National Marine Fisheries Service

(5) Wetland Permits Division representing the Maryland Department of Natural Resources

(6) Office of Environmental Programs of the Department of Health and Mental Hygiene.

This joint agency review group meets at least on a regular monthly schedule and may review as many as 60 different permit applications at one meeting. The meeting provides an opportunity for a rapid exchange of ideas and concerns related to the merits of a particular project as well as assuring the timely processing of the more routine type of permit applications.

STATE

At the State level the permit review process always includes the Departments of Natural Resources, Health and Mental Hygiene, and Economic and Community Development. If state wetlands are involved, then the State Board of Public Works must issue a wetlands license in order to authorize the project. If the project is in the Port of Baltimore, then the Maryland Port Administration must issue a construction permit and the Regional Planning Council will be involved in an advisory capacity.

Input from the Department of Natural Resources normally involves agency coordination from the Water Resources Administration (WRA), the Tidewater Administration (TA), and the Wildlife Administration (MWA). The WRA Wetland Permits Division has been designated by the Secretary of the Department to act as the lead agency for the Department. In that capacity it acts as the liaison with the Federal agencies chiefly through the Corps, and with other state and local agencies and presents the official Department position related to dredging projects review and approval after consultation with and integration of the inputs from the following Department agencies:

(1) Watershed Permits Division, WRA

(2) Coastal Resources Division, TA

(3) Tidal Fisheries Division, TA

(4) Wildlife Administration, MWA

(5) Geological Survey, MGS

The input of the Department of Health and Mental Hygiene has been delegated to the Office of Environmental Programs which is responsible for issuance of a Water Quality Certification. Federally-sponsored dredging projects and dredging projects at Federal reservations do not require a wetlands license; they must receive, however, a water quality certificate.

The Department of Economic and Community Development is involved in the permit process through the responsibilities of the Maryland Historical Trust.

LOCAL

If the dredging project occurs within the jurisdiction of Baltimore City or any of the sixteen Tidewater counties, then a grading and/or sedimentation permit may be required, and under certain conditions, a building permit may be required. Certain types of projects may also require other types of approvals at the local level, including zoning approvals, setbacks, subdivision regulation approvals, etc.

TABLE 2
SUMMARY OF REQUIRED AGENCY ACTIONS

AGENCY	ACTION	REMARKS
Corps of Engineers	Corps Permit	Required for all dredging operations in Maryland coastal waters.
Maryland Board of Public Works	Wetlands License	Required for all dredging projects involving state wetlands. Corps permit generally not issued until license is issued.
Wetland Permits Division Water Resources Administration DNR	Wetlands Permit	Required for all dredging projects in private wetlands.
Coastal Resources Division Tidewater Administration DNR	Coastal Zone Consistency Determination	Required for all dredging projects. A positive determination is a prerequisite for issuance of a Corps permit.
Office of Environmental Programs/Department of Health and Mental Hygiene	Water Quality Certification	Required for all dredging projects. This certification is a prerequisite for issuance of a Corps permit.
Maryland Port Administration/Dept. of Transportation	Construction Permit	Required for all port related construction activity in state waters. Usually limited to Port of Baltimore.
All coastal Counties and Baltimore City	a. Sediment/Grading Permit b. Building permit	a. Sediment/grading permit is usually required for all dredge material deposition areas. b. Building permit may be required is any temporary or permanent structures are erected.
Environmental Protection Agency	Review and approval comments	Required for all dredging projects.
U.S. Fish and Wildlife Service [DOI]	Review comments	Required for all dredging projects.
National Marine Fisheries Service [DOC]	Review comments	Required for all tidal dredging projects.
U.S. Coast Guard	Review and approval comments	Required only when a bridge or causeway is invoived in the project.
National Park Service [DOI]	Review comments	Required only when National Park lands are involved or impacted.
Tidal Fisheries Division Tidewater Administration DNR	Review comments	Comments solicited by and submitted to Wetland Permits Division.
Watershed Permits Division Water Resources Administration/DNR	Review comments	Comments usually solicited by and submitted through Wetland Permits Division.
Maryland Historical Trust	Review comments	Required on all projects.
Regional Planning Council	Review comments	Involved in those projects affecting the Baltimore Metropolitan Area only.

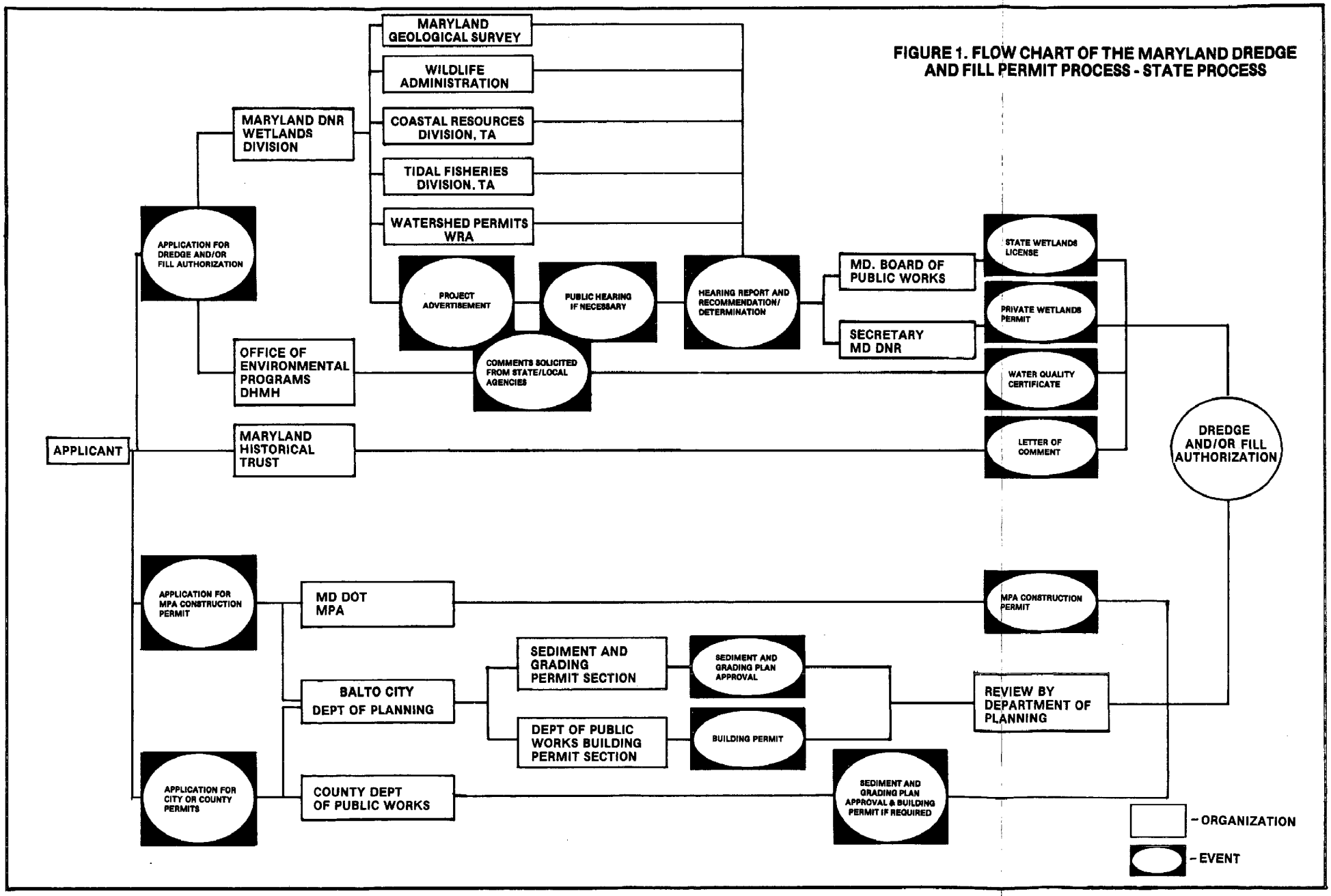
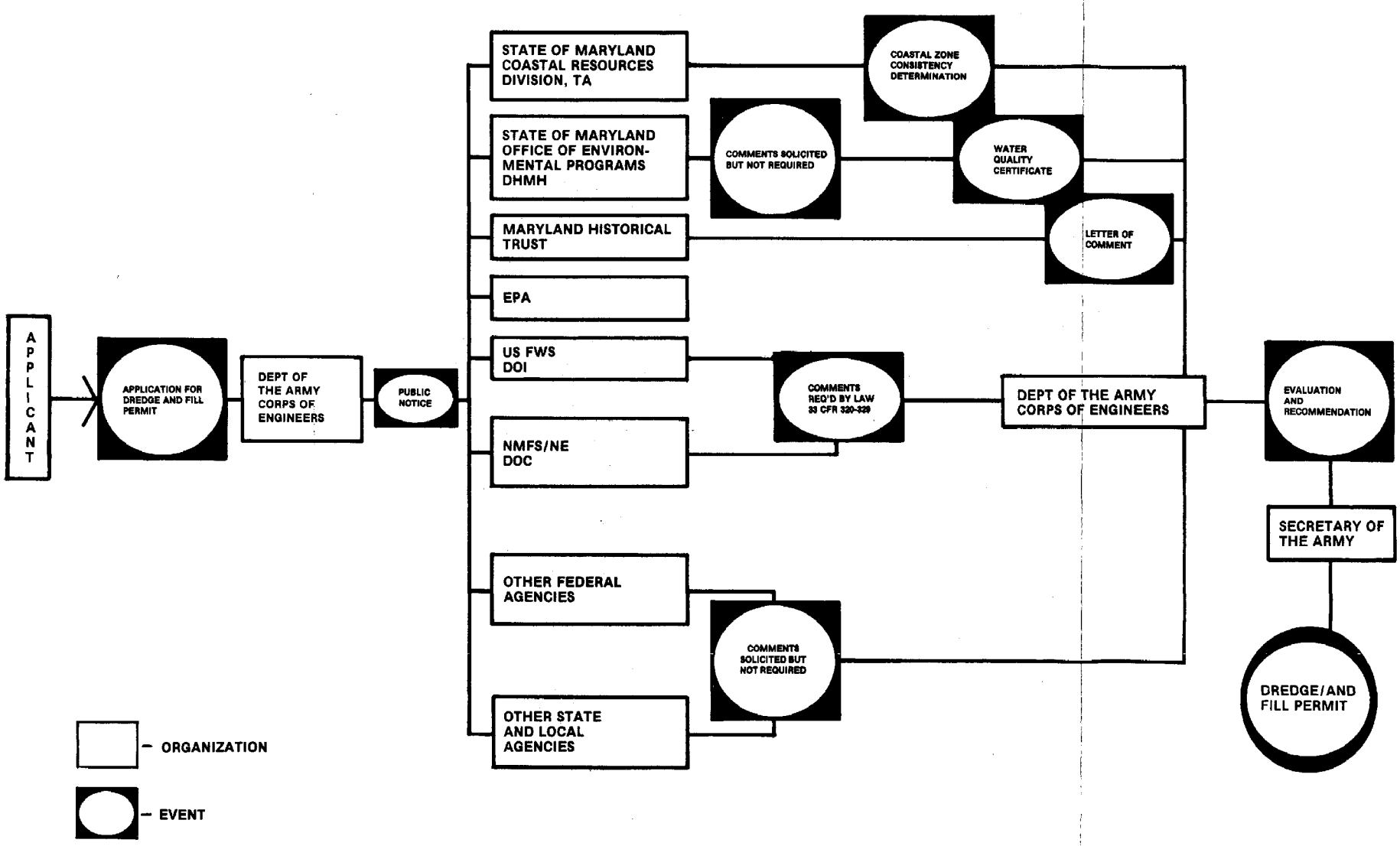


FIGURE 1. FLOW CHART OF THE MARYLAND DREDGE AND FILL PERMIT PROCESS - STATE PROCESS

FIGURE 2. FLOW CHART OF THE MARYLAND DREDGE AND FILL PERMIT PROCESS - FEDERAL PROCESS



GOVERNMENT AGENCY CONTACTS

Listed below in Tables 3 and Table 4 are the agency contacts for the Federal Government, Maryland State Government and local governments, respectively.

TABLE 3

FEDERAL AGENCY CONTACTS

U.S. Army Corps of Engineers

- Baltimore District

  Operations Division
  P.O. Box 1715
  Baltimore, MD
  (301)-962-3670

- Philadelphia District

  Operations Division
  Corps of Engineers, Custom House
  Second and Chestnut Streets
  Philadelphia, PA 19106
  (215)-597-4723

U.S. Environmental Protection Agency/Region 3

EIS and Wetlands Review Section
3PM82
Sixth and Walnut Streets
Philadelphia, PA 19106
(215)-597-7584

U.S. Fish and Wildlife Service

Annapolis Field Office
1825B Virginia Avenue
Annapolis, MD
(301)-269-5448

National Park Service

Environmental Quality Division
Mid-Atlantic Region
143 South Third Street
Philadelphia, PA 19106
(215)-597-7018

National Marine Fisheries Service

Habitat Protection Branch
Oxford, MD 21654
(301)-226-5771

U.S. Coast Guard

Bridge Section Chief
Portsmouth, VA
(804)-398-6227

TABLE 4

MARYLAND STATE AND LOCAL GOVERNMENT AGENCY CONTACTS

Department of Natural Resources
Tawes State Office Building
Annapolis, MD 21401

- Tidewater Administration
  - Coastal Resources Division
    Mr. Elder Ghigiarelli
    (301)-269-2784
  - Tidal Fisheries Division
    Mr. Nick Carter
    (301)-269-3061
  - Waterways Improvement Division
    Mr. Vince Bogucki
    (301)-269-3664
- Water Resources Administration
  - Wetland Permits Division
    Mr. Harold M. Cassell
    (301)-269-3871
  - Watershed Permits Division
    Mr. Charles K. Cover
    (301)-269-2265
- Wildlife Administration
  Wildlife Technical Service
  Mr. Carlo Brunori
  (301)-269-3195
- Maryland Geological Survey
  Mr. Jeff Halka
  (301)-235-0771

City of Baltimore

Mr. David Carroll
Baltimore City Department of Planning
222 East Saratoga Street
baltimore, MD
(301)-396-4343

Maryland Board of Public Works

Mr. Lawrence B. Goldstein
Annapolis, MD
(301)-269-2664

Department of Economic and Community Development

- Maryland Historical Trust
  Mr. Wayne E. Clark
  Shaw House
  21 State Circle
  Annapolis, MD 21401
  (301)-269-2212

Regional Planning Council

Ms. Mary Dolan
2225 North Charles Street
Baltimore, MD 21218
(301)-383-3129

Department of Health and Mental Hygiene

- Office of Environmental Programs
  Mr. Eduardo Acevedo
  201 West Preston Street
  Baltimore, MD 21201
  (301)-383-4244

Department of Transportation

- Maryland Port Administration
  Mr. Frank Hamons, Jr.
  Department of Planning and Research
  World Trade Center
  Baltimore, MD 21202
  (301)-659-4795

Counties and Local

Contact appropriate Department of Public Works, Soil Conservation Service, or Planning and Zoning Office for more details.

PART 2

DETAILED AGENCY REQUIREMENTS:

THE DREDGE AND FILL PERMIT REVIEW PROCESS FOR MARYLAND

FEDERAL AGENCIES

U.S. ARMY CORPS OF ENGINEERS

The U.S. Army Corps of Engineers is the lead federal agency in the permitting process related to dredge and fill operations in United States waters. As the lead agency, the Corps is responsible for the issuance of a permit as well as the notification and coordination of the review efforts of all other participating federal, state, and local agencies and the general public.

A Corps permit is mandated by law for 3 basic purposes: (1) to protect the quality of the nation's water, (2) to prevent alteration or obstruction of a navigable water of the United States, and (3) to control dumping of dredged material into ocean waters.

A Corps permit is required to locate a structure; to fill, excavate, or discharge dredged or fill material in waters of the United States; or to transport dredged material for the purpose of dumping it into ocean waters. Table 5 provides a list of typical activities which require a Corps permit. However, every activity may not require a separate individual permit application. Certain activities and work have been authorized by nationwide permits and general permits.

Nationwide permits have been issued for discharges of dredged or fill material into certain smaller or minor waters of the United States. Nationwide permits have also been issued for certain types of activities in all waters of the United States. These permits and their conditions are published in Section 330.4 and 330.5 of Title 33 of the Code of Federal Regulations. If any activity is covered by a nationwide permit and the applicable conditions will be met, there is no need to apply for an individual permit. In effect, activities authorized by the nationwide permits in the regulation are permitted in advance. No paperwork or delay is required.

General permits are issued by the District Engineer. They are similar to the nationwide permits, but are limited to smaller specified regions and may require some notification or reporting procedures. The District Engineer is authorized to determine those categories of activities in specified geographical regions that will cause only a minimal adverse environmental impact and to permit them with general permits. These will reduce delays by eliminating the need to process many individual applications.

Before an application is submitted, the responsible District Engineer office should be contacted to obtain current information about nationwide and general permits.

Enabling Legislation

The Corps' permitting authority is derived from (1) Sections 9 and 10 of the River and Harbor Act of 1899, and (2) Section 404 of the Clean Water Act. These two sources of authority are described below.

TABLE 5

LISTING OF TYPICAL ACTIVITIES WHICH REQUIRE A CORPS PERMIT

Artificial canals	Dolphins
Artificial islands	Dredging
Beach nourishment	Filling
Boat ramps	Groins and jetties
Breakwaters	Intake pipes
Bulkheads	Levees
Dams, dikes, weirs	Mooring Buoys
Discharging:	Ocean dumping
Sand	Outfall pipes
Gravel	Piers and wharves
Dirt	Riprap
Clay	Road fills
Stone	Signs
	Tunnels

a. Sections 9 and 10 of the River and Harbor Act of 1899

Section 9 of the River and Harbor Act of 1899 requires a permit from the Corps of Engineers to construct any dam or dike in a "navigable water of the United States". Bridges and causeways constructed in "navigable waters of the United States" also require permits under Section 9, but the authority to issue those permits was transferred to the United States Coast Guard in 1966 when the United States Department of Transportation was created.

Section 10 regulates virtually all work in, over, and under navigable waters of the United States.

Sections 9 and 10 of the River and Harbor Act of 1899 extend only over "navigable waters of the United States". Even structures or work outside the limits defined for navigable waters of the United States could require a Section 10 permit if the structure of work affects the course, location, or condition of the water body in such a manner as to impact on the navigable capacity of the water body. The law applies to all structures from the smallest recreational dock to the largest commercial dock, and includes any dredging or excavation, bank protection, overhead powerlines, and other work. (All tidal waters and Navigable Waters of the U.S.).

b. Section 404 of the Federal Water Pollution Control Act.

Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500, 86 Stat. 816, 33 USC 1344) authorizes the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge of dredged or fill material into waters of the United States at specified disposal sites. The term "discharge or fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

Regulations and Guidelines

In its role as the lead agency in the permitting process, the Corps has published both regulations and guidelines describing the Corps responsibilities and policies. The Corps has published a pamphlet titled, "U.S. Army Corps of Engineers, Permit Program, A Guide for Applicants." This guide, which was published to assist persons applying for a Corps of Engineers permit, contains a good description of the Corps permit program. The following materials have been excerpted from this pamphlet and are provided in Appendix A.

(a) Information required in a permit application form.

(b) Application form for a Corps permit ENG. FORM 4345, 1 Oct. 77

(c) Examples of types of drawings to be submitted with ENG FORM 4345

(d) Application checklist

(e) Application Disapproval

(f) Map of Corps divisions and districts.

U.S. ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency (EPA) participates in the review of permit applications to conduct dredging operations as a review and commenting agency. In this capacity, EPA makes recommendations to the Corps on whether a proposed permit should be approved or denied. EPA's authority goes beyond that of the other review agencies because it has legal authority to deny a proposed permit for environmental reasons. In the event of a disagreement between EPA and the Corps on the issuance of a permit, EPA can challenge the Corps Decision.

EPA's principal concern is to control discharges of dredged or fill materials to assure that the chemical, physical, and biological integrity of the waters of the United States is maintained and/or restored.

Enabling Legislation

EPA derives its authority for involvement in the permitting of dredging operations from the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.), Section 401-405, especially 404(b), and the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347), Section 102. These acts spell out, specifically, the interrelationship between EPA and the Corps, and give EPA its legal authority to deny a proposed permit for environmental reasons.

Regulations and Guidelines

EPA published final regulations on December 24, 1980, to implement Section 404(b)(1) of the Federal Water Pollution Control Act. These regulations, which were published in the form of guidelines, consist of two parts: Guidelines for Specification of Disposal Sites for Dredged or Fill Material and Testing Requirements for the Specification of Disposal Sites for Dredged or Fill Material. Both parts are contained in Appendix B.

Additionally, selected excerpts from EPA's Consolidated Permit Regulations, Part X published on May 19, 1980 are provided in Appendix B.

U.S. FISH AND WILDLIFE SERVICE

The U.S. Fish and Wildlife Service (FWS) participates in the review of permit applications to conduct dredging operations as a commenting agency. The FWS assesses the impacts on fish and wildlife of all water and related land resource development projects which are federally funded or are constructed under a federal permit or license. The FWS provides reports to federal construction or regulatory agencies and to permit applicants. Many of these projects occur in or affect wetland areas. Federal permits for water-related development are reviewed by the FWS to determine the existence of adverse impacts on fish and wildlife and their habitats, particulary in wetland areas.

Enabling Legislation

The FWS has been delegated an advisory-consultant authority on dredge and fill permits as a result of the following congressional acts:

(a) Fish and Wildlife Coordination Act (16 U.S.C. 661-667(e))

(b) Fish and Wildlife Act of 1956 (16 U.S.C. 742(d)-754)

(c) National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4347)

(d) Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.)

(e) Estuary Protection Act (16 U.S.C. 1221-1226)

(f) Coastal Zone Management Act of 1972 (16 U.S.C. 1451-1464)

(g) Wild and Scenic Rivers Act (16 U.S.C. 1272-1287)

The major legal authority for FWS comes from the Fish and Wildlife Coordination Act of 1958 which established the agency and gave it environmental review authority. This Act along with Section 102 of NEPA gives the FWS the authority to investigate each permit application that the Corps receives, to provide environmental advice and comments, and to recommend denial of the permit if necessary.

Regulations and Guidelines

The FWS published proposed regulations on May 18, 1979, implementing the Fish and Wildlife Coordination Act. A summary of these regulations is provided in the following pages. The full text contains the memorandum of understanding which has been developed between FWS and the Department of the Army, EPA, and the National Park Service.

An abbreviated list of FWS criteria for reviewing proposed fill and dredge projects is also provided. A more detailed description of the FWS mitigation policy was published on January 23, 1981, provided in Appendix C.

U.S. FISH AND WILDLIFE SERVICE
FISH AND WILDLIFE COORDINATION ACT PROPOSED RULES (May 18, 1979)

1. Existing dredge depths in navigational channels and access channels may be maintained or previously dredged depths may be restored. Specific criteria for projects involving this use include:
   (a) Designs and alignments should minimize disruption of natural sheetflow, waterflow, and drainage patterns or systems.
   (b) Designs should meet demonstrated navigational needs.
   (c) Designs should prevent the creation of pockets or other hydraulic conditions which would cause stagnant water problems.
   (d) Designs should minimize shoreline or other erosion problems and interference with natural sand and sediment transport processes.
   (e) Designs, where recommended, should use temporary dams or plugs in the seaward ends of canals or waterways until excavation has been completed.
   (f) Designs should minimize changes in tidal circulation patterns, salinity regimes, or related nutrient and aquatic life distribution patterns.
   (g) Alignments will be recommended by the FWS that avoid or minimize damages to shellfish grounds, beds of aquatic vegetation, coral reefs, and other shallow water and wetland areas of value to fish and wildlife resources.
   (h) Alignments should make maximum use of existing natural channels.
   (i) Construction should be conducted in a manner that minimizes turbidity and dispersal of dredged material.
   (j) Construction should follow schedules. These schedules will aim at minimizing interference with fish and wildlife migrations, spawning, and nesting or the public's enjoyment and utilization of these resources.

2. New or expanded boating facilities may be permitted, including designated wetland areas. Specific criteria for projects involving docks and piers include:
   (a) The size and extension of a dock or pier should be limited to that required for the intended use.
   (b) Project proposals should include transfer facilities for the proper handling of litter, wastes, refuse, spoil drilling mud, and petroleum products.
   (c) Piers and catwalks will be encouraged in preference to solid fills to provide needed access across biologically productive shallows and marshes to navigable water.

3. Bulkheads or seawalls. Specific criteria for projects involving this use include:
   (a) Construction of bulkheads, seawalls, or the use or riprapping generally will be acceptable in areas having unstable shorelines.
   (b) Except in special circumstances such as eroding shorelines, structures should be located no further waterward than the MHW line, and designated so that reflected wave energy does not destroy stable marine bottoms or constitute a safety hazard.
   (c) In areas which have undergone extensive development, applications for bulkheads will be acceptable that aesthetically and/or ecologically enhance the aquatic environment.

4. Bridges. Specific criteria for projects involving this use include:
   (a) Designs and alignments should minimize disruption of sheetflow, water flow, and drainage patterns or systems.
   (b) Approaches to permanent structures in wetland areas should be located, to the maximum extent possible, on pilings rather than solid fill causeways.

5. Projects involving jetties, groins, and breakwaters will be acceptable if they do not create adverse sand transportation patterns or unduly disturb the aquatic ecosystem.

6. Levees and dikes. Specific criteria for projects involving this use include:
   (a) Designs and alignments should minimize disruption of natural sheetflow, waterflow, and drainage patterns or systems.
   (b) Shoulder and slope surface should be stabilized following construction with natural vegetation plantings or by seeding of native species, where possible, or by riprapping.
   (c) Upon abandonment of a project site, levees and dikes will be evaluated for their wildlife potential and will be recommended for their retention or removal.

7. Cables and Transmission lines. Installation of aerial or submerged cables and transmission lines located and designed to provide maximum compatibility with the environment will be acceptable. Particular emphasis will be placed on measures to protect fish and wildlife resources, aesthetics, and unique natural features of the areas. In operational areas, routes should make maximum use of existing rights-of-ways.

8. Pipelines. Specific criteria for projects involving pipelines include:
   (a) Pipeline route that avoid or minimize damages to important spawning, nesting, nursery, or rearing areas will be encouraged.
   (b) In established operational areas, pipeline routes should make maximum use of existing rights-of-way.
   (c) In all areas, pipelines should be confined to areas which will minimize environmental impact; special care should be taken in unaltered areas.
   (d) Where recommended, pipeline access canals should be immediately plugged at the seaward end and subsequently maintained to prevent freshwater or saltwater intrusion.
   (e) Where recommended, bulkheads, plugs, or dams should be installed and maintained at all stream, bay, lake, or other waterway or water body crossings.
   (f) Pipeline placement should be designed with a wide margin of safety against breakage from mudslides, currents, earthquakes, or other causes.
   (g) Pipeline placement by the push method in marshlands will be encouraged.

U.S. FISH AND WILDLIFE SERVICE

CRITERIA FOR REVIEWING PROPOSED FILL AND DREDGE PROJECTS

The U.S. Fish and Wildlife Service considers that each notice of application should demonstrate that the proposed works:

(1) are water dependent
   (a) for non water-dependent works, particularly where biologically productive wetlands are involved and alternative upland sites are available, the Service usually recommends denial of a permit unless public interest requires further consideration.
   (b) For water-dependent works, the Service discourages the occupation and destruction of biologically productive wetlands and shallows. The Service usually recommends that the site occupied involve the least valuable of the alternative sites; that avoidable loss or damage to such productive wetlands and shallows, their fish and wildlife, and their human uses be prevented; and that any damages or losses of such resources proved unavoidable be reasonably mitigated or compensated.

(2) serves a recognized public need;

(3) minimizes environmental damages. The project must be:
   (a) judged to be the least environmentally damaging alternative or combination of alternatives (e.g., all appropriate means have been adopted to minimize environmental losses and degradations) and,
   (b) in the public's interest in safeguarding the environment from loss and degradation.

   In determining whether criteria (a) or (b) have been met, the FWS will always consider:
   1. the long term effects of the proposed work, structure, or activity.
   2. its cumulative effects, when viewed in the context of other already existing or foreseeable works, structures, or activities of different kinds.

The Service will recommend denial of Federal permits for proposed projects as follows:
   (1) Projects which needlessly degrade or destroy wetlands.
   (2) Projects not designed to prevent or minimize significant fish, wildlife and environmental damages.
   (3) Projects which do not utilize practicable, suitable, and available upland sites as alternatives to wetland areas.
   (4) Projects located on uplands which do not assure the protection of adjacent wetland areas.
   (5) Projects not designed to use current technology.
   (6) Projects where applicant uses a "piecemeal" approach to obtaining permits.

NATIONAL PARK SERVICE

The National Park Service (NPS) is involved in the permit review process for dredge and fill operations only on those projects involving park land under NPS jurisdiction. The two principal units of NPS encountered in Maryland Coastal waters are Fort McHenry and Assateague National Park. NPS may be involved either in the role of a review and commenting agency as is the case with the I-95 tunnels at Fort McHenry or as a permit application as is the case with shoreline stabilization work in the Assateague National Park.

Enabling Legislation

The National Park Service derives its authority for involvement in the permit review process from two sources:

(a) The Congressional action which established the National Park Service on August 25, 1916 (16 U.S.C.1)

(b) The National Environmental Policy Act of 1969.

Regulations and Guidelines

The guidelines employed by the National Park Service in evaluating the environmental impacts of potential dredge and fill projects are the Environmental Quality Procedures for complying with the National Environmental Policy Act of 1969, Part 516 DM 1-7 of the Department Manual of the Department of the Interior, which are provided in Appendix D.

NATIONAL MARINE FISHERIES SERVICE

The basic goal or purpose of the National Marine Fisheries Service (NMFS) is to maintain a viable commercial and recreational marine fishery for the benefit of all present and future U.S. citizens. To achieve this goal, the NMFS has established a variety of programs to deal with the different needs of managing these fisheries. One basic need is to improve management of the habitat on which marine fish depend for spawning, nursery, and feeding. To achieve this the branch of the NMFS which is responsible for maintaining environmental integrity uses existing legislation to ensure that all decisions regarding actions taken in the coastal zone give full consideration to potential effects on fish habitat.

The NMFS operates under more than fifty specific authorities, a few of which impose upon NMFS authority for management of coastal zone resources and for the overview and critique of proposed activities that would affect aquatic resources and their habitats. Of these authorities, the following eight deal most directly with NMFS's responsibilities related to dredging projects.

a. **Fish and Wildlife Act of 1956, 16 USC 742a-742k. 661-666c.** This is the basic legislation stating that fish and wildlife conservation shall receive equal consideration and be coordinated with other features of water resources development through consultation with the Fish and Wildlife Service, the NMFS (Reorganization Plan No. 4 of 1970), and State fish and game directors.

b. **Commercial Fisheries Research and Development Act of 1964, 16 USC 779-779f.** Authorizes the Secretary of the Interior (now Commerce) to cooperate with the States through their respective State agencies which regulate commercial fisheries in carrying out projects designed for research on and development of the commercial fisheries resources of the nation. These studies, conducted through Federal grants, often provide important data for analyzing the living marine resource aspects of environmental planning and coastal development projects.

c. **Endangered Species Act of 1973, 16 USC 1531-1542.** Provides for the conservation of endangered and threatened species of fish, wildlife, and plants. The program is to be administered jointly by the secretaries of the Interior and Commerce. Among other things, the Act prohibits, except in certain instances, the import, export, taking, and interstate transportation for commercial purposes of any endangered species.

The Secretaries shall cooperate with the States to the maximum extent before acquiring any land or water, or interest therein, for the purpose of conserving any endangered or threatened species.

d. **Anadromous Fish Conservation Act of 1965, 16 USC 757a-757f.** Authorizes the Secretary of the Interior (and Commerce pursuant to Reorganization Plan No. 4) to enter into cooperative agreements with the States, jointly or severally, to conserve, develop, and enhance the anadromous fishery resources of the nation that are subject to depletion from water developments. Similar agreements are authorized to conserve, develop, and enhance Great Lake Fish that ascend streams to spawn.

e. **Marine Migratory Sport Fish Act of 1959, 16 USC 760e-760g.** Directs the Secretary of Commerce to undertake a comprehensive continuing study of migratory marine fish of interest to recreational fishermen, including species which migrate through inshore waters. Included in such studies shall be research on migration, identity of stocks, growth rates, mortality, survival, environmental influences including pollution, to develop wise conservation policies and constructive management.

f. **Fishery Conservation and Management Act of 1976.** Directs the Secretary of Commerce to manage the Fishery resources of the fishery conservation and excludes the territorial sea.

g. **Marine Protection, Research and Sanctuaries Act of 1972.** Title I of this Act authorizes the Secretary of the Army, the Administrator of EPA, and the Secretary of the Department in which the Coast Guard is operating, to regulate the dumping of material (including dredge spoil) into the Great Lakes or coastal and ocean waters of the United States.

Title II authorizes the Secretary of Commerce to monitor and study the effects of dumping material into the Great Lakes or coastal or ocean waters of the United States.

h. **National Environmental Policy Act of 1969.** Requires all Federal agencies to prepare an environmental impact statement for all projects which could significantly affect the environment.

The National Marine Fisheries Service has not published regulations related to its involvement in the review of dredging and spoil disposal operations. The NMFS Northeast Regional Office (NMFS/NE) however, has provided informal guidance in the form of a list of general responses to water-rlated projects requiring Federal permits. The NMFS/NE perceives each project as having a unique set of characteristics which preclude development of exact criteria for all situations. The general guidance was developed based upon biological principles and past NMFS/NE project experience. Each project is reviewed as an independent action and final recommendations are based upon specific site and project situations.

The NMFS/NE also has developed an informal description of project review considerations which can be used as a guide in designing and evaluating your own project.

INFORMAL GUIDANCE

National Marine Fisheries Service, Northeast Region,
General Response to Water-Related Projects
Requiring Federal Permits

Each project has unique characteristics, thus criteria cannot be developed for all situations. The following guidelines are generalities based upon past experiences. Our final recommendations are based upon specific site and project situations.

1. The National Marine Fisheries Service, Northeast Region (NMFS/NE) encourages the following:
   (a) Stabilization of eroding shorelines with vegetation, gabions, or riprap.
   (b) Spoil deposition in confined upland areas.

2. NMFS/NE usually does not object to issuance of permits for the following:
   (a) Private mooring buoys.
   (b) Private piers that do not encroach upon public shellfish grounds.
   (c) Open-pile-type marinas located in areas where tidal circulation is adequate to maintain good water quality, and where extensive dredging is not required. Marinas should also avoid locating near shellfish beds, and provide sewage pump-out facilities.

3. NMFS/NE usually discourages the following:
   (a) Open-water spoil disposal
   (b) Dredging in marine and estuarine areas. However, if dredging is deemed necessary, dredged areas should be connected to adjacent bottom contours of equal or greater depth to promote circulation and prevent sump formation.

4. NMFS/NE usually recommends permit denial for the following:
   (a) Filling of wetlands or open water to create fastland
   (b) Bulkheads located channelward of the mean high water line, unless special circumstances require such placement
   (c) Marinas located in or near productive shellfish beds or in areas where tidal circulation of water is minimal
   (d) Dredging of marsh, shellfish, and sea grass beds
   (e) Dead-end canals
   (f) Dredging for fill or borrow material
   (g) Structures, such as tide gates or dikes, which impede circulation of tidal water over wetlands.

REVIEW CONSIDERATIONS

NMFS/NE suggest you consider the following items when initially planning your project.

(1) Alternatives: have you considered alternative project locations or designs that will meet your objectives with a minimum of disruption to marine or estuarine waters. For example, in many cases instead of encroaching upon wetlands or shallow open waters, a bulkhead can be placed at the base of the eroding bank, thus minimizing the loss of marine habitat and living resources.

(2) Water-dependency: Can your project be located elsewhere or must it be located on the water's edge?

(3) Public interest: A project may affect various public resources, including fisheries or associated habitat, either positively or negatively. Will your project provide long-term benefits to the community, such as increased employment, improved public water access or protection of public health and safety?

Generally, if the above items are met, you should have little difficulty in obtaining authorization to construct your project. However, if public fishery resources will be lost as a result of project construction, we may want to discuss additional alternatives or recommend to the Corps of Engineers that compensation be considered to offset the loss resources or habitat.

Compensation will be tailored to the particular site and project, and may consist of: replacement in-kind (i.e., conversion of uplands to marsh or shallow water); restoration of existing habitat that has been degraded; or enhancement of habitat to improve its biological productivity or carrying capacity.

U.S. COAST GUARD

The U.S. Coast Guard has the authority and responsibility to issue permits to construct a bridge or causeway in "navigable waters of the United States." Such a permit is required by Section 9 of the River and Harbor Act of 1899. This function was formerly the responsibility of the Corps but was transferred to the Coast Guard in 1966 when the Department of Transportation was created.

The principal concern of the Coast Guard relates to navigational safety. In addition, however, pursuant to the mandates of NEPA, the Coast Guard also conducts an environmental assessment of the project.

As part of its overal jurisdiction for navigational safety the Coast Guard is consulted by the Corps on those projects where navigational safety is a consideration.

Legislative Mandate

The U.S. Coast Guard derives its authority in dredging projects in matters related to navigation safety and issuance of Section 9 permits for construction of bridges and causeways in navigable waters from both the delegation of responsibility by the Secretary of the Department of Transportation (DOT reorganization, 1967) and Section 9 of the River and Harbor Act of 1899.

Regulations and Guidelines

The Coast Guard has published regulations related to its jurisdiction in navigation safety and construction of bridges and causeways in 33 CFR 115. These regulations, along with an instruction form which provides guidelines to the Coast Guard requirements for approval of a permit application, and a sample blank permit form are provided in Appendix E.

MARYLAND STATE AGENCIES

DEPARTMENT OF NATURAL RESOURCES

WATER RESOURCES ADMINISTRATION

• *WETLAND PERMITS DIVISION*

The Wetland Permits Division of the Water Resources Administration is responsible for wetland resource management, monitoring of overboard dredge material deposition, and the management/information system supporting these efforts. Priorities include review and processing of wetland permits and approvals for dredging and filling privately-owned wetlands; preparing reports and recommendations to the Board of Public Works on the issuance of wetland licenses for dredging and filling in state wetlands; performing the administrative tasks associated with the above (i.e., wetland hearings, etc.); administering the State's effort regarding environmental monitoring of dredge spoil deposition projects with particular emphasis on research contracts and identification of funding associated with the monitoring.

Division responsibilities consist of site inspections, project evaluations, public hearings and report/comment preparation as well as advisory services all for the purpose of meeting legal mandates and minimizing adverse environmental impacts on tidal wetland and open water resources.

The Wetlands Law obligates that a person secure a permit/license in order to dredge or fill within private or state wetlands. A change in the Wetlands Law has provided for maintenance dredging projects in state wetlands. This procedure permits the Department of Natural Resources to recommend inclusion in the wetlands license of a provision for periodic maintenance dredging for a 6-year period. Specifications are applied to these projects including limits upon area, depth, and quantity of dredge material.

Enabling Legislation

The Wetland Permits Division derives its authority for involvement in the permitting of dredging operations from Titles 8 and 9 of the Natural Resources Article of the Annotated Code of Maryland.

Section 1413.1 of Title 8 directs the Department in cooperation with other appropriate agencies to evaluate and monitor dredge spoil deposition in State waters for the purpose of identifying potential environmental damage.

Title 9, Wetlands and Riparian Rights, contains two sections which address the licensing and permitting of dredging operations. Section 202, License for Dredging or Filling of State Wetlands, specifies that a person may not dredge or fill on state wetlands without a license. Section 306, Permit to Conduct Activity not Permitted by Rules and Regulations, specifies that a person proposing to conduct dredge and fill operations on any private wetland must obtain a permit from the Secretary of the Department of Natural Resources.

Regulations and Guidelines

The Wetland Permits Division has prepared a brief instruction guide of the State requirements related to wetland licenses, permits and notifications. This guide includes (1) a description of the legal requirements, (2) a sample application or notification form including a sample plan, and (3) a supplemental form for storm drain projects.

The Division has prepared a set of guidelines for implementation of the Maryland Wetlands Law. These guidelines include (1) a description of general requirements of the Wetlands Act, (2) guidelines for evaluating applications, and (3) wetlands licensing procedures. The above reference materials are included in Appendix F.

• *WATERSHED PERMITS DIVISION*

The Watershed Permits Division reviews all plans and specifications submitted with proposed dredge and fill projects, in particular those with dredge spoil disposal areas. The review focuses on sediment and erosion control plans as required for proposed land clearing, soil moving, or construction activities associated with the dredge and fill operation. The project review entails verifying the design adequacy of the sediment control measures as well as the basic containment area structures; ascertaining that all necessary measures have been identified and specified; and that adequate standard details and specifications are incorporated into the construction documents. Recommendations may be made to correct any perceived deficiencies in the plans including the containment area size or configuration, dike size, construction methods, and outfall erosion protection. In addition, standard specifications for sediment and erosion control as well as innovative ideas proposed are checked for field efficiency.

Enabling Legislation

The Division derives its authority for involvement in the permit review process from Annotated Code of Maryland, Natural Resources Article, Section 8-1105. Referrals from the Water Resources Administration Wetland Permits Division are reviewed as a requirement of Wetlands Licenses issued for dredge spoil disposal areas.

Regulations and Guidelines

The Division has not published any regulations or guidelines.

The chronological sequence of review activities for county, private, and State and Federal (Corps of Engineers) dredging projects is described in the following attachments.

SEQUENCE OF REVIEW - STATE AND FEDERAL (CORPS OF ENGINEERS) DREDGING PROJECTS

Preliminary comments and recommendations may be solicited from the Division via the Wetland Permits Division. Standard general comments are forwarded to Wetlands including site specific comments when pertinent. Preliminary site inspections may be made to review proposed dredge spoil and disposal area.

In some instances preliminary plans and specifications may be submitted for additional review and comment.

Upon issuance of the Department of Health Water Quality Certification, and prior to initiation of any dike construction, the Contractor is required to submit a proposed Sediment and Erosion Control plan and engineering drawings of the spoil containment areas as proposed. This plan is reviewed for adequacy of proposed methods for controlling sediment runoff from the disturbed area including sediment traps, straw bale or silt fence barriers, vegetative stabilization, etc. as may be specified. In addition, containment dike details are reviewed for sufficiency, including area capacity, configuration, dike side slope and top width, earth compaction specifications and methods, pipe and riser details, outfall protection and discharge location. Changes to plans are made as required.

Upon receipt and review of an acceptable plan, an approval letter is sent to the Contractor. The complete file is transferred to the Water Resources Administration Enforcement Division for use in field inspection of the spoil disposal area.

SEQUENCE OF REVIEW - COUNTY AND PRIVATE DREDGING PROJECTS

Preliminary comments and recommendations may be solicited from the division by the applicant or through the Wetland Permits Division. General comments may be made based on standard requirements.

As a condition of the Wetlands License, plans for upland diked disposal areas are submitted to the WRA Enforcement Division by the owner or Contractor. Plans are referred to the Watershed Permits Division for review of dike configuration, adequacy, construction methods, slopes and top width, pipe and riser details, outfall protection and discharge location. Changes are made as required. The local County Soil Conservation District reviews the Sediment and Erosion Control plans.

Upon receipt and review of an acceptable plan, a memorandum of approval is sent to the Enforcement Division for inclusion in the Wetlands project file for use in field inspection.

TIDEWATER ADMINISTRATION

• *COASTAL RESOURCES DIVISION*

The Coastal Resources Division (CRD) has the responsibility to review and comment on all proposed projects that have the potential to significantly impact coastal resources. This primarily consists of Corps of Engineers and DNR (Water Resources Administration) permit applications, and federally funded projects through the State Clearinghouse process. The Division's major responsibilities in this regard are to (1) provide data and information relevant to the project; and (2) determine the project's consistency with the objectives and policies of the Coastal Zone Management Program. For any project in which there is a federal action involved, the Division must issue a Federal Consistency determination to the appropriate federal agency. This requirement is mandated by the Federal Consistency clause of the Coastal Zone Management Act of 1972 which states that any federal action in the coastal zone must be consistent to the extent practicable, with a State's approved Coastal Zone Management Program.

The results of the Division's review are submitted to the appropriate permitting program responsible for making the decision on the project. This is generally the permitting program within the Water Resources Administration, the regulatory agency with DNR. If a Corps permit is required but there is no State permit or license involved, the Division takes the lead for DNR in commenting on the project to the Corps.

State Clearinghouse projects are received by the Department and assigned to a lead agency by the Clearinghouse Review Officer in the Office of the Secretary. The lead agency is responsible for coordinating comments and recommendations of all appropriate units of the Department and for preparing the Department's response. CRD is generally the lead agency when the project is located in the coastal zone. When the Division is not the lead agency, its review of the project is submitted to the lead agency for inclusion in the Department's position. CRD's comments on Clearinghouse projects always include a Federal Consistency Determination.

Regardless of the type of project, any negative Federal Consistency determination must be approved by the secretary of the Department. In this manner, any conflicting positions among units of the Department are resolved by the Secretary prior to the determination leaving the Department.

Enabling Legislation

The Coastal Resources Division draws its authority for involvement in the permitting of dredging operations from:

(a) Section 306(e)(1)(c): Administrative review of all development plans, projects, or land and water use regulations, Federal Coastal Management Act of 1972.

(b) Section 307(c), (d): Consistency of Federal activities with approved State Coastal Zone Management Programs, Federal Coastal Zone Management Act of 1972.

(c) Executive Order 01.01.1978.05 Coastal Zone Management State of Maryland, Executive Department.

Regulations and Guidelines

CRD has published informal guidelines which describe (1) the process and guidelines for CRD involvement in the review and evaluation of coastal related projects, and (2) the procedures used in making Federal consistency determinations. These are presented in Appendix G.

• *TIDAL FISHERIES DIVISION*

The Tidal Fisheries Division participates in the review of permit applications to conduct dredging operations as a State technical review and commenting agency. The functions of this agency in the review process are varied. They include serving on intergovernmental committees and workshops, consideration of resource management plans, review of permit applications and environmental impact assessment documents, preparation of position papers, providing technical information to other agencies, and advising legislators.

The agency responses to dredging issues are primarily concerned with the maintenance of aquatic biota populations. Because of the magnitude and variability of environmental modifiers, evaluation of the "changes" resulting from modification proposals is critical to fulfilling the agency mission. Review of proposed physical changes are examined for their ecological impacts according to theory, past experience, and pertinent literature. Evaluation of the possible effects of the proposed projects are made and forwarded to the appropriate lead agency.

Enabling Legislation

The Tidal Fisheries Division draws its authority for involvement in the permitting of dredging operations from both Federal and State legislation as outlined below.

a. **Federal Legislation.**

(1) Section 404: Permits for disposal of dredged or fill material.
Federal Water Pollution Control Act, as amended (33 U.S.C., 1251 et seq.)

(2) Section 9: Construction of dams and Section 10: Obstructions in navigable waterways. River and Harbors Act of 1899.

(3) Section 102(2)C: Environmental Impact Statements.
National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347)

(4) Section 306(e)(1)(c): Administrative review of all development plans.
Coastal Zone Management Act of 1972.

(5) Section 2(a): Consultation with State wildlife resource agencies in the event of modification to water bodies.
Fish and Wildlife Coordination Act.

b. **State Legislation - Annotated Code of Maryland**

(1) Subtitle 2: State Wetlands, Section 202; and Subtitle 3. Private Wetlands
Title 9. Wetlands and Riparian Rights

(2) Gas and Oil. Subtitle 5. Coastal Facilities Act, Section 506.

Regulations and Guidelines

This agency has not promulgated specific regulations or guidelines. However, it recommends that at a minimum the following information be submitted for project evaluation:

(a) Exact location to include identifiable boundaries; maps

(b) Depth - existing and proposed

(c) Size of dredging project in cubic yards

(d) Method of Dredging

(e) Spoil disposal method - to include location

In addition the agency has informally adopted the general policies relative to specific types of dredging projects.

GENERAL POLICIES OF TIDAL FISHERIES DIVISION RELATED TO SPECIFIC TYPES OF PROJECTS

1. Dredging in shallow water, low salinity areas - These projects impact spawning grounds and nursery areas for finfish, such as to present hazards to their well being. This response is applied to dredging projects removing more than 500 cubic yards of material. The usually recommended no-dredging period for protection of spawning fish populations is March 1 through June 15.

2. Channel dredging in close proximity to natural oyster bars. If dredging is proposed within a charted oyster bar, it is recommended that dredging be restricted to the period October 1 to December 15. If dredging is proposed within 500 yards of natural oyster bars, the usually recommended dredging period is October 1 and December 15 and/or March 1 to May 31 of any year. The rationale behind this recommendation is that dredging operations should avoid the summer spawning and spat setting periods and the colder periods of reduced adult activity.

3. Dredging for bulkhead and fill projects. These project proposals usually receive a recommendation to limit bulkheading with accompanying dredged fill to the mean high water line. If allowed to project past the high water line these projects would convert shallow waste habitat into fast land, thus degrading important habitat for aquatic organisms.

4. Dredging for bulkhead and fill projects on dead end canals. These proposals usually are recommended to be denied on the grounds that the project would further degrade the water quality and fishery habitat on an already ecologically stressed system. Dead end canals have generally poor circulation and relatively vertical banks. A suggested alternative to bulkheading and dredging in these cases is the placement of riprap on the banks and no fill allowed.

5. Dredging projects which would fill a marsh. These projects usually are recommended to be denied. TFD's position is that the marsh protects the general water quality of the receiving waters adjacent to the project from the effects of storm water run-off and septic field seepage. Waste assimilative capacity of marshland is significant as is the marsh's contribution of detritus to the aquatic food chain.

   Modifications to the usual responses to the dredging projects cited above are occasionally made upon request of the permitting agency. Efforts are made to keep extensions of project operations from adversely impacting habitat or aquatic organism population.

• *WATERWAY IMPROVEMENT DIVISION*

The Waterway Improvement Division is neither a permitting agency nor a link in the permit process. Rather, it evaluates and funds projects that qualify under the Natural Resources Articles for Waterway improvement. The scenario for these services is as follows:

(a) A local governing body submits a project development proposal to the Dredging Division.

(b) The Dredging Division arranges an on-site investigation with the governing body and an evaluation is made as to the benefits that would accrue to the general recreational boating public and the anticipated cost.

(c) A course of action is projected:

  (1) If the benefits are sufficiently great, as compared to the project cost, the project will be accepted for 100 percent state funding.

  (2) If the benefits are not sufficiently great, as in a local private community, the governing body can be offered an interest-free loan to construct the project. The local community will petition the local governing body to establish a special Waterway Improvement Tax District for repayment of the loan.

  (3) The Dredging Division will conduct the necessary hydrographic and topographic surveys, design the channel, and compute the material quantity to be removed and the size of the spoil disposal pond required.

  (4) The governing body must then locate and provide to the Dredging Division, a properly executed entry and construction and dredged material acceptance easement for the spoil disposal site.

  (5) The Dredging Division will prepare the permit drawings and application for execution by the local governing body, who must obtain all permits and licenses.

  (6) The governing body forwards copies of all licenses and permits to the Dredging Division.

  (7) A budget request is prepared for inclusion in the next fiscal dredging budget for legislative approval.

(d) The governing body prepares the spoil area design including the sediment control practices approved by the local Soil Conservation District and bid specifications. Consultant services can be requested for those governing bodies which do not have these in-house capabilities.

(e) The governing body bids the project and recommends the low bidder to the Dredging Division for acceptance.

(f) The contract is awarded for construction as permitted by the environmental windows provided in the permit and license.

(g) The Dredging Division conducts the post dredge hydrographic survey and determines if in fact the channel has been constructed to the contracted dimensions for final acceptance of the project.

(h) The governing body is reimbursed for the project by the Dredging Division upon receipt of an invoice accompanied by copies of their checks with their endorsements.

An estimate of projected dredging projects in Maryland's coastal counties is provided in the following table.

WATERWAY IMPROVEMENTS DIVISION

5-10-20 YEAR PROGRAM

COUNTY	VOLUME	FUNDS	CONSTRUCTION PROJECTION
ANNE ARUNDEL COUNTY			
Lake Hillsmere	11,000 yds ^{3}	$120,000.00	10/1/81-12/15/81
Lake Ogleton	18,000	100,000.00	10/1/81-12/15/81
Lake Placid	8,800	175,000.00	3/1/82- 6/30/82
Marley Creek	64,000	300,000.00	Held for Spoil Site
Upper Magothy	2,300	200,000.00	Held for Spoil Site
CALVERT COUNTY			
Calvert Marine Museum	9,000 yds ^{3}	30,000.00	6/15/81- 9/30/81
Spring Cove	4,400 2 jetties	280,000.00	10/17/81-12/15/81
Hellen Creek	12,200	40,000.00	10/ 1/81-12/15/81
CHARLES COUNTY			
Cuckhold Creek	9,700 yds ^{3}	43,000.00	10/1/81-12/15/81
Port Tobacco	12,000	72,000.00	9/1/81-11/30/81
DORCHESTER COUNTY			
Cambridge Yacht Basin	3,400	35,000.00	10/ 1/80-12/15/80
Indian Creek	14,100	75,000.00	10/ 1/80-12/15/81
Lodge Cliff	5,132	50,000.00	9/30/81-12/15/81
McCready Creek	6,431	35,000.00	9/15/80-11/15/81
Ragged Point Marina	6,600	60,000.00	6/15/82- 9/30/82
Tyler Cove	22,100	135,000.00	10/ 1/81-12/15/81
Wallace Creek	39,000	164,500.00	9/15/80-11/30/80
HARFORD COUNTY			
Flying Point Park	3,200	37,450.00	11/ 1/80- 1/30/81
Foster Branch	7,000	25,000.00	6/15/81- 8/30/81
Light House Pier	1,200	15,000.00	9/15/81-11/15/81
QUEEN ANNE'S COUNTY			
Kent Island Narrows Breakwater		700,000.00	1/ 5/81- 1/30/81
Kent Island Commercial	23,375	200,000.00 50/50	1/ 5/81- 3/30/81
No-Name Creek	19,820	110,990.00	9/15/80-10/15/80
ST. MARY'S COUNTY			
St. George's Island Narrows	12,000	120,000.00	10/ 1/81-12/15/81
St. Inigoe's Ramp	668	26,000.00	10/ 1/81-12/15/81
St. Jerome's		125,000.00	3/15/81- 6/30/81
Tanner's Creek	Jetties		Held in litegation above
SOMERSET COUNTY			
Ewell Marina	32,000	160,000.00	10/1/81-12/30/81
TALBOT COUNTY			
Edge Creek Tax District	6,200	40,000.00	7/15/82-11/15/82
Peachblossom Cove T.D.	5,100	35,000.00	10/ 1/82-12/15/82
St. Michaels Town Slips			
WORCHESTER COUNTY			
Georges Island Landing	27,000	150,000.00	9/30/81-12/15/81
Turville Creek	44,400	225,000.00	8/15/81-12/15/81

5-10-20 Years

Maintenance dredging as projects warrant
Qualified new projects as requested

Enabling Legislation

The Natural Resources Article, Section 8-707 establishes the Waterway Improvement Division for the purposes of marking channels and harbors and to establish aids to navigation; to clear debris, vegetation and obstructions from state waterways; dredge channels and harbors and construct jetties and breakwaters; to construct marine facilities beneficial to the boating public; to improve, reconstruct, or remove bridges, drawbridges, or similar structures over or across waters; to evaluate water oriented recreation needs and capacities of Maryland waterways and develop comprehensive plans for Waterway Improvements; and to provide matching grants to local governments for the acquisition of vessels and equipment.

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

OFFICE OF ENVIRONMENTAL PROGRAMS

The Office of Environmental Programs of the Department of Health and Mental Hygiene must by law evaluate all proposed dredging projects that may involve changes or alterations in all State waters (tidal and non-tidal) for the purpose of issuing or denying a Water Quality Certification.

Under Section 401 of the Federal Water Pollution Control Act (PL 92-500; 86 Stat. 816, 33 USC 1411), any applicant for a federal permit to conduct an activity which may result in a discharge into navigable waters is required to obtain a certification from the State that the discharge will comply with the applicable water quality standards. The certification also pertains to the subsequent operation of the facility.

In cases where the Corps of Engineers or U.S. Coast Guard has stated that a water quality certificate is required, the Office of Environmental Programs issues or denies the water quality certificate, or places certain conditions on the activity. Even in public notices that do no state that a water quality certificate is required, but it is felt that the construction or use of the facility will create a discharge to the waters of the State, the Office reviews the proposed activity and issues or denies the water quality certificate, providing appropriate recommendations to the Corps of Engineers to implement water quality protection measures. The Office may solicit comments from interested parties and may schedule a public hearing on the project.

Failure to comply with the conditions of the Water Quality Certificate constitutes reason for cancellation of certification and legal proceedings may be instituted against the applicant in accordance with the Annotated Code of Maryland (1974 Volume). In granting the Water Quality Certificate, the Office reserves the right to inspect at any time the operations and records regarding the project.

Enabling Legislation

The authority of the Office of Environmental Programs for issuing a water quality certificate is derived from Section 401: Certification of Title IV - Permits and Licenses of Federal Water Pollution Control Act of 1972, as amended.

Regulations and Guidelines

The Water Quality Certification is issued after close coordination with other agencies of the State as well as local jurisdictions. Recommendations from Maryland DNR (Water Resources Administration, Tidal Fisheries Division, Coastal Resources Division), County Health Departments, Natural Resources Policies, other units of the State Health Department, and the Soil Conservation Service are incorporated into the Water Quality Certification as necessary.

The Office has not developed any guidelines or criteria specifically for dredging projects. The guidelines and criteria of the above-mentioned agencies have been employed. Guidelines for overboard disposal of spoil material, developed by a Spoil Disposal Criteria Committee, have been employed as a reference. Also, Department of Health and Mental Hygiene Code of Maryland Regulations 10.50.01 Water Quality and Pollution Control, are employed. Other sources of criteria are the sediment control requirements of the SCS, the Red Book published by EPA, and the EPA Technical Bulletin titled, "Protection of Shellfish Waters," EPA 430/9-74-010, July 1974. Where no guidelines are available, professional judgment is employed.

DEPARTMENT OF TRANSPORTATION

MARYLAND PORT ADMINISTRATION

The Maryland Port Administration (MPA) has the overall responsibility to increase the waterborne commerce of the ports in the state. Pursuant to its mission, MPA promotes the State's commercial ports in general, and plans, constructs, markets, operates, and maintains state-owned port facilities. In essence, MPA's role is essentially one of working closely with private industry and providing services to port facility users such as shipping lines, stevedoring firms, shippers, other port community businesses, and services to the general public.

With respect to dredging and spoil disposal activities the MPA has several areas of responsibility, a number of which are shared with the Department of Natural Resources (DNR). The major areas of responsibility include:

(a) Promotion of Port Oriented Waterway Improvements

(b) Estimates of Dredging and Spoil Disposal Needs

(c) Inventory of Disposal Sites

(d) Prioritization of Disposal Sites

(e) Site Acquisition and Plan Formulation

(f) Design and Construction

(g) Operations and Maintenance

(h) Monitoring

MARYLAND PORT ADMINISTRATION

Department of Engineering
World Trade Center Baltimore
Baltimore, Maryland 21202

INSTRUCTIONS FOR SECURING A MARYLAND PORT ADMINISTRATION CONSTRUCTION PERMIT

1. The Applicant must submit to the Maryland Port Administration a letter of application and permit application drawings as the first step in the application procedure. The letter of application should include a brief description of the construction, the dates of commencement and completion of the work and the current estimated cost of such work.

   a. The Applicant shall furnish to the Maryland Port Administration three copies of a permit application drawing showing location, character and extent of the work, ownership of the property involved, and ownership of all abutting properties. One set of the plans will be approved and returned to the Applicant if the permit is granted.

   b. All permit application drawings shall be shown where practicable on one sheet 8 inches wide and 10½ inches long, including a one-inch margin at the top of the sheet. The preparation of such drawings shall be in the conformance with current directives by the Baltimore District Office of the U.S. Army Corps of Engineers.

   c. For large project construction, owner will submit, in addition to the permit application drawing, construction drawings and specifications. The Engineering Department reserves the right to require such submission as it deems necessary.

2. Upon receipt of the letter of application and drawings, the Maryland Port Administration shall forward two copies of their serialized permit application form to be executed by Applicant. Both copies must be executed and returned. The forms shall be signed in the name of the owner of the property in front of which the improvements are to be made. If a corporation is owner, the application must be signed in the name of the corporation by the President or ther duly appointed officer, witnessed by the Secretary or Assistant Secretary, and affixed with the Corporate Seal.

   a. The Applicant will pay to the Maryland Port Administration a construction inspection charge for the work at the rate of $1.00 per $1000.00 of the estimated cost of the work, with a minimum charge of $10.00 for each permit. This payment shall be transmitted to the Maryland Port Administration with the executed application forms.

3. After receipt of the properly executed forms, the Maryland Port Administration shall conduct a construction inspection of the proposed site and determine if a permit is warranted. If a permit is approved, both copies of the form will be executed by the Director of Engineering of the Maryland Port Administration, and the green copy shall be returned to the Applicant as his authorization.

4. If the applicant's or agent's applying for permit does not own the property, the applicant's or agent's shall secured a letter of authorization from the property owner and a copy of the letter shall accompany the letter of application.

(i) Site Disposition

(j) Research

(k) Funding Management.

The MPA has both administrative and regulatory funtions. As part of its regulatory functions, MPA requires that all dredging and spoil disposal projects within its jurisdiction obtain an MPA construction permit.

Enabling Legislation

The MPA's authority for issuance of its construction permit and involvement in dredging and spoil disposal activities comes from the Annotated Code of Maryland, Title 6 Ports, which describes MPA's legislative mandates and general responsibilities.

Regulations and Guidelines

MPA has not published any regulations or guidelines related to its involvement in dredging and spoil disposal activities. However, an instruction form for obtaining an MPA construction permit has been prepared and is attached. In addition, the general and specific responsibilities of MPA with respect to dredging and spoil disposal activities are described in the Memorandum of Understanding (MOU) between MPA and DNR (available from either organization).

DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT

MARYLAND HISTORICAL TRUST

The Maryland Historical Trust is responsible for the State administration of NEPA and the National Historic Preservation Act in regard to the protection and enhancement of historic and archaeological resources. The Trust administers the National Register, grants awards, compliance, and educational programs necessary for fulfillment of the enabling legislation. The Trust compliance staff reviews all federal projects or permits received from the A-95 Clearinghouse, Corps of Engineers, and other agencies and works with concerned agencies or individuals in determining the effects of projects on our cultural heritage. The trust is also involved in assisting State agencies to comply with the Board of Public Works Policy which requires all State agencies with land holdings to assess the cultural resources on their property and develop management for the protection of those resources. The Maryland Geological Survey is responsible for the issuance of permits for the excavation of archaeological sites on State-owned property.

Enabling Legislation

The Maryland Historical Trust derives its authority for involvement in the permitting of dredging operations from two principal sources: (1) Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), and (2) Section 102(2)C of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347).

Regulations and Guidelines

The Maryland Historical Trust adheres to the regulations promulgated by the Advisory Council on Historic Preservation. These regulations are included in Appendix H.

The Trust has also published technical guidelines for archaeological investigations in Maryland, available in the Maryland Historical Trust Technical Series No. 1, which are provided in Appendix H.

MARYLAND BOARD OF PUBLIC WORKS

The Maryland Board of Public Works has the delegated authority to license all dredge and fill operations on state wetlands. The Board is assisted by the Secretary of Natural Resources through the Water Resources Administration's Wetlands Division, which submits a report to the Board indicating whether the license should be granted and, if so, specifying any terms, conditions, and considerations required after consultation with any interested federal, state, and local unit, and after holding any hearing and taking any evidence the Secretary thinks advisable.

Enabling Legislation

The Board derives its authority to license dredge and fill operations on state wetlands from Section 9-202: License for dredging and filling of Subtitle 2. State Wetlands of Title 9: Wetlands and riparian rights of the Annotated Code of Maryland, Natural Resources (1974).

Regulations and Guidelines

The Board has not published any regulations and generally relies on the recommendations of the Wetland Permits Division and their guidelines described in Appendix F.

REGIONAL PLANNING COUNCIL

The Regional Planning Council (RPC) was established to coordinate planning among Baltimore City and five neighboring counties that form the Baltimore region. RPC has a responsibility to review and comment on any project which will significantly impact coastal zone management in the region, especially if the project conflicts with the General Development Plan for the Baltimore Region or the recommendations of the harbor and coastal zone plans mentioned below. RPC maintains an active interest in planning for the harbor shoreline and coordinates a round table task force which works to resolve differences between permit requests and agency guidelines. This task force was established by the RPC and its advisory committee, the Coastal Zone Metropolitan Advisory Board. RPC also maintains a clearinghouse of information on many navigational projects of major importance in the Baltimore Region.

Enabling Legislation

The Regional Planning Council derives its authority for planning for the Baltimore Region and thus involvement in the permit review process of dredge and fill operations from Article 78D of the Maryland Annotated Code.

Regulations and Guidelines

RPC has not published specific regulations related to its involvement in the review of dredge and fill projects. However, it has published a number of planning documents for the Baltimore Region which serve as both policy and guidelines for projects within the region. Some of these planning documents include:

(a) Baltimore Harbor Plan, March 1975

(b) Baltimore Metropolitan Coastal Area Study, An Agenda for Action, March 1978.

(c) Environmental Enhancement of the Baltimore Harbor, September 1982.

(d) Hawkins Point/Marley Neck: Development Opportunities in the Port of Baltimore, August 1981.

MARYLAND LOCAL AGENCIES

BALTIMORE CITY

All dredging and spoil disposal projects that occur within the jurisdiction of Baltimore City require the acquisition of the following approvals: (1) a building permit, (2) a grading permit, and (3) review by the Baltimore City Department of Planning.

The Department of Planning coordinates the input of all city agencies with the state and Federal agencies.

Enabling Legislation

The City of Baltimore derives its authority for issuing permits from Baltimore's revised city charter of 1947.

Regulations and Guidelines

The City of Baltimore has not published regulations or guidelines related to the City's involvement in dredging and spoil disposal projects. However, the requirements for permits and approvals for building in Baltimore City are described in the development guidebook in Appendix I.

COUNTIES

The coastal counties are involved in the permitting process for dredging and spoil disposal projects as both sponsoring and regulatory agencies. The coastal counties bear the responsibility of obtaining and permitting suitable, spoil disposal facilities to handle the maintenance dredging of county waterways.

As a regulatory agency, the counties may require the issuance of a building permit if any temporary structures are to be constructed, or if fill is used for shoreline maintenance. Also, a grading and/or sedimentation permit may be required if the following conditions apply: (1) the slope of the land is to be altered more than one foot, (2) filling behind a bulkhead exceeds 50 cubic yards of soil, and (3) dredge spoil is deposited on fast land. Zoning restrictions, setbacks, and subdivision regulations may also require various approvals from the appropriate local agencies.

APPENDICES

APPENDIX A

U.S. ARMY CORPS OF ENGINEERS REGULATIONS

what information is required in a permit application?

Applicants are expected to furnish the Corps of Engineers:

- A detailed description of the proposed activity, including the purpose, use, type of structures, types of vessels that will use the facility, facilities for handling wastes and the type, composition and quantity of dredged or fill material.

- Names and addresses of adjoining property owners and others, on the opposite side of streams or lakes or whose property fronts on a cove, who may have a direct interest because they could possibly be affected by your project.

- Complete information about the location, including street number, tax assessors description, political jurisdiction and name of waterway in enough detail so that the site can be easily located during a field visit.

- A list of the status of all approvals and certifications required by other federal, state, and local governmental agencies. This information is important because review time is often reduced by joint or simultaneous processing.

- Reasons that explain denial of any approvals or certifications required by other government agencies. When other approvals or authorizations are denied, application for a Corps permit may not be approved.

If ENG Form 4345 is not signed by the applicant, attach a statement designating the duly authorized agent who is acting on your behalf.

For most projects little or no additional information is required. What you provide on ENG Form 4345 and the drawings is usually all that is needed to review your application.

Yet, when wetlands, historic or archeological sites, dredging, filling, or ocean dumping are involved, you may be asked to furnish additional information or drawings that will assist in evaluating your application.

APPLICATION FOR A DEPARTMENT OF THE ARMY PERMIT

For use of this form, see EP 1145–2–1

The Department of the Army permit program is authorized by Section 10 of the River and Harbor Act of 1899, Section 404 of P. L. 92–500 and Section 103 of P. L. 92–532. These laws require permits authorizing structures and work in or affecting navigable waters of the United States, the discharge of dredged or fill material into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. Information provided in ENG Form 4345 will be used in evaluating the application for a permit. Information in the application is made a matter of public record through issuance of a public notice. Disclosure of the information requested is voluntary; however, the data requested are necessary in order to communicate with the applicant and to evaluate the permit application. If necessary information is not provided, the permit application cannot be processed nor can a permit be issued.

One set of original drawings or good reproducible copies which show the location and character of the proposed activity must be attached to this application (see sample drawings and checklist) and be submitted to the District Engineer having jurisdiction over the location of the proposed activity. An application that is not completed in full will be returned.

1. Application number (To be assigned by Corps)	2. Date Day Mo. Yr.	3. For Corps use only.

4. Name and address of applicant.	5. Name, address and title of authorized agent.
Telephone no. during business hours A/C ( ) _____ A/C ( ) _____	Telephone no. during business hours A/C ( ) _____ A/C ( ) _____

6. Describe in detail the proposed activity, its purpose and intended use (private, public, commercial or other) including description of the type of structures, if any to be erected on fills, or pile or float–supported platforms, the type, composition and quantity of materials to be discharged or dumped and means of conveyance, and the source of discharge or fill material. If additional space is needed, use Block 14.

7. Names, addresses and telephone numbers of adjoining property owners, lessees, etc., whose property also adjoins the waterway.

8. Location where proposed activity exists or will occur.

Address:

Street, road or other descriptive location

In or near city or town

County State Zip Code

Tax Assessors Description: (If known)

Map No. Subdiv. No. Lot No.

Sec. Twp. Rge.

9. Name of waterway at location of the activity.

ENG Form 4345, 1 OCT 77 Edition of 1 Apr 74 is obsolete.

10. Date activity is proposed to commence. _____

Date activity is expected to be completed _____

11. Is any portion of the activity for which authorization is sought now complete? ☐ YES ☐ NO
If answer is "Yes" give reasons in the remark section. Month and year the activity was completed _____. Indicate the existing work on the drawings.

12. List all approvals or certifications required by other federal, interstate, state or local agencies for any structures, construction, discharges, deposits or other activities described in this application.

Issuing Agency	Type Approval	Identification No.	Date of Application	Date of Approval

13. Has any agency denied approval for the activity described herein or for any activity directly related to the activity described herein?

☐ Yes ☐ No (If "Yes" explain in remarks)

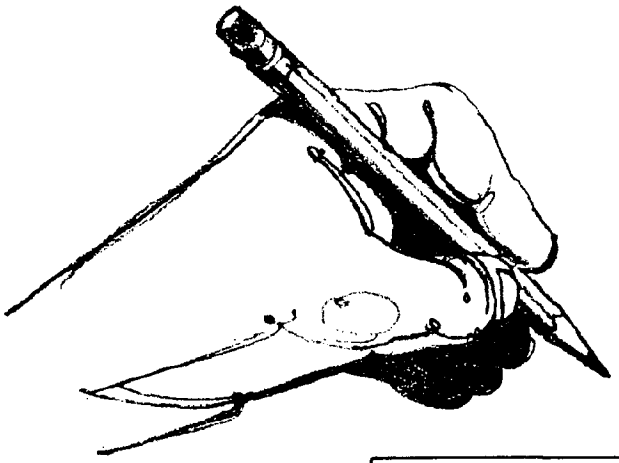
14. Remarks (Checklist, Appendix H for additional information required for certain activities).

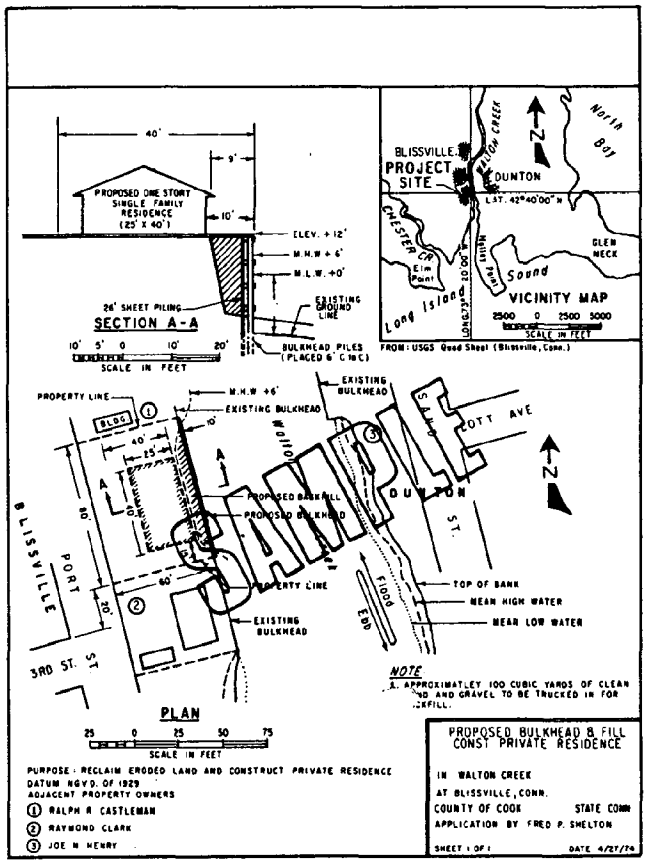
15. Application is hereby made for a permit or permits to authorize the activities described herein. I certify that I am familiar with the information contained in this application, and that to the best of my knowledge and belief such information is true, complete, and accurate. I further certify that I possess the authority to undertake the proposed activities.

_____
Signature of Applicant or Authorized Agent

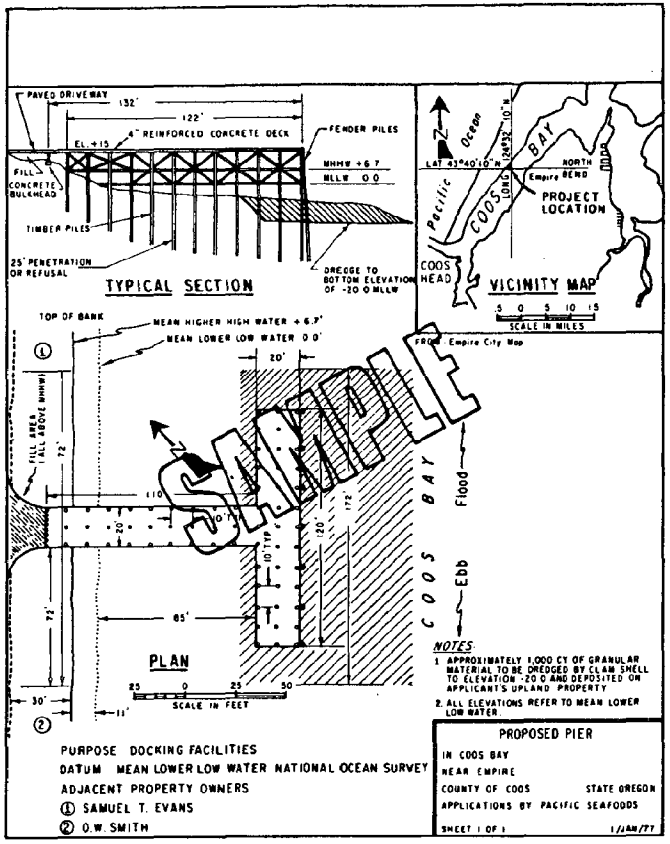
The application must be signed by the applicant; however, it may be signed by a duly authorized agent (named in Item 5) if this form is accompanied by a statement by the applicant designating the agent and agreeing to furnish upon request, supplemental information in support of the application.

18 U. S. C. Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department or agency of The United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisioned not more than five years, or both. Do not send a permit processing fee with this application. The appropriate fee will be assessed when a permit is issued.





The sample application drawings shown here and on the following page are examples of the type of drawings that should be submitted with ENG Form 4345 for simple projects. For complicated structures and activities, more detailed drawings are required.

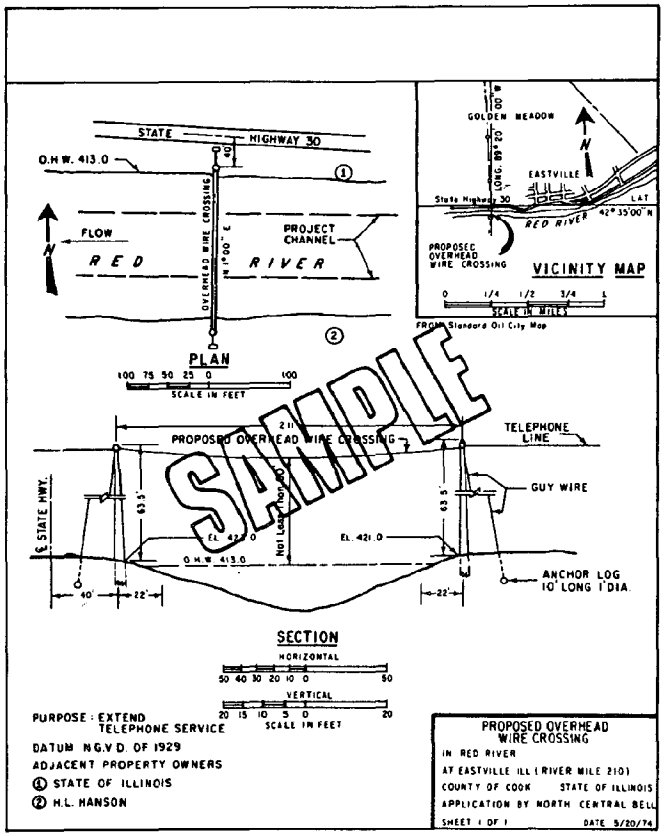


NOTES:

1. APPROXIMATELY 1,000 CY OF GRANULAR MATERIAL TO BE DREDGED BY CLAM SHELL TO ELEVATION -20.0 AND DEPOSITED ON APPLICANT'S UPLAND PROPERTY
2. ALL ELEVATIONS REFER TO MEAN LOWER LOW WATER

PURPOSE DOCKING FACILITIES
DATUM MEAN LOWER LOW WATER NATIONAL OCEAN SURVEY
ADJACENT PROPERTY OWNERS
① SAMUEL T. EVANS
② O.W. SMITH

PROPOSED PIER
IN COOS BAY
NEAR EMPIRE
COUNTY OF COOS STATE OREGON
APPLICATIONS BY PACIFIC SEAFOODS
SHEET 1 OF 1 1/JAN/77



PURPOSE: EXTEND TELEPHONE SERVICE
DATUM N.G.V.D. OF 1929
ADJACENT PROPERTY OWNERS
① STATE OF ILLINOIS
② H.L. HANSON

PROPOSED OVERHEAD WIRE CROSSING
IN RED RIVER
AT EASTVILLE ILL (RIVER MILE 210)
COUNTY OF COOK STATE OF ILLINOIS
APPLICATION BY NORTH CENTRAL BELL
SHEET 1 OF 1 DATE 5/20/74

application checklist

General

- ☐ Submit one original or good quality reproducible set of all drawings on 8" x 10-½" tracing cloth, tracing film or paper. Submit the fewest number of sheets necessary to adequately show the proposed activity. Drawings should be prepared in accordance with the general format of the samples. Block style lettering should be used.
- ☐ A 1-inch margin should be left at the top edge of each sheet for purposes of reproduction and binding. A ½-inch margin is required on the three other edges.
- ☐ Title block of each sheet submitted should identify the proposed activity and contain the name of the body of water; river mile, if applicable; name of county and state; name of applicant or agent; number of the sheet and total number of sheets in set; and date the drawing was prepared.
- ☐ Drawings should not reflect the approval, non-objection, or action of other agencies.
- ☐ Since drawings must be reproduced photographically, color shading cannot be used. Drawings must show work as a dot shading, hatching, or similar graphic symbols.

Vicinity Map. Identify the map or chart from which the vicinity map was taken and show the following:

- ☐ Location of the activity site including latitude and longitude and river mile, if known.
- ☐ Name of waterway.
- ☐ All applicable political (county, borough, town, city, etc.) boundary lines.
- ☐ Name of and distance to local town, community, or other identifying location.
- ☐ Names of all roads in the vicinity of the site.
- ☐ Graphic scale.
- ☐ North arrow.

Plan View. The plan view of the proposed activity should show the following:

- ☐ Existing shorelines.
- ☐ Ebb and flood in tidal waters and direction of flow in rivers.
- ☐ North arrow.
- ☐ Graphic or numerical scale.
- ☐ Mean high and low water lines if the proposed activity is located in tidal areas on the Atlantic and Gulf coasts.
- ☐ Mean higher high water and mean lower low water lines if the proposed activity is located in tidal areas on the Pacific coast.
- ☐ Ordinary high water line and ordinary low water line if the proposed activity is on a lake or ordinary high water if on a stream.

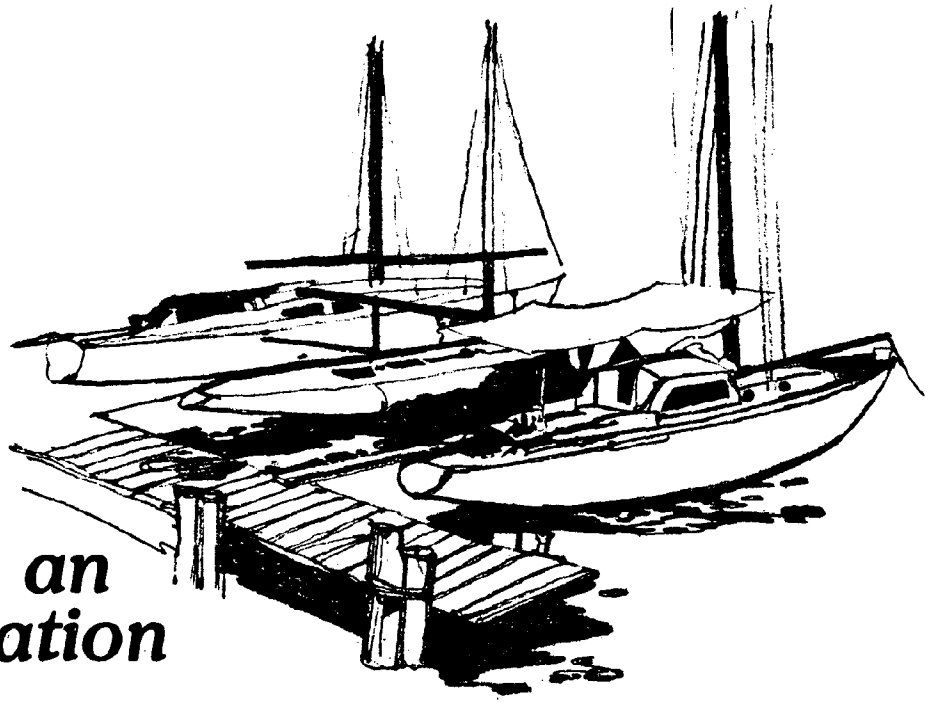
- ☐ Water depths around the project.
- ☐ Principal dimensions of the structure or work and extent of encroachment beyond the applicable high water line.
- ☐ Waterward dimension from an existing permanent fixed structure or object.
- ☐ Distances to nearby federal projects, if applicable.
- ☐ Number of cubic yards, type of material, method of handling, and location of fill or spoil disposal area if applicable. If spoil material is to be placed in approved dumping grounds, a separate map showing the location of the dumping grounds should be attached. The drawing must indicate proposed retention levees, weirs, and/or other devices for retaining hydraulically placed materials.
- ☐ Distance between proposed activity and navigation channel, where applicable.
- ☐ Federal harbor lines, if established and if known.
- ☐ Location of structures, if any, in navigable waters immediately adjacent to the proposed activity, including permit numbers, if known. Identify purpose of all structures.
- ☐ Location of any wetlands, swamps, marshes, etc. Identify.

Elevation and/or Section View. The elevation and/or section view of the proposed project should show the following:

- ☐ Same water elevations as in the plan view.
- ☐ Depth at waterward face of proposed work, or if dredging is proposed, show dredging grade.
- ☐ Dimensions from applicable high water line for proposed fill, float, or pile supported platform. Identify any structures to be erected thereon.
- ☐ Graphic or numerical scale.
- ☐ Cross-section of excavation or fill, including approximate side slopes.
- ☐ Elevation of spoil areas.

Notes on Drawings

- ☐ List names of adjacent property owners whose property also adjoins the water and are not shown on plan view.
- ☐ State purpose (private use, commercial, etc.) of proposed activity.
- ☐ State datum used in plan and elevation views. Use mean low water, mean lower low water, National Ocean Survey Datum or National Geodetic Vertical Datum of 1929.



when an application is disapproved

There are times during the evaluation process when the Corps finds that a project and its intended use will have an adverse impact on the public interest. If you are notified by the Corps that it is concerned about your project, you may . . . .

- Discuss with the Corps the reasons that make your application unacceptable
- Reconsider your plan and examine alternatives
- Modify the original project design to eliminate the objectionable features

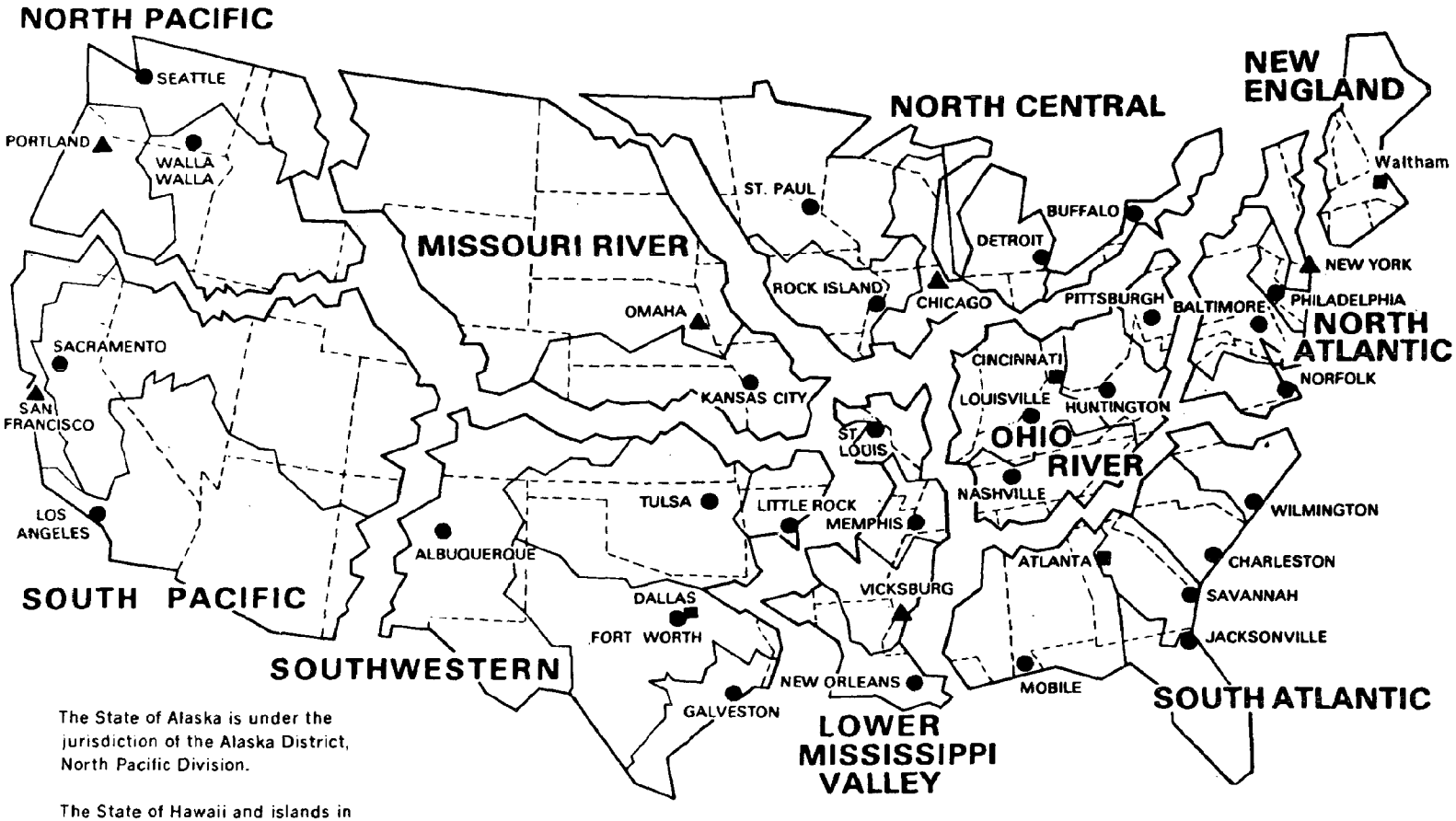
caution . . . do not become a violator

Do not begin any work that requires a Corps permit before you have received official authorization. Case-by-case consideration is given to known violations.

Violators may be subject to:

- Civil and/or criminal court action
- Fines of $500 to $50,000 per day
- Imprisonment for up to 2 years
- Removal of structures and materials

divisions and districts for civil works activities



The State of Alaska is under the jurisdiction of the Alaska District, North Pacific Division.

The State of Hawaii and islands in the Pacific are included in Honolulu District, Pacific Ocean Division with Headquarters at Honolulu, Hawaii.

The Territory of Puerto Rico and the U.S. Virgin Islands are included in Jacksonville District, South Atlantic Division.

— DISTRICT BOUNDARIES
■ DIVISION HEADQUARTERS
● DISTRICT HEADQUARTERS
▲ DIVISION AND DISTRICT HEADQUARTERS

federal register

Thursday
July 22, 1982

Part II

Department of Defense

Corps of Engineers, Department of the Army

Regulatory Programs of the Corps of Engineers

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

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

Interim Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Interim final rule and request for comments.

SUMMARY: We are hereby issuing final rules which govern the regulatory programs of the Corps of Engineers. On September 19, 1980, (45 FR 62732), we published proposed rules in the **Federal Register** which were based on legislative changes in the Clean Water Act, Executive Orders, judicial decisions and policy changes which occurred since our previous regulations were published on July 19, 1977. The major changes of these Regulations are reduction in processing time and expansion of the nationwide permit program. Because it has been nearly two years since the proposed rules were published, we are providing an additional comment period for interested parties to update their views. We will review all comments and determine whether any changes are necessary.

EFFECTIVE DATES: July 22, 1982. Comments must be received by August 23, 1982.

ADDRESS: Office of the Chief of Engineers, DAEN-CWO-N, 20 Massachusetts Ave., N.W., Washington, D.C. 20314.

FOR FURTHER INFORMATION CONTACT:
Mr. Bernie Goode 202-272-0199
or
Mr. Morgan Rees, 202-697-6985.

SUPPLEMENTARY INFORMATION:

Classification

We have determined these regulation revisions not to be a major rule requiring a Regulatory Impact Analysis (RIA) under Executive Order 12291. However, because of the extensive public interest in the overall program we prepared an RIA. We submitted the RIA to the Office of Management and Budget. A copy has been placed in the agency record for this rule making and is available for public inspection. Since these revisions, for the most part, provide regulatory relief, they do not require a 30-day delay in implementation under 5 U.S.C. 553(d).

Environmental Impact Statement

We have determined that this action does not constitute a major federal action significantly affecting the quality of the human environment. Appropriate environmental documentation is prepared for all permit decisions. We prepared an environmental assessment for each of the nationwide permits in Part 330. We determined that, considering the potential impacts, required conditions, discretionary authority and best management practices, none would require preparation of an environmental impact statement.

Public Comment

We received nearly 400 public comments which covered the full range of views. On balance, the comments were favorable, but there were many strong criticisms that the regulations were too slanted towards environmental protection on the one hand and too slanted towards economic development on the other. We also held two public hearings on proposed nationwide permits, transcripts of which are on file in the Office of the Chief of Engineers. We convened a task force of experienced field and headquarters regulatory and legal personnel to review all comments, and synthesized them into major issues. Significant changes are as indicated below.

Part 320—General Regulatory Policies

Section 320.1(a): This new section discussing Corps of Engineers approach to its regulatory authorities received generally favorable support and has been adopted as proposed.

Section 320.1(b): Types of activities regulated. In the proposed regulations, we changed the definition of our Section 10 authority to add the term "physical" to the historic "course, condition, location or *physical* capacity". This was based on the judicial opinion in *National Wildlife Federation* v. *Alexander*, 613 F 2d 1054 (DC CIRC Dec 7, 79). (An incorrect cite was given in the preamble to the proposed regulations.) Since several other judicial opinions conflict and the case cited above is under appeal, we have decided not to change the regulations at this time. The word "physical" has been deleted throughout these final regulations. We also changed the language referring to outer continental shelf jurisdiction to conform to language in recent amendments to the Outer Continental Shelf Lands Act.

Section 320.3(a): This revision recognizes that Federal applicants now require state water quality certifications per revisions to Section 401 of the CWA.

Section 320.3(b): Recognition of the status of Indian tribes has been added for Coastal Zone Management Act (CZMA) consistency requirements.

Section 320.3(n): A new section has been added to recognize Corps of Engineers responsibility to review for impacts on navigation applications to EPA for point source discharge permits under Section 402 of the Clean Water Act.

Section 320.4(a): The public interest review. This is the heart of our evaluation process. It involves a weighing and balancing of all factors affecting the public interest. Many comments expressed concern that the policy statements in paragraph (b) through (o) are too broad and are subject to too wide a range of interpretation. We recognize that concern and are developing specific guidance on how each of the factors may affect the public interest balancing process based on specific citations of law, Executive policy and policies of the Corps and other Federal agencies. We have changed § 320.4(a)(2)(ii) to conform to CEQ-NEPA regulations that alternatives to proposed actions need not be investigated when there are no unresolved conflicts as to resource use. We have also made a technical change. The analysis of cumulative impacts previously required by § 320.4(a)(2)(iv) has been incorporated in § 320.4(a)(1). The potential for cumulative impacts will be considered in the evaluation of the impacts on each public interest factor rather than in a separate cumulative impact analysis which may overlook potential cumulative effects of one or more of the factors.

Several comments questioned the relationship between our public interest review and the Environmental Protection Agency Guidelines for the Specification of Disposal Sites for Dredged or Fill Material. The guidelines (40 CFR Part 230) were published in the **Federal Register** on December 24, 1980 pursuant to Section 404(b)(1) of the CWA. The guidelines and the public interest review go hand-in-hand. Once all aspects of the public interest have been considered, if a project does not conform to the guidelines, the permit would be denied.

Section 320.4(c): The statement on mitigation of fish and wildlife impacts has been deleted from this section as it is now incorporated in the policy for conditioning permits expressed in 33 CFR 325.4.

Section 320.4(j): Some comments were concerned that permits may be issued

without compliance with the requirements of Federal law such as water quality certification and coastal zone consistency. That is not the case. Those requirements are covered in 33 CFR Part 325. Section 320.4(j) deals with only those requirements established by local or state laws or Federal laws administered by other Federal agencies.

Section 320.4(l) and (m): Extensive comments were received on both the floodplain management and water conservation policies. However, after considering all the points of view, we have retained the policies. The floodplain policy is consistent with Executive Order 11988. With addition of language from Section 101(g) of the CWA, the water conservation policy is consistent with Federal policy. It does not infringe on the primary authority of the states to allocate water rights.

Section 320.4(n): A section has been added to recognize the national importance of energy conservation and development.

Section 320.4(o): A section has been added on navigation policy. Previously, 33 CFR Part 328 addressed Corps authority to establish harbor lines and was used as a basis for navigation policy. However, with the rescission of that part, there is a need to express navigation policy elsewhere. We also had to retain in our regulations the provision which authorizes all activities which took place shoreward of a harbor line prior to 27 May 1970, the date on which harbor lines were changed from permit authorization lines to navigational guidance lines.

Part 321—Dams and Dikes

There were no significant objections to a minor wording change to exclude weirs from Section 9 coverage and to provide an expedited decision process by processing applications concurrently with the applicant obtaining the necessary approval from either the Congress or the State Legislature.

Part 322—Structures and Work

Section 322.2(f): A provision has been added to allow general permits to be issued to avoid unnecessary duplication of the regulatory control exercised by another agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.

Section 322.3(a)(1): The term "physical capacity" has been reverted to "navigable capacity" in the definition of Section 10 authority. See the discussion for § 320.1(b) above.

Section 322.4: Nationwide permits have been moved to Part 330.

Section 322.5(f): In the proposed rules, we specifically requested comments on our long standing policy of limiting our review of structures on the Outer Continental Shelf (OCS) under lease from the Department of Interior (DOI). About 10 years ago, we adopted a policy of limiting our review to navigation and national security because the DOI does a comprehensive review during its leasing procedures. There were extensive comments on both sides of the issue. Based on all the comments and in order to be responsive to Executive Order 12291, we have maintained our policy of limited review. The DOI concurred in this policy.

Section 322.5(g): We have changed this section to be consistent with the discussion under § 320.1(b) above.

Appendixes: The appendixes to Parts 322, 323, and 324 and Appendixes B and D–H to Part 325 have been deleted. They deal with internal Corps of Engineers operations and interagency agreements. They need not be incorporated in the Code of Federal Regulations. Also, we are sensitive to reducing the volume of these regulations. The interagency agreements have recently been revised and copies are available to the public.

Part 323—Discharges of Dredged and Fill Material

Section 323.2(a): In the proposed rules, we consolidated former categories 1, 2, and 3 of waters of the United States into one category. Some concerns were raised about this change. While we believe it would be a change only in form and not in substance, we did not make the change as proposed. This was to be consistent with EPA's definition found in 40 CFR Part 126.

Section 323.2(c): We received many comments on revisions to the definition of wetlands. In addition to a Corps field task force, we convened an interagency meeting to review potential improvements to the definition. Both groups, after extensive deliberation, did not provide any improvement on a technical basis. We have therefore, decided not to change the definition at this time.

Section 323.2(e) and (f): These sections were modified to combine the terms natural lake and impoundment into one term, lake. Many people commented that impoundments should not be given the same status in the review process as natural lakes. However, we believe that the evaluation of the public interest should be based on what the impacts actually are and not on whether the area in question is natural or man-made.

Section 323.2(h): The footnote for this section was changed to delete the requirement for the district engineer to notify the regional administrator of EPA when the median rather than the average annual flow is used to determine the headwaters of a stream. EPA and others expressed concern that EPA should be kept informed of these determinations. However, we know of no cases in the past where EPA has objected to such determinations. In the interests of reducing paperwork, we have deleted the notification requirement. District engineers, however, should notify EPA if EPA is known to have an interest in the area in question.

Section 323.2(n): A provision has been added to allow general permits to be issued to avoid unnecessary duplication of the regulatory control of another agency as discussed for 322.2(f), above.

Section 323.4: The nationwide permits which previously appeared in this section have been moved to Part 330. A new section has been added to describe the legislative exemptions to the program under Sections 404(f) and (r) of the CWA. The wording of § 323.4(a)(1)(i) and § 323.4(a)(1)(iii)(c)(1)(iv) have been changed slightly to recognize irrigation as a normal farming practice and to change the time for removal of stream blockages, to one year from the date of discovery, respectively. EPA has concurred with these changes and will at the next convenient opportunity amend its regulations at 40 CFR Part 230 to coincide with these modifications.

Section 323.5: A new section has been added to note the authority of EPA to transfer Section 404 programs to the states and Army support of program transfer. Many comments urged a more extensive discussion of procedural steps which the Corps intends to follow in a transfer process. However, we did not include such a discussion. EPA has published at 40 CFR Part 123 extensive transfer regulations. As we have not yet had the opportunity to discuss these with any states who have an interest in program transfer, we have not developed any transfer procedures.

Section 323.6(b): This section formerly § 323.5(b), has ben modified to be consistent with current agreements between the Corps and EPA which reflect EPA authority to veto disposal site specifications under Section 404(c) of the CWA.

Part 324—Ocean Disposal

Section 324.3(b)(2): This section was modified to note the requirement that Federal agencies must obtain Section 401 water quality certifications from the appropriate state or interstate agency to

dispose of dredged material within the territorial sea.

Part 325—Permit Processing

Section 325.1(b): This is a new provision for pre-application consultation based on regulations of the Council on Environmental Quality for agency procedural compliance with the National Environmental Policy Act (NEPA). Other Corps procedures and policies for compliance with CEQ's NEPA regulations in its regulatory programs are now found in Appendix B to 33 CFR Part 230; a number of changes and deletions have been made throughout Part 325 to reflect this.

Section 325.1(d): Many people commented that we required too much or too little information in support of an application. In deciding what should be required, we have tried to achieve a balance among various considerations such as clarity of plans for review by technical and non-technical people, cost of developing data and its utility in the review process, and to severely limit requests for additional information once an application is considered complete.

Section 325.1(d)(2): This new section would avoid piecemeal applications for work associated with the same project. Comments on this addition were very favorable.

Section 325.1(d)(6): This new section on dam safety drew extensive comment, some saying we did not go far enough, others saying that we have only duplicated existing state requirements. The intent of this section is that the district engineer must be reasonably assured that proper design standards are met. This may be done through evidence of approval by a duly established state review, design or review by appropriately qualified persons, or other reasonable means.

Section 325.1(e): This new section limits the additional information requested of an applicant to that which is essential for the district engineer's decision process.

Section 325.1(f) Fees: This was § 325.1(g) in the proposed rules. It was renumbered because the former Section 325.1(f), signature of application, was moved to § 325.1(d)(7) for format purposes. The fee for letters of permission (LOP) has been deleted on the basis that LOP's are minor and do not generate benefits to the permittee significant enough to warrant payment of a fee.

Section 325.2(a)(1) and (2): These sections were revised to reflect the requirement of Section 404(a) of the CWA that public notices be issued within 15 days of a completed application and a stipulation in a law suit involving ocean dumping, respectively.

Section 325.2(a)(6): The term "Findings of Fact" has been changed to "Statement of Findings" in this section and throughout these regulations to more properly reflect the nature of the document. This section also allows the district and division engineers to divulge recommendations on applications forwarded for higher authority decision.

Section 325.2(a)(9): This section concerning distribution of copies of permits has been moved from former § 325.2(b)(5).

Section 325.2(b): The provision for issuing joint notices with water quality certifying agencies has been moved and consolidated with other joint notice and processing authorities stated in 33 CFR 320.1(a)(5), 320.4(j)(6), and § 325.2(e).

Section 325.2(b)(1) has been expanded and clarified to describe procedures where more than one state is involved in the water quality certification process.

Section 325.2(b)(1)(ii) has been reworded for clarification.

Section 325.2(b)(2) has been expanded to cover costal zone certification procedures where Indian lands are involved.

Section 325.2(b)(5) refers to endangered species review (proposed to be in § 325.2(e). The former § 325.2(b)(5) has been moved to Section 325.2(a)(5) for format purposes.

Section 325.2(b)(6) has been deleted. The provision is a requirement of the Freedom of Information Act and need not be repeated in this regulation.

Section 325.2(d) has been revised to reduce processing time goals in accordance with comments received in response to the 1980 proposed rules. Subparagraph 4 is added to clarify that decisions will normally not be deferred pending action on other agency authorizations.

Section 325.2(e) has been added to specify alternative processing procedures available to division and district engineers. These include letters of permission, regional permits, joint procedures with other Federal, state, and local agencies and expedited review processes such as joint agency review meetings.

Section 325.2(e)(4): The authority to approve emergency processing procedures has been delegated from the Assistant Secretary of the Army to the division engineers. Many people asked for a more explicit description of emergency procedures. However, since it is impossible to determine ahead of time the nature of emergencies, division engineers are relied upon to use good judgment in establishing emergency procedures. Normally, such procedures would include expedited coordination with state and Federal agencies with an interest in any resources involved.

Section 325.3(a)(9) deletes the requirement for a statement concerning a preliminary determination of the need for and/or availability of an environmental impact statement and adds a notice of categorical exclusion, if appropriate, in accordance with Appendix B to 33 CFR Part 230.

Section 325.3(c): The requirement which was added in the proposed rules for periodic purging of the public notice mailing list and the authority to publish notices in the local newspaper have been deleted from the final regulation. District engineers are still expected to take these actions as appropriate, but they are within the scope of normal public involvement principles and need not be expressed in the CFR.

Section 325.3(d) has been deleted from the regulation. It is an internal requirement which has been added to our internal reports system.

Section 325.4: The former section on environmental impact statements has been moved to Appendix B of 33 CFR Part 230. A new section on permit conditioning has been added. We received many comments on this section. It has been rewritten to incorporate many of those comments and to clarify the intent. The authority for bonding was moved from Part 326 of the proposed rules as it is related more to permit conditioning than to enforcement.

Section 325.5(c): This section has been revised to conform to new Section 325.2(e) on alternative processing and evaluation procedures.

Section 325.6(c) and (d): These sections have been rewritten to clarify the difference between the expiration of a permit itself and the expiration of an authorized construction period. Specification of a starting time for permitted activities is now optional. The term "revalidation" is no longer in use and has been deleted. Ocean dumping permits are limited to three years based on a stipulation agreed to in a law suit.

Section 325.7(b) and (k) have been revised to give permittees who are notified of suspension proceedings an opportunity to have an informal meeting as well as or instead of a public hearing.

Section 325.7(d) has been modified to delegate permit revocation authority from the Chief of Engineers to the authority who made the decision on the original permit.

Section 325.8(b) and (c) have been revised to conform to Memoranda of Agreement reached with other Federal agencies pursuant to Section 404(q) of

the CWA and to authorize district engineers to deny certain permits without issuing a public notice where other required authorizations have been denied or where the activity will clearly interfere with navigation.

Section 325.9 has been revoked and reserved. The former section on supervision and enforcement has been moved to Part 326, except subparagraph (e) on bonding authority which has been addressed in § 325.4.

Section 325.11 on district engineer case reports to higher authority has been deleted. It is an internal requirement of the Corps and need not be expressed in the CFR.

Appendix A. The permit form has been revised as indicated in the proposed regulations. There were no significant comments on this appendix.

1. The term "Federal Water Pollution Control Act (86 Stat. 816, PL 92-500)" has been changed to "Clean Water Act (33 U.S.C. 1344)" to reflect the new law citation.

2. The last clause of general condition "i" has been deleted and set forth as a new condition "j": "That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein." This change is to eliminate any suggestion that this provision relates to property rights.

3. General conditions "j" and "k" have been combined into a new condition "k": "That this permit may be modified, suspended or revoked in whole or in part pursuant to the policies and procedures prescribed in 33 CFR 325.7." This change eliminates present inconsistencies between the two conditions and the regulation provisions. It also avoids the necessity to revise the standard permit conditions in the future as the suspension, modification, and revocation procedures change in the regulations through rulemaking procedures.

4. General condition "o" has been revised to delete the start time dates pursuant to the change to § 325.6(c).

5. New general condition "u" has been added as follows: "That if the permittee, during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer." This notification will enable the district engineer to notify the appropriate authorities as required by historic preservation laws.

6. The last phrase of condition "b" under "Discharges of dredged or fill material into waters of the United States" relating to toxic pollutants has been changed from "in to other than trace quantities" to "in toxic amounts" to agree with the language of Section 101(a)(3) of the CWA.

7. Condition "d" under "Discharges of Dredged or Fill Material into Waters of the United States" pertaining to wild and scenic rivers has been deleted as its original inclusion as a permit condition was inappropriate.

Appendix B has been revoked and reserved. The 1967 Memorandum of Understanding with Department of Interior has been terminated. New agreements have been reached with five Federal agencies, under Section 404(q) of the Clean Water Act.

Appendix C, Procedures for the Protection of Cultural Resources, is being revised and was not yet complete for publication. The interim procedures adopted on April 3, 1980, 40 FR 66, pgs. 22112, et seq. still apply.

Part 326—Enforcement

Comments on this part were generally related to concerns that increased authority given to district engineers in determining the disposition of an enforcement case would result in greater risk to environmental quality. However, the changes are actually related only to program management. Most violations are minor, many of them resulting from lack of public understanding of Federal jurisdiction. This regulation has been advised to allow district engineers to recognize those cases and not require lengthy paperwork and processing procedures on all of them. The staff resources thereby made available would allow the district engineer to take more vigorous enforcement action and conduct greater coordination with interested parties on those cases which are potentially significant. The changes provide a focus on the substance of the violation and the need for enforcement action. It is expected that in significant cases, there will be full coordination with interested parties to develop appropriate protective or remedial measures. The full public interest balancing process has been deleted from this Part 326 but remains in the after-the-fact evaluation phase of 33 CFR Part 325 thereby eliminating the duplication of that evaluation required in the previous regulation.

Section 326.3(d) has been added to provide for cases which are not suitable for legal action and where the responsible party refuses to apply for after-the-fact authorization. The district engineer may now proceed on his own initiative giving due consideration in the processing requirements and the public interest review to the extent of information furnished by the responsible party.

Section 326.5: The former section dealing with processing after-the-fact permit applications has been deleted. The processing requirements are contained in Part 325. Former § 325.9 on supervision and enforcement has been moved to this section as it more directly related to this part than to Part 325.

Part 327—Public Hearings

The public hearing regulation has been changed to make the public hearing policies consistent under all Corps of Engineers regulatory authorities. As a standard, we adopted the policies and criteria previously applicable to Section 404 only. This part also combines the hearing file with the complete administrative record of the permit action. All the information previously required for the public hearing file was also required to be in the administrative record. This duplication has been eliminated. The requirement for a verbatim hearing transcript has been retained. The mandatory requirement for district counsel to be present at all hearings as a legal adviser to the presiding officer (§ 327.6) has been changed to a discretionary decision; the district engineer may wish to informally resolve a hearing request (§ 327.4); and § 327.5 provides that the district engineer may also appoint an appropriately qualified person other than the deputy district engineer to be a hearing officer. The intent of these changes is to provide greater flexibility in responding to requests for public hearings.

Part 328—Harbor Lines

This part has been revoked and reserved. The Corps policy on harbor lines and their impact on the public interest review process is now found at 33 CFR 320.4(o). That subparagraph also retains the authorization for activities constructed shoreward of harbor lines prior to 27 May 1970.

Part 329—Definition of Navigable Waters of the United States

Based on a court decision (Leslie Salt Co. v. Froelke, 578 F.2d 742) (9th Cir 1978) the shoreward limit of navigable waters of the United States (frequently referred to as "Section 10 waters") in coastal areas is the mean high water line on both the Atlantic and Pacific coasts (formerly the mean higher high water was used on the Pacific coast). Therefore, Part 329 has been amended to

delete the second sentence of § 329.12(a)(2).

Part 330—Nationwide Permits

Combining the nationwide permits previously found in 33 CFR 322.4 (Section 10 nationwide permits) and 33 CFR 323.4 (Section 404 nationwide permits) received very favorable response. Extensive comment was received on some aspects of the nationwide permit program and on specific nationwide permits. We conducted public hearings in Washington, DC and in St. Paul, Minnesota of obtain additional public comment. Comments from all sources ranged from strongly supportive to strongly opposed because the program was either too broad or too restrictive. We prepared environmental assessments for all proposed nationwide permits, and Section 404(b)(1) evaluations for Section 404 actions. The Chief of Engineers then reached the decision, supported by a Statement of Findings (SOF) that each of the nationwide permits contained in Part 330 is in the public interest. The decisions were based on the policies expressed in 33 CFR Part 320 and include consideration of the Clean Water Act Sections 101(b), 101(f), 404(e), and 404(q) and Executive Order 12291 which superseded E.O. 12044.

The major areas of concern are as follows:

1. *Compliance with the specific language of Section 404(e) of the CWA.* That section provides that nationwide permits may be issued for categories of activities which are similar in nature and which have individually and cumulatively minor environmental impacts. The concern was that some of the nationwide permits, particularly the ones for discharges into certain waters (§ 330.4) exceeded the Section 404(e) authority because the activities covered were considered by the respondent to not be minor and similar in nature. However, those permits and others were in effect at the time Congress adopted Section 404(e). The legislative history clearly shows Congress' intent to endorse the program in effect at the time and to encourage its expansion. Therefore, we consider that categories of activities may be based on similarities in time (§ 330.3), location (§ 330.4) and type of work (§ 330.5).

2. *State certification under Section 401 of the CWA.* In the proposed rules, we stated that we assumed all states would want to waive certification requirements except for § 330.5(a)(16), run-off from upland disposal areas. Several states responded with concerns that the nationwide permits did not take into account local and state needs. As a result, the regional conditioning authority discussed below was added to address any special concerns states may have. Even so, the State of Wisconsin took action to formally deny certification of certain nationwide permits. These permits have been so noted in the regulations.

3. *Coastal Zone Management.* Under the Coastal Zone Management Act, a state must determine if the proposed activity is consistent with its approved state coastal zone management plan. We noted in the proposed rules that the nationwide permits would comply with state coastal zone programs. A few states replied that they would need more detailed information to make a consistency determination. However, the nature of nationwide permits must be general to account for wide variations from region to region. We appreciate the concern expressed and have adopted the regional conditioning authority to deal with those concerns.

4. *Reporting on nationwide permits.* In the preamble to the proposed rules, we specifically sought comments on the need for a reporting procedure as a prerequisite for working under a nationwide permit. Reaction was great and sharply mixed. What appeared to be good for one region was not practicable for another. Some of the nationwide permits have automatic procedures whereby the Corps is informed of the activities, and others were consensus "no reporting" situations. The ones in between were difficult to handle in a uniform national fashion. Therefore, we have designed the regional conditioning authority to provide for reporting on a regional basis where the division engineer determines there is an appropriate need.

5. *Discretionary Authority/Regional Conditioning.* The discretionary authority in the proposed rules generated many comments. One major concern was the removal of discretionary authority from district engineers to the Chief of Engineers. Some people supported that concept. However, most believed that the Chief is too far removed from the local level and that the administrative process of seeking the Chief's approval would be inefficient and would thereby unduly influence a district engineer to avoid seeking discretionary authority. On the other hand, some commenters pointed out and experience has shown a need to improve the consistency of interpretation of Corps jurisdiction and policy. Accordingly, we have vested discretionary authority on a case-by-case basis with the division engineer who is closer to the problem and can provide necessary consistency. However, in order to override a nationwide permit for a entire category or geographic region, approval must be obtained from the Chief of Engineers. The nationwide permits published today go into effect immediately. Should additional regional conditions be found to be appropriate, they may be added at any time and appropriately announce to concerned parties. Work done between now and the effective date of any regional conditions would not be subject to those conditions. We considered deferring publication of the nationwide permits until the division engineers had an opportunity to develop regional conditions. However, the benefits to the regulated public and to the government administrative efforts stemming from immediate implementation appear to far outweigh any risk to public resources which may result while regional conditions are being considered. Note also that previously exercised discretionary authority under nationwide permits issued on 19 July 1977 expires four months from the date of these regulations. However, it may be reinstated after appropriate procedures have been followed.

6. *Section 330.3(a):* The nationwide permit for activities occurring before phase-in dates was issued with the July 1977 regulations. Those activities remain authorized. The section is included here to retain in the regulation that these activities have been authorized.

7. *Section 330.4:* The nationwide permits for activities occurring in certain waters drew the most comments. Some urged that we broaden the categories of water, others believed that this permit exceeds the authority of Section 404(e). Areas above the headwaters and isolated waters have never been regulated on a case-by-case basis (except for lakes greater than 10 acres) and it was clearly within the scope of the CWA to retain the nationwide permits existing at the time the legislation was enacted. Fills in the areas involved, including the expansion to include lakes of greater than 10 acres, are not usually a threat to water quality of the surface tributary system. In addition, case-by-case regulation of such areas is a more appropriate role for the states based on Sections 101(b) and 101(f) of the CWA. If there are areas where adequate state regulation is not present and there is a threat to the principles of the CWA, division engineers may assert discretionary authority as appropriate. The two nationwide permits found in § 330.4(a)(1) and (2) consolidate the four nationwide permits previously found at

33 CFR § 323.4-2(a). Conditions (b)(2) was modified to comply with the Endangered Species Act.

8. *Section 330.5:* The section describes specific nationwide permits 1 through 25. A few generated no comments but most had strong supporters and strong opponents. We attempted to incorporate all the concerns into the permit conditions, but as a result of the widely divergent views, found the task impossible. While we recognize many of the concerns raised about protection of resources, we believe that we have minimized any significant risk through the conditions and the discretionary authority, including regional conditioning. As noted above, the requirements of the regulations have been followed and it has been found that each of these nationwide permits is in the public interest.

a. *Section 330.5(a)(1):* This is an expansion of an existing nationwide permit previously found at 33 CFR 322.4(a). Only navigation aids installed by the Coast Guard were included. This revision expands the coverage to all aids and regulatory markers regulated by the Coast Guard. This permit avoids dual Federal regulatory control.

b. *Section 330.5(a)(2):* This is a reauthorization of the nationwide permit for structures in artificial canals previously found at 33 CFR 322.4(b).

c. *Section 330.5(a)(3):* This is reauthorization of the nationwide permit previously found at 33 CFR 322.4(c). The term fill material has been added. Normally, fill for repair and maintenance is exempt from regulation by Section 404(f)(1)(A). However, there are conditions in Section 404(f)(2) under which the exemption may not apply. In those cases, the nationwide permit would be operable.

d. *Section 330.5(a)(4):* Fish and wildlife harvesting activities are added to this existing nationwide permit previously found at 33 CFR 322.4(d). Such activities are or can be adequately regulated through other Federal, State and local fishing and hunting regulatory programs or they are so minor in impact as not to require any individual review.

e. *Section 330.5(a)(5):* This is a reauthorization of the nationwide permit for water testing devices previously found at 33 CFR 322.4(e).

f. *Section 330.5(a)(6):* This is a reauthorization and expansion of the nationwide permit for survey activities previously found at 33 CFR 322.4(f). Seismic operations are added to avoid unnecessary delays for geophysical survey activities.

g. *Section 330.5(a)(7)* is a new nationwide permit to avoid duplicating the regulatory control exercised by EPA under its Section 402 permitting authority. The public concern with impacts of outfall structures is generally related to what comes out of the pipe rather than to the pipe itself. Some expressed concern that EPA's scope of review is not broad enough to encompass occasionally significant environmental concerns. We believe it is. However, as an additional safeguard, discretionary authority is available should the need arise.

h. *Section 330.5(a)(8)* is a new nationwide permit to avoid duplicating regulatory control exercised on the Outer Continental Shelf by the Department of Interior, Bureau of Land Management and Geological Survey.

i. *Section 330.5(a)(9)* is a new nationwide permit to avoid duplicating controls exercised by the U.S. Coast Guard over vessel anchorage and fleeting areas. There were many concerns expressed about fleeting areas in the upper Mississippi. However, only one fleeting area has been designated by the Coast Guard and it is located in the lower Mississippi near New Orleans.

j. *Section 330.5(a)(10)* is a new nationwide permit to avoid unnecessary Federal control over private mooring buoys.

k. *Section 330.5(a)(11)* is a new nationwide permit to avoid unnecessary Federal control over temporary markers and buoys.

l. *Section 330.5(a)(12)* is an expansion of an existing nationwide permit for utility line crossings previously found at 33 CFR 323.4-3(a)(1). It now also includes bedding and backfill for outfall and intake structures.

m. *Section 330.5(a)(13)* is an expansion of an existing Section 404 nationwide permit for bank stabilization previously found at 33 CFR 323.4-3(a)(2). It now includes Section 10 authorization and some additional conditions.

n. *Section 330.5(a)(14)* is a reauthorization of an existing nationwide permit for minor road crossings previously found at 33 CFR 323.4-3(a)(3).

o. *Section 330.5(a)(15)* is an expansion of an existing nationwide permit previously found at 33 CFR 323.4-3(a)(4) for some bridge-associated fills in tidal waters where those fills are regulated by the U.S. Coast Guard as part of the bridge permit. The expansion to include non-tidal waters reduces dual Federal regulatory control for bridges crossing tidal *and* non-tidal navigable waters of the United States.

p. *Section 330.5(a)(16)* is a new nationwide permit to recognize that the return water from dredged material placed hydraulically on upland sites is administratively a 404 discharge but need not be regulated on an individual basis as long as the water quality concerns are protected through the Section 401 certification procedure. Reducing regulatory burdens on upland disposal should encourage such disposal and avoid the confusion now existing on why hydraulic disposal on the upland needs a 404 permit while non-hydraulic disposal does not.

q. *Section 330.5(a)(17)* is a new nationwide permit to avoid duplicating the regulatory control exercised by the Department of Energy, Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920 for small hydropower projects. Some people were concerned that FERC review might not fully reflect the principles of the Clean Water Act. We disagree. However, the safeguard of discretionary authority is still available.

r. *Sections 330.5(a)(18) and (19)* are new nationwide permits for very small dredging and filling activities. We had imposed a limit of five cubic yards in the proposed rules. However, we were persuaded by the comments that increasing the limit to 10 cubic yards is reasonable.

s. *Section 330.5(a)(20)* is a new nationwide permit to avoid regulatory delays associated with oil and hazardous substances containment and cleanup operations.

t. *Section 330.5(a)(21)* is a new nationwide permit to avoid duplicating the regulatory control exercised by the Department of the Interior under the Surface Mining Control and Reclamation Act of 1977. The provision for an advance review by the Corps would afford the Corps an opportunity to insure that the activity needing a Corps permit would have minimal impacts and thus qualify for the nationwide permit.

u. *Section 330.5(a)(22)* is a new nationwide permit for work associated with removal of wrecked vessels and navigational obstructions.

v. *Section 330.5(a)(23)* is a new nationwide permit to reduce duplication of effort and unnecessary paperwork concerning activities of other Federal agencies which would have only minimal individual or cumulative environmental impacts. Some concerns were raised that other federal agencies are not as aware of CWA principles as is the Corps of Engineers. We disagree, but have reserved discretionary authority should the need arise. The conditions specified in the proposed rules have been consolidated and the notification requirement has been moved from the district engineer to the Chief of Engineers in accordance with CEQ categorical exclusion procedures.

w. *Section 330.5(a)(24)* is a new nationwide permit to avoid duplications with state-administered Section 404 permit programs. Administration of the Section 404 program in waters which are navigable waters of the United States based solely on historical commercial use may be transferred to qualified states pursuant to Section 404(g) of the CWA. However, the Corps retains Section 10 permitting authority in these waters. Thus the discharge of dredged or fill material in such waters would require both a Corps Section 10 permit and State Section 404 permit. Since both EPA and the Corps have adequate control over the state 404 programs to protect the federal interest, a nationwide permit to satisfy the Section 10 jurisdictional authority would avoid paperwork, duplications, and delays. Other activities not involving the discharge of dredged and fill material in such waters would continue to be subject to Section 10.

x. *Section 330.5(a)(25)* is a new nationwide permit for placement of concrete into tightly sealed forms. This would address the situation where poured concrete used as a structural member would require a Section 404 permit whereas a structural member made of steel or wood but serving the same purpose does not require a Section 404 permit. The concrete structure itself would still require a Section 10 permit if located in navigable waters of the United States. This nationwide permit was announced in the **Federal Register** of May 15, 1981 and was discussed at our public hearings.

y. *Section 330.8:* A 5-year expiration date is added pursuant to Section 404(e) of the CWA.

Note 1

The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

Note 2

One purpose of these regulations is to bring up to date *all* policies which affect the Corps regulatory programs. All policy guidance issued prior to January 1, 1981 is hereby terminated. Since that time we have issued guidance letters with specific expiration dates.

List of Subjects

33 CFR Part 320

Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 321

Dams, Intergovernmental relations, Navigation, Waterways.

33 CFR Part 322

Continental shelf, Electric power, Navigation, Water pollution control, Waterways.

33 CFR Part 323

Navigation, Water pollution control, Waterways.

33 CFR Part 324

Water pollution control.

33 CFR Part 325

Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

33 CFR Part 326

Investigations, Intergovernmental relations, Law enforcement, Navigation, Water pollution control, Waterways.

33 CFR Part 327

Administrative practice and procedure, Navigation, Water pollution control, Waterways.

33 CFR Part 329

Waterways.

33 CFR Part 330

Navigation, Water pollution control, Waterways.

For the reasons set forth in the preamble, Chapter II of Title 33 of the Code of Federal Regulations is amended by revising Parts 320, 321, 322, 323, 324, 325, 326, 327, and 329, removing and reserving Part 328 and adding a new part 330 to read as set forth below.

Dated: July 16, 1982.

Forrest T. Gay III,

Brigadier General, USA, Acting Director of Civil Works.

PART 320—GENERAL REGULATORY POLICIES

Sec.
320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related laws.
320.4 General policies for evaluating permit applications.

Authority: 33 U.S.C. 401 *et seq.;* 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 320.1 Purpose and scope.

(a) *Regulatory approach of the Corps of engineers.* (1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program evolved from one that protects navigation only to one that considers the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest balancing process" or the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources. It is a dynamic program that varies the weight given to a specific public interest factor in light of the importance of other such factors in a particular situation.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been given to the thirty six district engineers and eleven division engineers. If a district or division engineer makes a final decision on a permit application in accordance with the procedures and authorities contained in these regulations (33 CFR Parts 320–330), there is no administrative appeal of that decision.

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CFR Parts 325 and 330 is the primary method of eliminating unnecessary Federal control over activities which do not justify individual control or which are adequately regulated by another agency.

(4) The Corps believes that applicants are not necessarily due a favorable decision but they are due a timely one. Reducing unnecessary paperwork and delays is a continuing Corps goal.

(5) The Corps believes that state and Federal regulatory programs should complement rather than duplicate one another. Use of general permits, joint processing procedures, interagency review coordination and authority transfers (where authorized by law) are encouraged to reduce duplications.

(b) *Types of activities regulated.* This regulation and the regulations that follow (33 CFR Parts 321–330) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal laws applicable to the review of each activity that requires a Department of the Army permit; and the general policies that are applicable to the review of all activities that require Department of the Army permits. Parts 321–324 address the various types of activities that require Department of

the Army permits, including special policies and procedures applicable to those activities, as follows:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of artificial islands, installations and other devices on the outer continental shelf (Part 322);

(5) Discharges of dredged or fill material into the waters of the United States (Part 323);

(6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters (Part 324); and

(7) Nationwide general permits for certain categories of these activities (Part 330).

(c) *Forms of authorization.* Department of the Army permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of an individual application for a Department of the Army permit and general permits that authorize the performance of a category or categories of activities in a specific geographical region or nationwide. The term "general permit" as used in these regulations (33 CFR Parts 320–330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits issued by the Chief of Engineers through publication in the **Federal Register** and applicable throughout the nation. The nationwide permits are found in 33 CFR Part 330. If an activity is covered by a general permit, an application for a Department of the Army permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a Department of the Army Permit.

(d) *General instructions.* The procedures for processing all individual permits and regional general permits are contained in 33 CFR Part 325. However, before reviewing those procedures, a person wanting to do work that requires a Department of the Army permit should review the general and special policies that relate to the particular activity as outlined in this Part 320 and Parts 321 through 324. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. "*Navigable waters* of the United States" are defined in 33 CFR Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the River and Harbor Act of 1899. "*Waters* of the United States" are defined in 33 CFR 323.2(a). These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 401) (hereinafter referred to as Section 9) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways by the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (49 U.S.C. 1155g(6)(A)). (See also 33 CFR Part 321.) A Department of the Army permit pursuant to Section 404 of the Clean Water Act is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways. (See 33 CFR Part 323.)

(b) Section 10 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 403) (hereinafter referred to as Section 10) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands, installations, and other devices located on the outer continental shelf by Section 4(e) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See also 33 CFR Part 322.)

(c) Section 11 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads or other works may be extended or deposits made without approval of the Secretary of the Army. Effective May 27, 1970, permits for work shoreward of those lines must be obtained in accordance with Section 10 and, if applicable Section 404 of the Clean Water Act. (See § 320.4(o) of this Part.)

(d) Section 13 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency (EPA), and the States under Sections 402 and 405 of the Clean Water Act, respectively (33 U.S.C. 1342 and 1345). (See 40 CFR Parts 124 and 125.)

(e) Section 14 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 408) provides that the Secretary of the Army on the recommendation of the Chief of Engineers may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as Section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States as specified disposal sites. See 33 CFR Part 323. The selection and use of disposal sites will be in accordance with

guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army and published in 40 CFR 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers shall consider the economic impact on navigation of such a prohibition in reaching his decision. Furthermore, the Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas (See 40 CFR Part 230).

(g) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as Section 103) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of disposal in the ocean where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of the EPA in consultation with the Secretary of the Army and published in 40 CFR Parts 220–229. However, similar to the EPA Administrator's limiting authority cited in paragraph (f) of this section, the Administrator can prevent the issuance of a permit under this authority if he finds that the disposal of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas. (See also 33 CFR 324.)

§ 320.3 Related laws.

(a) Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any applicant for a Federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or would originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1456(c)), requires Federal agencies conducting activities, including development projects, directly affecting a State's coastal zone, to comply, to the maximum extent practicable, with an approved State coastal zone management program. Indian tribes doing work on Federal lands will be treated as a Federal agency for the purpose of the Coastal Zone Management Act. The Act also requires any non-Federal applicant for a Federal license or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State has concurred with the non-Federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program. (See also 15 CFR Part 930.)

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1432), authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations * * *". (See Appendix B of 33 CFR Part 230.)

(e) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, *et seq.*), the Migratory Marine Game-Fish Act (16 U.S.C. 760c–760g) and the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c) and other acts express the will of Congress to protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any Federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, as appropriate, and with the head of the appropriate State agency exercising administration over the wildlife resources of the affected State.

(f) The Federal Power Act of 1920 (16 U.S.C. 791a *et seq.*), as amended, authorizes the Department of Energy (DOE) to issue licenses for the construction, operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydro-power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the DOE for the inclusion of appropriate provisions in the DOE license rather than the issuance of separate Department of the Army permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the DOE under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *et seq.* remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of disposal in

ocean waters, Section 404 or Section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for such listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 *et seq.*), which amends the Act of June 27, 1960. By this Act, whenever a Federal construction project or Federally licensed project, activity or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project.

(h) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires Department of the Army authorization, the Property Report is required by Housing and Urban Development regulation to state whether or not a permit for the development has been applied for, issued, or denied by the Corps of Engineers under Section 10 or Section 404. The Property Report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act (16 U.S.C. 1531 *et seq.*) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act requires that Federal agencies in consultation with the US Fish and Wildlife Service and the National Marine Fisheries Service use their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized, funded or carried out by the Agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical. (See also 50 CFR Parts 17 and 402.)

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all Federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for Section 10, Section 404 and Section 103 permits which may also be required pursuant to the authorities listed in § 320.2 and the policies specified in § 320.4 of this Part.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act.

(l) Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 *et seq.*) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.

(m) The Ocean Thermal Energy Conversion Act of 1980, (42 U.S.C. Section 9101 *et seq.*) establishes a licensing regime administered by the Administrator of NOAA for the ownership, construction, location and operation of ocean thermal energy conversion (OTEC) facilities and plantships. An application for an OTEC license filed with the Administrator constitutes an application for all Federal authorizations required for ownership, construction, location and operation of an OTEC facility or plantship, except for certain activities within the jurisdiction of the Coast Guard. This includes applications for Section 10, Section 404 and other Department of Army authorizations which may be required.

(n) Section 402 of the Clean Water Act authorizes EPA to issue permits under procedures established to implement the National Pollutant Discharge Elimination System (NPDES) program. The administration of this program can be and, in many cases, has been delegated to individual states. Section 402(b)(6) states that no NPDES permit will be issued if the Chief of Engineers, acting for the Secretary of the Army and after consulting with the US Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

§ 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321–324.

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be

considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work:

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited.

(b) *Effect on wetlands.* (1) Some wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. For projects to be undertaken by Federal, state, or local agencies, additional guidance on wetlands considerations is stated in Executive Order 11990, dated 24 May 1977.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and

(vii) Wetlands which through natural water filtration processes serve significant and necessary water purification functions.

(3) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas in consultation with the appropriate Regional Director of the Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate state agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) or of this section because of provisions of paragraph (b)(3), of this section, unless the district engineer concludes, on the basis of the analysis required in paragraph (a), of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular alteration is necessary, the district engineer shall consider whether the proposed activity is dependent on being located in, or in close proximity to the aquatic environment and whether practicable alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and the availability of practicable alternative sites.

(5) In addition to the policies expressed in this subpart, the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90-454, and state regulatory laws or programs for classification and protection of wetlands will be given great weight.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this part) Corps of Engineers officials will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. They will give great weight to these views on fish and wildlife considerations in evaluating the application.

(d) *Water quality.* Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and, water quality standards, during the construction, and subsequent operation of the proposed activity. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

(e) *Historic, cultural, scenic, and recreational values.* Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, registered historic places and natural landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under Federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar Federal controls or policies. Action on permit applications should, insofar as possible, be consistent with and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

(f) *Effect on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea

is measured for purposes of the Submerged Lands Act and international law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or lowtide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and United States v. California, 381 U.S.C. 139 (1965), 382 U.S. 448 (1966)). Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the administrative record of the application. After completion of standard processing procedures, the record will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Interference with adjacent properties or water resource projects.* Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appear not to be in the public interest, the district engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources.

(2) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(3) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized Federal project, the applicant should be apprised in writing of the fact and of the possibility that a Federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the River and Harbor Act of 1899 or by Section 404 of the Clean Water Act which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claims or right to compensation will accrue from any such damage.

(4) Proposed activities which are in the area of a Federal project which exists or is under construction will be evaluated to insure that they are compatible with the purpose of the project.

(h) *Activities affecting coastal zones.* Applications for Department of the Army permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-Federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-Federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interests of national security. Federal agency and Indian tribe applicants for Department of the Army permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved State coastal zone management programs.

(i) *Activities in marine sanctuaries.* Applications for Department of the Army authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the Department of the Army permit will normally not be delayed pending action by another Federal, state or local agency (see 33 CFR 325.2(d)(4)). However, where the required Federal, state and/or local certification and/or authorization has been denied for activities which also require a Department of Army permit before final action has been taken on the Army permit, the Army permit will be denied without prejudice to the right of the applicant to reinstate processing of the application if subsequent approval is received from the appropriate Federal, state and/or local agency. Even if official certification and/or authorization is not required by state or Federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) Where officially adopted Federal, state, regional, local or tribal land-use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition to the other national factors of the public interest identified in § 320.4(a) of this part.

(3) A proposed activity may result in conflicting comments from several agencies within the same state. Where a state has not designated a single responsible coordinating agency, district engineers will ask the Governor to express his views or to designate one

state agency to represent the official state position in the particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Part 320–324, and the applicable statutes have been followed and considered: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarily, a permit will generally be issued for Federal and federally-authorized activities; another Federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review.

(5) The district engineers are encouraged to develop joint procedures with those states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for Department of the Army permits may be processed jointly with the state or other Federal applications to an independent conclusion and decision by the district engineer and appropriate Federal or state agency. (See 33 CFR 325.2(e).)

(6) The district engineer shall develop operating procedures for establishing official communications with Indian Tribes within the district. The procedures shall provide for appointment of a tribal representative who will receive all pertinent public notices, and respond to such notices with the official tribal position on the proposed activity. This procedure shall apply only to those Tribes which accept this option. Any adopted operating procedures shall be distributed by public notice to inform the Tribes of the option.

(k) *Safety of impoundment structures.* To insure that all impoundment structures are designed for safety, non-Federal applicants may be required to demonstrate that the structure complies with established state dam safety criteria or has been designed by qualified persons and, in appropriate cases, that the design has been independently reviewed (and modified as the review would indicate) by similarly qualified persons.

(l) *Floodplain management.*

(1) Floodplains possess significant natural values and carry out numerous functions important to the public interest. These include:

(i) Water resources values (natural moderation of floods, water quality maintenance, and groundwater recharge);

(ii) Living resource value (fish, wildlife, and plant resources);

(iii) Cultural resource values (open space, natural beauty, scientific study, outdoor education, and recreation); and

(iv) Cultivated resource values (agriculture, aquaculture, and forestry).

(2) Although a particular alteration to a floodplain may constitute a minor change, the cumulative impact of such changes may result in a significant degradation of floodplain values and functions and in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order 11988, district engineers, as part of their public interest review, should avoid to the extent practicable long and short term significant adverse impacts associated with the occupancy and modification of floodplains as well as the direct and indirect support of floodplain development whenever there is a practicable alternative. For those activities, which in the public interest, must occur in or impact upon floodplains, the district engineer shall ensure to the maximum extent practicable that the impacts of potential flooding on human health, safety and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains and restored and preserved.

(3) In accordance with Executive Order 11988, the district engineer should avoid authorizing floodplain developments whenever practicable alternatives exist outside the floodplain. If there are no practicable alternatives, the district engineer may consider, as a means of mitigation, alternatives within the floodplain which will lessen any significant adverse impact to the floodplain.

(m) *Water supply and conservation.* Water is an essential resource, basic to human survival, economic growth, and the natural environment. Water conservation requires the efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses. Full consideration will be given to water conservation as a factor in the public interest review including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. This policy is subject to Congressional policy stated in Sec. 101(g) of the Clean Water Act that the authority of states to allocate water quantities shall not be superseded, abrogated, or otherwise impaired.

(n) *Energy conservation and development.* Energy conservation and development is a major national objective. District engineers will give great weight to energy needs as a factor in the public interest review and will give high priority to permit actions involving energy projects.

(o) *Navigation.* (1) Section 11 of the River and Harbor Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on May 27, 1970 (33 CFR 209.150) which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to May 27, 1970 do not require specific authorization.

(2) The policy of considering harbor lines as guidance for assessing impacts on navigation continues.

(3) Navigation in all navigable waters of the United States continues to be a primary concern of the Federal government and will be given great weight in the public interest balancing process.

(4) District engineers should protect navigational and anchorage interests in connection with the NPDES program by recommending to EPA or to the state, if the program has been delegated, that a permit be denied unless appropriate conditions can be included to avoid any substantial impairment of navigation and anchorage.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.
321.1 General.
321.2 Definitions.
321.3 Special policies and procedures.

Authority: 33 U.S.C. 401.

§ 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320

and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require Department of the Army permits under Section 404 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of Section 404.

§ 321.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dike or dam" means an impoundment structure that completely spans a navigaible water of the United States and that may obstruct interstate waterborne commerce. The term does not include a weir which is regulated pursuant to Section 10 of the River and Harbor Act of 1899 (see 33 CFR Part 322).

§ 321.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of pemit applications under this regulation:

(a) The Secretary of the Army will decide whether Department of the Army authorization for a dam or dike in a navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the district engineer when forwarding the report to the Secretary of the Army, through the Chief of Engineers.

(b) Processing a Department of the Army application under Section 9 will not be completed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate state legislature has been obtained if the navigable water of the United States is solely within the boundaries of one state. The district engineer, upon receipt of such an application, will notify the applicant that the consent of Congress or the state legislature must be obtained before a permit can be issued.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.
322.1 General.
322.2 Definitions.
322.3 Activities requiring permits.
322.4 Reserved.
322.5 Special policies.

Authority: 33 U.S.C. 403.

§ 322.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325 those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) (hereinafter referred to as Section 10). See 33 CFR 320.2(b). Certain stuctures or work in or affecting navigable waters of the United States are also regulated under other authorities of the Department of the Army. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A Department of the Army permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 322.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "structure" shall include, without limitation, any pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.2(e).

(e) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR 325 and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR 320.

(f) The term "general permit" means a Department of the Army authorization that is issued on a nationwide ("nationwide permits") or regional ("regional permits") basis for a category or categories of activities when:

(1) those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) the general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330).

§ 322.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required under Section 10 for structures and/or work in or affecting navigable waters of the United States except as otherwise provided in these regulations. Activities that were commenced or completed shoreward of established Federal habor lines before May 27, 1970 (see 33 CFR 320.4(o)) also do not require Section 10 permits; however, if those activities involve the discharge of dredged or fill material into

waters of the United States after October 18, 1972, a Section 404 permit is required (see 33 CFR Part 323).

(1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) of this section, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody. For purposes of a Section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

(2) Pursuant to Section 154 of the Water Resource Development Act of 1976 (Pub. L. 94-587), Department of the Army permits will not be required under Section 10 to construct wharves and piers in any waterbody, located entirely within one State, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce. Section 154 applies only to the construction of a single pier or wharf and not to marinas. Furthermore, Section 154 is not applicable to any pier or wharf that would cause an unacceptable impact on navigation.

(b) *Outer continental shelf.* Department of the Army permits will also be required for the construction of artificial islands, installations, and other devices on the outer continental shelf pursuant to Section 4(e) of the Outer Continental Shelf Lands Act as amended (see 33 CFR 320.2(b)).

(c) *Activities of Federal agencies.* (1) Except as specifically provided in this subparagraph, activities of the type described in paragraphs (a) and (b), of this section, done by or on behalf of any Federal agency, other than any work or structures in or affecting navigable waters of the United States that are part of the civil works activities of the Corps of Engineers, are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and district engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(2) Congress has delegated to the Secretary of the Army and the Chief of Engineers in Section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States. The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of Section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(3) The policy provisions set out in 33 CFR 320.4(j) relating to state or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy, e.g., Section 313 and Section 401 of the Clean Water Act.

§ 322.4 [Reserved]

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 10 permits. The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* Department of the Army permits are required for structures or work in or affecting navigable waters of the United States. However, certain structures or work specified in 33 CFR Part 330 are permitted by that regulation. If a structure or work is not permitted by that regulation, an individual or regional Section 10 permit will be required.

(b) [Reserved]

(c) *Non-Federal dredging for navigation.* (1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging access channels to docks and berthing facilities or deepening such channels to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, state, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with these regulations. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will, therefore, be accorded to the fullest extent possible to both Federal and non-Federal operations. Furthermore, permits for non-Federal dredging operations will normally contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation may also authorize the periodic maintenance dredging of the project. Authorization procedures and limitations for maintenance dredging shall be as prescribed in 33 CFR 325.6(e). The permit will require the permittee to give advance notice to the district engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping in the ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* (1) As a matter of policy, in the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District

engineers will inform applicants of the hazards involved and encourage safety in location, design and operation. Corps of Engineers officials will also encourage cooperative or group use facilities in lieu of individual proprietor use facilities.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a resource manager are normally subject to permit authorities cited in § 322.3, above, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake resource manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the River and Harbor Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of their control of marking, lighting and standardization of such navigation aids. A Section 10 nationwide permit has been issued for such aids provided they are approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 330). Electrical service cables to such aids are not included in the nationwide permit (an individual or regional Section 10 permit will be required).

(f) *Outer continental shelf.* Artifical islands, installations, and other devices located on the outer continental shelf are subject to the standard permit procedures of this regulation. Where the islands, installations and other devices are to be constructed on lands which are under mineral lease from the Bureau of Land Management, Department of the Interior, that agency, in cooperation with other Federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artifical waterways connected to navigable waters of the United States.* (1) A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, of this part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of these regulations. For all other canals, the exercise of regulatory authority is restricted to those activities which affect the course, location, condition, or capacity of the navigable waters of the United States.

(2) The proponent of canal work should submit the application for a permit, including a proposed plan of the entire development, and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal, to the district engineer before commencing any form of work. If construction of the canal in such a manner as to result in an effect on the course, location, condition, or capacity of the navigable waters of the United States has already taken place without a permit, the district engineer will proceed in accordance with 33 CFR Part 326. Where the construction of the canal would result in an effect on the course, location, condition, or capacity of navigable waters of the United States, an application for a Section 10 permit should be made at the earliest stage of planning. Where the district engineer becomes aware that the canal construction has already begun, he will advise the proponent in writing of the need for a permit to the extent that the construction will result in an effect on the course, location, condition, or capacity of navigable waters of the United States. He will also ask the proponent if he intends to undertake such work and will request the immediate submission of the plans and permit application if it is so intended. The district engineer will also advise the proponent that any work is done at the risk that, if a permit is required, it may not be issued, and that the existence of partially completed excavation work will not be allowed to weigh favorably in evaluation of the permit application.

(h) *Facilities at the borders of the United States.* (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural gas to or from a foreign country, must be made to the Secretary of Energy. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), as amended by Executive Order 12038, February 3, 1978, and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766).

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country. (Executive Order 11423, August 16, 1968).

(5) A Department of the Army permit under Section 10 of the River and Harbor Act of 1899 is also required for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has been issued as provided above, the district engineer, in evaluating the general public interest, may consider the basic existence and operation of the facility to have been primarily examined and permitted as provided by the Executive Orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate Department of the Army authorizations under Section 404 of the Clean Water Act or under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as

amended, are also required (see 33 CFR Parts 323, 324).

(i) *Power transmission lines.* (1) Permits under Section 10 of the River and Harbor Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Department of Energy under the Federal Power Act of 1920. If an application is received for a permit for lines which are part of such a water project, the applicant will be instructed to permit the application to the Department of Energy. If the lines are not part of such a water power project, the application will be processed in accordance with the procedures of these regulations.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length of span, and type of supports as outlined in the National Electrical Safety Code.

Nominal system voltage, kV	Minimum additional clearance (feet) above clearance required for bridges
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750 to 765	45

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require Department of the Army permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notifed by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, district engineer, and other interested parties as to the effects of the proposal on the use of airspace. The district engineer will therefore refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to its recommendations when evaluating the general public interest.

(3) If the seaplane base would serve air carriers licensed by the Civil Aeronautics Board, the applicant must receive an airport operating certificate from the FAA. That certificate reflects a determination and conditions relating to the installation, operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the district engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(4) For regulations pertaining to seaplane landings at Corps of Engineers projects, see § 327.4 of this part.

(k) *Foreign trade zones.* The Foreign Trade Zones Act (48 Stat. 998–1003, 19 U.S.C. 81a to 81u, as amended) authorizes the establishment of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published at Title 15 of the Code of Federal Regulations, Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the district engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of these regulations. Evaluation by a district engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

PART 323–PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.
323.1 General.
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Authority: 33 U.S.C. 1344

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as Section 404). See 38 CFR 320.2(g). Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A Department of the Army permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means: [1]

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect

[1] The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term "wetlands" means 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.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(e) The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(f) The term "ordinary high water mark" means that the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the charactertics of the surrounding areas.

(g) The term "high tide line" is the line used in Sec. 404 determinations and means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency, but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(h) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second.[2] The District engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

(i) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(j) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(k) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.

(l) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The terms does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(m) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this regulation and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(n) The term "general permit" means a Department of the Army authorization that is issued on a nationwide ("nationwide permits") or regional ("regional permits") basis for a category or categories of activities when:

(1) those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) the general permit would result in avoiding unnecessary duplication of

[2] For streams that are dry during long periods of the year, district engineers may establish the headwater point as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330).

§ 323.3 Discharges requiring permits.

(a) *General.* Except as provided in § 323.4 below, Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"). If a discharge of dredged or fill material is not exempted by § 323.4 of this part or permitted by 33 CFR Part 330, an individual or regional Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

(b) *Activities of Federal agencies.* Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in expediting the processing of their applications.

§ 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under Section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(*1*) Minor Drainage means:

(*i*) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a Section 404 permit.);

(*ii*) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(*iii*) the discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species.[3]

(*iv*) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(*2*) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any of area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction

[3] The provisions of paragraphs (a)(1)(iii)(C)(*1*)(*ii*) and (*iii*) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.

of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with irrigation facilities in the waters of the U.S. are included within the exemption unless the discharges have the effect of bringing these waters into a use to which they were not previously subject and the flow or circulation may be impaired or reach reduced of such waters.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a state has an approved program under section 208(b)(4) of CWA which meets the requirements of sections 208(b)(4)(B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR 123.4(h)(4), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a)(1)–(6) of this section contains any toxic pollutant listed under section 307 of CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a)(1)–(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject and the flow for circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.[4]

(d) Federal projects which qualify under the criteria contained in Section 404(r) of CWA (Federal projects authorized by Congress where an EIS has been submitted to Congress prior to authorization or an appropriation) are exempt from Section 404 permit requirements, but may be subject to other state or Federal requirements.

§ 323.5 Program transfer to states.

Section 404(h) of the Clean Water Act allows the Administrator of the Environmental Protection Agency to transfer administration of the Section 404 permit program for discharges into certain waters of the United States to

[4] For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

qualified states. (The program cannot be transferred for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line, including wetlands adjacent thereto). See 40 CFR Part 123 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved, the Corps of Engineers will suspend processing of Section 404 applications in the applicable waters and will transfer pending applications to the state agency responsible for administering the program. District engineers will assist EPA and the states in any way practicable to effect transfer and will develop appropriate procedures to ensure orderly and expeditious transfer.

§ 323.6 Special policies and procedures.

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 404 permits. Applications for permits for the discharge of dredged or fill material into waters of the United States will be reviewed in accordance with guidelines promulgated by the Administrator, EPA, under authority of Section 404(b) of the Clean Water Act. (See 40 CFR Part 230.) If the EPA guidelines alone prohibit the designation of a proposed disposal site, the economic impact on navigation and anchorage of the failure to authorize the use of the proposed disposal site will also be considered in evaluating whether or not the proposed discharge is in the public interest.

(b) The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 CFR 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with Section 404(c) of the Clean Water Act. However the Corps will continue to complete the administrative processing of the application while the Section 404(c) procedures are underway including completion of final coordination with EPA under 33 CFR Part 325.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec.
324.1 General.
324.2 Definitions.
324.3 Activities requiring permits.
324.4 Special procedures.

Authority: 33 USC 1413.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the transportation of dredged material by vessel or other vehicle for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 USC 1413) (hereinafter referred to as Section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require Department of the Army permits under Section 10 of the River and Harbor Act of 1899 (33 USC 403) for the dredging in navigable waters of the United States. Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606: TIAS 5639).

(b) The term "dredged material" means any material excavated or dredged from navigable waters of the United States.

(c) The term "transport" or "transportation" refers to the carriage and related handling of dredged material by a vessel or other vehicle.

§ 324.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required for the transportation of dredged material for the purpose of dumping it in ocean waters.

(b) *Activities of Federal agencies.* (1) The transportation of dredged material for the purpose of disposal in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers are subject to the procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under these regulations. Division and district engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the transportation of dredged material for disposal in ocean waters are regulated by 33 CFR 209.145.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to state or local authorizations do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the substantive and procedural state, interstate, and local water quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Clean Water Act and the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and related laws in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 12088, dated October 18, 1978.) They are not required, however, to obtain and provide certification of compliance with effluent limitations and water quality standards from state or interstate water pollution control agencies in connection with activities involving the transport of dredged material for dumping into ocean waters beyond the territorial sea.

§ 324.4 Special procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 103 permits. The following additional procedures shall also be applicable under this regulation.

(a) *Public notice.* For all applications for Section 103 permits, the district engineer will issue a public notice which shall contain the information specified in 33 CFR 325.3.

(b) *Evaluation.* Applications for permits for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated to determine whether the proposed dumping will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, critieria established by the Administrator, EPA, pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, shall be applied including an

evaluation of the need for the ocean dumping and including the availability of alternatives to ocean dumping. Where ocean dumping is determined to be necessary, the district engineer will, to the extent feasible, specify disposal sites using the recommendations of the Administrator pursuant to Section 102(c) of the Act. See 40 CFR Parts 220 to 229.

(c) *EPA review.* If the Regional Administrator, EPA, advises the district engineer that the proposed dumping will comply with the criteria, the district engineer shall complete his evaluation of the Section 103 application under this regulation and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the district engineer that the proposed dumping will not comply with the criteria, the district engineer will proceed as follows.

(1) The district engineer shall determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer shall evaluate them in accordance with 33 CFR Parts 320, 322, 323, 325 and this regulation, as appropriate.

(2) If the district engineer makes a determination that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be in the public interest, he shall so advise the Regional Administrator of his intent to issue the permit setting forth his reasons for such determination.

(d) *EPA objection.* If the Regional Administrator advises, within 15 days of the notice of the intent to issue, that he will commence procedures specified by Section 103(c) of the Marine Protection, Research, and Sanctuaries Act of 1972 to prohibit designation of the disposal site, the case will be forwarded to the Chief of Engineers for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain, in addition to the analysis required by 33 CFR 325.11, an analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(e) *Chief of Engineers review.* The Chief of Engineers shall evaluate the permit application and make a decision to deny the permit or recommend its issuance. If the decision of the Chief of Engineers is that ocean dumping at the proposed disposal site is required because of the unavailability of economically feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with 40 CFR 225.4.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.

325.1 Applications for permits.
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325.10 Publicity.
Appendix A—Permit Form
Appendix B—Reserved

Authority: 33 U.S.C. 401 et seq.; 33 USC 1344; 33 USC 1413.

§ 325.1 Applications for permits.

(a) *General.* The processing procedures of this regulation (Part 325) apply to any Department of the Army permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for Department of the Army permits.

(b) *Pre-application consultation for major applications.* The district staff element having responsibility for administering, processing, and enforcing Federal laws and regulations relating to the Corps of Engineers regulatory program shall be available to advise potential applicants of studies or other information forseeably required for later Federal action. The district engineer will establish local procedures and policies including appropriate publicity programs which will allow potential permit applicants to contact the district engineer or the staff element to request pre-application consultation. Upon receipt of such request, the district engineer will assure the conduct of an orderly process which may involve other staff elements and affected agencies (Federal, state, or local) and the public. This early process should be brief but thorough so that the applicant may begin to assess the viability of some of the more obvious alternatives in the permit application. The district engineer will endeavor at this stage, to provide the applicant with all helpful information necessary in pursuing the application, including factors which the Corps must consider in its permit decision making process. Whenever the district engineer becomes aware of planning for work which may require a Department of the Army permit and which would involve the preparation of an environmental document, he shall contact the principals involved to advise them of the requirement for the permit(s) and the attendant public interest review including the development of an environmental document. Whenever a potential permit applicant indicates the intent to submit an application for work which may require the preparation of an environmental document, a single point of contact shall be designated within the district's regulatory staff to effectively coordinate the regulatory process, including the National Environmental Policy Act (NEPA) procedures and all attendant reviews, meetings, hearings, and other actions, including the scoping process if appropriate, leading to a decision by the district engineer. Effort devoted to this process should be commensurate with the likelihood of a permit application actually being submitted to the Corps. The regulatory staff coordinator shall maintain an open relationship with each applicant or his consultants so as to assure that the applicant is fully aware of the substance (both quantitative and qualitative) of the data required by the district engineer for use in preparing an environmental assessment or an environmental impact statement (EIS). The actual development of the scope of data required in cases requiring an EIS should be the product of the formal "scoping" process discussed in 33 CFR Part 230.

(c) *Application form.* Any person proposing to undertake any activity requiring Department of the Army authorization as specified in 33 CFR Parts 321–324 (except activities already authorized by general permit) must apply for a permit to the district engineer in charge of the district where the proposed activity is to be performed. Applications for permits must be prepared utilizing the prescribed application form (ENG Form 4345, OMB Approval No. OMB 49–R0420). The form may be obtained from the district engineer having jurisdiction over the waters in which the proposed activity will be located. Local variations of the application form for purposes of facilitating coordination with state and local agencies may be used.

(d) *Content of application.* (1) Generally, the application must include a complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; the names and addresses of adjoining

property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other Federal, interstate, state or local agencies for the work, including all approvals received or denials already made. See also Section 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms and will limit requests for additional information to those cases where the specific information is essential to complete an evaluation of the proposal's impact on the public interest.

(2) All activities which the applicant plans to undertake which are reasonably related to the same project and for which a Department of the Army permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.

(3) If the activity would involve dredging in navigable waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(4) If the activity would include the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters, the application must include the source of the material; the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. Certification under Section 401 of the Clean Water Act is required for such discharges into waters of the United States.

(5) If the activity would include the construction of a filled area or pile or float-supported platform, the project description must include the use of and specific structures to be erected on the fill or platform.

(6) If the activity would involve the construction of an impoundment structure, the applicant may be required to demonstrate that the structure complies with established state dam safety criteria or that the structure has been designed by qualified persons and, in appropriate cases, independently reviewed (and modified as the review would indicate) by similarly qualified persons. No specific design criteria are to be prescribed nor is an independent detailed engineering review to be made by the district engineer.

(7) *Signatures on application.* The application must be signed by the person who desires to undertake the proposed activity or by a duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action. An application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area and each owner submits a statement designating the same agent.

(e) *Additional information.* In addition to the information indicated in paragraph (d) of this section the applicant will be required to furnish only such additional information as the district engineer deems essential to assist in the evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(f) *Fees.* Fees are required for permits under Section 404 of the Clean Water Act, Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and Sections 9 and 10 of the River and Harbor Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be in the public interest. At that time, the district engineer will furnish the applicant two copies of the unsigned permit for his signature. He will also notify the applicant of the required fee and will request that any check or money order be made payable to the Treasurer of the United States. The permit will then be issued upon receipt of the application fee and the two signed permit copies. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of Federal, state or local governments will not be required to pay any fee in connection with permits.

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received, the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.

(2) Within 15 days of receipt of all information required in accordance with Sec. 325.1(d) of this part, the district engineer will issue a public notice as described in Sec. 325.3 of this part unless specifically exempted by other provisions of this regulation. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another Federal agency, the district engineer may seek the advise of that agency. At the earliest practicable time, the applicant must be given the opportunity to furnish the district engineer his proposed resolution or rebuttal to all objections from other Government

agencies and other substantive adverse comments before final decision will be made on the application. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so.

(4) The district engineer will follow Appendix B of 33 CFR Part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.

(5) The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR Part 327.

(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a Statement of Findings (SOF) or, where an EIS has been prepared, a Record of Decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material in waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit. In accordance with the authorities specified in § 325.8 of this Part, the district engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final EIS or environmental assessment, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in the format prescribed by the Chief of Engineers. District and division engineers will notify the applicant and interested Federal and state agencies that the application has been forwarded to higher headquarters. The district or division engineer may, at his option, disclose his recommendation to the news media and other interested parties, with the caution that it is only a recommendation and not a final decision. Such disclosure is encouraged in permit cases which have become controversial and have been the subject of stories in the media or have generated strong public interest. In those cases where the application is forwarded for decision in the format prescribed by the Chief of Engineers, the report will serve as the SOF or ROD.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward two copies of the draft permit to the applicant for signature accepting the conditions of the permit. The applicant will return both signed copies to the issuing official who then will sign and date the permit and return one copy to the permittee. The permit is not valid until signed by the issuing official. Letters of permission will be issued in letter form (signed by the issuing official only). Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document.

(8) The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees. This list will be distributed to all persons who may have an interest in any of the public notices listed.

(9) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390 Attention, Code NS12 and to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to Defense Mapping Agency, Hydrographic Center and National Ocean Survey as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iii) If the activity involves the erection of an aerial transmission line across a navigable water of the United States, to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, reference C322.

(iv) If the activity is listed in paragraphs (a)(9)(i), (ii), or (iii) of this section or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(b) *Procedures for particular types of permit situations.* (1) If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of Section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(i) The public notice for such activity, which will contain a statement on certification requirements (see Sec. 325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to Section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to Section 401(a)(2). If EPA does determine another state's waters may be affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state,

EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

(ii) No permit will be granted until required certification has been obtained or has been waived. Waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. The request for certification must be made in accordance with the regulations of the certifying agency. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

(2) If the proposed activity is to be undertaken in a State operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management Act (see 33 CFR 320.3(b)), the district engineer shall proceed as follows:

(i) If the applicant is a Federal agency, and the application involves a Federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of Federal activities. The Federal agency applicant shall be responsible for complying with the Coastal Zone Management Act's directive for ensuring that Federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved Coastal Zone Management Programs. (See 15 CFR Part 930.) If the State coastal zone agency objects to the proposed Federal activity on the basis of its inconsistency with the State's approved Coastal Zone Management Program, the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the Coastal Zone Management Act for resolving such disagreements.

(ii) If the applicant is not a Federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved State Coastal Zone Management Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the Coastal Zone Management Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers shall check with the certifying agency at the end of the allotted period of time before determining that a waiver has occurred.

(iii) If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.

(3) If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historical Preservation Act counterpart implementing regulations.

(4) If the proposed activity would consist of dredging of an access channel and/or berthing facility associated with an authorized Federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the Federal project to the maximum extent feasible. Separate notice, hearing, and environmental documentation will not be required for activities so included and coordinated; and the public notice issued by the district engineer for these Federal and associated non-Federal activities will be the notice of intent to issue permits for those included non-Federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the Federal project unless special considerations applicable to the proposed activity are identified. (See Sec. 322.5(C)).

(5) Applications will be reviewed for the potential impact on threatened or endangered species pursuant to Section 7 of the Endangered Species Act as amended. If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds that proposed activity may jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service by including a statement to this effect in the public notice (or will amend any previous notice as appropriate). Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity, pursuant to Section 7(c) of the Act. References, definitions, and consultation procedures are found in 33 CFR Part 306 and 50 CFR Part 402.

(c) [Reserved]

(d) *Timing of processing of applications.* The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:

(1) The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with §325.1.(d) of this part.

(2) The comment period of the public notice should not extend beyond 30 days from the date of the notice. However, if circumstances warrant, the district engineer may extend the comment period up to an additional 30 days.

(3) District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or procedures required by law (see below), (ii) the case must be referred to higher authority (see Sec. 325.8 of this part), (iii) the comment period is extended, (iv) a timely rebuttal or resolution of objections is not received from the applicant, (v) the processing is suspended at the request of the applicant, or (vi) information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete application. Certain laws (e.g., the Clean Water Act, the Coastal Zone Management Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other Federal agency certifications, public hearings, environmental impact statements, consultation, special studies and testing which may prevent district engineers from being able to decide certain applications within 60 days.

(4) Once the public comment period has closed (or, at the latest, on the ninetieth day following the public notice) and the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by Federal law, a prerequisite to making a decision on the Army permit application. Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the Army permit. In an unusual case, the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the Army permit while deferring his final decision.

(5) If the applicant fails to respond within 45 days to any request or inquiry of the district engineer, the district engineer may advise the applicant by certified letter that his application will be considered as having been withdrawn unless the applicant responds thereto within thirty days of the date of the letter.

(e) *Alternative procedures.* Division and district engineers are authorized to use alternative procedures as follows:

(1) *Letters of permission.* In those cases subject to Section 10 of the River and Harbor Act of 1899 in which, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impact on environmental values, and should encounter no appreciable opposition, the district engineer may omit the publishing of a public notice and authorize the work by a letter of permission. However, he will coordinate the proposal with all concerned fish and wildlife agencies, Federal and state, as required by the Fish and Wildlife Coordination Act. The letter of permission will not used to authorize the discharge of dredged or fill material into waters of the United States nor the transportation of dredged material for purposes of dumping it in ocean waters. The letter of permission form is specified in § 325.5 of this part.

(2) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is no longer in the public interest provided the procedures of Sec. 325.7 of this part are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.

(3) *Joint Procedures.* Division and district engineers are authorized and encouraged to develop joint procedures with states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the procedures in paragraphs (a)(1) through (5) of this section provided that the substantive requirements of those sections are maintained. Division and district engineers are also encouraged to develop management techniques such as joint agency review meetings to expedite the decision-making process. However, in doing so, the applicant's rights to a full public interest review and independent decision by the district or division engineer must be strictly observed.

(4) *Emergency procedures.* Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.

§ 325.3 Public notice.

(a) *General.* The public is the primary method of advising all interested parties of the proposed activity for which a

permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include the following items of information:

(1) Applicable statutory authority or authorities;

(2) The name and address of the applicant;

(3) The name or title, address and telephone number of the Corps employee from whom additional information concerning the application may be obtained;

(4) The location of the proposed activity;

(5) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, or pile or float-supported platforms, and a description of the type, composition and quantity of materials to be discharged or disposed of in the ocean;

(6) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

(7) If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;

(8) A list of other government authorizations obtained or requested by the applicant, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;

(9) If appropriate, a statement that the activity is a categorical exclusion for purposes of the National Environmental Policy Act (see paragraph 7 of Appendix B to 33 CFR Part 230);

(10) A statement on endangered species (see Sec. 325.2(b)(5);

(11) A statement(s) on evaluation factors (see Sec. 325.3(b));

(12) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest;

(13) A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing, within which interested parties may express their views concerning the permit application;

(14) A statement that any person may request, in writing, within the comment period specified in the notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing;

(15) For non-Federal applications in states with an approved Coastal Zone Management Plan, a statement on compliance with the approved Plan; and

(16) In addition, for Section 103 (ocean dumping) activities:

(i) The specific location of the proposed disposal site and its physical boundaries;

(ii) A statement as to whether the proposed disposal site has been designated for use by the Administrator, EPA, pursuant to Section 102(c) of the Act;

(iii) If the proposed disposal site has not been designated by the Administrator, EPA, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;

(iv) A brief description of known dredged material dischages at the proposed disposal site;

(v) Existence and documented effects of other authorized disposals that have been made in the disposal area (e.g., heavy metal background reading and organic carbon content);

(vi) An estimate of the length of time during which disposal would continue at the proposed site; and

(vii) Information on the characteristics and composition of the dredged material.

(b) *Evaluation factors.* A paragraph describing the various evaluation factors on which decisions are based shall be included in every public notice.

(1) Except as provided in paragraph (b)(3) of this section, the following will be included:

The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposals must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety production and, in general, the needs and welfare of the people.

(2) If the activity would involve the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters, the public notice shall also indicate that the evaluation of the impact on the activity of the public interest will include application of the guidelines promulgated by the Administrator, EPA under authority of Section 404(b) of the Clean Water Act (40 CFR Part 230) or of the criteria established under authority of Section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 229), as appropriate. (See also 33 CFR Parts 323 and 324).

(3) In cases involving construction of artificial islands, installations and other devices on outer continental shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(c) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian Tribes or tribal represenatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and areawide clearing houses as prescribed by OMB Circular A-95, to local news media and to any other interested party. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic

Preservation Officer, and the District Commander, U.S. Coast Guard.

(2) In addition to the general distribution of public notices cited above, notices will be sent to other addressees in appropriate cases as follows:

(i) If the activity would involve structures or dredging along the shores of the seas or Great Lakes, to the Coastal Engineering Research Center, Washington, D.C. 20016.

(ii) If the activity would involve construction of fixed structures or artificial islands on the outer continental shelf or in the territorial seas, to the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics (ASD(MRA&L)), Washington, D.C. 20310; the Director, Defense Mapping Agency (Hydrographic Center) Washington, D.C. 20390, Attention, Code NS12; and the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, and to affected military installations and activities.

(iii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iv) If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.

(v) If the activity would be in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, D.C. 20230 and to the appropriate District Director of Customs as Resident Representative, Foreign-Trade Zones Board.

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project. A copy of the public notice with the list of the addresses to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the district engineer may request its comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constitutent or himself, the district engineer will inform the member of Congress of the final decision.

§ 325.4 Conditioning of permits.

(a) *General.* The decision of whether to issue a permit is based on the public interest review described in 33 CFR 320.4. In order to protect the public interest, projects may require modifications or conditions different from what the applicant proposes.

(b) Division and district engineers are authorized to modify or add conditions to proposals when:

(1) they are necessary to meet a legal requirement,

(2) they serve to meet a public interest objective, or

(3) they will avoid or mitigate adverse impacts on fish and wildlife resources.

(c) Division and district engineers may modify or condition proposals to meet one of the objectives of 325.4(b) of this section when:

(1) there are no local, state or other Federal programs or policies to achieve the objective of the desired condition, and

(2) an agreement, enforceable at law, between the applicant and the party(ies) concerned with the resource use is not practicable.

(d) Division and district engineers will ensure that any modifications or conditions imposed on an applicant's proposal are:

(1) directly related to the impacts of the proposal; and

(2) commensurate in scope and degree with the impacts of concern; and

(3) reasonably enforceable.

(e) *Bonds.* If the District Engineer has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

§ 325.5 Forms of permits.

(a) *General discussion.* (1) Department of the Army permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, Department of the Army Permit (Appendix A).

(2) The general conditions included in ENG Form 1721 are normally applicable to all permits; however, some conditions may not apply to certain permits and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest in accordance with § 325.4 of this Part.

(b) *Individual permits.* (1) *Standard permits.* A standard permit is one which has been processed through the public interest review procedures, including public notice and receipt of comments, described throughout this Part. The standard individual permit shall be issued using ENG Form 1721.

(2) *Letters of permission.* A letter of permission will be issued where procedures of Section 325.2(e)(1) have been followed. It will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority, any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the general conditions form ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits.* (1) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. If the public interest so requires, the issuing authority may condition the regional permit to require a case-by-case reporting and acknowledgement system. However, no separate applications or other authorization documents will be required.

(2) *Nationwide permits.* Nationwide permits are a type of general permit and represent Department of the Army authorizations that have been issued by the regulation (33 CFR Part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit.

(d) *Section 9 permits.* Permits for structures under Section 9 of the River and Harbor Act of 1899 will be drafted at Department of the Army level.

§ 325.6 Duration of permits.

(a) *General.* Department of the Army permits may authorize both the work and the resulting use. Permits continue in effect until they automatically expire or are modified, suspended, or revoked.

(b) *Structures.* Permits for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the permit will be of limited duration with a definite expiration date.

(c) *Works.* Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with

a permit of indefinite duration under paragraph (b) of this section will specify time limits for completing the work or activity. The time limits may specify a date by which the work must be started, normally one year from the date of issuance, and will specify a date by which the work must be completed. The dates will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. Permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters will specify a completion date for the disposal not to exceed three years from the date of permit issuance.

(d) *Extensions of time.* An authorization or construction period will automatically expire if the permittee fails to request and receive an extension of time. Extensions of time may be granted by the district engineer. The permittee must request the extension and explain the basis of the request, which will be granted only if the district engineer determines that an extension would be in the public interest. Requests for extensions will be processed in accordance with the regular procedures of § 325.2 of this Part, including issuance of a public notice, except that such processing is not required where the district engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued and that the work is proceeding essentially in accordance with the approved plans and conditions.

(e) *Maintenance dredging.* If the authorized work includes periodic maintenance dredging, an expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Parts 320 to 325. In such cases, this district engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of this regulation and 33 CFR Parts 320–324. If the permittee desires to continue maintenance dredging beyond the expiration date, he must request a new permit. The permittee should be advised to apply for the new permit six months prior to the time he wishes to do the maintenance work.

§ 325.7 Modification, suspension or revocation of authorizations.

(a) *General.* The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this part, and not as modifications under this paragraph.

(b) *Modification.* Upon request by the permittee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms or conditions of the permit. In such cases, the district engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish. In the event a mutual agreement cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted by the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR Part 326.

(c) *Suspension.* The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/or a public hearing to present information in this matter. If a hearing is requested, the procedures prescribed in 33 CFR Part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested), the district engineer will take action to reinstate, modify or revoke the permit.

(d) *Revocation.* Following completion of the suspension procedures in paragraph (c) of this section if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.

(e) *Regional permits.* The district engineer may, by following the procedures of this section, revoke regional permits for individual activities, categories of activities, or geographic areas. Where groups of permittees are involved, such as for categories of activities or geographic areas, the informal discussions provided in paragraph (b) of this section may be waived and any written notification may be made through the general public notice procedures of this regulation. If a regional permit is revoked, any permittee may then apply for an individual permit which shall be processed in accordance with these regulations.

§ 325.8 Authority to issue or deny permits.

(a) *General.* Except as otherwise provided in this regulation, the Secretary of the Army, subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for construction or other work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899. He also has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for the discharge of dredged or fill material in waters of the United States pursuant to Section 404 of the Clean Water Act or for the transportation of dredged material for the purpose of disposing of it into ocean waters pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits pursuant to Section 9 of the River and Harbor Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District Engineers' authority.* District engineers are authorized to issue or deny permits in accordance with these regulations permits pursuant to Section 10 of the River and Harbor Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases not required to be referred to higher authority (see below). It is essential to the legality of a permit that it contain the name of the district engineer as the issuing officer. However, the permit need not be signed by the district engineer in person but may be signed for and in behalf of him by whomever he designates. In cases where permits are denied for reasons other than navigation or failure to obtain required local, State, or other Federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision. District engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state or other Federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation except in all cases required to be referred to higher authority (see below). District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with § 325.4 of this part, except for those conditions which may have been imposed by higher authority, and to modify, suspend and revoke permits according to the procedures of § 325.7 of this part. District engineers will refer the following applications to the division engineer for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When the recommended decision is contrary to the written position of the Governor of the State in which the work would be performed;

(3) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(4) When higher authority requests the application be forwarded for decision; or

(5) When the district engineer is precluded by law or procedures required by law from taking final action on the application (e.g., Section 404(c) of the Clean Water Act, Section 9 of the River and Harbor Act of 1899, or territorial sea baseline changes).

(c) *Division Engineers' authority.* Division engineers will review and evaluate all permit applications referred by district engineers. Division engineers may authorize the issuance or denial of permits pursuant to Section 10 of the River and Harbor Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions in accordance with § 325.4 of this Part in all cases not required to be referred to the Chief of Engineers. Division Engineers will refer the following applications to the Chief of Engineers for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(3) When higher authority requests the application be forwarded for decision; or

(4) When the division engineer is precluded by law or procedures required by law from taking final action on the application.

§ 325.9 [Reserved.]

§ 325.10 Publicity.

The district engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in waters of the United States or ocean waters. Whenever the district engineer becomes aware of plans being developed by either private or public entities which might require permits for implementation, he should advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Whenever the district engineer is aware of changes in Corps of Engineers regulatory jurisdiction, he will issue appropriate public notices.

Appendix A—Permit Form

Application No. _____
Name of Applicant _____
Effective Date _____
Expiration Date (If applicable) _____

DEPARTMENT OF THE ARMY

Permit

Referring to written request dated _____ for a permit to:

( ) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

( ) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (86 Stat. 816, Pub. L. 92-500);

( ) Transport dredged material for the purpose of disposal in ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052; Pub. L. 92-532);

_____

(Here insert the full name and address of the permittee.)

is hereby authorized by the Secretary of the Army:
to _____

(Here describe the proposed structure or activity, and its intended use. In the case of an application for a fill permit, describe the structures, if any proposed to be erected on the fill. In the case of an application for the discharge of dredged or fill material into waters of the United States or the transportation for discharge in ocean waters of dredged material, describe the type and quantity of material to be discharged.)

in _____

(Here to be named the ocean, river, harbor, or waterway concerned.)

at _____

(Here to be named the nearest well-known locality-preferably a town or city and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings, give file number or other definite

identification marks). Subject to the following conditions:

I. General conditions: (a) That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

(b) That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act of 1972 (Pub. L. 92-500; 86 Stat. 816), the Marine Protection, Research and Sanctuaries Act of 1972 (Pub. L. 92-532, 86 Stat. 1052), or pursuant to applicable State and local law.

(c) That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the district engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

(d) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

(e) That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

(f) That the permittee agrees that it will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

(g) That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

(h) That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.

(i) That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, state, or local laws or regulations.

(j) That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

(k) That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

(l) That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and or the Government may, in addition, institute appropriate legal proceedings.

(m) That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

(n) That the permittee shall notify the District Engineer of the time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

(o) That if the activity authorized herein is not completed on or before ——— day of ———, 19——, (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

(p) That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

(q) That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition (t) hereof, he must restore the area to a condition satisfactory to the District Engineer.

(r) That if the recording of this permit is possible under applicable state or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

(s) That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

(t) That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

(u) That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. Special Conditions: Here list conditions relating specifically to the proposed structure or work authorized by this permit. The following Special Conditions will be applicable when appropriate:

Structures In or Affecting Navigable Waters of the United States

(a) That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

(b) That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

(c) That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

(d) That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

(e) Structures for Small Boats: That the permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave

wash and the permittee shall not hold the United States liable for any such damage.

Maintenance Dredging

(a) That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for —— years from the date of issuance of this permit (ten years unless otherwise indicated);

(b) That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

Discharges of Dredged or Fill Material Into Waters of the United States

(a) That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR Part 230;

(b) That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.

(c) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

Disposal of Dredged Material Into Ocean Waters

(a) That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR Parts 220–228.

(b) That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

(Permittee) ——————————

(Date) ——————————

By authority of the Secretary of the Army:

(District Engineer) ——————————

(Date) ——————————

Transferee hereby agrees to comply with the terms and conditions of this permit.

(Transferee) ——————————

(Date) ——————————

Appendix B [Reserved]

PART 326—ENFORCEMENT, SUPERVISION AND INSPECTION

Sec.
326.1 Purpose.
326.2 Discovery of unauthorized activity.
326.3 Administrative action.
326.4 Legal action.
326.5 Supervision and enforcement of authorized activities.

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 326.1 Purpose.

This regulation prescribes the policy, practice, and procedures to be followed by the Corps of Engineers in connection with activities requiring Department of the Army permits that are performed without prior authorization; and supervision and inspection of authorized activities.

§ 326.2 Discovery of unauthorized activity.

(a) When the district engineer becomes aware of any unauthorized activity still in progress, including a violation of the terms and conditions of an authorized activity, he shall immediately issue an order prohibiting further work to all persons responsible for and/or involved in the performance of the activity and may order interim protective work. If the unauthorized activity has been completed, he will advise the responsible party of his discovery.

(b) Where the unauthorized activity involves an American Indian (including Alaskan natives, Eskimos, and Aleuts) or takes place on reservation land, district engineers will coordinate proposed cease and desist order with the Assistant Chief Counsel for Indian Affairs (DAEN–CCI).

§ 326.3 Administrative action.

(a) *Initial investigation.* Immediately upon discovery of an unauthorized activity, the district engineer shall commence an investigation to ascertain the facts surrounding the activity. In making this investigation, the district engineer should, in appropriate cases, depending upon the potential impacts of the completed work solicit the views of the Regional Administrator of the Environmental Protection Agency, the Regional Director of the U.S. Fish and Wildlife Service, and the Regional Director of the National Marine Fisheries Service, and other Federal, state, and/or local agencies. He shall also request the persons involved in the unauthorized activity to provide appropriate information on the activity to assist him in his evaluation and in determining the course of action to be taken.

(b) *Remedial work.* (1) The district engineer shall determine whether as a result of the unauthorized activity, life, property or important public resources are in serious jeopardy and would require expeditious measures for protection. Such measures may range from minor modification of the existing work to complete restoration of the area involved. Important public resources are identified in 33 CFR 320.4. If the district engineer determines that immediate remedial work is required, he shall issue an appropriate order describing the work, conditions and time limits required to provide satisfactory protection of the resource.

(2) Voluntary restoration by the responsible party on the party's own initiative shall be allowed if legal action is not otherwise necessary. However, district engineers will advise the responsible party of the option of an after-the-fact application for a permit to retain the unauthorized work. No permit will be required when complete and satisfactory restoration is accomplished.

(c) *Acceptance of an after-the-fact application.* Upon completion of appropriate remedial work, if any, the district engineer shall accept an application for an after-the-fact permit for all unauthorized activities unless:

(1) Civil action to enforce an order issued pursuant to § 326.2 or § 326.3(b) of this part is required;

(2) Criminal action is appropriate (see § 326.4a(1) of this part);

(3) State local, or other federal authorization or certification has been denied,[1] or a state or local enforcement action is pending. In the above situations, the District Engineer may accept an after-the-fact permit application provided he believes it would be in the public interest and he obtains approval of the next higher authority.

(4) In some cases, a violation of the Clean Water Act may be of such a nature that it is appropriate to seek a civil penalty as provided for in the act. These cases include knowing, flagrant, repeated or substantial impact violations.[2]

(d) If the responsible party fails to submit an application as noted in paragraph (c) of this section within a reasonable time period, the district engineer may proceed on his own initiative with a determination of whether the activity is in the public interest. The determination will be made in accordance with appropriate procedures described in 33 CFR Parts 320 through 325.

§ 326.4 Legal action.

(a) *Criminal or civil action.* District engineers shall be guided by the following policies in recommending appropriate legal action:

[1] This section refers to state or local authorizations required as a matter of Federal law before a Sec. 404 permit may be issued. Examples are Sec. 401 Water Quality Certification and Sec. 307 Coastal Zone Management Consistency Determinations.

[2] In such cases, the District Engineer may, in his discretion, recommend to the United States Attorney that a complaint be filed. An after-the-fact application should not be accepted until the enforcement action is completely resolved. This exception to the general rule of accepting after-the-fact applications should be used on a limited basis, only for those cases which merit special treatment.

(1) *Criminal action.* Criminal action is considered appropriate when the facts surrounding an unauthorized activity reveal the necessity for punitive action and/or when deterrence of future unauthorized activities in the area is considered essential to the establishment or maintenance of a viable regulatory program.

(2) *Civil action.* Civil action is considered appropriate when the evalution of the unauthorized activity reveals that (i) enforcement of an order issued pursuant to § 326.2 or § 326.3 (b) of this Part is required; (ii) after the procedures in § 326.3 (c) of this Part have been completed, the unauthorized activity would be in the public interest if altered or modified but attempts to secure voluntary alteration or modification have failed such that a judicial order is necessary, or (iii) after the procedures in § 326.3 (c) of this Part have been completed, a civil penalty under Section 309 of the Clean Water Act is warranted.

(b) *Preparation of case.* If the district engineer determines to recommend legal action he shall prepare a litigation report which shall contain an analysis of the data and information obtained during the investigation and a recommendation of appropriate civil and/or criminal action. In those cases where the analysis of the facts developed during the investigation and/or the after-the-fact application evaluation leads to the preliminary conclusion to recommend that removal of the unauthorized activity is in the public interest, the district engineer shall also recommend restoration of the area to its original or comparable condition.

(c) *Referral to local U.S. Attorney.* Except as provided in paragraph (d) of this section, district engineers are authorized to refer the following cases to the Department of Justice (DOJ) in accordance with procedures established by DOJ. Information copies of all letters of referral which go directly to a U.S. Attorney shall be forwarded to the Chief of Engineers, ATTN: DAEN-CCK, for transmittal to the Chief, Pollution Control Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530.

(1) Unauthorized structures or work in or affecting navigable waters of the United States that fall exclusively within the purview of Section 10 of the River and Harbor Act of 1899 (see 33 CFR Part 322) for which a criminal fine or penalty under Section 12 of that Act (33 U.S.C. 406) is recommended.

(2) Civil action involving small unauthorized structures, such as piers, which the district engineer determines are either (i) not in the public interest and recommends that they be removed, or (ii) would be in the public interest if altered or modified but attempts to secure voluntary alteration or modification have failed such that the district engineer recommends that a judicial order is necessary.

(3) Violations of Section 301 of the Clean Water Act involving the unauthorized discharge of dredged or fill material into the waters of the United States where the district engineer recommends, with the concurrence of the Regional Administrator, civil and/or criminal action pursuant to Section 309 of the Clean Water Act.

(4) Cases for which a temporary restraining order and/or preliminary injunction is appropriate following noncompliance with a cease and desist order.

(d) *Referral to Office, Chief of Engineers.* District engineers shall prepare and forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN-CCK, for cases not identified in paragraph (c) of this section which civil and/or criminal action is considered appropriate, including cases involving:

(1) Significant questions of law or fact;

(2) Discharges of dredged or fill material into waters of the United States that are not interstate waters or navigable waters of the United States, or part of a surface tributary system to these waters;

(3) Recommendations for substantial or complete restoration;

(4) Violations of Section 9 of the River and Harbor Act of 1899; and

(5) Violations of the Marine Protection, Research and Sanctuaries Act of 1972.

(6) All cases involving American Indians, including unauthorized activities on reservation lands.

§ 326.5 Supervision and enforcement of authorized activities.

(a) *Inspection and monitoring.* District engineers will assure that authorized activities are conducted and executed in conformance with approved plans and other conditions of the permits. Appropriate inspections should be made on timely occasions during performance of the activity and appropriate notices and instructions given permittees to insure that they do not depart from the approved plans. Reevaluation of a permit to assure compliance with its purposes and conditions will be carried out as provided in 33 CFR Part 325.7. If there are approved material departures from the authorized plans, the district engineer will require the permittee to furnish corrected plans showing the activity as actually performed.

(b) *Non-compliance.* Where the district engineer determines that there has been non-compliance with the terms or conditions of a permit, he should first contact the permittee and attempt to resolve the problem. If a mutually agreeable resolution cannot be reached, a written demand for compliance will be made. If the permittee has not agreed to comply within 5 days of receipt of the demand, the district engineer will issue an immediately effective notice of suspension in accordance with 33 CFR Part 325.7(c) and consider initiation of appropriate legal action (§ 326.4 of this Part).

(c) *Surveillance.* For purposes of inspection of permitted activities and for surveillance of the waters of the United States for enforcement of the permit authorities the district engineer will use all means at his disposal. All Corps of Engineers employees will be instructed to observe and report all unauthorized activities in waters of the United States. The assistance of members of the public and personnel of other interested Federal, state and local agencies to observe and report such activities will be encouraged. To facilitate this surveillance, the district engineer will, in appropriate cases, require a copy of ENG Form 4336 to be posted conspicuously at the site of authorized activities and will make available to all interested persons information on the scope of authorized activities and the conditions prescribed in the authorizations. Surveillance in ocean waters will be accomplished primarily by the Coast Guard pursuant to Section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(d) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activity in waters of the United States normally will be paid by the Federal Government in accordance with the provisions of Section 6 of the River and Harbor Act of 3 March 1905 (33 U.S.C. 417) unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may require the permittee to bear the expense of inspections in accordance with the conditions of his permit; however, the permittee will not be required or permitted to pay the United States inspector either directly or through the district engineer. The inspector will be paid on regular payrolls or service vouchers. The district engineer will collect the cost from the permittee in accordance with the following:

(1) At the end of each month the amount chargeable for the cost of

inspection pertaining to the permit will be collected from the permittee and will be taken up on the statement of accountability and deposited in a designated depository to the credit of the Treasurer of the United States, on account of reimbursement of the appropriation from which the expenses of the inspection were paid.

(2) If the district engineer considers such a procedure necessary to insure the United States against loss through possible failure of the permittee to supply the necessary funds in accordance with paragraph (d)(1) of this section he may require the permittee to keep on deposit with the district engineer at all times an amount equal to the estimated cost of inspection and supervision for the ensuing month, such deposit preferably being in the form of a certified check, payable to the order of Treasurer of the United States. Certified checks so deposited will be carried in a special deposit account (guaranty for inspection expenses) and upon completion of the work under the permit the funds will be returned to the permittee provided he has paid the actual cost of inspection.

(3) On completion of work under a permit, and the payment of expenses by the permittee without protest, the account will be closed, and outstanding deposits returned to the permittee. If the account is protested by the permittee, it will be referred to the division engineer for approval before it is closed and before any deposits are returned to the permittee.

(e) Where the unauthorized activity is determined not to be in the public interest, the notification of the denial of the permit will prescribe any corrective actions to be taken in connection with the work already accomplished, including restoration of those areas subject to denial, and establish a reasonable period of time for the applicant to complete such actions. The district engineer, after denial of the permit, will again consider whether to recommend civil and/or criminal action in accordance with § 326.4 of this Part.

(f) If the applicant declines to accept the proposed permit conditions, or fails to take corrective action prescribed in the notification of denial, or if the district engineer recommends legal action after denying the permit, the matter will be referred to the Chief of Engineers, Attn.: DAEN-CCK, with recommendations for appropriate action.

(g) Division and District Engineers are authorized and encouraged to develop joint surveillance and inspection procedures with other Federal, state, and local agencies with similar regulatory responsibilities and with other Federal, state and local agencies having special interest or expertise in the Corps regulatory program. However, any decision to initiate legal action or to require any restoration or other remedial work under Corps of Engineers authority remains the independent responsibility of the Division or district engineer.

PART 327—PUBLIC HEARINGS

Sec.
327.1 Purpose.
327.2 Applicability.
327.3 Definitions.
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327.5 Presiding officer.
327.6 Legal adviser.
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327.8 Conduct of hearings.
327.9 Filing of transcript of the public hearing.
327.10 Powers of the presiding officer.
327.11 Public notice.

Authority: 33 U.S.C. 1344; 33 U.S.C. 1413

§ 327.1 Purpose.

This regulation prescribes the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the evaluation of a proposed Department of the Army permit action or Federal project as defined in § 327.3 of this Part below including those held pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended (33 U.S.C. 1413).

§ 327.2 Applicability.

This regulation is applicable to all divisions and districts responsible for the conduct of public hearings.

§ 327.3 Definitions.

(a) Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed Department of the Army permit action, or Federal project, and which affords to the public the opportunity to present their views, opinions, and information on such permit actions or Federal projects.

(b) Permit action, as used herein means the evaluation of and decision on an application for a permit pursuant to Section 9 or 10 of the River and Harbor Act of 1899, Section 404 of the Clean Water Act, or Section 103 of the MPRSA, as amended, or the modification or revocation of any Department of the Army permit (see 33 CFR 325.7).

(c) Federal project means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to Section 404 of the Clean Water Act, or Section 103 of the MPRSA. See 33 CFR 209.145. (This regulation supersedes all references to public meetings in 33 CFR 209.145).

§ 327.4 General policies.

(a) A public hearing will be held in connection with the consideration of a Department of the Army permit application, or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project. In addition, a public hearing may be held when it is proposed to modify or revoke a permit. (See 33 CFR 325.7).

(b) Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a Department of the Army permit application or on a Federal project, that a public hearing be held to consider the material matters in issue in the permit application or Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, he shall promptly set a time and place for the public hearing and give due notice thereof, as prescribed in § 327.11 of this Part. Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing, and communicate his reasons therefor to all requesting parties.

(c) In case of doubt, a public hearing shall be held. HQDA has the discretionary power to require hearings in any case.

(d) In fixing the time and place for a hearing, the convenience and necessity of the interested public will be duly considered.

§ 327.5 Presiding officer.

(a) The district engineer, in whose district a matter arises, shall normally serve as the Presiding Officer. When the district engineer is unable to serve, he

may designate the deputy district engineer or other qualified person as such Presiding Officer. In cases of unusual interest, the Chief of Engineers or the Division Engineer may appoint such person as he deems appropriate to serve as the Presiding Officer.

(b) The Presiding Officer shall include in the administrative record of the permit action the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to or in support of the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The administrative record shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.

§ 327.6 Legal adviser.

At each public hearing, the district counsel or his designee may serve as legal advisor to the presiding officer. In appropriate circumstances, the district engineer may waive the requirement for a legal advisor to be present.

§ 327.7 Representation.

At the public hearing, any person may appear on his own behalf, or may be represented by counsel, or by other representatives.

§ 327.8 Conduct of hearings.

(a) The presiding officer shall make an opening statement outlining the purpose of the hearing and prescribing the general procedures to be followed.

(b) Hearings shall be conducted by the presiding officer in an orderly but expeditious manner. Any person shall be permitted to submit oral or written statements concerning the subject matter of the hearing, to call witnesses who may present oral or written statements, and to present recommendations as to an appropriate decision. Any person may present written statements for the hearing record prior to the time the hearing record is closed to public submissions, and may present proposed findings and recommendations. The presiding officer shall afford participants a reasonable opportunity for rebuttal.

(c) The presiding officer shall have discretion to establish reasonable limits upon the time allowed for statements of witnesses, for arguments of parties or their counsel or representatives, and upon the number of rebuttals.

(d) Cross-examination of witnesses shall not be permitted.

(e) All public hearings shall be reported verbatim. Copies of the transcripts of prceedings may be purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate district engineer.

(f) All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the presiding officer for reasons of redundancy, be received in evidence and shall constitute a part of the record.

(g) The pesiding officer shall allow a period of not less than 10 days after the close of the public hearing for submission of written comments.

(h) In appropriate cases, the district engineer may participate in joint public hearings with other Federal or state agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or state agency allows a cross-examination in its public hearing, the district engineer may still participate in the joint public hearing but shall not require cross-examination as a part of his participation.

§ 327.9 Filing of transcript of the public hearing.

Where the presiding officer is the initial action authority, the transcript of the public hearing, together with all evidence introduced at the public hearing, shall be made a part of the administrative record of the permit action or Federal project. The initial action authority shall fully consider the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as presiding officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the presiding officer and the transcript of the public hearing and evidence submitted thereat shall in such cases be fully considered by the initial action authority in his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Authority of the presiding officer.

Presiding officers shall have the following authority:

(a) To regulate the course of the hearing including the order of all sessions and the scheduling thereof, after any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and published in newspapers of general circulation.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 328 [RESERVED]

PART 329—DEFINITION OF NAVIGATION WATERS OF THE UNITED STATES

Sec.

329.1 Purpose.
329.2 Applicability.
329.3 General policies.
329.4 General definitions.
329.5 General scope of determination.
329.6 Interstate or foreign commerce.
329.7 Intrastate or interstate nature of waterway.
329.8 Improved or natural conditions of the waterbody.
329.9 Time at which commerce exists or determination is made.
329.10 Existence of obstructions.
329.11 Geographic and jurisdiction limits of rivers and lakes.
329.12 Geographic and jurisdictional limits of oceanic and tidal waters.
329.13 Georgraphic limits: Shifting boundaries.
329.14 Determination of navigability.
329.15 Inquiries regarding determinations.
329.16 Use and maintenance of lists of determinations.

Authority: 33 U.S.C. 401 et seq.

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigible waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Part 323.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States"; or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by the Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of commerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this Part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.* (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning areas. (See § 329.12(b) of this Part.)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to tranport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing imporvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" imporvements may potentially be made. The improvements need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward.

The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this Part retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and connot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" or commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation;' the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

(a) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the coast line. Wider zones of three leagues (nine nautical miles) are recognized off the coast of Texas and the Gulf coast of Florida and for other special regulatory powers such as those exercised over the outer continental shelf.

(1) *Coast line defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the coast line from which the distance of three geographic miles is measured. The line has significance for both domestic and international law (in which it is termed the "baseline"), and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the line may have to be drawn to seaward of such bodies.

(2) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§329.13 Geographic limits: Shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable

water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) *Effect on determinations.* Although conclusive determinations of navigability can be made only by Federal Courts, those made by Federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, District personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the Division Engineer, and will be based on a report of findings prepared at the District level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the District Engineer, accompanied by an opinion of the District Counsel, and forwarded to the Division Engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

(c) *Suggested format of report of findings.* (1) Name of waterbody:

(2) Tributary to:

(3) Physical characteristics:

(i) Type: (river, bay, slough, estuary, etc.)

(ii) Length:

(iii) Approximate discharge volumes: Maximum, Minimum, Mean.

(iv) Fall per mile:

(v) Extent of tidal influence:

(vi) Range between ordinary high and ordinary low water:

(vii) Description of improvements to navigation not listed in paragraph (c)(5) of this section:

(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interestate commerce:

(5) Authorized projects:

(i) Nature, condition and location of any improvements made under projects authorized by Congress:

(ii) Description of projects authorized but not constructed:

(iii) List of known survey documents or reports describing the waterbody:

(6) Past or present interstate commerce:

(i) General types, extent, and period in time:

(ii) Documentation if necessary:

(7) Potential use for interstate commerce, if applicable:

(i) If in natural condition:

(ii) If improved:

(8) Nature of jurisdiction known to have been exercised by Federal agencies if any:

(9) State or Federal court decisions relating to navigability of the waterbody, if any:

(10) Remarks:

(11) Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

(a) Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the Division Engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the Division Engineer. If a need develops for an emergency determination, District Engineers may act in reliance on a finding prepared as in § 329.14 of this part. The report of findings should then be forwarded to the Division Engineer on an expedited basis.

(b) Where determinations have been made by the Division Engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

> This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that ———— (River) (Bay) (Lake, etc.) is a navigable water of the United States from ———— to ————. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or (2) if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each District office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the Division Engineer; changes are not considered final until a determination has been made by the Division Engineer.

PART 330—NATIONWIDE PERMITS

Sec.
330.1 General.
330.2 Definitions.
330.3 Nationwide permits for activities occuring before certain dates.
330.4 Nationwide permits for discharges into certain waters.
330.5 Nationwide permits for specific activities.
330.6 Management practices.
330.7 Discretionary authority.
330.8 Expiration of nationwide permits.

Authority: 33 U.S.C. 403; 33 U.S.C. 1344.

§ 330.1 General.

The purpose of this regulation is to describe the Department of the Army's nationwide permit program and to list all current nationwide permits which have been issued by publication herein. The two types of general permits are referred to as "nationwide permits" and "regional permits." A nationwide permit is a form of general permit which authorizes a category of activities throughout the nation. The authority for general permits to be issued by district engineers on a regional basis is contained in 33 CFR Part 325. Copies of regional permits can be obtained from the appropriate district engineer. Nationwide permits are designed to allow the work to occur with little, if any, delay or paperwork. However, the nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Just because a condition cannot be met does not necessarily mean the activity cannot be authorized but rather that the activity will have to be authorized by an individual or regional permit. Additionally, division engineers have the discretion, under situations and procedures described herein, to override the nationwide permit coverage and require an individual or regional permit. The nationwide permits are issued to satisfy the requirements of both Section 10 of the River and Harbor Act of 1899

and Section 404 of the Clean Water Act unless otherwise stated. These nationwide permits apply only to Department of the Army regulatory programs (other Federal agency, state and local authorizations may be required for the activity).

§ 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321–329 are applicable to the terms used in this part.

(b) Discretionary authority means the authority delegated to division engineers in § 330.7 of this Part to override provisions of nationwide permits to add regional conditions or to require individual permit applications.

§ 330.3 Nationwide permits for activities occurring before certain dates.

The following activities are permitted by a nationwide permit which was issued on 19 July 1977 and need not be further permitted:

(a) Discharges of dredged or fill material in waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended Section 404 jurisdiction to *all* waters of the United States. These phase-in dates are: after July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States.

(b) Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer was not asserting jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation.

§ 330.4 Nationwide permits for discharges into certain waters.

(a) *Authorized discharges.* Discharges of dredge or fill material into the following waters of the United States are hereby permitted provided the conditions listed in paragraph (b) of this section below are met:

(1) Non-tidal rivers, streams and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.[1]

(2) Other non-tidal waters of the United States (see 33 CFR 323.2(a)(3)) that are not part of a surface tributary system to interstate waters or navigable waters of the United States.[1]

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That the discharge will not be located in the proximity of a public water supply intake;

(2) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species. In the case of Federal agencies, it is the agencies' responsibility to review its activities to determine if the action "may affect" any listed species or critical habitat. If so, the Federal agency must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service;

(3) That the discharge will consist of suitable material free from toxic pollutants in toxic amounts;

(4) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution;

(5) That the discharge will not occur in a component of the National Wild and Scenic River System.

(6) That the best management practices listed in § 330.6 of this Part should be followed to the maximum extent practicable.

§ 330.5 Nationwide permits for specific activities.

(a) *Authorized activities.* The following activities are hereby permitted provided the conditions specified in this paragraph and listed in paragraph (b) of this section are met:

(1) The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 66, Subchapter C).

(2) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.4(g)).

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill or of any currently serviceable structure or fill constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation[2] from the plans of the original structure or fill, and further provided that the structure or fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Maintenance dredging is not authorized by this nationwide permit.

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, clam and oyster digging.

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures.

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes.

(7) Outfall structures and associated intake structures[3] where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the individual and cumulative adverse environmental effects of the structure itself are minimal.

(8) Structures for the exploration, production, and transport of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Bureau of Land Management, provided those structures are not placed within the limits of any designated shipping safety fairway or traffic separation scheme (where such limits have not been designated or where changes are anticipated, District Engineers will consider recommending the discretionary authority provided by § 330.7 of this Part), and further subject to the provisions of the fairway regulations in 33 CFR 209.135.

(9) Structures placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established by the US Coast Guard.

(10) Non-commercial, single-boat, mooring buoys.

(11) Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 30 days after its use has been

[1] The State of Wisconsin has denied water quality certification pursuant to Section 401 of the Clean Water Act for certain waters within these two Nationwide Permit Categories. Discharges of dredged or fill material into those specified waters are not authorized under these two nationwide permits. A list of the specific waters may be obtained from the St. Paul District Engineer, 1135 U.S. Post Office & Customhouse, St. Paul, MN 55101.

[2] Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted.

[3] Intake structures per se are not included—only those directly associated with an outfall structure are covered by this nationwide permit.

discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually.

(12) Discharge of material for backfill or bedding for utility lines including outfall and intake structures provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line and outfall and intake structures will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322. See also paragraph (a)(7) of this section.)

(13) Bank stabilization activities provided:

(i) The bank stabilization activity is less than 500 feet in length;

(ii) The activity is necessary for erosion prevention;

(iii) The activity is limited to less than an average of one cubic yard per running foot placed along the bank within waters of the United States;

(iv) No material is placed in excess of the minimum needed for erosion protection;

(v) No material is placed in any wetland area;

(vi) No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

(vii) Only clean material free of waste metal products, organic materials, unsightly debris, etc. is used; and

(viii) The activity is a single and complete project.

(14) Minor road crossing fills including all attendant features both temporary and permanent that are part of a single and complete project for crossing of a non-tidal waterbody, provided that the crossing is culverted, bridged or otherwise designed to prevent the restriction of and to withstand expected high flows [4] and provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing will require a permit from the US Coast Guard if located in navigable waters of the United States (see 33 U.S.C. 301). Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4).

(15) Fill placed incidental to the construction of bridges across navigable waters of the United States including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such fill has been authorized by the US Coast Guard under Section 9 of the River and Harbor Act of 1899 as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit.

(16) Return water [5] from a contained dredged material disposal area provided the State has issued a certification under Section 401 of the Clean Water Act (see 33 CFR 325.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States.

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Department of Energy under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Department of Energy (see 18 CFR 4.61); and the individual and cumulative adverse effects on the environment are minimal.

(18) Discharges of dredged or fill material into waters of the United States that do not exceed ten cubic yards as part of a single and complete project provided no material is placed in wetlands [6] [7].

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project.[6]

(20) Structures, work and discharges for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action.

(21) Structures, work, and discharges associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal.

(22) Minor work or temporary structures required for the removal of wrecked, abandoned, or disabled vessels or the removal of obstructions to navigation.

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the CEQ Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment and the Office of the Chief of Engineers (ATTN: DAEN-CWO-N) has been furnished notice of the agency or department's application for the categorical exclusion and concurs with that determination.[7]

(24) Any activity permitted by a state administering its own permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)-(1) shall be permitted pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. Part 403). Those activities which do not involve a Section 404 state permit are not included in this nationwide permit but many will be exempted by Sec. 154 of Pub. L. 94-587. (See 33 CFR 322.2(a)(2)).

(25) Discharge of concrete into tightly

[4] District Engineers are authorized, where regional conditions indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit.

[5] The return water or runoff from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(j) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This nationwide permit satisfies the technical requirement for a Section 404 for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures.

[6] These nationwide permits are designed for very minor dredge and fill activities such as the removal of a small shoal in a boat slip; they cannot be used for piecemeal dredge and fill activities.

[7] The State of Wisconsin has denied water quality certifications pursuant to Section 401 of the Clean Water Act for these two nationwide permits. Consequently, the permits do not apply in Wisconsin.

sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction.

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That any discharge of dredged or fill material will not occur in the proximity of a public water supply intake;

(2) That any discharge of dredged or fill material will not occur in areas of concentrated shellfish production unless the discharge is directly related to a shellfish harvesting activity authorized by paragraph (a)(4) of this section.

(3) That the activity will not jeopardize a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species. In the case of Federal agencies, it is the agencies' responsibility to review its activities to determine if the action "may affect" any listed species or critical habitat. If so, the Federal agency must consult with the Fish and Wildlife Service and/or National Marine Fisheries Service;

(4) That the activity will not significantly disrupt the movement of those species of aquatic life indigenous to the waterbody (unless the primary purpose of the fill is to impound water);

(5) That any discharge of dredged or fill material will consist of suitable material free from toxic pollutants (See Section 307 of Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized will be properly maintained;

(7) That the activity will not occur in a component of the National Wild and Scenic River System; and

(8) That the activity will not cause an unacceptable interference with navigation.

(9) That the best management practices listed in § 330.6 of this Part should be followed to the maximum extent practicable.

§ 330.6 Management practices.

(a) In addition to the conditions specified in §§ 330.4 and 330.5 of this Part, the following management practices should be followed, to the maximum extent practicable, in the discharge of dredged or fill material under nationwide permits in order to minimize the adverse effects of these discharges on the aquatic environment. Failure to comply with these practices may be cause for the district engineer to recommend or the division engineer to take discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.7 of this Part.

(1) Discharges of dredged or fill material into waters of the United States shall be avoided or minimized through the use of other practical alternatives.

(2) Discharges in spawning areas during spawning seasons shall be avoided.

(3) Discharges shall not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

(4) If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow, shall be minimized.

(5) Discharge in wetlands areas shall be avoided.

(6) Heavy equipment working in wetlands shall be placed on mats.

(7) Discharges into breeding areas for migratory waterfowl shall be avoided.

(8) All temporary fills shall be removed in their entirety.

§ 330.7 Discretionary Authority.

Division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to § 404(b)(1). (40 CFR Part 230)

(a) *Regional conditions.* Division engineers are authorized to modify nationwide permits by adding conditions applicable to certain activities or specific geographic areas within their divisions. In developing regional conditions, division and district engineers will follow standard permit processing procedures as prescribed in 33 CFR Part 325 applying the evaluation criteria of 33 CFR Part 320 and appropriate parts of 33 CFR Parts 321, 322, 323, and 324. A copy of the Statement of Findings will be forwarded to the Office of the Chief of Engineers, ATTN: DAEN-CWO-N. Division and district engineers will take appropriate measures to inform the public at large of the additional conditions.

(b) *Individual permits.* In nationwide permit cases where additional regional conditioning may not be sufficient or where there is not sufficient time to develop regional conditions under paragraph (a) of this section, the division engineer may require individual permit applications on a case-by-case basis. Where time is of the essence, the district engineer may telephonically recommend that the division engineer assert discretionary authority to require an individual permit application for a specific activity. If the division engineer concurs, he may verbally authorize the district engineer to implement that authority. Both actions will be followed by written confirmation with copy to the Chief of Engineers (DAEN-CWO-N). Additionally, after notice and opportunity for public hearing, division engineers may recommend to the Chief of Engineers that individual permit applications be required for categories of activities, or in a specific geographic area. The division engineer will announce the decision to persons affected by the action. The district engineer will then regulate the activity or activities by processing an application(s) for individual permit(s) pursuant to 33 CFR Part 325.

(c) Discretionary authority which has been exercised under nationwide permits issued on 19 July 1977 expires four months from the effective date of this regulation. Such authority may be extended or reinstated after appropriate procedures of this regulation and 33 CFR Parts 320 through 325 have been followed.

§ 330.8 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits at least every five years. Based on this review, which will include public notice and opportunity for public hearing through publication in the **Federal Register**, he will either modify, reissue (extend) or revoke the permits. If a nationwide permit is not modified or reissued within five years of publication in the **Federal Register**, it automatically expires and becomes null and void.

[FR Doc. 82-19658 Filed 7-21-82; 8:45 am]

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APPENDIX B

U.S. ENVIRONMENTAL PROTECTION AGENCY REGULATIONS

federal register

Wednesday
December 24, 1980

Part IV

Environmental Protection Agency

Guidelines for Specification of Disposal Sites for Dredged or Fill Material

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 230

[WH-FRL 1647-7]

Guidelines for Specification of Disposal Sites for Dredged or Fill Material

AGENCY: Environmental Protection Agency.

ACTION: Rule.

SUMMARY: The 404(b)(1) Guidelines are the substantive criteria used in evaluating discharges of dredged or fill material under section 404 of the Clean Water Act. These Guidelines revise and clarify the September 5, 1975 Interim final Guidelines regarding discharge of dredged or fill material into waters of the United States in order to:

(1) Reflect the 1977 Amendments of Section 404 of the Clean Water Act (CWA);

(2) Correct inadequacies in the interim final Guidelines by filling gaps in explanations of unacceptable adverse impacts on aquatic ecosystems and by requiring documentation of compliance with the Guidelines; and

(3) Produce a final rulemaking document.

EFFECTIVE DATE: These Guidelines will apply to all 404 permit decisions made after March 23, 1981. In the case of civil works projects of the United States Army Corps of Engineers involving the discharge of dredged or fill material for which there is no permit application or permit as such, these Guidelines will apply to all projects on which construction or dredging contracts are issued, or on which dredging is initiated for Corps operations not performed under contract, after October 1, 1981. In the case of Federal construction projects meeting the criteria in section 404(r), these Guidelines will apply to all projects for which a final environmental impact statement is filed with EPA after April 1, 1981.

FOR FURTHER INFORMATION CONTACT: Joseph Krivak, Director, Criteria and Standards Division (WH-585), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, telephone (202) 755-0100.

SUPPLEMENTARY INFORMATION:

Background

The section 404 program for the evaluation of permits for the discharge of dredged or fill material was originally enacted as part of the Federal Water Pollution Control Amendments of 1972. The section authorized the Secretary of the Army acting through the Chief of Engineers to issue permits specifying disposal sites in accordance with the section 404(b)(1) Guidelines. Section 404(b)(2) allowed the Secretary to issue permits otherwise prohibited by the Guidelines, based on consideration of the economics of anchorage and navigation. Section 404(c) authorized the Administrator of the Environmental Protection Agency to prohibit or withdraw the specification of a site, upon a determination that use of the site would have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Under section 404(b)(1), the Guidelines are to be based on criteria comparable to those in section 403(c) of the Act, for the territorial seas, contiguous zone, and oceans. Unlike 403(c), 404 applies to all waters of the United States. Characteristics of waters of the United States vary greatly, both from region to region and within a region. There is a wide range of size, flow, substrate, water quality, and use. In addition, the materials to be discharged, the methods of discharge, and the activities associated with the discharge also vary widely. These and other variations make it unrealistic at this time to arrive at numerical criteria or standards for toxic or hazardous substances to be applied on a nationwide basis. The susceptibility of the aquatic ecosystem to degradation by purely physical placement of dredged or fill material further complicates the problem of arriving at nationwide standards. As a result, the Guidelines concentrate on specifying the tools to be used in evaluating and testing the impact of dredged or fill material discharges on waters of the United States rather than on simply listing numerical pass-fail points.

The first section 404(b)(1) Guidelines were promulgated by the Administrator in interim final form on September 5, 1975, after consultation with the Corps of Engineers. Since promulgation of the interim final Guidelines, the Act has been substantially amended. The Clean Water Act of 1977 established a procedure for transferring certain permitting authorities to the states, exempted certain discharges from any section 404 permit requirements, and gave the Corps enforcement authority. These amendements also increased the importance of the section 404(b)(1) Guidelines, since some of the exemptions are based on alternative ways of applying the Guidelines. These changes, plus the experience of EPA and the Corps in working with the interim final Guidelines, have prompted a revision of the Guidelines. The proposed revision attempted to reorganize the Guidelines, to make it clearer what had to be considered in evaluating a discharge and what weight should be given to such considerations. The proposed revision also tightened up the requirements for the permitting authority's documentation of the application of the Guidelines.

After extensive consultation with the Corps, the proposed revisions were put out for public comment (44 FR 54222, September 18, 1979). EPA has reviewed, and, after additional consultation with the Corps, revised the proposal in light of these comments. This preamble addresses the significant comments received, explains the changes made in the regulation, and attempts to clear up some misunderstandings which were revealed by the comments. Response to Significant Comments

Regulation Versus Guideline

A number of commenters objected to the proposed Guidelines on the grounds that they were too "regulatory." These commenters argued that the term "guidelines" which appears in section 404(b)(1) requires a document with less binding effect than a regulation. EPA disagrees. The Clean Water Act does not use the word "guideline" to distinguish advisory information from regulatory requirements. Section 404(b)(2) clearly demonstrates that Congress contemplated that discharges could be "prohibited" by the Guidelines. Section 403 (which is a model for the 404 (b)(1) Guidelines) also provides for "guidelines" which are clearly regulatory in nature. Consequently, we have not changed the regulation to make it simply advisory. Of course, as the regulation itself makes clear, a certain amount of flexibility is still intended. For example, while the ultimate conditions of compliance are "regulatory", the Guidelines allow some room for judgment in determining what must be done to arrive at a conclusion that those conditions have or have not been met. See, for example, § 230.6 and § 230.60, and introductory sentence in § 230.10.

Statutory Scheme and How the Guidelines Fit Into It

A number of commenters with objections appeared confused about EPA's role in the section 404 program. Some wondered why EPA was issuing Guidelines since EPA could stop an unacceptable discharge under section 404(c). Others were uncertain how the

Guidelines related to other section 404 regulations.

The Clean Water Act prohibits the discharge of dredged or fill material except in compliance with section 404. Section 404 sets up a procedure for issuing permits specifying discharge sites. Certain discharges (e.g. emergency repairs, certain farm and forest roads, and other discharges identified in sections 404(f) and (r)) are exempted from the permit requirements. The permitting authority (either the Corps of Engineers or an approved State program) approves discharges at particular sites through application of the section 404(b)(1) Guidelines, which are the substantive criteria for dredged and fill material discharges under the Clean Water Act. The Corps also conducts a Public Interest Review, which ensures that the discharge will comply with the applicable requirements of other statutes and be in the public interest. The Corps or the State, as the case may be, must provide an opportunity for a public hearing before making its decision whether to approve or deny. If the Corps concludes that the discharge does not comply with the Guidelines, it may still issue the permit under 404(b)(2) if it concludes that the economics of navigation and anchorage warrant. Section 404(b)(2) gives the Secretary a limited authority to issue permits prohibited by the Guidelines; it does not, as some commenters suggested, require the Guidelines to consider the economics of navigation and anchorage. Conversely, because of 404(b)(2), the fact that a discharge of dredged material does not comply with the Guidelines does *not* mean that it can never be permitted. The Act recognizes the concerns of ports in section 404(b)(2), not 404(b)(1). Many readers apparently misunderstood this point.

EPA's role under section 404 is several-fold. First, EPA has the responsibility for developing the 404(b)(1) Guidelines in conjunction with the Corps. Second, EPA reviews permit applications and gives its comments (if any) to the permitting authority. The Corps may issue a permit even if EPA comments adversely, after consultation takes place. In the case of state programs, the State director may not issue a permit over EPA's unresolved objection. Third, EPA has the responsibility for approving and overseeing State 404 programs. In addition, EPA has enforcement responsibilities under section 309. Finally, under either the Federal or State program, the Administrator may also prohibit the specification of a discharge site, or restrict its use, by following the procedures set out in section 404(c), if he determines that discharge would have an unacceptable adverse effect on fish and shellfish areas (including spawning and breeding areas), municipal water supplies, wildlife or recreation areas. He may do so in advance of a planned discharge or while a permit application is being evaluated or even, in unusual circumstances, after issuance of a permit. (See preamble to 40 CFR Part 231, 44 FR 58076, October 9, 1979.) If the Administrator uses 404(c), he may block the issuance of a permit by the Corps or a State 404 program. Where the Administrator has exercised his section 404(c) authority to prohibit, withhold, or restrict the specification of a site for disposal, his action may not be overridden under section 404(b)(2). The fact that EPA has 404(c) authority does not lessen EPA's responsibility for developing the 404(b)(1) Guidelines for use by the permitting authority. Indeed, if the Guidelines are properly applied, EPA will rarely have to use its 404(c) veto.

The Clean Water Act provides for several uses of the Guidelines in addition to the individual permit application review process described above. For example, the Corps or an approved state may issue General permits for a category of similar activities where it determines, on the basis of the 404(b)(1) Guidelines, that the activities will cause only minimal adverse environmental effects both individually and cumulatively (Section 404(e) and (g)(1)). In addition, some of the exemptions from the permit requirements involve application of the Guidelines. Section 404(r) exempts discharges associated with Federal construction projects where, among other things, there is an Environmental Impact Statement which considers the 404(b)(1) Guidelines. Section 404(f)(1)(F) exempts discharges covered by best management practices (BMP's) approved under section 208(b)(4)(B) and (c), the approval of which is based in part on consistency with the 404(b)(1) Guidelines.

Several commenters asked for a statement on the applicability of the Guidelines to enforcement procedures. Under sections 309, 404(h)(1)(G), and 404(s), EPA, approved States, and the Corps all play a role in enforcing the section 404 permit requirements. Enforcement actions are appropriate when someone is discharging dredged or fill material without a required permit, or violates the terms and conditions of a permit. The Guidelines as such are generally irrelevant to a determination of either kind of violation, although they may represent the basis for particular permit conditions which are violated. Under the Corps' procedural regulations, the Corps may accept an application for an after-the-fact permit, in lieu of immediately commencing an enforcement action. Such after-the-fact permits may be issued only if they comply with the 404(b)(1) Guidelines as well as other requirements set out in the Corps' regulations. Criteria and procedures for exercising the various enforcement options are outside the scope of the section 404(b)(1) Guidelines.

Some commenters suggested that we either include specific permit processing procedures or that we cross-reference regulations containing them. Such procedures are described in 33 CFR Part 320–327 (Corps' procedures) and in 40 CFR Part 122–124 (minimum State procedures). When specific State 404 programs are approved, their regulations should also be consulted.

How Future Changes in the Testing Provision Relate to Promulgation of This Final Rule

The September 18, 1979, proposal contained testing provisions which were essentially the same as those in the Interim Final regulations. The Preamble to that proposal explained that it was our intention to propose changes in the testing provisions, but that a proposal was not yet ready. Consequently, while we have been revising the rest of the Guidelines, we have also been working on a proposal for reorganizing and updating the testing provisions. Now that we have finalized the rest of the Guidelines, two options are available to us. First, we could delay issuing any final revisions to our 1979 proposal until we could propose a revised testing package, consider comments on it, and finalize the testing provisions. We could then put together the Guidelines and the revised testing section in one final regulation. The 1975 interim final Guidelines would apply in their entirety until then. Second, we could publish the final Guidelines (with the 1975 testing provisions) and simultaneously propose changes to the testing provision. It is our present belief that proposed changes to the testing provision would not affect the rest of the Guidelines, but the public would be allowed to comment on any inconsistencies it saw between the rest of the Guidelines and the testing proposal. Then, when the comments to the testing proposal had been considered, we would issue a new final regulation incorporating both the previously promulgated final Guidelines and the final revised testing provision.

We have selected the second option because this approach ensures that needed improvements to the Guidelines are made effective at the earliest possible date, it gives the public ample opportunity to comment on the revised testing section, and it maintains the 1975 testing requirements in effect during the interim which would be the case in any event.

Guideline Organization

Many readers objected to the length and complexity of the Guidelines. We have substantially reorganized the regulation to eliminate duplicative material and to provide a more logical sequence. These changes should make it easier for applicants to understand the criteria and for State and Corps permit evaluators and the Administrator to apply the criteria. Throughout the document, we have also made numerous minor language changes to improve the clarity of the regulations, often at the suggestion of commenters.

Following general introductory material and the actual compliance requirements, the regulations are now organized to more closely follow the steps the permitting authority will take in arriving at his ultimate decision on compliance with the Guidelines.

By reorganizing the Guidelines in this fashion, we were also able to identify and eliminate duplicative material. For example, the proposed Guidelines listed ways to minimize impacts in many separate sections. Since there was substantial overlap in the specific methods suggested in those sections, we consolidated them into new Subpart H. Other individual sections have been made more concise. In addition, we have decreased the number of *comments*, moving them to the Preamble or making them part of the Regulation, as appropriate.

General Permits

When issued after proper consideration of the Guidelines, General permits are a useful tool in protecting the environment with a minimum of red tape and delay. We expect that their use will expand in the future.

Some commenters were confused about how General permits work. A General permit will be issued only after the permitting authority has applied the Guidelines to the class of discharges to be covered by the permit. Therefore, there is no need to repeat the process at the time a particular discharge covered by the permit takes place. Of course, under both the Corps' regulations and EPA's regulations for State programs, the permitting authority may suspend General permits or require individual permits where environmental concerns make it appropriate. For example, cumulative impacts may turn out to be more serious than predicted. This regulation is not intended to establish the *procedures* for issuance of General permits. That is the responsibility of the permitting authority in accordance with the requirements of section 404.

Burden of Proof

A number of commenters objected to the presumption in the regulations in general, and in proposed § 230.1(c) in particular, that dredged or fill material should not be discharged unless it is demonstrated that the planned discharge meets the Guidelines. These commenters thought that it was unfair and inconsistent with section 404(c) of the Act.

We disagree with these objections, and have retained the presumption against discharge and the existing burden of proof. However, the section has been rewritten for clarity.

The Clean Water Act itself declares a national goal to be the elimination of the discharge of pollutants into the navigable waters (section 101(a)(1)). This goal is implemented by section 301, which states that such discharges are unlawful except in compliance with, *inter alia*, section 404. Section 404 in turn authorizes the permitting authority to allow discharges of dredged or fill material if they comply with the 404(b)(1) Guidelines. The statutory scheme makes it clear that discharges shall not take place until they have been found acceptable. Of course, this finding may be made through the General permit process and the statutory exemptions as well as through individual permits.

The commenters who argued that section 404(c) shifts the usual burden to the EPA Administrator misunderstood the relationship between section 404(c) and the permitting process. The Administrator's authority to prohibit or restrict a site under section 404(c) operates independently of the Secretary of the Army's permitting authority in 404(a). The Administrator may use 404(c) whether or not a permit application is pending. Conversely, the Secretary may deny a permit on the basis of the Guidelines, whether or not EPA initiates a 404(c) proceeding. If the Administrator uses his 404(c) "veto," then he does have the burden to justify his action, but that burden does not come into play until he begins a 404(c) proceeding (See 40 CFR Part 231).

Toxic Pollutants

Many commenters objected strenuously to the presumptions in the Guidelines that toxic pollutants on the section 307(a)(1) list are present in the aquatic environment unless demonstrated not to be, and that such pollutants are biologically available unless demonstrated otherwise. These commenters argued that rebutting these presumptions could involve individual testing for dozens of substances every time a discharge is proposed, imposing an onerous task.

The proposed regulation attempted to avoid unnecessary testing by providing that when the § 230.22(b) "reason to believe" process indicated that toxics were not present in the discharge material, no testing was required. On the other hand, contaminants other than toxics required testing if that same "reason to believe" process indicated they might be present in the discharge material. This is in fact a distinction without a difference. In practical application, toxic and non-toxic contaminants are treated the same; if either may be there, tests are performed to get the information for the determinations; if it is believed they are not present, no testing is done. Because the additional presumption for toxics did not actually serve a purpose, and because it was a possible source of confusion, we have eliminated it, and now treat "toxics" and other contaminants alike, under the "reason to believe test" (§ 230.60). We have provided in § 230.3 a definition of "contaminants" which encompasses the 307(a)(1) toxics.

Water Dependency

One of the provisions in the proposed Guidelines which received the most objections was the so-called "water dependency test" in the proposed § 230.10(e). This provision imposed an additional requirement on fills in wetlands associated with non-water dependent activities, namely a showing that the activity was "necessary." Many environmentalists objected to what they saw as a substantial weakening of the 1975 version of the water dependency test. Industry and development-oriented groups, on the other hand, objected to the "necessary" requirement because it was too subjective, and to the provision as a whole to the extent that it seemed designed to block discharges in wetlands automatically.

We have reviewed the water dependency test, its original purpose, and its relationship to the rest of the Guidelines in light of these comments. The original purpose, which many commenters commended, was to recognize the special values of wetlands and to avoid their unnecessary destruction, particularly when

practicable alternatives were available in non-aquatic areas to achieve the basic purposes of the proposal. We still support this goal, but we have changed the water-dependency test to better achieve it.

First, we agree with the comments from both sides that the "necessary" test imposed by the 1979 proposal is not likely to be workable in practice, and may spawn more disputes than it settles. However, if the "necessary" test is simply deleted, section 230.10(e) does not provide any special recognition of or protection for wetlands, and thus defeats its purpose. Furthermore, even if the "necessary" test were retained, the provision applies only to discharges of fill material, not discharges of dredged material, a distinction which lessens the effectiveness of the provision. Thus, we have decided, in accordance with the comments, that the proposal is unsatisfactory.

We have therefore decided to focus on, round out, and strengthen the approach of the so-called "water-dependency" provision of the 1975 regulation. We have rejected the suggestion that we simply go back to the 1975 language, in part because it would not mesh easily with the revised general provisions of the Guidelines. Instead, our revised "water dependency" provision creates a presumption that there are practicable alternatives to "non-water dependent" discharges proposed for special aquatic sites. "Non-water dependent" discharges are those associated with activities which do not require access or proximity to or siting within the special aquatic site to fulfill their basic purpose. An example is a fill to create a restaurant site, since restaurants do not need to be in wetlands to fulfill their basic purpose of feeding people. In the case of such activities, it is reasonable to assume there will generally be a practicable site available upland or in a less vulnerable part of the aquatic ecosystem. The mere fact that an alternative may cost somewhat more does not necessarily mean it is not practicable (see § 230.10(a)(2) and discussion below). Because the applicant may rebut the presumption through a clear showing in a given case, no unreasonable hardship should be worked. At the same time, this presumption should have the effect of forcing a hard look at the feasibility of using environmentally preferable sites. This presumption responds to the overwhelming number of commenters who urged us to retain a water dependency test to discourage avoidable discharges in wetlands.

In addition, the 1975 provision effectively created a special, irrebuttable presumption that alternatives to wetlands were always less damaging to the aquatic ecosystem. Because our experience and the comments indicate that this is not always the case, and because there could be substantial impacts on other elements of the environment and only minor impacts on wetlands, we have chosen instead to impose an explicit, but rebuttable, presumption that alternatives to discharges in special aquatic sites are less damaging to the aquatic ecosystem and are environmentally preferable. Of course, the general requirement that impacts on the aquatic ecosystem not be unacceptable also applies. The legislative history of the Clean Water Act, Executive Order 11990, and a large body of scientific information support this presumption.

Apart from the fact that it may be rebutted, this second presumption reincorporates the key elements of the 1975 provision. Moreover, it strengthens it because the recognition of the special environmental role of wetlands now applies to all discharges in special aquatic sites, whether of dredged or fill material, and whether or not water dependent. At the same time, this presumption, like the first one described above, retains sufficient flexibility to reflect the circumstances of unusual cases.

Consistent with the general burden of proof under these Guidelines, where an applicant proposes to discharge in a special aquatic site it is his responsibility to persuade the permitting authority that both of these presumptions have clearly been rebutted in order to pass the alternatives portion of these Guidelines.

Therefore, we believe that the new § 230.10(a)(3), which replaces proposed 230.10(e), will give special protection to wetlands and other special aquatic sites regardless of material discharged, allay industry's concerns about the "necessary" test, recognize the possibility of impacts on air and upland systems, and acknowledge the variability among aquatic sites and discharge activities.

Alternatives

Some commenters objected at length to the scope of alternatives which the Guidelines require to be considered, and to the requirement that a permit be denied unless the least harmful such alternative were selected. Others wrote to urge us to retain these requirements. In our judgment, a number of the objections were based on a misunderstanding of what the proposed alternatives analysis required. Therefore, we have decided to clarify the regulation, but have not changed its basic thrust.

Section 403(c) clearly requires that alternatives be considered, and provides the basic legal basis for our requirement. While the statutory provision leaves the Agency some discretion to decide *how* alternatives are to be considered, we believe that the policies and goals of the Act, as well as the other authorities cited in the Preamble to the proposed Guidelines, would be best served by the approach we have taken.

First, we emphasize that the only alternatives which must be considered are *practicable* alternatives. What is practicable depends on cost, technical, and logistic factors. We have changed the word "economic" to "cost". Our intent is to consider those alternatives which are reasonable in terms of the overall scope/cost of the proposed project. The term economic might be construed to include consideration of the applicant's financial standing, or investment, or market share, a cumbersome inquiry which is not necessarily material to the objectives of the Guidelines. We consider it implicit that, to be practicable, an alternative must be capable of achieving the basic purpose of the proposed activity. Nonetheless, we have made this explicit to allay widespread concern. Both "internal" and "external" alternatives, as described in the September 18, 1979 Preamble, must satisfy the practicable test. In order for an "external" alternative to be practicable, it must be reasonably available or obtainable. However, the mere fact of ownership or lack thereof, does not necessarily determine reasonable availability. Some readers were apparently confused by the Preamble to the Proposed Regulation, which referred to the fact the National Environmental Policy Act (NEPA) may require consideration of courses of action beyond the authority of the agency involved. We did not mean to suggest that the Guidelines were necessarily imposing such a requirement on private individuals but, rather, to suggest that what we were requiring was well within the alternatives analyses required by NEPA.

Second, once these practicable alternatives have been identified in this fashion, the permitting authority should consider whether any of them, including land disposal options, are less environmentally harmful than the proposed discharge project. Of course, where there is no significant or easily identifiable difference in impact, the

alternative need not be considered to have "less adverse" impact.

Several commenters questioned the legal basis for requiring the permitting authority to select the least damaging alternative. (The use of the term "select" may have been misleading. Strictly speaking, the permitting authority does not select anything; he denies the permit if the guidelines requirements have not been complied with.) As mentioned above, the statute leaves to EPA's discretion the exact implementation of the alternative requirement in section 403 of the Act. In large part, the approach taken by these regulations is very similar to that taken by the recent section 403(c) regulations (45 FR 65942, October 3, 1980). There is one difference; the Guidelines always prohibit discharges where there is a practicable, less damaging alternative, while the section 403(c) regulations only apply this prohibition in some cases. This difference reflects the wide range of water systems subject to 404 and the extreme sensitivity of many of them to physical destruction. These waters form a priceless mosaic. Thus, if destruction of an area of waters of the United States may reasonably be avoided, it should be avoided. Of course, where a category of 404 discharges is so minimal in its effects that it has been placed under a general permit, there is no need to perform a case-by-case alternatives analysis. This feature corresponds, in a sense, to the category of discharges under section 403 for which no alternatives analysis is required.

Third, some commenters were concerned that the alternative consideration was unduly focused on water quality, and that a better alternative from a water quality standpoint might be less desirable from, say, an air quality point of view. This concern overlooks the explicit provision that the existence of an alternative which is less damaging to the aquatic ecosystem does not disqualify a discharge if that alternative has other significant adverse environmental consequences. This last provision gives the permitting authority an opportunity to take into account evidence of damage to other ecosystems in deciding whether there is a "better" alternative.

Fourth, a number of commenters were concerned that the Guidelines ensure coordination with planning processes under the Coastal Zone Management Act, § 208 of the CWA, and other programs. We agree that where an adequate alternatives analysis has already been developed, it would be wasteful not to incorporate it into the 404 process. New § 230.10(a)(5) makes it clear that where alternatives have been reviewed under another process, the permitting authority shall consider such analysis. However, if the prior analysis is not as complete as the alternatives analysis required under the Guidelines, he must supplement it as needed to determine whether the proposed discharge complies with the Guidelines. Section 230.10(a)(4) recognizes that the range of alternatives considered in NEPA documents will be sufficient for section 404 purposes, where the Corps is the permitting authority. (However, a greater level of detail may be needed in particular cases to be adequate for the 404(b)(1) Guidelines analysis.) This distinction between the Corps and State permitting authorities is based on the fact that it is the Corps' policy, in carrying out its own NEPA responsibilities, to supplement (or require a supplement to) a lead agency's environmental assessment or impact statement where such document does not contain sufficient information. State permitting agencies, on the other hand, are not subject to NEPA in this manner.

We have moved proposed § 230.10(a)(1) (iii), concerning "other particular volumes and concentrations of pollutants at other specific rates", from the list of alternatives in § 230.10 to Subpart H, Minimizing Adverse Effects, because it more properly belongs there.

Definitions (§ 230.3)

A number of the terms defined in § 230.3 are also defined in the Corps' regulations at 33 CFR 323.2, applicable to the Corps' regulatory program. The Corps has recently proposed some revisions to those regulations and expects to receive comments on the definitions. To ensure coordination of these two sets of regulations, we have decided to reserve the definitions of "discharge of dredged material," "discharge of fill material," "dredged material," and "fill material," which otherwise would have appeared at § 230.3 (f), (g), (j), and (l).

Although the term "waters of the United States" also appears in the Corps' regulations, we have retained a definition here, in view of the importance of this key jurisdictional term and the numerous comments received. The definition and the comments are explained below.

Until new definitions are published, directly or by reference to the Corps' revised regulations, users of these Guidelines should refer to the definitions in 33 CFR 323.2 (except in the case of state 404 programs, to which the definitions in 40 CFR § 122.3 apply.)

Waters of the United States: A number of commenters objected to the definition of "waters of the United States" because it was allegedly outside the scope of the Clean Water Act or of the Constitution or because it was not identical to the Corps' definition. We have retained the proposed definition with a few minor changes for clarity for several reasons. First, a number of courts have held that this basic definition of waters of the United States reasonably implements section 502(7) of the Clean Water Act, and that it is constitutional (e.g., *United States* v. *Byrd, 609 F.2d 1204, 7th Cir. 1979; Leslie Salt Company* v. *Froehlke,* 578 F.2d 742, 9th Cir. 1978). Second, we agree that it is preferable to have a uniform definition for waters of the United States, and for all regulations and programs under the CWA. We have decided to use the wording in the recent Consolidated Permit Regulations, 45 Fed. Reg. 33290, May 19, 1980, as the standard.*

Some commenters suggested that the reference in the definition to waters from which fish are taken to be sold in interstate commerce be expanded to include areas where such fish spawn. While we have not made this change because we wish to maintain consistency with the wording of the Consolidated Permit regulations, we do not intend to suggest that a spawning area may not have significance for commerce. The portion of the definition at issue lists major examples, not *all* the ways which commerce may be involved.

Some reviewers questioned the statement in proposed § 230.72(c) (now § 230.11(h)) that activities on fast land created by a discharge of dredged or fill material are considered to be in waters of the United States for purposes of these Guidelines. The proposed language was misleading and we have changed it to more accurately reflect our intent. When a portion of the Waters of the United States has been legally converted to fast land by a discharge of dredged or fill material, it does not remain waters of the United States subject to section 301(a). The discharge may be legal because it was authorized by a permit or because it was made before there was a permit requirement. In the case of an illegal discharge, the fast land may remain subject to the jurisdiction of the Act until the government determines not to seek restoration. However, in authorizing a

* The Consolidated Permit Regulations exclude certain waste treatment systems from waters of the United States. The exact terms of this exclusion are undergoing technical revisions and are expected to change shortly. For this reason, these Guidelines as published do not contain the exclusion as originally worded in the Consolidated Permit Regulations. When published, the corrected exclusion will apply to the Guidelines as well as the Consolidated Permit Regulations.

discharge which will create fast lands, the permitting authority should consider, in addition to the direct effects of the fill inself, the effects on the aquatic environment of any reasonably foreseeable activities to be conducted on that fast land.

Section 230.54 (proposed 230.41) deals with impacts on parks, national and historical monuments, national sea shores, wilderness areas, research sites, and similar preserves. Some readers were concerned that we intended the Guidelines to apply to activities in such preserves whether or not the activities took place in waters of the United States. We intended, and we think the context makes it clear, that the Guidelines apply only to the specification of discharge sites in the waters of the United States, as defined in § 230.3. We have included this section because the fact that a water of the United States may be located in one of these preserves is significant in evaluating the impacts of a discharge into that water.

Wetlands: Many wetlands are waters of the United States under the Clean Water Act. Wetlands are also the subject of Federal Executive Order No. 11990, and various Federal and State laws and regulations. A number of these other programs and laws have developed slightly different wetlands definitions, in part to accommodate or emphasize specialized needs. Some of these definitions include, not only wetlands as these Guidelines define them, but also mud flats and vegetated and unvegetated shallows. Under the Guidelines some of these other areas are grouped with wetlands as "Special Aquatic Sites" (Subpart E) and as such their values are given special recognition. (See discussion of Water Dependency above.) We agree with the comment that the National Inventory of Wetlands prepared by the U.S. Fish and Wildlife Service, while not necessarily exactly coinciding with the scope of waters of the United States under the Clean Water Act or wetlands under these regulations, may help avoid construction in wetlands, and be a useful long-term planning tool.

Various commenters objected to the definition of wetlands in the Guidelines as too broad or too vague. This proposed definition has been upheld by the courts as reasonable and consistent with the Clean Water Act, and is being retained in the final regulation. However, we do agree that vegetative guides and other background material may be helpful in applying the definition in the field. EPA and the Corps are pledged to work on joint research to aid in jurisdictional determinations. As we develop such materials, we will make them available to the public.

Other commenters suggested that we expand the list of examples in the second sentence of the wetland definition. While their suggested additions could legally be added, we have not done so. The list is one of examples only, and does not serve as a limitation on the basic definition. We are reluctant to start expanding the list, since there are many kinds of wetlands which could be included, and the list could become very unwieldy.

In addition, we wish to avoid the confusion which could result from listing as examples, not only areas which generally fit the wetland definitions, but also areas which may or not meet the definition depending on the particular circumstances of a given site. In sum, if an area meets the definition, it is a wetland for purposes of the Clean Water Act, whether or not it falls into one of the listed examples. Of course, more often than not, it will be one of the listed examples.

A few commenters cited alleged inconsistencies between the definition of wetlands in § 230.3 and § 230.42. While we see no inconsistency, we have shortened the latter section as part of our effort to eliminate unnecessary comments.

Unvegetated Shallows: One of the special aquatic areas listed in the proposal was "unvegetated shallows" (§ 230.44). Since special aquatic areas are subject to the presumptions in § 230.10(a)(3), it is important that they be clearly defined so that the permitting authority may readily know when to apply the presumptions. We were unable to develop, at this time, a definition for unvegetated shallows which was both easy to apply and not too inclusive or exclusive. Therefore, we have decided the wiser course is to delete unvegetated shallows from the special aquatic area classification. Of course, as waters of the United States, they are still subject to the rest of the Guidelines.

"Fill Material": We are temporarily reserving § 230.3(1). Both the proposed Guidelines and the proposed Consolidated Permit Regulations defined fill material as material discharged for the primary purpose of replacing an aquatic area with dryland or of changing the bottom elevation of a water body, reserving to the NPDES program discharges with the same effect which are primarily for the purpose of disposing of waste. Both proposals solicited comments on this distinction, referred to as the primary purpose test. On May 19, 1980, acting under a court-imposed deadline, EPA issued final Consolidated Permit Regulations while the 404(b)(1) Guidelines rulemaking was still pending. These Consolidated Permit Regulations contained a new definition of fill material which eliminated the primary purpose test and included as fill material all pollutants which have the effect of fill, that is, which replace part of the waters of the United States with dryland or which change the bottom elevation of a water body for any purpose. This new definition is similar to the one used before 1977.

During the section 404(b)(1) rulemaking, the Corps has raised certain questions about the implementation of such a definition. Because of the importance of making the Final Guidelines available without further delay, and because of our desire to cooperate with the Corps in resolving their concerns about fill material, we have decided to temporarily reserve § 230.3(1) pending further discussion. This action does not affect the effectiveness of the Consolidated Permit Regulations. Consequently, there is a discrepency between those regulations and the Corps' regulations, which still contain the old definition.

Therefore, to avoid any uncertainty from this situation, EPA wishes to make clear its enforcement policy for unpermitted discharges of solid waste. EPA has authority under section 309 of the CWA to issue administrative orders against violations of section 301. Unpermitted discharges of solid waste into waters of the United States violate section 301.

Under the present circumstances, EPA plans to issue solid waste administrative orders with two basic elements. First, the orders will require the violator to apply to the Corps of Engineers for a section 404 permit within a specified period of time. (The Corps has agreed to accept these applications and to hold them until it resolves its position on the definition of fill material.)

Second, the order will constrain further discharges by the violator. In extreme cases, an order may require that discharges cease immediately. However, because we recognize that there will be a lapse of time before decisions are made on this kind of permit application, these orders may expressly allow unpermitted discharges to continue subject to specific conditions set forth by EPA in the order. These conditions will be designed to avoid further environmental damage.

Of course, these orders will not influence the ultimate issuance or non-issuance of a permit or determine the conditions that may be specified in such a permit. Nor will such orders limit the

Administrator's authority under section 309(b) or the right of a citizen to bring suit against a violator under section 505 of the CWA.

Permitting Authority: We have used the new term "permitting authority," instead of "District Engineer," throughout these regulations, in recognition of the fact that under the 1977 amendments approved States may also issue permits.

Coastal Zone Management Plans

Several commenters were concerned about the relationship between section 404 and approved Coastal Zone Management (CZM) plans. Some expressed concern that the Guidelines might authorize a discharge prohibited by a CZM plan; others objected to the fact that the Guidelines might prohibit a discharge which was consistent with a CZM plan.

Under section 307(b) of the CZM Act, no Federal permits may be issued until the applicant furnishes a certification that the discharge is consistent with an approved CZM plan, if there is one, and the State concurs in the certification or waives review. Section 325.2(b)(2) of the Corps' regulation, which applies to all Federal 404 permits, implements this requirement for section 404. Because the Corps' regulations adequately address the CZM consistency requirement, we have not duplicated § 325.2(b)(2) in the Guidelines. Where a State issues State 404 permits, it may of course require consistency with its CZM plan under State law.

The second concern, that the 404 Guidelines might be stricter than a CZM plan, points out a possible problem with CZM plans, not with the Guidelines. Under 307(f) of CZMA, all CZM plans must provide for compliance with applicable requirements of the Clean Water Act. The Guidelines are one such requirement. Of course, to the extent that a CZM plan is general and area-wide, it may be impossible to include in its development the same project-specific consideration of impacts and alternatives required under the Guidelines. Nonetheless, it cannot authorize or mandate a discharge of dredged or fill material which fails to comply with the requirements of these Guidelines. Often CZM plans contain a requirement that all activities conducted under it meet the permit requirements of the Clean Water Act. In such a case, there could of course be no conflict between the CZM plan and the requirements of the Guidelines.

We agree with commenters who urge that delay and duplication of effort be avoided by consolidating alternatives studies required under different statutes, including the Coastal Zone Management Act. However, since some planning processes do not deal with specific projects, their consideration of alternatives may not be sufficient for the Guidelines. Where another alternative analysis is less complete than that contemplated under section 404, it may not be used to weaken the requirements of the Guidelines.

Advanced Identification of Dredged or Fill Material Disposal Sites

A large number of commenters objected to the way proposed § 230.70, new Subpart I, had been changed from the 1975 regulations. A few objected to the section itself. Most of the comments also revealed a misunderstanding about the significance of identifying an area. First, the fact that an area has been identified as unsuitable for a potential discharge site does not mean that someone cannot apply for and obtain a permit to discharge there as long as the Guidelines and other applicable requirements are satisified.* Conversely, the fact that an area has been identified as a potential site does not mean that a permit is unnecessary or that one will automatically be forthcoming. The intent of this section was to aid applicants by giving advance notice that they would have a relatively easy or difficult time qualifying for a permit to use particular areas. Such advance notice should facilitate applicant planning and shorten permit processing time.

Most of the objectors focused on EPA's "abandonment" of its "authority" to identify sites. While that "authority" is perhaps less "authoritative" than the commenters suggested (see above), we agree that there is no reason to decrease EPA's role in the process. Therefore, we have changed new § 230.80(a) to read:

> "Consistent with these Guidelines, EPA and the permitting authority on their own initiative or at the request of any other party, and after consultation with any affected State that is not the permitting authority, may identify sites which will be considered as:"

We have also deleted proposed § 230.70(a)(3), because it did not seem to accomplish much. Consideration of the point at which cumulative and secondary impacts become unacceptable and warrant emergency action will generally be more appropriate in a permit-by-permit context. Once that point has been so determined, of course, the area can be identified as "unsuitable" under the new § 230.80(a)(2).

* EPA may foreclose the use of a site by exercising its authority under section 404(c). The advance identification referred to in this section is not a section 404(c) prohibition.

Executive Order 12044

A number of commenters took the position that Executive Order 12044 requires EPA to prepare a "regulatory analysis" in connection with these regulations. EPA disagrees. These regulations are not, strictly speaking, new regulations. They do not impose new standards or requirements, but rather substantially clarify and reorganize the existing interim final regulations

Under EPA's criteria implementing Executive Order 12044, EPA will prepare a Regulatory Analysis for any regulation which imposes *additional* annual costs totalling $100 million or which will result in a total *additional* cost of production of any major product or service which exceeds 5% of its selling price. While many commenters, particularly members of the American Association of Port Authorities (AAPA), requested a regulatory analysis and claimed that the regulations were too burdensome, none of them explained how that burden was an *additional* one attributable to this revision. A close comparison of the new regulation and the explicit and implicit requirements in the interim final Guidelines reveals that there has been very little real change in the criteria by which discharges are to be judged or in the tests that must be conducted; therefore, we stand by our original determination that a regulatory analysis is not required.

Perhaps the most significant area in which the regulations are more explicit and arguably stricter is in the consideration of alternatives. However, even the 1975 regulations required the permitting authority to consider "the availability of alternate sites and methods of disposal that are less damaging to the environment," and to avoid activities which would have significant adverse effects. We do not think that the revised Guidelines' more explicit direction to avoid adverse effects that could be prevented through selection of a clearly less damaging site or method is a change imposing a substantial new burden on the regulated public.

Because the revised regulations are more explicit than the interim final regulations in some respects, it is possible that permit reviewers will do a more thorough job evaluating proposed discharges. This may result in somewhat more carefully drawn permit conditions. However, even if, for purposes of argument, the possible cost of complying with these conditions is considered an *additional* cost, there is no reason to believe that it alone will be anywhere near $100 million annually.

We also believe that it is appropriate to recognize the regulatory benefits from these more carefully drafted final regulations. Because they are much clearer about what should be considered and documented, we expect there will be fewer delays in reviewing permits, and that initial decisions to issue permits are less likely to be appealed to higher authority. These benefits are expected to offset any potential cost increase.

Some commenters suggested that documentation requirements would generate an additional cost of operations. The Corps' procedural regulations at 33 CFR 325.8 and 325.11 already require extensive documentation for individual permits being denied or being referred to higher authority for resolution of a conflict between agencies.

Economic Factors

A number of commenters asked EPA to include consideration of economic factors in the Guidelines. We believe that the regulation already recognizes economic factors to the extent contemplated by the statute. First, the Guidelines explicitly include the concept of "practicability" in connection with both alternatives and steps to minimize impacts. If an alleged alternative is unreasonably expensive to the applicant, the alternative is not "practicable." In addition, the Guidelines also consider economics indirectly in that they are structured to avoid the expense of unnecessary testing through the "reason-to-believe-test." Second, the statute expressly provides that the economics of anchorage and navigation may be considered, but only after application of the section 404(b)(1) Guidelines. (See section 404(b)(2).)

Borrow Sites

A number of highway departments objected because they felt the Guidelines would require them to identify specific borrow sites at the time of application, which would disrupt their normal contracting process and increase cost. These objections were based on a misunderstanding of the Guideline's requirements. Under those Guidelines, the actual borrow sites need not be identified, if the application and the permit specify that the discharge material must come from clean upland sites which are removed from sources of contamination and otherwise satisfy the reason-to-believe test. A condition that the material come from such a site would enable the permitting authority to make his determinations and find compliance with the conditions of § 230.10, without requiring highway departments to specify in advance the specific borrow sites to be used.

Consultation With Fish and Wildlife Agencies

One commenter wanted us to put in a statement that the Fish and Wildlife Coordination Act requires consultation with fish and wildlife agencies. We have not added new language because (1) the Fish and Wildlife Act only applies to Federal permitting agencies and not to State permitting agencies, and (2) the Corps' regulations already provide for such consultation by the only Federal 404 permitting agency. However, we agree with the commenter that Federal and State fish and wildlife agencies may often provide valuable assistance in evaluating the impacts of discharges of dredged or fill material.

The Importance of Appropriate Documentation

Specific documentation is important to ensure an understanding of the basis for each decision to allow, condition, or prohibit a discharge through application of the Guidelines. Documentation of information is required for: (1) facts and data gathered in the evaluation and testing of the extraction site, the material to be discharged, and the disposal site; (2) factual determinations regarding changes that can be expected at the disposal site if the discharge is made as proposed; and (3) findings regarding compliance with § 230.10 conditions. This documentation provides a record of actions taken that can be evaluated for adequacy and accuracy and ensures consideration of all important impacts in the evaluation of a proposed discharge of dredged or fill material.

The specific information documented under (1) and (2) above in any given case depends on the level of investigation necessary to provide for a reasonable understanding of the impact on the aquatic ecosystems. We anticipate that a number of individual and most General permit applications will be for routine, minor activities with little potential for significant adverse environmental impacts. In such cases, the permitting authority will not have to require extensive testing or analysis to make his findings of compliance. The level of documentation should reflect the significance and complexity of the proposed discharge activity.

Factual Determinations

Proposed section 230.20, "Factual Determinations" (now § 230.11) has been significantly reorganized in response to comments. First, we have changed (e) to reflect our elimination of the artificial distinction between the section 307(a)(1) toxics and other contaminants. Second, we have eliminated proposed (f) (Biological Availability), since the necessary information will be provided by (d) and new (e). Proposed (f) was intended to reflect the presumption that toxics were present and biologically available. We have modified proposed (g), now (f), to focus on the size of the disposal site and the size and shape of the mixing zone. The specific requirement to document the site has been deleted; where such information is relevant, it will automatically be considered in making the other determinations. We have also deleted proposed (h) (Special Determinations) since it did not provide any useful information which would not already be considered in making the other factual determinations.

Finally, in response to many comments, we have moved the provisions on cumulative and secondary impact to the Factual Determination section to give them further emphasis. We agree that such impacts are an important consideration in evaluating the acceptability of a discharge site.

Water Quality Standards

One commenter was concerned that the reference § 230.10(b) to water quality standards and criteria "approved or promulgated under section 303" might encourage permit authorities to ignore other water quality requirements. Under section 303, all State water quality standards are to be submitted to EPA for approval. If the submitted standards are incomplete or insufficiently stringent, EPA may promulgate standards to replace or supplant the State standards. Disapproved standards remain in effect until replaced. Therefore, to refer to "EPA approved or promulgated standards" is to ignore those State standards which have been neither approved nor replaced. We have therefore changed the wording of this requirement as follows: "* * * any applicable State water quality standard." We have also dropped the reference to "criteria", to be consistent with the Agency's general position that water quality criteria are not regulatory.

Other Requirements for Discharge

Section 230.10(c) provides that discharges are not permitted if they will have "significantly" adverse effects on various aquatic resources. In this context, "significant" and "significantly" mean more than "trivial", that is, significant in a conceptual rather than a statistical sense. Not all effects which

are statistically significant in the laboratory are significantly adverse in the field.

Section 320.10(d) uses the term "minimize" to indicate that all reasonable reduction in impacts be obtained. As indicated by the "appropriate and practicable" provision, steps which would be unreasonably costly or would be infeasible or which would accomplish only inconsequential reductions in impact need not be taken.

Habitat Development and Restoration of Water Bodies

Habitat development and restoration involve changes in open water and wetlands that minimize adverse effects of proposed changes or that neutralize or reverse the effects of past changes on the ecosystem. Development may produce a new or modified ecological state by displacement of some or all of the existing environmental characteristics. Restoration has the potential to return degraded environments to their former ecological state.

Habitat development and restoration can contribute to the maintenance and enhancement of a viable aquatic ecosystem at the discharge site. From an environmental point of view, a project involving the discharge of dredged and fill material should be designed and managed to emulate a natural ecosystem. Research, demonstration projects, and full scale implementation have been done in many categories of development and restoration. The U.S. Fish and Wildlife Service has programs to develop and restore habitat. The U.S. Army Engineer Waterways Experiment Station has published guidelines for using dredged material to develop wetland habitat, for establishing marsh vegetation, and for building islands that attract colonies of nesting birds. The EPA has a Clean Lakes program which supplies funds to States and localities to enhance or restore degraded lakes. This may involve dredging nutrient-laden sediments from a lake and ensuring that nutrient inflows to the lake are controlled. Restoration and habitat development techniques can be used to minimize adverse impacts and compensate for destroyed habitat. Restoration and habitat development may also provide secondary benefits such as improved opportunities for outdoor recreation and positive use for dredged materials.

The development and restoration of viable habitats in water bodies requires planning and construction practices that integrate the new or improved habitat into the existing environment. Planning requires a model or standard, the achievement of which is attempted by manipulating design and implementation of the activity. This model or standard should be based on characteristics of a natural ecosystem in the vicinity of a proposed activity. Such use of a natural ecosystem ensures that the developed or restored area, once established, will be nourished and maintained physically, chemically and biologically by natural processes. Some examples of natural ecosystems include, but are not limited to, the following: salt marsh, cattail marsh, turtle grass bed, small island, etc.

Habitat development and restoration, by definition, should have environmental enhancement and maintenance as their initial purpose. Human uses may benefit but they are not the primary purpose. Where such projects are not founded on the objectives of maintaining ecosystem function and integrity, some values may be favored at the expense of others. The ecosystem affected must be considered in order to achieve the desired result of development and restoration. In the final analysis, selection of the ecosystem to be emulated is of critical importance and a loss of value can occur if the wrong model or an incomplete model is selected. Of equal importance is the planning and management of habitat development and restoration on a case-by-case basis.

Specific measures to minimize impacts on the aquatic ecosystem by enhancement and restoration projects include but are not limited to:

(1) Selecting the nearest similar natural ecosystem as the model in the implementation of the activity.

Obviously degraded or significantly less productive habitats may be considered prime candidates for habitat restoration. One viable habitat, however, should not be sacrificed in an attempt to create another, i.e., a productive vegetated shallow water area should not be destroyed in an attempt to create a wetland in its place.

(2) Using development and restoration techniques that have been demonstrated to be effective in circumstances similar to those under consideration wherever possible.

(3) Where development and restoration techniques proposed for use have not yet advanced to the pilot demonstration or implementation stage, initiate their use on a small scale to allow corrective action if unanticipated adverse impacts occur.

(4) Where Federal funds are spent to clean up waters of the U.S. through dredging, scientifically defensible levels of pollutant concentration in the return discharge should be agreed upon with the funding authority in addition to any applicable water quality standards in order to maintain the desired improved water quality.

(5) When a significant ecological change in the aquatic environment is proposed by the discharge of dredged or fill material, the permitting authority should consider the ecosystem that will be lost as well as the environmental benefits of the new system.

Dated: December 12, 1980.

Douglas M. Costle,

Administrator, Environmental Protection Agency.

Part 230 is revised to read as follows:

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OR DISPOSAL SITES FOR DREDGED OF FILL MATERIAL

Subpart A—General

Sec.

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230.2 Applicability.
230.3 Definitions.
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Subpart B—Compliance With the Guidelines

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Subpart F—Potential Effects on Human Use Characteristics

230.50 Municipal and private water supplies.
230.51 Recreational and commercial fisheries.
230.52 Water-related recreation.
230.53 Aesthetics.

Sec.
230.54 Parks, national and historic monuments, national seashores, wilderness areas, research sites and similar preserves.

Subpart G—Evaluation and Testing

230.60 General evaluation of dredged or fill material.
230.61 Chemical, biological, and physical evaluation and testing.

Subpart H—Actions to Minimize Adverse Effects

230.70 Actions concerning the location of the discharge.
230.71 Actions concerning the material to be discharged.
230.72 Actions controlling the material after discharge.
230.73 Actions affecting the method of dispersion.
230.74 Actions related to technology.
230.75 Actions affecting plant and animal populations.
230.76 Actions affecting human use.
230.77 Other actions.

Subpart I—Planning To Shorten Permit Processing Time

230.80 Advanced identification of disposal areas.

Authority: This regulation is issued under authority of Sections 404(b) and 501(a) of the Clean Water Act of 1977, 33 U.S.C. § 1344(b) and § 1361(a).

Subpart A—General

§ 23.1 Purpose and policy.

(a) The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.

(b) Congress has expressed a number of policies in the Clean Water Act. These Guidelines are intended to be consistent with and to implement those policies.

(c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

(d) From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

§ 230.2 Applicability.

(a) These Guidelines have been developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army acting through the Chief of Engineers under section 404(b)(1) of the Clean Water Act (33 U.S.C. 1344). The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States. Sites may be specified through:

(1) The regulatory program of the U.S. Army Corps of Engineers under sections 404(a) and (e) of the Act (see 33 CFR 320, 323 and 325);

(2) The civil works program of the U.S. Army Corps of Engineers (see 33 CFR 209.145 and section 150 of Pub. L. 94-587, Water Resources Development Act of 1976);

(3) Permit programs of States approved by the Administrator of the Environmental Protection Agency in accordance with sections 404(g) and (h) of the Act (see 40 CFR 122, 123 and 124);

(4) Statewide dredged or fill material regulatory programs with best management practices approved under section 208(b)(4)(B) and (C) of the Act (see 40 CFR 35.1560);

(5) Federal construction projects which meet criteria specified in section 404(r) of the Act.

(b) These Guidelines will be applied in the review of proposed discharges of dredged or fill material into navigable waters which lie inside the baseline from which the territorial sea is measured, and the discharge of fill material into the territorial sea, pursuant to the procedures referred to in paragraphs (a)(1) and (a)(2) above. The discharge of dredged material into the territorial sea is governed by the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92-532, and regulations and criteria issued pursuant thereto (40 CFR Part 220-228).

(c) Guidance on interpreting and implementing these Guidelines may be prepared jointly by EPA and the Corps at the national or regional level from time to time. No modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

§ 230.3 Definitions.

For purposes of this Part, the following terms shall have the meanings indicated:

(a) The term "Act" means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92-500, as amended by Pub. L. 95-217, 33 U.S.C. 1251, *et seq.*

(b) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

(c) The terms "aquatic environment" and "aquatic ecosystem" mean waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

(d) The term "carrier of contaminant" means dredged or fill material that contains contaminants.

(e) The term "contaminant" means a chemical or biological substance in a form that can be incorporated into, onto or be ingested by and that harms aquatic organisms, consumers of aquatic organisms, or users of the aquatic environment, and includes but is not limited to the substances on the 307(a)(1) list of toxic pollutants promulgated on January 31, 1978 (43 FR 4109).

(f) [Reserved]

(g) [Reserved]

(h) The term "discharge point" means the point within the disposal site at which the dredged or fill material is released.

(i) The term "disposal site" means that portion of the "waters of the United States" where specific disposal activities are permitted and consist of a bottom surface area and any overlying volume of water. In the case of wetlands on which surface water is not present, the disposal site consists of the wetland surface area.

(j) [Reserved]

(k) The term "extraction site" means the place from which the dredged or fill material proposed for discharge is to be removed.

(l) [Reserved]

(m) The term "mixing zone" means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge point where receiving water quality may not meet quality standards or other requirements otherwise applicable to the receiving water. The mixing zone should be considered as a place where wastes and water mix and not as a place where effluents are treated.

(n) The term "permitting authority" means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program

approved by EPA under § 404(g) and § 404(h) or his delegated representative.

(o) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the Act reflects that "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant", are radium and accelerator produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

(p) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem.

(q) The term "practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(q-1) "Special aquatic sites" means those sites identified in Subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See 230.10(a)(3))

(r) The term "territorial sea" means the belt of the sea measured from the baseline as determined in accordance with the Conventon on the Territorial Sea and the Contiguous Zone and extending seaward a distance of three miles.

(s) The term "waters of the united States" means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (1)–(4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s) (1)–(6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(t) The term "wetlands" means 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.

§ 230.4 Organization.

The Guidelines are divided into eight subparts. Subpart A presents those provisions of general applicability, such as purpose and definitions. Subpart B establishes the four conditions which must be satisfied in order to make a finding that a proposed discharge of dredged or fill material complies with the Guidelines. Section 230.11 of Subpart B, sets forth factual determinations which are to be considered in determining whether or not a proposed discharge satisfies the Subpart B conditions of compliance. Subpart C describes the physical and chemical components of a site and provides guidance as to how proposed discharges of dredged or fill material may affect these components. Subparts D–F detail the special characteristics of particular aquatic ecosystems in terms of their values, and the possible loss of these values due to discharges of dredged or fill material. Subpart G prescribes a number of physical, chemical, and biological evaluations and testing procedures to be used in reaching the required factual determinations. Subpart H details the means to prevent or mimimize adverse effects. Subpart I concerns advanced identification of disposal areas.

§ 230.5 General procedures to be followed.

In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence:

(a) In order to obtain an overview of the principal regulatory provisions of the Guidelines, review the restrictions on discharge in § 230.10(a)–(d), the measures to mimimize adverse impact of Subpart H, and the required factual determinations of § 230.11.

(b) Determine if a General permit (§ 230.7) is applicable; if so, the applicant needs merely to comply with its terms, and no further action by the permitting authority is necessary. Special conditions for evaluation of proposed General permits are contained in § 230.7. If the discharge is not covered by a General permit:

(c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§ 230.10(a)).

(d) Delineate the candidate disposal site consistent with the criteria and evaluations of § 230.11(f).

(e) Evaluate the various physical and chemical components which characterize the non-living environment of the candidate site, the substrate and the water including its dynamic characteristics (Subpart C).

(f) Identify and evaluate any special or critical characteristics of the candidate disposal site, and surrounding areas which might be affected by use of such site, related to their living communities or human uses (Subparts D, E, and F).

(g) Review Factual Determinations in § 230.11 to determine whether the information in the project file is sufficient to provide the documentation required by § 230.11 or to perform the pre-testing evaluation described in § 230.60, or other information is necessary.

(h) Evaluate the material to be discharged to determine the possibility of chemical contamination or physical incompatibility of the material to be discharged (§ 230.60).

(i) If there is a reasonable probability of chemical contamination, conduct the appropriate tests according to the section on Evaluation and Testing (§ 230.61).

(j) Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, based upon the specialized methods of minimization of impacts in Subpart H.

(k) Make and document Factual Determinations in § 230.11.

(l) Make and document Findings of Compliance (§ 230.12) by comparing Factual Determinations with the requirements for discharge of § 230.10.

This outline of the steps to follow in using the Guidelines is simplified for purposes of illustration. The actual process followed may be iterative, with the results of one step leading to a reexamination of previous steps. The permitting authority must address all of the relevant provisions of the Guidelines in reaching a Finding of Compliance in an individual case.

§ 230.6 Adaptability.

(a) The manner in which these Guidelines are used depends on the physical, biological, and chemical nature of the proposed extraction site, the material to be discharged, and the candidate disposal site, including any other important components of the ecosystem being evaluated. Documentation to demonstrate knowledge about the extraction site, materials to be extracted, and the candidate disposal site is an essential component of guideline application. These Guidelines allow evaluation and documentation for a variety of activities, ranging from those with large, complex impacts on the aquatic environment to those for which the impact is likely to be innocuous. It is unlikely that the Guidelines will apply in their entirety to any one activity, no matter how complex. It is anticipated that substantial numbers of permit applications will be for minor, routine activities that have little, if any, potential for significant degradation of the aquatic environment. It generally is not intended or expected that extensive testing, evaluation or analysis will be needed to make findings of compliance in such routine cases. Where the conditions for General permits are met, and where numerous applications for similar activities are likely, the use of General permits will eliminate repetitive evaluation and documentation for individual discharges.

(b) The Guidelines user, including the agency or agencies responsible for implementing the Guidelines, must recognize the different levels of effort that should be associated with varying degrees of impact and require or prepare commensurate documentation. The level of documentation should reflect the significance and complexity of the discharge activity.

(c) An essential part of the evaluation process involves making determinations as to the relevance of any portion(s) of the Guidelines and conducting further evaluation only as needed. However, where portions of the Guidelines review procedure are "short form" evaluations, there still must be sufficient information (including consideration of both individual and cumulative impacts) to support the decision of whether to specify the site for disposal of dredged or fill material and to support the decision to curtail or abbreviate the evaluation process. The presumption against the discharge in § 230.1 applies to this decision-making.

(d) In the case of activities covered by General permits or 208(b)(4)(B) and (C) Best Management Practices, the analysis and documentation required by the Guidelines will be performed at the time of General permit issuance or 208(b)(4)(B) and (C) Best Management Practices promulgation and will not be repeated when activities are conducted under a General permit or 208(b)(4)(B) and (C) Best Management Practices control. These Guidelines do not require reporting or formal written communication at the time individual activities are initiated under a General permit or 208(b)(4)(B) and (C) Best Management Practices. However, a particular General permit may require appropriate reporting.

§ 230.7 General permits.

(a) *Conditions for the issuance of General permits.* A General permit for a category of activities involving the discharge of dredged or fill material complies with the Guidelines if it meets the applicable restrictions on the discharge in § 230.10 and if the permitting authority determines that:

(1) The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment;

(2) The activities in such category will have only minimal adverse effects when performed separately; and

(3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment.

(b) *Evaluation process.* To reach the determinations required in paragraph (a) of this section, the permitting authority shall set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated under the General permit. While some of the information necessary for this evaluation can be obtained from potential permittees and others through the proposal of General permits for public review, the evaluation must be completed before any General permit is issued, and the results must be published with the final permit.

(1) This evaluation shall be based upon consideration of the prohibitions listed in § 230.10(b) and the factors listed in § 230.10(c), and shall include documented information supporting each factual determination in § 230.11 of the Guidelines (consideration of alternatives in § 230.10(a) are not directly applicable to General permits);

(2) The evaluation shall include a precise description of the activities to be permitted under the General permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single General permit based on Subparts C–F of the Guidelines. Allowable differences between activities which will be regulated under the same General permit shall be specified. Activities otherwise similar in nature may differ in environmental impact due to their location in or near ecologically sensitive areas, areas with unique chemical or physical characteristics, areas containing concentrations of toxic substances, or areas regulated for specific human uses or by specific land or water management plans (e.g., areas regulated under an approved Coastal Zone Management Plan). If there are specific geographic areas within the purview of a proposed General permit (called a draft General permit under a State 404 program), which are more appropriately regulated by individual permit due to the considerations cited in this paragraph, they shall be clearly delineated in the evaluation and excluded from the permit. In addition, the permitting authority may require an individual permit for any proposed activity under a General permit where the nature or location of the activity makes an individual permit more appropriate.

(3) To predict cumulative effects, the evaluation shall include the number of individual discharge activities likely to be regulated under a General permit until its expiration, including repetitions of individual discharge activities at a single location.

Subpart B—Compliance With the Guidelines

§ 230.10 Restrictions on discharge.

Note.—Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under § 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demostrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a § 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under Title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under § 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by Subparts B and G, after consideration of Subparts C–F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Except as provided under § 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

§ 230.11 Factual determinations.

The permitting authority shall determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment in light of Subparts C–F. Such factual determinations shall be used in § 230.12 in making findings of compliance or non-compliance with the restrictions on discharge in § 230.10. The evaluation and testing procedures described in § 230.60 and § 230.61 of Subpart G shall be used as necessary to make, and shall be described in, such determination. The determinations of effects of each proposed discharge shall include the following:

(a) *Physical substrate determinations.* Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, on the characteristics of the substrate at the proposed disposal site. Consideration shall be given to the similarity in particle size, shape, and degree of compaction of the material

proposed for discharge and the material constituting the substrate at the disposal site, and any potential changes in substrate elevation and bottom contours, including changes outside of the disposal site which may occur as a result of erosion, slumpage, or other movement of the discharged material. The duration and physical extent of substrate changes shall also be considered. The possible loss of environmental values (§ 230.20) and actions to minimize impact (Subpart H) shall also be considered in making these determinations. Potential changes in substrate elevation and bottom contours shall be predicted on the basis of the proposed method, volume, location, and rate of discharge, as well as on the individual and combined effects of current patterns, water circulation, wind and wave action, and other physical factors that may affect the movement of the discharged material.

(b) *Water circulation, fluctuation, and salinity determinations.* Determine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows, and normal water fluctuation. Consideration shall be given to water chemistry, salinity, clarity, color, odor, taste, dissolved gas levels, temperature, nutrients, and eutrophication plus other appropriate characteristics. Consideration shall also be given to the potential diversion or obstruction of flow, alterations of bottom contours, or other significant changes in the hydrologic regime. Additional consideration of the possible loss of environmental values (§ 230.23–.25) and actions to minimize impacts (Subpart H), shall be used in making these determinations. Potential significant effects on the current patterns, water circulation, normal water fluctuation and salinity shall be evaluated on the basis of the proposed method, volume, location, and rate of discharge.

(c) *Suspended particulate/turbidity determinations.* Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, in terms of potential changes in the kinds and concentrations of suspended particulate/turbidity in the vicinity of the disposal site. Consideration shall be given to the grain size of the material proposed for discharge, the shape and size of the plume of suspended particulates, the duration of the discharge and resulting plume and whether or not the potential changes will cause violations of applicable water quality standards. Consideration should also be given to the possible loss of environmental values (§ 230.21) and to actions for minimizing impacts (Subpart H). Consideration shall include the proposed method, volume, location, and rate of discharge, as well as the individual and combined effects of current patterns, water circulation and fluctuations, wind and wave action, and other physical factors on the movement of suspended particulates.

(d) *Contaminant determinations.* Determine the degree to which the material proposed for discharge will introduce, relocate, or increase contaminants. This determination shall consider the material to be discharged, the aquatic environment at the proposed disposal site, and the availability of contaminants.

(e) *Aquatic ecosystem and organism determinations.* Determine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms. Consideration shall be given to the effect at the proposed disposal site of potential changes in substrate characteristics and elevation, water or substrate chemistry, nutrients, currents, circulation, fluctuation, and salinity, on the recolonization and existence of indigenous aquatic organisms or communities. Possible loss of environmental values (§ 230.31), and actions to minimize impacts (Subpart H) shall be examined. Tests as described in § 230.61 (Evaluation and Testing), may be required to provide information on the effect of the discharge material on communities or populations of organisms expected to be exposed to it.

(f) *Proposed disposal site determinations.* (1) Each disposal site shall be specified through the application of these Guidelines. The mixing zone shall be confined to the smallest practicable zone within each specified disposal site that is consistent with the type of dispersion determined to be appropriate by the application of these Guidelines. In a few special cases under unique environmental conditions, where there is adequate justification to show that widespread dispersion by natural means will result in no significantly adverse environmental effects, the discharged material may be intended to be spread naturally in a very thin layer over a large area of the substrate rather than be contained within the disposal site.

(2) The permitting authority and the Regional Administrator shall consider the following factors in determining the acceptability of a proposed mixing zone:

(i) Depth of water at the disposal site;

(ii) Current velocity, direction, and variability at the disposal site;

(iii) Degree of turbulence;

(iv) Stratification attributable to causes such as obstructions, salinity or density profiles at the disposal site;

(v) Discharge vessel speed and direction, if appropriate;

(vi) Rate of discharge;

(vii) Ambient concentration of constituents of interest;

(viii) Dredged material characteristics, particularly concentrations of constituents, amount of material, type of material (sand, silt, clay, etc.) and settling velocities;

(ix) Number of discharge actions per unit of time;

(x) Other factors of the disposal site that affect the rates and patterns of mixing.

(g) *Determination of cumulative effects on the aquatic ecosystem.* (1) Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.

(2) Cumulative effects attributable to the discharge of dredged or fill material in waters of the United States should be predicted to the extent reasonable and practical. The permitting authority shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications, the issuance of a General permit, and monitoring and enforcement of existing permits.

(h) *Determination of secondary effects on the aquatic ecosystem.* (1) Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. Information about secondary effects on aquatic ecosystems shall be considered prior to the time final section 404 action is taken by permitting authorities.

(2) Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff

from residential or commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S. Activities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which should be considered in evaluating the impact of creating those fast lands.

§ 230.12 Findings of compliance or non-compliance with the restrictions on discharge.

(a) On the basis of these Guidelines (Subparts C through G) the proposed disposal sites for the discharge of dredged or fill material must be:

(1) Specified as complying with the requirements of these Guidelines; or

(2) Specified as complying with the requirements of these Guidelines with the inclusion of appropriate and practicable discharge conditions (see Subpart H) to minimize pollution or adverse effects to the affected aquatic ecosystems; or

(3) Specified as failing to comply with the requirements of these Guidelines where:

(i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or

(ii) The proposed discharge will result in significant degradation of the aquatic ecosystem under § 230.10(b) or (c); or

(iii) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or

(iv) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.

(b) Findings under this section shall be set forth in writing by the permitting authority for each proposed discharge and made available to the permit applicant. These findings shall include the factual determinations required by § 230.11, and a brief explanation of any adaptation of these Guidelines to the activity under consideration. In the case of a General permit, such findings shall be prepared at the time of issuance of that permit rather than for each subsequent discharge under the authority of that permit.

Subpart C—Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

Note.—The effects described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B.

§ 230.20 Substrate.

(a) The substrate of the aquatic ecosystem underlies open waters of the United States and constitutes the surface of wetlands. It consists of organic and inorganic solid materials and includes water and other liquids or gases that fill the spaces between solid particles.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in varying degrees of change in the complex physical, chemical, and biological characteristics of the substrate. Discharges which alter substrate elevation or contours can result in changes in water circulation, depth, current pattern, water fluctuation and water temperature. Discharges may adversely affect bottom-dwelling organisms at the site by smothering immobile forms or forcing mobile forms to migrate. Benthic forms present prior to a discharge are unlikely to recolonize on the discharged material if it is very dissimilar from that of the discharge site. Erosion, slumping, or lateral displacement of surrounding bottom of such deposits can adversely affect areas of the substrate outside the perimeters of the disposal site by changing or destroying habitat. The bulk and composition of the discharged material and the location, method, and timing of discharges may all influence the degree of impact on the substrate.

§ 230.21 Suspended particulates/turbidity.

(a) Suspended particulates in the aquatic ecosystem consist of fine-grained mineral particles, usually smaller than silt, and organic particles. Suspended particulates may enter water bodies as a result of land runoff, flooding, vegetative and planktonic breakdown, resuspension of bottom sediments, and man's activities including dredging and filling. Particulates may remain suspended in the water column for variable periods of time as a result of such factors as agitation of the water mass, particulate specific gravity, particle shape, and physical and chemical properties of particle surfaces.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in greatly elevated levels of suspended particulates in the water column for varying lengths of time. These new levels may reduce light penetration and lower the rate of photosynthesis and the primary productivity of an aquatic area if they last long enough. Sight-dependent species may suffer reduced feeding ability leading to limited growth and lowered resistance to disease if high levels of suspended particulates persist. The biological and the chemical content of the suspended material may react with the dissolved oxygen in the water, which can result in oxygen depletion. Toxic metals and organics, pathogens, and viruses absorbed or adsorbed to fine-grained particulates in the material may become biologically available to organisms either in the water column or on the substrate. Significant increases in suspended particulate levels create turbid plumes which are highly visible and aesthetically displeasing. The extent and persistence of these adverse impacts caused by discharges depend upon the relative increase in suspended particulates above the amount occurring naturally, the duration of the higher levels, the current patterns, water level, and fluctuations present when such discharges occur, the volume, rate, and duration of the discharge, particulate deposition, and the seasonal timing of the discharge.

§ 230.22 Water.

(a) Water is the part of the aquatic ecosystem in which organic and inorganic constituents are dissolved and suspended. It constitutes part of the liquid phase and is contained by the substrate. Water forms part of a dynamic aquatic life-supporting system. Water clarity, nutrients and chemical content, physical and biological content, dissolved gas levels, pH, and temperature contribute to its life-sustaining capabilities.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can change the chemistry and the physical characteristics of the receiving water at a disposal site through the introduction of chemical constituents in suspended or dissolved form. Changes in the clarity, color, odor, and taste of water and the addition of contaminants can reduce or eliminate the suitability of water bodies for populations of aquatic organisms, and for human consumption, recreation, and aesthetics. The introduction of nutrients or organic material to the water column as a result of the discharge can lead to a high biochemical oxygen demand (BOD), which in turn can lead to reduced dissolved oxygen, thereby potentially affecting the survival of many aquatic organisms. Increases in nutrients can favor one group of organisms such as algae to the detriment of other more desirable types such as submerged aquatic vegetation, potentially causing adverse health

effects, objectionable tastes and odors, and other problems.

§ 230.23 Current patterns and water circulation.

(a) Current patterns and water circulation are the physical movements of water in the aquatic ecosystem. Currents and circulation respond to natural forces as modified by basin shape and cover, physical and chemical characteristics of water strata and masses, and energy dissipating factors.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can modify current patterns and water circulation by obstructing flow, changing the direction or velocity of water flow, changing the direction or velocity of water flow and circulation, or otherwise changing the dimensions of a water body. As a result, adverse changes can occur in: location, structure, and dynamics of aquatic communities; shoreline and substrate erosion and depositon rates; the deposition of suspended particulates; the rate and extent of mixing of dissolved and suspended components of the water body; and water stratification.

§ 230.24 Normal water fluctuations.

(a) Normal water fluctuations in a natural aquatic system consist of daily, seasonal, and annual tidal and flood fluctuations in water level. Biological and physical components of such a system are either attuned to or characterized by these periodic water fluctuations.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. Such water level modifications may change salinity patterns, alter erosion or sedimentation rates, aggravate water temperature extremes, and upset the nutrient and dissolved oxygen balance of the aquatic ecosystem. In addition, these modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas.

§ 230.25 Salinity gradients.

(a) Salinity gradients form where salt water from the ocean meets and mixes with fresh water from land.

(b) Possible loss of environmental characteristics and values: Obstructions which divert or restrict flow of either fresh or salt water may change existing salinity gradients. For example, partial blocking of the entrance to an estuary or river mouth that significantly restricts the movement of the salt water into and out of that area can effectively lower the volume of salt water available for mixing within that estuary. The downstream migration of the salinity gradient can occur, displacing the maximum sedimentation zone and requiring salinity-dependent aquatic biota to adjust to the new conditions, move to new locations if possible, or perish. In the freshwater zone, discharge operations in the upstream regions can have equally adverse impacts. A significant reduction in the volume of fresh water moving into an estuary below that which is considered normal can affect the location and type of mixing thereby changing the characteristic salinity patterns. The resulting changed circulation pattern can cause the upstream migration of the salinity gradient displacing the maximim sedimentation zone. This migration may affect those organisms that are adapted to freshwater environments. It may also affect municipal water supplies.

Note.—Possible actions to minimize adverse impacts regarding site characteristics can be found in Subpart H.

Subpart D—Potential Impacts on Biological Characteristics of the Aquatic Ecosystem

Note.—The impacts described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B.

§ 230.30 Threatened and endangered species.

(a) An endangered species is a plant or animal in danger of extinction throughout all or a significant portion of its range. A threatened species is one in danger of becoming an endangered species in the foreseeable future throughout all or a significant portion of its range. Listings of threatened and endangered species as well as critical habitats are maintained by some individual States and by the U.S. Fish and Wildlife Service of the Department of the Interior (codified annually at 50 CFR § 17.11). The Department of Commerce has authority over some threatened and endangered marine mammals, fish and reptiles.

(b) Possible loss of values: The major potential impacts on threatened or endangered species from the discharge of dredged or fill material include:

(1) Covering or otherwise directly killing species;

(2) The impairment or destruction of habitat to which these species are limited. Elements of the aquatic habitat which are particularly crucial to the continued survival of some threatened or endangered species include adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species. Each of these elements can be adversely affected by changes in either the normal water conditions for clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current patterns, circulation and fluctuation, or the physical removal of habitat; and

(3) Facilitating incompatible activities.

(c) Where consultation with the Secretary of the Interior occurs under Section 7 of the Endangered Species Act, the conclusions of the Secretary concerning the impact(s) of the discharge on threatened and endangered species and their habitat shall be considered final.

§ 230.31 Fish, crustaceans, mollusks and other aquatic organisms in the food web.

(a) Aquatic organisms in the food web include, but are not limited to, finfish, crustaceans, mollusks, insects, annelids, planktonic organisms, and the plants and animals on which they feed and depend upon for their needs. All forms and life stages of an organism, throughout its geographic range, are included in this category.

(b) Possible loss of values: The discharge of dredged or fill material can variously affect populations of fish, crustaceans, mollusks and other food web organisms through the release of contaminants which adversely affect adults, juveniles, larvae, or eggs, or result in the establishment or proliferation of an undesirable competitive species of plant or animal at the expense of the desired resident species. Suspended particulates settling on attached or buried eggs can smother the eggs by limiting or sealing off their exposure to oxygenated water. Discharge of dredged and fill material may result in the debilitation or death of sedentary organisms by smothering, exposure to chemical contaminants in dissolved or suspended form, exposure to high levels of suspended particulates, reduction in food supply, or alteration of the substrate upon which they are dependent. Mollusks are particularly

sensitive to the discharge of material during periods of reproduction and growth and development due primarily to their limited mobility. They can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals. The discharge of dredged or fill material can redirect, delay, or stop the reproductive and feeding movements of some species of fish and crustacea, thus preventing their aggregation in accustomed places such as spawning or nursery grounds and potentially leading to reduced populations. Reduction of detrital feeding species or other representatives of lower trophic levels can impair the flow of energy from primary consumers to higher trophic levels. The reduction or potential elimination of food chain organism populations decreases the overall productivity and nutrient export capability of the ecosystem.

§ 230.32 Other wildlife.

(a) Wildlife associated with aquatic ecosystems are resident and transient mammals, birds, reptiles, and amphibians.

(b) Possible loss of values: The discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem. These adverse impacts upon wildlife habitat may result from changes in water levels, water flow and circulation, salinity, chemical content, and substrate characteristics and elevation. Increased water turbidity can adversely affect wildlife species which rely upon sight to feed, and disrupt the respiration and feeding of certain aquatic wildlife and food chain organisms. The availability of contaminants from the discharge of dredged or fill material may lead to the bioaccumulation of such contaminants in wildlife. Changes in such physical and chemical factors of the environment may favor the introduction of undesirable plant and animal species at the expense of resident species and communities. In some aquatic environments lowering plant and animal species diversity may disrupt the normal functions of the ecosystem and lead to reductions in overall biological productivity.

Note.—Possible actions to minimize adverse impacts regarding characteristics of biological components of the aquatic ecosystem can be found in Subpart H.

Subpart E—Potential Impacts on Special Aquatic Sites

Note.—The impacts described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B. The definition of special aquatic sites is found in § 230.3(q-1).

§ 230.40 Sanctuaries and refuges.

(a) Sanctuaries and refuges consist of areas designated under State and Federal laws or local ordinances to be managed principally for the preservation and use of fish and wildlife resources.

(b) Possible loss of values: Sanctuaries and refuges may be affected by discharges of dredged or fill material which will:

(1) Disrupt the breeding, spawning, migratory movements or other critical life requirements of resident or transient fish and wildlife resources;

(2) Create unplanned, easy and incompatible human access to remote aquatic areas;

(3) Create the need for frequent maintenance activity;

(4) Result in the establishment of undesirable competitive species of plants and animals;

(5) Change the balance of water and land areas needed to provide cover, food, and other fish and wildlife habitat requirements in a way that modifies sanctuary or refuge management practices;

(6) Result in any of the other adverse impacts discussed in Subparts C and D as they relate to a particular sanctuary or refuge.

§ 230.41 Wetlands.

(a)(1) Wetlands consist of 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.

(2) Where wetlands are adjacent to open water, they generally constitute the transition to upland. The margin between wetland and open water can best be established by specialists familiar with the local environment, particularly where emergent vegetation merges with submerged vegetation over a broad area in such places as the lateral margins of open water, headwaters, rainwater catch basins, and groundwater seeps. The landward margin of wetlands also can best be identified by specialists familiar with the local environment when vegetation from the two regions merges over a broad area.

(3) Wetland vegetation consists of plants that require saturated soils to survive (obligate wetland plants) as well as plants, including certain trees, that gain a competitive advantage over others because they can tolerate prolonged wet soil conditions and their competitors cannot. In addition to plant populations and communities, wetlands are delimited by hydrological and physical characteristics of the environment. These characteristics should be considered when information about them is needed to supplement information available about vegetation, or where wetland vegetation has been removed or is dormant.

(b) Possible loss of values: The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. The addition of dredged or fill material may destroy wetland vegetation or result in advancement of succession to dry land species. It may reduce or eliminate nutrient exchange by a reduction of the system's productivity, or by altering current patterns and velocities. Disruption or elimination of the wetland system can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland. Discharges can also change the wetland habitat value for fish and wildlife as discussed in Subpart D. When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts. Discharging fill material in wetlands as part of municipal, industrial or recreational development may modify the capacity of wetlands to retain and store floodwaters and to serve as a buffer zone shielding upland areas from wave actions, storm damage and erosion.

§ 230.42 Mud flats

(a) Mud flats are broad flat areas along the sea coast and in coastal rivers to the head of tidal influence and in inland lakes, ponds, and riverine systems. When mud flats are inundated, wind and wave action may resuspend bottom sediments. Coastal mud flats are exposed at extremely low tides and inundated at high tides with the water table at or near the surface of the substrate. The substrate of mud flats contains organic material and particles

smaller in size than sand. They are either unvegetated or vegetated only by algal mats.

(b) Possible loss of values: The discharge of dredged or fill material can cause changes in water circulation patterns which may permanently flood or dewater the mud flat or disrupt periodic inundation, resulting in an increase in the rate of erosion or accretion. Such changes can deplete or eliminate mud flat biota, foraging areas, and nursery areas. Changes in inundation patterns can affect the chemical and biological exchange and decomposition process occurring on the mud flat and change the deposition of suspended material affecting the productivity of the area. Changes may reduce the mud flat's capacity to dissipate storm surge runoff.

§ 230.43 Vegetated shallows.

(a) Vegetated shallows are permanently inundated areas that under normal circumstances support communities of rooted aquatic vegetation, such as turtle grass and eelgrass in estuarine or marine systems as well as a number of freshwater species in rivers and lakes.

(b) Possible loss of values: The discharge of dredged or fill material can smother vegetation and benthic organisms. It may also create unsuitable conditions for their continued vigor by: (1) changing water circulation patterns; (2) releasing nutrients that increase undesirable algal populations; (3) releasing chemicals that adversely affect plants and animals; (4) increasing turbidity levels, thereby reducing light penetration and hence photosynthesis; and (5) changing the capacity of a vegetated shallow to stabilize bottom materials and decrease channel shoaling. The discharge of dredged or fill material may reduce the value of vegetated shallows as nesting, spawning, nursery, cover, and forage areas, as well as their value in protecting shorelines from erosion and wave actions. It may also encourage the growth of nuisance vegetation.

§ 230.44 Coral reefs.

(a) Coral reefs consist of the skeletal deposit, usually of calcareous or silicaceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef.

(b) Possible loss of values: The discharge of dredged or fill material can adversely affect colonies of reef building organisms by burying them, by releasing contaminants such as hydrocarbons into the water column, by reducing light penetration through the water, and by increasing the level of suspended particulates. Coral organisms are extremely sensitive to even slight reductions in light penetration or increases in suspended particulates. These adverse effects will cause a loss of productive colonies which in turn provide habitat for many species of highly specialized aquatic organisms.

§ 230.45 Riffle and pool complexes.

(a) Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a steaming flow, a smooth surface, and a finer substrate. Riffle and pool complexes are particularly valuable habitat for fish and wildlife.

(b) Possible loss of values: Discharge of dredged or fill material can eliminate riffle and pool areas by displacement, hydrologic modification, or sedimentation. Activities which affect riffle and pool areas and especially riffle/pool ratios, may reduce the aeration and filtration capabilities at the discharge site and downstream, may reduce stream habitat diversity, and may retard repopulation of the disposal site and downstream waters through sedimentation and the creation of unsuitable habitat. The discharge of dredged or fill material which alters stream hydrology may cause scouring or sedimentation of riffles and pools. Sedimentation induced through hydrological modification or as a direct result of the deposition of unconsolidated dredged or fill material may clog riffle and pool areas, destroy habitats, and create anaerobic conditions. Eliminating pools and meanders by the discharge of dredged or fill material can reduce water holding capacity of streams and cause rapid runoff from a watershed. Rapid runoff can deliver large quantities of flood water in a short time to downstream areas resulting in the destruction of natural habitat, high property loss, and the need for further hydraulic modification.

Note.—Possible actions to minimize adverse impacts on site or material characteristics can be found in Subpart H.

Subpart F—Potential Effects on Human Use Characteristics

Note.—The effects described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B.

§ 230.50 Municipal and private water supplies.

(a) Municipal and private water supplies consist of surface water or ground water which is directed to the intake of a municipal or private water supply system.

(b) Possible loss of values: Discharges can affect the quality of water supplies with respect to color, taste, odor, chemical content and suspended particulate concentration, in such a way as to reduce the fitness of the water for consumption. Water can be rendered unpalatable or unhealthy by the addition of suspended particulates, viruses and pathogenic organisms, and dissolved materials. The expense of removing such substances before the water is delivered for consumption can be high. Discharges may also affect the quantity of water available for municipal and private water supplies. In addition, certain commonly used water treatment chemicals have the potential for combining with some suspended or dissolved substances from dredged or fill material to form other products that can have a toxic effect on consumers.

§ 230.51 Recreational and commercial fisheries.

(a) Recreational and commercial fisheries consist of harvestable fish, crustaceans, shellfish, and other aquatic organisms used by man.

(b) Possible loss of values: The discharge of dredged or fill materials can affect the suitability of recreational and commercial fishing grounds as habitat for populations of consumable aquatic organisms. Discharges can result in the chemical contamination of recreational or commercial fisheries. They may also interfere with the reproductive success of recreational and commercially important aquatic species through disruption of migration and spawning areas. The introduction of pollutants at critical times in their life cycle may directly reduce populations of commercially important aquatic organisms or indirectly reduce them by reducing organisms upon which they depend for food. Any of these impacts can be of short duration or prolonged, depending upon the physical and chemical impacts of the discharge and the biological availability of contaminants to aquatic organisms.

§ 230.52 Water-related recreation.

(a) Water-related recreation encompasses activities undertaken for amusement and relaxation. Activities encompass two broad categories of use: consumptive, e.g., harvesting resources by hunting and fishing; and non-comsumptive, e.g. canoeing and sight-seeing.

(b) Possible loss of values: One of the more important direct impacts of dredged or fill disposal is to impair or destroy the resources which support recreation activities. The disposal of dredged or fill material may adversely modify or destroy water use for recreation by changing turbidity, suspended particulates, temperature, dissolved oxygen, dissolved materials, toxic materials, pathogenic organisms, quality of habitat, and the aesthetic qualities of sight, taste, odor, and color.

§ 230.53 Aesthetics.

(a) Aesthetics associated with the aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners.

(b) Possible loss of values: The discharge of dredged or fill material can mar the beauty of natural aquatic ecosystems by degrading water quality, creating distracting disposal sites, inducing inappropriate development, encouraging unplanned and incompatible human access, and by destroying vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area. The discharge of dredged or fill material can adversely affect the particular features, traits, or characteristics of an aquatic area which make it valuable to property owners. Activities which degrade water quality, disrupt natural substrate and vegetational characteristics, deny access to or visibility of the resource, or result in changes in odor, air quality, or noise levels may reduce the value of an aquatic area to private property owners.

§ 230.54 Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar preserves.

(a) These preserves consist of areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value.

(b) Possible loss of values: The discharge of dredged or fill material into such areas may modify the aesthetic, educational, historical, recreational and/or scientific qualities thereby reducing or eliminating the uses for which such sites are set aside and managed.

Note.—Possible actions to minimize adverse impacts regarding site or material characteristics can be found in Subpart H.

Subpart G—Evaluation and Testing

§ 230.60 General evaluation of dredged or fill material.

The purpose of these evaluation procedures and the chemical and biological testing sequence outlined in § 230.61 is to provide information to reach the determinations required by § 230.11. Where the results of prior evaluations, chemical and biological tests, scientific research, and experience can provide information helpful in making a determination, these should be used. Such prior results may make new testing unnecessary. The information used shall be documented. Where the same information applies to more than one determination, it may be documented once and referenced in later determinations.

(a) If the evaluation under paragraph (b) indicates the dredged or fill material is not a carrier of contaminants, then the required determinations pertaining to the presence and effects of contaminants can be made without testing. Dredged or fill material is most likely to be free from chemical, biological, or other pollutants where it is composed primarily of sand, gravel, or other naturally occurring inert material. Dredged material so composed is generally found in areas of high current or wave energy such as streams with large bed loads or coastal areas with shifting bars and channels. However, when such material is discolored or contains other indications that contaminants may be present, further inquiry should be made.

(b) The extraction site shall be examined in order to assess whether it is sufficiently removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants. Factors to be considered include but are not limited to:

(1) Potential routes of contaminants or contaminated sediments to the extraction site, based on hydrographic or other maps, aerial photography, or other materials that show watercourses, surface relief, proximity to tidal movement, private and public roads, location of buildings, municipal and industrial areas, and agricultural or forest lands.

(2) Pertinent results from tests previously carried out on the material at the extraction site, or carried out on similar material for other permitted projects in the vicinity. Materials shall be considered similar if the sources of contamination, the physical configuration of the sites and the sediment composition of the materials are comparable, in light of water circulation and stratification, sediment accumulation and general sediment characteristics. Tests from other sites may be relied on only if no changes have occurred at the extraction sites to render the results irrelevant.

(3) Any potential for significant introduction of persistent pesticides from land runoff or percolation;

(4) Any records of spills or disposal of petroleum products or substances designated as hazardous under section 311 of the Clean Water Act (See 40 CFR 116);

(5) Information in Federal, State and local records indicating significant introduction of pollutants from industries, municipalities, or other sources, including types and amounts of waste materials discharged along the potential routes of contaminants to the extraction site; and

(6) Any possibility of the presence of substantial natural deposits of minerals or other substances which could be released to the aquatic environment in harmful quantities by man-induced discharge activities.

(c) To reach the determinations in § 230.11 involving potential effects of the discharge on the characteristics of the disposal site, the narrative guidance in Subparts C–F shall be used along with the general evaluation procedure in § 230.60 and, if necessary, the chemical and biological testing sequence in § 230.61. Where the discharge site is adjacent to the extraction site and subject to the same sources of contaminants, and materials at the two sites are substantially similar, the fact that the material to be discharged may be a carrier of contaminants is not likely to result in degradation of the disposal site. In such circumstances, when dissolved material and suspended particulates can be controlled to prevent carrying pollutants to less contaminated areas, testing will not be required.

(d) Even if the § 230.60(b) evaluation (previous tests, the presence of polluting industries and information about their discharge or runoff into waters of the U.S., bioinventories, etc.) leads to the conclusion that there is a high probability that the material proposed for discharge is a carrier of contaminants, testing may not be necessary if constraints are available to

reduce contamination to acceptable levels within the disposal site and to prevent contaminants from being transported beyond the boundaries of the disposal site, if such constraints are acceptable to the permitting authority and the Regional Administrator, and if the potential discharger is willing and able to implement such constraints. However, even if tests are not performed, the permitting authority must still determine the probable impact of the operation on the receiving aquatic ecosystem. Any decision not to test must be explained in the determinations made under § 230.11.

§ 230.61 Chemical, biological, and physical evaluation and testing.

Note.—The Agency is today proposing revised testing guidelines. The evaluation and testing procedures in this section are based on the 1975 § 404(b)(1) interim final Guidelines and shall remain in effect until the revised testing guidelines are published as final regulations.

(a) No single test or approach can be applied in all cases to evaluate the effects of proposed discharges of dredged or fill materials. This section provides some guidance in determining which test and/or evaluation procedures are appropriate in a given case. Interim guidance to applicants concerning the applicability of specific approaches or procedures will be furnished by the permitting authority.

(b) *Chemical-biological interactive effects.* The principal concerns of discharge of dredged or fill material that contain contaminants are the potential effects on the water column and on communities of aquatic organisms.

(1) *Evaluation of chemical-biological interactive effects.* Dredged or fill material may be excluded from the evaluation procedures specified in paragraphs (b)(2) and (3) of this section if it is determined, on the basis of the evaluation in § 230.60, that the likelihood of contamination by contaminants is acceptably low, unless the permitting authority, after evaluating and considering any comments received from the Regional Administrator, determines that these procedures are necessary. The Regional Administrator may require, on a case-by-case basis, testing approaches and procedures by stating what additional information is needed through further analyses and how the results of the analyses will be of value in evaluating potential environmental effects.

If the General Evaluation indicates the presence of a sufficiently large number of chemicals to render impractical the identification of all contaminants by chemical testing, information may be obtained from bioassays in lieu of chemical tests.

(2) *Water column effects.* (i) Sediments normally contain constituents that exist in various chemical forms and in various concentrations in several locations within the sediment. An elutriate test may be used to predict the effect on water quality due to release of contaminants from the sediment to the water column. However, in the case of fill material originating on land which may be a carrier of contaminants, a water leachate test is appropriate.

(ii) Major constituents to be analyzed in the elutriate are those deemed critical by the permitting authority, after evaluating and considering any comments received from the Regional Administrator, and considering results of the evaluation in § 230.60. Elutriate concentrations should be compared to concentrations of the same constituents in water from the disposal site. Results should be evaluated in light of the volume and rate of the intended discharge, the type of discharge, the hydrodynamic regime at the disposal site, and other information relevant to the impact on water quality. The permitting authority should consider the mixing zone in evaluating water column effects. The permitting authority may specify bioassays when such procedures will be of value.

(3) *Effects on benthos.* The permitting authority may use an appropriate benthic bioassay (including bioaccumulation tests) when such procedures will be of value in assessing ecological effects and in establishing discharge conditions.

(c) Procedure for comparison of sites.

(1) When an inventory of the total concentration of contaminants would be of value in comparing sediment at the dredging site with sediment at the disposal site, the permitting authority may require a sediment chemical analysis. Markedly different concentrations of contaminants between the excavation and disposal sites may aid in making an environmental assessment of the proposed disposal operation. Such differences should be interpreted in terms of the potential for harm as supported by any pertinent scientific literature.

(2) When an analysis of biological community structure will be of value to assess the potential for adverse environmental impact at the proposed disposal site, a comparison of the biological characteristics between the excavation and disposal sites may be required by the permitting authority. Biological indicator species may be useful in evaluating the existing degree of stress at both sites. Sensitive species representing community components colonizing various substrate types within the sites should be identified as possible bioassay organisms if tests for toxicity are required. Community structure studies should be performed only when they will be of value in determining discharge conditions. This is particularly applicable to large quantities of dredged material known to contain adverse quantities of toxic materials. Community studies should include benthic organisms such as microbiota and harvestable shellfish and finfish. Abundance, diversity, and distribution should be documented and correlated with substrate type and other appropriate physical and chemical environmental characteristics.

(d) Physical tests and evaluation. The effect of a discharge of dredged or fill material on physical substrate characteristics at the disposal site, as well as on the water circulation, fluctuation, salinity, and suspended particulates content there, is important in making factual determinations in § 230.11. Where information on such effects is not otherwise available to make these factual determinations, the permitting authority shall require appropriate physical tests and evaluations as are justified and deemed necessary. Such tests may include sieve tests, settleability tests, compaction tests, mixing zone and suspended particulate plume determinations, and site assessments of water flow, circulation, and salinity characteristics.

Subpart H—Actions To Minimize Adverse Effects

Note.—There are many actions which can be undertaken in response to § 203.10(d) to minimize the adverse effects of discharges of dredged or fill material. Some of these, grouped by type of activity, are listed in this subpart.

§ 230.70 Actions concerning the location of the discharge.

The effects of the discharge can be minimized by the choice of the disposal site. Some of the ways to accomplish this are by:

(a) Locating and confining the discharge to minimize smothering of organisms;

(b) Designing the discharge to avoid a disruption of periodic water inundation patterns;

(c) Selecting a disposal site that has been used previously for dredged material discharge;

(d) Selecting a disposal site at which the substrate is composed of material similar to that being discharged, such as discharging sand on sand or mud on mud;

(e) Selecting the disposal site, the discharge point, and the method of discharge to minimize the extent of any plume;

(f) Designing the discharge of dredged or fill material to minimize or prevent the creation of standing bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of areas subject to such fluctuations.

§ 230.71 Actions concerning the material to be discharged.

The effects of a discharge can be minimized by treatment of, or limitations on the material itself, such as:

(a) Disposal of dredged material in such a manner that physiochemical conditions are maintained and the potency and availability of pollutants are reduced.

(b) Limiting the solid, liquid, and gaseous components of material to be discharged at a particular site;

(c) Adding treatment substances to the discharge material;

(d) Utilizing chemical flocculants to enhance the deposition of suspended particulates in diked disposal areas.

§ 230.72 Actions controlling the material after discharge.

The effects of the dredged or fill material after discharge may be controlled by:

(a) Selecting discharge methods and disposal sites where the potential for erosion, slumping or leaching of materials into the surrounding aquatic ecosystem will be reduced. These sites or methods include, but are not limited to:

(1) Using containment levees, sediment basins, and cover crops to reduce erosion;

(2) Using lined containment areas to reduce leaching where leaching of chemical constituents from the discharged material is expected to be a problem;

(b) Capping in-place contaminated material with clean material or selectively discharging the most contaminated material first to be capped with the remaining material;

(c) Maintaining and containing discharged material properly to prevent point and nonpoint sources of pollution;

(d) Timing the discharge to minimize impact, for instance during periods of unusual high water flows, wind, wave, and tidal actions.

§ 230.73 Actions affecting the method of dispersion.

The effects of a discharge can be minimized by the manner in which it is dispersed, such as:

(a) Where environmentally desirable, distributing the dredged material widely in a thin layer at the disposal site to maintain natural substrate contours and elevation;

(b) Orienting a dredged or fill material mound to minimize undesirable obstruction to the water current or circulation pattern, and utilizing natural bottom contours to minimize the size of the mound;

(c) Using silt screens or other appropriate methods to confine suspended particulate/turbidity to a small area where settling or removal can occur;

(d) Making use of currents and circulation patterns to mix, disperse and dilute the discharge;

(e) Minimizing water column turbidity by using a submerged diffuser system. A similar effect can be accomplished by submerging pipeline discharges or otherwise releasing materials near the bottom;

(f) Selecting sites or managing discharges to confine and minimize the release of suspended particulates to give decreased turbidity levels and to maintain light penetration for organisms;

(g) Setting limitations on the amount of material to be discharged per unit of time or volume of receiving water.

§ 230.74 Actions related to technology.

Discharge technology should be adapted to the needs of each site. In determining whether the discharge operation sufficiently minimizes adverse environmental impacts, the applicant should consider:

(a) Using appropriate equipment or machinery, including protective devices, and the use of such equipment or machinery in activities related to the discharge of dredged or fill material;

(b) Employing appropriate maintenance and operation on equipment or machinery, including adequate training, staffing, and working procedures;

(c) Using machinery and techniques that are especially designed to reduce damage to wetlands. This may include machines equipped with devices that scatter rather than mound excavated materials, machines with specially designed wheels or tracks, and the use of mats under heavy machines to reduce wetland surface compaction and rutting;

(d) Designing access roads and channel spanning structures using culverts, open channels, and diversions that will pass both low and high water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement;

(e) Employing appropriate machinery and methods of transport of the material for discharge.

§ 230.75 Actions affecting plant and animal populations.

Minimization of adverse effects on populations of plants and animals can be achieved by:

(a) Avoiding changes in water current and circulation patterns which would interfere with the movement of animals;

(b) Selecting sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species which have a competitive edge ecologically over indigenous plants or animals;

(c) Avoiding sites having unique habitat or other value, including habitat of threatened or endangered species;

(d) Using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat. Use techniques that have been demonstrated to be effective in circumstances similar to those under consideration wherever possible. Where proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiate their use on a small scale to allow corrective action if unanticipated adverse impacts occur.

(e) Timing discharge to avoid spawning or migration seasons and other biologically critical time periods;

(f) Avoiding the destruction of remnant natural sites within areas already affected by development.

§ 230.76 Actions affecting human use.

Minimization of adverse effects on human use potential may be achieved by:

(a) Selecting discharge sites and following discharge procedures to prevent or minimize any potential damage to the aesthetically pleasing features of the aquatic site (e.g. viewscapes), particularly with respect to water quality;

(b) Selecting disposal sites which are not valuable as natural aquatic areas;

(c) Timing the discharge to avoid the seasons or periods when human recreational activity associated with the aquatic site is most important;

(d) Following discharge procedures which avoid or minimize the disturbance of aesthetic features of an aquatic site or ecosystem.

(e) Selecting sites that will not be detrimental or increase incompatible human activity, or require the need for frequent dredge or fill maintenance activity in remote fish and wildlife areas;

(f) Locating the disposal site outside of the vicinity of a public water supply intake.

§ 230.77 Other actions.

(a) In the case of fills, controlling runoff and other discharges from activities to be conducted on the fill;

(b) In the case of dams, designing water releases to accommodate the needs of fish and wildlife.

(c) In dredging projects funded by Federal agencies other than the Corps of Engineers, maintain desired water quality of the return discharge through agreement with the Federal funding authority on scientifically defensible pollutant concentration levels in addition to any applicable water quality standards.

(d) When a significant ecological change in the aquatic environment is proposed by the discharge of dredged or fill material, the permitting authority should consider the ecosystem that will be lost as well as the environmental benefits of the new system.

Subpart I—Planning To Shorten Permit Processing Time

§ 230.80 Advanced identification of disposal areas.

(a) Consistent with these Guidelines, EPA and the permitting authority, on their own initiative or at the request of any other party and after consultation with any affected State that is not the permitting authority, may identify sites which will be considered as:

(1) Possible future disposal sites, including existing disposal sites and non-sensitive areas; or

(2) Areas generally unsuitable for disposal site specification;

(b) The identification of any area as a possible future disposal site should not be deemed to constitute a permit for the discharge of dredged or fill material within such area or a specification of a disposal site. The identification of areas that generally will not be available for disposal site specification should not be deemed as prohibiting applications for permits to discharge dredged or fill material in such areas. Either type of identification constitutes information to facilitate individual or General permit application and processing.

(c) An appropriate public notice of the proposed identification of such areas shall be issued;

(d) To provide the basis for advanced identification of disposal areas, and areas unsuitable for disposal, EPA and the permitting authority shall consider the likelihood that use of the area in question for dredged or fill material disposal will comply with these Guidelines. To facilitate this analysis, EPA and the permitting authority should review available water resources management data including data available from the public, other Federal and State agencies, and information from approved Coastal Zone Management programs and River Basin Plans.

(e) The permitting authority should maintain a public record of the identified areas and a written statement of the basis for identification.

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Part V

Environmental Protection Agency

Testing Requirements for the Specification of Disposal Sites for Dredged or Fill Material

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 230

[WH-FRL 1647-6]

Testing Requirements for the Specification of Disposal Sites for Dredged or Fill Material

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: This proposed rule revises the testing requirements in the section 404(b)(1) Guidelines for the Specification of Disposal Sites for Dredged and Fill Material under section 404 of the Clean Water Act.

The testing requirements in the Guidelines are being revised because on September 18, 1979, when the Guidelines were proposed, EPA and the Corps of Engineers had not completed revisions on the testing portion and sought comments on the remainder of the Guidelines only at that time.

The revised testing section is intended to reconcile the need for simplicity and ease of application of the testing procedures on the one hand with the need for sufficient information to identify potential adverse effects on the environment on the other hand.

DATE: All comments received on or before February 6, 1981, will be considered.

ADDRESSES: Send written comments to: Joseph Krivak, Criteria and Standards Division, Office of Water and Waste Management, (WH-585), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Each person submitting a comment should include his or her name and address and give reasons for any recommendations. A copy of all public comments will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2922 (EPA Library), 401 M Street, S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Joseph Krivak, 202-755-0100.

SUPPLEMENTARY INFORMATION:

Background

The section 404 program was established by the Federal Water Pollution Control Act of 1972 (FWPCA) to regulate the discharge of dredged or fill material into waters of the United States. The Secretary of the Army, acting through the Chief of Engineers, and States with programs which have been approved by EPA are authorized to issue permits specifying sites for the discharge of dredged or fill material. Sites are to be specified through the application of guidelines developed by EPA in conjunction with the Secretary (the 404(b)(1) Guidelines).

EPA published Interim Final 404(b)(1) Guidelines on September 5, 1975, which, *inter alia*, provided for certain testing procedures to provide information to be used in the permit decision. Since then, both the passage of the 1977 Amendments to the FWPCA and the experience of EPA and the Corps of Engineers in applying the Guidelines prompted EPA to develop proposed revisions to the Guidelines, which were published in the **Federal Register** on September 18, 1979. Because EPA and the Corps had not at that time completed revisions to the testing portions of the Guidelines, but did not want to delay revisions to the rest of the Guidelines, the September 18, 1979 proposal retained the 1975 testing provisions (with certain non-substantive editing changes) and sought comments on the remainder of the Guidelines only. A final rule reflecting public comments but retaining the old testing provisions (now appearing in §§ 230.60 and 230.61) is being published elsewhere in today's **Federal Register.**

EPA and the Corps have now completed a proposed testing package. After the comment period, we will consider the comments and make appropriate changes in the testing provisions. Then final testing provisions will replace §§ 230.60 and 230.61 as they appear in today's final section 404(b)(1) Guidelines. We are not planning any other changes in the Guidelines apart from those necessary to accommodate the new testing package. While we believe that it will not be necessary to change the regulations substantively to accommodate the new testing procedures, we solicit comments on this point.

The Corps of Engineers has played a major role in developing today's proposed rule. This draft was revised to reflect the comments of Corps and EPA employees with experience sith the permitting process and with the technical and scientific issues involved.

Purpose and Content of the Revised Testing Section

Under the 404(b)(1) Guidelines, a discharge may not take place if the permitting authority finds, among other things, that the discharge will have unacceptable adverse effects or that practical steps have not been taken to minimize adverse impacts (§ 230.10). In order to determine whether these requirements have been met in a particular case, the permitting authority must consider the factors set out in the Guidelines, in light of the particular facts involved. The testing procedures are designed to provide some of the information to be used in making determinations concerning the potential impacts of a particular proposed discharge. Where the circumstances indicate that testing is not likely to provide useful information, the regulation allows the permit decision to be made without testing. We have attempted in this way to reconcile our desire for simplicity and ease of application of the testing procedures on the one hand with the need for sufficient information to identify potential adverse effects on the other hand.

Section-by-Section Summary*

Proposed § 230.60 explains the purpose of testing and sets out general information pertaining to testing. It is our intent to minimize the testing burden, consistent with the need for the permitting authority to make an informed judgment about the potential impacts of a discharge. Thus, this section provides that results of previous tests may be used in appropriate circumstances.

In addition, under § 230.61, tests to evaluate the impacts of contaminants are required only when there is reason to believe that contaminants are present. We have proposed that the trigger be the presence of such contaminants "above background levels." Section 230.61(a) identifies factors which should be considered in this "reason to believe" test (or "initial evaluation," as it is sometimes called). Comments are sought on the adequacy of this list of factors.

Section 230.62 sets out specific testing requirements. These requirements are organized by "category" of discharge. In order to determine which requirements apply to particular discharges, we have constructed categories of discharges, based on the initial evaluation, to reflect different potentials for adverse impacts on the aquatic ecosystem. Comments are sought on the appropriateness of the proposed categories for this purpose. The specific tests required for particular categories are based on the severity of potential impacts.

When there is no reason to believe that dredged material is contaminated, it falls into Category 1, and no contaminant-related testing is required. Category 2 includes dredged material which, while possibly contaminated, probably is not significantly more contaminated than the discharge site.

*The definitions in § 230.3 of the final Guidelines apply to these testing revisions.

Tests are specified to verify that the material is not more contaminated, and, if it is, to provide information to be used in assessing its potential for harm. Comments are solicited on the appropriateness of the proposed tests for this purpose.

Category 3 includes discharges of apparently contaminated dredged material which is to be discharged into contained or confined disposal areas. In this situation, testing is concerned only with the return flow. Where the contained site is itself located in waters of the United States, discharges within it will automatically destroy or dislocate the life there, whether or not the discharged material is contaminated. Thus, there is no need to test the contamination of the material which will remain in the site. The tests for Category 3 are designed to compare the runoff with the receiving water, and, if significant differences are discovered, to assess the potential for harm. Again, comments are sought on the appropriateness of the proposed tests.

Category 4 includes dredged material which, on the basis of the precategorization evaluation, appears to be more contaminated than the discharge site (e.g., not to fall into Category 2) and which will not be confined or contained (e.g., is not in Category 3), and hence presents a potential for environmental harm. Biological tests are prescribed to provide information on the likelihood and extent of harm. Comments are solicited on the appropriateness of the prescribed tests to provide the information needed to evaluate the potential adverse impacts of such discharges.

Under § 230.63, Categories 5 and 6 apply to fill material. If the material is not believed to be contaminated (or the contaminants will not leach out), no testing is required. If there is potential for environmental contamination, the prescribed tests are conducted. When dredged material is used for fill, it should be placed in Categories 1 through 4, not 5 or 6. Comments are solicited on the appropriateness of the categories for fill and the adequacy of the tests for Category 6 for all contaminated, non-dredged fill material, particularly in light of the definition of fill material in the Guidelines published today (40 CFR 230 [FRL 1647-7]) and in the Consolidated Permit Regulations (40 CFR 122.3, 45 FR 33421, May 19, 1980).

Section 230.64 provides a procedure for calculating a mixing zone from the information obtained from testing in § 230.62. Section 230.64 is concerned with the calculation of the mixing zone, not on the evaluation of its acceptability. Where the calculated mixing zone violates a water quality standard (either because the standard prohibits mixing zones or because the calculated mixing zone is outside that allowed under the standard), the discharge will fail to satisfy the requirements of § 230.10(b)(1). Even where the mixing zone meets water quality standards, it may nonetheless contribute to the impact on the environment, and should be weighed with all the other available information in making the determination of significant degradation under § 230.10(c).

Where there are numerical water quality standards for the contaminant involved, the edge of the mixing zone is based on the place where the discharged material is sufficiently diluted to meet ambient water quality standards. Where no numerical water quality exists, the mixing zone perimeter will be calculated based on the results of the water column bioassay. Comments are solicited on the propriety of these two methods for calculating the mixing zone perimeter.

The proposal also calls for bioassay tests where the contaminant levels in the elutriate exceed those of the receiving waters and contaminant levels in the receiving water already exceed applicable standards or criteria, making dilution to those standards impossible. Comments are solicited on whether such tests are necessary or whether such circumstances alone clearly establish the likelihood of significant degradation.

Other points

It is our present intention to have these revised testing provisions go into effect 90 days after their publication as a final rule (probably by the summer of 1981). While the required tests are quite similar to those required under the 1975 regulation, and while we have endeavored to keep to a minimum the occasions when tests will be conducted, we are interested in any comments on the appropriateness of this date.

Under the revised section 404(b)(1) Guidelines, the permitting authority may choose to conduct the tests itself, instead of requiring the applicant to do so. We anticipate this happening when several similar discharges are proposed for a single area, for example. Commenters should bear this in mind in commenting on the potential burden of testing.

Comments objecting to the particular tests specified or suggesting new tests will be more helpful to us if they include reference to (or copies of) pertinent literature.

The Environmental Protection Agency has determined that this document does not constitute a major regulation requiring preparation of an economic impact statement under Executive Order 12044.

The Waterways Experiment Station of the Corps of Engineers has prepared a background document in support of this proposed rule, based on input from both our agencies. Copies are availabe for review in EPA Headquarters Library (Public Information Reference Unit), Room 2404, Waterside Mall, 401 M Street, SW., Washington, D.C. 20460.

Dated: December 12, 1980.

Douglas M. Costle,

Administrator, Environmental Protection Agency.

40 CFR Part 230 is proposed to be amended by revising Subpart G to read as follows:

(1) The authority citation for Part 230 reads as follows:

Authority: Secs. 404, 501 of the Clean Water Act of 1977, 33 U.S.C. 1344(b), 1361(a).

(2) Subpart G is revised to read as follows:

Subpart G—Evaluation and Testing

Sec.
230.60 Purpose of testing and general approach.
230.61 Initial evaluation of dredged or fill material.
230.62 Detailed evaluation, including possible testing of dredged material.
230.63 Detailed evaluation, including possible testing of fill material.
230.64 Mixing zone determinations.

Authority: Secs. 404, 501 of the Clean Water Act of 1977 (33 U.S.C. 1344(b), 1361(a).

Subpart G—Evaluation and Testing

§ 230.60 Purpose of testing and general approach.

(a) *Purpose.* The purpose of the testing procedures in this Subpart is to provide the permitting authority with technical information required to assess the potential chemical and biological effects of the discharge of dredged or fill material into waters of the United States. The permitting authority must interpret this technical information in light of the specific characteristics of the proposed discharge under evaluation. The technical information and interpretation should be used in making the factual determinations in § 230.11.

(1) Because the testing procedures in this Subpart are done primarily in the laboratory, rather than in the field, and because the tests are only generally predictive of what may actually take place at the discharge site, test results shall not be considered as a sole determinant in making the required Findings of Compliance in § 230.12. Therefore, all test results, including

those that describe sediments with a high potential for significant degradation on aquatic organisms, must be related to other pertinent factors in factual determinations (§ 230.11) before Findings of Compliance are made.

(2) Subpart G addresses only those tests designed to determine the chemical and biological degradation caused by contaminants (specific pollutants designated by the authority of Sections 307(a) and 311 of the Clean Water Act (CWA) and other potentially toxic or hazardous pollutants, referred to in § 230.3(g)), which are believed to be in dredged or fill material. To assess the potential effects of the discharge in the factual determinations, it may be necessary to conduct other analyses (e.g., coliform, BOD, COD, etc.) or to consider physical effects such as burial, turbidity, etc., as discussed in Subpart B.

(3) Where the results of prior evaluations, chemical and biological tests, and scientific research can provide information helpful in reaching a determination, those should be used. Such prior results may make new testing unnecessary. The information used to reach each determination shall be documented, except that where the same information is applicable to more than one determination, it may be documented in one instance and referenced in later determinations.

(b) *General approach.* Chemical and biological testing requirements of this section are designed to provide information for the factual determinations and ecological evaluations and to assist in determining the compatibility of the proposed discharge of dredged or fill material with applicable water quality standards. Except for " other analyses" as stated in § 230.60(a)(2), the permitting authority will require tests only in those cases where there is reason to believe that contaminants are present in forms and amounts that are likely to degrade the aquatic environment, including potential availability to organisms in toxic amounts. This "reason to believe" determination will be made by the permitting authority in the initial evaluation process of § 230.61. Categories have been established to provide the permitting authority with guidance on when testing is needed and what tests can be considered sufficient for the application of the Guidelines.

(1) Permitting authorities and/or U.S. EPA Regional administrators may approve modifications of these procedures or require additional tests to obtain needed information for the determination for a specific situation. The reasons for such modifications shall be fully explained and documented in the Section 404(b)(1) evaluation.

(2) The persistence, stability, and solubility in water and/or other solvents of contaminants as well as the duration and rates of introduction of contaminants and rates of dilution and dispersion after introduction are important considerations in selecting appropriate chemical and biological tests and interpreting the test results.

(3) Tests in this section may be performed on several alternative discharge sites concurrently, if this will aid in obtaining necessary information for making the factual determinations for contaminants.

(4) A technical implementation manual containing acceptable and recommended procedures for implementing the testing requirements of this subpart will be developed and approved jointly by the Administrator, EPA, and the Chief of Engineers. The manual will be reviewed periodically and revised as necessary.

§ 230.61 Initial evaluation of dredged or fill material.

(a) An initial evaluation shall be conducted and documented to determine if there is reason to believe that any dredged or fill material to be discharged into waters of the United States contains any contaminant above background level. This initial evaluation will be used in assigning the proposed discharge to a category for testing. This evaluation should be accomplished with existing data on file with or readily available to the permitting authority; Regional Administrator, EPA; and other public and private sources, as appropriate. Factors which may be considered for the extraction site and, if appropriate, the disposal site, include, but are not limited to, the following:

(1) Potential routes of introduction of specific contaminants. These may be identified by examining maps, aerial photographs, and other graphic materials that show watercourses, surface relief, proximity to tidal movement, private and public roads, location of buildings, agricultural land, municipal and industrial sewage and storm outfalls, etc., or by making field inspections.

(2) Previous tests on the material at the extraction site or on samples from other similar projects in the vicinity, when there are similarities of sources and types of contaminants, water circulation and stratification, accumulation of sediments, general sediment characteristics, and potential impact on the aquatic environment, as long as no known changes have occurred to render the comparisons inappropriate.

(3) The probability of past substantial introduction of contaminants from land runoff (e.g., pesticides).

(4) Spills of toxic substances or substances designated as hazardous under Section 311 of the Clean Water Act (see 40 CFR Part 116).

(5) Substantial introduction of pollutants from industries.

(6) Source and previous use of materials proposed for discharge as fill.

(7) Substantial natural deposits of minerals and other natural substances.

(b) Before the permitting authority concludes that there is no reason to believe that contaminants are present in the discharge material above background levels, he should consider all relevant, reasonably available information which might indicate its presence. However, if there is no information indicating the likelihood of such contamination, the permitting authority may conclude that contaminants are not present above background levels. Examples of documents and records in which data on contaminants may be obtained are:

(1) Report of Pollution Caused Fish Kills (U.S. EPA)

(2) Selected Chemical Spill Listing (U.S. EPA)

(3) Pollution Incident Reporting System (U.S. CG)

(4) Surface Impoundment Assessment (U.S. EPA)

(5) Identification of In-Place Pollutants and Priorities for Removal (U.S. EPA)

(6) Revised Status Report-Hazardous Waste Sites (U.S. EPA)

(7) Hazardous Waste Management Facilities in the United States—1977 (U.S. EPA)

(8) Corps of Engineers Studies of Sediment Pollution

(9) Sediment Tests for Previously Permitted Activities (U.S. CE/District Engineers)

(10) Pesticide Spill Reporting System (U.S. EPA)

(11) STORET (U.S. EPA)

(12) Past 404(b)(1) Evaluations

(13) USGS Water and Sediment Data on Major Tributaries

(14) Pertinent and Applicable Research Reports

(15) NPDES Permit Records

§ 230.62 Detailed evaluation, including possible testing of dredged material.

(a) Based on the outcome of the initial evaluation made pursuant to § 230.61, dredged material proposed for discharge will be assigned to one of four categories for its detailed technical evaluation. Figure 1 illustrates how evaluation under these categories leads

to factual determinations required under § 230.11. The following paragraphs describe the categories, the testing (if any) required under each, and how this evaluation leads to the factual determinations.

(b) *Category 1: Discharge Without Potential for Environmental Contamination.* (1) Dredged material falls into Category 1 when the initial evaluation does not indicate the presence of contaminants in the dredged material above background levels. Consequently, the only concern is the direct physical effects of the material to be discharged, and there is no need to compare this material chemically to sediments at the proposed disposal site. Dredged material which is composed predominantly of sand, gravel, shell or other naturally occurring sedimentary material with particle sizes predominantly larger than silt is likely to, but does not always, qualify for inclusion under Category 1. Generally, these materials are characteristic of areas of high current or wave energy, such as streams with large bedloads or coastal areas with shifting bars and channels. However, noncontaminated fine-grained materials may also be shown by the precategorization elevation to meet the conditions of Category 1. No chemical or biological testing is required to make the factual determinations.

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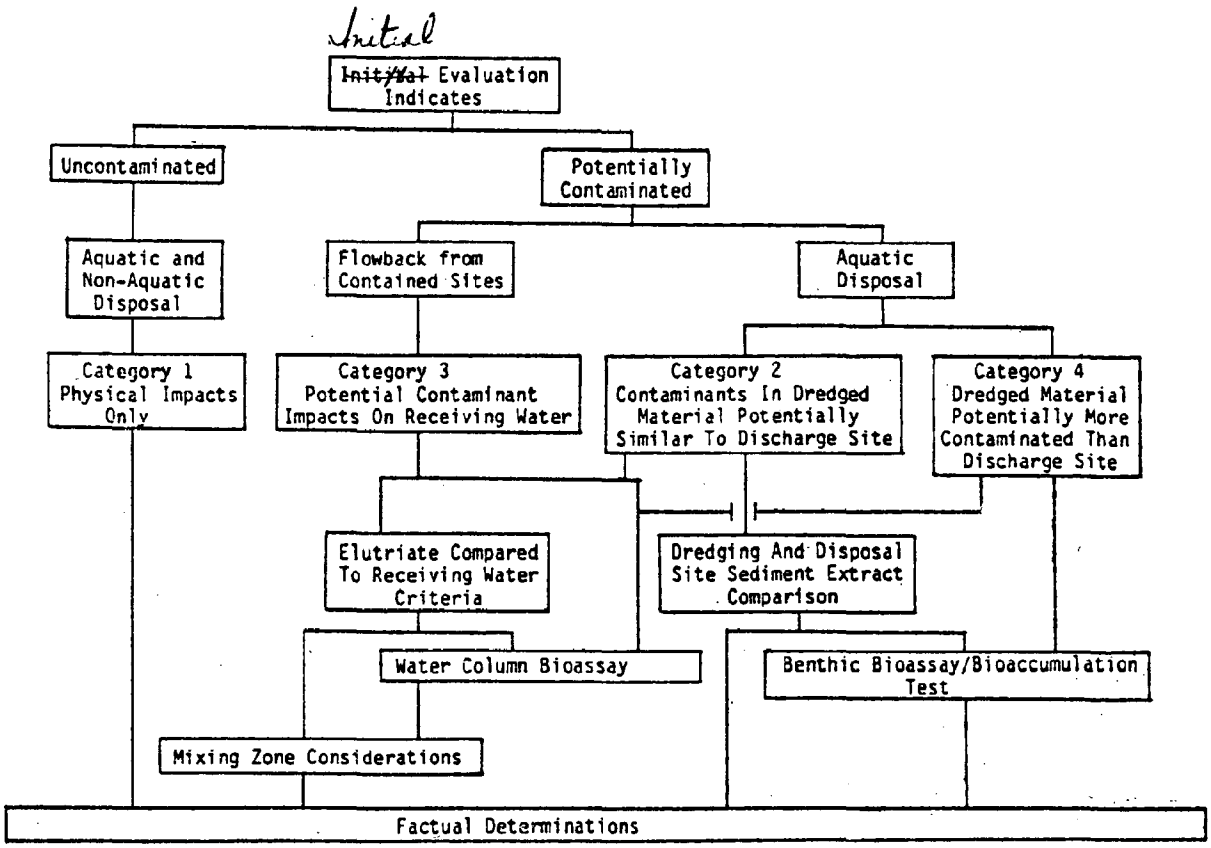
Fig. 1. Testing Flow Chart



N.B. Follow every line out of a box, and if a line branches, follow one or the other branch.

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(c) *Category 2: Open Water Discharge with Level of Contamination Similar to the Discharge Site.* Discharges should be assigned to Category 2 when the initial evaluation indicates that contaminants may be present in the dredged material above background levels, but will not be more available than the same contaminants at the disposal site. If this initial evaluation is confirmed by the evaluation described below, the permitting authority may conclude that the discharge will not cause substantive harmful effects to the resident aquatic community other than the physical effects caused by placement of the material. The Category 2 evaluation must consider possible effects on both the benthic component of the aquatic environment under § 230.62(c)(1) and the water-column component under § 230.62(c)(2).

(1) *Sediment assessment.* Chemical extraction tests are used in Category 2 to assess similarities in the potential for long-term leaching and bioavailability of contaminants from the dredged material and discharge site sediments. Research generally indicates that only the fractions of inorganic contaminants which are dissolved in the interstitial water and loosely associated with sediment particles are available to organisms. Since these fractions are measured in a water extract, the appropriate extractant for inorganic contaminants in Category 2 sediment assessments is water. For some organic contaminants, however, extraction with a solvent other than water may be appropriate. Analysis of organic chemicals in sediments is a rapidly advancing field. Analytical methods are being developed for compounds for which none now exist and methods which do exist are subject to rapid obsolescence. Therefore, sediment extraction techniques must be selected for the specific contaminants of concern at the time the need arises. The appropriate extractant for comparing the availability of organic contaminants to organisms from the dredged material and discharge site sediment is a polar or non-polar solvent that effectively extracts the contaminant of concern from the sediment in a reproducible manner.

(i) *Testing protocol.* Chemical analyses shall be conducted on the extracts of the sediment at the dredging and disposal sites. The location and number of sampling stations and replicates shall be designed specifically for the sites being evaluated. Test results shall be used to determine whether the concentrations of those contaminants identified during the § 230.61 evaluation are substantively greater in the dredged material than in the disposal site sediment.

(ii) *Need for additional testing.* Further testing of the impact of contaminants on the benthic component of the environment is required for the factual determinations only when the above comparative analysis indicates substantively greater concentrations of contaminants in the sediments to be discharged than in the disposal site sediments. In such cases, the proposed dredged material will be evaluated further using the benthic assessment protocol for Category 4 under § 230.62(e)(1). For all other situations no further testing for contaminants is required to make the factual determinations of § 230.11 relating to chemical contamination of sediments.

(2) *Water-column assessment.* The potential for short-term water-column impacts is assessed in Category 2 by the standard elutriate test or, under the special circumstance described below, by a water-column bioassay. Generally, the appropriate test is a chemical comparison of the concentration of contaminants in the elutriate of the proposed dredged material with the concentration in the receiving water (See paragraph (c)(1)(i) of this section). These concentration values are then used with the appropriate water quality standard or criterion to calculate a mixing zone.

(i) *Chemical comparison protocol.* Chemical analyses shall be conducted on the receiving water and on the elutriate of the dredged material. The location and number of sampling stations and replicates shall be designed specifically for the dredging and disposal sites being evaluated. Test results shall be used to determine whether, after consideration of mixing, the discharge will substantively increase concentrations of those contaminants identified during the § 320.61 evaluation in solution at the disposal site.

(ii) *Mixing zone determination.* The size of the mixing zone will be calculated pursuant to § 230.64 for the contaminant requiring the greatest dilution volume, as determined from the elutriate analyses, to meet applicable water quality standards, or, if none, Federal water quality criteria established by EPA. The selected standard or criteria shall define the perimeter of the mixing zone.

(iii) *Need for additional testing.* Further testing for contaminants in relation to the water-column component of the environment may be required to make the factual determinations when concentrations in the elutriate of the sediment to be discharged are substantively greater than concentrations in the composite sample of the receiving water and either the calculation of a mixing zone using the appropriate water quality standards or criteria does not provide sufficient information to make an assessment of water-column impacts or the receiving water concentration exceeds the standard or criterion, making dilution to this standard or criterion impossible. Such further testing for water-column effects will consist of a water-column bioassay conducted according to § 230.62(f). No further testing for contaminants is required to make the factual determinations for all other situations, except as provided in § 230.60(b)(1).

(d) *Category 3: Contained, Confined, or Other Disposal Operations of Material with Potential for Contamination of the Water Column Only.* Discharge of dredged material should be assigned to Category 3 when all but the return water, including suspended particles, is confined or contained sufficiently to prevent the long-term availability of contaminants to the aquatic community, and there is reason to believe the concentration of contaminants in the return water are above ambient levels in the receiving water. The Category 3 evaluation consists of consideration of possible impacts to the receiving water column.

(1) *Water-column assessment.* The potential for short-term water-column impacts is assessed in Category 3 by an elutriate test, or under the special circumstance described below, by a water-column bioassay. Generally, the appropriate test is a chemical comparison of the concentration of contaminants in the elutriate of the proposed dredged material with the concentration in the receiving water. These concentration values are then used with the appropriate water quality standards or criteria to calculate a mixing zone. Where retention time within the containment area will be of short duration, the standard elutriate test can be used to estimate the concentration of those contaminants that will be released in the effluent. Where the containment area is managed for maximum solids retention and, consequently, the liquid is retained for long periods, a modified elutriate test should be used, considering biological, chemical and physical changes that may occur in the containment area. Settleability tests should be conducted to simulate the actual retention time.

(2) *Chemical comparison protocol.* Chemical analyses shall be conducted

on the receiving water and on the elutriate of the dredged material. The location and number of sampling stations and replicates shall be designed specifically for the dredging and disposal sites being evaluated. Test results shall be used to determine whether, after consideration of mixing, the discharge will substantively increase concentrations of those contaminants identified during the § 230.61 evaluation in solution at the disposal site.

(3) *Mixing zone determination.* The size of the mixing zone will be calculated pursuant to § 230.64 for the contaminant requiring the greatest dilution volume as determined from the elutriate analyses, to meet applicable water quality standards or, if none, Federal water quality criteria established by EPA. The selected standard or criteria shall define the perimeter of the mixing zone.

(4) *Need for additional testing.* Further testing for contaminants in relation to the water-column component of the environment may be required to make the factual determinations when concentrations in the elutriate of the sediment to be discharged are substantively greater than concentrations in the composite sample of the receiving water and either the calculation of a mixing zone using the appropriate water quality standards or criteria does not provide sufficient information to make an assessment of water-column impacts or the receiving water concentration exceeds the standard or criterion, making dilution to this standard or criterion impossible. Such further testing for water-column effects will consist of a water-column bioassay conducted according to § 230.62(f). No further testing for contaminants is required to make the factual determinations for all other situations, except as provided in § 230.60(b)(1).

(e) *Category 4: Open Water Discharge With Potential for Harm.* Uncontained or unconfined dredged material will be assigned to Category 4 when the initial evaluation indicates the dredged material contains biologically available contaminants in amounts which have the potential for substantive environmental harm. The Category 4 evaluation considers possible effects on both the benthic and water-column components of the aquatic environment.

(1) *Benthic assessment.* The required tests are a benthic bioassay and an investigation of bioaccumulation potential. Due to the infant state-of-the-art in bioaccumulation procedures and the technical uncertainty in the ecological interpretation of bioaccumulation data, the permitting authority may find that such tests or scientific literature for interpretation of results have not been defined in the Corps/EPA implementation manual for specific contaminants. In such cases, the permitting authority may waive the requirement for bioaccumulation tests for these specific contaminants, provided he notifies the Regional Administrator prior to making the factual determinations.

(i) *Selection of appropriately sensitive organisms.* The sensitivity of these procedures is dependent primarily on the selection of appropriate species. The species should be selected from appropriately sensitive aquatic organisms as determined by the permitting authority. A minimum of one benthic and one epibenthic species shall be used for bioassays. At least one benthic or epibenthic species of sufficient size with limited mobility, and with a propensity for accumulating the identified contaminants, shall be used in bioaccumulation tests if any are conducted. The species designated for bioaccumulation tests may be one or more of those used in the bioassay.

(ii) *Benthic bioassay protocol.* Results of a benthic bioassay will be used to compare survival in sediment from the dredging site with survival in a sedimentologically similar reference substrate from within or near the disposal site. If survival of the test organisms is similar, then no increased toxic effects to the benthic community should result from the discharge. Should statistically significant decreases in survival in the dredged material be observed, then the permitting authority will assess the substantive effects of the contaminated discharge in making the factual determinations.

(iii) *Bioaccumulation protocol.* The bioaccumulation potential of those contaminants identified in the initial evaluation procedures of § 230.61 or in previous tests shall be assessed by comparing the concentrations in the tissues of the designated organism exposed to the sediments to be dredged with the concentrations in the tissues in the same species exposed to a sedimentologically similar reference substrate from within or near the disposal site. Bioaccumulation potential is indicated when the concentrations of the contaminants in the tissue of the organisms exposed to the sediments to be discharged are significantly greater statistically than those concentrations in the tissues of the organisms exposed to the reference substrate. Where there is bioaccumulation potential, the permitting authority must assess the substantive effects of the contaminated discharge in making the factual determinations.

(A) A comparative field assessment will be used when dredged material from the dredging site in question has been discharged at the proposed disposal site during previous activities and the § 230.61 evaluation indicates that the dredged material has not become more contaminated since the last disposal operation; or

(B) When such a field assessment is not practicable, assessment will be performed using animals exposed in the laboratory bioassay protocol of § 230.62(e)(1)(ii).

(iv) *Need for additional testing.* No further benthic bioassay or bioaccumulation potential testing is required to make the factual determinations.

(2) *Water-column assessment.* The required test is a water-column bioassay under § 230.62(f). The mixing zone must be considered in interpreting the test results and making the factual determinations.

(f) *Water-column bioassay protocol.* An acute bioassay will be used to compare survival in the unfiltered elutriate from the material to be dredged with survival in an unfiltered composite sample representing the entire water-column at the disposal site. The location and number of sampling stations and replicates shall be designed specifically for the dredging and disposal sites being evaluated. Test results shall be used to determine whether, after consideration of mixing, the discharge will cause a substantive increase in toxic effects in the water-column at the disposal site. If the survival of test organisms is similar in the elutriate and receiving water, then increased toxic effects in the water-column should not result from the discharge. Should statistically significant decreases in survival in the elutriate be observed, then the mixing zone will be calculated based on the 96-hour LC 50 of the elutriate from the bioassay results.

(1) *Selection of appropriately sensitive organisms.* The sensitivity of the water-column bioassay is dependent primarily on the selection of appropriate species. Test species should be representative of animals in the aquatic community at the site of the proposed discharge. Test organisms should be selected from appropriately sensitive aquatic species. A minimum of one vertebrate and one invertebrate aquatic species shall be used.

(2) *Mixing zone determination.* The size of the mixing zone will be calculated pursuant to §230.64 such that the perimeter is defined by 0.01 of the

lowest 96-hour LC 50 observed in the bioassay.

(3) *Need for additional testing.* No further testing for contaminants in relation to the water-column component of the environment is required to make the factual determinations, except as provided in § 230.60(b)(1).

§ 230.63 Detailed evaluation, including possible testing, of fill material.

Based on the outcome of the initial evaluation made pursuant to § 230.61, natural or man-made material from upland sources proposed for discharge as fill will be assigned to one of two categories for technical evaluation. Dredged material used as fill will be evaluated under § 230.62.

(a) *Category 5: Discharge without Potential for Environmental Contamination.* Discharge of fill material falls into Category 5 when the initial evaluation does not indicate the presence of contaminants in the fill material above background levels or when such contaminants will be adequately contained to prevent leaching and/or erosion. No chemical or biological testing is required to make the factual determinations.

(b) *Category 6: Discharge of Fill Material with Potential for Environmental Contamination.* Discharge of fill material falls into Category 6 when the § 230.61 initial evaluation indicates contaminants may be present in the fill material above background levels and the permitting authority determines that there is a potential for leaching. The water leachate test is appropriate.

(1) *Testing protocol.* Samples of the fill material will be subjected to a water leachate test. From this testing the permitting authority shall determine whether the concentration of each contaminant identified during the § 230.61 evaluation is substantially greater than the appropriate existing Federal or State water quality standard. No dilution factor or mixing zone determination shall be considered.

(2) *Need for additional testing.* No further testing for contaminants of concern is required to make the factual determinations, except as provided in § 230.60(b)(1).

§ 230.64 Mixing zone determinations.

A limited mixing zone, serving as a zone of initial dilution and dispersion in the immediate vicinity of the discharge point for dredged material, is allowed unless specifically prohibited by applicable water quality standards. Because water quality standards regarding concentrations of contaminants may be exceeded within the mixing zone, limitations must be placed on its size, shape, and location. Also, factors that will contribute to water degradation other than unacceptable levels of contaminants must be limited. The permitting authority shall consider each contaminant identified as present within the dredged material in light of its potential effect upon any element of water quality prescribed in applicable water quality standards or criteria. Such standards or criteria may establish specific numerical limitations upon the permissible concentration of the contaminant itself and/or upon the extent to which the discharge may alter a specified parameter of water quality after interaction of the contaminant with ambient water (for example, BOD or DO).

(a) *Mixing zone calculations.* The perimeter of the mixing zone shall be defined by the applicable water quality standard of the contaminant requiring the greatest dilution volume, or by 0.01 of the lowest 96-hour LC 50 when a water-column bioassay has been conducted.

(1) One of the following methods (provided in order of preference) shall be used to determine the volume and conformation of the zone required to achieve dilution and dispersal of contaminants to numerical limitations specified in Federal or State water quality standards or to 0.01 of the lowest 96-hour LC 50, as indicated above.

(i) When field data on the proposed discharge are adequate to predict the initial dispersion and diffusion of the discharge plume, such data shall be used; or

(ii) When field data on the dispersion and diffusion of a discharge with similar characteristics are available, these data shall be used in conjunction with an appropriate mathematical model (acceptable to the permitting authority) to make the required determination; or

(iii) When the above methods are impractical, due to inadequate field data or the unavailability of an appropriate mathematical model, the zone of dilution and dispersion may be estimated by assuming particular geometrical shapes for the disposal plume.

(2) Factors important in determining the shape and trajectory of the discharge plume and the volume of the zone of dilution and dispersal include the following:

(i) Surface area and water depth at the disposal site;

(ii) Current velocity, direction and variability at the disposal site;

(iii) Degree of turbulence;

(iv) Stratification attributable to causes including but not limited to obstructions, salinity, or density profiles at the disposal site;

(v) Discharge vessel speed and direction if appropriate;

(vi) Time to empty vessel or length of discharge;

(vii) Ambient concentration of contaminants;

(viii) Dredged material characteristics, particularly concentrations of constituents, amount of material, types of material (sand, silt, clay, etc.), and settling velocities;

(ix) Rate of discharge;

(x) Number of discharge actions per unit of time; and

(xi) Other characteristics of the disposal site that affect the rates and patterns of mixing.

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federal register

Monday
May 19, 1980

Part X

Environmental Protection Agency

Consolidated Permit Regulations

PART 123—STATE PROGRAM REQUIREMENTS

A. What Does This Part Do?

This Part establishes the requirements for State RCRA, UIC, NPDES, and 404 programs and the process for approval, revision, and withdrawal of these State programs. It also establishes guidelines for EPA overview of these programs, including the requirement for a Memorandum of Agreement between EPA and the State. Although State programs are established and operated under State law, approved State RCRA, UIC, NPDES, and 404 programs also implement Federal law and operate in lieu of Federally administered programs. A permit issued by a State under State law after its program has been approved satisfies the Federal permit requirement. Under the CWA, EPA retains the right to object to ("veto") NPDES and 404 permits proposed to be issued by approved States. Part 123 contains the procedures for EPA objection to these permits.

Part 123 is divided into a general subpart (Subpart A) and five program specific subparts (Subparts B–F). Unless expressly indicated, the requirements of Subpart A are generally applicable to all of the State Programs covered by this Part, except State RCRA programs under interim authorization; their requirements are contained solely in Subpart F. Subparts B, C, D and E provide program-specific requirements additional to those of Subpart A for the RCRA final authorization, UIC, NPDES, and 404 programs, respectively.

The procedures for issuing permits, as well as the minimum technical requirements for such permits, are incorporated into the requirements for State programs by cross-references to other provisions of EPA regulations. For example, many of the permit requirements contained in Part 122, which is applicable in full to EPA-administered permit programs, are applicable to State programs through cross-references in Part 123. Because EPA does not issue Section 404 permits (these are issued by the Corps of Engineers in the absence of an approved State program), Part 122 does not contain a subpart devoted solely to 404 permitting. Instead, Part 123, Subpart E contains the additional permit processing requirements applicable to State 404 programs.

With one major exception, the requirements of Part 123 represent the *minimum* requirements which States must meet to qualify for approval. States are allowed some flexibility in how they implement these requirements and are free to impose more stringent controls pursuant to State law. (The exception, discussed below, concerns the statutory requirement under RCRA that State hazardous waste programs be "consistent" with other approved State programs and with the Federal program.)

Many of the comments EPA received on proposed Part 123 objected to this scheme of setting minimum requirements for State programs and allowing States flexibility to implement those requirements. Some commenters felt that the requirements for State programs were too detailed and inflexible and that EPA should simply approve "effective" State programs. On the other hand, many national companies favored nationally uniform requirements and raised objections to allowing flexibility among the States. After careful consideration, EPA rejects both the suggestion that State program requirements should be totally flexible and the suggestion that they be much more rigid.

EPA believes that numerous problems would occur if it were to simply approve "effective" State programs without setting minimum requirements. First, since many States are presently working on developing programs, setting specific minimum requirements enables these States to know with certainty whether their program will be approvable. For example, State A is working on a hazardous waste statute. A controversial aspect of this legislation is the level of penalties and fines for program violations. By specifically establishing the minimum levels of fines for State programs in Part 123, EPA has given clear guidance. A requirement only of "effectiveness," which is subject to multiple interpretations, would subject the State to the risk of disapproval by EPA unless it enacted legislation identical to the Federal law.

It would be most difficult for the Agency to approve programs based on "effectiveness." To generate a record that a State program is "effective" which would withstand judicial scrutiny, EPA would have to look much beyond the State's submission for approval. Moreover, unless EPA established standards on which to judge whether the program was effective, it would be difficult to justify approving one State's program and denying another's. These regulations establish the specific criteria which are needed in order to make and justify these approval decisions.

In addition, because decisionmaking based on effectiveness relies primarily on the past performance of a program, it would be particularly difficult to judge State programs which are new or substantially modified since these programs would have no "track-record." Moreover, past performance is not as important to EPA as expected future performance. The Agency does not intend to disapprove all State programs which have had problems in the past. It views the decision whether or not to approve a State program as being forward looking; the Agency is primarily concerned that the program be effective in the future.[4]

Finally, all three of the statutes authorizing the State programs covered by this Part contemplate specific criteria for State programs (see CWA section 101(e), 402(b), 404(h), and 304(i); RCRA sections 3006(a) and 7004(b), and SDWA section 1421). There is a growing body of case law which suggests that in the absence of specific requirements EPA would not be able to deny a State's request for approval.

On the other hand, EPA rejects the suggestion that State programs be nationally uniform (i.e., that they should meet *all* the requirements of Parts 122 and 124). The Agency has carefully analyzed each of the Part 122 and Part 124 requirements to determine which are essential to State programs. In evaluating which requirements the State should adopt, EPA employed the following criteria:

(1) Is the requirement necessary to protect public health and the environment?;

(2) Is there a need for national uniformity with respect to the requirement?;

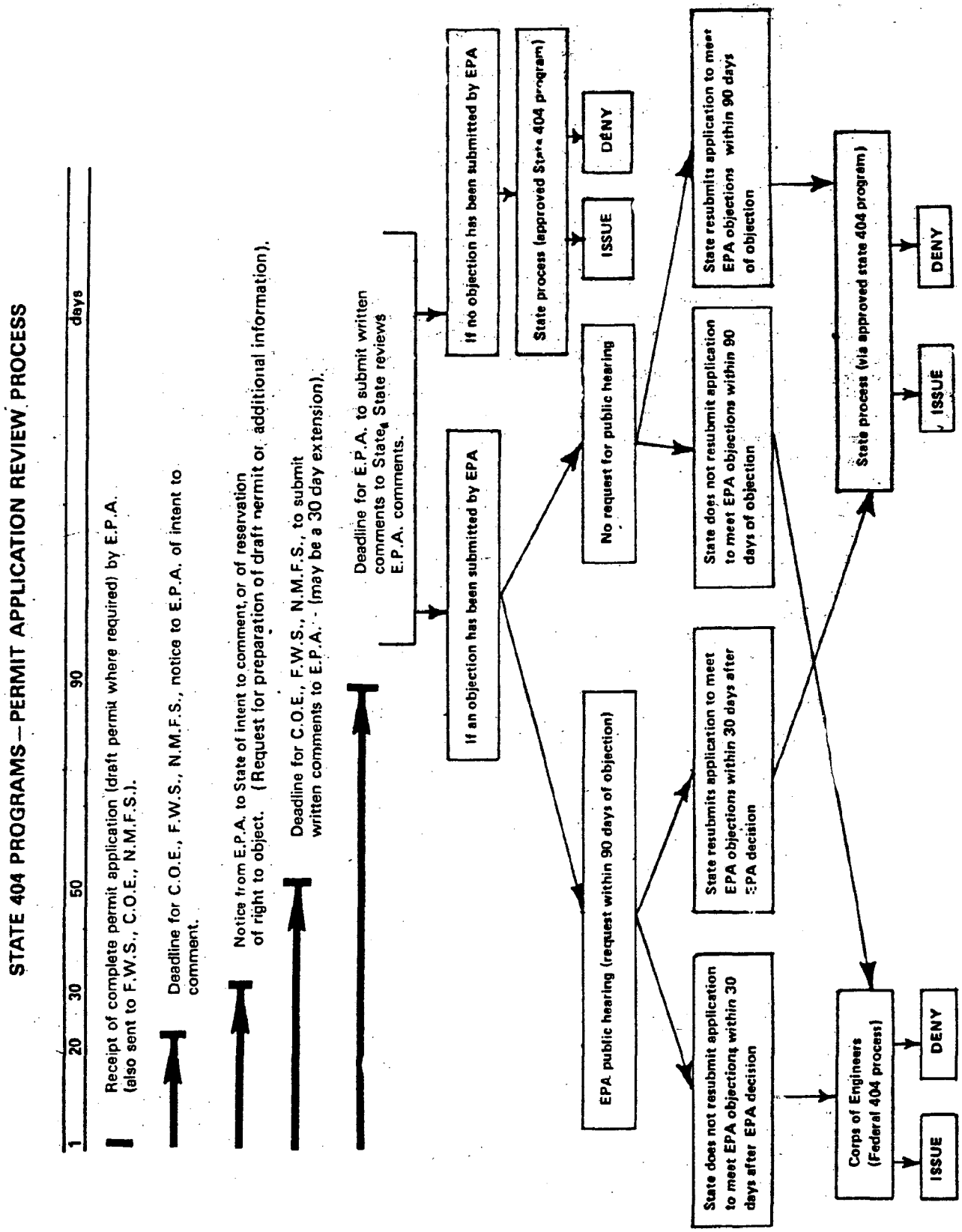
(3) Is the requirement necessary to promote a programmatic goal? (e.g., to promote public participation); and

(4) Is the requirement necessary under Federal law for State programs? (e.g., 5-year permit terms for NPDES and 404 permits).

Many of the procedures of Parts 122 and 124 do not meet these criteria, and therefore have not been made applicable to State programs. For example, while the Agency believes that fact sheets, draft permits, and 30 day public comment periods are necessary to ensure the opportunity for public participation (an explicit goal of Federal environmental programs), it does not

[4] In this regard, there was one place in the proposed regulations where the Agency suggested that past performance in enforcement would be a factor in evaluating State RCRA programs (see the *Comment* after proposed § 123.34(d)). This provision was strongly criticized by a large number of commenters who felt that past performance is not a relevant factor in evaluating a State program. While EPA believes that past performance can be considered, it agrees with the commenters that the decision whether or not to approve a State program is forward looking and that past performance should not be the only or prime decision factor.

believe that the process for administrative appeals of permits need to be uniform. Indeed, most States have their own administrative procedures acts and there were no comments suggesting that these were inadequate.



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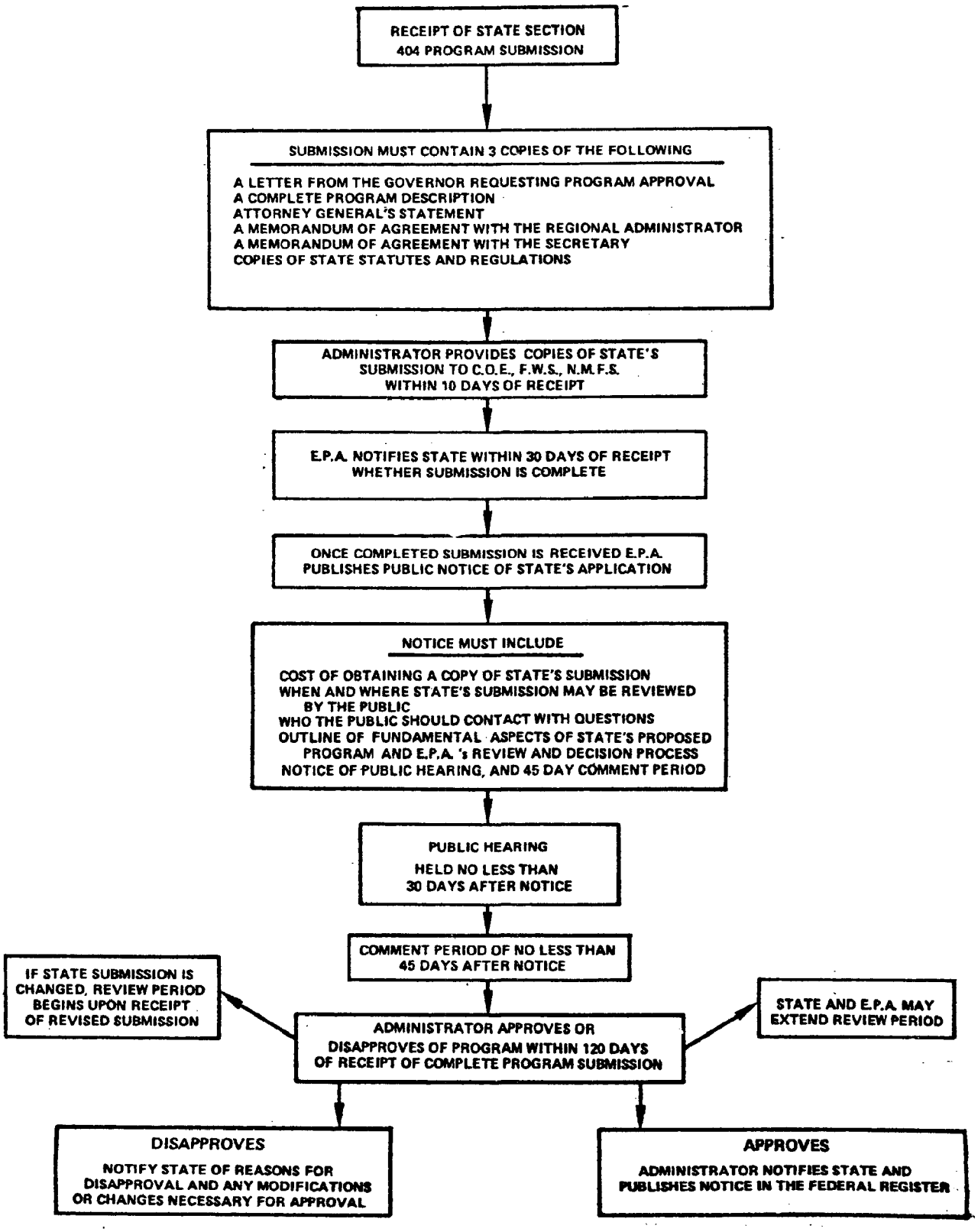

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PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM; THE HAZARDOUS WASTE PERMIT PROGRAM; AND THE UNDERGROUND INJECTION CONTROL PROGRAM

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Appendix D to Part 122—NPDES Permit Application Testing Requirements (§ 122.53).

Authority: Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; and Clean Water Act, 33 U.S.C. § 1251 *et seq.*

Subpart A—Definitions and General Program Requirements

§ 122.1 What are the consolidated permit regulations?

(a) *Coverage.* (1) These consolidated permit regulations include provisions for five permit programs:

(i) The *Hazardous Waste Management* (HWM) Program under Subtitle C of the Solid Waste Disposal Act, as amended by the *Resource Conservation and Recovery Act of 1976* (RCRA) (Pub. L. 94–580, as amended by Pub. L. 95–609; 42 U.S.C. § 6901 *et seq.*);

(ii) The *Underground Injection Control* (UIC) Program under Part C of the *Safe Drinking Water Act* (SDWA) (Pub. L. 95–523, as amended by Pub. L. 95–190; 42 U.S.C. § 300f *et seq.*);

(iii) The *National Pollutant Discharge Elimination System* (NPDES) Program under sections 318, 402, and 405(a) of the *Clean Water Act* (CWA) (Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576; 33 U.S.C. § 1251 *et seq.*);

(iv) The *Dredge or Fill* (404) Program under section 404 of the *Clean Water Act;* and

(v) The *Prevention of Significant Deterioration* (PSD) Program under regulations implementing section 165 of the *Clean Air Act* (CAA), as amended, (Pub. L. 88–206 as amended; 42 U.S.C. § 7401 *et seq.*)

(2) For the RCRA, UIC, and NPDES programs, these regulations cover basic EPA permitting requirements (Part 122), what a State must do to obtain approval to operate its program in lieu of a Federal program and minimum requirements for administering the approved State program (Part 123), and procedures for EPA processing of permit applications and appeals (Part 124). For the 404 program, these regulations include only the requirements which must be met for a State to administer its own program in lieu of the U.S. Army Corps of Engineers in "State regulated waters," and provisions for EPA vetoes of State issued 404 permits. For the PSD program, these regulations cover only procedures for EPA processing of PSD permits in Part 124.

(b) *Structure.* (1) *Coverage of Parts.* These consolidated permit regulations are incorporated into three Parts of Title 40 of the Code of Federal Regulations:

(i) *Part 122.* This Part contains definitions for all of the programs except PSD. It also contains basic permitting requirements for EPA-administered RCRA, UIC, and NPDES programs, such as application requirements, standard permit conditions, and monitoring and reporting requirements.

(ii) *Part 123.* This Part describes what States must do to obtain EPA approval of their RCRA, UIC, NPDES, or 404 programs. It also sets forth the minimum requirements for administering these permit programs after approval.

(iii) *Part 124.* This Part establishes the procedures for EPA issuance of RCRA, UIC, NPDES, and PSD permits. It also establishes the procedures for administrative appeals of EPA permit decisions.

(2) *Subparts.* Parts 122, 123, and 124 are each organized into subparts. Each Part has a general Subpart A which contains requirements that apply to all the programs covered by that Part. Additional subparts supplement these general provisions with requirements which apply to one or more specified programs. In case of any inconsistency between Subpart A and any program-specific subpart, the program-specific subpart is controlling.

(3) Certain requirements set forth in Parts 122 and 124 are made applicable to approved State programs, including State 404 programs, by reference in Part 123. These references are set forth in § 123.7. If a section or paragraph of Parts 122 or 124 is applicable to States, through reference in § 123.7, that fact is signaled by the following words at the end of the section or paragraph heading: *(applicable to State programs, see § 123.7).* If these words are absent, the section (or paragraph) applies only to EPA-administered permits.

(4) The structure and coverage of these regulations by program is indicated in the following chart. A permit applicant or permittee that is interested in finding out about only one of the programs covered by these regulations can use this chart to determine which regulations to read. If a State is the permitting authority, the applicant or permittee should read the State laws and program regulations which implement the requirements of Part 123 for the relevant program.

Program	Coverage		
	Part 122	Part 123	Part 124
RCRA	Subparts A and B	Subparts A, B, and F	Subparts A, B, E, and F.
UIC	Subparts A and C	Subparts A and C	Subparts A and F.
NPDES	Subparts A and D	Subparts A and D	Subparts A, D, E, and F.
404	Subpart A	Subparts A and E	Subpart A.
PSD	None	None	Subparts A, C, and F.

(c) *Relation to other requirements.* (1) *Consolidated permit application forms.* Applicants for EPA-issued RCRA Part A, UIC, NPDES, or PSD permits and persons seeking interim status under RCRA must submit their applications on EPA's consolidated permit application forms when available. (There will be no form for RCRA Part B applications and therefore no EPA application form is used. See § 122.25.) These forms, like these consolidated regulations, contain a general form covering all programs plus several program-specific forms. Although application forms have been consolidated, they, like permits, have been coordinated without losing their separate legal identities. There is no "consolidated permit." Each permit and application under a program is a separate document. Most of the information requested on these application forms (other than Form 5 for PSD) is required by these regulations. The essential information required in the general form (Form 1) is listed in § 122.4. The additional information required for RCRA Part A applications (Form 3) is listed in § 122.24, for UIC applications (Form 4) in § 122.37, and for NPDES applications (Forms 2a–d) in § 122.53. Applicants for State-issued permits must use State forms which must require at a minimum the information listed in these sections. All minimum information requirements for State 404 permit applications appear in § 123.94.

(2) *Technical regulations.* The five permit programs which are covered in these consolidated permit regulations each have separate additional regulations that contain technical requirements for those programs. These separate regulations are used by permit-issuing authorities to determine what requirements must be placed in permits if they are issued. These separate regulations are located as follows:

RCRA	40 CFR Parts 260–266.
UIC	40 CFR Part 146.
NPDES	40 CFR Parts 125, 129, 133, 136. 40 CFR Subchapter N (Parts 400–460)
404	40 CFR Part 230.
PSD	40 CFR Part 52.

(d) *Authority.* The consolidation of these permit programs into one set of regulations is authorized by sections 101(f) and 501(a) of CWA, sections 1006 and 2002 of RCRA, section 1450 of the SDWA, and section 301 of the CAA.

(e) *Public participation.* This rule establishes the requirements for public participation in EPA and State permit issuance, enforcement, and related variance proceedings; and in the approval of State RCRA, UIC, NPDES, and 404 programs. These requirements carry out the purposes of the public participation requirements of 40 CFR Part 25 (Public Participation), and supersede the requirements of that Part as they apply to actions covered under Parts 122, 123, and 124.

(f) *State authorities.* Nothing in Parts 122, 123, or 124 precludes more stringent State regulation of any activity covered by these regulations, whether or not under an approved State program, except as provided for the RCRA program in § 123.33 (requirement that State RCRA programs under final authorization be consistent with the Federal program and other State programs).

§ 122.2 Purpose and scope of Part 122.

(a) *Subpart A* of Part 122 contains definitions (§ 122.3) and basic permitting requirements (§§ 122.4 through 122.19). Definitions are given for the RCRA, UIC, NPDES, and State 404 programs. Definitions for EPA processing of PSD permits are in Part 124, Subpart C. The permitting requirements apply to EPA administered RCRA, UIC, and NPDES programs. (Permit program requirements for the Federal 404 program administered by the Corps of Engineers do not appear in these regulations but are found in 33 CFR Parts 320–327.) In addition, the permitting requirements apply to State-administered RCRA, UIC, NPDES, and 404 programs to the extent specified by cross-reference in § 123.7.

(b) *Subparts B, C, and D* contain additional requirements for RCRA, UIC and NPDES permitting, respectively. They apply to EPA, and to approved States to the extent specified by cross-reference in § 123.7.

§ 122.3 Definitions.

The following definitions apply to Parts 122, 123, and 124, except Part 124 coverage of the PSD program (see § 124.2). Terms not defined in this section have the meaning given by the appropriate Act. When a defined term appears in a definition, the defined term is sometimes placed within quotation marks as an aid to readers. When a definition applies primarily to one or more programs, those programs appear in parentheses after the defined term.

Acidizing (UIC) means the injection of acid through the borehole or "well" into a "formation" to increase permeability and porosity by dissolving the acid-soluble portion of the rock constituents.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Applicable standards and limitations (NPDES) means all State, interstate, and Federal standards and limitations to which a "discharge" or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved

modifications or revisions. For RCRA, application also includes the information required by the Director under § 122.25 (contents of Part B of the RCRA application).

Appropriate Act and regulations means the Clean Water Act (CWA); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA); or Safe Drinking Water Act (SDWA), whichever is applicable; and applicable regulations promulgated under those statutes. In the case of an "approved State program" appropriate Act and regulations includes State program requirements.

Approved program or *approved State* means a State or interstate program which has been approved or authorized by EPA under Part 123.

Aquifer (RCRA and UIC) means a geological "formation," group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

Area of reviw (UIC) means the area surrounding an "injection well" described according to the criteria set forth in § 146.06.

Average monthly discharge limitation (NPDES) means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

Average weekly discharge limitation (NPDES) means the highest allowable average of "daily discharges" over a calendar week, calculated as the sum of all daily discharges measured during a calendar week divided by the number of daily discharges measured during that week.

Best management practices ("BMPs") (NPDES and 404) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." For NPDES, BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. For State 404 programs, BMPs also include methods, measures, practices, or design and performance standards, which facilitate compliance with section 404(b)(1) environmental guidelines (40 CFR Part 230), effluent limitations or prohibitions under section 307(a), and applicable water quality standards.

BMPs (NPDES and 404) means "best management practices."

Closure (RCRA) means the act of securing a "Hazardous Waste Management facility" pursuant to the requirements of 40 CFR Part 264.

Contaminant (UIC) means any physical, chemical, biological, or radiological substance or matter in water.

Contiguous zone (NPDES) means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge (NPDES) means a "discharge" which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub. L. 92-500, as amended by Pub. L. 95-217 and Pub. L. 95-576; 33 U.S.C. § 1251 *et seq.*

Daily discharge (NPDS) means the "discharge of a pollutant" meansured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.

Direct discharge (NPDES) means the "discharge of a pollutant."

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administered program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval; see § 123.71.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

Discharge (NPDES) when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant (NPDES) means:

(a)(1) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(2) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

(b) This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works.

This term does not include an addition of pollutants by any "indirect discharger."

Discharge Monitoring Report ("DMR") (NPDES) means the EPA uniform national form, including any subsequent additions, revisions, or modifications, for the reporting of self-monitoring results by permitees. DMRs must be used by "approved States" as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

Discharge of dredged material (404) means any addition from any "point source" of "dredged material" into "waters of the United States." The term includes the addition of dredged material into waters of the United States and the runoff or overflow from a contained land or water dredged material disposal area. Discharges of pollutants into waters of the United States resulting from the subsequent onshore processing of dredged material are not included within this term and are subject to the NPDES program even though the extraction and deposit of such material may also require a permit from the Corps of Engineers or the State section 404 program.

Discharge of fill material (404) means the addition from any "point source" of "fill material" into "waters of the United States." The term includes the following activities in waters of the United States: placement of fill that is necessary for the construction of any structure; the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation

devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

Disposal (RCRA) means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any "hazardous waste" into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water.

Disposal facility (RCRA) means a facility or part of a facility at which "hazardous waste" is intentionally placed into or on the land or water, and at which hazardous waste will remain after closure.

Disposal site (404) means that portion of the "waters of the United States" enclosed within fixed boundaries consisting of a bottom surface area and any overlaying volume of water. In the case of "wetland" on which water is not present, the disposal site consists of the wetland surface area. Fixed boundaries may consist of fixed geographic point(s) and associated dimensions, or of a discharge point and specific associated dimensions.

DMR (NPDES) means "Discharge Monitoring Report."

Draft permit means a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in § 124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in § 124.5, is not a "draft permit." A "proposed permit" is not a "draft permit."

Drilling mud (UIC) means a heavy suspension used in drilling an "injection well," introduced down the drill pipe and through the drill bit.

Dredged material (404) means material that is excavated or dredged from "waters of the United States."

Effluent limitation (NPDES) means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

Effluent limitations guidelines (NPDES) means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise "effluent limitations."

Effluents (404) means "dredged material" or "fill material," including return flow from confined sites.

Emergency permit means a RCRA, UIC, or State 404 "permit" issued in accordance with §§ 122.27, 122.40 or 123.96, respectively.

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.

EPA means the United States "Environmental Protection Agency."

Exempted aquifer (UIC) means an "aquifer" or its portion that meets the criteria in the definition of "underground source of drinking water" but which has been exempted according to the procedures in § 122.35(b).

Existing HWM facility (RCRA) means a facility which was in operation or for which construction had commenced, on or before October 21, 1976. Construction had commenced if:

(a) The owner or operator had obtained all necessary Federal, State, and local preconstruction approvals or permits; and

(b)(1) A continuous physical, on-site construction program had begun, or

(2) The owner or operator had entered into contractual obligations—which cannot be cancelled or modified without substantial loss—for construction of the facility to be completed within a reasonable time.

[Note.—This definition reflects the literal language of the statute. However, EPA believes that amendments to RCRA now in conference will shortly be enacted and will change the date for determining when a facility is an "existing facility" to one no earlier than May of 1980; indications are that the conferees are considering October 30, 1980. Accordingly, EPA encourages every owner or operator of a facility which was built or under physical construction as of the promulgation date of these regulations to file Part A of its permit application so that it can be quickly processed for interim status when the change in the law takes effect. When those amendments are enacted, EPA will amend this definition.]

Existing injection well (UIC) means an "injection well" other than a "new injection well."

Facility or activity means any "HWM facility," UIC "injection well," NPDES "point source," or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Fill material (404) means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

Final authorization (RCRA) means approval by EPA of a State program which has met the requirements of § 3006(b) of RCRA and the applicable requirements of Part 123, Subparts A and B.

Fluid (UIC) means any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

Formation (UIC) means a body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

Formation fluid (UIC) means "fluid" present in a "formation" under natural conditions as opposed to introduced fluids, such as "drilling mud."

General permit (NPDES and 404) means an NPDES or 404 "permit" authorizing a category of discharges under the CWA within a geographical area. For NPDES, a general permit means a permit issued under § 122.59. For 404, a general permit means a permit issued under § 123.95.

Generator (RCRA) means any person, by site location, whose act or process produces "hazardous waste" identified or listed in 40 CFR Part 261.

Ground water (RCRA and UIC) means water below the land surface in a zone of saturation.

Hazardous substance (NPDES) means any substance designated under 40 CFR Part 116 pursuant to section 311 of CWA.

Hazardous waste (RCRA and UIC) means a hazardous waste as defined in 40 CFR § 261.3.

Hazardous Waste Management facility ("HWM facility") means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of "hazardous waste." A facility may consist of several "treatment," "storage," or "disposal" operational units (for example, one or more landfills, surface impoundments, or combinations of them).

HWM facility (RCRA) means "Hazardous Waste Management facility."

Indirect discharger (NPDES) means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

Injection well (RCRA and UIC) means a "well" into which "fluids" are being injected.

Injection zone (UIC) means a geological "formation," group of formations, or part of a formation receiving fluids through a "well."

In operation (RCRA) means a facility which is treating, storing, or disposing of "hazardous waste."

Interim authorization (RCRA) means approval by EPA of a State hazardous waste program which has met the requirements of § 3006(c) of RCRA and applicable requirements of Part 123, Subpart F.

Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the "appropriate Act and regulations."

Major facility means any RCRA, UIC, NPDES, or 404 "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

Manifest (RCRA and UIC) means the shipping document originated and signed by the "generator" which contains the information required by Subpart B of 40 CFR Part 262.

Maximum daily discharge limitation (NPDES) means the highest allowable "daily discharge."

Municipality (NPDES) means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal or sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of CWA.

National Pollutant Discharge Elimination System means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

New discharger (NPDES) means any building, structure, facility, or installation:

(a)(1) From which there is or may be a new or additional "discharge of pollutants" at a "site" at which on October 18, 1972 it had never discharged pollutants; and

(2) Which has never received a finally effective NPDES "permit" for discharges at that site; and

(3) Which is not a "new source."

(b) This definition includes an "indirect discharger" which commences discharging into "waters of the United States." It also includes any existing mobile point source, such as an offshore oil drilling rig, seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a location for which it does not have an existing permit.

New HWM facility (RCRA) means a "Hazardous Waste Management facility" which began operation or for which construction commenced after October 21, 1976.

New injection well (UIC) means a "well" which began injection after a UIC program for the State applicable to the well is approved.

New source (NPDES) means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source; or

(b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

NPDES means "National Pollutant Discharge Elimination System."

Off-site (RCRA) means any site which is not "on-site."

On-site (RCRA) means on the same or geographically contiguous property which may be divided by public or private right(s)-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right(s)-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which the person controls and to which the public does not have access, is also considered on-site property.

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this Part and Parts 123 and 124. "Permit" includes RCRA "permit by rule" (§ 122.26), UIC area permit (§ 122.39), NPDES or 404 "general permit" (§§ 122.59 and 123.85), and RCRA, UIC, or 404 "emergency permit" (§§ 122.27, 122.40, and 123.96). Permit does not include RCRA interim status (§ 122.23), UIC authorization by rule (§ 122.37), or any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Permit by rule (RCRA) means a provision of these regulations stating that a "facility or activity" is deemed to have a RCRA permit if it meets the requirements of the provision.

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Phase I (RCRA) means that phase of the Federal hazardous waste management program commencing on the effective date of the last of the following to be initially promulgated: 40 CFR Parts 122, 123, 260-261, 262, 263, and 265. Promulgation of Phase I refers to promulgation of the regulations necessary for Phase I to begin.

Phase II (RCRA) means that phase of Federal hazardous waste management program commencing on the effective date of the first Subpart of 40 CFR Part 264, Subparts F through R to be initially promulgated. Promulgation of Phase II refers to promulgation of the regulations necessary for Phase II to begin.

Physical construction (RCRA) means excavation, movement of earth, erection of forms or structures, or similar activity to prepare an "HWM facility" to accept "hazardous waste."

Plugging (UIC) means the act or process of stopping the flow of water, oil, or gas in "formations" penetrated by a borehole or "well."

Point source (NPDES and 404) means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel, or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

Pollutant (NPDES and 404) means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or

disposal will not result in the degradation of ground or surface water resources.

[Note.—Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).]

POTW means "publicly owned treatment works."

Primary industry category (NPDES) means any industry category listed in the NRDC settlement agreement (*Natural Resources Defense Council et al.* v. *Train*, 8 E.R.C. 2120 (D.D.C. 1976), *modified* 12 E.R.C. 1833 (D.D.C. 1979); also listed in Appendix A of Part 122.

Privately owned treatment works (NPDES) means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater (NPDES) means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

Proposed permit (NPDES) means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works ("POTW") means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a "State" or "municipality." This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

Radioactive waste (UIC) means any waste which contains radioactive material in concentrations which exceed those listed in 10 CFR Part 20, Appendix B, Table II, Column 2, or exceed the "Criteria for Identifying and Applying Characteristics of Hazardous Waste and for Listing Hazardous Waste" in 40 CFR Part 261, whichever is applicable.

RCRA means the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94-580, as amended by Pub. L. 95-609, 42 U.S.C. § 6901 *et seq.*).

Recommencing discharger (NPDES) means a source which recommences discharge after terminating operations.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Schedule of compliance means a schedule of remedial measures included in a "permit," including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the "appropriate Act and regulations."

SDWA means the Safe Drinking Water Act (Pub. L. 95-523, as amended by Pub. L. 95-1900; 42 U.S.C. § 300f *et seq.*).

Secondary industry category (NPDES) means any industry category which is not a "primary industry category."

Secretary (NPDES and 404) means the Secretary of the Army, acting through the Chief of Engineers.

Section 404 program or *State 404 program* or *404* means an "approved State program" to regulate the "discharge of dredged material" and the "discharge of fill material" under section 404 of the Clean Water Act in "State regulated waters."

Sewage from vessels (NPDES) means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of CWA, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

Sewage sludge (NPDES) means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a "publicly owned treatment works." "Sewage" as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water runoff, that are discharged to or otherwise enter a publicly owned treatment works.

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands (except in the case of RCRA), and the Commonwealth Northern Mariana Islands (except in the case of CWA).

State Director means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the RCRA, SDWA, and CWA programs.

State regulated waters (404) means those "waters of the United States" in which the Corps of Engineers suspends the issuance of section 404 permits upon approval of a State's section 404 permit program by the Administrator under section 404(h). These waters shall be identified in the program description as required by § 123.4(h)(1). The Secretary shall retain jurisdiction over the following waters (see CWA section 404(g)(1)):

(a) Waters which are subject to the ebb and flow of the tide;

(b) Waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark; and

(c) "Wetlands" adjacent to waters in (a) and (b).

Storage (RCRA) means the holding of "hazardous waste" for a temporary period, at the end of which the hazardous waste is treated, disposed, or stored elsewhere.

Stratum (plural *strata*) (UIC) means a single sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock material.

Total dissolved solids (UIC and NPDES) means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR Part 136.

Toxic pollutant (NPDES and 404) means any pollutant listed as toxic under section 307(a)(1) of CWA.

Transporter (RCRA) means a person engaged in the off-site transportation of "hazardous waste" by air, rail, highway or water.

Treatment (RCRA) means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any "hazardous waste" so as to neutralize such wastes, or so as to recover energy or material resources from the waste, or so as to render such waste non-

hazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

UIC means the Underground Injection Control program under Part C of the Safe Drinking Water Act, including an "approved program."

Underground injection (UIC) means a "well injection."

Underground source of drinking water ("USDW") (RCRA and UIC) means an "aquifer" or its portion:

(a)(1) Which supplies drinking water for human consumption; or

(2) In which the ground water contains fewer than 10,000 mg/l "total dissolved solids;" and

(b) Which is not an "exempted aquifer."

USDW (RCRA and UIC) means "underground source of drinking water."

Variance (NPDES) means any mechanism or provision under sections 301 or 316 of CWA or under 40 CFR Part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

Waters of the United States or *Waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (1)-(4) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)-(f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

Well (UIC) means a bored, drilled or driven shaft, or a dug hole, whose depth is greater than the largest surface dimension.

Well injection (UIC) means the subsurface emplacement of "fluids" through a bored, drilled, or driven "well;" or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

Wetlands means 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.

PART 123—STATE PROGRAM REQUIREMENTS

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Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*

Subpart A—General Program Requirements

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under the following statutes and the requirements State programs must meet to be approved by the Administrator under:

(1) Section 3006(b) (hazardous waste-final authorization) and section 3006(c) (hazardous waste-interim authorization) of RCRA;

(2) Section 1422 (underground injection control—UIC) of SDWA;

(3) Sections 318, 402, and 405 (National Pollutant Discharge Elimination System—NPDES) of CWA; and

(4) Section 404 (dredged or fill material) of CWA.

(b) Subpart A contains requirements applicable to all programs listed in paragraph (a) except hazardous waste programs operating under interim authorization. All requirements applicable to hazardous waste programs operating under interim authorization are contained in Subpart F. (References in this subpart to "programs under this Part" do not refer to hazardous waste programs operating under interim authorization.) Subpart A includes the elements which must be part of submissions to EPA for program approval, the substantive provisions which must be present in State programs for them to be approved, and the procedures EPA will follow in approving, revising, and withdrawing State programs. Subpart B contains additional requirements for States seeking final authorization under RCRA. Subpart C contains additional requirements for State UIC programs. Subpart D specifies additional requirements for State NPDES programs. Subpart E specifies additional requirements for State section 404 programs.

(c) State submissions for program approval must be made in accordance with the procedures set out in Subpart A and, in the case of State 404 programs with the procedures set out in Subpart E. (Submissions for interim authorization shall be made in accordance with Subpart F.) This includes developing and submitting to EPA a program description (§ 123.4), an Attorney General's statement (§ 123.5), a Memorandum of Agreement with the Regional Administrator (§ 123.6) and with the Secretary in the case of section 404 programs (§ 123.99).

(d) The substantive provisions which must be included in State programs for them to be approved include requirements for permitting, compliance evaluation, enforcement, public participation, and sharing of information. The requirements are found both in Subpart A (§§ 123.7 to 123.11) and in the program specific subparts. Many of the requirements for State programs are made applicable to States by cross-referencing other EPA regulations. In particular, many of the provisions of Parts 122 and 124 are made applicable to States by the references contained in § 123.7.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this Part, the appropriate Act and any comments received.

(f) The Administrator shall approve State programs which conform to the applicable requirements of this Part.

(g) Upon approval of a State program, the Administrator (or the Secretary in the case of section 404 programs) shall suspend the issuance of Federal permits for those activities subject to the approved State program.

(h) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this Part.

(i) States are encouraged to consolidate their permitting activities. While approval of State programs under this Part will facilitate such consolidation, these regulations do not require consolidation. Each of the four programs under this Part may be applied for and approved separately.

(j) Partial State programs are not allowed under NPDES, 404, or RCRA (for programs operating under final authorization). However, in many cases States will lack authority to regulate activities on Indian lands. This lack of authority does not impair a State's ability to obtain full program approval in accordance with this Part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. Similarly, a State can assume primary enforcement responsibility for the UIC program, notwithstanding § 123.51(e), when the State program is unable to regulate activities on Indian lands within the State. EPA, or in the case of section 404 programs the Secretary, will administer the program on Indian lands if the State does not seek this authority.

[Note.—States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.]

(k) Except as provided in § 123.32, nothing in this Part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this Part;

(2) Operating a program with a greater scope of coverage than that required under this Part. Where an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

[Note.—For example, when a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits. Also, State assumption of the section 404 program is limited to certain waters, as provided in § 123.91(c). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill materials into those waters over which the Secretary retains section 404 jurisdiction.]

§ 123.2 Definitions.

The definitions in Part 122 apply to all subparts of this Part, including Subpart F.

§ 123.3 Elements of a program submission.

(a) Any State that seeks to administer a program under this Part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State requesting program approval;

(2) A complete program description, as required by § 123.4, describing how the State intends to carry out its responsibilities under this Part;

(3) An Attorney General's statement as required by § 123.5;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.6, and, in the case of State section 404 programs, a Memorandum of Agreement with the Secretary as required by § 123.99;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(6) The showing required by § 123.39(c) (RCRA programs only) and § 123.54(b) (UIC programs only) of the State's public participation activities prior to program submission.

(b) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program under the appropriate Act) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

§ 123.4 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the Federal program under State law or under an interstate compact. The program description shall include:

(a) A description in narrative form of the scope, structure, coverage and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program, including the information listed below. If more than one agency is responsible for administration of a program, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. In the case of State RCRA programs, such a designation is mandatory (see paragraph (f)(4) of this section). When the State proposes to administer a program of greater scope of coverage than is required by Federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the Federally required portion of the program.

(1) A description of the State agency staff who will carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section, identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

(d) Copies of the permit form(s), application form(s), reporting form(s), and manifest format the State intends to employ in its program. Forms used by States need not be identical to the forms used by EPA but should require the same basic information, except that State NPDES programs are required to use standard Discharge Monitoring Reports (DMR). The State need not provide copies of uniform national forms it intends to use but should note its intention to use such forms. State section 404 application forms must include the information required by § 123.94 and State section 404 permit forms must include the information and conditions required by § 123.97.

[Note.—States are encouraged to use uniform national forms established by the

Administrator. If uniform national forms are used, they may be modified to include the State Agency's name, address, logo, and other similar information, as appropriate, in place of EPA's.]

(e) A complete description of the State's compliance tracking and enforcement program.

(f) *State RCRA programs only.* In the case of State RCRA programs, the program description shall also include:

(1) A description of the State manifest tracking system, and of the procedures the State will use to coordinate information with other approved State programs and the Federal program regarding interstate and international shipments.

(2) An estimate of the number of the following:

(i) Generators;

(ii) Transporters: and

(iii) On- and off-site storage, treatment and disposal facilities, and a brief description of the types of facilities and an indication of the permit status of these facilities.

(3) If available, an estimate of the annual quantities of hazardous wastes:

(i) Generated within the State;

(ii) Transporters; and

State; and

(iii) Stored, treated, or disposed of within the State:

(A) on-site; and

(B) off-site.

(4) When more than one agency within a State has responsibility for administering the State program, an identification of a "lead agency" and a description of how the State agencies will coordinate their activities.

(g) *State UIC programs only.* In the case of a submission for approval of a State UIC program the State's program description shall also include:

(1) A schedule for issuing permits within five years after program approval to all injection wells within the State which are required to have permits under this Part and Part 122;

(2) The priorities (according to criteria set forth in 40 CFR § 146.09) for issuing permits, including the number of permits in each class of injection well which will be issued each year during the first five years of program operation;

(3) A description of how the Director will implement the mechanical integrity testing requirements of 40 CFR § 146.08, including the frequency of testing that will be required and the number of tests that will be reviewed by the Director each year;

(4) A description of the procedure whereby the Director will notify owners and operators of injection wells of the requirement that they apply for and obtain a permit. The notification required by this paragraph shall require applications to be filed as soon as possible, but not later than four years after program approval for all injection wells requiring a permit;

(5) A description of any rule under which the Director proposes to authorize injections, including the text of the rule;

(6) For any existing enhanced recovery and hydrocarbon storage wells which the Director proposes to authorize by rule, a description of the procedure for reviewing the wells for compliance with applicable monitoring, reporting, construction, and financial responsibility requirements of §§ 122.41 and 122.42, and 40 CFR Part 146;

(7) A description of and schedule for the State's program to establish and maintain a current inventory of injection wells which must be permitted under State law;

(8) Where the Director has designated underground sources of drinking water in accordance with § 122.35(a), a description and identification of all such designated sources in the State;

(9) A description of aquifers, or parts thereof, which the Director has identified under § 122.35(b) as exempted aquifers, and a summary of supporting data;

(10) A description of and schedule for the State's program to ban Class IV wells prohibited under § 122.36; and

(11) A description of and schedule for the State's program to establish an inventory of Class V wells and to assess the need for a program to regulate Class V wells.

(h) *State 404 programs only.* In the case of a submission for approval of a section 404 program the State's program description shall also include:

(1) A description of State regulated waters.

[Note.—States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps of Engineers retains authority under section 404(g) of CWA.]

(2) A categorization, by type and quantity, of discharges within the State, and an estimate of the number of discharges within each category for which the discharger must file for a permit.

(3) An estimate of the number and percent of activities within each category for which the State has already issued a State permit regulating the discharge.

(4) In accordance with § 123.92(a)(6), a description of the specific best management practices requirements proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of CWA for construction or maintenance of farm roads, forest roads or temporary roads for moving mining equipment.

(5) A description of how the State section 404 agency(ies) will interact with other State and local agencies.

(6) A description of how the State will coordinate its enforcement strategy with that of the Corps of Engineers and EPA.

(7) Where more than one agency within a State has responsibility for administering the State program:

(i) A memorandum of understanding among all the responsible State agencies which establishes:

(A) Procedures for obtaining and exchanging information necessary for each agency to determine and assess the cumulative impacts of all activities authorized under the State program;

(B) Common reporting requirements; and

(C) Any other appropriate procedures not inconsistent with section 404 of CWA or these regulations;

(ii) A description of procedures for coordinating compliance monitoring and enforcement, distributing among the responsible agencies information received from applicants and permittees, and issuing reports required by section 404 of CWA or these regulations.

(8) Where several State 404 permits are required for a single project, a description of procedures for:

(i) Ensuring that all the necessary State 404 permits are issued before any of the permits go into effect; and

(ii) Concurrent processing and, where appropriate, joint processing of all of the necessary State 404 permits.

§ 123.5 Attorney General's statement.

(a) Any State that seeks to administer a program under this Part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under § 123.4 and to meet the requirements of this Part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on

all matters pertaining to the State program.

[Note.—EPA will supply States with an Attorney General's statement format on request.]

(b) *When a State seeks authority over* activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

(c) *State NPDES programs only.* In the case of State NPDES programs, the Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under § 122.59.

(d) *State section 404 programs only.*

(1) In the case of State section 404 programs the State Attorney General's statement shall contain an analysis of State law regarding the prohibition on taking private property without just compensation, including any applicable judicial interpretations, and an assessment of the effect such law will have on the successful implementation of the State's regulation of the discharge of dredged or fill material.

(2) In the case of State section 404 programs, where more than one agency has responsibility for administering the State program, the Attorney General's Statement shall include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State as a whole has full authority to administer a complete State section 404 program.

§ 123.8 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this Part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this Part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). When existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

[Note.—For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.]

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

[Note.—The nature and basis of EPA review of State permits and permit applications differs among the programs governed by this Part. See §§ 123.36 (RCRA) 123.75 (NPDES) and 123.101 (404).]

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of § 123.74 (NPDES programs only) and § 123.100 (404 programs only).

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When appropriate, provisions for joint processing of permits by the State and EPA, for facilities or activities which require permits from both EPA and the State under different programs See § 124.4.

[Note.—To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to consider steps to coordinate or consolidate their own permit programs and activities.]

(6) Provisions for modification of the Memorandum of Agreement in accordance with this Part.

(c) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

[Note.—Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. However, it may still be appropriate to specify in the MOA the basis for such detailed agreements, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.]

(d) *State RCRA programs only.* In the case of State RCRA programs the Memorandum of Agreement shall also provide that:

(1) EPA may conduct compliance inspections of all generators, transporters, and HWM facilities in each year for which the State is operating under final authorization. The Regional Administrator and the State Director may agree to limitations on compliance inspections of generators, transporters, and non-major HWM facilities.

(2) No limitations on EPA compliance inspections of generators, transporters, or non-major HWM facilities under paragraph (d)(1) of this section shall restrict EPA's right to inspect any generator, transporter, or HWM facility which it has cause to believe is not in compliance with RCRA; however, before conducting such an inspection, EPA will normally allow the State a reasonable opportunity to conduct a compliance evaluation inspection.

(3) The State Director shall promptly forward to EPA copies of draft permits and permit applications for all major HWM facilities for review and comment. The Regional Administrator and the State Director may agree to limitations regarding review of and comment on draft permits and/or permit applications for non-major HWM facilities. The State Director shall supply EPA copies of final permits for all major HWM facilities.

(4) The Regional Administrator shall promptly forward to the State Director information obtained prior to program approval in notifications provided under

section 3010(a) of RCRA. The Regional Administrator and the State Director shall agree on procedures for the assignment of EPA identification numbers for new generators, transporters, treatment, storage, and disposal facilities.

(5) The State Director shall review all permits issued under State law prior to the date of program approval and modify or revoke and reissue them to require compliance with the requirements of this Part. The Regional Administrator and the State Director shall establish a time within which this review must take place.

(e) *State NPDES programs only.* In the case of State NPDES programs the Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under sections 402(d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following discharges:

(1) Discharges into the territorial sea;

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(3) Discharges proposed to be regulated by general permits (see § 122.59);

(4) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

(5) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

(6) Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in Appendix A to Part 122;

(7) Discharges from other sources with a daily average discharge exceeding 0.5 (one-half) million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow.

(f) *State section 404 programs only.* (1) In the case of State section 404 programs, the Memorandum of Agreement with the Regional Administrator shall also specify:

(i) The categories (including any class, type, or size within such categories) of discharges for which EPA will waive review of State-issued permit applications, draft permits, and draft general permits. While the Regional Administrators and the State, after consultation with the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, may agree to waive Federal review of certain "classes or categories" of permits, no waiver may be granted for the following activities:

(A) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(B) Major discharges;

(C) Discharges into critical areas established under State or Federal law including fish and wildlife sanctuaries or refuges, National and historical monuments, wilderness areas and preserves, National and State parks, components of the National Wild and Scenic Rivers system, the designated critical habitat of threatened or endangered species, and sites identified or proposed under the National Historic Preservation Act;

(D) Discharges proposed to be regulated by general permits; or

(E) Discharges known or suspected to contain toxic pollutants in toxic amounts under section 307(a)(1) of CWA or hazardous substances in reportable quantities under section 311 of CWA.

(ii) A definition of major discharges.

(2) In the case of State section 404 programs, where more than one agency within a State has responsibility for administering the program, all of the responsible agencies shall be parties to the Memorandum of Agreement.

(g) *State NPDES and Section 404 programs only.* Whenever a waiver is granted under paragraphs (e) or (f)(1) of this section, the Memorandum of Agreement shall contain:

(1) A statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination; and

(2) A statement that the State shall supply EPA and, in the case of State section 404 programs, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Servcie (unless receipt is waived in writing), with copies of final permits.

§ 123.7 Requirements for permitting.

(a) All State programs under this Part must have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.4—(Application for a permit), except in the case of § 122.4(d) for State section 404 programs;

(2) § 122.6—(Signatories);

(3) § 122.7—(Applicable permit conditions);

(4) § 122.8—(Establishing permit conditions);

(5) § 122.9—(Duration);

(6) § 122.10(a)—(Schedules of compliance);

(7) § 122.11—(Monitoring requirements);

(8) § 122.13 (a) and (b)—(Effect of permit);

(9) § 122.14—(Permit transfer);

(10) § 122.15—(Permit modification);

(11) § 122.16—(Permit termination);

(12) § 122.18—(Noncompliance reporting);

(13) § 122.19 (b)–(d)—(Confidential information);

(14) § 124.3(a)—(Application for a permit);

(15) § 124.5 (a), (c), (d), and (f)—(Modification of permits), except as provided in § 123.100(b)(2) for State section 404 programs;

(16) § 124.6 (a), (c), (d), and (e)—(Draft permit), except as provided in § 123.100(b)(2) for State section 404 programs;

(17) § 124.8—(Fact sheets), except as provided in § 123.100(b)(2) for State section 404 programs;

(18) § 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e)—(Public notice);

(19) § 124.11—(Public comments and requests for hearings);

(20) § 124.12(a)—(Public hearings), and

(21) § 124.17 (a) and (c)—(Response to comments).

[Note.—States need not implement provisions identical to the above listed provisions or the provisions listed in §§ 123.7 (b)–(d). Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of Parts 122 and 124. See, for example, § 122.5(d) (continuation of permits) and § 124.4 (consolidation of permit processing).

(b) *State RCRA programs only.* Any State hazardous waste program shall have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.21(d)(2)—(Specific inclusions);

(2) § 122.22—(Application for a permit);
(3) § 122.24—(Contents of Part A);
(4) § 122.25—(Contents of Part B);

[Note.—States need not use a two part permit application process. The State application process must, however, require information in sufficient detail to satisfy the requirements of §§ 122.24 and 122.25.]

(5) § 122.26—(Permit by rule);
(6) § 122.27—(Emergency permits);
(7) § 122.28—(Additional permit conditions);
(8) § 122.29—(Establishing permit conditions); and
(9) § 122.30—(Interim permits for UIC wells).

(c) *State UIC programs only.* State UIC programs shall have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:
(1) § 122.32—(Classification of injection wells);
(2) § 122.33—(Prohibition of unauthorized injection);
(3) § 122.34—(Prohibition of movement of fluids into underground sources of drinking water);
(4) § 122.35—(Identification of underground sources of drinking water and exempted aquifers);
(5) § 122.36—(Elimination of Class IV wells);
(6) § 122.37—(Authorization by rule);
(7) § 122.38—(Authorization by permit);
(8) § 122.39—(Area permits);
(9) § 122.41—(Additional permit conditions);
(10) § 122.42—(Establishing permit conditions);
(11) § 122.44—(Corrective action); and
(12) § 122.45—(Requirements for wells managing hazardous wastes).

(d) *State NPDES programs only.* State NPDES programs shall have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:
(1) § 122.52—(Prohibitions);
(2) § 122.53 (a), (d)–(g) and (i)–(k)—(Application for a permit);
(3) § 122.54—(Concentrated animal feeding operations);
(4) § 122.55—(Concentrated aquatic animal production facilities);
(5) § 122.56—(Aquaculture projects);
(6) § 122.57—(Separate storm sewers);
(7) § 122.58—(Silviculture);
(8) § 122.59—(General permits), *provided that* States which do not seek to implement the general permit program under § 122.59 need not do so;
(9) § 122.60—(Conditions applicable to all permits);
(10) § 122.61—(Conditions applicable to specified categories of permits);
(11) § 122.62—(Establishing permit conditions);
(12) § 122.63—(Calculating NPDES conditions);
(13) § 122.64—(Duration of permit);
(14) § 122.65—(Disposal into wells);
(15) § 124.56—(Fact sheets);
(16) § 124.57(a)—(Public notice);
(17) § 124.59—(Comments from government agencies);
(18) Subparts A, B, C, D, H, I, J, K and L of Part 125; and
(19) 40 CFR Parts 129, 133, and Subchapter N.

[Note.—For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of § 122.60 or by requiring more prompt notice of an upset.]

(e) *State NPDES and 404 programs only.* (1) State NPDES and 404 permit programs shall have an approved continuing planning process under 40 CFR § 35.1500 and shall assure that the approved planning process is at all times consistent with CWA.

(2) State NPDES and 404 programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(i) For the purposes of this paragraph:

(A) "Board or body" includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(B) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(C) "Permit holders or applicants for a permit" does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(D) "Income" includes retirement benefits, consultant fees, and stock dividends.

(ii) For the purposes of this subparagraph, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

§ 123.8 Requirements for compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The State shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index, or inventory of such facilities and activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information;

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(c) The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to

regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conform with this requirement.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

(e) *State NPDES programs only.* State NPDES compliance evaluation programs shall have procedures and ability for:

(1) Maintaining a comprehensive inventory of all sources covered by NPDES permits and a schedule of reports required to be submitted by permittees to the State agency;

(2) Initial screening (i.e., pre-enforcement evaluation) of all permit or grant-related compliance information to identify violations and to establish priorities for further substantive technical evaluation;

(3) When warranted, conducting a substantive technical evaluation following the initial screening of all permit or grant-related compliance information to determine the appropriate agency response;

(4) Maintaining a management information system which supports the compliance evaluation activities of this Part; and

(5) Inspecting the facilities of all major dischargers at least annually.

§ 123.9 Requirements for enforcement authority.

(a) Any State agency administering a program shall have available the following remedies for violations of State program requirements:

(1) To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;

[Note.—This paragraph requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.]

(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:

(i) *State RCRA programs only.* (A) Civil penalties shall be recoverable for any program violation in at least the amount of $10,000 per day.

(B) Criminal remedies shall be obtainable against any person who knowingly transports any hazardous waste to an unpermitted facility; who treats, stores, or disposes of hazardous waste without a permit; or who makes any false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of program compliance. Criminal fines shall be recoverable in at least the amount of $10,000 per day for each violation, and imprisonment for at least six months shall be available.

(ii) *State UIC programs only.* (A) For all wells except Class II wells, civil penalties shall be recoverable for any program violation in at least the amount of $2,500 per day. For Class II wells, civil penalties shall be recoverable for any program violation in at least the amount of $1,000 per day.

(B) Criminal fines shall be recoverable in at least the amount of $5,000 per day against any person who willfully violates any program requirement, or, for Class II wells, pipeline (production) severance shall be imposable against any person who willfully violates any program requirement.

(iii) *State NPDES and section 404 programs only.* (A) Civil penalties shall be recoverable for the violation of any NPDES or section 404 permit condition; any NPDES or section 404 filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or any regulation or orders issued by the State Director. Such penalties shall be assessable in at least the amount of $5,000 per day for each violation.

(B) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES or section 404 permit condition; or any NPDES or section 404 filing requirement. Such fines shall be assessable in at least the amount of $10,000 per day for each violation.

[Note.—States which provide criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of paragraph (a)(3)(iii)(B) of this section.]

(C) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES or section 404 form, in any notice or report required by an NPDES or section 404 permit, or who knowingly renders inaccurate any moitoring device or method required to be maintained by the Director. Such fines shall be recoverable in at least the amount of $5,000 for each instance of violation.

[Note.—In many States the State Director will be represented in State courts by the State Attorney General or other appropriate legal officer. Although the State Director need not appear in court actions he or she should have power to request that any of the above actions be brought.]

(b)(1) The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.

[Note.—For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.]

(c) Any civil penalty assessed, sought or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation. A civil penalty agreed upon by the State Director in settlement of administrative or judicial litigation may be adjusted by a percentage which represents the likelihood of success in establishing the underlying violation(s) in such litigation. If such civil penalty, together with the costs of expeditious compliance, would be so severely disproportionate to the resources of the violator as to jeopardize continuance in business, the payment of the penalty may be deferred or the penalty may be forgiven in whole or part, as circumstances warrant. In the case of a penalty for a failure to meet a statutory or final permit compliance deadline, "appropriate to the violation," as used in this paragraph, means a penalty which is equal to:

(1) An amount appropriate to redress the harm or risk to public health or the environment; plus

(2) An amount appropriate to remove the economic benefit gained or to be gained from delayed compliance; plus

(3) An amount appropriate as a penalty for the violator's degree of recalcitrance, defiance, or indifference to requirements of the law; plus

(4) An amount appropriate to recover unusual or extraordinary enforcement costs thrust upon the public; minus

(5) An amount, if any, appropriate to reflect any part of the noncompliance attributable to the government itself; and minus

(6) An amount appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's control (*e.g.*, floods, fires).

[Note.—In addition to the requirements of this paragraph, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended:

Procedures for assessment by the State of the costs of investigations, inspections, or monitoring surveys which lead to the establishment of violations;

Procedures which enable the State to assess or to sue any persons responsible for unauthorized activities for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon human health and the environment resulting from the unauthorized activity, whether or not accidental;

Procedures which enable the State to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, or their habitat, and for any other damages caused by unauthorized activity, either to the State or to any residents of the State who are directly aggrieved by the unauthorized activity, or both; and

Procedures for the administrative assessment of penalties by the Director.]

(d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a) (1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.8(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

§ 123.10 Sharing of information.

(a) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction. If the information has been submitted to the State under a claim of confidentiality, the State must submit that claim to EPA when providing information under this section. Any information obtained from a State and subject to a claim of confidentiality will be treated in accordance with the regulations in 40 CFR Part 2. If EPA obtains from a State information that is not claimed to be confidential, EPA may make that information available to the public without further notice.

(b) EPA shall furnish to States with approved programs the information in its files not submitted under a claim of confidentiality which the State needs to implement its approved program. EPA shall furnish to States with approved programs information submitted to EPA under a claim of confidentiality, which the State needs to implement its approved program, subject to the conditions in 40 CFR Part 2.

§ 123.11 Coordination with other programs.

(a) Issuance of State permits under this Part may be coordinated with issuance of RCRA, UIC, NPDES, and 404 permits whether they are controlled by the State, EPA, or the Corps of Engineers. See § 124.4.

(b) The State Director of any approved program which may affect the planning for and development of hazardous waste management facilities and practices shall consult and coordinate with agencies designated under section 4006(b) of RCRA (40 CFR Part 255) as responsible for the development and implementation of State solid waste management plans under section 4002(b) of RCRA (40 CFR Part 256).

§ 123.12 Approval process.

The process for EPA approval of State programs is set out in §§ 123.39 (RCRA), 123.54 (UIC), 123.77 (NPDES), and 123.104 (404).

§ 123.13 Procedures for revision of State programs.

(a) Either EPA or the approved State may initiate program revision. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities.

(b) Revision of a State program shall be accomplished as follows:

(1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the Federal Register and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.

(3) The Administrator shall approve or disapprove program revisions based on the requirements of this Part and of the appropriate Act.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the Federal Register. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs shall notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under § 123.4(b) shall be revised and resubmitted.

(d) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary.

(e) *State RCRA programs only.* All new programs must comply with these regulations immediately upon approval. Any approved program which requires revision because of a modification to this Part or to 40 CFR Parts 122, 124, 260, 261, 262, 263, 264, 265 or 266 shall be so revised within one year of the date of promulgation of such regulation, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within two years.

(f) *State UIC programs only.* The State shall submit the information required under paragraph (b)(1) of this section within 270 days of any amendment to this Part or 40 CFR Parts 122, 124, or 146 which revises or adds any requirement

respecting an approved State UIC program.

(g) *State NPDES programs only.* All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this Part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within 2 years, except that revision of State programs to implement the requirements of 40 CFR Part 403 (pretreatment) shall be accomplished as provided in 40 CFR § 403.10. In addition, approved States shall submit, within 6 months, copies of their permit forms for EPA review and approval. Approved States shall also assure that permit applicants, other than POTWs, either (1) whose permits expire after November 30, 1980 or (2) whose permits expire before November 30, 1980 and who have not reapplied for a permit prior to April 30, 1980, submit, as part of their application, the information required under §§ 122.4(d) and 122.53 (d) or (e), as appropriate.

(h) *State section 404 programs only.* The Regional Administrator shall consult with the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service regarding any substantial program revision, and shall consider their recommendations prior to approval of any such revision.

§ 123.14 Criteria for withdrawal of State programs.

(a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this Part, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets the requirements of this Part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this Part, including:

(i) Failure to exercise control over activities required to be regulated under this Part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this Part; or

(iii) Failure to comply with the public participation requirements of this Part.

(3) When the State's enforcement program fails to comply with the requirements of this Part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.6.

§ 123.15 Procedures for withdrawal of State programs.

(a) A State with a program approved under this Part may voluntarily transfer program responsibilities required by Federal law to EPA (or to the Secretary in the case of 404 programs) by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator (and the Secretary in the case of section 404 programs) 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA (or the Secretary in the case of section 404 programs) (such as permits, permit files, compliance files, reports, permit applications) which are necessary for EPA (or the Secretary in the case of section 404 programs) to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator (and the Secretary in the case of section 404 programs) shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal government for program administration and/or identify any other deficiencies in the plan.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of the transfer in the Federal Register and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA and State mailing lists.

(b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program, other than a UIC program. The process for withdrawing approval of State UIC programs is set out in § 123.55.

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this Part as set forth in § 123.14. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing and shall specify the allegations against the State which are to be considered at the hearing. Within 30 days the State shall admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program shall have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definitions of "Act," "Administrative Law Judge," "Hearing," "Hearing Clerk," and "Presiding Officer" in 40 CFR § 22.03 apply in addition to the following:

(i) "Party" means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) "Person" means the Agency, the State and any individual or organization having an interest in the subject matter of the proceeding.

(iii) "Petitioner" means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* The following provisions of 40 CFR Part 22 (Consolidated Rules of Practice) are applicable to proceedings under this paragraph:

(i) § 22.02—(use of number/gender);

(ii) § 22.04(c)—(authorities of Presiding Officer);

(iii) § 22.06—(filing/service of rulings and orders);

(iv) § 22.07(a) and (b)—*except that,* the time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator—(computation/extension of time);

(v) § 22.08—*however,* substitute "order commencing proceedings" for "complaint"—(Ex Parte contacts);

(vi) § 22.09—(examination of filed documents);

(vii) § 22.11(a), (c) and (d), *however,* motions to intervene must be filed within 15 days from the date the notice

of the Administrator's order is first published—(intervention);

(viii) § 22.16 *except that*, service shall be in accordance with paragraph (b)(4) of this section, the first sentence in § 22.16(c) shall be deleted, and, the word "recommended" shall be substituted for the word "initial" in § 22.16(c)—(motions);

(ix) § 22.19(a), (b) and (c)—(prehearing conference);

(x) § 22.22—(evidence);

(xi) § 22.23—(objections/offers of proof);

(xii) § 22.25—(filing the transcript); and

(xiii) § 22.26—(findings/conclusions).

(4) *Record of proceedings.* (i) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(ii) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 401 M Street, S.W., Washington, D.C. 20460;

(iii) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involve matters of substance;

(iv) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(v) A copy of each such submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(vi) Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service; and

(vii) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(5) *Participation by a person not a party.* A person who is not a party may, at the discretion of the Presiding Officer, be permitted to make a limited appearance by making an oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(6) *Rights of parties.* All parties to the proceeding may:

(i) Appear by counsel or other representative in all hearing and prehearing proceedings;

(ii) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions, and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator.* (i) Within 60 days after the certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the appropriate Act and regulations his decision shall constitute "final agency action" within the meaning of 5 U.S.C. §704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the appropriate Act and regulations he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the State fails to take appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S.C. § 704.

(c) Withdrawal of authorization under this section and the appropriate Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions by the State prior to withdrawal.

Subpart E—Additional Requirements for State Programs Under Section 404 of the Clean Water Act

§ 123.91 Purpose and scope.

(a) This Subpart describes additional requirements, both procedural and substantive, for State permit programs under section 404 of CWA (regulating discharges of dredged or fill material). Because EPA does not operate the section 404 program, the permit requirements in Parts 122 and 124 are relevant to section 404 programs only to the extent they are made applicable to State section 404 programs in § 123.7(a). Additional permit application and processing requirements applicable to State 404 programs are set out in this Subpart.

(b) The requirements for State section 404 programs are promulgated under the authority of sections 101(e) and 501(a) of CWA.

(c) No partial section 404 programs will be approved by EPA. Except as provided in § 123.92, the State program must regulate all discharges of dredged or fill material into State regulated waters. State section 404 programs are limited under section 404(g)(1) of CWA to coverage of such State regulated waters. See the definition of "State regulated waters" in § 122.3.

(d) Under section 404(h)(5) of CWA, States are entitled, after program approval, to administer and enforce general permits issued by the Secretary. If the State chooses not to administer and enforce these permits, the Secretary retains jurisdiction until they expire. If the Secretary has retained jurisdiction and if a permit appeal or modification request is not finally resolved when the Federally issued permit expires, the Secretary, upon agreement with the State, may continue to retain jurisdiction until the matter is resolved.

§ 123.92 Activities not requiring permits.

(a) Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under this subpart:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) *Cultivating* means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) *Harvesting* means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(1) *Minor Drainage* means:

(*i*) The discharge or dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(*ii*) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(*iii*) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species;

[Note.—The provisions of paragraphs (a)(1)(iii)(C)(*1*)(*ii*) and (*iii*) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (*e.g.*, the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.]

(*iv*) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within

one year of formation of such blockages in order to be eligible for exemption.

(2) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (*e.g.*, wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of spoil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of dredged or fill material.

(E) *Seeding* means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. A simple connection of an irrigation return or supply ditch to waters of the U.S. and related bank stabilization measures are included within this exemption. Where a trap, weir, groin, wall, jetty or other structure within waters of the U.S., which will result in significant discernable alterations to flow or circulation, is constructed as part of the connection, such construction requires a 404 permit.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a State has an approved program under section 208(b)(4) of CWA which meets the requirements of sections 208(b)(4)(B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the State's approved program description pursuant to the requirements of § 123.4(h)(4), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1)–(6) of this section contains any toxic pollutant listed under section 307 of CWA such discharge shall be subject to any applicable toxic effluent standard or

prohibition, and shall require a permit under the State program.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)–(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation *may* be impaired by such alteration.

[Note.—For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill materials into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.]

(d) Federal projects which qualify under the criteria contained in section 404(r) of CWA (Federal projects authorized by Congress where an EIS has been submitted to Congress prior to authorization or an appropriation) are exempt from State section 404 permit requirements, but may be subject to other State or Federal requirements.

§ 123.93 Prohibitions.

No permit shall be issued by the State Director in the following circumstances:

(a) When the conditions of the permit do not comply with the requirements of CWA, or regulations and guidelines implementing CWA, including the section 404(b)(1) environmental guidelines (40 CFR Part 230);

(b) When the Regional Administrator has objected to issuance of the permit under section 404(j) of CWA and the objection has not been resolved.

(c) When, in the judgment of the Secretary of the Army acting through the Chief of Engineers, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge.

(d) When the proposed discharge would be into a defined area for which specification as a disposal site has been prohibited, restricted, denied, or withdrawn by the Administrator under section 404(c) of CWA, and the discharge would fail to comply with the Administrator's actions under that authority.

§ 123.94 Permit application.

(a) *Publicity and preapplication consultation.* The State Director shall maintain a program to inform, to the extent possible, potential applicants for permits of the requirements of the State program and of the steps required to obtain permits for activities in State regulated waters. The State Director is encouraged to include preapplication consultation as part of this program to assist applicants in understanding the requirements of the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230) and in fulfilling permit application requirements.

(b) *Application for permit.* Except when an activity is authorized by a general permit under § 123.95 or is exempt from the requirement to obtain a permit under § 123.92, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit an application to the State Director. State application forms are subject to EPA review and approval.

(c) *Content of Application.* A complete application shall include the following information:

(1) A complete description of the proposed activity including:

(i) Name, address, and phone number of the applicant; the names, addresses, and phone numbers of owners of properties adjacent to the site; and, if appropriate, the location and dimensions of adjacent structures;

(ii) A description of the source of the dredged or fill material and method of dredging used, if any; a description of the type, composition and quantity of the material; the proposed method of transportation and disposal of the material, including the type of equipment to be used; and the extent (in acres) of the area of waters of the United States to be filled or used for disposal;

(iii) The purpose and intended use of the proposed activity (including whether it is water-dependent); a description of the use of any structures to be erected on the fill; and a schedule for the proposed activity;

(iv) A list of the approvals required by other Federal, interstate, State and local agencies for the activity, including all approvals or denials received; and

(v) A vicinity map identifying the proposed disposal site and the local jurisdiction closest to the disposal site.

(2) Information about the disposal site needed to evaluate compliance with 40 CFR Part 230, including the following:

(i) A description of known alternatives to the proposed discharge, including alternative disposal sites, construction methods, methods of discharge, and reasons for rejecting the alternatives;

(ii) A description of special aquatic sites, public use areas, wildlife refuges, and public water supply intakes in the affected or adjacent areas that may require special protection or preservation;

(iii) Plants, fish, shellfish, and wildlife in the disposal site which may be dependent on water quality and quantity;

(iv) Uses of the disposal site which might affect human health and welfare; and

(v) A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the discharge. Guidelines for minimizing the adverse effects of discharges of dredged or fill material are found in 40 CFR Part 230.

[Note.—The State shall provide permit applicants with guidance, either through the application form or on an individual basis, regarding the level of detail of information and documentation required under this paragraph. The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of presence of long-lived toxic chemical substances, and degree of environmental degradation.]

(3) One original set of drawings and maps, or one set of drawings and maps of reproducible quality, including:

(i) A map showing the following in plan view:

(A) Location of the activity site including latitude, longitude, and river mile, if known;

(B) Name of waterway;

(C) All applicable political (*e.g.*, county, borough, town, city, etc.) boundary lines;

(D) Names of all major roads in the vicinity of the site including the road providing the closest practicable access to the site;

(E) North arrow;

(F) Arrows showing flow and circulation patterns;

(G) Existing shorelines or ordinary high watermark;

(H) Location of known wetlands;

(I) Water depths and bottom configuration around the project;

(J) Delineation of disposal site;

(K) Size-relationship between the proposed disposal site and affected waters (*e.g.*, a ¼ acre fill in a 15-acre wetland);

(L) Location of previously used dredged material disposal sites with remaining capacity in the vicinity of the

project. The map must indicate retention levees, weirs, and any other devices for retaining dredged or fill materials; and

(M) Location of structures, if any, in waters of the United States immediately adjacent to the proposed activity, including permit numbers, if known. Identify purposes of all structures.

(ii) A cross-sectional view of the proposed project showing the following:

(A) Water elevations;

(B) Water depths at waterward face of proposed work, or if dredging is proposed, showing dredging grade;

(C) Cross-section of fill;

(D) Elevation of spoil areas;

(E) Location of wetlands; and

(F) Delineation of disposal site.

(iii) Notes on all maps or drawings submitted, including:

(A) A list of names of adjacent property owners whose property also adjoins the water and who are not shown in the plan view;

(B) A title block for each sheet submitted identifying the proposed activity and containing the name of the body of water; river mile, if applicable; name of county, State and nearest incorporated municipality; name of applicant; number of the sheet and the total number of sheets in set; and date the drawing was prepared; and

(C) Graphic or numerical scale.

§ 123.95 General permits.

(a) *Coverage.* The State Director may issue a general permit for similar activities as specified in paragraph (b)(1) of this section within a defined geographic area as specified in paragraph (b)(2) of this section, if he or she determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

(b) *Conditions.* In addition to §§ 122.7 and 123.97, and the applicable requirements of § 123.98, each general permit shall contain conditions as follows:

(1) *Activities:* A specific description of the type(s) of activities which are authorized, including limitations for any single operation, to ensure that the requirements of paragraph (a) of this section are satisfied. At a minimum, these limitations shall include:

(i) The maximum quantity of material that may be discharged;

(ii) The type(s) of material that may be discharged;

(iii) The depth of fill permitted;

(iv) The maximum extent to which an area may be modified; and

(v) The size and type of structures that may be constructed.

(2) *Area:* A precise description of the geographic area to which the general permit applies, including, when appropriate, limitations on the types of waters or wetlands where operations may be conducted, to ensure that the requirements of paragraph (a) of this section are satisfied.

(3) *Notice:* The permit shall contain a requirement that no activity is authorized under the general permit unless the Director receives notice at least 30 days in advance of the date when the proposed activity is to commence. The Director may require any information in the notice necessary to determine whether the conditions of the general permit will be satisfied. If within 15 days of the date of submission of the notice the owner or operator has not been informed by the State Director of his or her intent to require an individual permit application, the owner or operator may commence operations under the general permit.

(c) *Requiring an individual permit.*

(1) Upon receiving notice under paragraph (b)(3) of this section, the State Director may require, at his discretion, that the owner or operator apply for an individual permit. Cases where an individual permit may be required include:

(i) The activity has more than a minimal adverse environmental effect;

(ii) The cumulative effects on the environment of the authorized activities are more than minimal; or

(iii) The discharger is not in compliance with the conditions of the general permit.

(2) When the State Director notifies the owner or operator within 15 days of receipt of notice under paragraph (b)(3) of this section that an individual permit application is required for that activity, the activity shall not be authorized by the general permit.

(3) The Director may require any person authorized under a general permit to apply for an individual permit.

§ 123.96 Emergency permits.

(a) *Coverage.* Notwithstanding any other provision of this Part or Part 124, the State Director may temporarily permit a specific dredge or fill activity if:

(1) An unacceptable hazard to life or severe loss of property will occur if an emergency permit is not granted; and

(2) The anticipated threat or loss may occur before a permit can be issued or modified under the procedures otherwise required by this Part and Part 124.

(b) *Requirements for issuance.* (1) The emergency permit shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of §§ 122.7, 123.97 and 123.98.

(2) Any emergency permit shall be limited in duration to the time required to complete the authorized emergency action, not to exceed 90 days.

(3) The emergency permit must have a condition requiring restoration of the disposal site (for example, removal of fill, steps to prevent erosion). If more than 90 days from issuance is necessary to complete restoration, the permit may be extended for this purpose only.

(4) The emergency permit may be oral or written. If oral, it must be followed within five days by a written emergency permit.

(5) Notice of the emergency permit shall be published and public comments received in accordance with applicable requirements of §§ 124.10 and 124.11 as soon as possible but no later than 10 days after the issuance date.

(6) The emergency permit may be terminated at any time without process if the State Director determines that termination is appropriate to protect human health or the environment.

§ 123.97 Additional conditions applicable to all 404 permits.

The following conditions, in addition to those set forth in § 122.7, apply to all 404 permits:

(a) The permittee need not comply with the conditions of this permit to the extent and for the duration that such noncompliance is authorized in an emergency permit. (See § 123.96.)

(b) Activities are not conducted under the authority of this permit if they are not specifically identified and authorized in this permit.

(c) The permittee shall maintain the authorized work area in good condition and in accordance with the requirements contained in this permit.

(d) If any applicable water quality standards are revised or modified, or if a toxic effluent standard or prohibition under CWA section 307(a) is established for a pollutant present in the permittee's discharge and is more stringent than any limitation in the permit, the permit shall be promptly modified to conform to the standard, limitation or prohibition.

§ 123.98 Establishing 404 permit conditions.

In addition to the conditions established under § 122.8(a), each 404 permit shall include conditions meeting the following requirements, when applicable:

(a) *Identification.* A specific identification and description of the authorized activity, including:

(1) The name and address of the permittee and the permit application identification number;

(2) The use or purpose of the discharge;

(3) The type and quantity of the materials to be discharged;

(4) Any structures proposed to be erected on fill material; and

(5) The location and boundaries of the discharge site(s), including a detailed sketch and the name and a description of affected State regulated waters.

(b) *Environmental guidelines.* Provisions ensuring that the discharge will be conducted in compliance with the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230), including conditions to ensure that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.

(c) *Water quality standards.* Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated after the permit is issued, it shall be modified as provided in § 123.97(d).

(d) *Toxic effluent guidelines or prohibitions.* Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of CWA or applicable State or local law. If an applicable toxic effluent standard or prohibition is promulgated after the permit is issued, it shall be modified as provided in § 123.97(d).

(e) *Best Management Practices.* Applicable BMPs approved by a Statewide CWA section 208(b)(4) agency as provided in the agreement described in § 123.102(a)(1).

(f) *General permits.* Any conditions necessary for general permits as required under § 123.95.

(g) *Commencement of work.* A specific date on which the permit shall automatically expire, unless previously revoked and reissued or modified or continued, if the authorized work has not been commenced.

§ 123.99 Memorandum of Agreement with the Secretary.

Before a State program is approved under this Part, the State shall enter into a Memorandum of Agreement with the Secretary. Where more than one agency within a State has responsibility for administering the State program, all of the responsible agencies shall be parties to the Memorandum of Agreement. The Memorandum of Agreement shall include:

(a) A description of State regulated waters, as identified by the Secretary.

(b) Where an agreement is reached, procedures for joint processing of permits for activities which require both a section 404 permit from the State and a section 9 or 10 permit from the Secretary under the Rivers and Harbors Act of 1899, provided such procedures satisfy the requirements of this Part.

(c) An identification of those general permits, if any, issued by the Secretary, the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program and a plan for transferring responsibility for these permits to the State, including procedures for the prompt transmission from the Secretary to the State Director of relevant information not already in the possession of the State Director including support files for permit issuance, compliance reports and records of enforcement actions. In many instances States will lack the authority to directly administer permits issued by the Federal government. However, procedures authorized under State law may be established to transfer responsibility for these permits.

(d) Procedures whereby the Secretary will, upon program approval, transfer to the State pending section 404 permit applications and other relevant information, not already in the possession of the State Director.

(e) Procedures to ensure that the State Director will not issue a permit on the basis of any application received from the Secretary which the Secretary has identified as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.

(f) A provision that the State shall not issue any section 404 permit for a discharge which, in the judgment of the Secretary after consultation with the Secretary of the Department in which the Coast Guard is operating, would substantially impair anchorage or navigation.

(g) Those classes or categories, if any, of proposed State permits for which the Secretary waives the right to review.

(h) Other matters not inconsistent with this Part that the Secretary and the State deem appropriate.

[Note.—For example, where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue section 404 permits (by virtue of section 404(g)(1) of CWA), the State is strongly encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.]

§ 123.100 Transmission of information to EPA and other Federal agencies.

(a) The Memorandum of Agreement under § 123.6 shall provide for the following:

(1) Prompt transmission to the Regional Administrator (by certified mail) and to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of all complete permit applications received by the State Director, except those for which permit review has been waived under § 123.6(f)(1)(i). The State shall supply EPA, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service with copies of permit applications for which permit reivew has been waived whenever requested by such agencies. Where State law requires preparation of an environmental impact statement (EIS) or similar document, and such EIS or other document is available, the EIS or other document shall accompany the permit application when transmitted to the Regional Administrator.

(2) Prompt transmission to the Regional Administrator (by certified mail) and to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of notice of every action taken by the State agency related to the consideration of any permit application, including a copy of each draft permit prepared, and any conditions, requirements, or documents which are related to the draft permit or which affect the authorization of the draft permit. A draft permit shall be prepared by the State and transmitted to EPA:

(i) At the time of transmission of the complete permit application, for discharges listed in § 123.6(f)(1)(i)(A)–(E);

(ii) Upon request of EPA in accordance with § 123.101(e)(3), for discharges not listed in § 123.6(f)(1)(i)(A)–(E), unless EPA has waived review under § 123.6(f)(1)(i).

(3) Prompt transmission to the Regional Administrator, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of each draft general permit. A draft general permit shall be prepared by the State whenever the State intends to issue a general permit.

(4) Transmission to the Regional Administrator, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of every issued permit following issuance, along with any and all conditions and requirements.

(b)(1) State section 404 programs shall comply with the draft permit requirements of §§ 124.6 (a), (c), (d), and (e) and 124.8 for those discharges which require a draft permit under paragraph (a)(2) of this section and for those discharges to be regulated by general permits. For discharges which require a draft permit under paragraph (a)(2) of this section, public review and EPA review, under § 123.101, shall be based on the permit application and the draft permit. For discharges to be regulated by general permits, public review and EPA review shall be based on the draft general permit.

(2) For all other discharges, public review and EPA review, if not waived under § 123.6(f)(1)(i), shall be based on the permit application. For these discharges, States need not comply with §§ 124.6 (a), (c), (d), and (e) or 124.8.

§ 123.101 EPA review of and objections to State permits.

(a) The Memorandum of Agreement shall provide that the Regional Administrator may comment upon, object to, or make recommendations with respect to permit applications, draft permits (if prepared under § 123.100), or draft general permits within 90 days of receipt. If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft permit, or draft general permit, he or she shall notify the State Director of his or her intent within 30 days of receipt. The Regional Administrator may notify the State within 30 days of receipt that there is no comment but reserve the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing. The Regional Administrator shall send a copy of any comment, objection, or recommendation to the permit applicant.

(b) Within 90 days following receipt of a permit application, draft permit or draft general permit for which the Regional Administrator has provided notification under paragraph (a) of this section, the Regional Administrator may object to permit issuance. In order to object, the Regional Administrator shall set forth in writing and transmit to the State Director:

(1) A statement of the reason(s) for the objection (including the section of CWA or regulations thereunder that support the objection); and

(2) The actions that must be taken by the State Director in order to eliminate the objection (including the conditions which the permit would include if it were issued by the Regional Administrator).

(c) When the State Director has received an objection to a permit application, draft permit, or draft general permit under this section and has taken the steps required by the Regional Administrator to eliminate the objection, a revised permit shall be prepared and transmitted to the Regional Administrator for review. If no further objection is received from the Regional Administrator within 15 days of the receipt of the revised permit, the Director may issue the permit.

(d) Any objection under this section must be based upon one or more of the following grounds:

(1) The permit application, draft permit, or draft general permit fails to apply, or to ensure compliance with, any applicable requirement of this Part;

(2) In the case of any permit application for which notification to the Administrator is required under section 404(h)(1)(E) of CWA, the written recommendations of an affected State have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate (see § 123.102(c));

(3) The procedures followed in connection with processing the permit failed in a material respect to comply with procedures required by CWA, by this Part, by other regulations and guidelines thereunder, or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the draft permit or draft general permit misinterprets CWA or any guidelines or regulations thereunder, or misapplies them to the facts;

(5) Any provisions of the permit application, draft permit, or draft general permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions including water quality standards, required by CWA, by 40 CFR Part 230, or by the draft permit or draft general permit;

(6) The information contained in the permit application is insufficient to judge compliance with 40 CFR Part 230 or

(7) Issuance of a permit would in any other respect be outside the requirements of section 404 of CWA, or regulations implementing section 404 of CWA.

(e) Prior to notifying the State Director of an objection based upon any of the grounds set forth in paragraph (d) of this section, the Regional Administrator:

(1) Shall consider all data transmitted pursuant to §§ 123.100 and 123.102.

(2) Shall, if the information provided is inadequate to determine whether the permit application, draft permit, or draft general permit meets the guidelines and requirements of CWA, request the State Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record, or other information, including a supplemented application, that the Regional Administrator determines are necessary for review. This request shall be made within 30 days of receipt of the State submittal under § 123.100. It shall constitute an interim objection to the issuance of the permit, and the period of time specified in the Memorandum of Agreement for the Regional Administrator's review shall be suspended from the date of the request and shall resume when the Regional Administrator has received such record or other information requested.

(3) May, in the case of discharges for which a draft permit is not automatically required under § 123.100(a)(2)(i), request within 30 days of receipt of the permit application that the State Director prepare a draft permit under § 123.100(a)(2)(ii). The draft permit shall be submitted to EPA and other Federal agencies, as required under § 123.100(a)(2). When a draft permit is prepared under this subparagraph, Federal and public review shall recommence under § 123.100(b)(1). The Regional Administrator's period for review shall begin upon receipt of the draft permit.

[Note.—It is anticipated that draft permits will be requested only in exceptional and/or complex cases.]

(4) May, at his or her discretion, and to the extent feasible within the period of time available under the Memorandum of Agreement, afford to interested persons an opportunity to comment on the basis for the objection

(f) Within 90 days of receipt by the State Director of an objection by the Regional Administrator, the State or any interested person may request that a public hearing be held by the Regional Administrator on the objection. A public hearing in accordance with the procedures of §§ 124.12 (c) and (d) shall be held, and public notice provided in accordance with § 124.10, whenever requested by the State issuing the permit, or if warranted by significant public interest based on requests received.

(g) A public hearing held under paragraph (f) of this section shall be conducted by the Regional

Administrator, and, at the Regional Administrator's discretion, with the assistance of an EPA panel designated by the Regional Administrator, in an orderly and expeditious manner.

(h) Following the public hearing the Regional Administrator shall reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision.

(i)(1) If no public hearing is held under paragraph (f) of this section and the State does not resubmit a permit revised to meet the Regional Administrator's objection or notify EPA of its intent to deny the permit within 90 days of receipt of the objection, the Secretary may issue the permit in accordance with the guidelines and regulations of CWA.

(2) If a public hearing is held under paragraph (f) of this section, the Regional Administrator does not withdraw the objection, and the State does not resubmit a permit revised to meet the Regional Administrator's objection or modified objection or notify EPA of its intent to deny the permit within 30 days of the date of the Regional Administrator's notification under paragraph (h) of this section, the Secretary may issue the permit in accordance with the guidelines and regulations of CWA.

§ 123.102 Coordination requirements.

(a) *General coordination.* (1) If the State has a Statewide CWA section 208(b)(4) regulatory program, the State Director shall develop an agreement with the agency designated to administer such program. The agreement shall include:

(i) A definition of the activities to be regulated by each program;

(ii) Arrangements providing the agencies an opportunity to comment on prospective permits, BMPs, and other relevant actions; and

(iii) Arrangements incorporating BMPs developed by the section 208(b)(4) program into section 404 permits, where appropriate.

(2) Where a CWA section 208(b)(4) program has been approved under section 208(b)(4)(C), no permit shall be required for activities for which the Administrator has approved BMPs under such approved program except as provided in §§ 123.92 (b) and (c). Until such section 208(b)(4) program has been approved by the Administrator, a person proposing to discharge must obtain an individual permit or comply with a general permit.

(3) The State Director shall consult with any State agency(ies) with jurisdiction over fish and wildlife resources.

(b) *Coordination with other Federal and Federal-State review processes.* State section 404 programs shall assure coordination of State section 404 permits with Federal and Federal-State water related planning and review processes.

(1) The State Director shall assure that the impact of proposed discharges will be consistent with the Wild and Scenic Rivers Act when the proposed discharge could affect portions of rivers designated wild, recreational, scenic, or under consideration for such designation.

(2) Agencies with jurisdiction over Federal and Federal-State water related planning and review processes, including the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, shall notify the Regional Administrator that they wish to comment on a permit application, draft permit, or draft general permit within 20 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of receipt by the Regional Administrator of the permit application, draft permit or draft general permit. The Regional Administrator may allow any such agency up to an additional 30 days to submit comments, upon request of such agency.

(3) All comments from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service on permit applications, draft permits, and draft general permits shall be considered by the Regional Administrator. If the Regional Administrator does not adopt a recommendation of any such agency, he shall consult with that agency. The final decision to object or to require permit conditions shall be made by the Regional Administrator.

(c) *Coordination with other States.* If the proposed discharge may affect the quality of the waters of any State(s) other than the State in which the discharge occurs the State Director shall provide an opportunity for such State(s) to submit written comments within the public comment period on the effect of the proposed discharge on such State(s) waters, and to suggest additional permit conditions. If these recommendations are not accepted by the State Director, he shall notify the affected State and the Regional Administrator in writing of his failure to accept these recommendations, together with his reasons for so doing.

[Note.—States are encouraged to receive and use information developed by the U.S. Fish and Wildlife Service as part of the National Wetlands Inventory as it becomes available.]

§ 123.103 Enforcement authority.

In addition to meeting the requirements of § 123.9, State section 404 programs shall include procedures which enable the State Director to immediately and effectively halt or remove any unauthorized discharges of dredged or fill material, including the authority to issue a cease and desist order, interim protective order, or restoration order to any person responsible for, or involved in, an unauthorized discharge.

§ 123.104 Approval process.

(a) Within 10 days of receipt of a complete State section 404 program submission under § 123.3, the Administrator shall provide copies of the State's submission to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

(b) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the Federal Register, and in enough of the largest newspapers in the State to attract Statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State, EPA, Corps of Engineers, U.S. Fish and Wildlife Service, and National Marine Fisheries Service mailing lists and all permit holders and applicants within the State. This notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice of the hearing is published in the Federal Register;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(c) Within 90 days of receipt of a complete program submission under § 123.3, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service shall

submit any comments on the State program.

(d) Within 120 days of the receipt of a complete program submission under § 123.3, the Administrator shall approve or disapprove the program based on the requirements of this Part and of CWA and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received, and explains the Agency's response to these comments. The Administrator shall respond individually to comments received from the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

(e) If the Administrator approves the State's section 404 program he or she shall notify the State and the Secretary and publish notice in the Federal Register. The Secretary shall suspend the issuance of section 404 permits by the Corps of Engineers within the State, except for those waters specified in section 404(g)(1) of CWA and not identified in the program description under § 123.4(h)(1) as State regulated waters.

(f) If the Administrator disapproves the State program he or she shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

APPENDIX C

U.S. FISH AND WILDLIFE SERVICE REGULATIONS

federal register

Friday
May 18, 1979

Part V

Department of the Interior

Office of the Secretary

Department of Commerce

National Oceanic and Atmospheric Administration

Fish and Wildlife Coordination Act, Uniform Procedures for Compliance

DEPARTMENT OF THE INTERIOR

Office of the Secretary

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[50 CFR Part 410]

Fish and Wildlife Coordination Act; Notice of Proposed Rulemaking

AGENCY: National Oceanic and Atmospheric Administration, Commerce; Office of the Secretary, Interior.

ACTION: Proposed rulemaking.

SUMMARY: This Notice invites public participation in the development of rules which would establish uniform procedures for federal agency compliance with the Fish and Wildlife Coordination Act (FWCA). The President's Water Policy Message of June 6, 1978 and the President's Water Policy Memorandum dated July 12, 1978, directed the publication of these rules. These rules would standardize agency procedures and interagency relationships in the analysis of the impacts of federal, or federally-approved, water-related projects upon wildlife resources. They relate closely to the procedures established for compliance with the National Enviornmental Policy Act [NEPA].

DATES: Written comments must be received no later than July 17, 1979.

ADDRESS: Comments should be addressed to: Associate Director (AE), Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

Written and oral comments will be received at public hearings to be convened in the following cities on dates to be later announced by notice published in the **Federal Register**:

Arlington (Dallas/Ft. Worth), Texas
Washington, D.C.
San Francisco, California
New Orleans, Louisiana
Denver, Colorado

FOR FURTHER INFORMATION CONTACT:

Thomas J. Bond, Fish and Wildlife Service, Division of Ecological Services, 18th and E Sts. NW., Washington, D.C. 20240, (202) 653-5952.

James R. Chambers, National Marine Fisheries Service, 3300 Whitehaven St. NW., Page Building II, Washington, DC 20235, (202) 634-7940.

SUPPLEMENTARY INFORMATION:

I. Procedural Background

In a Water Policy Memorandum dated July 12, 1978, President Carter directed that—

> The Secretary of the Interior in cooperation with the Secretary of Commerce shall promulgate regulations by March 1, 1979, defining the requirements and procedures that must be met for fully complying with the Fish and Wildlife Coordination Act.* * * Then, not later than 3 months after promulgation of such final regulations, Federal agencies with consultative responsibilities under the [FWCA] shall publish . . . separate procedures to be followed in implementing the regulations for [the FWCA]. These procedures shall be reviewed, and if consistent with the regulations, approved within 60 days by the Secretary of the Interior . . . and shall be published in final form. These regulations shall include acceptable methods for determining adequate measures to prevent or to mitigate losses to fish, wildlife, . . . and other resources protected by [the FWCA] . . . and procedures to ensure compliance of all projects not yet constructed with [the FWCA] and these regulations.[1]

A Notice of Intent to Propose Rules under the FWCA was published in the **Federal Register** on September 29, 1978, 43 FR 44870-44872. We received a large number of responses to the questions asked in that Notice, particularly from state fish and wildlife agencies. The staff of the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) which participated in the drafting of these rules held numerous conferences with interested Congressional staffs and with most federal agencies which would be affected by these rules. In addition, the President's Water Policy Implementation Task Force on Environmental Statutes discussed, and held public hearings on, the President's proposal for FWCA rules.

II. The FWCA

The FWCA requires federal agencies (hereinafter "action agencies") which propose, or are authorized, to undertake the impoundment, diversion, deepening, or other control or modification of waters of any stream or other body of water, or which are asked to approve such activity in some way, to provide wildlife conservation equal consideration with other features of such projects throughout the agencies' planning and decision-making processes. It requires such agencies, or applicants to such agencies, to first consult with state and federal wildlife agencies with a view to ascertaining what project facilities, operations, or measures may be considered necessary by those agencies to mitigate and compensate for project-occasioned losses to wildlife resources, as well as to enhance those resources.

The FWCA further requires that the reports and recommendations of wildlife agencies on the wildlife aspects of such projects shall be presented to action agency decision-makers and (where applicable) the Congress, and that the action agencies shall give full consideration to those reports. Action agencies are required to include in project plans such means and measures for wildlife conservation as they may find justifiable to obtain maximum overall project benefits, and the costs thereof are to be considered integral to those of the project.

III. Relationship of the FWCA and This Proposal to NEPA and Other Environmental Review Requirements

Because of the breadth of the concerns imposed upon wildlife agencies by the FWCA, more is required of wildlife agencies in carrying out their commenting responsibilities under NEPA than is required of most other agencies who comment upon environmental impact statements (EIS). The Eighth U.S. Circuit Court of Appeals has noted that "[t]he proposed mitigation plans go to the very heart of the question before the [agency] preparing its environmental impact statement—whether the project should proceed at the present time in view of its environmental consequences." *Environmental Defense Fund v. Froehlke*, [Cache River], 473 F.2d 346, 351 (8th Cir. 1972).

The procedures established in these proposed FWCA rules can be carried out at the same time that action agencies are complying with the NEPA regulations, particularly prior to and during the preparation of a draft EIS.[2]

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[1] The President also directed the submission of annual reports to the Office of Management and Budget which demonstrate compliance with environmental protection statutes, including the FWCA. Finally, the President directed that—

> In all project construction appropriation requests, agencies shall include designated funds for all environmental mitigation required for the project and shall require that mitigation funds be spent concurrently and proportionately with construction funds throughout the life of the project.

These reporting and funding directives are being analyzed by the President's Water Policy Implementation Task Force on Environmental Statutes and are not addressed in this Notice. However, should that Task Force so recommend, these rules may be amended at a later date to incorporate the procedures adopted for complying with these latter two directives.

[2] It has been stated that "compliance with the National Environmental Policy Act . . . is *de facto* compliance with [the FWCA]." *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404 (W.D. Va. 1973). This conclusion was presumed by that Court to be justified by *Environmental Defense Fund, Inc. v. Corps of Engineers* [Gillham Dam], 325 F. Supp. 749, 754 (E.D. Ark. 1971), which held that where a federal agency observes the requirements of NEPA, "it will automatically take into consideration all factors

Footnotes continued on next page

The relationship between the NEPA regulations and these proposed rules has been carefully drawn here and specific cross-citations have been made to the NEPA regulations where appropriate. § 410.3 (definitions of "compensation," "loss prevention," "mitigation"); § 410.16(a); (general relationship); § 410.15 (lead agencies); § 410.22(b)(4) (scoping); § 410.22(a)(1) (preliminary review of applications); § 410:23(b) (timing of reports by wildlife agencies); § 410.24(a)(2) (findings on justification for wildlife mitigation measures in draft EIS); §§ 410.32(b), 410.32(d)(1)(i) (compliance with NEPA in development of General Plans); § 410.33(c) (post-authorization monitoring).

The requirements of NEPA and the FWCA are similar in many respects. First, by requiring that wildlife conservation be given "equal consideration" with other features of water resource development programs, the FWCA assigns a weight to wildlife values in making determinations on the content of Federal project plans or Federal approvals. This parallels the goals and policies of Section 101 of NEPA, and the requirements in Section 102(4) and (B) that agencies use a systematic interdisciplinary approach to insure that environmental values and amenities are given appropriate consideration along with economic and technical factors. The legislative history of the FWCA shows that Congress was prepared to accept a reduction in the benefits of other project purposes in order to obtain the benefits of fish and wildlife conservation.

Secondly, NEPA's requirement that wildlife impacts and mitigation alternatives be considered in environmental impact statements carries with it an obligation to undertake mitigation activities to the fullest extent possible in order to achieve the goals of Section 101. See NEPA Section 102 and 40 CFR 1505.2(c) and 1505.3. The FWCA requires (1) the preparation of a plan containing specific measures to mitigate and compensate wildlife losses, as well as to enhance wildlife resources, (2) the submission of that plan to Congress at the same time project reports are submitted, and, (3) the implementation of the authorized mitigation plan concurrently with construction.

The FWCA is more than a mere consultative responsibility; it is an affirmative mandate to action agencies, of which consultation with wildlife agencies is only a part. Like NEPA, it requires early planning and post-consultation findings and implementation. Moreover, it speaks specifically to benefit-cost calculations and allocates responsibilities for paying the costs of mitigation. 16 U.S.C. 662(c),(d), 663(b). This complements the requirements of NEPA's Sections 102(2)(C) and 102(2)(E). In the case of projects requiring EIS's, the NEPA regulations provide that when benefit-cost analyses are prepared, they shall be incorporated by reference or appended to the EIS to assist in the evaluation of alternatives, and of environmental consequence. 40 CFR 1502.23. These proposed reguations are thus fully consistent with and complement NEPA and the NEPA regulations.

These rules will also advance the President's directive that federal agencies should coordinate and simplify invironmental review requirements. See President's Invironmental Message of May 23, 1977, 13 WEEKLY COMP. OF PRES. DOC. 782, 794. FWCA compliance is to be coordinated with other federal environmental review requirements. See §§ 410.23(b) and 410.23(c)(6).

In addition, § 410. 15 permits two or more action agencies which each have jurisdiction over an action, and which would separately have to comply with the FWCA, to complete the consultation and reporting phases of FWCA compliance through one (lead) agency. Section 410.16(b) requires action agencies which are considering the approval of a project to which the FWCA applies to require their applicants to make a showing of compliance with other permit programs to which the FWCA applies separately; namely, sections 402 and 404 of the Clean Water Act and sections 9 and 10 of the River and Harbor Act of 1899. Action agency observance of these two provisions could avoid placing wildlife agencies in the position of commenting upon the same proposed project at different times. This is the "two bites at the apple" problem which is posed for any federal agency administering a federal environmental review requirement respecting an action over which several other federal agencies may also initiate primary jurisdiction. This problem is exacerbated when an applicant for one of these various federal approvals makes application to the agencies at different points in time. Such results also occur when one federal regulation becomes applicable to a project only after the jurisdiction of another agency has been invoked by an application filed under a different program.

IV. Applicability

Subpart B of these rules establishes a compliance procedure for all projects covered by the FWCA, with slightly different procedures applied, depending upon whether the project in question is federal or "non-federal." Latitude is provided to action agencies during the proposed rulemaking and implementing procedures phases of this initiative to discuss with the Secretary of the Interior and the Administrator of NOAA FWCA compliance procedures which would be carefully tailored to their individual needs and programs.

No procedures would be established in advance for FWCA compliance by comprehensive water and related land resources planning programs, for certain projects undertaken in emergencies, and for federal programs administered by states. An opportunity is provided during the proposed rulemaking and implementing procedures phases of this initiative to devise FWCA review procedures appropriate to these types of activities.

V. Project Accounting

Several provisions of these proposed rules should resolve some of the confusion which exists over the treatment of wildlife resource-related project accounting for benefit-cost, reimbursement, and budgeting purposes. These rules make a distinction between "mitigation" and "enhancement". See § 410.3. This is necessary for two reasons. First, the costs of installing fish and wildlife enhancement measures at federal projects are reimbursed to the United States under rules which differ substantially from those which govern the reimbursement of the costs of loss prevention and mitigation measures. *Compare* 16 U.S.C. 460*l*-12, *et seq.*, *with* 16 U.S.C. 662(b), 662(d).

Second, the costs of fish and wildlife loss prevention and mitigation measures are required by the FWCA to be considered as costs, not benefits, for the purposes of any benefit-cost analysis which may be required by other law. See § 410.24(b). Although the costs of adopted wildlife resource loss-compensation measures, and of uncompensated losses, would be figured as costs in the overall project benefit-

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Footnotes continued from last page required by [the FWCA] and it is not reasonable to require them to do both separately." While it may not have been appropriate to require the Corps in that case to consult again with wildlife agencies—it having done so previously under NEPA—it is quite another matter to suggest the NEPA and the FWCA impose identical burdens. Other cases considering the relationship of the two Acts have recognized their distinct requirements. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970); *Akers v. Resor*, 339 F. Supp. 1375 (D. Tenn. 1972); *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977); *Texas Committee on Natural Resources v. Alexander*, —— F. Supp.—— (E.D. Texas, December 8, 1978) unofficially reported 12 ERC 1676.

cost ratio, conservation measures would not be subjected to normal benefit-cost analysis in order to determine whether they are justified. See § 410.24(b)(3)(ii) and § 410.24(a)(2).

These rules also make it clear that the total costs of wildlife compensation measures (acquisition, operation, maintenance, replacement, and management) are to be included in cost analysis. See § 410.24(a)(2). In the case of federal profects, the budgeting of such costs will be by the construction agency, in order that the true costs of water projects can be recognized. See § 410.32(e); 16 U.S.C. 663(b). Lack of agency and Congressional attention to funding of OM&R costs has been a major factor foreclosing authorized mitigation.

VI. Techniques for Evaluating Project Impacts on Fish and Wildlife Resources

These rules respond to the President's directive that "these regulations shall include acceptable methods for determining adequate methods to prevent or to mitigate losses to fish, wildlife, * * * and other resources protected by * * *" the FWCA. This is consistent with and carries out NEPA's Section 102(2)(3), which requires "to the fullest extent possible" that all agencies identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making, along with economic and technical considerations. These rules would require, at least for federal projects, that the federal construction agency receive, consider, and transmit to the Congress an analysis of the extent of wildlife resource productivity lost to, or gained with, the proposed project, and an analysis of the compensation measures which are required to replace that loss, measured in terms of equivalent wildlife resource productivity. See §§ 410.23(c)(3), 410.24(a)(1)(ii), 410.24(c). In preparing their reports under the FWCA, wildlife agencies are directed to use evaluation techniques in describing project effects and identifying conservation measures which are directed at qualifying and quantifying potential effects on wildlife, their habitat and related values. See § 410.23(c)(1). Action agency findings on conservation measures which they deem justifiable must be based upon the use of assessment and evaluation techniques reflecting wildlife habitat values. See § 410.24(b)(1).

VII. Section-by-Section Analysis

A general overview of the remaining, more significant provisions of the proposed rules follows. The FWCA and these rules apply to water-related federal actions; defined as "projects". Different procedures are provided, depending upon whether the projects in question are federal undertakings, as opposed to "non-federal" projects which are "approved" by a federal agency. These procedures are set forth in Subpart B.

In § 410.3, the terms "action agency", "approval", and "project" are defined. "Project" defines the kind and location of impacts covered by the FWCA. "Action agency" defines the kinds of federal actions which are the predicate for application of the FWCA. "Approval" refers to a federal agency action which provides entitlements for *non*-federal projects.

The terms "loss prevention", "mitigation", and "enhancement" have been defined and distinguished after extensive deliberations among wildlife resource planners. They are distinguished because (1) they have different economic and financial connotations (described above), and (2) in order to emphasize them as separate steps in the action agency approval and authorization process. Enhancement is recognized to be a separate planning objective which is just as important as mitigation. See §§ 410.24(b)(1), 410.21.

"Compensation" is used to state an objective or measure of loss prevention and mitigation planning. It is a term used in the FWCA.

The definition of "Regional Directors", as applied in § 410.22(a) (1) and (2), confirms the fact that the jurisdiction of the Departments of the Interior and Commerce over all projects to which the FWCA applies will be totally concurrent. It is recognized that different levels of effort will be devoted to various projects by the two federal agencies, depending upon such factors as project location, resource impact, program emphasis, and staffing. Should the pending proposal for executive reorganization become effective, appropriate changes will be made to this proposal.

"Wildlife agency" is defined and used to refer to federal and state wildlife agencies collectively. In the case of state agencies, the FWCA is construed to require consultation with the state agency which exercises "immediate and direct administration over the fish and wildlife resources" of the affected state or states.

"Wildlife" and "wildlife resources" are defined by taxonomic classifications, as well as by reference to habitat elements. As applied in § 410.24(b)(1), the rules require that action agencies consider impacts upon wildlife resource not only in the project area, but wherever they "occur". For example, an upstream water project could have significant impacts upon the wildlife resources of an estuary far removed from the project site.

"Wildlife resource properties", as applied in § 410.32, refers to areas designated by federal agencies in connection with federal projects for the conservation of wildlife resources. Areas set aside in connection with non-federal projects are not affected by these proposed rules.

Section 410.11(a) should resolve a great deal of confusion which has arisen over the applicability of the FWCA to certain federal programs, project locations, actions indirectly affecting water, and types of water resources. It is recognized that by defining the applicability of the FWCA, in part, by reference to actions which "depend upon, or necessarily result in, a diversion, control or other modification of a stream or other body of water," there will be a point at which the effects of that federal action upon water are remote. During proposed rulemaking or the implementing procedures phase of the President's initiative, action agencies and the public may recommend to the Secretary of the Interior whatever special compliance procedures they feel should be applied to these programs.

Section 410.11 (b) and (c) restate the exemptions or exclusions contained in the FWCA for certain programs or projects. Public and agency views are particularly solicited on the extent to which the FWCA applies to certain of such programs directly. Agreements have been reached between wildlife agencies and some of those agencies to insure that wildlife resource considerations are factored into their decision-making processes. These agreements will appear in the Appendices to this Part. Though the FWCA may not apply to such agency programs directly, the FWCA does apply through other agency environmental review programs applicable to these otherwise exempt projects and programs. The most apparent of those other agency programs are: the Section 103(b), 402, and 404 permit programs under the Clean Water Act; the permit programs under §§ 9 and 10 of the River and Harbor Act of 1899.

Section 410.12 deals with the timing and extent to which these rules will be applied to particular projects which are in various stages of authorization, approval, or construction. It is responsive to the President's directive that these rules should "insure compliance of all projects not yet constructed with [the FWCA]". This includes, *inter alia*, projects which are authorized and on which construction is not complete. Guidance is sought from the affected agencies and the public on screening criteria [see § 410.12(c)(1)] which could be use to selectively apply these rules to projects where construction has begun but has not yet advanced to a stage where compensation measures are foreclosed.

A vast potential exists for examining the fish and wildlife resource conservation potentials of authorized federal water projects, particularly those authorized many years ago. Should the procedures of Subpart B become applicable to such projects in accordance with this provision, the relevant decision-makers and the Congress would be provided with up-to-date analyses of the fish and wildlife resource needs and potentials of these projects.

It is understood that the views, needs, and rights of federal projects sponsors would be taken into account during the observance of these procedures, and in any later submissions which may be made to the Congress for implementing the ensuing recommendations of the Executive Branch.

Subpart B sets forth the basic FWCA compliance procedure. Section 410.21 provides substance to the term "equal consideration," as used in the FWCA. It emphasizes the relative weight to be accorded to wildlife resource conservation. It identifies enhancement as a separate project objective of equal importance with the objective of merely compensating for wildlife resource losses. It defines the FWCA compliance process as involving four steps; not just as the consultation and avoidance process which sometimes characterizes the practices of action and wildlife agencies today.

Section 410.22 largely restates existing action agency practices for the initiation of wildlife agency involvement in their planning and approval processes. The intent of this section is to get wildlife agencies involved early so that they can complete their necessarily extensive review in time for action agencies to use their input in a meaningful way. For larger projects which are likely to have the most significant impact upon wildlife resources, action agencies are required to provide, in their application procedures for non-federal projects, that applicants for such projects must provide documentation showing that the applicant has previously consulted with the wildlife agencies. This practice has been used successfully by the Federal Energy Regulatory Commission. Delays in action agency approval processes are avoided by the development of environmentally sound project applications. Often, tardy, post-application consultation with wildlife agencies places them in a reactive posture, often with a short time frame for response. The resultant delays caused by honest attempts to carry out FWCA responsibilities are characterized as faults in the FWCA and wildlife agencies.

No period of time is specified for this consultation in advance of the application in question. This is left to the judgment of the applicant. Since this procedure applies only in the case of larger projects—which doubtless will require an extensive period of pre-application planning—it should not be burdensome. To the extent that this procedure may encourage the filing of well-conceived applications, it will result in a saving of action agency resources.

Section 410.24 deals with the decision-making processes of action agencies. It requires action agencies to make a record of their decisions concerning the wildlife resource component of environmental mitigation. It also requires public disclosure of, and public participation in, action agency decisions on which wildlife conservation measures will be incorporated into the project. It identifies the financial cost of wildlife conservation measures as the subject of benefit-cost analysis. These cost are to be developed for alternatives so that a true comparison can be made among them, and so that, if an alternative to the primary proposal is selected, appropriate conservation measures are available for inclusion in the authorization.

Section 410.24(b)(3) specifies some considerations which may not be taken into account by action agencies in making the statutorily-required findings as to which wildlife conservation measures recommended by wildlife agencies are justified to maximize overall project benefits. Whereas it is true that action agencies have the ultimate authority under the FWCA to make these findings, it is also true that, at least in the case of federal projects, the Congress, not the federal action agency, makes the final determination. Moreover, these findings are made by action agencies in the context of certain objectives and requirements of the FWCA.

Paragraphs (b)(3)(ii) and (b)(3)(iii) of § 410.24 provoked much discussion during the preparation of these proposed rules, partly because they are misunderstood. These rules apply only to measures recommended for the "compensation" of wildlife resource losses, not to "enhancement." The FWCA provides that wildlife resource compensation measures are to be considered costs of doing business in public resource areas. Thus, the fact that measures necessary for compensation of wildlife resource losses may produce "benefits" under one of a number of different methods of calculation is totally irrelevant to the question of whether those measures are justified under the FWCA.

Similarly, the unwillingness of non-federal entities to fund or reimburse their statutory share of federal project costs otherwise deemed justified to compensate for wildlife resource losses should not be a reason for refusing to seek authorization of such measures. Paragraph 410.24(b)(3)(iii) does not apply to non-federal projects. If, prior to federal project authorization, non-federal entities indicate an unwillingness to fund an appropriate share of these project costs, the project would not be recommended for authorization. Subsequent to authorization, if the action agency determines that wildlife resource compensation measures which had not previously been authorized should be recommended for authorization, then alternative cost-sharing provisions can be recommended in those cases where non-federal entities are unwilling (e.g., by reason of contract rights) to share the costs. Nothing in these rules would require the adoption of such measure in those circumstances or require the imposition of such burdens on non-federal entities.

Section 410.32 should provide an incentive for wildlife agencies and action agencies to devote more attention to wildlife areas which had been proposed to justify project authorizations. If, as a result of the FWCA compliance process, a project is authorized in part upon the representation that land and water areas will be acquired and managed in order to replace the wildlife productivity lost to the project, and then the affected agencies do not provide resources to make good that representation, then the wildlife resource and the public have been short-changed. Bare acquisition, without management, is not mitigation.

VIII. Alternative Approaches

This discussion focuses upon alternatives which were considered to those provisions of these proposed rules which would make significant changes in action agency procedures.

The procedures contained in Subparts B and C apply to all projects to which the FWCA applies, unless they are rendered inapplicable by specific provision of these rules or by Secretarial action during the implementing procedures phase of the President's initiative. See § 410.12. The Departments of the Interior and Commerce are not in a position at this time to review and analyze all federal programs to determine whether the procedures of Subparts B and C can be meaningfully applied to all such programs. Action agencies are in a much better position to examine these questions in the first instance and to seek selective modification, when necessary.

Section 410.12(c) is responsive to the President's directive that these rules should apply to authorized but not completed *federal* projects. These rules would not apply to all such projects. In certain of these cases, the Secretary of the Interior can consider specified criteria and find that these procedures will be applied. In such cases, affected federal agencies are provided an opportunity to state whether they believe the rules should apply. However, if an authorized project is not exempt, action agencies are admonished not to make "any irreversible or irretrievable commitment of resources pending compliance with these rules which would foreclose the consideration of alternatives to compensate for wildlife resource losses."

Alternatives considered included a provision making these rules applicable immediately upon their effective date and a provision which would direct the action agencies not to seek funding for these projects until these rules were complied with. We also considered making these rules applicable to approved, non-federal projects. It was determined that the proposal adopted was the least burdensome alternative which was still acceptable from the standpoint of meeting the intent of the President's directive.

Section 410.22(a)(1) would require action agencies to change their procedures for receiving applications for non-federal projects which they approve. It would require a showing that the applicant undertook pre-application consultation with the wildlife agencies. This requirement applies only to applications for the larger, potentially more damaging projects (from the perspective of wildlife resource conservation). An alternative considered and rejected would have applied this procedure to all, or wider, classes of projects. Also rejected was a proposal to require pre-application consultation with wildlife agencies prior to a fixed period in advance of filing an application with the action agency. The proposal which was adopted was considered acceptable from the standpoint of promoting environmentally sound non-federal projects applications.

Although the findings which would be required of action agencies by § 410.24(a) are being made as a matter of practice by some action agencies, this provision was deemed necessary to ensure that wildlife agencies and the public are able to participate in this aspect of decision-making by all action agencies. In many cases, the wildlife agencies and the public are excluded from action agency decision-making on wildlife conservation recommendations and are provided no meaningful rationale for why they were rejected. Alternative procedures which were rejected included (1) publication of these findings in only one media (the Federal Register), (2) a provision requiring action agency decision-makers to provide their rationale for rejecting wildlife conservation measures recommended by their own staffs, and (3) a provision for mandatory public hearings upon the request of wildlife agencies.

Section 410.24(b)(1) requires that findings made by action agencies as to loss prevention and mitigation measures deemed justified to maximize overall project benefits "shall be made using assessment and evaluation techniques based upon wildlife habitat values. Monetary values may be displayed and used in measuring the cost-effectiveness of alternative mitigation plans but shall not be used for justification purposes." This provision recognizes the limitations of monetary or user-day computations of value in determining whether recommended loss prevention and mitigation measures will compensate for wildlife resources lost, and therefore should be adopted. Alternatives considered included a proposal that assessment and evaluation techniques based upon wildlife habitat values should be emphasized, but not required in such findings. Also considered and rejected was a provision requiring the use of a particular assessment and evaluation technique, once approved or certified by the Secretary of the Interior, coupled with a ban upon the use of other such techniques subsequent to certification.

The selected proposal serves the function of forcing wildlife and action agencies to focus upon losses to wildlife resources, rather than on the human use of such resources. If habitat productivity is lost to a project, no amount of human use of the project features will replace it. The fact that a value can be attached to human use of project features or of "replacement" habitat is gratuitous but bears no relation to the assessment of what must be done to replace habitat productivity lost to a project. The use of computational methods other than those based on wildlife habitat productivity (or values) has persisted because there has been insufficient incentive such as these rules to abandon them.

IX. Rulemaking Requirements

The Department of the Interior and the Department of Commerce have determined that the rulemaking procedures of the Department of the Interior will be followed. The Department of the Interior has determined that this document is a significant rule but does not require a regulatory analysis under Executive Order 12044, and 43 CFR Part 14. An enviornmental assessment has been prepared and is available from the Associate Director, Environment, Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240 [(202) 343-4767].

The policy of the Department of the Interior is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written and oral comments, suggestions, or objections regarding this proposal in the manner set forth above.

In the Notice of Intent to Propose Rules, published at 43 FR 44870-44872, it was proposed that these rules be codified in Part 403 of Title 50, CFR. In order to provide more room in the 400 series of Title 50 for endangered species regulations, these joint rules will, when adopted, be codified as Part 410 of Title 50.

The joint authors of this document are:

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It is therefore proposed to amend 50 CFR, Chapter IV, by adding a new Part 410 in the manner set forth below.

Dated this 11 day of May, 1979.

James A. Joseph,

Acting Secretary of the Interior.

Elsa A. Porter,

Acting Secretary of Commerce.

PART 410—FISH AND WILDLIFE COORDINATION ACT

Subpart A—General Provisions

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Appendix E—FWS Guidelines For Review of Fish and Wildlife Aspects of Proposals In or Affecting Navigable Waters.

Authority.—Fish and Wildlife Coordination Act, Pub. L. 85-264, 72 Stat. 563 (16 U.S.C. 661, *et seq.*); National Environmental Policy Act of 1969, sec. 102(2)(A) and (B), Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332(2)(A), (B)); 5 U.S.C. 552; Fish and Wildlife Act of 1956, sec. 7, 70 Stat. 1122 (16 U.S.C. 742f); President's Memorandum on Environmental Quality and Water Resources Management, July 12, 1978 [See also, Weekly Comp. of Pres. Doc. 105 (June 6, 1978)]; U.S.C. 301.

Subpart A—General Provisions

§ 410.1 Scope.

This Part implements the National Environmental Policy Act (NEPA), 42 U.S.C. 4332, and sections 1-4, 8, and 9 of the Fish and Wildlife Coordination Act (FWCA), 72 Stat. 563, as amended (16 U.S.C. 661-664, 666b, 666c (1976)). The FWCA recognizes that wildlife resources make a vital contribution to the Nation and that federal and non-federal water and related land resources developments will affect such resources. It mandates that wildlife conservation shall receive equal consideration and be coordinated with other features of water resource development programs throughout the action agencies' planning and decision-making processes. It requires such agencies, or applicants to such agencies, to first consult with state and federal wildlife agencies to ascertain what means and measures may be considered necessary by those agencies to prevent and mitigate project-related losses of wildlife resources, as well as to enhance those resources.

The FWCA further requires that reports and recommendations from wildlife agencies be presented to action agency decision-makers and (in the case of federal projects) the Congress, and that the action agencies shall give full consideration to those reports and recommendations. Action agencies are required to include in project plans such means and measures for wildlife conservation as they may find justifiable to obtain maximum overall project benefits to the public. The costs of such means and measures are to be considered integral to those of the project.

§ 410.2 Purpose.

The purpose of these rules is to ensure that wildlife conservation of fully considered and weighted equally with other project features in agency decision-making processes by integrating such considerations into project planning, NEPA compliance procedures, financial and economic analyses, authorization documents, and project implementation. This Part will—

(a) Establish procedures to be followed in achieving compliance with the FWCA in the development and consideration of alternative project plans which provide for the conservation of wildlife resources;

(b) Minimize delays in project authorization decisions and require the development of environmentally sound project plans without needless waste of public and private resources by establishing procedures for the timing and integration of FWCA compliance into decision-making processes while plans are still flexible;

(c) Ensure that planning for wildlife resource conservation measures addresses loss prevention, mitigation, compensation, and enhancement;

(d) Establish guidelines which ensure that applicants for selected classes of non-federal project approvals by action agencies will consult with wildlife agencies before making such applications;

(e) Describe factors to be considered by an action agency in determining what measures are justifiable to obtain maximum overall project benefits to the public;

(f) Require the use of techniques based upon habitat values as the means for assessing impacts on wildlife resources and for evaluating loss prevention, mitigation and compensation measures;

(g) Ensure that comparative benefit-cost analyses of alternative project plans include the construction, acquisition, operation, maintenance, and replacement costs of wildlife conservation measures, and, if quantifiable, the costs of uncompensated wildlife resource losses;

(h) Provide for inter-agency review of, and public participation in, wildlife and action agency decisions on means and measures for wildlife resource conservation.

§ 410.3 Definitions.

As used in this Part:

"Action agency" means a department, agency or instrumentality of the United States which plans, constructs, operates or maintains a project, or which plans for or approves a grant, loan, loan guarantee, financial or technical assistance, permit, lease, license, or contract for projects.

"Approval" or "approve" means final action agency action on an application by a federal, state, or other applicant for a grant, loan, loan guarantee, financial or technical assistance, permit, lease, license, or contract.

"Compensation" means completely offsetting losses to wildlife resource values using measures described in the NEPA regulations [40 CFR 1508.20].

"Conservation" means wildlife resource loss prevention, mitigation, compensation, and enhancement.

"Enhancement" means development or improvement of wildlife resource values of the area affected by the project beyond that which would occur without the project. This term is synonomous with the term

"development and improvement," as used in the FWCA.

"Federal project" means a project planned or constructed by or on behalf of a federal agency.

"Loss prevention" means designing and implementing a project to avoid adverse impacts on wildlife resources. [40 CFR 1508.20(b)]

"Mitigation" means (1) lessening wildlife resource losses to a project through use of loss prevention measures and (2) offsetting losses through use of other structural and non-structural measures. [40 CFR 1508.20(b)-(e)]

"Project" means any action, or planning process which could condition an action, which impounds, diverts, deepens the channel of, or otherwise controls, pollutes, or modifies any water body for any purpose whatsoever. Such water bodies include, without limitation, wetlands and the waters of any stream, including their associated ground water, or estuarine or marine waters seaward to the outer margin of continental shelf (OCS) or fisheries conservation zone, whichever is farther.

"Regional Directors" means the named officials, or designees, of the Fish and Wildlife Service (FWS) [including the Area Director for Alaska] and the National Marine Fisheries Service (NMFS) in whose geographic areas of jurisdiction the project may be located. For projects outside the U.S. territorial sea, "Regional Director" means the named official of both agencies whose area of jurisdiction is closest to the project. [See App. A for addresses and areas of jurisdiction of federal Wildlife agency Regional Directors].

"Reporting Officer" means that action agency official responsible for preparing the project report, obtaining public and agency views, and making recommendations on a proposed project to higher authority (if any) within the agency. Implementing procedures of action agencies will identify appropriate reporting officer(s).

"Wildlife agency" means the FWS, NMFS, and, if the project is to be sited within the boundaries of States of the United States, the state agency(ies) exercising immediate and direct administration over the fish or wildlife resources of the particular state(s) wherein projects are proposed to be, or have been, constructed. For projects to be sited outside the territorial sea, this term means the head of the wildlife agency(ies) of the state(s) nearest the project.

"Wildlife" and "wildlife resources" mean birds, fish, mammals and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. "Wildlife resources" include the biotic and abiotic factors upon which wildlife depends; i.e. habitat.

"Wildlife resource properties" means the lands, waters, or interests therein to be acquired, reserved, or otherwise set aside by federal agency for the conservation of wildlife resources in connection with a federal project, pursuant to the provisions of section 3 and section 4 of the FWCA.

§ 410.11 Applicability of the FWCA.

(a) *General.* The FWCA applies to federal projects and to non-federal projects which are approved by an action agency. It applies to federal projects which are authorized by the federal construction agency itself, as well as those authorized by the Congress. Examples of projects covered by the FWCA are:

(1) Discharges of pollutants, including municpal, mining and industrial wastes or dredged and fill material, into water or wetlands;

(2) Those involving the construction, operation, or maintenance of channels, turning basins, or other navigation features;

(3) Those involving the construction of dams, impoundments, and/or water diversion structures for flood control, hydroelectric power generation, water supply, cooling ponds, irrigation, recreation, fish and wildlife, or other purposes;

(4) Those which depend upon, or necessarily result in, a diversion, control or other modification of a stream or other body of water, such as: federal water and hydro-power marketing, allocation or contracting decisions; changes in reservoir release and storage plans; diversions for or discharges from power plants; mineral exploration or extraction permits, leases, or licenses on the OCS; reservoir rights-of-way on federal or Indian trust lands; projects conducted in beds of intermittent streams, or those temporarily dewatered; water-related aspects of federal mining or mineral leases, or of mining plans adopted under the Surface Mining Control and Reclamation Act;

(5) Those undertaken to abate damages or causes of erosion, storms, or floods [See paragraph 410.22(a)(2)(iii) for expedited FWCA compliance procedures in these cases];

(6) Those involving the rehabilitation or lining of water conveyance systems;

(7) Water resource and water quality planning programs.

(b) *Previously authorized or approved projects.* Prior authorization or approval of a project does not constitute a waiver, *per se,* of FWCA requirements. By reason of section 2(g) of the FWCA, section 2 of the FWCA does not apply to projects (or project units) authorized or approved prior to August 12, 1958, which were completed or substantially completed on August 12, 1958. A project or project unit is deemed to be substantially completed when sixty percent or more of then-estimated construction costs (as of August 12, 1958) had been obligated for expenditure. However, the FWCA does apply to projects (or project units) authorized or approved prior to August 12, 1958, which were not substantially completed at that time, and to projects (or project units) authorized or approved subsequent to August 12, 1958, regardless of their state of construction or whether completed.

Section 2 applies to action agency initiation of a process of developing a report on the modification or supplementation of plans for previously authorized federal projects (whether or not constructed). It also applies to any application for the renewal or modification of a federal approval.

(c) *Agencies or agency projects specifically exempt from the FWCA.* The FWCA does not apply to the Tennessee Valley Authority, the small watershed program of the Soil Conservation Service (as authorized by Section 3 of the Watershed Protection and Flood Prevention Act of 1954), to impoundment projects where the aggregate maximum surface area of such impoundments is less than ten acres, or to activities for or in connection with programs primarily for land management and use carried out by federal agences with respect to federal lands under their jurisdiction. However, where such projects require other water-related federal approvals, the FWCA applies through those programs.

§ 410.12 Applicability of this part.

Except as provided in §§ 410.13, 410.14, and 410.22(a)(2)(iii), this Part shall apply to projects to which the FWCA applies and shall govern the content of implementing procedures issued in accordance with Subpart D. They shall become applicable as follows:

(a) *Projects not authorized or approved.* For projects in a planning phase and not yet approved or authorized for construction on the effective date of these rules, action agencies shall comply with the procedures and methods prescribed by this Part which are applicable to the planning or approval stages remaining on that date.

(b) *Completed or approved projects.* This Part applies upon action agency initiation of a process of developing a report on the modification or supplementation of plans for previously authorized federal projects (whether or not constructed). It applies to applications for renewal, modification, or relicensing of a non-federal project. It applies to actions which are defined as projects and which are proposed or undertaken at those authorized projects covered by § 410.11(b). These rules will apply to completed federal, and other federally-approved, projects as the action agency may, from time to time, determine practicable.

(c) *Authorized but not completed federal projects.* (1) This Part will become applicable to federal projects, or separately-authorized units thereof, which were authorized for construction but not completed on the effective date of this Part to the same extent that the Principles and Standards Manual of Procedures, issued pursuant to the President's Water Policy Initiatives of July 12, 1978, will be applied to such projects. The Secretary of the Interior may nevertheless determine that this Part will apply to projects otherwise exempt by reason of the foregoing if, after a review of evidence submitted in accordance with paragraph (c)(3) of this section, the Secretary determines that—

(i) Authorized fish and wildlife conservation measures will not be installed or will not substantially compensate for fish and wildlife resource losses caused by the project, and

(ii) The impacts of the project upon wildlife resources are significant, or

(iii) Construction has not proceeded to the point that all options for wildlife conservation are practically foreclosed. Where appropriate, the Secretary of the Interior will consult with the Administrator of NOAA in making this determination.

(2) If this Part becomes applicable to a Federal project in accordance with paragraph (c)(1) of this section, action agencies shall not make any irreversible or irretrievable commitment of resources pending compliance with this Part which would foreclose the consideration or alternatives to compensate for wildlife losses.

(3) Within Ninety (90) days of a written request by the Secretary of the Interior, action agencies will submit the following information to the Secretary of the Interior with respect to each federal project, and separately-authorized federal project unit, which is otherwise exempt by reason of paragraph (c)(1) of this section:

(i) Its location, and the source and date of authorization;

(ii) The state of constuction (if any) and the percentage of current total estimated project cost which has been expended;

(iii) A description of the mitigation and enhancement measures which were authorized and a discussion of any difficulties encountered which could defeat adoption of such measures;

(iv) Where mitigation and enhancement measures may be under consideration for future authorization, an explanation of the status of planning and approval of such proposals within the action agency;

(v) If mitigation or enhancement land acquisition was authorized, a statement of the percentage of the authorized amount which has been acquired;

(vi) A ranking of those projects most in need of Secretarial action under paragraph (c)(1), stating the rationale for such ranking and listing those not under active consideration for construction;

(vii) A statement of whether the project meets one or more of the criteria referred to in paragraph (c)(1) and, if it does, whether the procedure of this Part should nonetheless apply.

(d) *Waivers by States or NMFS.* Where, in the judgment of a Regional Director of NMFS or the head of a state wildlife agency, their involvement in the procedures set forth in Subparts B and C would be inappropriate, he or she may waive those requirements as applied to said agency.

§ 410.13 Comprehensive water resources planning requirements.

With the exception of Level C studies undertaken by federal action agencies, Subpart B will not apply to comprehensive water or related land resources planning requirements. However, § 410.21 does apply to such programs. Wildlife agencies will be involved in such programs as provided in Subpart D.

§ 410.14 Federal programs administered by States.

Subpart B will not apply to projects approved under federal programs administered in whole or in part by States, except as provided pursuant to § 410.41.

§ 410.15 Lead action agencies.

Wildlife agencies will coordinate action compliance with the procedural requirements of §§ 410.22 and 410.23 of this Part through lead action agencies designated in accordance with NEPA regulations [40 CFR 1501.5], or, where not so designated, through an action agency which obtains the concurrence of other action agencies which may have jurisdiction over the project in question to act in that capacity. Notwithstanding such agreement, action agencies must comply with the other requirements of the FWCA and this Part.

§ 410.16 Relation to other environmental review requirements.

(a) Compliance with NEPA and the Principles and Standards of the Water Resources Council are complementary to, but not a substitute for, compliance with the FWCA or these rules. To the maximum extent possible, the reports and recommendations of wildlife agencies will accompany environmental assessments and be incorporated into the draft and final decision document and the draft and final environmental impact statement (EIS), and Principles and Standards analysis.

(b) If a permit is required under sections 103(b), 402, or 404 of the Clean Water Act or section 9 or 10 of the River and Harbor Act of 1899 for projects of, or pending approval before, a federal agency, that agency shall ensure compliance with those permit programs before, or at the same time, approves, seeks authorization of, or seeks construction funding for the project.

(c) Many statutory authorities require consultation with the Departments of the Interior and/or Commerce on the wildlife impacts of federal actions. Federal, state, or private agencies or individuals are encouraged to adopt and employ the procedures or methods prescribed by these rules to obtain the full loss prevention, mitigation, and enhancement potential of projects, whenever authorized.

Subpart B—FWCA Compliance Procedure

§ 410.21 Equal consideration.

Equal consideration of wildlife resource values in project planning and approval is the essence of the FWCA compliance process. It requires action agencies to involve wildlife agencies throughout their planning, approval, and implementation process for a project and highlights the need to utilize a systematic approach to analyzing and establishing planning objectives for wildlife resource needs and problems and developing and evaluating alternative plans. Wildlife resources will be conserved in action agency project planning and approval by minimizing adverse effects, compensating for wildlife resource losses, and enhancing wildlife resource values.

Compliance with the equal consideration mandate requires:

(1) *Consultation* between action agencies (or applicants to them) and wildlife agencies on measures necessary to conserve wildlife in project planning, construction, and operation;

(2) *Reporting* by wildlife agencies on the effects of the project and its alternatives upon wildlife resources and on measures recommended to conserve wildlife resources in connection with the project and its alternatives;

(3) Full *consideration* by the action agencies of measures recommended to conserve wildlife resources, both with regard to the project and its alternatives;

(4) *Implementation* of justifiable conservation measures.

§ 410.22 Consultation.

(a) *Initiation.* The FWCA compliance process may be initiated by a potential applicant, an action agency, or a wildlife agency.

(1) Potential Applicants. Implementing procedures of action agencies shall provide that applicants for those non-federal project approvals enumerated below contain written evidence that they initiated the FWCA compliance process with both Regional Directors and the head of the state wildlife agency exercising administration over the fish and wildlife resources of the state(s) wherein the project is to be constructed. This pre-application procedure applies to projects which—

(i) Involve drainage, dredging, filling, or other modification of wetlands greater than ten acres, create impoundments greater than fifty acres, involve one half mile of dredging or stream channel modification, or

(ii) Require a water-dependent power project approval from the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), or the Rural Electrification Administration (REA). This paragraph also applies to preliminary permit (FERC) and early site review (NRC) applications. The intent of this paragraph (a)(1) of this section is to assist applicants in designing environmentally sound projects without waste of their planning resources and to minimize the potential for delay in the processing of applications. Action agency implementing procedures shall advise that consultation should be initiated by the applicant at the earliest stages of its project planning, and that its submissions to wildlife agencies shall indicate the general work or activity being considered, its purpose(s), and the general area in which it is contemplated. The information provided to wildlife agencies will be specific enough to allow them to identify possible effects on wildlife and to identify potential conservation measures (including alternatives), and yet be general and flexible enough to allow the incorporation of justifiable conservation measures prior to submission of a formal application to the action agency. Wildlife agencies will provide to the potential applicant a brief analysis of potential impacts to wildlife resources, suggested modifications or alternatives, and an indication of which project features, if any, would likely be viewed as being unacceptable at the time of permit or license review. The detail of analysis and refinement of recommendations will be related to the level of detail of the proposed plan. The wildlife agencies shall identify any areas of concern or analysis that require further detail or study. The results of this analysis should be integrated in or accompany the action agency's NEPA environmental assessment.

(2) Action agencies. Notwithstanding any applicant consultation which may be required by paragraph (a)(1) of this section, action agencies shall initiate (or continue) the FWCA compliance process in the following manner:

(i) Federal projects. Action agencies shall notify both Regional Directors and the head of the state wildlife agency (through OMB Circular A-95 procedures, or otherwise) upon initiation of studies or actions which may lead to the authorization of a federal project. This also applies to the initiation of planning for the modification or supplementation of project reports on previously authorized project. See § 410.12(b)(2). Action agencies shall invite wildlife agencies to participate actively throughout the planning process. [For existing Memoranda of Understanding, see App. B and C].

(ii) Federally-approved projects. Appropriate written notice of preliminary permit (FERC) and early site review (NRC) applications, as well as NRC and FERC construction license and permit or renewal applications, will be forwarded for comment to both the Secretaries of the Interior and of Commerce and to the head of the wildlife agency for the state(s) wherein the proposed construction may occur. Appropriate written notice of all other applications to federal agencies for approvals, including renewal applications, shall be forwarded promptly after their receipt to both Regional Directors and to the head of the wildlife agency for the state(s) wherein the proposed construction may occur. The evidence which is required by paragraph (a)(1) of this section shall accompany these notices.

(iii) Emergencies. (A) If a major disaster will be declared by the President under authority of the Disaster Relief Act Amendments of 1974, the designated Federal Coordinating Officer (FCO) of the Federal Emergency Management Agency (FEMA), will consult with the Regional Directors and the affected state wildlife agency to determine the need for FWCA compliance during the course of the emergency. When continuing detailed coordination is determined necessary by wildlife agencies, the FCO will provide facilities for a wildlife agency coordinator(s) at the Disaster Field Office (DFO). Field level coordination will occur between the designated wildlife coordinator(s) and the FEMA Public Assistance Officer (PAO) responsible for the DFO. In the event of unresolved conflicts between the wildlife coordinator(s) and the PAO, the matter will be referred to the Federal Coordinating Officer for resolution.

(B) Procedures for FWCA compliance in other action agency programs or actions in emergency situations will be identified during the period for approval of implementing procedures.

(3) Wildlife agencies. Where FWCA compliance is not initiated where required, it shall be deemed initiated upon notice by a wildlife agency.

(b) *Coordinated planning.* (1) Particularly in the case of federal projects and NRC, FERC, and REA-approved projects, wildlife and action agencies shall utilize a systematic approach in analyzing wildlife resource needs and problems, establishing planning goals therefor, and developing and evaluating alternative resource management plans.

(2) Wildlife agencies will cooperate with action agencies in the development of analyses, recommendations, and reports to action agencies on means and measures for the conservation of wildlife resources.

(3) Action agencies shall provide wildlife agencies adequate opportunity to prepare FWCA reports and recommendations and transmit them to the action agency for timely consideration with NEPA environmental assessments, and for incorporation into the draft EIS and other decision documents.

(4) In the case of federal projects and FERC, NRC, and REA-approved projects, the action agencies shall convene scoping meetings with the wildlife agencies and (where applicable) applicants upon initiation of the FWCA compliance process. Such meeting need

not be convened where consultation has occurred in accordance with paragraph (b)(1) of this section. To the fullest extent possible, these meetings should be combined with the NEPA scoping process where the proposal requires preparation of a draft EIS. 40 CFR 1501.7. Such meetings may also be convened in the case of other applications for approvals at the request of a wildlife agency or the action agency. Such meetings will be for the purposes of—

(i) Developing plans of study which ensure full wildlife agency participation throughout each phase of the planning or approval process,

(ii) Determining who, as among the federal and state agencies or the applicant, will undertake and oversee the required studies and investigations,

(iii) Establishing mutually acceptable target dates for the initiation and completion of studies and the submission of FWCA reports and recommendations,

(iv) Coordinating FWCA compliance with other environmental review requirements,

(v) Ensuring that conservation of wildlife resources is given equal consideration with other study or project purposes or goals, and

(vi) Ensuring that action agencies provide wildlife agencies with adequate descriptions of alternative project plans under consideration. A record of the agreements reached and responsibilities assigned in scoping meetings shall be distributed to the participating parties and included in the administrative record of the action agency. All parties share a responsibility for early and timely exchange of information required for completion of assigned studies, investigations, reports, and recommendations.

§ 410.23 Reporting.

(a) *Authority.* Except in the case of NRC and FERC-licensed projects, the authority to transmit FWCA reports and recommendations of the Secretaries of the Interior and Commerce is exercised by the Regional Directors. In the case of FERC and NRC-approved projects, such authority is exercised for the Secretary of Commerce by the Assistant Administrator for Fisheries, NOAA, and for the Secretary of the Interior by the Assistant Secretary for Policy, Budget, and Administration, acting upon the recommendation of the FWS and the Office of Environmental Project Review.

(b) *Timing.* Consistent with NEPA regulations [40 CFR 1501.6 and 1502.25], wildlife agencies shall, to the maximum extent possible, forward their reports and recommendations to action agencies within an agreed-upon time frame sufficient to permit preliminary action agency decisions on incorporation of those recommendations into project plans, and to permit their inclusion and analysis in the draft decision document and/or the environmental assessment or draft EIS. See § 410.24(a). To the maximum extent possible, preparation and transmittal of FWCA reports will be coordinated and combined with the preparation and transmittal of reports or other reviews required of the Department of the Interior or National Oceanic and Atmospheric Administration (NOAA) by other federal environmental review requirements, including—

(1) Endangered Species Act of 1973,

(2) Estuary Protection Act,

(3) § 6(a) of the Federal Water Project Recreation Act,

(4) Coastal Zone Management Act,

(5) §§ 103(b), 401, 402, 404, 303, and 208 of the Clean Water Act of 1977,

(6) § 5(d) and 7(b) of the Wild and Scenic Rivers Act.

Memoranda of understanding or agreements which may provide time limits for the referral of FWCA reports and recommendations for certain classes of projects appear in Appendices B and C.

(c) *Content.* (1) Wildlife agencies will prepare reports that describe project-related effects upon wildlife resources and identify alternative means and measures necessary to conserve wildlife resources. Evaluation techniques used in describing effects and identifying conservation measures will be directed at quantifying and qualifying potential effects upon wildlife, their habitat and its productivity and related values.

(2) Wildlife agencies shall prepare and submit reports to action agencies that describe—

(i) Wildlife problems and needs and recommended fish and wildlife planning goals,

(ii) The positive and negative effects and impacts of alternative project plans upon wildlife and recommended conservation features,

(iii) The positive and negative effects and impacts of the construction and operation of the selected plan upon wildlife, the conservation measures identified during plan formulation, and specific recommendations for conservation measures that should be included in the selected plan,

(iv) The results and impacts expected from implementing these recommendations, and

(v) The plan, if any, which they prefer from the standpoint of wildlife conservation.

(3) Wildlife agency reports on federal projects shall include an analysis of the extent of wildlife resource productivity lost to, or gained with, the proposed project and of the conservaton measures required to replace that loss (if that is possible), measured without reference to values attributed to human use ("user-day") or other monetary computations. This analysis may be provided for non-federal projects and for alternative project plans.

(4) FWCA reports and recommendations will contain a review of the disposition of wildlife agency recommendations previously made.

(5) If features of project design, construction, or operation are not sufficiently developed that their effects can be properly assessed, the report of the wildlife agencies will so state and will list the areas requiring further study to identify necessary conservation measures. Any consultation or coordination necessary in the implementation of conservation measures will be identified.

(6) When analyzing project effects and impacts, wildlife agencies will take into account other water-related project planning and review requirements, such as: Executive Orders 11988 (floodplains) and 11990 (wetlands); § 73 of the Water Resources Development Act of 1974 (non-structural alternatives); Indian trust environmental review requirements; the Marine Protection, Research, and Sanctuaries Act of 1972; § 102(b) of the Clean Water Act; federal water policy; the potential effects of the proposed project upon federal property and public trust interests, including reserved water rights.

(d) *Public participation.* Where significant wildlife resource issues are involved, wildlife agencies will invite public participation in the process of developing FWCA reports and recommendations in accordance with guidelines which they develop.

(e) *Inability to report.* If a wildlife agency is unable to prepare an FWCA report or otherwise participate in the planning or approval process, it shall notify the action agency within 30 days of the receipt of an action agency's request to initiate consultation, detailing the reasons therefor. Such notification does not relieve action agencies of the requirements of the FWCA or §§ 410.21 and 410.24 of this Subpart.

(f) *Follow-through.* Once wildlife agency reports are sent to action agencies, all wildlife agenceis should actively pursue such means as will

ensure that necessary studies and recommended measures are undertaken and implemented.

§ 410.24 Consideration.

(a) *Action agency findings.* (1) The reporting officer shall prepare for the administrative record (project plan or planning report, where applicable) written findings on which of the measures recommended by wildlife agencies with respect to the selected project plan and its alternatives are and are not believed to be justified, and why. This documentation will include:

(i) A summation of measures adopted during plan formulation to prevent and compensate for wildlife resource losses;

(ii) In the case of federal projects, a finding whether the selected plan fully compensates for losses to wildlife resource productivity, measured in terms of equivalent wildlife resource productivity;

(iii) The justification for tradeoffs made between wildlife conservation and other project features in arriving at the selected plan;

(iv) An identification of any issues of disagreement remaining between the action agency and the wildlife agencies.

(2) In addition to the matter required for federal projects by § 2(f) of the FWCA (16 U.S.C. 662(f)), the reporting officer on federal projects and projects pending consideration by NRC and FERC, shall analyze and discuss the acquisition, operation, maintenance, replacement, and management costs, and the environmental impacts, of wildlife conservation measures proposed by each wildlife agency for each alternative treated in the draft and final environmental impact statement, in benefit-cost analyses of alternatives, and (where applicable) in the evaluation accounts of the Principles and Standards of the Water Resources Council. The reporting officer shall also treat uncompensated damages to fish and wildlife resources as a cost chargeable to the project. All such costs (monetary and non-monetary) shall be estimated over the life of the project, regardless of whether the U.S. Treasury or non-federal parties will bear them.

(3) In making the findings required by paragraphs (a)(1) and (a)(2) of this section, the reporting officer and each higher action agency decision-making authority shall use the criteria established in paragraph (b) of this section.

(4) Where the findings required by paragraphs (a)(1) and (a)(2) of this section have not been disclosed in a draft EIS, in publicly circulated planning document, or in public or adjudicatory hearings, the reporting officer shall publish those findings in the **Federal Register** or other appropriate media and afford the public reasonable opportunity to present its views. In the case of FERC and NRC-approved projects, opportunities for administrative or court review of the findings of action agency initial or final decision-makers will not be considered compliance with this paragraph.

(5) The reporting officer shall transmit the information required by paragraphs (a)(1) through (a)(4) to counterpart officials in the wildlife agency(ies) concerned for an agreed-upon period of time for comment prior to final agency action on the matter. If there are differences at this stage between a wildlife agency and the action agency on the reporting officer's disposition of wildlife agency recommendations, the wildlife agency may request the action agency to hold a public hearing on the matter. Action agency implementing procedures shall require an ensuing reconsideration of the matter and, if such hearings are deemed appropriate by the action agency, full consideration of information generated by such public hearings. Differences not resolved in this manner shall be made a matter of record and, if requested by either the action or wildlife agency, promptly referred to successively higher authority of both agencies for resolution. Where memoranda of understanding or agreement do not already so provide [see App. B and C], implementing procedures shall provide a means of complying with this paragraph.

(6) If, despite best efforts, wildlife agencies cannot identify loss prevention, mitigation, and enhancement measures in detail prior to project authorization or approval, action agencies shall include in their recommendations to higher authorities the requirements necessary to ensure that, once identified and described, these measures will be proposed for authorization or approval and, if authorized and funded or approved, will be implemented. Action agencies should avoid committing resources which foreclose adoption of alternative wildlife conservation measures.

(b) *Decision criteria.* (1) Action agencies are required to make findings on wildlife conservation measures which they deem justified to be included in projects to obtain maximum overall project benefits to the public. Action agencies must regard wildlife conservation as a programmatic and project purpose or goal equal to other project purposes or goals. Certain project benefits may be diminished to obtain these conservation goals. Findings directed at loss prevention and mitigation measures shall be made using assessment and evaluation techniques based upon wildlife habitat values. Monetary values may be displayed and used in measuring the cost-effectiveness of alternative mitigation plans, but shall not be used for justification purposes. Enhancement measures may be evaluated using other techniques, but should be measured using habitat-based techniques, where possible. Such findings shall be made with the objectives of both preventing and compensating for wildlife resource losses, and of enhancing wildlife resource values. To the extent practicable and justifiable, action agencies shall ameliorate project-related losses to wildlife resources, wherever they occur. With the exception of the enhancement component, wildlife resource conservation measures do not create benefits for the purposes of benefit-cost analysis; they are to be considered as avoiding or abating costs (losses) to existing resources and values.

(2) Action agencies may not reject recommended wildlife conservation measures for federal projects on the grounds that wildlife conservation is not a "purpose" for which a federal project was or can be authorized, or on the grounds that they are not authorized to so condition a non-federal project approval. The FWCA amends the organic authorities of action agencies to provide these authorities. In the case of federal projects undertaken by the Department of the Interior, the Fish and Wildlife Act of 1956, 70 Stat. 1122 (16 U.S.C. 742f(4)–(5) (1976)), supplements such authority.

(3) Action agencies must justify the adoption or rejection of means and measures for wildlife resource conservation using substantive economic, envirnomental, and social reasons. Measures recommended by wildlife agencies for compensation of wildlife resource losses cannot be considered unjustified because—

(i) That agency or other agencies may not have adopted a habitat-based wildlife impact assessment and evaluation procedure,

(ii) Those measures, either alone or collectively, do not have a favorable monetary benefit-cost ratio,

(iii) Project beneficiaries or other non-federal entities are unwilling to fund the appropriate share of increased federal project costs necessary to compensate for wildlife resource losses,

(iv) There are other proposed uses for land or waters recommended for wildlife compensation purposes, unless

their proposed use is found to be more in the public interest than the proposed mitigation, or

(v) Recommended wildlife resource properties or compensation measures are outside the immediate project boundaries.

(4) If an action agency finds that a measure recommended by wildlife agencies for compensation of wildlife resource losses is not justifiable because it would render the monetary benefit-cost ratio of the project unfavorable or because project beneficiaries or other non-federal entities are unable to fund the appropriate share of increased federal project costs necessary to mitigate/compensate for the wildlife resource losses involved, the action agency shall explain in detail, in terms of obtaining maximum overall project benefits, its reasons for so finding.

(5) Justifiable means and measures for wildlife resource conservation shall be incorporated as conditions or stipulations in action agency approvals where the practical effect of not doing so is that the means and measures will not be adopted.

(c) *Requests for project authorization.* The reports, recommendations, and findings required by §§ 410.23 and 410.24 shall be made an integral part of (1) action agency reports submitted to the Office of Management and Budget and the Congress in connection with a construction authorization proposal, and (2) submission to action agency final decision-maker(s) of recommendations on projects they may approve or authorize.

Subpart C—Project Implementation

§ 410.31 Congressional liaison.

Wildlife agencies will make themselves available to testify in authorization and appropriations committee hearings concerning proposals for Congressional authorization or funding of wildlife conservation measures.

§ 410.32 General plans for management of wildlife resource properties.

A General Plan is a document that designates the lands which are to become transferred for wildlife resource management properties and generally describes the use of such properties for wildlife management purposes. The objective of General Plans is to ensure a realization of the wildlife resource conservation measures which formed a basis for the justification and authorization of the project. The FWCA requires the execution of a General Plan prior to action agency transfer of administrative or legislative jurisdiction over the area to the agency which will administer the area for wildlife purposes.

(a) *The determination of which agency shall manage the wildlife resource properties.* (1) Properties with migratory bird values. After investigation, the Secretary of the Interior will determine whether wildlife resource properties have value in carrying out the national migratory bird program. When the Secretary concludes that the properties have such value, the Department of the Interior may administer the lands directly, or in accordance with a cooperative agreement with the appropriate state wildlife agency. The Secretary may manage such properties through another public or private agency or organization. The action agency shall make such wildlife resource properties available, without cost, for administration to—

(i) The Secretary of the Interior, when the Department of the Interior will be responsible for administering the property either directly, or through cooperation with a public or private agency or organization, or

(ii) The state wildlife agency, if it is jointly determined by the Secretary of the Interior and such state wildlife agency that state administration of those wildlife resources would be in the public interest.

(2) *Other properties.* When the Secretary concludes that the wildlife resource properties have value other than for migratory bird management, the state wildlife agency shall be afforded the opportunity to assume management of the lands.

(3) *Interim administration.* During the period after the action agency has acquired the wildlife resource properties and before the joint approval of the General Plan, wildlife resource properties shall be made available upon request and without cost to the FWS for interim administration of the property for wildlife resource conservation purposes. The FWS and the state wildlife agency may agree which agency shall assume interim administrative responsibility. If for any reason, the state wildlife agency cannot assume or continue the administration of wildlife resource properties, the FWS shall be afforded the opportunity to assume administration of such property for wildlife resource purposes on an interim basis, or to enter into cooperative arrangements with the action agency whereby that agency shall administer such property for wildlife resource purposes.

(b) *NEPA compliance.* Action agencies are responsible for NEPA compliance respecting General Plans. Where possible, the information referred to in subsection (d) of this section should appear in the project EIS.

(c) *Development and approval of general plans.* (1) After consultation with the state wildlife agency, the Regional Director of NMFS, the action agency and (if different) the agency exercising primary jurisdiction over the area ("primary jurisdiction agency"), the FWS will initiate the development of a preliminary draft of a general plan for the management of the wildlife resources of wildlife resource properties. In cases where the area in question will likely be managed by a State, the FWS will request the state wildlife agency to prepare the draft. The major features of the draft shall be based on the wildlife agencies' reports and recommendations which are required by section 2(b) of the FWCA and these rules. The draft shall be submitted concurrently to the wildlife agencies, the action agency, and (if different) the primary jurisdiction agency, for their review and responsive recommendations.

(2) Any differences between the action and/or primary jurisdiction agency and the FWS on the proposed General Plan that cannot be resolved by staff shall be resolved by—

(i) The Secretary of the Interior, when the said agency is an agency in the Department of the Interior, or

(ii) The Secretary of the Interior, in consultation with the head of any other department or agency of which the action or primary jurisdiction agency may be a part.

(3) Any differences over the content of the proposed General Plan between FWS and state wildlife agency that cannot be resolved by them will be resolved by the Governor of the affected state and the Secretary of the Interior.

(4) General plans shall be approved at the same time as the document which transfers administration of the lands from the primary jurisdiction agency to the agency or organization designated in accordance with paragraph (a) of this section. The General Plan shall be approved or modified jointly by—

(i) The head of the agency exercising primary jurisdiction over the area,

(ii) The Secretary of the Interior, and

(iii) The head of the wildlife agency of the state wherein the proposed project may be or is constructed.

(5) Where the FWS and NMFS agree that wildlife resources of interest to NMFS would be substantially affected by management of the wildlife resource property which is the subject of the

General Plan, the responsibilities assigned to Interior officials by paragraphs (c)(2) through (c)(4) of this section shall be performed jointly by the appropriate official of NOAA and Interior.

(d) *Content of a general plan.* A General Plan shall: (1) Describe the uses of the wildlife resource property by generally detailing—

(i) The wildlife management goals for the area, as discussed in the project EIS (where applicable),

(ii) The principal species and habitats to be managed,

(iii) The general management concepts and practices to be employed,

(iv) The wildlife development, facilities, or other features to be constructed,

(v) Any restrictions on use of the wildlife resource properties, and

(vi) The availability of the land for public access;

(2) Designate the agency or organization responsible for the administration of the wildlife resource properties, as governed by the provisions of paragraph (a) of this section;

(3) Describe the boundaries and location of the wildlife resource management properties;

(4) Identify capital, operation, maintainence and replacement costs;

(5) Contain provisions for continued consultation between the agency administering the property for wildlife purposes and the primary jurisdiction agency to coordinate wildlife resource management with the management of the project.

(e) *Funding and reports.* Funds for operation, maintainence, management, and replacement of wildlife resource properties acquired or made available for compensation of project-related wildlife resources losses shall be computed by the administering agency and included in the annual budget submissions of action agencies. Together with other project features adopted for compensation of wildlife resource losses, these costs are integral project costs. Any agency administering wildlife resource properties may be requested to prepare annual reports to action and federal wildlife agencies demonstrating how authorized wildlife conservation measures and the General Plan are being implemented and how compensation and enhancement is being achieved.

§ 410.33 Study or modification of authorized federal projects.

If it is decided to undertake post-authorization wildlife resource studies of Federal projects, they should be made either by wildlife agencies, or by others after consultation with wildlife agencies. Post-authorization studies should determine the need for added wildlife conservation measures. In addition to the monitoring provided for in NEPA regulations [40 CFR 1505.3], post-construction studies should evaluate the impact of any non-implementation of measures recommended by wildlife agencies, as well as the effectiveness of implemented measures.

All reports, findings, and determinations resulting from such studies shall be incorporated into any reports on modification or supplementation of plans for previously-authorized projects and employed in complying with the FWCA and these rules. See § 410.11(b).

Subpart D—Implementation of This Part

§ 410.41 Action agency implementing procedures.

(a) Within three months of the publication (not effective) date of these rules, action agencies shall propose to the Secretary of the Interior procedures which would implement this Part. Action agencies will first identify in that proposal the typical classes of projects of, or approved by, them which are referred to in paragraphs 410.11 (a) through (c) and § 410.14 of Subpart A, and in § 410.22(a)(2)(iii) of Subpart B. For each class of projects so identified, action agencies shall provide responses to the following:

(1) What are the statutory and U.S. Code citations under which authority the class of projects may be authorized;

(2) Do existing procedures already satisfy the following provisions of this Part (if so, give specific CFR or other citations to appropriate sections of action agency procedures), particularly—

(i) Section 410.3 ("Regional Directors," "reporting officer" and "wildlife agency") and § 410.22(a)(2)—routing of consultation requests, and

(ii) Section 410.11(c) and § 410.16(b)—coordination with the Clean Water Act and River and Harbor Act permit programs.

(3) Does the law applicable to the action agency positively bar the adoption of any requirement of this Part applicable to a class in question;

(4) What implementing procedures are required to put into effect the provisions set forth in paragraph (a)(2);

(5) How would this be accomplished—by codified regulation, by a public proceeding, or by other instructions—and what time delay is required by procedural preconditions to their adoption;

(6) If any applicable provisions of this Part are believed to be inappropriate for a class of projects, are there reasons why such classes should be exempt, or is there an alternative which satisfies the substance and intent of the provisions?

(b) In consultation with the Administrator of NOAA and the head of the federal agency in question, the Secretary of the Interior will resolve any differences on interpretation and applicability of this Part which may arise and cannot be resolved by staff during the process of approval of implementing procedures.

(c) The Secretary will approve acceptable implementing procedures which are proposed in accordance with paragraph 410.41(a) within one hundred fifty (150) days of the publication date of this Part.

§ 410.42 Comprehensive planning requirements.

Within three months of the publication date of these rules, action agencies will review the comprehensive water and related land resources and water quality planning programs administered by them to determine what level(s) of wildlife agency involvement therein are presently provided for by written action agency procedures. Action agencies will report such determinations to the Secretary of the Interior and, if necessary, propose to the Secretary new coordination procedures for wildlife agency involvement in such programs, including (but not limited to) those authorized by, or referred to as—

(a) Water Resources Planning Act of 1965,

(b) Sections 201, 208, 303, and 314 of the Clean Water Act of 1977,

(c) Type IV studies of the Soil Conservation Service,

(d) Coastal Zone Management Act of 1972,

(e) Federal Land Policy and Management Act,

(f) Land and Water Conservation Fund Act,

(g) Wild and Scenic Rivers Act,

(h) Resource Conservation and Development Act,

(i) Forest and Renewable Resources Planning Act of 1974,

(j) Urban Studies of the Corps of Engineers,

(k) National Forest Management Planning Act of 1976,

(l) Soil and Water Resource Conservation Act of 1977,

(m) Surface Mining Control and Reclamation Act,
(n) Outer Continental Shelf Lands Act.

Appendix A. Regional Directors, Fish and Wildlife Service

Region I

U.S. Fish and Wildlife Service, Lloyd 500 Building, Suite 1692, 500 N.E. Multnomah Street, Portland, Oregon 97232.

Region II

U.S. Fish and Wildlife Service, 500 Gold Avenue, S.W., P.O. Box 1306, Albuquerque, New Mexico 87103.

Region III

U.S. Fish and Wildlife Service, Federal Building, Fort Snelling, Twin Cities, MN 55111.

Region IV

U.S. Fish and Wildlife Service, 17 Executive Park Drive, N.E., P.O. Box 95067, Atlanta, Georgia 30347.

Region V

U.S. Fish and Wildlife Service, One Gateway Center, Suite 700, Newton Corner, Massachusetts 02158.

Region VI

U.S. Fish and Wildlife Service, P.O. Box 25486, 134 Union Boulevard, Lakewood, Colo. 80228.

Alaska Area Office

U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503.

Regional Directors, National Marine Fisheries Service

Regional Director, National Marine Fisheries Service, Northeast Region, Federal Building, 191 Main Street, Gloucester, Massachusetts 01930.

Regional Director, National Marine Fisheries Service, Southeast Region, Duval Building, 9450 Gandy Boulevard, St. Petersburg, Florida 33702.

Regional Director, National Marine Fisheries Service, Northwest Region, 1700 Westlake Avenue, North, Seattle, Washington 98109.

Regional Director, National Marine Fisheries Service, Southwest Region, 300 South Ferry Street, Terminal Island, California 90731.

Regional Director, National Marine Fisheries Service, Alaska Region, P.O. Box 1668, Juneau, Alaska 99801.

BILLING CODE 4310-55-M

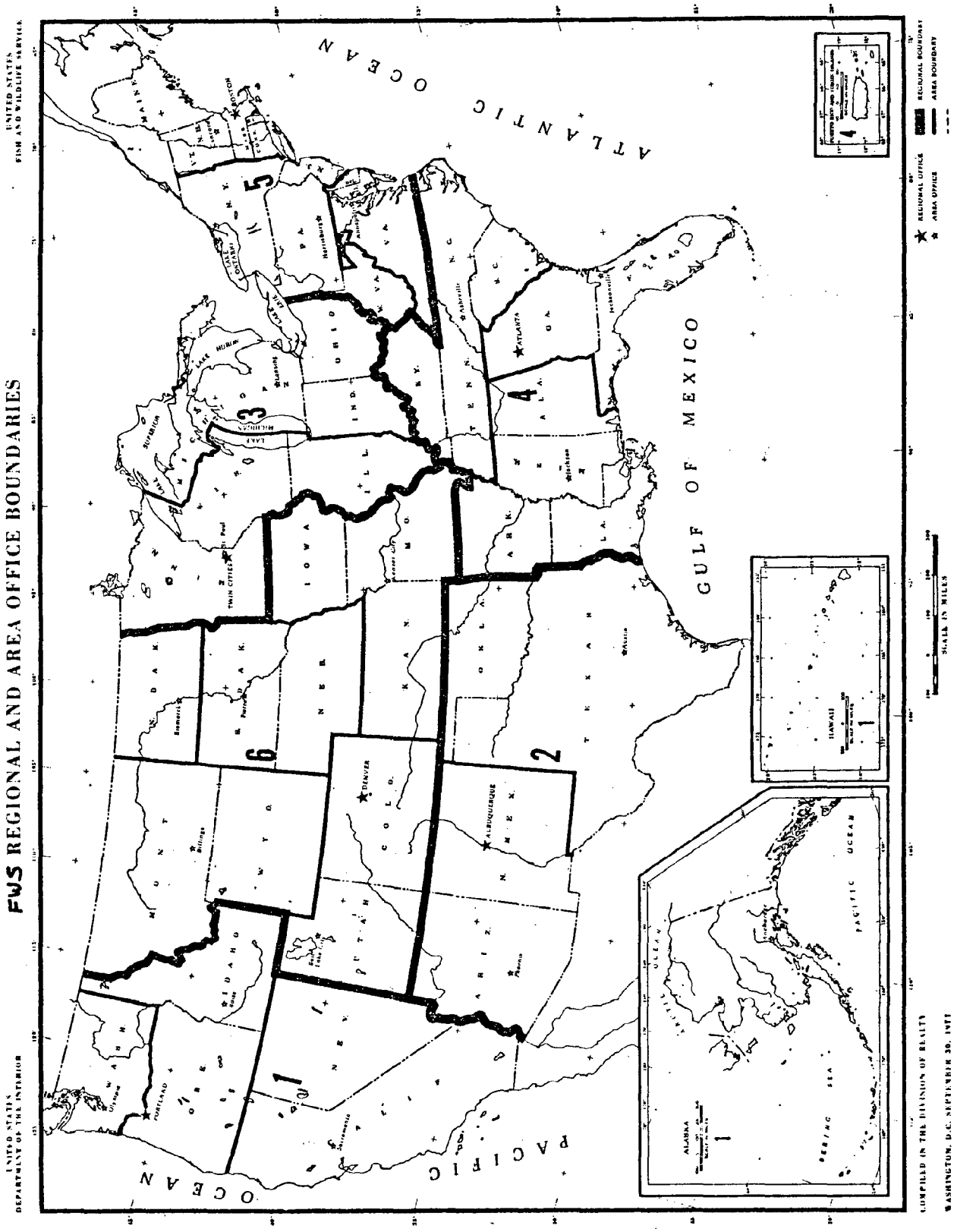
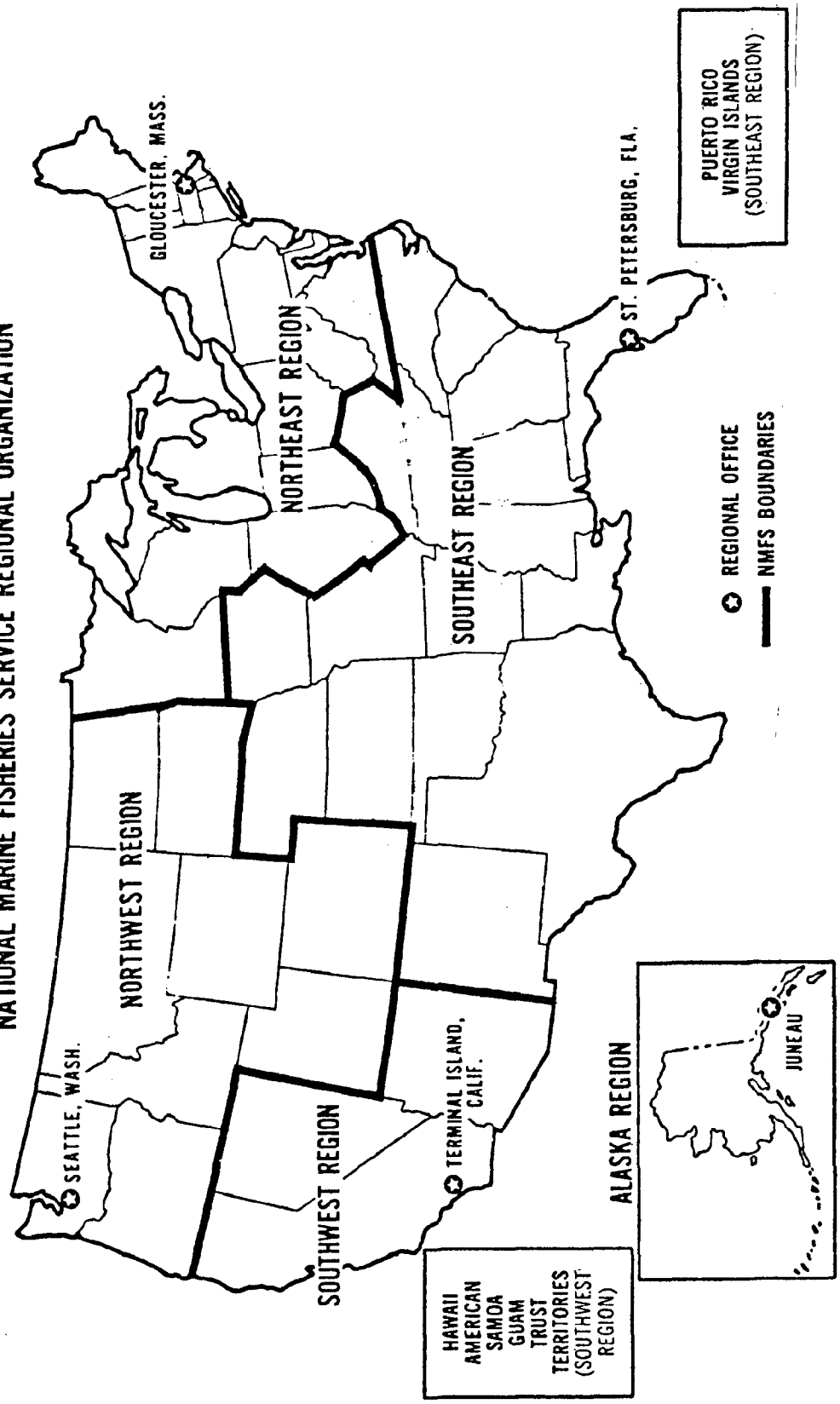

FWS REGIONAL AND AREA OFFICE BOUNDARIES
UNITED STATES
DEPARTMENT OF THE INTERIOR
UNITED STATES
FISH AND WILDLIFE SERVICE
ATLANTIC OCEAN
GULF OF MEXICO
PACIFIC OCEAN
BERING SEA
ALASKA
HAWAII
PUERTO RICO AND VIRGIN ISLANDS
REGIONAL OFFICE
AREA OFFICE
REGIONAL BOUNDARY
AREA BOUNDARY
SCALE IN MILES
COMPILED IN THE DIVISION OF REALTY
WASHINGTON, D.C. SEPTEMBER 30, 1977

Exhibit 2 to DOO 25-5B

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

NATIONAL MARINE FISHERIES SERVICE REGIONAL ORGANIZATION



OCTOBER 16, 1978

BILLING CODE 4310-55-C

Appendix B—Part A-28 Land Acquisition

Exhibit 1.—General Plans—A-28.1

Procedures for Developing General Plans for Fish and Wildlife Management

The agreement between the Fish and Wildlife Service and the Corps of Engineers, approved by the Acting Secretary of the Interior on August 6, and by the Secretary of the Army on August 20, 1954, provides in Section 7 that General Plans for Fish and Wildlife Management, as specified in Section 3 of the Coordination Act (Pub. L. 732, 79th Congress, approved August 14, 1946, 60 Stat. 1080) shall be developed jointly by the Corps of Engineers, the Fish and Wildlife Service, and the appropriate State agency for all project lands and waters where management for fish and wildlife purposes is proposed. The agreement further provides, in Section 8, that standard procedures for the development of General Plans for Fish and Wildlife Management shall be developed jointly by the Office of the Chief of Engineers and the Fish and Wildlife Service. Section 8 further provides that copies of such procedures will be made available to all field offices of both agencies.

General Plans for Fish and Wildlife Management are prepared for the purpose of designating the type of use as between the national migratory bird management program of the Department of the Interior and the wildlife programs of the respective State and therein to define the lands and waters to be administered by each. Such Plans should be only as detailed in those respects as may be necessary to indicate the agencies, the areas, and the general purposes to be accomplished under each assignment. The Plans should not be burdened with operating details which are properly a part of the cooperative agreements understood to be necessary between the Corps of Engineers and the Fish and Wildlife Service or the State in making areas available to the latter two agencies subsequent to the completion of the General Plans for Fish and Wildlife Management.

In accordance with Section 8 of the August agreement, the following procedures for the development of General Plans for Fish and Wildlife Management have been developed jointly by the Office of the Chief of Engineers and the Fish and Wildlife Service.

A. *Specific Procedures*

1. Reports prepared by the Fish and Wildlife Service in cooperation with the appropriate State fish and game agency, in accordance with Section 2 of the Act of August 14, 1946, shall specify, when appropriate, the necessity for a General Plan for Fish and Wildlife Management in the recommendations of the reports. In accordance with previously established procedure, the reports will be transmitted to the District Engineer.

2. Whenever the use of project lands and waters for fish and wildlife management purposes is proposed, the Service or the appropriate State agency may request the preparation of a General Plan for Fish and Wildlife Management. The formulation of a General Plan for Fish and Wildlife Management shall be a joint cooperative endeavor by the District Engineer, Corps of Engineers; Regional Director of the Service; and the Head of the appropriate State agency, by mutual exchange of information pertaining thereto, discussions, and agreement. Normally the Service or the State will initiate the preliminary draft of a General Plan for Fish and Wildlife Management after determining the views of the other agencies. Such draft of a General Plan for Fish and Wildlife Management will be submitted concurrently for comment to the other two agencies. Such General Plan for Fish and Wildlife Management will be subject to approval by the Secretary of the Army, the Secretary of the Interior, and the Head of the agency exercising administration over the wildlife resources of the State wherein the lands and waters lie.

3. After the field offices of the Corps, the State and the Service have reached agreement as to the form and context of the General Plan for Fish and Wildlife Management, signature in triplicate by the appropriate State official will be obtained thereto signifying concurrence, and the signed copies thereof will be forwarded by the Corps through channels to higher authority for approval and execution by the respective Secretaries of the two Departments.

4. After completion, conformed copies of the General Plan for Fish and Wildlife Management shall be supplied by the Secretary of the Army to each of the three respective parties.

B. *General Provisions*

1. Every reasonable effort will be made to reach mutual agreement at an early date with respect to the provisions of a General Plan for Fish and Wildlife Management for a project. Where a General Plan is to be prepared, wildlife agencies of the affected States and the Fish and Wildlife Service will be consulted by the Corps of Engineers on wildlife matters with a view to reaching tentative agreement on lands and waters to be utilized for wildlife management purposes prior to public hearings on Master Reservoir Management Plans.

2. It is agreed that project lands and waters of particular value for the conduct of the national migratory bird management program made available to the Fish and Wildlife Service may subsequently, through a cooperative agreement, be administered by a State in accordance with Section 4 of the Coordination Act, if such action appears to be in the public interest.

3. It is understood that the Federal and State agencies managing the project lands for wildlife may utilize same for the production of food for the wildlife involved.

Approved: March 9, 1955.

John L. Farley,

Director, Fish and Wildlife Service.

Approved: April 6, 1955.

S. D. Shugs,

Chief, Corps of Engineers.

Memorandum of Understanding Between the Fish and Wildlife Service, U.S. Department of the Interior, and the Forest Service, U.S. Department of Agriculture

Whereas the Fish and Wildlife Service is the agency of the Federal Government primarily responsible for the welfare of fish and wildlife resources and research thereon; and

Whereas the Forest Service is the agency of the Federal Government primarily responsible for the administration and management of the National Forests and for all aspects of forestry research;

Now, Therefore, it is mutually agreed that the general functions of the two agencies under this memorandum within the limits of their resources, will be as follows:

1. Administration and Management

a. The Fish and Wildlife Service will act in an advisory capacity to the Forest Sevice in matters pertaining to fish and wildlife management on lands administered by the Forest Service. The responsibility and authority for correlation and integration of fish and wildlife habitat management with recreation, watershed management, timber production, range management and other uses of these lands will rest at all times with the Forest Service.

b. The Forest Service will act in an advisory capacity to the Fish and Wildlife Service in matters pertaining to timber, watershed and range management on forest and related lands under the control of the Fish and Wildlife Service. The responsibility and authority for correlation and integration of timber, watershed and grazing management with recreation, game, fish and other uses on these areas will rest at all times with the Fish and Wildlife Service.

c. The Fish and Wildlife Service will operate fish hatcheries and rearing facilities, and may provide fish for the stocking of water on national forest lands on mutually agreeable terms. The Fish and Wildlife Service may conduct stream and lake surveys and related investigations to determine principles upon which fishery management should be based in the national forests, and will cooperate with the Forest Service and the State Fish and Game Departments in carrying out fish management programs.

d. Federal predator control projects on national forests will be conducted by the Fish and Wildlife Service, but only after the program has been approved by the Forest Service. Programs to control non-game animals damaging forest resources may be conducted by either agency, after joint approval, in accordance with methods approved by the Fish and Wildlife Service. Where State predator control projects are carried out on national forests, it is the responsibility of the Forest Service to

coordinate this program with that of the Fish and Wildlife Service.

e. No introduction of an exotic wild animal species will be undertaken or authorized on the national forests without the approval of both agencies.

f. Studies of water-use projects on national forest lands, required to be made under the Fish and Wildlife Coordination Act and the Federal Power Act, will be planned and conducted by the Fish and Wildlife Service in cooperation with the Forest Service and State fish and game agencies.

2. Research

The Fish and Wildlife Service and the Forest Service will conduct cooperative research relating to fish and wildlife, including rodents, and wildlife habitat management on forest and range lands wherever and whenever it is of mutual interest to the two agencies. Such cooperative research will be guided by the following:

a. Generally, research involving the two agencies will be coordinated, with the Fish and Wildlife Service emphasizing the wild animal phase and the Forest Service emphasizing the vegetation and land-use phases.

b. Where lack of finances limits the participation of either agency in coordinated research, joint planning and evaluation of results will remain the guiding principle.

3. There will at all times be a free exchange of pertinent data and frank discussions between members of the two agencies. Members of both agencies will refrain from expressing in public a view contrary to the mutually accepted policy or plans of the other.

4. Nothing in this memorandum of understanding is intended to modify in any manner the present cooperative programs of either agency with States, other public agencies, or educational institutions.

5. The Cooperative Agreement between the Forest Service and the Fish and Wildlife Servive, dated September 16, 1952, is superseded by this Memorandum of Understanding.

6. This Memorandum of Understanding will become effective upon the date subscribed by the last signatory, and shall continue in force and effect until terminated by either agency upon ninety days written notice to the other.

Dated: October 6, 1960.

U.S. Department of the Interior, Fish and Wildlife Service.

Arnie J. Suomela,

Commissioner of Fish and Wildlife.

Dated: October 19, 1960.

U.S. Department of Agriculture, Forest Service.

R. E. McArdle,

Chief, Forest Service.

Memorandum of Understanding Between the Geological Survey, Bureau of Land Management, Fish and Wildlife Service

Whereas, the Geological Survey, hereinafter referred to as the Survey, is responsible for the issuance of mineral exploration permits and for the supervision of development and production of mineral resources on the Outer Continental Shelf of the United States;

Whereas, the Bureau of Land Management, hereinafter referred to as the Bureau, is responsible for the administration and issuance of leases thereon; and is responsible for the examination and assessment, under the National Environmental Policy Act of 1969, of foreseeable environmental impact that could result from the development of mineral deposits; and

Whereas, the Fish and Wildlife Service, hereinafter referred to as the Service, is responsible for the conservation and management of fish and wildlife resources, and has the capability to provide advice and assistance on biological, chemical and physical factors affecting these resources to the foregoing agencies; and

Whereas, the Survey and the Bureau, in meetng their responsibilities for administering and supervising mineral exploration, leasing, development, and production, and assessing environmental impact, desire to engage in mutual cooperation and exchange of information and to solicit the cooperation and expertise of the Service;

Now, Therefore, it is mutually agreed that:

A. The Survey and the Bureau will cooperate with the Service in minimizing harm to fish and wildlife resources and their environment by providing the Service with:

1. Information regarding the conduct of marine geophysical explorations supervised by the Survey.

2. Opportunity to make recommendations on conditions to be included in permits for such geophysical explorations and in leases for mineral development.

3. Opportunity to observe geophysical explorations in areas of interest and, when in the course of such observation, it appears that adverse environmental effects may result, to recommend such action as may be necessary to reduce such possibility.

4. Information regarding areas of the Outer Continental Shelf that are expected to be or are being considered for a possible call for nominations.

B. The Service will cooperate with the Survey and Bureau in assessing the potential environmental impact of administering OCS leasing, and of administering and supervising exploration, development and production of mineral resources with minimal environmental harm by providing:

1. Results of periodic studies on problems relating to the impact of mineral exploration and exploitation on estuarine and coastal resources.

2. Information which relates directly or indirectly to the assessment of potential environmental impact, and to the administration and supervision of mineral exploration and production of the Outer Continental Shelf lands by the Bureau or the Survey.

3. Information useful in the identification and designation of restricted use areas including Marine Preserves.

C. Designation of Coordinating Offices for Purposes of this Memorandum:

1. For the Survey, the Conservation Division is designated as the coordinating office in Washington, and the office of the appropriate Regional Conservation Manager or the Conservation Manager, Gulf of Mexico OCS Operations, as the field level coordinating office.

2. For the Bureau, the Division of Marine Minerals is designated as the coordinating office in Washington, and the office of the appropriate Outer Continental Shelf Manager as the field level coordinating office.

3. For the Service, the Office of Environmental Quality, Bureau of Sport Fisheries and Wildlife is designated as the coordinating office in Washington, and the office of the appropriate Regional Director of the Bureau of Sport Fisheries and Wildlife as the field level coordinating office.

D. General Provisions:

All assistance rendered under this Agreement will be carried out in full compliance with the objectives, policies, and responsibilities of the Department. Any unresolved matters concerning Outer Continental Shelf management where there is a mutual interest shall be referred for resolution to the next supervisory level involved.

Arrangements will be made by the three agencies at headquarters and field offices as may be necessary to implement the intent and purposes of this Agreement.

Dated: November 8, 1972.

Spencer H. Smith,

Director, Bureau of Sport Fisheries and Wildlife.

Dated: November 20, 1972.

Burt Silcock,

Director, Bureau of Land Management.

Dated: November 16, 1972.

V. E. McKelvey,

Director, Geological Survey.

Memorandum of Understanding Between Bureau of Land Management, Fish and Wildlife Service, and U.S. Geological Survey Concerning OCS Environmental Research and Monitoring Activities

Purpose: The purpose of this Memorandum of Understanding (MOU) is to detail procedures and responsibilities of the Bureau of Land Management (BLM), the U.S. Geological Survey (USGS), and the Fish and Wildlife Service (FWS) in the conduct of environmental research and monitoring associated with the OCS minerals program. This ensues from Section 2 of Secretarial Order 2974. The environmental research and monitoring activities are carried out in the context of a BLM program for administration, management, funding, the construction of environmental studies related to the effects of OCS development, and which include benchmark data collection, subsequent monitoring, and special investigations. Benchmark and monitoring studies will be designed, conducted, or overseen in the manner described below. Special studies initiation, implementation, and monitoring are outlined in the subsequent section.

A. Benchmark and Monitoring Studies

In order to facilitate inter-bureau coordination with respect to benchmark and monitoring studies related to OCS minerals development, BLM, USGS, and FWS agree to the following procedures:

1. BLM will apprise USGS and FWS of any schedule (including schedule changes) of forthcoming benchmark or monitoring studies for each OCS lease area as soon as such schedule is prepared, or a change is made. In order that BLM may have full knowledge of ongoing or occasional studies being performed or funded by FWS and USGS in the area, the transmittal of a studies schedule by BLM shall oblige FWS and USGS to prepare lists of ongoing environmental studies, future (within present and the succeeding fiscal years) proposed studies, and past (within previous two years) studies, and transmit them to BLM within 30 days. Studies to be listed are defined as those studies which collect data on biotic, physical, and geologic systems on the OCS and in the coastal zone, or specific effects studies of limited geographic or subject scope.

2. (a) To provide specifically for the participation of USGS and FWS in the design phase of benchmark or monitoring studies on an area-by-area basis, one or more planning conferences will be scheduled for each separately identified OCS area in which such studies are to be conducted. Staff representatives of BLM, USGS, and FWS will meet to formulate a study plan. At the conference(s), USGS and FWS will make Recommndations concerning (1) specific elements to be incorporated in the studies, including scope, intensity, timing, required funding, etc., and (2) allocation of funds and the levels of effort among various study elements. The conference(s) will normally be under Washington Office control; a period of one month after notification by BLM of its desire to construct a study plan will be allowed for field office recommendations to reach the Washington Office of the respective bureaus.

(b) Each study plan will be formally reviewed at the Washington Office level for comment by USGS and FWS prior to the issuance of a request for proposals (RFP), non-competitive contract, or arrangements for development of study plans and management of the study with other agencies. A time period of one week after the final planning conference will be allowed for the formal study plan review.

(c) After due consideration of all views and recommendations, BLM will approve the study plan for implementation and will notify GS and FWS of its decision. If GS and FWS do not agree with the final decision of BLM, they may notify the Assistant Secretary—Program Development and Budget of the nature of the disagreement through the appropriate line Assistant Secretary (as specified in Section 5 of Secretarial Order 2974) within 5 working days after notification of the decision. In such a case, the Assistant Secretary—Program Development and Budget will inform the Director, BLM that he has received an appeal of the decision. The Assistant Secretary—Program Development and Budget will then take appropriate steps to resolve the disagreement. If GS or FWS do not notify the Assistant Secretary—Program Development and Budget of a disagreement within 5 working days, the decision of BLM will be considered uncontested and implementation will proceed.

3. (a) Subsequent to the development of a study plan, but in all cases prior to the issuance of an RFP, non-competitive procurement, or interagency agreement for any or all work elements, a meeting will be held to mutually consider the desirability of FWS or USGS participation in the performance or management of work elements identified in each study plan developed. Such meeting should be held within two weeks of a completed study plan, unless significant revision of the study plan is anticipated by other sources (such as the OCS Research Management Advisory Board). Provisions for such participation will then be made if, and as, appropriate. Recommendations from FWS and USGS regarding the type of procurement should be made at this meeting.

(b) At the meeting mentioned in 3.(a), FWS and USGS should indicate to BLM those aspects of each study plan in which each agency has a special interest and would like to monitor in some fashion. As both bureaus are already standing members of the Technical Proposal Evaluation Committee, monitoring may take the form of:

(1) Participation in post-contract award planning and coordination with contractors.

(2) Assignment as the contracting Officer's authorized representative (COAR) and/or inspector.

After consideration of the interests of FWS and USGS, BLM will determine appropriate arrangements for such study monitoring and will notify USGS and FWS of its decision. If USGS and FWS do not agree with the final decision of BLM, they may notify the Assistant Secretary—Program Development and Budget of the nature of the disagreement through the appropriate line Assistant Secretary (as specified in Section 5 of Secretarial Order 2974) with 5 working days after notification of the decision. In such a case the Assistant Secretary—Program Development and Budget will inform the Director, BLM that he has received an appeal of the decision. The Assistant Secretary—Program Development and Budget will then take appropriate steps to resolve the disagreement. If GS or FWS do not notify the Assistant Secretary—Program Development and Budget of a disagreement within 5 working days, the decision of BLM will be considered uncontested and implementation will proceed.

B. Special Investigations

In order that BLM may obtain the expert advice from FWS and USGS regarding special investigations that do not lie within the framework of benchmark or monitoring studies, FWS and USGS will submit to BLM on or before January 1 and July 1 of each year their recommendations for special investigations. Each set of recommendations should be constructed and directed toward those investigations which:

(1) may affect decisionmaking by the Secretary

(2) are non-duplicative of planned or ongoing efforts

(3) fill data gaps in the Department's research effort toward determining the effects of OCS mineral development.

Recommendations should not be restricted to in-house capabilities or interests, but should examine the scientific and technical questions from as many theoretical aspects as possible. BLM will direct the investigation of duplication of effort with Federal, State, and private agencies through the Inter-Bureau Coordinating Committee on the OCS Minerals Program, OCS Research Management Advisory Board, contracts, and informal contacts. To aid BLM in this investigation, the FWS and USGS will list those ongoing or proposed in-house studies that could relate to the special investigations portion of the OCS environmental studies program.

1. At the beginning of budget review cycles (fiscal funding, supplemental appropriations), BLM will conduct a meeting with FWS and USGS concerning accumulated recommendations (including BLM's). The topical nature of said meeting will be the examination of each recommended special investigation, its scope, feasibility and tractability, anticipated funding, and management. A mutually agreed upon set of special investigations recommended for BLM funding will be developed, except that, in all cases, any additional BLM recommended investigations will not be subject to agreement. Comments and criticism by FWS and USGS concerning BLM recommended studies are actively solicited, however, BLM recommended studies are actively solicited, however, BLM reserves the right to prioritize special investigations pursuant to approved funding levels.

2. When special investigations are given budgetary approval, FWS and USGS will be notified of the anticipated special investigations.

3. BLM will decide timing of initiation of each and every BLM funded special investigation. When such a determination is made, FWS and/or USGS (depending on needed expertise) will meet with BLM to discuss design of the investigation. In general, the sequence of events outlined in Section A above will then be followed to insure inter-bureau participation and involvement throughout the study period.

Dated: March 30, 1976.

Curt Berklund,

Director, Bureau of Land Management.

Dated: April 20, 1976.

W. A. Radlinski,

Director U.S. Geological Survey.

Dated: April 30, 1976.

Lynn A. Greenwalt,

Director, Fish and Wildlife Service.

Memorandum of Understanding Between Bureau of Land Management and the Fish and Wildlife Service on Interfacing Activities Regarding OCS Leasing Process

Purpose: The purpose of this Memorandum of Understanding (MOU) is to outline general procedures providing for Fish and Wildlife Service (FWS) input to the Bureau of Land Management (BLM) in relation to interfacing activities associated with the OCS leasing process. This ensues from Sections 2 and 3 of Secretarial Order 2974. The activities are carried out in the context of a BLM program for the administration and management of the OCS leasing program which includes baseline studies, resource assessments, tract selections environment impact statements, and other inputs to the decision process. The varous activities will be conducted in the manner outlined below.

A. Baseline Studies

The FWS participate in the formulation of the environmental baseline studies program. This involvement is set forth in the BLM-USGS-FWS Memorandum of Understanding on environmental research and monitoring activities.

B. Proposed Sale

1. *Preliminary Resource Assessment.*—The FWS in response to a formal request from the BLM will provide an assessment of fish and wildlife resources within a general proposed lease area, and those nearby areas which will be affected by activity in the lease area. The assessment will be based on existing knowledge.

2. *Supplemental Information Prior to Tract Selection.*—Because, at the time of the Call for Nominations, the proposed sale area is better defined, FWS may provide additional information which might bear upon potential leasing and development of particular tracts. This response will be based on additional data or assessments which were not available at the time of preliminary resource assessment. This additional during the tract selection process.

C. Tract Selection Process

Tract Selections—The FWS will participate, as outlined in S.O. 2974, in the tract selection process and will be represented at field and Washington office tract selection meetings as appropriate. The Regional representative will prepare a memorandum for attachment to the BLM-GS field recommendation. An FWS Washington office representative will surname the memorandum to the Secretary recommending the tentative tract selection.

D. Draft Environmental Impact Statement

1. *Data for Impact Statements.*—The appropriate FWS regional office will work directly with the BLM OCS Office to provide such data and insight on the fish and wildlife resources within and immediately adjacent to a proposed sale area as is available. The BLM will develop lease stipulations to protect fish and wildlife resources in consultation with the FWS.

2. *Review Draft Environmental Impact Statement.*—Draft environmental impact statements will be reviewed for content and substance.

3. *Attend Public Hearings.*—The FWS will attend public hearings on draft environmental impact statements usually representing the Assistant Secretary for Fish and Wildlife and Parks.

E. Decision Process

1. *FWS Input to Program Decision Option Document (PDOD).*— The FWS will provide input to the PDOD regarding fish and wildlife resources of concern in relation to the proposed sale. Input should discuss aspects of resources that are controversial, questioned, unresolved or otherwise the subject of discussion which warrant consideration by the Secretary.

FWS will prepare and forward to BLM options for the sale which are concerned with the fish and wildlife protection issues that FWS identifies.

Options presented will include a list of the tracts affected, the manner in which the area in each option will be affected, and, if possible, quantitative/qualitative estimates of the value of the resource based on the best information available.

2. *Review Final Environmental Impact Statement.*—The review process will be the same as for the draft statement except that comment will usually be restricted to important new information or where, in the opinion of FWS, comments on the draft were not adequately considered.

3. *Program Decision Option Document.*—FWS will review the draft PDOD, especially with regard for the issues as FWS views them and the sale options as FWS perceives them from a fish and wildlife resource advocacy viewpoint. Any FWS position in relation to fish and wildlife resource protection provided by the options will be provided to the secretary for his consideration in the decisionmaking process.

4. *Notice of Sale.*—The FWS will review the notice of sale and surname the document if appropriate.

Dated: March 30, 1976.

Curt Berklund,

Director, Bureau of Land Management.

Dated: March 3, 1976.

Lynn A. Greenwalt,

Director, Fish and Wildlife Service.

October 9, 1975.

United States Department of the Interior, Fish and Wildlife Service,
Washington, D.C. 20240.

Memorandum to: Associate Director, Environment and Research; Associate Director, Fish and Wildlife Management; Assistant Director, Administration; Regional Directors; Alaska Area Director, and Western Field Coordinator.

From: Director, Fish and Wildlife Service.

Subject: Memorandum of Understanding Between the National Park Service and the Fish and Wildlife Service.

A few weeks ago we mailed several hundred copies of the subject Memorandum of Understanding to the Regional Offices. If it has not been done already, please see that they are distributed to the appropriate offices for careful review and implementation.

Assistant Scretary Reed has asked us to prepare a report one year from the date the Memorandum of Understanding was signed outlining the steps that have been taken to implement it. He stressed "the need for all of our personnel to improve their cooperation, coordination and liaison to insure that the Interior family is working together toward mutual goals."

May we have your progress report, including highlights of implementation of this Memorandum of Understanding, by July 1, 1976.

Lynn A. Greenwalt,

Director, Fish and Wildlife Service.

Memorandum of Understanding Between the National Park Service and the U.S. Fish and Wildlife Service

1. WHEREAS the National Park Service and the Fish and Wildlife Service are both concerned with the conservation and the management of lands, waters, and fish and wildlife resources and their use and enjoyment by the public; and

2. WHEREAS the National Park Service is responsible for the administration and the management of the natural, historic, and recreation areas of the National Park System and the fish and wildlife resources therein, including the development and interpretation of research and resources management plans; and is authorized to conduct and to direct research necessary to fulfill these responsibilities; and is authorized to furnish technical assistance to other agencies on recreational planning, development and operations; and

3. WHEREAS the Fish and Wildlife Service administers lands on which there are fish, wildlife and recreational resources, and is authorized to cooperate with other Federal agencies in the conduct of research, surveys, and investigations to provide a sound biological basis for fish and wildlife conservation and management; and

4. WHEREAS the complexities of natural resources management demand integrated skills and knowledge from many disciplines of the natural, social and physical sciences; and

5. WHEREAS both agencies have developed recognized experience and skill in their paramount fields of responsibilities and desire to exchange their knowledge on mutually satisfactory terms in furtherance of the recognized objectives, policies, and responsibilities of each,

NOW, THEREFORE, it is agreed that:

a. The Fish and Wildlife Service will assist the National Park Service in the attainment of its basic objectives by conducting research and by providing technical advice and services required to preserve and to manage fish and wildlife resources on lands administered by the National Park Service; and

b. The National Park Service will assist the Fish and Wildlife Service in the attainment of

its basic objectives by conducting studies and by providing technical advice and services required to develop and to operate recreational and interpretive use facilities and programs on lands administered by the Fish and Wildlife Service.

In Effecting This Understanding

A. The Fish and Wildlife Service will when requested: 1. Assist the National Park Service by planning and by conducting research on fish and wildlife occurring on lands and waters of the National Park System or proposed for addition to such system. Such research may include, but not necessarily be limited to: studies concerned with taxonomy and distribution, ecology, population dynamics, behavior, life histories, habitat requirements, food habits, parasites, diseases, pesticide-wildlife relationships, and other factors affecting the numbers and conditions of fish and wildlife.

This research will be designed to:

a. Advance technical knowledge on fish and wildlife resources to achieve a better understanding of ecological relationships.

b. Provide information basic to the conservation, management, and interpretation of fish and wildlife on lands administered by the National Park Service.

c. Provide such information as necessary in order to assess the impacts of other activities and programs carried out in units of the National Park System on the fish and wildlife resources.

2. Assist the National Park Service by conducting investigations and providing technical assistance and services in fish and wildlife management. Such management services may include, but will not be limited to:

a. Surveys of marine and fresh water resources conducted to determine: the status of populations of fishes and other aquatic life, catch by anglers, fishermen use, needs for replenishing fish stocks, feasibility of native fish restoration, aquatic habitat reclamation, the degree of protection necessary for the preservation of threatened and endangered species of aquatic plant and animal life and the applicability of fishing regulations.

b. Surveys of animal resources to determine: the status of animal populations, conditions of the habitat, occurrence of diseases, parasites and other factors affecting the number and conditions of animal species, the degree of protection and/or management of threatened animal species and habitats necessary to insure their survival, and measures required to protect or to restore native species of animals and their habitat.

c. Studies concerned with the effects of proposed water resource projects and other developments upon the fauna and flora of established areas in the National Park System or in areas proposed for inclusion in the System.

d. Provision of fishes from national fish hatcheries for distribution in park waters under approved stocking programs and assistance in fish stocking operations.

e. Participation in the planning and the conduct of fish restoration or aquatic habitat reclamation projects.

f. Technical assistance in projects directed toward the control of surplus, problem or non-native animals.

g. Evaluation of the effects of pollutants on fish and wildlife and their habitats in units of the National Park System.

h. Management of fish and wildlife resources on recreation areas in the National Park System, when so agreed upon through approved management plans.

B. The National Park Service will when requested: 1. Assist the Fish and Wildlife Service by planning for recreational development and use by the public on lands under Fish and Wildlife Service jurisdiction.

This assistance may include, but is not limited to:

a. Recreational surveys and analysis of present and projected visitor use of Fish and Wildlife Service areas.

b. Assistance in developing recreational use plans for Fish and Wildlife Service areas having potential for public use. These general development plans will include proposals for primary and supportive visitor use facilities which are compatible with the basic mission of the area.

c. Assistance in providing necessary professional services for the designing and developing of recreational facilities, and in the analyzing of traffic flow and visitor use patterns as a guide for developing future recreational facilities.

d. Assistance in designing exhibits and interpretive materials depicting interesting and educational features of the area's natural resources.

e. Assistance in operating recreational and interpretive programs and facilities on lands under the jurisdiction of the Fish and Wildlife Service, when so agreed upon through approved management plans.

f. Archeology, history and cultural anthropology surveys and assistance in developing preservation or restoration plans for Fish and Wildlife areas.

2. Assist the Fish and Wildlife Service by planning and conducting training programs for Fish and Wildlife Service employees engaged in recreation management and interpretation of fish and wildlife to the public. This assistance may include attendance by Fish and Wildlife Service personnel at National Park Service training schools or provision of special instruction by National Park Service personnel at Fish and Wildlife Service training sessions. The objective shall be the development of suitable programs, including interpretation, as features of an expanded Fish and Wildlife Service effort to provide recreation related to fish and wildlife.

3. Recognize and facilitate the use of national parks by the Fish and Wildlife Service for studies and investigations designed essentially for Fish and Wildlife Service purposes when not in conflict with the park mission.

4. Consider proposals for the collection of scientific specimens by the Fish and Wildlife Service under permit issued by the Superintendent of the area in which collecting is done.

5. Assist the Fish and Wildlife Service in surveys of fish and wildlife resources and in the conduct of approved restoration projects being conducted for the National Park Service by furnishing such manpower, equipment, and facilities as may be available for the purpose.

6. Evaluate any proposals to transfer fish and fish eggs from park waters for cultural or restoration purposes or to transfer wildlife from park lands for restoration purposes when these activities will not jeopardize the welfare of the native species in the park and will not conflict with other park values.

7. Consider cooperative proposals to use National Park Service lands to reintroduce endangered plant and animal species historically indigenous to the areas.

C. General Provisions

1. All assistance and services rendered under this agreement by either Service for the benefit of the other will be carried out in full compliance with the program objectives, policies, and responsibilities of the benefiting Service. Reference should be made to his Memorandum of Understanding in other agreements with State agencies that may pertain to fish and wildlife resources of the National Park System. If cooperative projects are to be undertaken in a particular area, an initial meeting between the appropriate personnel will be held to develop a thorough understanding of project objectives and responsibilities.

2. The extent to which the National Park Service and the Fish and Wildlife Service will undertake substantial cooperative projects falling within the terms of this Memorandum of Understanding will depend upon availability of funds and personnel. By mutual agreement, funds may be transferred from one Service to the other or the work performed on a reimbursable basis for this purpose. In order to staff and finance substantial cooperative projects, it is essential that the work be programmed in advance and a determination made as to which Service should budget the work before it is undertaken. Projects undertaken within the terms of this Memorandum of Understanding will be implemented after a work plan is developed which sets forth the work to be accomplished, source and level of funding, manpower requirements, and respective agency responsibilities have been approved by both agencies.

3. Irrespective of 2. above, personnel of each Service are encouraged to provide routine advice and assistance to one another. Advance programming or an exchange of funds between the Service shall not be required for this purpose.

4. The parties to this Memorandum agree to exchange information and consult with each other prior to implementing plans, programs, or activities that may directly or indirectly affect the other party.

5. Publication of research and technical reports shall be encouraged and shall follow the normal editorial and review policies of the author's respective agency. Other reports, manuscripts, and informational materials related to National Park Service and Fish and Wildlife Service policies, administration and management programs resulting from projects covered in this Memorandum will be released or published only after mutual agreement in

each specific case. Advice and information on all cooperative projects will be freely exchanged. The Service issuing the reports or informational materials will provide copies of these releases to the other.

6. Scientific specimens collected in the course of investigations conducted essentially for Fish and Wildlife Service purposes shall be deposited in the study collections of the Fish and Wildlife Service until such time as they are catalogued as part of the U.S. National Museum collection. Specimens collected in the course of investigations conducted essentially for National Park Service purposes shall be deposited in the study collection of the park concerned. Other suitable depositories for such specimens may be used by either Service upon mutual consent. Each Service will provide duplicate specimens to the other upon request.

7. The Fish and Wildlife Service is recognized as the lead Service in matters pertaining to threatened and endangered species of plant and animals under authority given to the Secretary of the Interior by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543; 87 Stat. 884). The National Park Service recognizes its unique responsibilities in this matter by providing essential habitat and protection of existing populations within several of the national parks for many of the plant and animal forms covered by this Act. The Fish and Wildlife Service will, as appropriate, cooperatively assist the National Park Service in carrying out the Endangered Species Program within parks administered by the National Park Service in accordance with regulations and policies of the National Park Service. The Fish and Wildlife Service will provide consultation and supportive services as prescribed in the Endangered Species Act of 1973 which will benefit special National Park Service management programs pertaining to threatened and endangered species of plants and animals.

8. This Memorandum of Understanding supersedes the Memorandum of Understanding between the National Park Service and the Bureau of Sport Fisheries and Wildlife dated August 5, 1966. Supplementary agreements between the Bureau of Sport Fisheries and Wildlife, now known as the U.S. Fish and Wildlife Service, and the National Park Service, presently in force, remain in effect until superseded or terminated by mutual consent. Supplementary agreements will be entered into and implemented by the two Services at appropriate administrative levels to carry out the function and objectives outlined in this Memorandum of Understanding.

9. This Memorandum of Understanding shall become effective when approved by the Assistant Secretary of the Interior for Fish and Wildlife and Parks and shall continue in force and effect until terminated by either party with the concurrence of the Assistant Secretary. This Memorandum may be amended by mutual consent and with the concurrence of the Assistant Secretary.

Dated: June 23, 1975.

Gary Everhardt,

Director, National Park Service.

Dated: July 10, 1975.

Lynn A. Greenwalt,

Director, Fish and Wildlife Service.

Approved:

Nathanial P. Reed,

Assistant Secretary of the Interior for Fish and Wildlife and Parks.

Memorandum of Agreement between the Bureau of Outdoor Recreation and the Bureau of Sport Fisheries and Wildlife

(Supersedes the Memorandum of Understanding approved on February 3, 1965)

In view of the mutual necessity for close cooperation between the Bureau of Outdoor Recreation and the Bureau of Sport Fisheries and Wildlife to insure that fish and wildlife resources and outdoor recreation make the greatest possible contribution to the welfare of the American public, it is mutually agreed that the two Bureaus will carry out their respective responsibilities and programs with full coordination and shall specifically operate in the following manner.

1. *Planning:* There will be frequent consultation between planning offices of the two Bureaus in the development of plans for programs of the type specified in this agreement. Where so designated herein, each Bureau will furnish the other with one or more copies of the completed plans. Site plans of the Bureau of Sport Fisheries and Wildlife—master plans for refuges, hatcheries, and laboratories—will be furnished only when they have a bearing on a cooperative endeavor between the two Bureaus.

2. *Planning Related to Water Resource Development Programs:* The purpose of this section is (1) to promote sound planning for recreation related to fish and wildlife and other outdoor recreation in conection with Federal water resource projects and programs and with similar projects subject to Federal license or permit; and (2) to establish procedures which will avoid duplication of effort and insure inter-Bureau coordination.

A. The Bureau of Sport Fisheries and Wildlife will conduct investigations and prepare reports to construction agencies concerning the fish and wildlife aspects of water resource projects. These reports will contain, among other things, recommendations for the conservation, development, and utilization of fish and wildlife resources for recreational, commercial, and other purposes, including recommendations, where appropriate, for the acquisition and use of lands and waters for such purposes.

B. The Bureau of Outdoor Recreation will conduct investigations and prepare reports to construction agencies concerning the total outdoor recreation aspects of water resource projects. These reports will include, where appropriate, data on fish and wildlife to be supplied by the Bureau of Sport Fisheries and Wildlife. These reports also will contain, among other things, recommendations concerning the preservation, development, and utilization of lands and water for all types of outdoor recreation opportunities and will reflect coordination of planning to provide for such opportunities.

C. The Bureau of Sport Fisheries and Wildlife will furnish to the Bureau of Outdoor Recreation for inclusion on the project report of that Bureau information concerning the conservation, development, and utilization of fish and wildlife resources for sport fishing, hunting, and other related recreation purposes. This information will cover such specific subjects as: present and future demand for hunting, fishing, and other recreation uses of fish and wildlife; existing and prospective supplies of fish and wildlife resources; recommended measures for the conservation, development, and utilization of fish and wildlife resources; and anticipated benefits and costs in dollars and/or other measures. To the extent appropriate, the Bureau of Outdoor Recreation may refer in its reports to the findings and recommendations of the Bureau of Sport Fisheries and Wildlife.

D. The Bureau of Outdoor Recreation will furnish to the Bureau of Sport Fisheries and Wildlife for inclusion in the project report of that Bureau information concerning the conservation, development, and utilization of land and water for general and specialized outdoor recreation purposes. This information will cover such subjects as: present and future demand for all recognized outdoor recreation activities; existing and prospecting supplies; recommended measures for the preservation, development, and utilization of recreation opportunity; and anticipated benefits and costs in dollars and/or other measures. To the extent appropriate, the Bureau of Sport Fisheries and Wildlife may refer in its reports to the findings and recommendations of the Bureau of Outdoor Recreation.

E. In recognition of the problems of separating hunting, fishing, photography, and nature study from other closely associated general recreation activities such as camping, boating, and picnicking, the reporting officers will make a special effort to identify areas of mutual and separable interests and take them into account in the planning process. Where hunting, fishing, and other recreation use of fish and wildlife resources are experienced by visitors to a project area the extent and value of this use will be determined by the Bureau of Sport Fisheries and Wildlife. The extent and value of other uses of recreation opportunity afforded by a project area including such activities as camping, which may be experienced in conjunction with hunting, fishing, and allied uses of fish and wildlife resources, will be determined by the Bureau of Outdoor Recreation.

F. To the extent practicable, the Bureau of Outdoor Receation and the Bureau of Sport Fisheries and Wildlife when reporting on a specific river basin or project area will employ the same or equivalent basic data relating to population, mobility, income levels, and other economic factos in their determination of needs, resource requirements, and recommended action.

G. Reports of the two Bureaus on a given water resource project will be consistent one with the other insofar as the effects of the

project on conservation, development, and utilization of fish and wildlife are concerned.

H. Reporting officers of the two Bureaus will cooperate closely with a view toward attaining compatible use of water resource projects for various outdoor recreation activities including fishing and hunting.

I. Information made available by one Bureau to the other under the terms of this agreement will be treated as preliminary and subject to revision until the Bureau supplying the information has released or is prepared to release such information in its own reports and/or has granted approval of its release by the other agency.

J. The Bureau of Outdoor Recreation, after consultation with the Bureau of Sport Fisheries and Wildlife, will include in its report on any Federal water resource project a finding on the extent to which the proposed recreation and fish and wildlife development conforms to and is in accordance with the State Comprehensive Plan developed pursuant to Subsection 5(d) of the Land and Water Conservation Fund Act of 1965 (Pub. L. 88-578), as required by Subsection 6(a) of the Federal Water Project Recreation Act of July 9, 1965 (Pub. L. 89-72).

K. Procedures shall be devised by the two Bureaus to provide for the equitable division of dual-use separable costs involving general recreation and fish and wildlife enhancement to facilitate cost-sharing and administration negotiations with non-Federal public bodies pursuant to Subsection 2(a) of the Federal Water Project Recreation Act of July 9, 1965.

3. *Studies of Demand for Outdoor Recreation:* The Bureau of Outdoor Recreation conducts studies of demand for outdoor recreation in connection with the Nationwide Outdoor Recreation Plan, which it prepares in accordance with the directive of the Congress in Public Law 88-29. The Bureau of Sport Fisheries and Wildlife conducts hunting and fishing surveys under the authority of the Fish and Wildlife Act of 1956, as amended, and the Fish and Wildlife Coordination Act, as amended.

In view of the close relationships between these types of demand studies, each Bureau agrees to inform the other, in writing, as to its plans for the conduct of such studies, and to consult with the other as to the content of the studies in order to promote maximum coordination of demand data and to avoid duplication of effort.

4. *Financial Assistance to States for Planning and Program Development:* Under authority of the Land and Water Conservation Fund Act of 1965, the Bureau of Outdoor Recreation may provide financial assistance to States for the preparation and maintenance of comprehensive statewide outdoor recreation plans, required by that Act as a prerequisite to receiving acquisition and development grants. Under authority of the Federal Aid in Wildlife Restoration Act (Pittman-Robertson Act) and the Federal Aid in Fish Restoration Act (Dingell-Johnson Act), the Bureau of Sport Fisheries and Wildlife may provide financial assistance to the States for the preparation of statewide plans and programs for the utilization and development of fish and wildlife resources which would be important segments of the State outdoor recreation plans.

A. In view of the close relationship of these two types of financial assistance, the two Bureaus agree to keep each other informed as to these matters and to coordinate their efforts in the review and approval of the two programs.

B. The Bureau of Outdoor Recreation will inform the Bureau of Sport Fisheries and Wildlife of those "701" urban planning grants made to States by the Department of Housing and Urban Development for recreation planning, provided under authority of Section 701 of the Housing Act of 1954, as amended.

C. Whenever possible, the Bureau of Outdoor Recreation will finance fish and wildlife planning under its grants to the extent such planning contributes to and is an integral part of the State Comprehensive Outdoor Recreation Plan.

D. The Bureau of Outdoor Recreation will encourage the Department of Housing and Urban Development to include provisions for fish and wildlife planning, to the extent cited above, in such "701" grants as are made to State planning agencies for developing recreation plans.

E. The Bureau of Outdoor Recreation and the Bureau of Sport Fisheries and Wildlife agree to work out any additional details and procedures which may be necessary to implement this agreement.

5. *Financial Assistance to States for Acquisition and Development:* Land acquisition and development projects which are submitted for financial assistance under either Bureau's grant program will be reviewed by the receiving Bureau for consistency with the Statewide Comprehensive Outdoor Recreation Plan.

A. Each Bureau will study project proposals for grant assistance with consideration for programs of the other. Those that would affect a project assisted by the other Bureau will be referred to that Bureau for review. Projects for the acquisition or development of facilities for the production of fish and game for stocking purposes will be referred to the Bureau of Sport Fisheries and Wildlife for review and comments as to the need for and desirability of the Project.

B. The Bureau of Outdoor Recreation shall submit to the Bureau of Sport Fisheries and Wildlife any project proposal for acquisition or development adjacent to National Wildlife Refuges, National Fish Hatcheries, or areas managed under the small wetlands waterfowl production program; or any proposal affecting rare and endangered species, anadromous fish, or migratory birds. If no comments are made by the Bureau of Sport Fisheries and Wildlife within thirty (30) days, the project will be presumed to have no adverse effects on fish or wildlife.

6. *Threatened Species of Fish or Wildlife:* One of the purposes of funds allocated to Federal agencies under the Land and Water Conservation Fund Act is the acquisition of land for the preservation of habitat for species of fish and wildlife threatened with extinction. The Bureau of Sport Fisheries and Wildlife will:

A. Compile all available information on such species.

B. Prepare plans to insure preservation.

C. Support Bureau of Outdoor Recreation budget requests as agreed upon.

D. Ascertain, acquire, and manage such lands, and will designate them as national areas for this purpose, and, wherever feasible, will develop their utility for wildlife-oriented outdoor recreation.

7. *Regional Liaison and Cooperation:* Since both Bureaus are organized on a regional basis (although not congruent) and since broad authority has been delegated to the respective regional directors, active liaison and cooperation will be fostered at the regional level. As specific procedures are formulated, such will be incorporated in the respective Bureau operating instuctions or manuals.

8. *Terms of Agreement:* This Agreement supersedes the Memorandum of Understanding between the Bureau of Outdoor Recreation and the Bureau of Sport Fisheries and Wildlife, dated February 3, 1965.

This Agreement shall become effective upon the date subscribed by the last signatory and shall continue in full force and effect until terminated by either Bureau upon sixty (60) days written notice to the other.

IN WITNESS WHEREOF the parties hereto have executed this Memorandum of Agreement as of the dates entered below:

Dated: November 19, 1966.

John S. Gottschalk,

Director, Bureau of Sport Fisheries and Wildlife.

Dated: January 24, 1970.

Douglas Hoft,

Director, Bureau of Outdoor Recreation.

Memorandum of Agreement between the Bureau of Sport Fisheries and Wildlife and the Bureau of Outdoor Recreation, United States Department of the Interior

(Supplements the Memorandum of agreement of January 24, 1979)

WHEREAS, hunting and fishing and associated recreation activities are important segments of the total recreation province and planning for those activities should be an integral part of the comprehensive statewide outdoor recreation plan prepared for purposes of the Land and Water Conservation Fund Act of 1965; as amended, as well as for the state comprehensive fish and wildlife resource management plan prepared under the authorities of the Federal Aid in Fish and Wildlife Restoration Acts, as amended; and

WHEREAS, it is of mutual benefit to the state planning programs assisted by those Acts that close coordination between the programs be maintained; and

WHEREAS, the Bureau of Outdoor Recreation has been delegated responsibility by the Secretary of the Interior as the agency responsible for the administration of the Land and Water Conservation Fund Act of 1965, as amended; and

WHEREAS, the Bureau of Sport Fisheries and Wildlife has been delegated responsibility by the Secretary of the Interior as the agency responsible for the

administration of the Federal Aid in Fish and Wildlife Restoration Act, as amended;

NOW THEREFORE, it is mutually agreed that the general functions of the two agencies under this memorandum within the limits of their resources, will be as follows:

A. *Coordination of State Planning Efforts.* Both Bureaus will encourage their counterpart State planners to:

1. Develop the overall assessment of hunting and fishing within the State as an integral part of the statewide outdoor recreation plan as well as the State comprehensive fish and wildlife plan.

2. Effect close planning coordination to avoid duplication in the collection of data pertinent to both plans.

3. Use the same methodologies for inventorying physical resources, estimating and projecting hunting, fishing and other recreation demand and determining future requirements for the environmental, scientific, and recreational enrichment of the people.

4. Use the same basic estimates and projections of population, and other supply and demand variables as those used for overall comprehensive planning in the State.

5. Use common target years for projections.

6. use common or consistent intra-State planning regions to the extent possible.

7. Summarize and reflect in the appropriate sections of the statewide comprehensive outdoor recreation plan the needs and proposed actions of the comprehensive plan for fish and wildlife management.

B. *Federal Review of Planning Documents.*

1. Within their respective Regions, the Regional Directors, Bureau of Sport Fisheries and Wildlife, will be accorded an opportunity to review each statewide comprehensive outdoor recreation plan submitted to the Bureau of Outdoor Recreation, and the Regional Directors, Bureau of Outdoor Recreation will be accorded the opportunity to review each State comprehensive fish and wildlife plan submitted to the Bureau of Sport Fisheries and Wildlife.

2. Thirty days will be allowed for the review and comments, if any, that the Regional Director may wish to make.

3. Comments received will be of assistance in the review process and will serve as a basis for discussions with the State planners for subsequent updating and improvement of the plan.

4. Where they are still available, the Regional Directors, Bureau of Outdoor Recreation, will endeavor to make arrangements with each State to furnish the appropriate Regional Director, Bureau of Sport Fisheries and Wildlife, with a copy of the current statewide outdoor recreation plan. Where copies are no longer available, the Regional Director, Bureau of Sport Fisheries and Wildlife, upon his request, will be accorded an opportunity to review the file or working copy held by the Bureau of Outdoor Recreation.

5. Each Regional Director will encourage each State to furnish copies of plans developed under their respective Federal grant programs to the appropriate counterpart Regional Director for his information and files.

6. Amendments or updated strategic or operational plans submitted for approval under either Federal grant program will be exchanged by the Regional Directors for review and comment as under B1 and B2 of this memorandum.

This agreement supplements but does not supersede or replace the Memorandum of Agreement of January 24, 1970, between the Bureau of Outdoor Recreation and the Bureau of Sport Fisheries and Wildlife.

This agreement shall become effective on the date subscribed by the last signatory and shall continue in full force and effect until terminated by either Bureau upon sixty (60) days written notice to the other.

IN WITNESS WHEREOF, the parties hereto have executed this Memorandum of Agreement as of the dates entered below.

Dated: November 20, 1973.

United States Department of the Interior, Bureau of Outdoor Recreation.

James G. Watt,

Director.

Dated: October 26, 1973.

United States Department of the Interior, Bureau of Sport Fisheries and Wildlife.

Lynn A. Greenwalt,

Director.

Memoradum of Understanding Between the Secretary of the Interior and the Secretary of the Army

In recognition of the responsibilities of the Secretary of the Army under section 10 and 13 of the Act of March 3, 1899 (33 U.S.C. 403 and 407), relating to the control of dredging, filling, and excavation in the navigable waters of the United States, and the control of refuse in such waters, and the interrelationships of those responsibilities with the responsibilities of the Secretary of the Interior under the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 *et seq.),* the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661–666c), and the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a *et seq.),* relating to the control and prevention of water pollution in such waters and the conservation of the Nation's natural resources and related environment, including fish and wildlife and recreational values therein; in recognition of our joint responsibilities under Executive Order No. 11288 to improve water quality through the prevention, control, and abatement of water pollution from Federal and federally licensed activities; and in recognition of other provisions of law and policy, we, the two Secretaries, adopt the following policies and procedures:

Policies

It is the policy of the two Secretaries that there shall be full coordination and cooperation between their respective Departments on the above responsibilities at all organizational levels, and it is their view that maximum efforts in the discharge of those responsibilities, including the resolution of differing views, must be undertaken at the earliest practicable time and at the field organizational unit most directly concerned. Accordingly, District Engineers of the U.S. Army Corps of Engineers shall coordinate with the Regional Directors of the Secretary of the Interior on fish and wildlife, recreation, and pollution problems associated with dredging, filling, and excavation operations to be conducted under permits issued under the 1899 Act in the navigable waters of the United States, and they shall avail themselves of the technical advice and assistance which such Directors may provide.

2. The Secretary of the Army will seek the advice and counsel of the Secretary of the Interior on difficult cases. If the Secretary of the Interior advises that proposed operations will unreasonably impair natural resources or the related environment, including the fish and wildlife and recreational values thereof, or will reduce the quality of such water in violation of applicable water quality standards, the Secretary of the Army in acting on the request for a permit will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage, including all data presented by the Secretary of the Interior, and will either deny the permit or include such conditions in the permit as he determines to be in the public interest, including provisions that will assure compliance with water quality standards established in accordance with law.

Procedures for Carrying Out These Policies

1. Upon receipt of an application for a permit for dredging, filling, excavation, or other related work in navigable waters of the United States, the District Engineers shall send notices to all interested parties, including the appropriate Regional Directors of the Federal Water Pollution Control Administration; the United States Fish and Wildlife Service, and the National Park Service of the Department of the Interior, and the appropriate State conservation, resources, and water pollution agencies.

2. Such Regional Directors of the Secretary of the Interior shall immediately make such studies and investigations as they deem necessary or desirable, consult with the appropriate State agencies, and advise the District Engineers whether the work proposed by the permit applicant, including the deposit of any material in or near the navigable waters of the United States, will reduce the quality of such waters in violation of applicable water quality standards or unreasonably impair natural resources or the related environment.

3. The District Engineers will hold public hearings on permit applications whenever response to a public notice indicates that hearings are desirable to afford all interested parties full opportunity to be heard on objections raised.

4. The District Engineer, in deciding whether a permit should be issued, shall weigh all relevant factors in reaching his decision. In any case where Directors of the Secretary of the Interior advise the District Engineers that proposed work will impair the water quality in violation of applicable water quality standards or unreasonably impair the natural resources or the related environment,

he shall, within the limits of his responsibility, encourage the applicant to take steps that will resolve the objections to the work. Failing in this respect, the District Engineers shall forward the case for the consideration of the Chief of Engineers and the appropriate Regional Director of the Secretary of the Interior shall submit his views and recommendations to his agency's Washington headquarters.

5. The Chief of Engineers shall refer to the Under Secretary of the Interior all those cases referred to him containing unresolved substantive differences of views and he shall include his analysis thereof, for the purpose of obtaining the Department of the Interior's comments prior to final determination of the issues.

6. In those cases where the Chief of Engineers and the Under Secretary are unable to resolve the remaining issues, the cases will be referred to the Secretary of the Army for decision in consultation with the Secretary of the Interior.

7. If in the course of operations within this understanding either Secretary finds its terms in need of modification, he may notify the other of the nature of the desired changes. In that event the Secretaries shall within 90 days negotiate such amendment as is considered desirable or may agree upon termination of this understanding at the end of the period.

Dated: July 13, 1967.

Steward L. Udall,

Secretary of the Interior.

Dated: July 13, 1967.

Stanley Resor,

Secretary of the Army.

Memorandum of Understanding for the Geothermal Program, U.S. Geological Survey—Bureau of Land Management—U.S. Fish and Wildlife Service, Cooperative Procedures in the Geothermal Program

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Memorandum of Understanding for the Geothermal Program

U.S. Geological Survey—Bureau of Land Management—U.S. Fish and Wildlife Service

The following guidelines are for the mutual cooperative efforts of the U.S. Geological Survey, Bureau of Land Management, and U.S. Fish and Wildlife Service in implementing the Federal geothermal resources program pursuant to the Geothermal Steam Act of 1970.

Abbreviations used hereafter for the various agencies, offices, and reports are as follows:

BLM—Bureau of Land Management
BLM-DO—Bureau of Land Management District Office
BLM-SO—Bureau of Land Management State Office
GS—U.S. Geological Survey
GS-RCM—U.S. Geological Survey, Regional Conservation Manager
AGS—Area Geothermal Supervisor
GS-AG—U.S. Geological Survey Area Geologist
GS-DG—U.S. Geological Survey District Geologist
FWS—Fish and Wildlife Service
FWS-RO—Fish and Wildlife Service Regional Office
FWS-AO—Fish and Wildlife Service Area Office
EAR—Environmental Analysis Record (prepared by BLM)
EA—Environmental Analysis (prepared by GS)
GEAP—Geothermal Environmental Advisory Panel (Sec. Order 2962)

1. *Priorities and Scheduling of Lease Sales and Non-Competitive Leasing.* (Primary responsibility—BLM.)

Primary contacts will be the AGS, the FWS-RO, the BLM-SO involved.

(a) *Competitive Lease Sale Scheduling.* BLM-SO may on its own motion, on recommendation from GS, or through nominations from industry, select areas for and schedule competitive lease sales in Known Geothermal Resource Areas (KGRA's). The BLM-SO will consult with GS-RCM as to KGRA leasing priorities, recommendations for lease stipulations, total area to be covered by the EAR, and overall priority and scheduling of the EAR and the sale. The BLM-SO will consult with FWS-AO and RO concerning fish and wildlife resources and related habitat, and regarding recommended stipulations and mitigating measures to protect these resources.

Generally, the areas to be covered by the EAR, prepared by BLM-DO, should include the maximum number of non-competitive lease applications in the vicinity of the KGRA. Determiniation of priority of sheduling lease sales will generally be based upon the geothermal potential of the area, its environmental sensitivity, and industry, interest. If nominations are either solicited or received from industry, BLM-SO will send an information copy of nominations to AGS, Menlo Park, and the FWS-AO.

(b) *Scheduling for Non-Competitive Leasing.* Where non-competitive leasing only is involved, BLM-SO should consult with AGS and FWS-RO to determine area, priority, and scheduling of EAR's. Where withdrawn lands are involved, the BLM-SO shall consult with the appropriate land management agencies with he basic authority to permit leasing. The criteria for scheduling of EAR's to be prepared by the BLM-DO should include geothermal potential of the area, its environmental sensitivity, and industry interest. AGS will furnish, upon request by BLM-SO, a priority listing of potential geothermal areas with copies to the FWS-RO.

2. *Environmental Analysis Considerations.*

(a) *Pre-Lease Environmental Analysis Record (EAR).* (Primary responsibility—BLM.)

(1) Upon initiation or revision of an EAR for either competitive or non-competitive leasing, BLM-DO will notify in writing the AGS and the FWS-AO of the area covered by the EAR. The AGS and FWS-AO will furnish BLM-DO with technical advice and information for consideration in the EAR, including recommended stipulations and mitigating measures. BLM-DO should specify deadline for such input with a minimum of 30 days advance notice. Maximum lead time should be provided.

(2) BLM-DO will furnish a copy of the draft EAR, with proposed special lease stipulations, to the AGS and FWS-AO and FWS-RO for review and comments prior to submission of EAR to BLM-SO.

(3) BLM-SO will furnish AGS the final BLM stipulations which are to be attached to non-competitive leases, or included in the notice of competitive lease sale, for the AGS review and concurrence with the stipulations. FWS-RO will be furnished a copy of the stipulations for review and comment.

(4) BLM-SO will furnish AGS and FWS-RO with two copies each of the final EAR.

(b) *Post-Lease Environmental Analysis (EA).* (Primary responsibility—AGS)

(1) For each proposal which requires a Plan of Operations, an Environmental Analysis (EA) will be prepared by the AGS. The AGS will request the technical advice on fish and wildlife matters, surface management, and environmental expertise of the BLM-SO and FWS-AO. The FWS-AO and the BLM-SO will provide technical advice and information in their areas of expertise to AGS for consideration in the EA which will include the recommended surface protection and reclamation requirements.

(2) When the GEAP chooses to review the draft EA, BLM-DO and FWS-RO will also be sent copies of the AGS draft EA for its review and comment.

(3) In every case, BLM-SO and FWS-AO and GEAP will be provided with a copy of the final EA.

3. *Competitive Lease Sales.* (Primary responsibility—BLM.)

In steps (a) through (h) below, the GS contact will be the AGS, and the FWS contact the appropriate FWS-AO. In step (d)

cooperation for those activities related to resource inventories, surveys, and monitoring; assessment and appraisal; program evaluation; development of program strategies; preparation of statements of policy; and resource planning. Status reports will be prepared to keep Agency Heads informed of joint activities. Should unresolvable conflicts arise, they will be elevated to the Agency Heads for resolution.

Recognizing that each Agency has different objectives in design, development, and implementation of inventory, assessment/appraisal, and resource planning activities, this Agreement will provide for coordination of the following areas:

1. Land Classification System;
2. Data element definitions and units of measure;
3. Intensity and subject matter of surveys and inventories;
4. Statistical reliability;
5. Land-base being inventoried;
6. Compatibility for data exchange;
7. Compatibility of analytical assumptions;
8. Identification of Agency activities;
9. Data acquisition procedures—tie to Interagency Remote Sensing Committee;
10. Division of responsibilities;
11. Criteria for evaluation, sensitivity, and cost-benefit analysis;
12. Preparation of needed interagency agreements;
13. Involvement and coordination with States;
14. Coordination of budgets to avoid duplication and to take advantage of joint opportunities;
15. Program evaluation;
16. Statements of policy;
17. Development of program strategies; and
18. Resource planning.

Special Assignments

The Agency representatives will also advise and consult with the Director of the Rocky Mountain Forest and Range Experiment Station on the activities of the Station's Evaluation of alternative research directions, assignment of priorities and personnel, establishment of technical working arrangements, as needed, and related matters.

Procedures

The Agency representatives will meet on the last Thursday of each month. Staff from each Agency will participate, as appropriate, on subject items to be coordinated. Existing working relationships and agreements that now exist between the Agencies will not be preempted. Additional working relationships will be established as needed.

The meetings will be chaired alternately by the Agencies. Minutes will be taken of each meeting and distributed to Agency Heads and others as deemed necessary. Additional meetings will be called or regular meetings canceled or rescheduled by mutual agreement of Agency representatives.

This agreement shall be effective on the date of the last signature hereto. Any agency may withdraw from the agreement upon written notice to the others. The agreement may be terminated upon mutual consent of the parties.

Frank Gregg,

Director, Bureau of Land Management.

Dated: June 6, 1978.

R. A. Resler,

Acting Chief, Forest Service.

Dated: June 6, 1978.

Lynn A. Greenwalt,

Director, Fish & Wildlife Service.

Dated: June 6, 1978.

R. M. Davis,

Administrator, Soil Conservation Service.

Dated: June 6, 1978.

October 30, 1978.

In Reply Refer To:
FWS/PL

Memorandum

To: Agency Representatives.
From: Fish and Wildlife Service.
Subject: Interagency Agreement Related to Classifications and Inventories of Natual Resources.

Attached is a copy of the amendment to the subject agreement adding the United States Geological Survey as a member.

Attachment.

Interagency Agreement Related to Classification and Inventories of Natural Resources

Effective the date of the last signature hereto the above agreement is amended to include the United States Geological Survey.

Frank Gregg,

Director, Bureau of Land Management.

Dated: October 24, 1978.

R. A. Resler,

Chief Forest Service.

Dated: October 26, 1978.

Lynn A. Greenwalt,

Director, Fish & Wildlife Service.

Dated: October 24,1978.

R. M. Davis,

Administrator Soil Conservation Service.

Dated: October 25, 1978.

J. R. Balsley,

Acting Director, Geological Survey.

Dated: October 24, 1978.

Memorandum of Understanding Between the Environmental Protection Agency and U.S. Department of the Interior

I. Purpose

This Memorandum of Understanding has been developed in accordance with the provisions of the Interagency Memorandum, of Agreement prescribed in section 304(j)(1) of Pub. L. 92-500, and executed on August 30, 1973, by the Administrator, Environmental Protection Agency (EPA) and the Secretaries of the Army, Agriculture and the Interior. The purpose of this Memorandum is to: coordinate the programs of the U.S. Fish and Wildlife Service, the National Park Service, and the Heritage Conservation and Recreation Service (HCRS) with the water quality management process administered by the Environmental Protection Agency under sections 201, 208, and 303 of the Clean Water Act; facilitate the participation of these Interior Bureaus in the State and local establishment of water quality goals and the development and implementation of State and local programs to achieve those goals; and assure adequate consideration, under the Clean Water Act, of program needs of these Interior Bureaus.

II. Provisions

A. The U.S. Fish and Wildlife Service, National Park Service, and Heritage Conservation and Recreation Service will to the extent resources permit:

1. Establish a central point in the National and Regional Offices to facilitate Bureau involvement in the water quality management planning process, seek to derive Interior program benefits from improved water quality, and coordinate and integrate regional and field program activities with water quality management programs.
2. Participate in State and local review and State revision of water quality standards providing technical assistance and information on the identification of water uses and water quality criteria necessary to protect water uses including outdoor recreation needs, protection and propagation of aquatic life and wildlife, and preservation of natural and cultural resources under the administrative jurisdiction or trustee-ship of the Agency.
3. Participate in the development, implementation, and evaluation of State and areawide water quality management plans, provide appropriate technical assistance and information, and serve on advisory committees where appropriate.
4. Comment to EPA on State adopted water quality standards and state and areawide water quality management plans submitted to EPA for approval.
5. Provide EPA with appropriate technical and other material for inclusion in guidance and other memoranda circulated to EPA Regional Offices and State and areawide agencies.
6. Within 5 months after the effective date of this agreement recommend guidelines to EPA for designating Outstanding National Resource Waters.
7. Within 6 months from the date of publication of mutually approved guidance under E. 12, identify waters under jurisdiction of the Assistant Secretary which should be considered for designation as Outstanding National Resource Waters. Participate in identifying such waters in the State water quality standards review and revision process.
8. Submit a work plan for implementing this agreement within 90 days of the signing of this memorandum and prepare an annual progress report reviewing activities of the previous year under this agreement and updating the work plan.

B. United States Fish and Wildlife Service (FWS)—In addition, the U.S. Fish and Wildlife Service will to the extent resources permit:

1. Conduct research and provide technical assistance and information on development of water quality criteria.

2. Advise EPA and State and areawide water quality management planning agencies of FWS monitoring results which indicate pollution levels that are detrimental to fish, wildlife, or their habitat.

3. In cooperation with HCRS, develop integrated water quality/water quantity modeling methods and criteria for determining minimum and optimum stream flows and other physical parameters that are necessary for protection of fish and wildlife and recreational objectives.

4. Assist States and areawide water quality management planning agencies as requested in identifying endangered and threatened species and their critical habitats identified pursuant to Pub. L. 93-205 in the planning area which are impacted by water quality. Recommend water quality standards and other water quality management plan provisions to the States and areawide agencies where necessary to protect and enhance such species and habitats. FWS will assist, where appropriate, in the development of those provisions.

5. In waters under FWS jurisdiction, comply with applicable Federal, State, interstate and local requirements including State water quality standards as provided in section 313 of the Clean Water Act.

6. Coordinate FWS activities which affect or concern water quality with appropriate water quality management planning agencies.

7. Take an active role in selected special study projects under the water quality management planning process and FWS programs to:

(a) Identify water quality management planning activities to protect resources of concern to the FWS;

(b) Assist in the development of work plans; and

(c) Participate in the development and implementation of the water quality management planning program in cooperation with local, State and other federal agencies.

8. Encourage State Fish and Wildlife agency involvement in the development, review and revision of water quality standards and development and implementation of water quality management plans.

9. Encourage consideration of public boat ramp and nature trail construction in facilities planning.

10. Consistent with section 208 and related provisions of the Clean Water Act of 1977 and to the extent resources are made available through FWS budget channels:

(a) Complete a National Wetlands Inventory, develop interpretive reports, and make such information available to planning agencies as specified in the Clean Water Act;

(b) Provide technical assistance to EPA Regional Offices and State 208 agencies through training, handbooks, workshops, and direct consultation and advice;

(c) Develop environmental requirements and management techniques for key species in wetlands or riparian habitats.

(d) Develop and demonstrate supplemental nonpoint source Best Management Practices to protect or enhance fish and wildlife resources.

(e) Develop and demonstrate methods and strategies to utilize sewage wastewater for fish and wildlife habitat enhancement.

(f) Initiate research to provide supplemental data on the effects of environmental contaminants on fish and wildlife and their supporting ecosystems from key pollutants listed in Table 1 of the House Committee Print 95-33 (Committee on Public Works and Transportation) and any additional pollutants designated under 307(a).

C. Heritage, Conservation and Recreation Service—In addition, the HCRS will to the extent resources permit:

1. Identify recreation and open space opportunities and methods. Provide general advice concerning the protection of natural and cultural resources.

2. Prepare program guidelines for State and local governments encouraging the use of Land and Water Conservation Fund grants for the development of recreation and open space opportunities in conjunction with existing and planned wastewater treatment works.

3. Coordinate program activities with the water quality management planning and the statewide Comprehensive Outdoor Recreation Plan process to maximize outdoor recreational benefits derived from improved water quality and protect natural and cultural resources.

4. Develop guidance, in coordination with EPA and the FWS, encouraging and assisting State and areawide water quality management planning agencies in enhancing outdoor recreation opportunities and protecting natural and cultural resources. HCRS regional offices will distribute the guidance to park and recreation agencies and encourage those agencies to address outdoor recreation in the water quality management process.

5. Encourage appropriate State and local park, recreation, and natural resource agencies and public constituencies to maximize HCRS program benefits derived from improved water quality and to coordinate with and participate in water quality management planning.

6. Provide EPA with appropriate technical material relating to primary and supplemental public recreational opportunities and protection of natural and cultural resources.

7. Convene, in cooperation with EPA, regional conferences to develop an awareness of the primary and supplemental public recreation opportunities of State and local water quality management planning programs.

8. Encourage through guidance the provision of adequate facilities to accept and treat wastes from watercraft equipped with containment devices.

9. In cooperation with FWS, develop integrated water quality/water quantity modeling methods and criteria for determining minimum and optimum stream flows and other physical parameters that are necessary to achieve viable fish, wildlife and recreational objectives.

10. Participate in the development of State and areawide water quality management plans to assure proper consideration and protection of natural and cultural resources which include properties listed in or eligible for the National Register of Historic Places and the National Register of Natural Landmarks. Assist as requested with water quality management plan implementation.

11. Encourage consideration of public boat ramp and nature trail construction in facilities planning.

D. National Park Service (NPS)—The National Park Service will to the extent resources permit:

1. Assist State and areawide water quality management planning agencies in the review and revision of water quality standards to identify:

(a) Water quality conditions necessary to preserve and protect natural and cultural resources within the National Park System;

(b) Appropriate water uses consistent with the NPS responsibility;

(c) Waters which should be considered for designation as Outstanding National Resource Waters.

2. Participate in the development and implementation of State and areawide water quality management plans as necessary to assure proper consideration and protection of natural and cultural resources within the National Park System.

3. Serve on advisory committees in water quality management planning areas where water quality impacts units of the National Park System.

4. Encourage State natural resource management agency involvement in the review and revision of water quality standards and development and implementation of water quality management plans.

5. Take an active role in select demonstration-type projects under water quality management planning and NPS programs to:

(a) identify water quality management planning programs to protect resources under NPS jurisdiction;

(b) assist in the development of work plans;

(c) participate in the development and implementation of water quality management plans to maintain, restore, and enhance the chemical, physical and biological integrity of waters associated with or affecting the involved units of the National Park System.

6. Comply with State water quality standards in waters within units of the National Park System.

7. Coordinate NPS activities which affect or concern water quality with appropriate water quality management planning agencies.

8. Identify endangered and threatened species and their habitats in units of the National Park System for appropriate State and areawide water quality management planning agencies.

9. Assure that adequate facilities exist in units of the National Park System to accept and treat wastes from watercraft equipped with containment devices.

10. Exercise such other legal authorities and responsibilities as are or may be available to assure the maintenance, restoration, and/or enhancement of existing water quality in units of the National Park System.

E. Environmental Protection Agency—The Environmental Protection Agency will to the extent resources permit:

1. Establish contact points in the National and Regional offices for coordinating the activities under this memorandum.

2. Provide assistance and all necessary information including National guidance to facilitate the timely involvement of Interior Bureaus in the development of water quality management plans. Assist these Interior Bureaus in securing placement on appropriate State and areawide water quality management planning agency mailing lists.

3. Assure that State and areawide water quality management planning agencies actively seek the advice and involvement of these Interior Bureaus and their State and local counterparts in the water quality management planning process including State/EPA Agreement and areawide work program formulation, advisory groups, and development and implementation of water quality management plans.

4. Assure that State and areawide water quality management planning agencies coordinate their activities with the appropriate Interior Bureau activities affecting the planning area.

5. Provide these Interior Bureaus with the opportunity to review and comment on proposed criteria and information developed under sections 304(a) and 403 of the Clean Water Act.

6. Provide these Interior Bureaus with the opportunity to review and comment on proposed regulations, guidance and technical publications under sections 208 and 303 of the Clean Water Act.

7. Respond to Interior Bureau comments transmitted under paragraphs 5 and 6 above.

8. Encourage State and areawide water quality management planning agencies to consider nonstructural solutions to water pollution control problems that will preserve and enhance fish and wildlife habitat, open space and outdoor recreation.

9. Ensure that State water quality standards revisions describe the water quality necessary to meet requirements of the Act, including protection of existing and designated beneficial uses and designated Outstanding National Resource Waters.

10. Assure that State and areawide water quality managment planning agencies consider State Comprehensive Outdoor Recreation Plan (SCORP) priorities and State fish and wildlife plan priorities and Comprehensive Statewide Historic Preservation Plan priorities.

11. Consult with these Interior Bureaus in the development of guidelines identifying open space and recreation opportunities that can be expected to result from improved water quality, the planning of wastewater treatment works, and waste management policies under section 201(f) of the Clean Water Act.

12. Consult with Interior Bureaus for the purpose of developing EPA guidelines for identifying Outstanding National Resource Waters; within 9 months after the effective date of this agreement, issue the mutually approved guidelines for consideration by the States in the development of water quality standards.

13. During the next scheduled (after mutually approved guidelines are published under E. 12) review and revision of Water Quality Standards encourage States to apply the guidelines and consider designating waters identified under A. 7 of this agreement by the Assistant Secretary; encourage States to submit a written justification for failure to designate waters identified under A. 7 as Outstanding National Resource Waters; upon request of the Assistant Secretary, review (in consultation with the Assistant Secretary and the State) the State's action and, in the absence of a State designation, take under consideration the promulation of designations pursuant to Section 303(c)(4) of the Clean Water Act, where appropriate.

14. Provide the Regional Directors of these Interior Bureaus with the opportunity to review and comment on water quality management plans and State water quality standards submitted to the EPA Regional Administrators for review and approval. The EPA Regional Administrators will carefully consider comments submitted by these Interior Bureaus in the EPA review and approval process. Upon request if the Director of FWS, HCRS, or NPS, the Deputy Assistand Administrator for Water Planning and Standards will review unresolved concerns and will seek to resolve them prior to approval. The Assistant Administrator for Water and Waste Management will participate upon request of the Assistant Secretary.

15. Support these Interior Bureaus in obtaining resources to implement the provisions of this agreement.

16. Submit a work plan to the Assistant Secretary for implementing EPA responsibilities under this agreement within 90 days from the signing of this memorandum and prepare an annual progress report reviewing activities of the previous year under this agreement and updating the work plan.

Within five years from the effective date of this agreement, the Deputy Administrator and the Assistant Secretary shall review the effectiveness of this agreement in achieving the stated purposes. If, based upon that review or at any time during the course of implementation of this agreement, either the Deputy Administrator or the Assistant Secretary determines that the memorandum needs modification, the Deputy Administrator and the Assistant Secretary shall within 90 days after official notice negotiate such amendments considered appropriate.

Cecil D. Andrus,

Secretary, U.S. Department of the Interior.

Dated: November 10, 1978.

Douglas M. Costle,

Administrator, U.S. Envirohmental Protection Agency.

Dated: November 13, 1978.

Memorandum of Agreement Between Environmental Protection Agency and Bureau of Sport Fisheries and Wildlife, Department of the Interior

In accordance with the advice of the President to Congress in his July 9, 1970 Message Relative to Reorganization Plans Nos. 3 and 4, this Agreement takes cognizance of several scientific and technical environmental matters of common concern to the Agency and the Bureau: research, including monitoring and field appraisal, on effects of chemical contaminants (pesticides, PCB's, heavy metals, and other pollutants) on fish and wildlife; questions of pollution and its abatement at Bureau installations; establishment of water quality criteria and standards as these may affect fish and wildlife; chemical contamination in food chains; and the registration of chemicals and drugs. This Agreement recognizes the merit of avoiding duplication and of exchanging information and expertise in the interest of the public service.

The elements of the Agreement are as follows:

1. Research and Monitoring of Environmental Contaminants

The Bureau's four primary centers for research on the effects of environmental pollutants (Laurel, Maryland; Denver, Colorado; Columbia, Missouri; and Ann Arbor, Michigan) will continue and, as possible, broaden efforts at understanding and anticipating the effects of pollutants on survival, reproduction, physiology, behavior, and other factors critical to the well-being and management of fish and wildlife and the conservation of wildlife populations. The Bureau will seek to understand the mode of action, methods of inhibition, and movements through the ecosystem of chemicals and formulations in common or anticipated use.

The Bureau agrees to provide, to the designated offices or officers of the Agency, regularly scheduled data and progress reports based upon current Notifications of Research Projects (NRP's) submitted to the Science Information Exchange of the Smithsonian Institution.

The Bureau will continue to provide to the Agency, on request, all available information and advice that may be helpful in evaluating pollutants or in preparing for hearings. The Bureau will allow employees of the Agency to utilize the Bureau's specialized reprint files and will permit them to photocopy reprints in reasonable numbers on Bureau machines, as available, without charge.

The Agency agrees to provide, to the designated offices or officers of the Bureau, information concerning current or anticipated pesticide or other pollutant problems upon which research would be desirable.

In the interests of efficiency, economy, and avoidance of duplication, the concern of the Bureau and its expertise in research on the effects of pollutants on wildlife and freshwater fish, particularly on effects that are important to conservation, management, and recreational use of fish, wildlife, and associated food organisms and environment, are recognized. The Agency will depend especially heavily on the Bureau for research,

data, information, and analyses in relation to wildlife.

Both parties agree that the EPA is concerned and has expertise with respect to many environmental areas including effects of pollutants on man and laboratory mammals, effects of pollutants on the aquatic environment, determination of pollutant sources, regulation of pesticides, control of pollutants, studies of air and water quality, and control of air and water quality. The Bureau recognizes that some of these fields do and will require tests with fish.

When the Agency requires research or analyses within the expertise of the Bureau, the Agency may ask the Bureau to undertake this work in its entirety or to participate in Agency research or analysis. The Bureau will make a concerted effort to provide such service, retaining the option for in-house or contract services. The cost of such work will be borne by the requesting party. A similar relationship will prevail when the Bureau requires special work within the expertise of the Agency.

The Bureau has not only the expertise for evaluating the effects of toxicants on fish and wildlife resources, but also the capability to conduct on-site studies by using its own professional field people who are already trained and strategically located throughout the country.

The Bureau will continue to monitor residue levels of organochlorine insecticides, heavy metals, and other contaminants in birds and freshwater fish under the National Pesticide Monitoring Program in cooperation with the Council on Environmental Quality (CEQ). As part of its research and monitoring programs, it will conduct field observations on the effects of pollutants upon fish and wildlife. The Bureau will review all plans involving the proposed use of pesticides on Bureau lands.

The Bureau will make monitoring data available to the Agency as quickly as possible after chemical analyses are completed, assembled, and reviewed. The Agency will consult the Bureau for its views on the interpretation of monitoring data with respect to hazards to fish and wildlife. The Agency needs meaningful data in considering the possible impact of pesticides and other contaminants upon man and other living organisms. The Bureau and the Agency will take such steps as they deem necessary to ensure free exchange of information on a scientist-to-scientist basis, which will benefit both agencies in meeting their responsibilities on environmental matters.

The Agency reserves the right to be the first to release or to publish data resulting from work it has performed or financed independently of the Bureau. The Bureau reserves the same right in respect to work it has performed or financed. Work done jointly by the Agency and the Bureau, or done by one with the financial aid of the other, will be released or published only if agreed to by both parties. If the Agency and the Bureau differ on the advisability of releasing given data that have resulted from joint action, either party may release the data 30 days after giving written notice to the other party. Notwithstanding this agreement, such data may be entered into any statutory or judicial review procedure without the 30 days notice.

2. Federal Aid in Pesticide Programs

Nothing in this Agreement will limit the authority of the States to carry out research, development, and management programs using chemical agents, including herbicides and other pesticides, nor the authority of the Bureau to enter into agreements with the States to finance such programs under Federal Aid in Fish and Wildlife Restoration, and other grant or contractual programs, subject to guidelines published by EPA for Federal agencies or mutually acceptable requirements for specific projects.

3. Pollution Elimination at Bureau Installations

The Bureau recognizes the Agency's expertise in, and its own responsibilities for prevention, control and abatement of environmental pollution at Bureau installations. The Bureau will need the Agency's advice and assistance in interpretation of water quality standards and effluent limitations, review of proposed pollution elimination facilities, and other aspects of wastes and effluents.

In addition, each of the parties to this Agreement will provide for the timely exchange of information which would be of apparent benefit to either agency (for example: new knowledge or new developments in such areas as general water chemistry, hydraulics, monitoring devices, heating or cooling mechanisms, filtering methods or equipment, pumps, and aerators).

4. Provision of Test Fish

The Bureau agrees to provide to the Agency reasonable numbers and available species of fish from its National Fish Hatcheries, as may be required for the Agency's research. Requirements for unusual numbers, species, or sizes of fish will be specified at least 12 months in advance of the time the fish are needed.

5. Registration of Chemicals

The Bureau and its Federal Aid-supported State programs have urgent need for certain chemicals for fish and wildlife management (for example, herbicides for vegetation control in hatchery waters, control agents for pest animals). Bureau research centers and field stations will continue to do research pertinent to the registration and clearance of these chemicals. The Agency agrees to furnish the Bureau prompt authoritative statements from the Agency on minimum requirements for clearance and registration of such materials as the Agency regulates. The Agency agrees to provide guidelines for the research and testing needed to secure clearance and registration; to review research protocols from the Bureau promptly; and to inform the Bureau, upon request, of the status of any particular pesticide or device within the registration process.

The Agency, in its responsibility for registration of pesticidal chemicals, requires expert advice in establishing guidelines and protocols for evaluating the effects of these chemicals on fish and wildlife. The Agency recognizes the experience, responsibility, and interest of the Bureau in this field and may consult the Bureau in the preparation and trial of protocols for laboratory, field, and simulated field tests with fish and wildlife. The Bureau may assist in the evaluation of given tests proposed for inclusion in protocols designed for use with fish and wildlife. The Bureau agrees, within the limits of its resources, to conduct methodological research on this subject as mutually agreed upon; to provide copies of publications and reports on this subject that result from its own research; and on request to provide knowledgeable professionals for membership on panels and task forces.

The Agency recognizes that the Bureau requires much reliable information on pesticides and pollutants in the course of its work, and that the Bureau cannot meet this need by duplicating the vast amount of toxicological work already performed by industry on given chemicals. The Agency will, therefore, release to the Bureau, on request, as much information on given pesticides and other materials as is legally permissible and economically practicable.

6. Water Quality Criteria and Standards

The Bureau recognizes the Agency's responsibility for promulgating water quality criteria, for approving State water quality standards and establishing standards when necessary, and for conducting or sponsoring research that will lead to more effective standards. The Agency recognizes the Bureau's responsibility to conduct research to determine the water quality required for the health and productivity of the fish and wildlife resource. The Agency will consult the Bureau for aid in defining water quality criteria for protection of the fish and wildlife.

In discharging their responsibilities in these areas, the Agency and the Bureau agree to maintain close liaison to avoid needless duplication of research effort; to keep each other apprised of research progress; to be responsive to each other's needs in planning future research; and, when mutually beneficial, to share facilities and equipment, or to collaborate on research programs.

7. Joint Actions

In reviewing plans for federally constructed, permitted, licensed or supported water resource development projects, the Bureau will provide information to the Agency on the water quality criteria and flow regimens necessary for fish and wildlife and the fish and wildlife mitigation or enhancement benefits these will provide. Since these evaluations also will be used in the Bureau report to the sponsoring or licensing agency, any modification of such evaluations in reports of the Agency should be limited to those concurred in by the Bureau.

Each signatory party is obligated to call the attention of the other to needed actions in all areas of common concern. Each will identify for the other the areas in which they are unable to act and will inform the other of activities they are undertaking. When the nominally responsible agency is unable to carry out work in an important area involving fish and wildlife, this Agreement provides for

interim cooperative agreements for reassignment of the work, for the transfer of funds, and for loan of equipment and manpower to accomplish the task. In such instances, the transfer of resources will be implemented by a separate interagency agreement which specifically describes the work to be undertaken.

When informed of large losses of fish or wildlife presumably caused by pollution, each agency will promptly inform the other and will state its plans for investigating the situation. These investigations may be made singly or jointly, as each agency deems best in specific cases.

Whenever any ad hoc or standing committee involving both fish and wildlife resources and water quality is established by either agency, the other agency may be invited to nominate a representative to sit on the committee as a regular member.

This Memorandum of Agreement, entered into in good faith for the public good, the mutual benefit of the agreeing agencies, and the promotion of efficiency in Government, may be amended by common consent or terminated in whole or in part after not less than 60 days notice of intention by either party.

Approvals:

For the Environmental Protection Agency.

John R. Quarles, Jr.,

Deputy Administrator, Environmental Protection Agency.

Dated: October 10, 1973.

For the Bureau of Sport Fisheries and Wildlife.

Lynn A. Greenwalt,

Director, Bureau of Sport Fisheries and Wildlife, Department of the Interior.

Dated: January 31, 1974.

Department of Agriculture Soil Conservation Service Water resources Project Type Activities

Channel Modification Guidelines

Agency: Soil Conservation Service (Department of Agriculture) and Fish and Wildlife Service (Department of the Interior).

Action: Notice of Final Guidelines for Use of Channel Modification as a Means of Water Management in water resource project type activities of the Soil Conservation Service (SCS). The guidelines are not intended to have the force of rules or regulations, but are published for the information of the interested public.

Summary: An interdisciplinary team of specialists from the Department of the Interior's Fish and Wildlife Service (FWS) and the Department of Agriculture's Soil Conservation Service has worked cooperatively over the past several months to develop the attached guidelines for channel modification. The guidelines are based on these professional's own experienced judgment, plus the suggestions of many other interested Federal and State agencies, organizations, and individuals whose views were solicited. The heads of both agencies, Lynn A. Greenwalt and R. W. (Mel) Davis, have personally guided this effort and support the guidelines.

For the guidelines to be effective, reasoned judgment will be required among professional planners, biologists, and others. Compromises will need to be negotiated. We expect users of the guidelines to suggest refinements. After a reasonable period of use, we will review their effectiveness and rewrite them if the need is apparent. The guidelines should be studied thoroughly and applied intelligently. In general, they provide that:

1. SCS and FWS will use an interdisciplinary planning process which permits a balancing of the need to both maintain a viable, naturally functioning ecosystem and provide for projected food and fiber, economic, and other social needs.

2. Measures other than channel work will be suggested, analyzed, evaluated, an accepted if channel work will cause measurable habitat losses and if other alternatives will contribute to project objectives with less damaging effects. Channel work normally will be a "last resort" measures.

3. Channel work will not be undertaken when it would destroy or modify critical habitat for endangered or threatened species.

4. Wetland types 3–20 will not purposely drained, and any indirect drainage of these types will be avoided unless appropriate mitigation or compensation is provided. Types 1 and 2 will be evaluated as to their ecological importance and preservation strongly recommended in accordance with provisions in the guidelines.

5. The intent and spirit of the Federal Wild and Scenic River Act and similar State legislation will be respected.

6. Important fish and wildlife habitat values will be maintained or enhanced. Conservation easements or other comparable means will be utilized wherever necessary to provide reasonable protection for wetlands subject to secondary drainage predicted to occur as a result of, or be facilitated by, channel modification.

Effective date:

For further information contact: Dr. F. Eugene Hester, Associate Director, Environment and Research, U.S. Fish and Wildlife Service (202–343–5715).

Mr. Joseph W. Haas, Assistant Administrator for Water Resources, Soil Conservation Service (202–447–4527).

Supplementary Information: On August 8, 1977, the Soil Conservation Service and the Fish and Wildlife Service published in the Federal Register (42 FR 40119) proposed guidelines for use of channel modification as a means of water management in water resource project type activities of the Soil Conservation Service. During the 37-day commenting period numerous comments were received from Federal agencies, State agencies, organizations, and individuals. All written comments were given consideration in developing the final guidelines. The full text of all comments received is on file and available for public inspection in: Room 5228, South Agriculture Building, Washington, D.C., Room 849, 1730 K Street, N.W., Washington, D.C.

Accordingly, the following final guidelines are published for information purposes.

Robert L. Herbst,

Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior.

M. Rupert Cutler,

Assistant Secretary for Conservation, Research, and Education, U.S. Department of Agriculture.

Channel Modification Guidelines

Prepared by U.S. Department of the Interior, Fish and Wildlife Service; U.S. Department of Agriculture, Soil Conservation Service.

Published in the Federal Register, Vol. 43, No. 41, Wednesday, March 1, 1978, pp. 8276–8280

Channel Modification Guidelines

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Channel Modification Guidelines

I. Introduction

A. Purpose. These guidelines are promulgated by the Soil Conservation Service (SCS) and the Fish and Wildlife Service (FWS) to guide their personnel in identifying when and where channel modification may be used as a technique for implementing water and related land resource projects. They will be used in the planning of all SCS projects or measures which qualify for either technical, financial, and/or credit assistance under the authorities for flood prevention projects, small watershed projects, and resource conservation and development projects. These program authorities contain provisions for maintaining and enhancing fish and wildlife resources as well as achieving other water management objectives.

B. Policy. It is the policy of SCS and FWS that care and effort will be made to maintain and restore streams, wetlands, and riparian vegetation as functioning parts of a viable ecosystem upon which fish and wildlife resources depend.

It is also the policy of SCS and FWS to use an interdisciplinary planning process which will permit a balancing of the need to maintain a viable, naturally functioning ecosystem and projected food and fiber, economic, and other social needs.

The application of these guidelines, the resource inventory, interpretation, and planning assistance provided by SCS and FWS will ensure identification and consideration of alternatives to channel modification.

C. Applicability. These guidelines become effective as of the date they are approved. They will be applied to: (1) all new planning starts; (2) all projects in the planning phase, unless SCS and FWS agree it is not important

and feasible to apply the guidelines; (3) all projects approved for construction, (a) when supplements or revisions are prepared which would result in an increase in the amount or type of channel modification which would increase the potential adverse environmental impact; or (b) when SCS and FWS agree that (i) important fish and wildlife habitat is involved and threatened; (ii) project modification is feasible; and (iii) project modification to minimize adverse environmental impact has not been accomplished as a result of reviews mandated by the National Environmental Policy Act or other congressional, Presidential, or Secretarial initiatives.

After the guidelines have been in use for a year or more, their effectiveness will be reviewed, and changes will be made if determined to be necessary. These guidelines may be terminated at the request of either agency.

II. Background

Congress has recognized that erosion, floodwater, and sediment can cause damage in the watersheds of the rivers and streams of the United States. It has found that loss of life and damage to property constitute a menace to the national welfare and that the Federal Government should cooperate with States and their political subdivisions for the purposes of preventing such damages and of furthering the conservation, development, utilization, and disposal of water. In so doing, this action will also preserve, protect, and improve the Nation's land and water resources and the quality of the environment.

Congress has also recognized that rivers and streams, wetlands, and riparian vegetation constitute a valuable resource which is vital to the public interest in naturally functioning ecosystems, water transport, and maintenance of fish and wildlife populations. Dependent upon the situation, wetlands can serve as: (1) natural flood detention areas; (2) sediment and debris traps; (3) water purifiers and in recycling nutrients; (4) groundwater recharge areas; (5) nursery areas for aquatic animal species; (6) important habitats for a wide variety of plant and animal species, some of which have been depleted to the point that their continued existence is endangered; and (7) areas which produce highly valuable crops of timber, fish, and wildlife.

High flows in rivers and streams and periodic overflow have significant value in creating and maintaining meandering channels and in cleansing and redistributing substrates. This action by water provides riffles, pools, or other habitat for fish spawning and rearing and production of aquatic invertebrates. It also provides diverse plant successional areas and other types of shoreline habitat that fulfill fish and wildlife food and cover requirements. However, it is also recognized that many areas adjacent to streams and wetlands are well-suited for and have a long history of agricultural and urban uses.

Channel modification, used in a sensitive manner, is one method that can be utilized in solving specific water management problems. It may be needed to restore a water course impaired or damaged naturally or through man's unwise use or management of adjacent or upstream lands. It may also be needed to provide a safe and health environment and for the maintenance of existing agricultural productivity.

However, channel modification can cause serious damage to fish and wildlife resource values. In addition to the direct impacts on the stream and immediate environs, the practice has, on occasion, led directly or indirectly to major drainage of wetlands, clearing of bottomland forests for intensive agriculture, and increased flooding and siltation in downstream areas. Channel modification for flood control, drainage, and irrigation projects has often resulted in severe conflict with the function of the associated ecosystems, changing or reducing both the variety and abundance of fish and wildlife resources.

Because of the variety of values associated with water, it is incumbent upon the SCS and the FWS to continue to share their technical expertise to help ensure decisions which will result in the maximum benefits to assure long-term agricultural productivity and optimum environmental quality.

III. Guidelines

A. Alternatives. The guidelines for channel modification will be used when formulating alternative plans under the Water Resources Council's Principles and Standards. The planning process will include an inventory of resources, including fish and wildlife habitats and their geographic delineation. It will also identify appropriate means for minimizing adverse impacts on habitat values. Measurement of habitat values will be determined on a case-by-case basis in accordance with habitat evaluation procedures promulgated by FWS and developed jointly with SCS.

Alternative plans will be formulated to: (1) emphasize environmental quality; (2) optimize national economic development; and (3) provide varying mixes of the components of the environmental quality and national economic development objectives. For each alternative plan, there will be a display of accounting of relevant beneficial and adverse effects. A comparison of the displays will identify trade-offs between the environmental quality and economic development objectives. Within this framework and in compliance with the requirements of the National Environmental Policy Act (NEPA); equal consideration will be given to environmental and economic and technical aspects in the decisionmaking process.

In compliance with the mandates of NEPA and the Water Resources Council's Principles and Standards, the FWS will assist the SCS develop, evaluate, and recommend alternatives, if any, to channel modification when it is expected to cause, directly or indirectly, measurable losses of fish and wildlife resources. Channel modifications will not be considered if a practical alternative exists. A practical alternative is one which meets *all* of the following tests: (1) is consistent with the Water Resources Council's Principles and Standards; (2) makes a significant contribution to project objectives; and (3) results in less damage to fish and wildlife habitat. Thus, channel modification will normally emerge as the last resort measure.

The following three broad types of alternatives will be considered singly or in combination:

1. Soil and Water Conservation practices.

2. Nonstructural—nonstructural measures may include, but are not limited to, land use regulation, land acquisition, the maintenance of aquatic areas, floodplain zoning, floodproofing existing buildings, flood forecasting, flood warning, flood hazard information, flood insurance, tax adjustments, emergency assistance, and relocation of properties and people.

3. Structural—structural alternatives to channel modification include, but are not limited to, dams, floodways, dikes, levees (including set back levees), flood walls, pumping plants, diversions, and wetland development, maintenance, and restoration.

B. Types of Channel Modification. Channel modification is defined in these guidelines to include actions such as riprapping, selective snagging, clearing and snagging, widening, deepening, realignment, and lining, listed *generally* in order of ascending impact on fish and wildlife resources.

1. Selective Snagging—The selective removal of obstructions from a channel to increase its capacity to convey water. This includes, but is not limited to, the removal of downed timber and accumulations of debris or obstructions.

2. Clearing and Snagging—The removal of obstructions from the channel and stream banks, including the removal of vegetation and accumulations of bedload material, to increase its capacity to convey water. It may include the removal of sediment bars, drifts, logs, snags, boulders, piling, piers, headwalls, and debris.

3. Riprapping—The placement of irregular permanent material such as rock in critical areas along the watercourse to protect the earth materials against excessive erosive forces.

4. Widening—The overall widening of a channel to restore or increase its capacity to convey water. This usually involves clearing, snagging, and excavation of a portion of the channel side slope(s). Where practical, widening is performed on one side only with appropriate consideration given to alternating from one side to the other.

5. Deepening—The overall deepening of a channel to increase its capacity to convey water and/or provide drainage. Deepening usually involves clearing or snagging and excavation of a portion of the channel bottom and the channel side slope(s).

6. Realignment—The construction of a new channel or a new alignment and may involve the clearing, snagging, widening, and/or deepening of the existing channel where the new alignment coincides with the existing channel. It may include straightening the alignment to restore or increase the capacity of the channel to convey water.

7. Lining—Placement of a nonvegetative protective lining over all or part of the perimeter of a channel to prevent erosion or

to increase the capacity of the channel to convey or conserve water.

C. Channel Modification as an Alternative. The following criteria will be utilized in the planning process for determining when channel modification can be considered an alternative. It used, channel modification will be the minimum required, either alone or in combination with other measures. It will be accomplished using the least damaging construction techniques and equipment in order to retain as much of the existing characteristics of the channel and riparian habitat as possible. Construction practices may include, but are not limited to, such things as seasonal construction, minimum clearing, reshaping spoil, limiting excavation to one bank (on alternating sides where appropriate), and prompt revegetation of disturbed areas.

Channel modification may be considered as an alternative for project purposes for which the SCS is currently authorizied by law and which are in conformance with agency (SCS) policy and regulations, provided the modification is designed to resolve specific problems and *would not cause* directly or indirectly any of the following to occur:

1. Jeopardize the continued existence of endangered species and threatened species designated or formally proposed [1] by the destruction or modification of habitat of such species which is determined to be critical under the Endangered Species Act of 1973 or species similarly classified under law of the State(s) in which the project is located.

2. Result in restricted access to use of streams or stream segments developed specifically for recreation or fish and wildlife use by the general public.

3. The intent or purpose is to drain or otherwise alter wetland types 3 through 20,** or the result of the modification would be to indirectly alter wetlands types 3 through 20 and provisions for appropriate mitigation or compensation by establishment of similar habitat values in the project area are not provided. Wetland types 1 and 2 with important fish and wildlife habitat values will be treated in accordance with item 3 below, and their preservation will be strongly recommended when they are adjacent to types 3 through 20 or are needed to maintain a balanced aquatic or semi-aquatic ecosystem.

Also, channel modification will not be considered as an alternative unless it can be accomplished with little or no direct or indirect adverse*** effect on:

1. Stream or stream segments now designated or undergoing study under the Wild and Scenic Rivers Act or officially designated pursuant to other Federal or State(s) legislative actions for their important natural, esthetic, or recreational values.

2. Streams located in or flowing through or contiguous to established wilderness areas, parks, refuges, or other areas set aside pursuant to Federal or State(s) legislative actions for fish and wildlife esthetic or recreational values.

3. Important fish and wildlife habitat values, including riparian habitat, in the project impact area, State, or Nation after providing for all appropriate mitigation, compensation, or preservation measures. Conservation easements or other comparable means will be utilized wherever necessary to provide reasonable life of project protection for wetlands or riparian areas subject to secondary drainage predicted to occur as a result of, or be facilitated by, channel modification. (Measurement of habitat values will be determined on a case-by-case basis in accordance with habitat evaluation procedures to be promulgated by FWS and developed jointly with SCS.)

IV. Coordination and Interaction

The FWS and the SCS recognize that the application of the above guidelines can most effectively be accomplished through cooperative effort during all planning phases of a water resource project. The FMS and the SCS will work cooperatively with State fish and wildlife agencies to inventory and assess the fish and wildlife resources and to plan alternatives, enhancements, replacement, or necessary mitigation measures.

The level of effort to be devoted by FWS to each watershed project will be proportional to the value of the resources and expected impact on fish and wildlife resources. If FWS determines at any stage of planning that it cannot, for any reason, participate, it will so notify SCS in writing stating reasons for discontinued participation. Even though FWS discontinues participation in planning, they will eventually, as prescribed by law, become involved with reviewing and commenting on the watershed plan. In such instances, FWS will not oppose the project plan on the basis of channel modifications unless it is clearly evident that the plan is not in conformance with the provisions of these guidelines after consultation with SCS determining this to be the case.

The following procedures will be used in the planning of water resource projects. The coordination identified is between the field levels of FWS and SCS; however, *both agencies recognize that planning will always involve State fish and wildlife agencies as well as the interested public and sponsoring agencies at all stages througout the planning process.*

[1] Applicable only during a 6-month period immediately following the date a proposal is published in the Federal Register by FWS in compliance with the Endangered Species Conservation Act of 1973.

**Wetland types as described in FWS Circular #39 or subsequent publications.

***Rule of reason must be used in applying these guidelines and determining the actual net effects and their significance at the field level considering the value of the resource and importance of the project objectives.

Coordination of Field Level Planning [1]

Process	SCS action	FWS action
Preapplication	Potential application under consideration. Notifies FWS that potential application is being considered and issued invitation to meetings.	Participate in meetings.
	Assists sponsors in developing information when appropriate. (Normally requires from one to several days.) Request from FWS available fish and wildlife information and viewpoints concerning potentials for and impacts of a probable project.	Furnishes available information and FWS viewpoint concerning potentials for and impacts of a probable project. If requested, participates jointly with SCS and State fish and wildlife agency studies needed and reports findings as may be required. (Field level letter.)
Application	Receives application. Notifies FWS in writing that application has been received and when field examination is to begin. Issues invitation to FWS to participate in all meetings and in study and evaluation of available information. (Field examination may require a few days to several weeks.).	Participates in meetings.
	Initiates field examination and assembles available information, coordinates study and evaluation of available information and data. Begins environmental assessment.	Participates in field examination. Assembles and furnishes available fish and wildlife information and data. Participates in study and evaluation of available information and data and in identification of problems and study needs and potential solutions worthy of further study.
	Identifies problems and needs, potential solutions, and broad alternatives worthy of further study. Request FWS to work cooperatively with SCS and State fish and wildlife agency in any special studies required in this step.	Works cooperatively with SCS and State fish and wildlife agency in any special studies required and in preparing an appropriate report.
	Prepares field examination report (Includes pertinent fish and wildlife information from FWS) and provides copy to FWS.	Provides inputs (letter report) for the field examination report.
	Requests FWS to participate in developing a plan of study. Prepares the study plan.	Participates with SCS in developing a plan of study. FWS will advise as to scope and detail of specific studies needed, capability of FWS to perform studies, and its desire to participate in design of any contracts to secure necessary information.
	Requests planning authority (submits views of FWS with request for planning authorization).	

Coordination of Field Level Planning [1]—Continued

Process	SCS action	FWS action
Planning	Receives notice of planning authorization. Notifies FWS in writing. Initiates and coordinates Preliminary Investigation (PI) and continues environmental assessment. Notifies FWS in writing. (PI may require from several weeks to 2 years.).	Participates in meetings and preparation of joint FWS–State fish and wildlife agency–SCS fish and wildlife inventory, assessment, base line data, and report.
	SCS initiates preparation of PI report and update of the study plan. Requests FWS participation in PI and update of plan of study.	Furnishes additional inputs to problems, needs, alternatives and impacts as the PI process progresses and jointly makes recommendations for mitigation, compensation, and enhancement. Furnishes inputs for the PI report and updating of study plan.
	Sends PI report to FWS and others	Participates with SCS to review the PI report with the public.
Detailed Planning	Coordinates the detailed planning stage and continuation of the environmental assessment. Notifies FWS that detailed planning is to commence and issues invitation to participate in detailed planning and in meetings.	Participates with SCS and others in detailed planning of alternatives and the components. Works cooperatively with State fish and wildlife agency and SCS to formulate the alternatives and to assess fish and wildlife impacts. Works cooperatively with SCS and State in preparation of recommendations for mitigation, compensation, and enhancement for initial draft plan and, when prepared, an EIS. Participates in meetings. Provides detailed report in accordance with Fish and Wildlife Coordination Act and Section 12 of P.L. 83–566.
	Prepares initial draft plan and, when required, an EIS. Initiates local field review and issues an invitation to FWS to participate in this review. Provides FWS with initial draft plan and an EIS, if prepared.	Provides review comments on initial draft and participates in local field review.
Review (Formal)	Prepares a draft plan and EIS, if required, and circulates for interagency review.	Provides comments to Interior and works with SCS in an attempt to resolve issues, if warranted.
	SCS prepares final plan and EIS, if required. Forwards plan and EIS through system for approval and authorization.	Review plan and EIS according to FWS and Interior instructions.
Operations	Receives notice of authorization for installation. Notifies FWS. (Regional and area offices.) Prepares construction plans and invites FWS to review them.	Reviews pertinent construction plans.
	Notifies FWS of supplement when the channel modification guidelines are applicable. (See page 2.) Prepares supplemental plans when necessary and circulates for local field review.	Participates in formulating supplemental plan when the channel modification guidelines are applicable. Same involvement as in planning and provides inputs for supplemental plan. Also provides comments on supplemental plan when circulated for local field review.
	Forwards supplemental plan for approval. Provides FWS copy of supplemental plan.	
Maintenance	Advises FWS and State fish and wildlife agency of scheduled maintenance inspections during the life of the project.	Participates in maintenance inspections at FWS discretion. If appropriate, makes recommendations for changes in O&M agreement if necessary to ensure that proper maintenance is accomplished.

[1] All steps apply to planning for small watershed projects. Appropriate steps will be followed for P.L. 78–534 and Resource Conservation and Development measures planning.

NOTES.—1. SCS notifies FWS when planning is suspended, project action terminated, or other stop actions are taken.

2. The level of effort to be devoted by the FWS to each watershed project will be proportional to the value of the resources and expected impact on fish and wildlife resources. If FWS determines at any stage of planning that it cannot, for any reason, participate, it will so notify SCS in writing stating reasons for discontinued participation.

V. Resolution of Issues

General. It is recognized that issues may develop which cannot be resolved at the field level. When issues arise, it will be the practice of the FWS and the SCS to refer such cases and issues to the next higher respective administrative level for resolution and ultimately, if necessary, to the Secretaries of Agriculture and Interior. The Secretary of Agriculture will seek the advice and counsel of the Secretary of the Interior in reaching his decision. Consultation between the two agencies will, at each level, occur throughout the decision process.

Procedure. 1. Most of the problems in applying the guidelines will be identified at the field planning level. When this occurs, the SCS Planning Staff Leader will consult directly with the FWS Field Supervisor (Ecological Services) and attempt to resolve the issue.

2. Should the SCS Planning Staff Leader and the FWS Area of Field Supervisor be unable to reach agreement, the issue should be referred and coordinated as follows:

USDA in Consultation With USDI

State Conservationist, SCS	Regional Director and/or Area Manager, FWS as appropriate
Administrator, SCS	Director, FWS
Assistant Secretary for Conservation, Research and Education	Assistant Secretary for Fish and Wildlife and Parks
Secretary of Agriculture	Secretary of the Interior

The decision on whether channel modification will be part of a project plan shall rest with the Secretary of Agriculture. If disagreement still exists at the Secretary's level, the FWS views and recommendations will be appended to the project plan.

At all levels in the decision process, the desires and needs of the local sponsors, environmental groups, State and Federal agencies, and interested public will be taken fully into account.

Dated: February 21, 1978.

Lynn A. Greenwalt,

Director, Fish and Wildlife Service.

February 22, 1978.

R. M. Davis,

Administrator, Soil Conservation Service.

Water Project Planning and Analysis, Federal Interagency Agreements, 2.541c

Joint Policy of the Departments of the Interior and of the Army Relative to Reservoir Project Lands

Acquisition of lands for reservoir projects. In so far as permitted by law, it is the policy of the Departments of the Interior and of the Army to acquire, as a part of reservoir project construction, adequate interest in lands necessary for the realization of optimum values for all purposes including additional land areas to assure full realization of optimum present and future outdoor recreational and fish and wildlife potentials of each reservoir.

1. *Lands for reservoir construction and operation.* The fee title will be acquired to the following:

a. Lands necessary for permanent structures.

b. Lands below the maximum flowage line of the reservoir including lands below a selected freeboard where necessary to safeguard against the effects of saturation, wave action, and bank erosion and to permit induced surcharge operation.

c. Lands needed to provide for public access to the maximum flowage line as described in paragraph 1b, or for operation and maintenance of the project.

2. *Additional lands for correlative purposes.* The fee title will be acquired for the following:

a. Such lands as are needed to meet present and future requirements for fish and wildlife as determined pursuant to the Fish and Wildlife Coordination Act.

b. Such lands as are needed to meet present and future public requirements for outdoor recreation, as may be authorized by Congress.

3. *Easements* in lieu of fee title may be taken only for lands that meet all of the following conditions:

a. Lands lying above the storage pool.

federal register

Friday
January 23, 1981

Part III

Department of the Interior

Fish and Wildlife Service

U.S. Fish and Wildlife Service Mitigation Policy

[As corrected in the Federal Register of February 4, 1981]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

U.S. Fish and Wildlife Service Mitigation Policy; Notice of Final Policy

AGENCY: U.S. Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of Final Policy.

SUMMARY: This Notice establishes final policy guidance for U.S. Fish and Wildlife Service personnel involved in making recommendations to protect or conserve fish and wildlife resources. The policy is needed to: (1) ensure consistent and effective Service recommendations; (2) allow Federal and private developers to anticipate Service recommendations and plan for mitigation needs early; and (3) reduce Service and developer conflicts as well as project delays. The intended effect of the policy is to protect and conserve the most important and valuable fish and wildlife resources while facilitating balanced development of the Nation's natural resources.

EFFECTIVE DATE: January 23, 1981.

ADDRESS: Comments submitted on the proposed policy may be inspected in Room 738, 1375 K Street, N.W., Washington, D.C. 20005, between 9 a.m. and 3 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: John Christian, Policy Group Leader—Environment, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, (202) 343-7151.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The development and use of the Nation's natural resources continues in an effort to provide people with their basic needs and to improve their lives. Fish and wildlife and the intricate fabric of natural resources upon which they depend provide benefits to people in many ways. Fishing, hunting, and bird watching are basic benefits that come to mind immediately. These activities involve the direct use of these renewable "natural resources." Perhaps a greater benefit, although more difficult for some to understand, is the maintenance of the structure and function of the ecosystem that comprises all living species, including people. The presence of diverse, healthy fish and wildlife populations generally signals a healthy ecosystem which contains those elements necessary for human survival, including unpolluted air and productive land.

That fabric of natural resources called habitat is the supply for fish and wildlife renewal. The life requirements for plant and animal species are varied and complex. Each species requires a different set of environmental conditions for survival and vigorous growth. These conditions form the habitat of the various species. The development and use of natural resources leads to changes in environmental conditions that can redefine habitat and thus change the mix and abundance of plant and animal species.

A given change in habitat might increase or decrease overall habitat productivity or result in gains or losses of species that are valuable to people or ecosystems. In some cases, habitat modifications can also increase the numbers of species considered undesirable, and create a nuisance to people or crowd out more valuable species. Therefore, development actions can cause habitat changes that are considered either beneficial or adverse depending on the intended wildlife management objectives.

When professional biologists determine that a given development action will cause a change that is considered adverse, it is appropriate to consider ways to avoid or minimize and compensate for such adverse change or loss of public resources. This is commonly referred to as mitigation.

Fish and wildlife resources are public in nature. The Service has provided Federal leadership for over 40 years to protect and conserve fish and wildlife and their habitat for the benefit of the people of the United States. Under its legal authorities, the Service conducts fish and wildlife impact investigations and provides mitigation recommendations on development projects of all kinds. These efforts have been conducted through a full partnership with State agencies responsible for fish and wildlife resources, and since 1970, with the National Marine Fisheries Service of the U.S. Department of Commerce. The recommendations of the Service are considered by the Federal development and regulatory agencies for their adoption as permitted by law.

Over the years, the Service has reviewed innumerable project and program plans with the potential to adversely affect fish and wildlife resources. The mitigation recommended in recent years by Service personnel to prevent or ameliorate adverse impacts has been governed primarily by a broad policy statement on mitigation promulgated in 1974 and by specific guidelines issued as needed. Recent events have prompted the Service to make known its mitigation objectives and policies. Specific management needs include:

(1) Recent legislative, executive and regulatory developments concerning the environment which have led to a need to update and expand the advice within the 1974 Service policy statement;

(2) Increasing Service review responsibilities which require issuance of comprehensive guidance on mitigation to maintain the quality and consistency of Service mitigation recommendations;

(3) An explicit summary of Service mitigation planning goals and policies to be disclosed to developers and action agencies to aid their earliest planning efforts; and

(4) Finally, the current national need to accelerate development of energy resources which requires that early planning decisions be made that can minimize conflict between important environmental values and energy development.

For these reasons, it was determined to be necessary to fully outline the overall mitigation policy of the U.S. Fish and Wildlife Service. The final Service policy statement integrates and outlines the major aspects of current Service mitigation efforts. Intended as an overview document, its guidance is based on an analysis of current Service field recommendations and on the guidance contained in recent Service management documents.

This policy conditions only the actions of Service employees involved in providing mitigation recommendations. It does not dictate actions or positions that Federal action agencies or individuals must accept. However, it is hoped that the policy will provide a common basis for mitigation decisionmaking and facilitate earlier consideration of fish and wildlife values in project planning activities.

Finally, it should be stressed that this Service policy outlines mitigation needs for fish and wildlife, their habitat and uses thereof. Others interested in mitigation of project impacts on other aspects of the environment such as human health or heritage conservation may find the Service policy does not fully cover their needs. There was no intent to develop a mitigation policy that covers all possible public impacts except those stated. However, the Service strongly believes that preservation and conservation of natural resources is a necessary prerequisite to human existence.

DISCUSSION

The following items are included to provide a better understanding of the policy's relationship to other guidance and to improve the understanding of its technical basis.

1. Relationship of Service Mitigation Policy to Other Service Planning Activities.

The final policy is designed to stand on its own. However, for a clearer perspective of the relationship of the policy to the goals and objectives of the U.S. Fish and Wildlife Service, it can be read with the Service Management Plan and the Habitat Preservation Program Management Document.

The Service Management Plan describes the overall direction of the Service and the interrelationships of the four major categories, including Habitat Preservation, Wildlife Resources, Fishery Resources, and Federal Aid-Endangered Species.

The Habitat Preservation Program Management Document outlines what the Service will do over a one- to five-year period to ensure the conservation and proper management of fish and wildlife habitat. It provides guidance to Service personnel and other interested parties on the goals, objectives, policies, and strategies of the Habitat Preservation Category of the U.S. Fish and Wildlife Service. It includes a discussion of important resource problems that the Service believes require priority attention.

2. Relationship of the Mitigation Policy to any future Fish and Wildlife Coordination Act (FWCA) Regulations and the National Environmental Policy Act (42 U.S.C. 4321–4347) (NEPA).

The Service mitigation policy outlines internal guidance for Service personnel for all investigations and recommendations for mitigation under relevant Service authorities, including the FWCA and NEPA. However, the coverage of the policy is basically different from that of any future FWCA regulations as was explained in the preamble to the proposed policy (September 9, 1980) (45 FR 59486–59494). Any future FWCA regulations will principally recommend procedures for all affected agencies to ensure compliance with that Act before and after they receive fish and wildlife agency recommendations. In contrast, the Service mitigation policy only applies to Service personnel and outlines mitigation planning goals and policies for impact analyses and recommendations.

The relationship of the mitigation policy to NEPA requirements is also a complementary one. The regulations implementing NEPA (43 FR 55978–56007) recognize "appropriate" mitigation recommendations as an important element of the rigorous analysis and display of alternatives including the proposed action (40 CFR Part 1502.14). The NEPA regulations later specify that Service impact analyses and mitigation recommendations shall be used as input to preparation of draft environmental impact statements (DEIS) as follows:

"To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders." (40 CFR 1502.25(a)).

These provisions provide clear direction that NEPA requirements are not duplicative of or substitute for mitigation recommendations developed under the Fish and Wildlife Coordination Act and other Service authorities. In fact, the NEPA regulations require that Service recommendations be fully integrated into the NEPA process as vital information necessary to comply with NEPA.

3. Focus of the Policy on Habitat Value.

The policy covers impacts to fish and wildlife populations, their habitat and the human uses thereof. However, the primary focus in terms of specific guidance is on the mitigation of losses of habitat value. Population estimates are considered by many to be unreliable indicators for evaluating fish and wildlife impacts. Sampling errors, cyclic fluctuations of populations and the lack of time series data all contribute to the problem. Therefore, the Service feels that habitat value, by measuring carrying capacity, is a much better basis for determining mitigation requirements. However, the use of population information is not foreclosed by the policy. In fact, concern for population losses led to formulation of the "General Policy" section to ". . . seek to mitigate all losses of fish, wildlife, their habitat and uses thereof . . ." The Service agrees that mitigation of population losses is a necessary aspect of this policy, for example, when habitat value is not affected but migration routes are blocked off as in the case of dam construction on a salmon river.

Mitigation of human use losses of fish and wildlife resources is also a necessary aspect of the policy. However, if mitigation of habitat value occurs, then in the majority of cases, losses of human use are also minimized. But, in some cases, public access to the resource may be cut off by the project and significant recreational or commercial benefits may be lost.

In those cases where mitigation of habitat value is not deemed adequate for losses of fish and wildlife populations or human uses, the Service will seek to mitigate such losses in accordance with the general principles and concepts presented in the policy. However, in the majority of cases, the Service feels that mitigation of impacts on habitat values will assure a continuous supply of fish and wildlife populations and human use opportunities.

The Service has recently revised and updated its *Habitat Evaluation Procedures* (HEP). It can be used, where appropriate, to determine mitigation needs based on habitat value losses. In some cases, the project may not be deemed appropriate for applying the methodology as in the case of activities conducted on the high seas under the Outer Continental Shelf (OCS) leasing program. In such cases, the use of other methods to describe habitat value impacts is clearly acceptable, including the best professional judgment of Service biologists. Other limitations related to the use of HEP are outlined in the Ecological Services Manual (100 ESM 1). The HEP are available upon request from the Chief, Division of Ecological Services, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

4. Acre for Acre Loss Replacement Is Not Necessarily Recommended by the Policy.

As explained above, the policy focuses on habitat value. The habitat value of an acre of habitat can vary considerably depending on the type of vegetation and other physical, biological or chemical features. Service recommendations, therefore, will be based on the habitat value adversely impacted, as opposed to strictly acreage. For example, loss of one acre of a specific type of wetland might result in recommendations for replacement of less than one acre of a different type of wetland of greater habitat value. If the habitat value of the wetland available for replacement was equal to that lost, then recommendations could be on an acre-for-acre basis.

5. Rationale for Mitigation Planning Goals.

In developing this policy, it was agreed that the fundamental principles guiding mitigation are: 1) that avoidance or compensation be recommended for the most valued resources; and 2) that the degree of mitigation requested

correspond to the value and scarcity of the habitat at risk. Four Resource Categories of decreasing importance were identified, with mitigation planning goals of decreasing stringency developed for these categories. Table 1 summarizes all categories and their goals.

Table 1: Resource Categories and Mitigation Planning Goals

Resource category	Designation criteria	*Mitigation planning goal*
1	High value for evaluation species and unique and irreplaceable.	No loss of existing habitat value.
2	High value for evaluation species and scarce or becoming scarce.	No net loss of in-kind habitat value.
3	High to medium value for evaluation species and abundant.	No net loss of habitat value while minimizing loss of in-kind habitat value.
4	Medium to low value for evaluation species.	Minimize loss of habitat value.

POLICY HISTORY

The policy statement integrates and outlines the major aspects of current Service mitigation efforts. Intended as an overview document, its guidance is based on an analysis of over 350 Service field recommendations and on the guidance contained in recent Service management documents. The proposed policy was published in the **Federal Register** on September 9, 1980 (45 FR 59486–59494). A correction notice which corrected insignificant formatting and typographical errors was published on September 19, 1980 (45 FR 62564). A notice extending the comment period on the proposed policy to November 10, 1980, was published on October 8, 1980 (45 FR 66878). The final publication is based on full and thorough consideration of the public comments as discussed below.

RESPONSE TO COMMENTS

Over 90 sets of comments were received on the proposed policy. All comments were thoroughly analyzed and cataloged and considered. Many commentors expressed agreement with Service publication of the policy, sensing a more consistent and predictable Service approach to mitigation recommendations and a resultant decrease in the degree of conflict with developers. Many felt the policy represented a rational approach to fish and wildlife resource management, and that it would provide for adequate protection and conservation of the Nation's fish and wildlife resources. The underlying concept that the degree of mitigation requested should correspond to the importance and scarcity of the habitat at risk was also supported by many commentors. Numerous commentors also praised its scope, cohesiveness and clarity, and stressed that it should provide valuable guidance for Government personnel providing technical and project planning assistance.

Detailed responses to significant comments follow:

GENERAL COMMENTS ON THE PROPOSED SERVICE MITIGATION POLICY

Comment: Although the Service prepared an Environmental Assessment and, from its findings, concluded that policy issuance did not constitute a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act (NEPA), a few commentors disagreed with the Service's conclusion that an Environmental Impact Statement (EIS) was not necessary for the proposed action.

Response: During policy development, the Service took action to determine if preparation of an environmental impact statement under NEPA was required. Although section 1508.18 of the Council on Environmental Quality's (CEQ) Regulations for implementing the procedural provisions of NEPA classified adoption of an official policy as a "Federal action," it remained unclear as to whether this action was "major," or whether it would "significantly" affect the quality of the human environment, since policy implementation would not result in or substantially alter agency programs. As was stated in the preamble, this policy is basically a distillation of approaches and policy currently being practiced by Service field personnel in providing mitigation recommendations.

In order to resolve this uncertainty, an Environmental Assessment was prepared for the proposed and final policy. By doing so, the Service has complied with one of the major purposes of the NEPA regulations, which is to have NEPA applied early in the decisionmaking process.

The NEPA regulations do not, in the opinion of the Service, require that the agency speculate on future, possible events without any relation to actual, existing impacts of an action. Section 1502.2 of the NEPA regulations directs that an EIS is to be analytical, however, the Service action simply does not create any impacts capable of such analysis. Thus, there is no reasonable or scientific way for the Service to analyze any environmental impacts, significant or otherwise, as discussed in §§ 1502.16 and 1508.27.

This problem is particularly vexsome when those impacts depend on future contingencies and can be more appropriately analyzed when those contingencies occur. Even § 1502.4, which discussed EIS's in terms of broad agency actions, does so in the context of specific impacts caused by the action. In the opinion of the Service, it has fully complied with the letter and spirit of NEPA and its regulations.

Comment: One commentor felt that the preamble statement that an EIS would be premature at this time contradicted a finding of no significant impact.

Response: The Service sees no contradiction with a finding of no significant impact and the statement that an EIS is premature. The finding of no significant impact derives from an analysis showing that the policy has no significant impacts amenable to analysis at the present time. However, when in the future the Service does apply the policy in developing mitigation recommendations for a major Federal action which might significantly affect the quality of the human environment, then the environmental impacts associated with implementing those recommendations which are considered justifiable by the development agency can be analyzed by that development agency. The Service has no way of predicting which of its recommendations will be accepted by the developer; therefore, analysis of impacts of accepted mitigation recommendations is the responsibility of the developer.

Comment: One commentor was of the opinion that an EIS "should be prepared for the Service's proposed mitigation recommendations on each project." Moreover, the commentor felt that a significant portion of these EIS's should be devoted to analysis of economic impacts.

Response: Mitigation recommendations and actions cannot be meaningfully analyzed except in the context of the development action initiating them. And, since an EIS would be required for any major Federal action which would significantly affect the quality of the human environment and whose alternatives would include consideration of mitigation, a separate EIS would not be necessary for mitigation actions.

Under the FWCA, the action agency which makes the ultimate decision is to include all "justifiable mitigation means and measures" in project formulation. The burden of analyzing the economic impacts of "justifiable" mitigation measures therefore rests primarily with

the project sponsor, who will likely use the Water Resources Council's Principles and Standards to assist in the analysis.

Comment: The substantive requirements of the Service mitigation policy should be consistent with the requirements of the National Environmental Policy Act's implementing regulations and the Water Resources Council's Principles and Standards.

Response: We agree. The proposed and final policy have been developed consistent with the substantive and procedural requirements of these regulations.

Comment: The Environmental Assessment identifies as one of the advantages of the proposed mitigation policy the establishment of "* * * minimum performance standards for FWS recommendations (which) would serve as benchmarks by which the FWS and developers or action agencies * * * could assess individual Service mitigation proposals." However, neither the **Federal Register** notice nor the Environmental Assessment identify or discuss these "benchmarks."

Response: The term "benchmarks" referred to the mitigation goals and planning procedures. Both the proposed policy preamble and its Environmental Assessment discussed these guidelines, explaining their derivation and importance to policy purposes. However, a point of clarification is needed regarding these guidelines. It is the recommendations made by Service personnel that would be measured against these standards, not the mitigation implemented by an action agency. The final policy makes this point explicit.

Comment: Many commentors argued that the proposed policy goes beyond that authorized by law. Specific concern was expressed over the use of words that were mandatory in tone (e.g., "require" and "must") as opposed to advisory. In addition, some commented that the Service has no authority to support or oppose projects as stated in the policy.

Response: The Service agrees that the legal authorities for the mitigation policy do not authorize the Service to exercise veto power over land and water development activities. That understanding was implicit in the proposed policy. Appropriate changes have been made in the policy to more explicitly recognize and signify the advisory nature of the Service responsibility.

However, it should be clearly noted that the Fish and Wildlife Coordination Act places clear mandatory requirements on Federal development agencies falling under that Act's authority to (1) consult with the Service, National Marine Fisheries Service (NMFS) and State agencies responsible for fish and wildlife resources; (2) incorporate such reports and recommendations in one overall project report; (3) provide "full consideration" of the "reports and recommendations;" (4) include in the project plan "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain overall maximum project benefits;" and (5) other requirements related to funding and land acquisition.

The clear intent of Congress was that recommendations developed by the U.S. Fish and Wildlife Service, NMFS, and State agencies responsible for fish and wildlife resources be taken seriously, and we know of no law which prohibits the Service from taking a position for or against a project when making mitigation recommendations.

Comment: The policy will adversely impact developmental interests.

Response: The goal of the policy is to provide for equal consideration of fish and wildlife conservation while facilitating development.

Congress has clearly stated that "wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs" (Pub. L. 85-624, Fish and Wildlife Coordination Act). This advice is further amplified in Senate Report 1981 on the FWCA (84th Congress, 2nd Session (1958)). The Congress recognized that in some instances, the level of dollar benefits to some purposes might have to be diminished "in some slight degree" in order to accomplish the fish and wildlife conservation objectives of the Act.

However, policy issuance should benefit developmental interests. By providing developers with a clear picture of Service mitigation concerns and priorities, the policy will allow developers to anticipate Service mitigation recommendations prior to final decisions on project design and location. By reducing a developer's planning uncertainties, the policy will result in lowered project costs and fewer project delays and conflicts.

Comment: Does the policy present general guidance or minimum required standards? The Service appears to be trying to establish required standards.

Response: The final policy sets out mitigation goals and planning guidance to guide the development of Service mitigation recommendations. It does not require absolute strict adherence to a required standard. Changes have been made to reflect this.

Comment: No mention is made of the State role in mitigation planning to assure a compatible approach. The States' authorities and decisionmaking prerogatives with respect to fish and wildlife resources should be denoted and the States' roles in mitigation should be emphasized further.

Response: A compatible approach is desirable. We have included appropriate changes. However, the policy is solely for Service personnel. There is no intent to infringe on the States' prerogatives.

Comment: The policy should require full public disclosure of Service mitigation analyses, determinations, and recommendations.

Response: We agree that full disclosure of Service analyses, determinations and recommendations during the mitigation process would serve the public interest. All public documents associated with Service recommendations for mitigation on specific land and water developments are available for review in Ecological Services field offices. No change in the policy is necessary.

Comment: The Service should specifically address the acid rain problem in its policy. In particular, the policy should address the impact of Federal policies and programs that support power plant conversions to coal.

Response: The Service currently reviews such Federal actions under NEPA, since these policies and programs are likely to require an EIS. Because acid rain has been highlighted as an Important Resource Problem (IRP) by the Service, environmental analyses which do not adequately address acid rain problems will receive particular attention by Service reviewers. Our comments will be technically reinforced by Service research already being conducted in this area. Since the policy already covers this issue, no change is necessary.

Comment: Could the mitigation policy call for a recommendation as extreme as reflooding of the Mississippi River Valley?

Response: The mitigation policy would not lead to so extreme a recommendation because it does not apply to development actions completed prior to enactment of Service authorities or exempted by those authorities. In those situations where the policy does apply, there will be no recommendations for mitigation over and above the level of impacts associated with a project. This policy acts to minimize impacts of projects, not reverse them.

Comment: Which agency enforces this policy and what power does it have?

Response: This is a policy that applies only to Service personnel. It does not predetermine the actions of other Federal agencies, nor the actions of State agencies or developers. Although the policy statement is not judicially enforceable, the Service will administer the policy by monitoring the mitigation recommendations made by its own personnel.

Comment: Too often land acquired for mitigation does not provide the spectrum of resource values previously available because the managing agency's philosophy prevents it from managing the land for a mix of goals.

Response: Lands acquired for mitigation purposes must provide the specific mitigation benefits for which they were intended. Secondary land uses, such as provision of timber, oil and gas exploration, or recreational benefits, should be attempted where these uses are compatible with the mitigation lands' primary purpose. This concept has been added to the policy.

SPECIFIC COMMENTS ON THE MITIGATION POLICY

(These comments are keyed to sections of the proposed policy.)

I. Purpose

Comment: Why is this policy apparently unconcerned with flora?

Response: Mitigating for fish and wildlife losses necessarily means dealing with the plant communities on which all animal life indirectly depends. When habitat is preserved, it is the plant communities that are the vast bulk of the living material of that habitat.

Plants *per se* are addressed by other authorities of the Service which are not within the scope of this policy, such as the Endangered Species Act and associated regulations.

II. Authority

No significant comments.

III. Scope

Comment: How does the policy affect projects already completed or under construction?

Response: Appropriate changes in the Scope section have been made to clarify policy coverage with regard to completed projects or projects under construction.

Comment: Since Federal permit renewals will result in no new effects on the environment, they should be exempt from the policy.

Response: The permit or license renewal process provides an opportunity to re-evaluate the project. Depending on new scientific information concerning impacts, the adequacy of past developer mitigation efforts, or new authorities, new mitigation recommendations may be necessary.

Not infrequently, permit or license holders use the renewal process as a convenient occasion to seek changes in their permits. Any changes in permit or license holders' activities have to be evaluated to determine whether or not they necessitate new mitigation recommendations.

This policy, therefore, will be used by the Service in permit or license renewal proceedings, keeping in mind that Service recommendations are advisory to action agencies. Appropriate changes were made in the policy to reflect this position.

Comment: Does this policy apply to man-induced wetlands?

Response: Where the Service has the authority and responsibility to recommend mitigation for these habitats, the tenets of the policy shall apply.

Comment: There is a need for a mechanism for evaluating enhancement and a means to differentiate it from mitigation.

Response: Although enhancement is an important concern of the Service, the Service mitigation policy should not serve as the primary vehicle for discussing enhancement. The final policy does differentiate between enhancement and mitigation recommendations by defining enhancement to include measures which would improve fish and wildlife resources beyond that which would exist without the project and which cannot be used to satisfy the appropriate mitigation planning goal. As for evaluating enhancement, it would appear likely that many of the procedures that can be used to evaluate mitigation can be used to evaluate enhancement.

Comment: What is the basis for the policy position that enhancement cannot occur until all losses are compensated? There is no legislative history for this.

Response: Unfortunately, the term "enhancement" suffers from wide differences in semantic usage. The proposed policy used the term to be synonymous with improvements beyond the achievement of full mitigation. This strict interpretation appeared to spark controversy.

The final policy incorporates a different usage of the term. Enhancement is used to describe measures not necessary to accomplish mitigation purposes.

Comment: The policy should credit towards mitigation goals those habitat value increases associated with areas of the habitat which are enhanced by the project. Habitat value should be computed for enhancement activities, and the inclusion of habitat enhancement factors would provide for a more accurate estimate of the project's impact on the environment.

Response: Use of the term "habitat enhancement" to describe development or improvement efforts is confused by this comment. The mitigation policy does not cover enhancement as we have described it. However, where habitat improvement or development caused by a project will result in habitat value increases, it may be considered as mitigation when consistent with the resource category designation criteria and the appropriate mitigation planning goal.

Comment: There should be a clear statement that all opportunities for enhancement of fish and wildlife resources be thoroughly considered and included in project plans to the extent feasible.

Response: We agree. Appropriate changes were made.

IV. Definition of Mitigation

Comment: Some commentors indicated concern over the definition of mitigation as used in the policy. Specific concern was expressed that those aspects of project planning that include avoidance or actions to minimize impacts should be considered good project planning and that mitigation should be confined solely to actions to compensate for resource losses.

Response: The Service agrees that avoidance or actions to minimize impacts should be part of the early design of projects and not just an afterthought. Some consider mitigation to be a separate and distinct process that occurs after project planning has been completed. The legally binding definition of mitigation as used in the regulations to implement the National Environmental Policy Act (NEPA) can have the effect of altering this notion through incorporation of all those actions that can lessen project impacts throughout the planning process.

The policy has been modified to more clearly state that the Service supports and encourages incorporation of features that will reduce adverse impacts on fish and wildlife resources as part of early planning and project design in order to avoid delays or conflicts. But without the emphasis on avoidance and minimization provided by the NEPA regulations' definition, there would be little incentive for development agencies to incorporate such features. The Service, therefore, supports and adopts that definition.

V. Mitigation Policy of the U.S. Fish and Wildlife Service

Comment: A number of documents are referred to in the draft policy. They are essential to the functioning of the policy and should be published as an appendix and otherwise made available for public comment, including public hearings.

Response: The preamble to the proposed policy clearly indicated that the policy was designed to stand on its own. The referenced documents are not essential to the functioning of the policy. For instance, even though Service field personnel will rely basically on the *Habitat Evaluation Procedures* in conducting project analyses, the policy indicates that other methods can be used where appropriate and available. The concept of habitat value has been recognized throughout the history of fish and wildlife management. It is not new.

Regardless of the fact that the policy stands on its own, the referenced documents have undergone varying degrees of public scrutiny independent of the mitigation policy. For instance, a notice of availability and request for public comment was published in the **Federal Register** for the Service Management Plan and Program Management Document on September 29, 1980 (45 FR 64271–64272). A habitat-based evaluation methodology has been under active development in the Service since 1973. The first document officially called the *Habitat Evaluation Procedures* was published in 1976 with the most recent revision in 1980. During this 7 year period, the Nation's top wildlife biologists have been consulted, both within the government and outside. The procedures have been presented at numerous public conferences and have been the subject of intense scrutiny.

Finally, the referenced documents were made available to reviewers. Over 75 requests were made and immediately filled to allow commentors the full benefit of this information in preparing comments, including the group providing this comment. Minor changes were made in the policy to more clearly indicate that the policy can stand on its own.

A. General Principles

Comment: Pursued to its logical conclusion, the concept of fish and wildlife as public trust resources could lead to serious restrictions on the use and management of private lands.

Response: When the concept of personal property rights is exercised in such a way as to jeopardize the interests of the public in fish and wildlife resources on public or private lands, the government may use its authorities to see that any damage to those interests is prevented or mitigated.

The Service does and will attempt to fulfill its duties within its authorities and in a reasonable manner. It is certainly cognizant of the fact that pursuing any concept to its logical extreme may lead to unreasonableness, and will continue to strive to prevent this from happening in its mitigation activities.

Comment: What does "equal consideration" of wildlife conservation mean within the context of the Fish and Wildlife Coordination Act and this mitigation policy?

Response: "Equal consideration" was not defined in the Act or this policy, and has no particular meaning in the context of this policy. This policy only covers Service recommendations, not action agency requirements.

Comment: The proposed Service policy now absolutely precludes support for non-water dependent projects within or affecting waters of the United States. This should be modified to conform to the requirements of Federal regulatory agencies such as the Army Corps of Engineers (COE) and the Environmental Protection Agency (EPA).

Response: The Service policy clearly does not exercise veto power over development actions. Moreover, the Service will execute its responsibilities fully within the context of existing laws and regulations governing environmental reviews. However, the Service feels that wetlands and shallow water habitats should not be subjected to *needless* development because of the public values of these areas. The Service policy statement does not include water dependency as the "sole" criterion for its recommendations. Other factors, including the likelihood of a significant loss, are considered prior to a Service recommendation for support of a project or the "no project" alternative.

The provisions of the policy have been modified to make such recommendations discretionary.

Comment: Congress, not the Service, is the entity that has the authority to require and fund compensation for Federal projects.

Response: We agree. The policy has been modified.

Comment: Mitigation should not be required for an indefinite period of time.

Response: Mitigation is appropriate for the entire time period that habitat losses persist, which includes the life of the project and as long afterwards as the impacts of the project continue to exist. The policy reflects this position.

Comment: Under "General Principles," the policy should seek and endorse novel or imaginative approaches to mitigation.

Response: The Service fully supports development of novel and imaginative approaches that mitigate losses of fish and wildlife, their habitat, and uses thereof, and has been in the forefront of such development. No change is necessary.

Comment: An Indian tribe strongly supports the Department of the Interior's recognition of the role of Indian tribal governments in mitigation planning.

Response: Our national heritage and, in some cases, the livelihood of Indian tribes, can be directly linked with the conservation and use of fish and wildlife resources. Therefore, the U.S. Fish and Wildlife Service will continue to recognize and support Indian tribal governments' efforts to mitigate impacts on these resources.

B. U.S. Fish and Wildlife Service Mitigation Goals by Resource Category

Comment: The mitigation goals for the resource categories were characterized as: reasonable, too strict, or not strict enough.

Response: As was explained in the preamble to the draft policy, the resource categories and their mitigation goals were abstracted from an analysis of actual field recommendations. The designation criteria for the resource categories (replaceability, scarcity, and value for evaluation species) are the basic decision factors used by Service personnel to assess relative mitigation needs. The mitigation goals represent reasonable mitigation expectations for projects, viewed in the light of our two-faceted goal—(1) to conserve, protect and enhance fish and wildlife and their habitats, and (2) to facilitate balanced development of our Nation's natural resources.

Numerous comments were received commending us on the balanced approach embodied in this policy. Since its tenets derive from field recommendations and comments, the credit belongs entirely to our field staff.

Some commentors criticized the mitigation goals. One group felt that one or several of the mitigation goals were too strict. These commentors objected to what they considered to be unreasonably high goals for fish and wildlife mitigation. In contrast to this first group, another set of commentors felt that the goals were not strict enough, and called attention to our legislative responsibility to seek protection for all fish and wildlife resources.

Our response is that the mitigation goals represent the best professional judgment and cumulative experience of Service field supervisors in developing mitigation proposals that would satisfy

our legislative mandates, operate under time and money constraints, and assist in maximizing overall social well-being. The basic concept, therefore, is unchanged in the final policy, although minor changes were made to improve understanding based on the comments.

Comment: Rather than rely on strict inflexible mitigation goals, the Service should use "tradeoff" evaluation procedures in developing mitigation proposals.

Response: It is the responsibility of the Federal action agency to use tradeoff evaluation procedures consistent with the Water Resources Council's Principles and Standards, where applicable, to select a mitigation alternative that will assist in maximizing overall project benefits. The Fish and Wildlife Coordination Act specifies that "the project plan shall include such justifiable means and measures for wildlife purposes as the *reporting agency* (emphasis added) finds should be adopted to obtain maximum overall project benefits." The role of the Service is to represent those public trust resources under its jurisdiction. The proposed policy outlined a system wherein the highest valued resources would be subject to the most protective mitigation recommendations. Few, if any, commentors have disagreed with this valuation perspective. Therefore, no changes were made.

However, many commentors have questioned the reasonableness of a seemingly uncompromising system that did not appear to allow occasional deviations from these goals.

The system is not rigid. As stated in the Purpose section of the policy, the policy advice will be used as guidance for Service personnel, but variations appropriate to individual circumstances are permitted.

Comment: Numerous commentors raised the issue of the somewhat subjective nature of identifying certain species as "important" for the purposes of the policy. In addition, commentors indicated that such distinctions could lead to mis-classification of habitats in terms of resource categories and that clear criteria were needed. Finally, many commentors felt that the artificial distinction of certain species as "important" was both a violation of the public trust and Service legal authorities.

Response: People perceive some species to be more important than others. In the context of biology and ecology, all species are important, serving a useful purpose within the confines of their biological niche. The mitigation policy must address *both* the needs and desires of human society *and* the ecosystem perspective. This is a difficult task. But human decisions concerning fish and wildlife resources in the face of a development action require judgment about the values of what will be lost and the need to avoid or minimize and compensate for loss of such values.

The specific criteria for such determinations are also exceedingly difficult to frame in a National policy context. The importance of a species to society depends on a complex, changing mix of factors. The importance of a species within an ecosystem is also subject to many dynamic factors. But human decisions about the level and type of mitigation necessary for development actions must be made in the absence of perfect information concerning these factors. In addition, the Service biologist reviewing project impacts has severe constraints on the number of species and ecosystem linkages that can be analyzed given funding, personnel and time limitations. Somehow, choices must be made.

We have deleted the term "important species" from the policy and replaced it with a more precise term, "evaluation species." The criteria for selection of evaluation species still includes those species of high resource value to humans or that represent a broader ecological perspective of an area. Other changes have been made related to the determination of resource categories to allow for additional public input and resource agency coordination into such determinations, where appropriate.

The effect of this change is not intended and shall not be interpreted to broaden the scope or extent of application of this policy. But it does remove the implication that species can be ranked against each other in terms of their overall importance to society, which many considered quite beyond the capability of human beings.

Comment: The wording of the policy should clearly indicate that species selected for analysis should only be those demonstrated to actually utilize an area.

Response: We agree, except for situations where fish and wildlife restoration or improvement plans have been approved by State or Federal resource agencies. In that case the analysis will include species identified in such plans. Appropriate clarification has been added to the definition of evaluation species.

Comment: The proper focus of the policy should be the ecosystem rather than particular species.

Response: Aside from the very real technical problems of applying a complex concept such as the ecosystem to mitigation planning, the authorities underlying this policy deal with fish and wildlife and their habitat, rather than ecosystems.

Ecosystems are addressed under this policy in two ways. First, one criterion in the selection of an evaluation species is the biological importance of the species to the functioning of its ecosystem. Secondly, when habitat loss is mitigated, the part of the ecosystem comprising that habitat is itself protected. No changes have been made.

Comment: Recreational use losses may at times have to be directly mitigated. The goal statements should reflect this need.

Response: We agree. Appropriate changes were made.

Comment: In addition to assessing conditions of scarcity from a biogeographical viewpoint, i.e., ecoregions, the policy should also use geopolitical subdivisions, e.g., state boundaries.

Response: As a Federal agency, the Service perceives its major responsibility to be to protect those fish and wildlife and their habitat that are valuable and scarce on a national level, whether or not they transcend state boundaries. However, should State resource agencies wish to outline relative scarcity on a more local basis, Service personnel would certainly assist, whenever practicable. This point has been added to the policy.

Comment: The policy should scale the relative need to achieve a particular mitigation goal to the degree a particular habitat will be impacted. For example, if a half-acre of important habitat is affected by a project and it is part of a one-acre plot, this circumstance should lead to a mitigation recommendation different from the situation where the same half-acre is part of a ten thousand acre area. As drafted, the policy does not reflect the differences in these situations.

Response: The Purpose section of the policy states that it will be used as guidance for Service personnel, but variations appropriate to individual circumstances will be permitted. The relative need to achieve a particular mitigation goal depends primarily on the perceived value of the habitat, its scarcity, and the replaceability of the threatened habitat. Other factors, such as scaling considerations, can combine to modify this general Service perspective on what constitutes appropriate mitigation.

Comment: The resource categories and mitigation goals are general, lack definition, and provide no guidance on habitat value. These categories are all

subject to interpretation by the Service field personnel.

Response: It would be counterproductive, if not impossible, for a national policy to be worded as precisely as the commentor suggests and still be implemented in a reasonable manner under numerous and diverse local circumstances. Words used to describe resource categories and mitigation goals do have generally understood meanings. It is essential that field personnel be allowed to exercise professional judgment in applying resource categories and mitigation goals to specific activities. However, numerous clarifying changes were made based on the comments to increase comprehension and understanding.

Comment: It is essential to other agencies' review to know what general types of habitat will be most important in the U.S. Fish and Wildlife Service mitigation policy. At a minimum, some examples of the types of habitat within each category should be given.

Response: The final policy does give guidance on areas that will be generally considered for Resource Category 1 or 2. Providing examples for all resource categories could be misleading since the same type of habitat may fall into several different resource categories, depending on, among other factors, its relative scarcity and quality from one locale to another across the nation.

On the other hand, field professionals are generally familiar with the quality and abundance of a given type of habitat that is in their area, so it is preferable not to burden them with potentially inappropriate guidelines of this nature.

Comment: The policy should clearly distinguish between upland habitats and the more valuable wetland habitats.

Response: In some cases, upland habitats may be determined to have resource values equal to or greater than wetland habitats, so a policy that solely favored one habitat type over the other would not be in the best public interest. However, the policy has been changed to indicate that certain habitats within Service-identified Important Resource Problems (IRPs) and special aquatic sites should be given special consideration as Resource Category 1 or 2. The IRPs contain a predominance of wetland coastal areas.

Comment: If you build something in a habitat, it just changes it to another habitat that some other animal or fish lives in—including the human being, although the Service does not seem to appreciate that. For example, if you build a highway, it is bad for dogs, rabbits, opossums and field rats and such that get run over by cars and trucks, but it is good for crows and buzzards that eat dead meat.

Response: The Service has not come across many instances where crows and buzzards could be considered scarce, but when such a circumstance can be documented and verified, the Service will certainly try to protect and enhance valuable highway habitat.

• *Resource Category 1*

Comment: A literal interpretation of the Resource Category 1 mitigation goal would require absolutely no habitat loss—not even a nature trail. Resource Category 1 should be deleted.

Response: Not all environmental changes are adverse to the habitat of a fish and wildlife resource. If a nature trail resulted in an insignificant impact on habitat value that was determined not to be adverse, then the Service would not recommend against it. The policy has been clarified to reflect this point.

Comment: Endangered and threatened species should be included as part of Resource Category 1.

Response: It would be inappropriate to expand the scope of the Mitigation Policy to include threatened and endangered species. The treatment of these species is addressed in an extensive body of complex and detailed legislation and regulation. The Congress has legislated very specific and precise law with regard to threatened and endangered species. Inclusion of these species under this policy would only confuse the issue and compound the difficulties involved in implementation of the Endangered Species Act and its associated regulations. Other reasons are discussed in the scope section of the final policy.

Comment: For all practical purposes, Resource Categories 1 and 2 adopt a "no growth" policy.

Response: The U.S. Fish and Wildlife Service is not advocating a "no growth" mitigation policy. The means and measures to achieve mitigation for Resource Categories 1 and 2 are designed to provide some flexibility so that limited growth can occur in an environmentally prudent manner. The policy reflects the national consensus that some habitats are of exceptional public value and should be carefully conserved, as evidenced in the Wild and Scenic Rivers Act (Pub. L. 90–542), the Wilderness Act (Pub. L. 88–577), and the National Trails System Act (Pub. L. 94–527).

• *Resource Category 2*

Comment: It is ill-advised to support in-kind replacement involving trading habitat for lesser value habitat which is then improved to support the species affected by the project. It takes too long, and in the meantime, populations supported by the habitat on the project site are lost.

Response: If the period required for improving the replacement habitat to the appropriate condition was exceedingly long, this may be one indication that the habitat at risk was unique or irreplaceable and actually belonged in Resource Category 1. In that case in-kind replacement through improvement of lesser quality habitat would be an inappropriate mitigation recommendation. Also, additional measures aimed at population restoration could be recommended to restock the area, provided suitable habitat was available to support the stocked species. No changes were made.

Comment: One commenter was perturbed by an apparently rigid insistence by the policy of in-kind replacement of lost habitat. The commentor pointed out that there could be occasions in which in-kind habitat was not available to a project sponsor.

Response: The policy guideline for Resource Category 2 includes an exception when "* * * in-kind replacement is not physically or biologically attainable". No change was necessary.

Comment: The policy appears to insist upon "acre-for-acre" replacement of in-kind habitat.

Response: The policy does not insist on "acre-for-acre" replacement of in-kind habitat. The mitigation planning goals involving in-kind replacement specifically ask for replacement of in-kind habitat *value*. This point has been further clarified in the definitions section, throughout the policy, and in the policy preamble.

• *Resource Category 3*

Comment: The mitigation goal for Resource Category 3 is not authorized by law and will be difficult to implement due to professional disagreement on satisfactory achievement.

Response: Under the Fish and Wildlife Coordination Act, the Service has the responsibility to recommend compensation for the loss of fish and wildlife resources. The Act does not restrict compensation to in-kind compensation. By recommending out-of-kind compensation under certain circumstances, the Service increases the range of options that developers may use to mitigate project impacts to include development and improvement of marginal resources different from those lost. However, modifications have been made in the policy to indicate that

in-kind replacement is preferred for Resource Category 3.

Comment: The mitigation goal for Resource Category 3 should emphasize that in-kind habitat value replacement is preferable to out-of-kind replacement.

Response: We agree. This point has been brought out in the final policy statement.

Comment: Although out-of-kind replacement is acceptable for Resource Category 3 losses and, under certain circumstances, may be accepted for Resource Category 2 losses, the policy should advise against replacement of rare habitat types for more common habitat types.

Response: We agree with the commentor's point and expect that Service field personnel will recommend mitigation alternatives that incorporate this concept, to the extent practicable. The Service is entirely in favor of preserving and/or promoting habitat diversity. No changes were necessary.

• *Resource Categories 4 and 5*

Comment: Compensation should be included as a means for satisfying the mitigation goal for Resource Category 4.

Response: Appropriate language changes have been made to allow for such recommendations.

Comment: Habitats encompassed by Resource Categories 4 and 5 are the only areas wherein significant increases in fish and wildlife can be realized through habitat improvement. Yet, the mitigation goals for these categories allow continual loss of these areas which possess great potential for improvements in carrying capacity.

Response: The Service appreciates the significance of areas with relatively low existing habitat values with respect to their potential for carrying capacity improvements. In fact, the Service may recommend improvement of these areas' habitat values to mitigate for unavoidable losses in Resource Categories 2 and 3. In addition, where these areas are included in a project planning area and are not appropriate for mitigation efforts, the Service will recommend that all opportunities for enhancement of these areas be thoroughly considered and included in project plans, where practicable.

We have amended the policy to include the above guidance.

Comment: Resource Category 5 is confusing and unnecessary. All habitat has some value, no matter how low. It should be redefined or deleted.

Response: We agree. This resource category has been deleted from the final policy.

C. Mitigation Planning Procedures

1. *Mitigation Goals*

Comment: Developers, Federal resource agencies, and the public should participate with the Service and State agencies in making Resource Category determinations and in developing mitigation proposals.

Response: Developers, as well as other members of the public, may provide information that will assist the Service in making Resource Category determinations. This opportunity has been noted in the final policy statement. Moreover, where these parties' inputs will significantly aid in development of mitigation proposals that will adequately satisfy mitigation planning goals, the Service will welcome their input.

Comment: It is hoped that reclassification of habitats in Resource Category 3 to Resource Categories 2 or 1 can be readily employed if and when certain habitats become more scarce.

Response: Resource Category determinations are made on the basis of conditions likely to occur without the project. If those conditions later change, the Resource Category of a given habitat can be redetermined.

However, once a mitigation plan in connection with a given project has been agreed upon, the U.S. Fish and Wildlife Service will not provide new or additional recommendations except under limited circumstances as outlined in the policy under the scope section.

2. *Impact Assessment Methods*

Comment: The policy does not appear to recognize that development activities may also show positive environmental effects. For example, cleared spaces beneath power lines can provide browsing areas for wildlife. Such positive effects should be factored into the mitigation assessment process.

Response: We agree. This point has been included in the final policy statement. The final policy further indicates that the Service and other State and Federal resource agencies shall make the determination of whether a biological change constitutes a beneficial or adverse impact. However, when determining mitigation needs for a planning area, the Service will utilize these policy guidelines to determine whether these positive effects can be applied towards mitigation.

Comment: The draft policy indicates "no net loss" as a goal for certain Resource Categories but it is unclear in defining the time period allowed to restore the land to its original value as in the case of strip mining operations. Maintenance of "no net loss" throughout the life of a long-term operation is not possible.

Response: The policy states that the net biological impact of a specific project proposal is the difference in predicted habitat value between the future with the action and the future without the action. This is based on the procedures established by the Water Resources Council's Principles and Standards. The future with the project determination includes consideration of losses during the life of the project. Under the policy, if the disturbed habitat is of sufficient value for evaluation species to warrant a Resource Category 2 or 3 level determination, the Service will provide recommendations for "no net loss" over the life of the project. The ability of the project sponsor to achieve this goal depends on many factors that cannot be predicted in advance. In many cases, it will be possible to achieve this goal. No change was necessary.

Comment: The with and without analyses should make allowances for human activities and natural species successions which can reasonably be expected to take place in the project area.

Response: We agree. Appropriate changes have been made in this policy.

Comment: Many commentors disagreed with the emphasis placed on the *Habitat Evaluation Procedures* (HEP) within the Service policy statement. Some commentors felt it should be de-emphasized, whereas others felt it deserved further emphasis.

Response: Although references to the more technical aspects of HEP have been deleted, the methodology itself remains one of the Service's more important impact assessment tools. The policy does not recommend exclusive use of HEP, since time or resource contraints may, in some cases, show alternative methods to be more practical. Where HEP habitat value assessments do not fully capture important biological characteristics within a planning area, Service personnel will use supplemental data, methodologies, and/or professional judgment to develop appropriate mitigation proposals.

Comment: What are the "other habitat evaluation systems" alluded to in the policy's section on impact assessment methods? This reference is very vague.

Response: Other systems can include the Habitat Evaluation System (HES) developed by the Department of the Army, and the Instream Flow Incremental Methodology (IFIM) of the U.S. Fish and Wildlife Service. Additional systems are referenced by the Water Resources Council in a draft document entitled, "Analysis of

Wetland Evaluation Procedures" and other publications. This information is not appropriate for inclusion into the policy so no change was made.

Comment: If other methodologies are found to be more appropriate for use than the Instream Flow Incremental Methodology (IFIM) for measuring flow impacts, they should be used.

Response: We agree. The final policy does state, however, that consideration should be given to the use of the IFIM.

Comment: Hopefully, this policy will stop the piecemeal destruction of valuable habitat, especially in areas like the Florida Keys where insidious lot-by-lot development continues in low wetland sites with the concurrence of the U.S. Fish and Wildlife Service.

Response: The Service does not concur with piecemeal development where significant resource losses will occur. Cumulative impacts are addressed by this policy. The Service is sensitive to this loss of habitat and will seek mitigation consistent with this policy. No change was necessary.

Comment: Population information should be included as an additional factor in determining mitigation requirements.

Response: We agree. Although population mitigation was an implicit part of the proposed policy, further language clarifying this point has been added to the final policy statement.

Comment: Professional judgment should be used as an alternative method for assessing project impacts.

Response: We agree that this is a valuable method that has been in use for many years. It is difficult to improve on informed and considered scientific judgment by an expert. The Service will continue to rely heavily on this approach. The policy was changed to reflect this emphasis.

3. *Mitigation Recommendations*

Comment: Service recommendations should be timely.

Response: The proposed and final policy specifically require Service personnel to present mitigation recommendations "* * * at the earliest possible stage of project planning to assure maximum consideration." This point has been echoed throughout Service management documents. Service personnel can generally provide timely guidance provided developers make a point of notifying them of proposed projects still in the planning stage and provided Federal action agencies supply sufficient transfer funding with which to conduct environmental investigations. Under Section 2(e) of the Fish and Wildlife Coordination Act, Federal action agencies are authorized to transfer funds to the Service "* * * as may be necessary to conduct all or part of the investigations required to carry out the purposes of * * * (Section 2 of the Act)." The Service uses these transfer funds to conduct project-specific investigations.

Comment: Requiring field biologists to consider cost-effectiveness in providing mitigation recommendations is beyond their capability and may conflict with the lead agencies' role as the determiner of overall public interest. Habitat protection should be a higher priority than cost-effectiveness.

Response: The proposed policy did not require a cost-effectiveness analysis by Service biologists in a formal sense. We fully agree that Service personnel must perceive their responsibility to be analysis and recommendations based on the biological aspects of project proposals. There is no intent to require Service biologists to do a formal economic analysis for which they are not trained nor for which there is clear legislative direction. However, the Service has a responsibility to the public to give consideration to cost while recommending ways to conserve fish and wildlife. The policy has been changed to reflect this need for consideration of other factors.

Comment: The Federal action agency should have the option of non-Service expertise to develop mitigation measures in those instances where the Service cannot meet lead agency program requirements.

Response: Although the Service cannot prevent other agencies from utilizing biological expertise from non-Federal sources to develop mitigation plans, the Fish and Wildlife Coordination Act specifically authorizes the Secretary of the Interior to prepare a report and recommendations on the fish and wildlife aspects of projects, including mitigation. This report and recommendations are to receive "full consideration" by the development agency. If the Federal action agency involves the Service early and provides sufficient transfer funds, then the Service should be able to meet their needs. No change in the policy was necessary.

Comment: Several mitigation proposals should be prepared for each alternative structural or non-structural plan.

Response: The Service is willing to prepare multiple proposals provided funds and time are available.

Comment: Some commentors felt that concurrent and proportionate funding of mitigation may not always lead to optimal mitigation and should not be a rigid requirement. Other commentors strongly supported concurrent and proportionate funding.

Response: The Water Resources Council's Principles and Standards require "* * * *at least* concurrent and proportionate implementation with other major project features, except where such concurrent and proportionate mitigation is physically impossible" (emphasis added).

We agree with the Council, and endorse expenditure of funds at an earlier stage of project planning when this will lead to more effective mitigation. Appropriate changes to the policy on this matter have been made.

Comment: Mitigation costs should include the cost of managing the acquired land for the life of the project, and the value of present and future timber and crops on acquired land. In addition, an environmental benefit/cost analysis should be developed for each project, and Congress should not authorize a project unless the project plan includes the proposed mitigation program and all its costs, including the cost of lost timber productivity and other resources.

Response: Costing of projects is determined by the Water Resource Council's Principles and Standards and is therefore beyond the jurisdiction of this policy. We point out that Service policy does not preclude timber harvest or other resource recovery operations on mitigation lands when the activity is compatible with fish and wildlife management objectives.

Comment: The Service mitigation policy should more clearly note that fee-simple land acquisition should be a measure of last resort.

Response: The policy statement has undergone further modification to more clearly stress the conditions when land acquisition is to be recommended by Service personnel. In the future, the Service will place far greater emphasis on developing mitigation recommendations that avoid, minimize, or rectify impacts in order to reduce the need for compensation lands. Amplification of this point may be seen in the section on mitigation planning procedures.

Comment: If some interest in land must be acquired, areas of marginal productivity should be considered first. Such underdeveloped land would benefit from better management of its productive capacity and respond more vigorously than land already at higher levels of production.

Response: We agree that special consideration should be given to marginal lands, and have changed the policy accordingly.

Comment: Who owns land acquired for mitigation purposes?

Response: Depending on the individual circumstances of the project, land acquired through fee-simple title is usually owned either by the Federal or State government and administered by appropriate Federal or State resource agencies. Where wildlife easements are acquired, the land belongs to the property owner, and the easement right to the Federal or State government.

Comment: The policy should require Service personnel to identify the authority to be used in implementing any mitigation recommendations that are made.

Response: The final policy clearly identifies the legal authorities under which the Service is expected to develop mitigation recommendations. In addition, the policy only applies to Service recommendations and is not an instrument directing legal research in individual circumstances. It would be inappropriate to instruct our personnel to identify the implementing authority for the development agencies which are fully aware of the authorities available to implement Service recommendations. In the case of projects to be authorized by Congress, authorities to implement mitigation can be, and increasingly have been, spelled out.

Comment: The policy neglects to indicate the necessary process if an agency does not agree with Service mitigation recommendations.

Response: This process has already been established for most Federal agencies. If the project planners and the Service field office cannot agree on a modified or substitute proposal for mitigation, the matter often is referred upwards to the next highest level. Higher management levels are then generally able to resolve the issue quickly, although the Federal action agency has the final say. No change was necessary.

Comment: Mitigation recommendations should ensure that habitats which are preserved are adequate in size and contiguous to ensure species survival and ecosystem functioning.

Response: We agree. This point has not, however, been added to the policy since it is standard operating procedure at the field level.

Comment: Improvement of public use prospects within a project area should not be considered mitigation for habitat value losses. Development of public access is legitimate mitigation only when public uses are lost as a result of project action.

Response: We agree. Construction of public access facilities does not replace habitat lost or degraded and may even reduce wildlife habitat and invite degradation by making an area more accessible to more people. Construction of public use facilities may be in the public interest but should not be disguised as mitigation for loss or degradation of wildlife habitat. This point has been added to the policy.

4. *Follow-up*

Comment: The Service should initiate post-project evaluation studies, as well as encourage, support, and participate in these studies.

Response: We agree and will do so within the constraints of time, personnel and cost. The Service will initiate additional follow-up studies when funds are provided by the Federal action agency. The policy has been changed to reflect this.

Comment: Follow-up studies must be designed so as to separate the effects on fish and wildlife populations of implementing mitigation recommendations from other causes of changes in species numbers. This has not been the case in past studies.

Response: We agree in principle, but point out that this is a very difficult task technically, and that the conclusions in this regard rarely withstand vigorous analysis.

Nonetheless, distinguishing the true causes of population changes should be one of the goals of the follow-up study.

Comment: The policy should indicate what actions would occur if post-project evaluation shows mitigation recommendations are not being achieved as agreed to by the developer.

Response: We agree. The policy now includes provisions instructing Service personnel to recommend corrective action in such situations.

Appendix A

No significant comments.

Appendix B

Comment: Why not include more intensive management of remaining habitat as a way of reducing net habitat loss?

Response: We agree, and have modified the policy accordingly in the Means and Measures section, which has since been integrated into the body of the final policy.

The section clearly places priority on increased habitat management as a means of replacing habitat losses, and additionally stresses use of existing public lands to accomplish these ends.

Comment: A mitigation recommendation of "No project" is not logical or valid as a mitigation measure.

Response: The Council on Environmental Quality's definition of mitigation, which has been adopted in this policy, clearly states that mitigation includes ". . . avoiding the impact altogether by not taking a certain action or parts of an action. . . ." Obviously, a mitigation recommendation of "No project" falls under this subset of the definition, since a project's impact can be avoided *altogether* by a decision not to construct a project.

Appendix C

Comment: The definition of the word "practicable" should be amended to denote that the burden of identifying alternative mitigation measures and of conducting a searching inquiry into their practicability rests with the Service as well as the Federal action agency.

Response: The policy indicates that the Service will strive to provide mitigation recommendations that represent the best judgment of the Service on the most effective means and measures to achieve the mitigation goal, including consideration of cost.

Comment: A definition for "developments" (as used in Section V.A., "General Principles") should be provided in Appendix C.

Response: "Development" is a general-purpose term encompassing those activities falling under the scope of Service mitigation authorities cited within this policy. For example, if timber harvesting activities require preparation of an EIS, or involves waters of the U.S. and requires the issuance of a Federal permit or license, the Service would provide mitigation recommendations consistent with the policy.

NATIONAL ENVIRONMENTAL POLICY ACT REQUIREMENTS

The Service has prepared an Environmental Assessment of this final policy. Based on an analysis of the Environmental Assessment, the Director of the U.S. Fish and Wildlife Service has concluded that the final action is not a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347). Thus the policy does not require an Environmental Impact Statement (EIS).

The Environmental Assessment and Finding of No Significant Impact will be furnished upon request.

REGULATORY ANALYSIS

This policy statement has been issued in conformity with the Department of the Interior's rulemaking requirements, which apply to actions meeting the broad definition of a rule set forth in the Administrative Procedures Act, 5 U.S.C.

551(4) and 43 CFR Part 14.2(e) (1980). This statement is not intended to be judicially enforceable. It will not be codified. It does not create private rights. It only guides internal Service administration and is not to be inflexibly applied by Service personnel. The Department had previously determined that the proposed policy was not a significant rule and did not require a regulatory analysis under Executive Order 12044 and 43 Part 14. No significant changes were made in the final policy that required a new determination.

ACKNOWLEDGEMENTS

The primary author of this final policy is John Christian, Leader, Policy Group—Environment, U.S. Fish and Wildlife Service, (202) 343-7151. Primary support for policy development was provided by policy analysts Nancy Chu, Scott Cameron, and Peter Ciborowski; and Ecological Services Washington Office and field personnel. Manuscript preparation was accomplished by Roberta Hissey, Karen Baker, Carol Prescott, and Jinethel Baynes.

Accordingly, the mitigation policy of the U.S. Fish and Wildlife Service is set forth as follows:

U.S. FISH AND WILDLIFE SERVICE MITIGATION POLICY

I. PURPOSE

This document establishes policy for U.S. Fish and Wildlife Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, their habitats, and uses thereof. It will help to assure consistent and effective recommendations by outlining policy for the levels of mitigation needed and the various methods for accomplishing mitigation. It will allow Federal action agencies and private developers to anticipate Service recommendations and plan for mitigation measures early, thus avoiding delays and assuring equal consideration of fish and wildlife resources with other project features and purposes. This policy provides guidance for Service personnel but variations appropriate to individual circumstances are permitted.

This policy supersedes the December 18, 1974, policy statement entitled "Position Paper of the Fish and Wildlife Service Relative to Losses to Fish and Wildlife Habitat Caused by Federally Planned or Constructed Water Resource Developments" and the Service River Basin Studies Manual Release 2.350 entitled "General Bureau Policy on River Basin Studies."

II. AUTHORITY

This policy is established in accordance with the following major authorities: (See Appendix A for other authorities.)

Fish and Wildlife Act of 1956 (16 U.S.C. 742(a)–754). This Act authorizes the development and distribution of fish and wildlife information to the public, Congress, and the President, and the development of policies and procedures that are necessary and desirable to carry out the laws relating to fish and wildlife including: (1) ". . . take such steps as may be required for the development, advancement, management, conservation, and protection of the fisheries resources;" and (2) ". . . take such steps as may be required for the development, management, advancement, conservation, and protection of wildlife resources through research . . . and other means."

Fish and Wildlife Coordination Act (16 U.S.C. 661–667(e)). This Act authorizes the U.S. Fish and Wildlife Service, National Marine Fisheries Service (NMFS), and State agencies responsible for fish and wildlife resources to investigate all proposed Federal undertakings and non-Federal actions needing a Federal permit or license which would impound, divert, deepen, or otherwise control or modify a stream or other body of water and to make mitigation and enhancement recommendations to the involved Federal agency. "Recommendations . . . shall be as specific as practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages." In addition, the Act requires that wildlife conservation be coordinated with other features of water resource development programs.

Determinations under this authority for specific projects located in estuarine areas constitute compliance with the provisions of the Estuary Protection Act. (See Appendix A.)

Watershed Protection and Flood Prevention Act (16 U.S.C. 1001–1009). This Act allows the Secretary of the Interior to make surveys, investigations, and ". . . prepare a report with recommendations concerning the conservation and development of wildlife resources . . ." on small watershed projects.

National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347). This Act and its implementing regulations (40 CFR Part 1500–1508) requires that the U.S. Fish and Wildlife Service be notified of all major Federal actions affecting fish and wildlife resources and their views and recommendations solicited. Upon completion of a draft Environmental Impact Statement, the Service is required to review it and make comments and recommendations, as appropriate. In addition, the Act provides that "the Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."

III. SCOPE

A. Coverage

This policy applies to all activities of the Service related to the evaluation of impacts of land and water developments and the subsequent recommendations to mitigate those adverse impacts except as specifically excluded below. This includes: (1) investigations and recommendations for all actions requiring a federally issued permit or license that would impact waters of the U.S.; (2) all major Federal actions significantly affecting the quality of the human environment; and (3) other Federal actions for which the Service has legislative authority or executive direction for involvement including, but not limited to: coal, minerals, and outer continental shelf lease sales or Federal approval of State permit programs for the control of discharges of dredged or fill material.

B. Exclusions

This policy does not apply to threatened or endangered species. The requirements for threatened and endangered species are covered in the Endangered Species Act of 1973 and accompanying regulations at 50 CFR Parts 17, 402, and 424. Under Section 7 of the Endangered Species Act, as amended, all Federal agencies shall ensure that activities authorized, funded, or carried out by them are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Mitigating adverse impacts of a project would not in itself be viewed as satisfactory agency compliance with Section 7. Furthermore, it is clear to the Service that Congress considered the traditional concept of mitigation to be inappropriate for Federal activities impacting listed species or their critical habitat.

This policy does not apply to Service recommendations for Federal projects completed or other projects permitted or licensed prior to enactment of Service authorities (unless indicated otherwise in a specific statute) or specifically exempted by them and not subject to reauthorization or renewal. It also does not apply where mitigation plans have already been agreed to by the Service, except where new activities or changes in current activities would result in new impacts or where new authorities, new scientific information, or developer failure to implement agreed upon recommendations make it necessary. Service personnel involved in land and water development investigations will make a judgment as to the applicability of the policy for mitigation plans under development and not yet agreed upon as of the date of final publication of this policy.

Finally, this policy does not apply to Service recommendations related to the enhancement of fish and wildlife resources. Recommendations for measures which improve fish and wildlife resources beyond that which would exist without the project and which cannot be used to satisfy the

appropriate mitigation planning goal should be considered as enhancement measures. The Service strongly supports enhancement of fish and wildlife resources. The Service will recommend that all opportunities for fish and wildlife resource enhancement be thoroughly considered and included in project plans, to the extent practicable.

IV. DEFINITION OF MITIGATION

The President's Council on Environmental Quality defined the term "mitigation" in the National Environmental Policy Act regulations to include: "(a) avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitute resources or environments." (40 CFR Part 1508.20(a–e)).

The Service supports and adopts this definition of mitigation and considers the specific elements to represent the desirable sequence of steps in the mitigation planning process. (See Appendix B for definitions of other important terms necessary to understand this policy.)

V. MITIGATION POLICY OF THE U.S. FISH AND WILDLIFE SERVICE

The overall goals and objectives of the Service are outlined in the Service Management Plan and an accompanying Important Resource Problems document which describes specific fish and wildlife problems of importance for planning purposes. Goals and objectives for Service activities related to land and water development are contained in the Habitat Preservation Program Management Document. The mitigation policy was designed to stand on its own; however, these documents will be consulted by Service personnel to provide the proper perspective for the Service mitigation policy. They are available upon request from the Director, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

A. General Policy

The mission of the U.S. Fish and Wildlife Service is to:

PROVIDE THE FEDERAL LEADERSHIP TO CONSERVE, PROTECT AND ENHANCE FISH AND WILDLIFE AND THEIR HABITATS FOR THE CONTINUING BENEFIT OF THE PEOPLE.

The goal of Service activities oriented toward land and water development responds to Congressional direction that fish and wildlife resource conservation receive equal consideration and be coordinated with other features of Federal resource development and regulatory programs through effective and harmonious planning, development, maintenance and coordination of fish and wildlife resource conservation and rehabilitation in the United States, its territories and possessions. The goal is to:

CONSERVE, PROTECT AND ENHANCE FISH AND WILDLIFE AND THEIR HABITATS AND FACILITATE BALANCED DEVELOPMENT OF THIS NATION'S NATURAL RESOURCES BY TIMELY AND EFFECTIVE PROVISION OF FISH AND WILDLIFE INFORMATION AND RECOMMENDATIONS.

Fish and wildlife and their habitats are public resources with clear commercial, recreational, social, and ecological value to the Nation. They are conserved and managed for the people by State, Federal and Indian tribal Governments. If land or water developments are proposed which may reduce or eliminate the public benefits that are provided by such natural resources, then State and Federal resource agencies and Indian tribal agencies have a responsibility to recommend means and measures to mitigate such losses. Accordingly:

IN THE INTEREST OF SERVING THE PUBLIC, IT IS THE POLICY OF THE U.S. FISH AND WILDLIFE SERVICE TO SEEK TO MITIGATE LOSSES OF FISH, WILDLIFE, THEIR HABITATS, AND USES THEREOF FROM LAND AND WATER DEVELOPMENTS.

In administering this policy, the Service will strive to provide information and recommendations that fully support the Nation's need for fish and wildlife resource conservation as well as sound economic and social development through balanced multiple use of the Nation's natural resources. The Service will actively seek to facilitate needed development and avoid conflicts and delays through early involvement in land and water development planning activities in advance of proposals for specific projects or during the early planning and design stage of specific projects.

This should include early identification of resource areas containing high and low habitat values for important species and the development of ecological design information that outlines specific practicable means and measures for avoiding or minimizing impacts. The former can be used by developers to site projects in the least valuable areas. This could possibly lower total project costs to development interests. These actions are part of good planning and are in the best public interest.

The early provision of information to private and public agencies in a form which enables them to avoid or minimize fish and wildlife losses as a part of initial project design is the preferred form of fish and wildlife conservation.

B. U.S. Fish and Wildlife Service Mitigation Planning Goals by Resource Category

The planning goals and guidelines that follow will be used to guide Service recommendations on mitigation of project impacts. Four Resource Categories are used to indicate that the level of mitigation recommended will be consistent with the fish and wildlife resource values involved.

The policy covers impacts to fish and wildlife populations, their habitat and the human uses thereof. However, the primary focus in terms of specific guidance is on recommendations related to habitat value losses. In many cases, compensation of habitat value losses should result in replacement of fish and wildlife populations and human uses. But where it does not, the Service will recommend appropriate additional means and measures.

RESOURCE CATEGORY 1

a. Designation Criteria

Habitat to be impacted is of high value for evaluation species and is unique and irreplaceable on a national basis or in the ecoregion section.

b. Mitigation Goal

No Loss of Existing Habitat Value.

c. Guideline

The Service will recommend that all losses of existing habitat be prevented as these one-of-a-kind areas cannot be replaced. Insignificant changes that do not result in adverse impacts on habitat value may be acceptable provided they will have no significant cumulative impact.

RESOURCE CATEGORY 2

a. Designation Criteria

Habitat to be impacted is of high value for evaluation species and is relatively scarce or becoming scarce on a national basis or in the ecoregion section.

b. Mitigation Goal

No Net Loss of In-Kind Habitat Value.

c. Guideline

The Service will recommend ways to avoid or minimize losses. If losses are likely to occur, then the Service will recommend ways to immediately rectify them or reduce or eliminate them over time. If losses remain likely to occur, then the Service will recommend that those losses be compensated by replacement of the same kind of habitat value so that the total loss of such in-kind habitat value will be eliminated.

Specific ways to achieve this planning goal include: (1) physical modification of replacement habitat to convert it to the same type lost; (2) restoration or rehabilitation of previously altered habitat; (3) increased management of similar replacement habitat so that the in-kind value of the lost habitat is replaced, or (4) a combination of these measures. By replacing habitat value losses with similar habitat values, populations of species associated with that habitat may remain relatively stable in the area over time. This is generally referred to as in-kind replacement.

Exceptions: An exception can be made to this planning goal when: (1) different habitats and species available for replacement are determined to be of greater value than those lost, *or* (2) in-kind replacement is not physically or biologically attainable in the ecoregion section. In either case, replacement involving different habitat kinds may be recommended provided that the total value of the habitat lost is recommended for replacement (see the guideline for Category 3 mitigation below).

RESOURCE CATEGORY 3

a. Designation Criteria

Habitat to be impacted is of high to medium value for evaluation species and is relatively abundant on a national basis.

b. Mitigation Goal

No Net Loss of Habitat Value While Minimizing Loss of In-Kind Habitat Value.

c. Guideline

The Service will recommend ways to avoid or minimize losses. If losses are likely to occur, then the Service will recommend ways to immediately rectify them or reduce or eliminate them over time. If losses remain likely to occur, then the Service will recommend that those losses be compensated by replacement of habitat value so that the total loss of habitat value will be eliminated.

It is preferable, in most cases, to recommend ways to replace such habitat value losses in-kind. However, if the Service determines that in-kind replacement is not desirable or possible, then other specific ways to achieve this planning goal include: (1) substituting different kinds of habitats, or (2) increasing management of different replacement habitats so that the value of the lost habitat is replaced. By replacing habitat value losses with different habitats or increasing management of different habitats, populations of species will be different, depending on the ecological attributes of the replacement habitat. This will result in no net loss of total habitat value, but may result in significant differences in fish and wildlife populations. This is generally referred to as out-of-kind replacement.

RESOURCE CATEGORY 4

a. Designation Criteria

Habitat to be impacted is of medium to low value for evaluation species.

b. Mitigation Goal

Minimize Loss of Habitat Value.

c. Guideline

The Service will recommend ways to avoid or minimize losses. If losses are likely to occur, then the Service will recommend ways to immediately rectify them or reduce or eliminate them over time. If losses remain likely to occur, then the Service may make a recommendation for compensation, depending on the significance of the potential loss.

However, because these areas possess relatively low habitat values, they will likely exhibit the greatest potential for significant habitat value improvements. Service personnel will fully investigate these areas' potential for improvement, since they could be used to mitigate Resource Category 2 and 3 losses.

C. Mitigation Planning Policies

1. State-Federal Partnership

a. The U.S. Fish and Wildlife Service will fully coordinate activities with those State agencies responsible for fish and wildlife resources, the National Marine Fisheries Service (NMFS) and the Environmental Protection Agency (EPA) related to the investigation of project proposals and development of mitigation recommendations for resources of concern to the State, NMFS or EPA.

b. Service personnel will place special emphasis on working with State agencies responsible for fish and wildlife resources, NMFS and EPA to develop compatible approaches and to avoid duplication of efforts.

2. Resource Category Determinations

a. The Service will make Resource Category determinations as part of the mitigation planning process. Such determinations will be made early in the planning process and transmitted to the Federal action agency or private developer to aid them in their project planning, to the extent practicable.

b. Resource Category determinations will be made through consultation and coordination with State agencies responsible for fish and wildlife resources and other Federal resource agencies, particularly the National Marine Fisheries Service and the Environmental Protection Agency, whenever resources of concern to those groups are involved. Where other elements of the public, including development groups, have information that can assist in making such determinations, the Service will welcome such information.

c. All Resource Category determinations will contain a technical rationale consistent with the designation criteria. The rationale will: (1) outline the reasons why the evaluation species were selected; (2) discuss the value of the habitat to the evaluation species; and (3) discuss and contrast the relative scarcity of the fish and wildlife resource on a national and ecoregion section basis.

Note.—If the State agency responsible for fish and wildlife resources wishes to outline scarcity on a more local basis, U.S. Fish and Wildlife Service personnel should assist in developing such rationale, whenever practicable.

d. When funding, personnel, and available information make it practicable, specific geographic areas or, alternatively, specific habitat types that comprise a given Resource Category should be designated in advance of development. Priority for predesignation will be placed on those areas that are of high value for evaluation species and are subject to development pressure in the near future. Such predesignations can be used by developers or regulators to determine the least valuable areas for use in project planning and siting considerations.

e. The following examples should be given special consideration as either Resource Category 1 or 2:

(1) Certain habitats within Service-identified Important Resource Problem (IRP) areas. Those IRPs dealing with threatened or endangered species are not covered by this policy. (See Scope)

(2) Special aquatic and terrestrial sites including legally designated or set-aside

areas such as sanctuaries, fish and wildlife management areas, hatcheries, and refuges, and other aquatic sites such as floodplains, wetlands, mudflats, vegetated shallows, coral reefs, riffles and pools, and springs and seeps.

3. Impact Assessment Principles

a. Changes in fish and wildlife productivity or ecosystem structure and function may not result in a biologically adverse impact. The determination as to whether a biological change constitutes an adverse impact for which mitigation should be recommended is the responsibility of the Service and other involved Federal and State resource agencies.

b. The net biological impact of a development proposal (or alternatives) is the difference in predicted biological conditions between the future with the action and the future without the action. If the future without the action cannot be reasonably predicted and documented by the project sponsor, then the Service analysis should be based on biological conditions that would be expected to exist over the planning period due to natural species succession or implementation of approved restoration/improvement plans or conditions which currently exist in the planning area.

c. Service review of project impacts will consider, whenever practicable:

(1) The total long-term biological impact of the project, including any secondary or indirect impacts regardless of location; and (2) any cumulative effects when viewed in the context of existing or anticipated projects.

d. The *Habitat Evaluation Procedures* will be used by the Service as a basic tool for evaluating project impacts and as a basis for formulating subsequent recommendations for mitigation subject to the exemptions in the Ecological Services Manual (100 ESM 1). When the *Habitat Evaluation Procedures* do not apply, then other evaluation systems may be used provided such use conforms with policies provided herein.

e. In those cases where instream flows are an important determinant of habitat value, consideration should be given to the use of the Service's Instream Flow Incremental Methodology to develop instream flow mitigation recommendations, where appropriate.

f. Where specific impact evaluation methods or mitigation technologies are not available, Service employees shall continue to apply their best professional judgment to develop mitigation recommendations.

4. Mitigation Recommendations

a. The Service may recommend support of projects or other proposals when the following criteria are met:

(1) They are ecologically sound;

(2) The least environmentally damaging reasonable alternative is selected;

(3) Every reasonable effort is made to avoid or minimize damage or loss of fish and wildlife resources and uses;

(4) All important recommended means and measures have been adopted with guaranteed implementation to satisfactorily compensate for unavoidable damage or loss consistent with the appropriate mitigation goal; and

(5) For wetlands and shallow water habitats, the proposed activity is clearly water dependent and there is a demonstrated public need.

The Service may recommend the "no project" alternative for those projects or other proposals that do not meet all of the above criteria and where there is likely to be a significant fish and wildlife resource loss.

b. Recommendations will be presented by the Service at the earliest possible stage of project planning to assure maximum consideration. The Service will strive to provide mitigation recommendations that represent the best judgment of the Service, including consideration of cost, on the most effective means and measures of satisfactorily achieving the mitigation planning goal. Such recommendations will be developed in cooperation with the Federal action agency or private developer responsible for the project, whenever practicable, and will place heavy reliance on cost estimates provided by that Federal action agency or private developer.

c. The Service will recommend that the Federal action agency include designated funds for all fish and wildlife resource mitigation (including, but not limited to, Service investigation costs, initial development costs and continuing operation, maintenance, replacement, and administrative costs) as part of the initial and any alternative project plans and that mitigation funds (as authorized and appropriated by Congress for Federal projects) be spent concurrently and proportionately with overall project construction and operation funds throughout the life of the project.

Note.—Prevention of losses may necessitate expenditure of funds at an earlier stage of project planning. This is acceptable and preferred.

d. Service mitigation recommendations will be made under an explicit expectation that these means and measures: (1) would be the ultimate responsibility of the appropriate Federal action agency to implement or enforce; and (2) would provide for a duration of effectiveness for the life of the project plus such additional time required for the adverse effects of an abandoned project to cease to occur.

e. Land acquisition in fee title for the purpose of compensation will be recommended by the Service *only* under one or more of the following three conditions:

(1) When a change in ownership is necessary to guarantee the future conservation of the fish and wildlife resource consistent with the mitigation goal for the specific project area; *or*

(2) When other means and measures for mitigation (see Section 5 below) will not compensate habitat losses consistent with the mitigation goal for the specific project area; *or*

(3) When land acquisition in fee title is the most cost-effective means that may partially or completely achieve the mitigation goal for the specific project area.

Service recommendations for fee title land acquisition will seek to identify mitigation lands with marginal economic potential.

f. First priority will be given to recommendation of a mitigation site within the planning area. Second priority will be given to recommendation of a mitigation site in proximity to the planning area within the same ecoregion section. Third priority will be given to recommendation of a mitigation site elsewhere within the same ecoregion section.

g. Service personnel will fully support a variety of uses on mitigation lands where such uses are compatible with dominant fish and wildlife uses and, for Federal wildlife refuges, are consistent with the provisions of the Refuge Recreation Act and the National Wildlife Refuge Administration Act. However, it may be in the best public interest to recommend limiting certain uses that would significantly decrease habitat value for species of high public interest. In such cases, the Service may recommend against such incompatible uses.

h. Measures to increase recreation values will not be recommended by Service personnel to compensate for losses of habitat value. Recreation use losses not restored through habitat value mitigation will be addressed through separate and distinct recommended measures to offset those specific losses.

i. The guidelines contained in this policy do not apply to threatened or endangered species. However, where both habitat and endangered or threatened species impacts are involved,

Service personnel shall fully coordinate Environment efforts with Endangered Species efforts to provide timely, consistent, and unified recommendations for resolution of fish and wildlife impacts, to the extent possible. More specifically, Environment and Endangered Species personnel shall coordinate all related activities dealing with investigations of land and water developments. This includes full use of all provisions that can expedite Service achievement of "one-stop shopping," including coordinated early planning involvement, shared permit review activities, consolidated permit reporting, and consolidated flow of pre-project information to developers, consistent with legislative mandates and deadlines.

j. The Service will place high priority on and continue to develop and implement procedures for reducing delays and conflicts in permit related activities. Such procedures will include, but not be limited to:

(1) Joint processing of permits.

(2) Resource mapping.

(3) Early provision of ecological design information.

(4) Involvement in Special Area Management Planning.

k. The Service will encourage predevelopment compensation actions by Federal action agencies which can be used to offset future unavoidable losses for lands or waters not adequately protected by an existing law, policy, or program.

Banking of habitat value for the express purpose of compensation for, unavoidable future losses will be considered to be a mitigation measure and not an enhancement measure. Withdrawals from the mitigation "bank" to offset future unavoidable losses will be based on habitat value replacement, not acreage or cost for land purchase and management.

5. Mitigation Means and Measures

Mitigation recommendations can include, but are not limited to, the types of actions presented below. These means and measures are presented in the general order and priority in which they should be recommended by Service personnel with the exception of the "no project" alternative. (See Section 4(a)).

a. Avoid the impact

(1) Design project to avoid damage or loss of fish and wildlife resources including management practices such as timing of activities or structural features such as multiple outlets, passage or avoidance structures and water pollution control facilities.

(2) Use of nonstructural alternative to proposed project.

(3) No project.

b. Minimize the impact

(1) Include conservation of fish and wildlife as an authorized purpose of Federal projects.

(2) Locate at the least environmentally damaging site.

(3) Reduce the size of the project.

(4) Schedule timing and control of initial construction operations and subsequent operation and maintenance to minimize disruption of biological community structure and function.

(5) Selective tree clearing or other habitat manipulation.

(6) Control water pollution through best management practices.

(7) Time and control flow diversions and releases.

(8) Maintain public access.

(9) Control public access for recreational or commercial purposes.

(10) Control domestic livestock use.

c. Rectify the impact

(1) Regrade disturbed areas to contours which provide optimal fish and wildlife habitat or approximate original contours.

(2) Seed, fertilize and treat areas as necessary to restore fish and wildlife resources.

(3) Plant shrubs and trees and other vegetation to speed recovery.

(4) Control polluted spoil areas.

(5) Restock fish and wildlife resources in repaired areas. Fish stocking or introductions will be consistent with the Service Fish Health Policy (January 3, 1978).

d. Reduce or eliminate the impact over time

(1) Provide periodic monitoring of mitigation features to assure continuous operation.

(2) Assure proper training of project personnel in the operations of the facility to preserve existing or restored fish and wildlife resources at project sites.

(3) Maintain or replace equipment or structures so that future loss of fish and wildlife resources due to equipment or structure failure does not occur.

e. Compensate for impacts

(1) Conduct wildlife management activities to increase habitat values of existing areas, with project lands and nearby public lands receiving priority.

(2) Conduct habitat construction activities to fully restore or rehabilitate previously altered habitat or modify existing habitat suited to evaluation species for the purpose of completely offsetting habitat value losses.

(3) Build fishery propagation facilities.

(4) Arrange legislative set-aside or protective designation for public lands.

(5) Provide buffer zones.

(6) Lease habitat.

(7) Acquire wildlife easements.

(8) Acquire water rights.

(9) Acquire land in fee title.

6. Follow-up

The Service encourages, supports, and will initiate, whenever practicable, post-project evaluations to determine the effectiveness of recommendations in achieving the mitigation planning goal. The Service will initiate additional follow-up studies when funds are provided by the Federal action agency.

In those instances where Service personnel determine that Federal agencies or private developers have not carried out those agreed upon mitigation means and measures, then the Service will request the responsible Federal action agency to initiate corrective action.

APPENDIX A—OTHER AUTHORITIES AND DIRECTION FOR SERVICE MITIGATION RECOMMENDATIONS

LEGISLATIVE

Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.). The 1977 amendments require the Fish and Wildlife Service ". . . upon request of the Governor of a State, and without reimbursement, to provide technical assistance to such State in developing a Statewide (water quality planning) program and in implementing such program after its approval." In addition, this Act requires the Service to comment on proposed State permit programs for the control of discharges of dredged or fill material and to comment on all Federal permits within 90 days of receipt.

Federal Power Act of 1920, as amended (16 U.S.C. 791(a), 803, 811). This Act authorizes the Secretary of the Interior to impose conditions on licenses issued for hydroelectric projects within specific withdrawn public lands. The Secretary is given specific authority to prescribe fishways to be constructed, maintained, and operated at the licensee's expense.

Estuary Protection Act (16 U.S.C. 1221–1226). This Act requires the Secretary of the Interior to review all project plans and reports for land and water resource development affecting estuaries and to make recommendations for conservation, protection, and enhancement.

Coastal Zone Management Act of 1972 (16 U.S.C. 1451–1464). This Act

requires the Secretary of Commerce to obtain the views of Federal agencies affected by the program, including the Department of the Interior, and to ensure that these views have been given adequate consideration before approval of Coastal Zone Management Plans. The Service provides the Department's views about fish and wildlife resources. Pursuant to the Coastal Zone Management Act Amendments of 1980 (Pub. L. 96-464) the Department of Interior provides comments on Federal grants to help States protect and preserve coastal areas because of their ". . . conservational, recreational, ecological or aesthetic values." The 1980 Amendments also authorize the Department of Interior to enter into Special Area Management Planning to ". . . provide for increased specificity in protecting natural resources, reasonable coast dependent economic growth . . . and improved predictability in government decisionmaking."

Water Bank Act (16 U.S.C. 1301-1311). This Act requires that the Secretary of Agriculture ". . . shall consult with the Secretary of Interior and take appropriate measures to insure that the program carried out . . . is in harmony with wetlands programs administered by the Secretary of the Interior."

Wild and Scenic Rivers Act (16 U.S.C. 1271-1287). This Act requires the Secretary of the Interior to comment on such proposals. The Fish and Wildlife Service provides the Department's views with regard to fish and wildlife resources.

Geothermal Steam Act of 1970 (30 U.S.C. 1001-1025). This Act requires that the Fish and Wildlife Service recommend to the Secretary those lands that shall not be leased for geothermal development by reason of their status as ". . . a fish hatchery administered by the Secretary, wildlife refuge, wildlife range, game range, wildlife management area, waterfowl production area, or for lands acquired or reserved for the protection and conservation of fish and wildlife that are threatened with extinction."

Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.). This Act requires the Department of the Interior to regulate surface mining and reclamation at existing and future mining areas. The Fish and Wildlife Service provides the Department with technical assistance regarding fish and wildlife aspects of Department programs on active and abandoned mine lands, including review of State regulatory submissions and mining plans, and comments on mining and reclamation plans.

Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1801). This Act requires the Secretary of the Interior to manage an environmentally sound oil and natural gas development program on the outer continental shelf. The Fish and Wildlife Service provides recommendations for the Department regarding potential ecological impacts before leasing in specific areas and contributes to environmental studies undertaken subsequent to leasing.

Mineral Leasing Act of 1920, as amended (30 U.S.C. 185). This Act authorizes the Secretary of the Interior to grant rights-of-way through Federal lands for pipelines transporting oil, natural gas, synthetic liquids or gaseous fuels, or any other refined liquid fuel. Prior to granting a right-of-way for a project which may have a significant impact on the environment, the Secretary is required by this Act to request and review the applicant's plan for construction, operation, and rehabilitation of the right-of-way. Also, the Secretary is authorized to issue guidelines and impose stipulations for such projects which shall include, but not be limited to, ". . . requirements for restoration, revegetation and curtailment or erosion of surface land; . . . requirements designed to control or prevent damage to the environment (including damage to fish and wildlife habitat); and . . . requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife and biotic resources of the area for subsistence purposes."

Cooperative Unit Act (16 U.S.C. 753(a)-753(b)). This Act provides for cooperative programs for research and training between the Fish and Wildlife Service, the States, and universities.

Airport and Airway Development Act (49 U.S.C. 1716). This Act requires the Secretary of Transportation to ". . . consult with the Secretary of the Interior with regard to the effect that any project . . . may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment . . .".

Department of Transportation Act (49 U.S.C. 1653(f)). This Act makes it national policy that ". . . special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites . . .," and requires that the Secretary of Transportation ". . . cooperate and consult with the Secretary of the Interior in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed." The Department of Transportation projects using protected lands cannot be approved unless there are no feasible and prudent alternatives to avoid such use and, if none, all possible measures to minimize harm have been considered.

EXECUTIVE

President's Water Policy Message (June 6, 1978). This Message directs the Secretary of the Interior to promulgate procedures for determination of measures to mitigate losses of fish and wildlife resources.

Water Resources Council's *Final Rules; Principles and Standards for Water and Related Land Resources Planning—Level C* (September 29, 1980). These rules reiterate the importance of participation in the development planning process by interested Federal agencies, including the Department of the Interior. This participation includes review, coordination, or consultation required under various legislative and executive authorities. Under these rules, "Consideration is to be given to mitigation (as defined in 40 CFR 1508.20) of the adverse effects of each alternative plan. Appropriate mitigation is to be included where suitable as determined by the agency decisionmaker. Mitigation measures included are to be planned for at least concurrent and proportionate implementation with other major project features, except where such concurrent and proportionate mitigation is physically impossible. In the latter case, the reasons for deviation from this rule are to be presented in the planning report, and mitigation is to be planned for the earliest possible implementation. Mitigation for fish and wildlife and their habitat is to be planned in coordination with Federal and State fish and wildlife agencies in accordance with the Fish and Wildlife Coordination Act of 1958 (16 U.S.C. 661-664) (sic)."

Executive Order 11990—Protection of Wetlands (May 24, 1977). This Executive Order requires that each Federal agency ". . . take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for: (1) acquiring, managing and disposing of Federal lands and facilities; and (2) providing federally undertaken, financed or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulation and licensing activities." Relevant wetland concerns and values include, but are not

limited to, maintenance of natural systems and long-term productivity of existing flora and fauna, habitat diversity, hydrological utility, fish, wildlife, timber, and food. Under this Order, a developmental project in a wetland may proceed only if no practicable alternatives can be ascertained and if the proposal . . . includes all practicable measures to minimize harm to the wetland that may result from its use."

Executive Order 11988—Floodplain Management (May 24, 1977). This Executive Order requires that Federal agencies take floodplain management into account when formulating or evaluating water or land use plans and that these concerns be reflected in the budgets, procedures, and regulations of the various agencies. This Order allows developmental activities to proceed in floodplain areas only when the relevant agencies have ". . . considered alternatives to avoid adverse effects and incompatible development in the floodplains . . ." or when, in lieu of this, they have ". . . designed or modified their actions in order to minimize potential harm to or within the floodplain . . .".

Executive Order 11987—Exotic Organisms (May 24, 1977). This Executive Order requires that Federal agencies shall restrict, to the extent permitted by law, the introduction of exotic species into the lands or waters which they own, lease, or hold for purposes of administration, and encourage the States, local governments, and private citizens to do the same. This Executive Order also requires Federal agencies to restrict, to the extent permitted by law, the importation of exotic species and to restrict the use of Federal funds and programs for such importation. The Secretary of the Interior, in consultation with the Secretary of Agriculture, is authorized to develop by rule or regulation a system to standardize and simplify the requirements and procedures appropriate for implementing this Order.

NATIONAL/INTERNATIONAL TREATIES

Federal Trust Responsibility to Indian Tribes. This responsibility is reflected in the numerous Federal treaties with the Indian tribes. These treaties have the force of law. Protection of Indian hunting and fishing rights necessitates conservation of fish and wildlife and their habitat.

Convention Between the United States and Japan (September 19, 1974). This Treaty endorses the establishment of sanctuaries and fixes preservation and enhancement of migratory bird habitat as a major goal of the signatories.

Convention Between the United States and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environments (November 8, 1978). This Treaty endorses the establishment of sanctuaries, refuges, and protected areas. It mandates reducing or eliminating damage to all migratory birds. Furthermore, it provides for designation of special areas for migratory bird breeding, wintering, feeding, and molting, and commits the signatories to ". . . undertake measures necessary to protect the ecosystems in these areas . . . against pollution, detrimental alteration and other environmental degradation." Implementing legislation, Pub. L. 95–616, was passed in the United States in 1978.

Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (April 15, 1941). This Treaty has several provisions requiring parties to conserve certain wildlife resources and their habitats.

Convention Between the United States and Great Britain (for Canada) for Protection of Migratory Birds (August 1, 1916, as amended January 30, 1979). This Treaty provides for a uniform ". . . system of protection for certain species of birds which migrate between the United States and Canada, in order to assure the preservation of species either harmless or beneficial to man." The Treaty prohibits hunting insectivorous birds, but allows killing of birds under permit when injurious to agriculture. The 1979 amendment allows subsistence hunting of waterfowl outside of the normal hunting season.

APPENDIX B—OTHER DEFINITIONS

"Compensation," when used in the context of Service mitigation recommendations, means full replacement of project-induced losses to fish and wildlife resources, provided such full replacement has been judged by the Service to be consistent with the appropriate mitigation planning goal.

"Ecoregion" refers to a large biogeographical unit characterized by distinctive biotic and abiotic relationships. An ecoregion may be subclassified into domains, divisions, provinces, and sections. A technical explanation and map is provided in the "Ecoregions of the United States" by Robert G. Bailey, published by the U.S. Forest Service, 1976.

"Ecosystem" means all of the biotic elements (i.e., species, populations, and communities) and abiotic elements (i.e., land, air, water, energy) interacting in a given geographic area so that a flow of energy leads to a *clearly* defined trophic structure, biotic diversity, and material cycles. (Eugene P. Odum. 1971. *Fundamentals of Ecology)*

"Evaluation species" means those fish and wildlife resources in the planning area that are selected for impact analysis. They must currently be present or known to occur in the planning area during at least one stage of their life history except where species not present (1) have been identified in fish and wildlife restoration or improvement plans approved by State or Federal resource agencies, or (2) will result from natural species succession over the life of the project. In these cases, the analysis may include such identified species not currently in the planning area.

There are two basic approaches to the selection of evaluation species: (1) selection of species with high public interest, economic value or both; and (2) selection of species to provide a broader ecological perspective of an area. The choice of one approach in lieu of the other may result in a completely different outcome in the analysis of a proposed land or water development. Therefore, the objectives of the study should be clearly defined before species selection is initiated. If the objectives of a study are to base a decision on potential impacts to an entire ecological community, such as a unique wetland, then a more ecologically based approach is desirable. If, however, a land or water use decision is to be based on potential impacts to a public use area, then species selection should favor animals with significant human use values. In actual practice, species should be selected to represent social, economic and broad ecological views because mitigation planning efforts incorporate objectives that have social, economic, and ecological aspects. Species selection always should be approached in a manner that will optimize contributions to the stated objectives of the mitigation planning effort.

Most land and water development decisions are strongly influenced by the perceived impacts of the proposed action on human use. Since economically or socially important species have clearly defined linkages to human use, they should be included as evaluation species in all appropriate land and water studies. As a guideline, the following types of species should be considered:

- Species that are associated with Important Resource Problems as designated by the Director of the Fish and Wildlife Service (except for threatened or endangered species).

• Other species with monetary and non-monetary benefits to people accruing from consumptive and nonconsumptive human uses including, but not limited to, fishing, hunting, bird-watching and educational, aesthetic, scientific or subsistence uses.

An analysis based only on those species with directly identifiable economic or social value may not be broad enough to adequately describe all of the ramifications of a land and water use proposal. If it is desirable to increase the ecological perspective of an assessment, the following types of species should be considered:

• Species known to be sensitive to specific land and water use actions. The species selected with this approach serve as "early warning" or indicator species for the affected fish and wildlife community.

• Species that perform a key role in a community because of their role in nutrient cycling or energy flows. These species also serve as indicators for a large segment of the fish and wildlife community, but may be difficult to identify.

• Species that represent groups of species which utilize a common environmental resource (guilds). A representative species is selected from each guild and predicted environmental impacts for the selected species are extended with some degree of confidence to other guild members.

"Federal action agency" means a department, agency or instrumentality of the United States which plans, constructs, operates or maintains a project, or which plans for or approves a permit, lease, or license for projects or manages Federal lands.

"Fish and wildlife resources" means birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent.

"Habitat" means the area which provides direct support for a given species, population, or community. It includes all environmental features that comprise an area such as air quality, water quality, vegetation and soil characteristics and water supply (including both surface and groundwater).

"Habitat value" means the suitability of an area to support a given evaluation species.

"Important Resource Problem" means a clearly defined problem with a single important population or a community of similar species in a given geographic area as defined by the Director of the Fish and Wildlife Service.

"In-kind replacement" means providing or managing substitute resources to replace the habitat value of the resources lost, where such substitute resources are physically and biologically the same or closely approximate those lost.

"Loss" means a change in fish and wildlife resources due to human activities that is considered adverse and;

(1) reduces the biological value of that habitat for evaluation species;

(2) reduces population numbers of evaluation species;

(3) increases population numbers of "nuisance" species;

(4) reduces the human use of those fish and wildlife resources; or

(5) disrupts ecosystem structure and function.

Changes that improve the value of existing habitat for evaluation species are not to be considered losses, i.e., burning or selective tree harvesting for wildlife management purposes. In addition, reductions in animal populations for the purpose of harvest or fish and wildlife managment will not be considered as losses for the purpose of this policy.

"Minimize" means to reduce to the smallest practicable amount or degree.

"Mitigation banking" means habitat protection or improvement actions taken expressly for the purpose of compensating for unavoidable losses from specific future development actions. It only includes those actions above and beyond those typically taken by Congress for protection of fish and wildlife resources.

"Out-of-kind replacement" means providing or managing substitute resources to replace the habitat value of the resources lost, where such substitute resources are physically or biologically different from those lost.

"Planning area" means a geographic space with an identified boundary that includes:

(1) The area identified in the study's authorizing document;

(2) The locations of resources included in the study's identified problems and opportunities;

(3) The locations of alternative plans, often called "project areas;" and

(4) The locations of resources that would be directly, indirectly, or cumulatively affected by alternative plans, often called the "affected area."

"Practicable" means capable of being done within existing constraints. The test of what is practicable depends upon the situation and includes consideration of the pertinent factors, such as environment, cost, or technology.

"Project" means any action, planning or approval process relating to an action that will directly or indirectly affect fish and wildlife resources.

"Replacement" means the substitution or offsetting of fish and wildlife resource losses with resources considered to be of equivalent biological value. However, resources used for replacement represent loss or modification of another type of habitat value. Replacement actions still result in a loss of habitat acreage and types which will continually diminish the overall national resource base. It should be clearly understood that replacement actions never restore the lost fish and wildlife resource—that is lost forever.

Dated: January 13, 1981.

Cecil Andrus,

Secretary of the Department of the Interior.

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APPENDIX D

NATIONAL PARK SERVICE MANUAL

DEPARTMENTAL MANUAL

TRANSMITTAL SHEET

PART	SUBJECT	RELEASE NUMBER
516 DM 1-7	Environmental Quality	2244
FOR FURTHER INFORMATION, CONTACT Office of Environmental Project Review		DATE MAR 18 1980

EXPLANATION OF MATERIAL TRANSMITTED:

This release completely revises the Department's procedures for compliance with the National Environmental Policy Act (NEPA). The procedures adopt the regulations of the Council on Environmental Quality (CEQ) and Chapters 2-6 cannot be read independently from CEQ's regulations.

In addition the procedures reflect the Secretary's decision that there be only one set of NEPA procedures for the Department, that environmental impact statements be approved at the organizational levels responsible for decisionmaking on proposals, and that decisionmakers be held accountable for NEPA compliance.

Procedures specific to each bureau will be promulgated as appendices to Chapter 6.

Larry E. Meierotto
Assistant Secretary of the Interior

Filing Instructions

Remove:	Insert:
516 DM 1 (2 sheets)	516 DM 1 (4 sheets)
516 DM 2 (10 sheets)	516 DM 2 (2 sheets)
Appendices A-E (11 sheets)	Appendix 1 (1 sheet)
	516 DM 3 (1 sheet)
	516 DM 4 (3 sheets)
	Appendix 1 (2 sheets)
	Appendix 2 (1 sheet)
	516 DM 5 (1 sheet)
	516 DM 6 (2 sheets)

Pen and Ink Change:

516 DM 3	change to 516 DM 7

1.1 Purpose. This Chapter establishes the Department's policies for complying with Title 1 of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347) (NEPA); Section 2 of Executive Order 11514, Protection and Enhancement of Environmental Quality, as amended by Executive Order 11991; and the regulations of the Council on Environmental Quality (CEQ) implementing the procedural provisions of NEPA (40 CFR 1500-1508).

1.2 Policy. It is the policy of the Department:

A. To provide leadership in protecting and enhancing those aspects of the quality of the Nation's environment which relate to or may be affected by the Department's policies, goals, programs, plans, or functions in furtherance of national environmental policy;

B. To use all practicable means, consistent with other essential considerations of national policy, to improve, coordinate, and direct its policies, plans, functions, programs, and resources in furtherance of national environmental goals;

C. To interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered by the Department in accordance with the policies of NEPA;

D. To consider and give important weight to environmental factors, along with other essential considerations, in developing proposals and making decisions in order to achieve a proper balance between the development and utilization of natural, cultural, and human resources and the protection and enhancement of environmental quality;

E. To consult, coordinate, and cooperate with other Federal agencies and State, local, and Indian tribal governments in the development and implementation of the Department's plans and programs affecting environmental quality and, in turn, to provide to the fullest extent practicable, these entities with information concerning the environmental impacts of their own plans and programs;

F. To provide, to the fullest extent practicable, timely information to the public to better assist in understanding Departmental plans and programs affecting environmental quality and to facilitate their involvement in the development of such plans and programs; and

G. To cooperate with and assist the CEQ.

1.3 General Responsibilities. The following responsibilities reflect the Secretary's decision that the officials responsible for making program decisions are also responsible for taking the requirements of NEPA into account in those decisions and will be held accountable for that responsibility:

A. Assistant Secretary--Policy, Budget and Administration.

(1) Is the Department's focal point on NEPA matters and is responsible for overseeing the Department's implementation of NEPA.

(2) Serves as the Department's principal contact with the CEQ.

(3) Assigns to the Director, Office of Environmental Project Review, the responsibilities outlined for that Office in this Part.

B. Solicitor. Is responsible for providing legal advice in the Department's compliance with NEPA.

C. Assistant Secretaries.

(1) Are responsible for compliance with NEPA, E.O. 11514, as amended, the CEQ regulations, and this Part for bureaus and offices under their jurisdiction.

(2) Will insure that, to the fullest extent possible, the policies, regulations, and public laws of the United States administered under their jurisdiction are interpreted and administered in accordance with the policies of NEPA.

D. Heads of Bureaus and Offices.

(1) Must comply with the provisions of NEPA, E.O. 11514, as amended, the CEQ regulations and this Part.

(2) Will interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered under their jurisdiction in accordance with the policies of NEPA.

(3) Will continue to review their statutory authorities, administrative regulations, policies, programs, and procedures, including those related to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the intent, purpose, and provisions of NEPA and, in consultation with the Solicitor and the Legislative Counsel, shall take or recommend, as appropriate, corrective actions as may be necessary to bring these authorities and policies into conformance with the intent, purpose, and procedures of NEPA.

(4) Will monitor, evaluate, and control on a continuing basis their activities so as to protect and enhance the quality of the environment. Such activities will include those directed to controlling pollution and enhancing the environment and designed to accomplish other program objectives which may affect the quality of the environment. They will develop programs and measures to protect and enhance environmental quality and assess progress in meeting the specific objectives of such activities as they affect the quality of the environment.

1.4 Consideration of Environmental Values.

A. In Departmental Management.

(1) In the management of the natural, cultural, and human resources under its jurisdiction, the Department must consider and balance a wide range of economic, environmental, and social objectives at the local, regional, national, and international levels, not all of which are quantifiable in comparable terms. In considering and balancing these objectives, Departmental plans, proposals,

and decisions often require recognition of complements and resolution of conflicts among interrelated uses of these natural, cultural, and human resources within technological, budgetary, and legal constraints.

(2) Departmental project reports, program proposals, issue papers, and other decision documents must carefully analyze the various objectives, resources, and constraints, and comprehensively and objectively evaluate the advantages and disadvantages of the proposed actions and their reasonable alternatives. Where appropriate, these documents will utilize and reference supporting and underlying economic, environmental, and other analyses.

(3) The underlying environmental analyses will factually, objectively, and comprehensively analyze the environmental effects of proposed actions and their reasonable alternatives. They will systematically analyze the environmental impacts of alternatives, and particularly those alternatives and measures which would reduce, mitigate or prevent adverse environmental impacts or which would enhance environmental quality. However, such an environmental analysis is not, in and of itself, a program proposal or the decision document, is not a justification of a proposal, and will not support or deprecate the overall merits of a proposal or its various alternatives.

B. In Internally Initiated Proposals. Officials responsible for development or conduct of planning and decisionmaking systems within the Department shall incorporate to the maximum extent necessary environmental planning as an integral part of these systems in order to insure that environmental values and impacts are fully considered and in order to facilitate any necessary documentation of those considerations.

C. In Externally Initiated Proposals. Officials responsible for development or conduct of loan, grant, contract, lease, license, permit, or other externally initiated activities shall require applicants, to the extent necessary and practicable, to provide environmental information, analyses, and reports as an integral part of their applications. This will serve to encourage applicants to incorporate environmental considerations into their planning

processes as well as provide the Department with necessary information to meet its own environmental responsibilities.

1.5 Consultation, Coordination, and Cooperation with Other Agencies and Organizations.

A. Departmental Plans and Programs.

(1) Officials responsible for planning or implementing Departmental plans and programs will develop and utilize procedures to consult, coordinate, and cooperate with relevant State, local, and Indian tribal governments; other bureaus and Federal agencies; and public and private organizations and individuals concerning the environmental effects of these plans and programs on their jurisdictions or interests.

(2) Bureaus and offices will utilize, to the maximum extent possible, existing notification, coordination and review mechanisms established by the Office of Management and Budget, the Water Resources Council, and CEQ. However, use of these mechanisms must not be a substitute for early and positive consultation, coordination, and cooperation with others, especially State, local, and Indian tribal governments.

B. Other Departmental Activities.

(1) Technical assistance, advice, data, and information useful in restoring, maintaining, and enhancing the quality of the environment will be made available to other Federal agencies, State, local, and Indian tribal governments, institutions, and individuals as appropriate.

(2) Information regarding existing or potential environmental problems and control methods developed as a part of research, development, demonstration, test, or evaluation activities will be made available to other Federal agencies, State, local, and Indian tribal governments, institutions and other entities as appropriate.

(3) Recognizing the worldwide and long-range character of environmental problems, where consistent with the foreign policy of the United States, appropriate support will be made available to initiatives, resolutions, and

programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment.

C. Plans and Programs of Other Agencies and Organizations

(1) Officials responsible for protecting, conserving, developing, or managing resources under the Department's jurisdiction shall coordinate and cooperate with State, local, and Indian tribal governments, other bureaus and Federal agencies, and public and private organizations and individuals, and provide them with timely information concerning the environmental effects of these entities' plans and programs.

(2) Bureaus and offices are encouraged to participate early in the planning processes of other agencies and organizations in order to insure full cooperation with and understanding of the Department's programs and interests in natural, cultural, and human resources.

(3) Bureaus and offices will utilize to the fullest extent possible, existing Departmental review mechanisms to avoid unnecessary duplication of effort and to avoid confusion by other organizations.

1.6 Public Involvement. Bureaus and offices, in consultation with the Office of Public Affairs, will develop and utilize procedures to insure the fullest practicable provision of timely public information and understanding of their plans and programs with environmental impact including information on the environmental impacts of alternative courses of action. These procedures will include, wherever appropriate, provision for public meetings or hearings in order to obtain the views of interested parties. Bureaus and offices will also encourage State and local agencies and Indian tribal governments to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment. (See also 301 DM 2.)

1.7 Mandate.

A. This Part provides Department-wide instructions for complying with NEPA and Executive Orders 11514, as amended by 11991 (Protection and Enhancement of Environmental Quality) and 12114 (Environmental Effects Abroad of Major Federal Actions).

B. The Department hereby adopts the regulations of the CEQ implementing the procedural provisions of NEPA (Sec. 102(2)(C)) except where compliance would be inconsistent with other statutory requirements. In the case of any apparent discrepancies between these procedures and the mandatory provisions of the CEQ regulations, the regulations shall govern.

C. Instructions supplementing the CEQ regulations are provided in Chapters 2-7 of this Part. Citations in brackets refer to the CEQ regulations. Instructions specific to each bureau are appended to Chapter 6. In addition, bureaus may prepare a handbook(s) or other technical guidance for their personnel on how to apply this Part to principal programs.

D. Instructions implementing Executive Order 12114 will be provided in Chapter 8.

3/18/80 #2244
Replaces 9/17/70 #1222 and 9/27/71 #1341

2.1 Purpose. This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to initiating the NEPA process.

2.2 Apply NEPA Early [1501.2].

A. Bureaus will initiate early consultation and coordination with other bureaus and any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved, and with appropriate Federal, State, local and Indian tribal agencies authorized to develop and enforce environmental standards.

B. Bureaus will also consult early with interested private parties and organizations, including when the bureau's own involvement is reasonably foreseeable in a private or non-Federal application.

C. Bureaus will revise or amend program regulations or directives to insure that private or non-Federal applicants are informed of any environmental information required to be included in their applications and of any consultation with other Federal agencies, and State, local, or Indian tribal governments required prior to making the application. A list of these regulations or directives will be included in each Bureau Appendix to Chapter 6.

2.3 Whether to Prepare an EIS [1501.4].

A. Categorical Exclusions [1508.4].

(1) The following criteria will be used to determine actions to be categorically excluded from the NEPA process:

(a) The action or group of actions would have no significant effect on the quality of the human environment, and

(b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.

(2) Based on the above criteria, the classes of actions listed in Appendix 1 to this Chapter are categorically excluded, Department-wide, from the NEPA process. A list of categorical exclusions specific to bureau programs will be included in each Bureau Appendix to Chapter 6.

(3) The following exceptions apply to individual actions within categorical exclusions. Environmental assessments must be prepared for actions which may:

(a) Have significant adverse effects on public health or safety.

(b) Adversely affect such unique geographic characteristics as historic or cultural resources, park, recreation, or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

(c) Have highly controversial environmental effects.

(d) Have highly uncertain environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects.

(f) Be related to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Adversely affect properties listed or eligible for listing in the National Register of Historic Places.

(h) Affect a species listed or proposed to be listed on the List of Endangered or Threatened Species.

(i) Threaten to violate a Federal, State, local, or tribal law or requirements imposed for the protection of the environment or which require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act.

(4) Notwithstanding the criteria and exceptions above, extraordinary circumstances may dictate or a responsible Departmental or bureau official may decide to prepare environmental assessments.

B. Environmental Assessment (EA) [1508.9]. See 516 DM 3.

C. Finding of No Significant Impact (FONSI) [1508.13]. A FONSI will be prepared as a separate covering document based upon a review of an EA. Accordingly, the words include(d) in Section 1508.13 should be interpreted as attach(ed).

D. Notice of Intent (NOI) [1508.22]. A NOI will be prepared as soon as practicable after a decision to prepare an environmental impact statement and shall be published in the Federal Register, with a copy to the Office of Environmental Project Review, and made available to the affected public in accordance with Section 1506.6. Publication of a NOI may be delayed if there is proposed to be more than three (3) months between the decision to prepare an environmental impact statement and the time preparation is actually initiated. The Office of Environmental Project Review will periodically publish a consolidated list of these notices in the Federal Register.

E. Environmental Impact Statement (EIS) [1508.11]. See 516 DM 4. Decisions/actions which would normally require the preparation of an EIS will be identified in the Bureau Appendix to Chapter 6.

2.4 Lead Agencies [1501.5].

A. The Assistant Secretary--Policy, Budget and Administration will designate lead bureaus within the Department when bureaus under more than one Assistant Secretary are involved and will represent the Department in consultations with CEQ or other Federal agencies in the resolution of lead agency determinations.

B. Bureaus will inform the Office of Environmental Project Review of any agreements to assume lead agency status.

C. A non-Federal agency will not be designated as a joint lead agency unless it has a duty to comply with a local or State environmental impact statement requirement that is comparable to a NEPA statement. Any non-Federal agency may be a cooperating agency by agreement. Bureaus will consult with the Solicitor's Office in cases where such non-Federal agencies are also applicants before the Department to determine relative lead/cooperating agency responsibilities.

2.5 Cooperating Agencies [1501.6].

A. The Office of Environmental Project Review will assist bureaus and coordinate requests from non-Interior agencies in determining cooperating agencies.

B. Bureaus will inform the Office of Environmental Project Review of any agreements to assume cooperating agency status or any declinations pursuant to Section 1501.6(c).

2.6 Scoping [1501.7].

A. The invitation requirement in Section 1501.7(a)(1) may be satisfied by including such an invitation in the NOI.

B. If a scoping meeting is held, consensus is desirable; however, the lead agency is ultimately responsible for the scope of an EIS.

2.7 Time Limits [1501.8]. When time limits are established they should reflect the availability of personnel and funds.

DEPARTMENTAL CATEGORICAL EXCLUSIONS

The following actions are categorical exclusions pursuant to 516 DM 2.3A(2). However, environmental documents will be prepared for individual actions within these categorical exclusions if the exceptions listed in 516 DM 2.3A(3) apply.

1.1 Personnel actions and investigations and personnel services contracts.

1.2 Internal organizational changes and facility and office reductions and closings.

1.3 Routine financial transactions, including such things as salaries and expenses, procurement contracts, guarantees, financial assistance, income transfers, and audits.

1.4 Law enforcement and legal transactions, including such things as arrests; investigations; patents; claims; legal opinions; and judicial proceedings including their initiation, processing and/or settlement.

1.5 Regulatory and enforcement actions, including inspections, assessments, administrative hearings, and decisions; when the regulations themselves or the instruments of regulations (leases, permits, licenses, etc.) have previously been covered by the NEPA process or are exempt from it.

1.6 Non-destructive data collection, inventory (including mapping), study, research and monitoring activities.

1.7 Routine and continuing government business, including such things as supervision, administration, operations, maintenance, and replacement.

1.8 Management, formulation, and allocation of the Department's budget at all levels. (This does not exempt the preparation of environmental documents for proposals included in the budget when otherwise required.)

3.1 Purpose. This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to environmental assessments (EA).

3.2 When to Prepare [1501.3].

A. An EA will be prepared for all actions, except those covered by a categorical exclusion, covered sufficiently by an earlier environmental document, or for those actions for which a decision has already been made to prepare an EIS. The purpose of such an EA is to allow the responsible official to determine whether to prepare an EIS.

B. In addition, an EA may be prepared on any action at any time in order to assist in planning and decisionmaking.

3.3 Public Involvement.

A. Public notification must be provided and, where appropriate, the public involved in the EA process [1506.6].

B. The scoping process may be applied to an EA [1501.7].

3.4 Content.

A. At a minimum, an EA will include brief discussions of the need for the proposal, of alternatives as required by Section 102(2)(E) of NEPA, of the environmental impacts of the proposed action and such alternatives, and a listing of agencies and persons consulted [1508.9(b)].

B. In addition, an EA may be expanded to describe the proposal, a broader range of alternatives, and proposed mitigation measures if this facilitates planning and decisionmaking.

C. The level of detail and depth of impact analysis should normally be limited to that needed to determine whether there are significant environmental effects.

D. An EA will contain objective analyses which support its environmental impact conclusions. It will not, in and of itself, conclude whether or not an EIS will be prepared. This conclusion will be made upon review of the EA by the responsible official and documented in either a NOI or FONSI.

3.5 Format.

A. An EA may be prepared in any format useful to facilitate planning and decisionmaking.

B. An EA may be combined with any other planning or decisionmaking document; however, that portion which analyzes the environmental impacts of the proposal and alternatives will be clearly and separately identified and not spread throughout or interwoven into other sections of the document.

4.1 Purpose. This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to environmental impact statements (EIS).

4.2 Statutory Requirements [1502.3]. NEPA requires that an EIS be prepared by the responsible Federal official. This official is normally the lowest-level official who has overall responsibility for formulating, reviewing, or proposing an action or, alternatively, has been delegated the authority or responsibility to develop, approve, or adopt a proposal or action. Preparation at this level will insure that the NEPA process will be incorporated into the planning process and that the EIS will accompany the proposal through existing review processes.

4.3 Timing [1502.5].

A. The feasibility analysis (go/no-go) stage, at which time an EIS is to be completed, is to be interpreted as the stage prior to the first point of major commitment to the proposal. For example, this would normally be at the authorization stage for proposals requiring Congressional authorization, the location or corridor stage for transportation, transmission, and communication projects, and the leasing stage for mineral resources proposals.

B. An EIS need not be commenced until an application is essentially complete; e.g., any required environmental information is submitted, any consultation required with other agencies has been conducted, and any required advance funding is paid by the applicant.

4.4 Page Limits [1502.7]. Where the text of an EIS for a complex proposal or group of proposals appears to require more than the normally prescribed limit of 300 pages, bureaus will insure that the length of such statements is no greater than necessary to comply with NEPA, the CEQ regulations, and this Chapter.

4.5 Supplemental Statements [1502.9].

A. Supplements are only required if such changes in the proposed action or alternatives, new circumstances, or resultant significant effects are not adequately analyzed in the previously prepared EIS.

B. A bureau and/or the appropriate program Assistant Secretary will consult with the Office of Environmental Project Review and the Office of the Solicitor prior to proposing to CEQ to prepare a final supplement without preparing an intervening draft.

C. If, after a decision has been made based on a final EIS, a described proposal is further defined or modified and if its changed effects are minor or still within the scope of the earlier EIS, an EA and FONSI may be prepared for subsequent decisions rather than a supplement.

4.6 Format [1502.10].

A. Proposed departures from the standard format described in the CEQ regulations and this Chapter must be approved by the Office of Environmental Project Review.

B. The section listing the preparers of the EIS will also include other sources of information, including a bibliography or list of cited references, when appropriate.

C. The section listing the distribution of the EIS will also briefly describe the consultation and public involvement processes utilized in planning the proposal and in preparing the EIS, if this information is not discussed elsewhere in the document.

D. If CEQ's standard format is not used or if the EIS is combined with another planning or decisionmaking document the section which analyzes the environmental consequences of the proposal and its alternatives will be clearly and separately identified and not interwoven into other portions of or spread throughout the document.

4.7 Cover Sheet [1502.11]. The cover sheet will also indicate whether the EIS is intended to serve any other environmental review or consultation requirements pursuant to Section 1502.25.

4.8 Summary [1502.12]. The emphasis in the summary should be on those considerations, controversies, and issues which significantly affect the quality of the human environment.

4.9 Purpose and Need [1502.13]. This section may introduce a number of factors, including economic and technical considerations and Departmental or bureau statutory missions, which may be beyond the scope of the EIS. Care should be taken to insure an objective presentation and not a justification.

4.10 Alternatives Including the Proposed Action [1502.14].

A. As a general rule, the following guidance will apply:

(1) For internally initiated proposals; i.e., for those cases where the Department conducts or controls the planning process, both the draft and final EIS shall identify the bureau's proposed action.

(2) For externally initiated proposals; i.e., for those cases where the Department is reacting to an application or similar request, the draft and final EIS shall identify the applicant's proposed action and the bureau's preferred alternative unless another law prohibits such an expression.

(3) Proposed departures from this guidance must be approved by the Office of Environmental Project Review and the Office of the Solicitor.

B. Mitigation measures are not necessarily independent of the proposed action and its alternatives and should be incorporated into and analyzed as a part of the proposal and appropriate alternatives. Where appropriate, major mitigation measures may be identified and analyzed as separate alternatives in and of themselves where the environmental consequences are distinct and significant enough to warrant separate evaluation.

4.11 Appendix [1502.18]. If an EIS is intended to serve other environmental review or consultation requirements pursuant to Section 1502.25, any more detailed information needed to comply with these requirements may be included as an appendix.

4.12 Incorporation by Reference [1502.21]. Citations of specific topics will include the pertinent page numbers. All literature references will be listed in the bibliography.

4.13 Incomplete or Unavailable Information [1502.22]. The references to overall costs in this section are not limited to market costs, but include other costs to society such as social costs due to delay.

4.14 Methodology and Scientific Accuracy [1502.24]. Conclusions about environmental effects will be preceded by an analysis that supports that conclusion unless explicit reference by footnote is made to other supporting documentation that is readily available to the public.

4.15 Environmental Review and Consultation Requirements [1502.25].

A. A list of related environmental review and consultation requirements is attached as Appendix 1 to this Chapter.

B. If the EIS is intended to serve as the vehicle to fully or partially comply with any of these requirements, the associated analyses, studies, or surveys will be identified as such and discussed in the text of the EIS and the cover sheet will so indicate. Any supporting analyses or reports will be referenced or included as an appendix and shall be sent to reviewing agencies as appropriate in accordance with applicable regulations or procedures.

4.16 Inviting Comments [1503.1].

A. Comments from State agencies will be requested through the State Clearinghouse established by the Governor pursuant to OMB Circular A-95, unless the Governor has designated an alternative review process, and may be requested from local agencies through Areawide Clearinghouses to the extent that they include the affected local jurisdiction.

B. When the proposed action may affect the environment of an Indian reservation, comments will be requested from the Indian tribe through the tribal governing body, unless the tribal governing body has designated an alternate review process.

4.17 Response to Comments [1503.4].

A. Preparation of a final EIS need not be delayed in those cases where a Federal agency, from which comments are required to be obtained [1503.1(a)(1)], does not comment within the prescribed comment period. Informal attempts will be made to determine the status of any such comments and every reasonable attempt should be made to include the comments and a response in the final EIS.

B. When other commentors are late, their comments should be included in the final EIS to the extent practicable.

C. For those EISs requiring the approval of the Assistant Secretary--Policy, Budget and Administration pursuant to 516 DM 6.3, bureaus will consult with the Office of Environmental Project Review when they propose to prepare an abbreviated final EIS [1503.4(c)].

4.18 Elimination of Duplication with State and Local Procedures [1506.2]. Bureaus will incorporate in their appropriate program regulations provisions for the preparation of an EIS by a State agency to the extent authorized in Section 102(2)(D) of NEPA. Eligible programs are listed in Appendix 2 to this Chapter.

4.19 Combining Documents [1506.4]. See 516 DM 4.6D.

4.20 Departmental Responsibility [1506.5]. Following the responsible official's preparation or independent evaluation of and assumption of responsibility for an environmental document, an applicant may print it provided the applicant is bearing the cost of the document pursuant to other laws.

4.21 Public Involvement [1506.6]. See 516 DM 1.6 and 301 DM 2.

4.22 Further Guidance [1506.7]. The Office of Environmental Project Review may provide further guidance concerning NEPA pursuant to its organizational responsibilities (110 DM 22) and through supplemental directives (015 DM 6).

4.23 Proposals for Legislation [1506.8]. The Legislative Counsel, in consultation with the Office of Environmental Project Review, shall:

A. Identify in the annual submittal to OMB of the Department's proposed legislative program any requirements for and the status of any environmental documents.

B. When required, insure that a legislative EIS is included as a part of the formal transmittal of a legislative proposal to the Congress.

4.24 Time Periods [1506.10].

A. The minimum review period for a draft EIS will be sixty (60) days from the date of transmittal to the Environmental Protection Agency.

B. For those EISs requiring the approval of the Assistant Secretary--Policy, Budget and Administration pursuant to 516 DM 6.3, the Office of Environmental Project Review will be responsible for consulting with the Environmental Protection Agency and/or CEQ about any proposed reductions in time periods or any extensions of time periods proposed by those agencies.

LIST OF OTHER ENVIRONMENTAL REVIEW AND CONSULTATION REQUIREMENTS

1.1 Cultural Resources

Archeological Resources Protection Act of 1979
16 U.S.C. § 470aa *et seq*.

Archeological and Historic Preservation Act of 1974
16 U.S.C. § 469a-1

National Historic Preservation Act of 1966 (Sec. 106)
16 U.S.C. § 470f

Antiquities Act of 1906
16 U.S.C. § 431

Executive Order 11593 (Protection and Enhancement of the Cultural Environment)

American Indian Religious Freedom Act
92 Stat. 469

1.2 Water and Related Land Resources

Marine Protection, Research and Sanctuaries Act of 1972
(Sec. 102, 103, 301)
16 U.S.C. § 1431 *et seq*.

Safe Drinking Water Act of 1974
42 U.S.C. § 300f

Flood Disaster Protection Act of 1973
12 U.S.C. § 24, 1701-1 Supp
42 U.S.C. § 4001 *et seq*.

Coastal Zone Management Act of 1972
16 U.S.C. § 1451, 1456

Estuary Protection Act
16 U.S.C. § 1221

Executive Order 11988 (Floodplain Management)

Executive Order 11990 (Wetlands Protection)

Federal Water Project Recreation Act (Ss 6(a))
16 U.S.C. § 4601-17

Clean Water Act (§ 208, 303, 401, 402, 404, 405, 511)
33 U.S.C. §§ 1288, 1314, 1341, 1342, 1344

Rivers and Harbors Act of 1899 (§ 9 and § 10)
33 U.S.C. § 401 et seq.

Wild and Scenic Rivers Act of 1968 (Sec. 7)
16 U.S.C. § 1274 et seq.

Federal Power Act
16 U.S.C. § 797

Water Resources Planning Act of 1965
42 U.S.C. § 1962 et seq.

Water Resources Council's Principles and Standards

1.3 Wildlife

Endangered Species Act (Sec. 7)
16 U.S.C. § 1531 et seq.

Fish and Wildlife Coordination Act
16 U.S.C. § 661, 662

Fish and Wildlife Conservation at Small Watershed Projects
16 U.S.C. § 1001, 1005(4), 1008

1.4 Public Lands, Open Space, Recreation

Federal Land Policy and Management Act
43 U.S.C. § 1701, 1761-1771

Mineral Leasing Act Amendments of 1973
30 U.S.C. § 185

Forest and Rangeland Renewable Resources Act
16 U.S.C. § 1601 et seq.

Land and Water Conservation Fund Act of 1965(Sec. 6(f))
16 U.S.C. § 4601-8(f)

Open Space Lands
42 U.S.C. § 1500a(d)

Urban Park and Recreation Recovery Act
16 U.S.C. § 2501 et seq.

National Trails System Act
16 U.S.C. § 1241

1.5 Marine Resources

Deepwater Port Act
33 U.S.C. § 1501, 1503-1505

Ocean Dumping
33 U.S.C. § 1401, 1412, 1413, 1414

Marine Protection, Research and Sanctuaries Act
16 U.S.C. § 1431-1434

1.6 Transportation

Department of Transportation Act of 1966 (Sec. 4(f))
49 U.S.C. § 1653(f)

Federal Aid Highway Act of 1958
23 U.S.C. § 128, 138

Urban Mass Transportation Act of 1964
49 U.S.C. § 1602, 1610

Airport and Airway Development Act of 1970
49 U.S.C. § 1716

Federal Aviation Act
49 U.S.C. § 3334

1.7 Air Quality

Clean Air Act
42 U.S.C. § 7401 et seq.

1.8 Miscellaneous

Intergovernmental Coordination Act of 1968
42 U.S.C. § 4201, 4231, 4233
(A-95 review process, including urban impact analysis)

Demonstration Cities and Metropolitan Development Act of 1966
42 U.S.C. § 3334

Surface Mining Control and Reclamation Act of 1977
30 U.S.C. § 1201 *et seq.*

Resources Conservation and Recovery Act of 1976
42 U.S.C. § 3251 *et seq.*

Noise Control Act of 1972, as amended
42 U.S.C. § 4901 *et seq.*

PROGRAMS OF GRANTS TO STATES IN WHICH STATE AGENCIES HAVING STATEWIDE JURISDICTION MAY PREPARE EISs

2.1 Fish and Wildlife Service

A. Anadromous Fish Conservation [#15.600]

B. Fish Restoration [#15.605]

C. Wildlife Restoration [#15.611]

D. Endangered Species Conservation [#15.612]

2.2 Heritage Conservation and Recreation Service

A. Outdoor Recreation--Acquisition, Development and Planning [#15.400]

B. Historic Preservation Grants-in-Aid [#15.411]

C. Urban Park and Recreation Recovery Program Grants (not yet incorporated in CFDA)

Note: Citations in brackets refer to the Catalog of Federal Domestic Assistance, Office of Management and Budget, 1979

5.1 Purpose. This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to decisionmaking.

5.2 Predecision Referrals to CEQ [1504.3].

A. Upon receipt of advice that another Federal agency intends to refer a Departmental matter to CEQ, the lead bureau will immediately meet with that Federal agency to attempt to resolve the issues raised and expeditiously notify its Assistant Secretary and the Office of Environmental Project Review.

B. Upon any referral of a Departmental matter to CEQ by another Federal agency, the Office of Environmental Project Review will be responsible for coordinating the Department's position.

5.3 Decisionmaking Procedures [1505.1].

A. Procedures for decisions by the Secretary/Under Secretary are specified in 301 DM 1. Assistant Secretaries should follow a similar process when an environmental document accompanies a proposal for their decision.

B. Bureaus will incorporate in their formal decisionmaking procedures and NEPA handbooks provisions for consideration of environmental factors and relevant environmental documents. The major decision points for principal programs likely to have significant environmental effects will be identified in the Bureau Appendix to Chapter 6.

C. Relevant environmental documents, including supplements, will be included as part of the record in formal rulemaking or adjudicatory proceedings.

D. Relevant environmental documents, comments, and responses will accompany proposals through existing review processes so that Departmental officials use them in making decisions.

E. The decisionmaker will consider the environmental impacts of the alternatives described in any relevant environmental document and the range of these alternatives must encompass the alternatives considered by the decisionmaker.

5.4 Record of Decision [1505.2].

A. Any decision documents prepared pursuant to 301 DM 1 for proposals involving an EIS may incorporate all appropriate provisions of Section 1505.2(b) and (c).

B. If a decision document incorporating these provisions is made available to the public following a decision, it will serve the purpose of a record of decision.

5.5 Implementing the Decision [1505.3]. The terms "monitoring" and "conditions" will be interpreted as being related to factors affecting the quality of the human environment.

5.6 Limitations on Actions [1506.1]. A bureau will notify its Assistant Secretary, the Solicitor, and the Office of Environmental Project Review of any situations described in Section 1506.1(b).

5.7 Timing of Actions [1506.10]. For those EISs requiring the approval of the Assistant Secretary--Policy, Budget and Administration pursuant to 516 DM 6.3, the responsible official will consult with the Office of Environmental Project Review before making any request for reducing the time period before a decision or action.

5.8 Emergencies [1506.11]. In the event of an unanticipated emergency situation, a bureau will immediately take any necessary action to prevent or reduce risks to public health or safety or serious resource losses and then expeditiously consult with its Assistant Secretary, the Solicitor, and the Office of Environmental Project Review about compliance with NEPA. The Office of Environmental Project Review and the bureau will jointly be responsible for consulting with CEQ.

6.1 Purpose. This Chapter provides supplementary instructions for implementing those provisions of the CEQ regulations pertaining to procedures for implementing and managing the NEPA process.

6.2 Organization for Environmental Quality.

A. Office of Environmental Project Review. The Director, Office of Environmental Project Review, reporting to the Assistant Secretary--Policy, Budget and Administration (PBA), is responsible for providing advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with NEPA, E.O. 11514, the CEQ regulations, and this Part. (See also 110 DM 22.)

B. Bureaus and Offices. Heads of bureaus and offices will designate organizational elements or individuals, as appropriate, at headquarters and regional levels to be responsible for overseeing matters pertaining to the environmental effects of the bureau's plans and programs. The individuals assigned these responsibilities should have management experience or potential, understand the bureau's planning and decisionmaking processes, and be well trained in environmental matters, including the Department's policies and procedures so that their advice has significance in the bureau's planning and decisions. These organizational elements will be identified in the Bureau Appendix to this Chapter.

6.3 Approval of EISs.

A. A program Assistant Secretary is authorized to approve an EIS in those cases where the responsibility for the decision for which the EIS has been prepared rests with the Assistant Secretary or below. The Assistant Secretary may further assign the authority to approve the EIS if he or she chooses. The Assistant Secretary--PBA will make certain that each program Assistant Secretary has adequate safeguards to assure that the EISs comply with NEPA, the CEQ regulations, and the Departmental Manual.

B. The Assistant Secretary--PBA is authorized to approve an EIS in those cases where the decision for which the EIS has been prepared will occur at a level in the Department above an individual program Assistant Secretary.

6.4 List of Specific Compliance Responsibilities.

A. Bureaus and offices shall:

(1) Prepare NEPA handbooks providing guidance on how to implement NEPA in principal program areas.

(2) Prepare program regulations or directives for applicants.

(3) Propose categorical exclusions.

(4) Prepare and approve EAs.

(5) Decide whether to prepare an EIS.

(6) Prepare and publish NOIs and FONSIs.

(7) Prepare and, when assigned, approve EISs.

B. Assistant Secretaries shall:

(1) Approve bureau handbooks.

(2) Approve regulations or directives for applicants.

(3) Approve categorical exclusions.

(4) Approve EISs pursuant to 516 DM 6.3.

C. The Assistant Secretary--Policy, Budget and Administration shall:

(1) Concur with regulations or directives for applicants.

(2) Concur with categorical exclusions.

(3) Approve EISs pursuant to 516 DM 6.3.

6.5 Bureau Requirements.

A. Requirements specific to bureaus appear as appendices to this Chapter and include the following:

(1) Identification of officials and organizational elements responsible for NEPA compliance (516 DM 6.2B).

(2) List of program regulations or directives which provide information to applicants (516 DM 2.2B).

(3) Identification of major decision points in principal programs (516 DM 5.3B) for which an EIS is normally prepared (516 DM 2.3E).

(4) List of categorical exclusions (516 DM 2.3A).

B. Appendices are attached for the following bureaus:

(1) Fish and Wildlife Service (Appendix 1).

(2) Geological Survey (Appendix 2).

(3) Heritage Conservation and Recreation Service (Appendix 3).

(4) Bureau of Indian Affairs (Appendix 4).

(5) Bureau of Land Management (Appendix 5).

(6) Bureau of Mines (Appendix 6).

(7) National Park Service (Appendix 7).

(8) Office of Surface Mining (Appendix 8).

(9) Water and Power Resources Service (Appendix 9).

C. The Office of the Secretary and other Departmental Offices do not have separate appendices, but must comply with this Part and will consult with the Office of Environmental Project Review about compliance activities.

6.6 Information About the NEPA Process. The Office of Environmental Project Review will publish periodically a Departmental list of contacts where information about the NEPA process and the status of EISs may be obtained.

APPENDIX E

U.S. COAST GUARD DOCUMENTATION

FEB 5 198

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

DOCUMENTATION TO
ACCOMPANY BRIDGE APPLICATIONS

MAILING ADDRESS:
COMMANDER (oan)
FIFTH COAST GUARD DISTRICT
FEDERAL BUILDING
431 CRAWFORD STREET
PORTSMOUTH, VIRGINIA 23705

HAI

An applicant for authorization to construct a bridge across navigable waters of the United States must comply with the following:

1. Section 115.50, Title 33, U.S. Code of Federal Regulations. (Copy Attached)

2. National Environmental Policy Act of 1969 (Public Law 91-190)

   Section 102 (2) (C) of the NEP Act is designed to ensure that environmental considerations are given careful attention and appropriate weight in all decisions of the Federal governments. To meet the requirements of Section 102 (2) (C), an applicant must submit one of the following:

   a. "Environmental Assessment" - A written analysis submitted describing the environmental impacts of proposed actions.

   b. "Environmental Impact Statement" - A report which identifies and analyzes in detail the environmental impacts of a proposed action.

   c. "Negative Declaration" - A detailed statement that the proposed action will not have a significant impact on the environment.

   The environmental statement should cover the bridge, the bridge approaches and any highway/railway project which is part of the overall construction plan. This encompasses the geographic area where construction would cease if a permit were not granted for the bridge.

3. Federal Water Pollution Control Act (Public Law 92-500)

   Section 401 (a) (1) requires that any applicant for a Federal license or permit to construct or operate a facility which may result in any discharge into the navigable waters of the United States shall provide the licensing or permitting agency a certification, normally in the form of a WATER QUALITY CERTIFICATE, from the state in which the discharge originates that such a discharge will comply with the applicable provisions of Section 301, 302, 306, and 307 of the Act. Section 502 (6) of the Act states that the term "pollutant" includes dredged soil, solid waste, sewage and sludge, chemical wastes, wrecked or discarded equipment, rock, sand and other enumberated categories.

~~In addition the following laws may require some action on the part of t~~ applicant.

   Department of Transportation Act of 1966 (Public Law 89-670) Section 4 (f)

   Section 4 (f) lands include any publicly owned land from a public park, recreation area, wildlife or waterfowl refuge, or any land from an historic site.

   National Historic Preservation Act of 1966 (Public Law 89-665)

   "Historic Preservation" includes the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, or culture.

COASTAL ZONE MANAGEMENT ACT. CAMA PERMIT REQUIRED (IF STATE HAS APPROVED PLAN)

Section 115.50, Title 33, U. S. Code of Federal Regulations
Bridges Across Waterways

(a) Approval of plans - To obtain approval of the Commandant, an application for authorization to construct a bridge across navigable waters of the United States must show the name and address of the applicant; the waterway and location of the bridge; citation to the act of Congress or the State legislature authorizing the bridge; be accompanied by a map of the location and plans of the bridge showing these features which affect navigation; papers to establish the identity of the applicant.

(b) Prior authority necessary - A bridge cannot lawfully be constructed across any navigable waterway of the united states until legislative authority has been obtained and the plans have been approved by the Commandant. (See section 9, River and Harbor Act of Mar. 3, 1899 (30 Stat. 1151; 33 U. S.C. 401), General Bridge Act of Mar. 23, 1906 (34 Stat. 84; 33 U. S. C. 491), and General Bridge Act of 1946 (60 Stat. 847; 33 U. S. C. 525 et seq.).)

(c) Legislation required - The legislative authority must be obtained from Congress if the bridge crosses an international waterway. If the navigable portions of the waterway are not within the limits of a single state, the General Bridge Act of 1946 grants authority of Congress and no special act is necessary. If the navigable portions of the waterway are within the limits of a single State, State authority is necessary.

(d) Form - The application for the approval of plans consists of a letter accompanied with maps and plans of the proposed structure.

(e) Signature - In case of signature by an agent or by an official of a corporation, a duly authenticated copy of the authority for the action must accompany the application.

(f) Identification - If the applicant is a corporation, it must furnish certified copies of the following papers, all properly authenticated: The charter or articles of incorporation; the minutes of organization; extract from minutes showing the names of the present officers of the corporation.

(1) Where State laws vest in State or county officers, such as boards of supervisors and county courts, the power to authorize the construction of bridges, they must furnish with their application certified extracts from their proceedings showing their action authorizing the proposed structure.

(g) Plans - Four sets of plans must be submitted with the application on which the location of the work and the essential features covered by the application will be outlined in red. Each drawing must have a simple title, date and number, preferably in the lower righthand corner.

(h) Size of sheets - The drawings will be on sheets 8 by 10½ inches in size. As few sheets will be used as necessary to show clearly what is proposed.

(i) Special instructions - (1) The scale will be shown graphically. The north and south line will be indicated by a meridian arrow. Soundings and elevations will be shown in feet and referred to the established Government datum plane at the locality.

(2) The direction of currents will be indicated by an arrow, and the strength of currents, both ebb and flow, or low water and high water, will be shown close to the proposed location of the bridge, and at both ends of the waterway shown on the map of location.

(3) The plans will show in figures the least clear height of the lowest part of the superstructure over navigation openings, with reference to the planes of mean high water and mean low water if the bridge is to cross tidal water. If the waters are nontidal, the least clear height will be shown with reference to the planes of extreme high water and mean low water. If records of river heights are available, the plane above which flood waters have not remained more than 2 percent of the time will be indicated. Reference will also be made to other datum planes if appropriate for the waterway in question.

(4) If harbor lines have been established at the site of the bridge, their position will be shown on the plans.

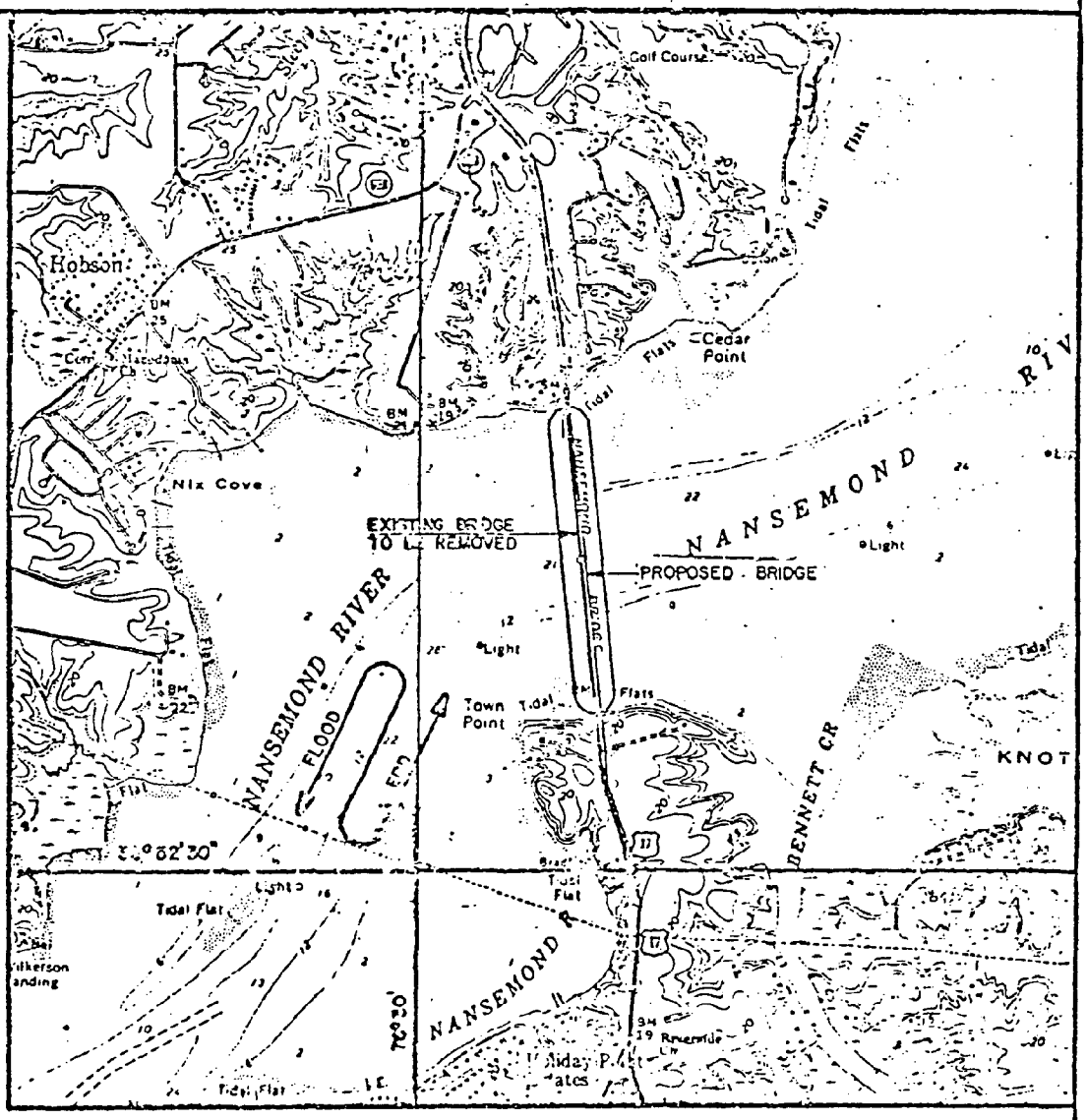
(j) Structural details - Only those should be shown which are needed to illustrate the effect of the proposed structure on navigation. If the bridge is to be equipped with a draw, the latter will be shown in two positions: closed and open.

(k) To whom application should be presented - The application and the papers and plans accompanying it should be submitted to the District Commander having jurisdiction over the area in which the bridge site is located.

(l) Action on application - When an application is received for approval of plans for a bridge, the District Commander will verify the authority for construction of the bridge, review the application and plans as to sufficiency, ascertain the views of local authorities and other interested parties, and submit a report with the application to the Commandant.

9. Investigation for involvement with:

	No Effect	Comments
Section 4(f) of DOT Act		
Wetlands, DOT Order 5660.1A		
Floodplains, DOT Order 5650.2		
Section 106 of National Historic Preservation Act and E.O. 11593		
Section 401 Federal Water Pollution Control Act		
Fish and Wildlife Coordination Act		
Threatened and Endangered Species		
Coastal Zone Management Act		
Clean Air Act		
Noise Control Act		
Wild & Scenic Rivers		
Prime & Unique Farmlands		
Uniform Relocation and Assistance Act		



LOCATION MAP

Proposed Bridge to be located 2.5 Miles above the mouth of NANSEMOND RIVER.

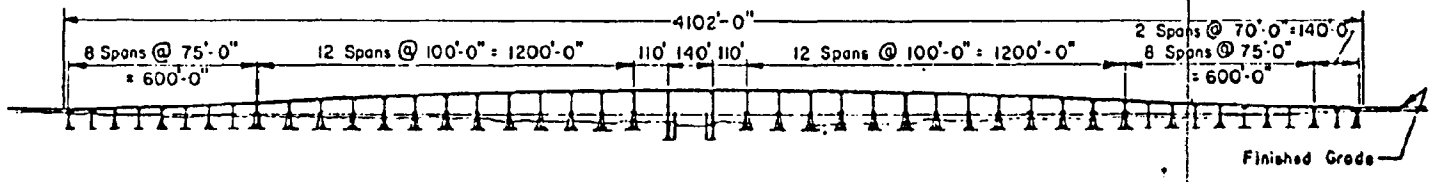
Location Map reproduced from U.S.G.S. Maps BOYERS HILL, BENNS CHURCH, CHUCKATUCK and NEWPORT NEWS SOUTH Quadrangles.

SCALE OF STATUTE MILES

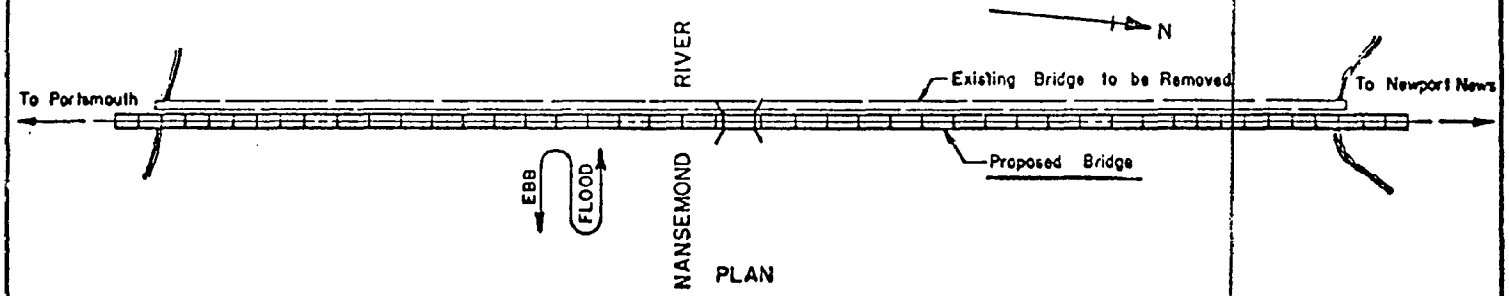
0 ½ 1

PROPOSED BRIDGE
~~N.B.L. RTE. 17 OVER~~
NANSEMOND RIVER
PROJ. 6017-061-103, B603
CITY OF SUFFOLK
APPLICATION BY
VIRGINIA DEPARTMENT OF HIGHWAYS
AND TRANSPORTATION
OFFICE OF THE BRIDGE ENGINEER
RICHMOND, VA. APRIL, 1978

SHEET 1 OF 3 (1)



ELEVATION

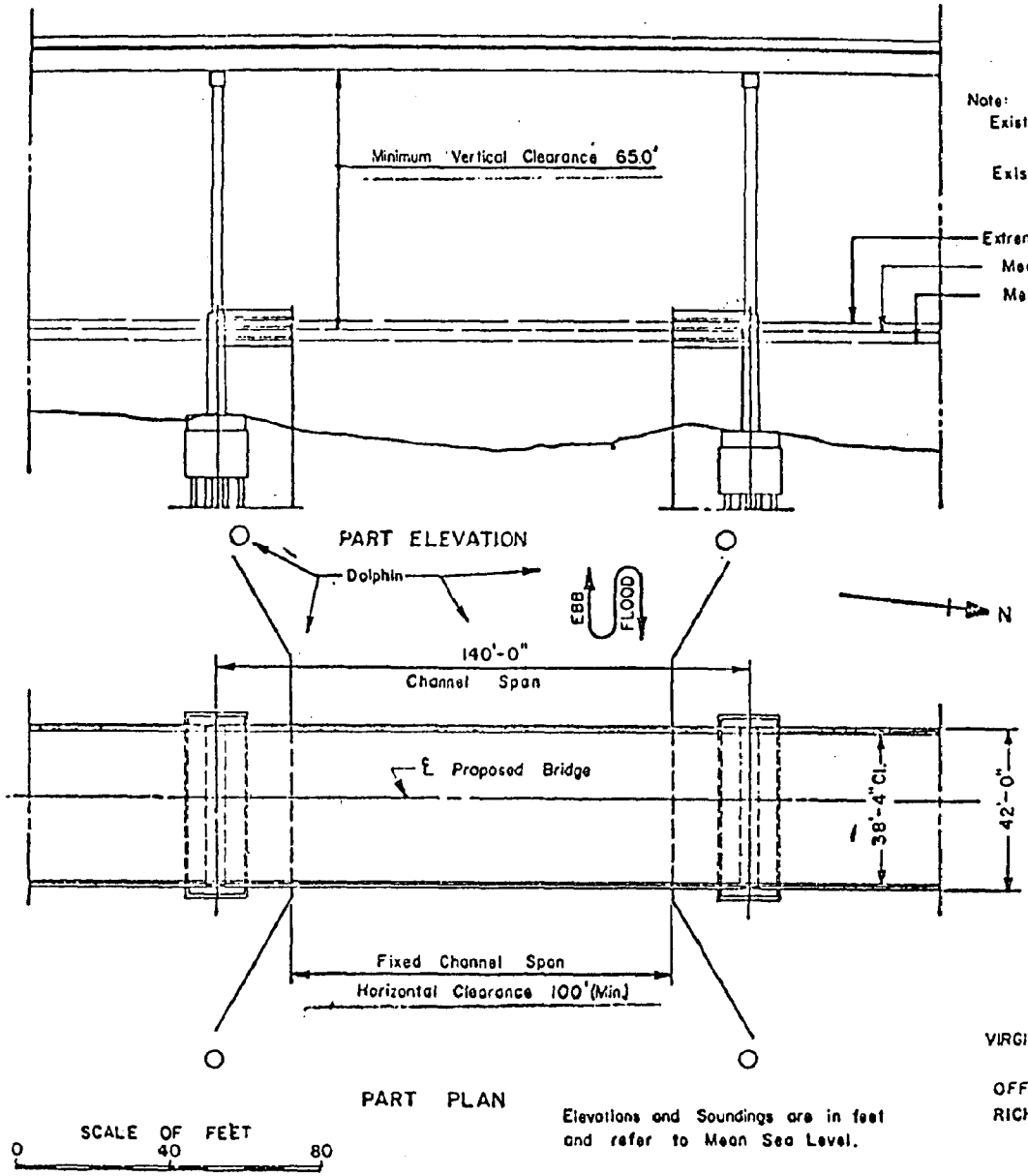


PLAN

PROPOSED BRIDGE
N.B.L. RTE. 17 OVER
NANSEMOND RIVER
PROJ. 6017-061-103, B603
CITY OF SUFFOLK
APPLICATION BY
VIRGINIA DEPARTMENT OF HIGHWAYS
AND TRANSPORTATION
OFFICE OF THE BRIDGE ENGINEER
RICHMOND, VA. APRIL, 1978

SHEET 2 OF 3

SCALE OF FEET
0 500 1000



Note:
Existing Vertical Clearance : Bascule Span
Closed : 21.3' ± Open : Unlimited
Existing Horizontal Clearance : 96'-0"

Extreme High Tide Elev. 8.0 (Aug. 1933)
Mean High Tide Elev. 1.8
Mean Low Tide Elev. -1.2

Elevations and Soundings are in feet and refer to Mean Sea Level.

PROPOSED BRIDGE
N.B.L. RTE. 17 OVER
NANSEMOND RIVER
PROJ. 6017-061-103, B603
CITY OF SUFFOLK
APPLICATION BY
VIRGINIA DEPARTMENT OF HIGHWAYS
AND TRANSPORTATION
OFFICE OF THE BRIDGE ENGINEER
RICHMOND, VA. APRIL, 1978
Rev.; June, 1978
SHEET 3 OF 3

U.S. Department of Transportation
United States Coast Guard

OCT 5 1981

BRIDGE PERMIT

(102-81-5)

WHEREAS by Title V of an act of Congress approved August 2, 1946, entitled "General Bridge Act of 1946," as amended (33 U.S.C. 525-533), the consent of Congress was granted for the construction, maintenance and operation of bridges and approaches thereto over the navigable waters of the United States;

AND WHEREAS under Section 502(b) of that act, the authority of which was transferred to and vested in the Secretary of Transportation by Section 6(g)(6)(C) of the Department of Transportation Act (80 Stat. 931) and delegated by the Secretary to the Commandant, U.S. Coast Guard by Section 1.46(c) of Title 49 Code of Federal Regulations, it is required that the location and plans for such bridges be approved by the Commandant before construction is commenced and in approving the location and plans of any such bridge, the Commandant may impose any specific conditions relating to the construction, maintenance and operation of the structure which he deems necessary in the interest of public navigation, such conditions to have the force of law;

AND WHEREAS the COMMONWEALTH OF VIRGINIA has submitted the location and plans of a bridge to be constructed across Williams Creek near Dahlgren, Virginia;

NOW THEREFORE, This is to certify that the location and plans dated 29 April 1981 are hereby approved by the Commandant, subject to the following conditions:

1. No deviation from the approved plans may be made either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Commandant.

2. The construction of falsework, cofferdams or other obstructions, if required, shall be in accordance with plans submitted to and approved by the Commander, Fifth Coast Guard District prior to construction of the bridge. All work shall be so conducted that the free navigation of the waterway is not unreasonably interfered with and the present navigable depths are not impaired. Timely notice of any and all events that may affect navigation shall be given to the District Commander during construction of the bridge. The channel or channels through the structure shall be promptly cleared of all obstructions placed therein or caused by the construction of the bridge to the satisfaction of the District Commander, when in his judgment the construction work has reached a point where such action should be taken, but in no case later than ninety days after the bridge has been opened to traffic.

3. Issuance of this permit does not relieve the permittee of the obligation or responsibility for compliance with the provisions of any other law or regulation as may be under the jurisdiction of the U. S. Department of the Interior, Fish and Wildlife Service; U. S. Department of Commerce, National Marine Fisheries Service; Commonwealth of Virginia, State Water Control Board, or any other federal, state or local authority having cognizance of any aspect of the location, construction or maintenance of said bridge.

4. In the event archaeological resources are encountered during the course of construction activity, the permittee should immediately notify the Virginia Historic Landmarks Commission.

5. All parts of the existing to be replaced S.R. 206 Bridge across Williams Creek, mile 1.2, not utilized in the new bridge shall be removed down to or below the natural bottom of the waterway and the waterway cleared to the satisfaction of the District Commander. A period of 90 days subsequent to the opening to traffic of the new bridge, mile 1.2, will be allowed for such removal and clearance.

6. When the proposed bridge is no longer used for transportation purposes, it shall be removed in its entirety and the waterway cleared to the satisfaction of the District Commander. Such removal and clearance shall be completed by and at the expense of the owner of the bridge upon due notice from the District Commander.

7. The approval hereby granted shall cease and be null and void unless construction of the bridge is commenced within 3 years and completed within 5 years after the date of this permit.

J. WATT
Captain, U. S. Coast Guard
Chief, Bridge Administration Division
By direction of the Commandant

APPENDIX F

MARYLAND DEPARTMENT OF NATURAL RESOURCES (DNR) WETLAND PERMITS DIVISION DOCUMENTATION

STATE OF MARYLAND
WATER RESOURCES ADMINISTRATION
TAWES STATE OFFICE BUILDING, ANNAPOLIS, MD 21401

WETLAND LICENSES, PERMITS AND NOTIFICATIONS

This brief review may provide you with a better understanding of the Maryland Wetlands Act and directions for filing the form that you should submit. The form will serve as Notification or as Application to do any dredging, filling or otherwise altering wetlands in Maryland.

BACKGROUND

Wetlands and their resources have played an important role in the State's development. The rich mixture of saltwater, freshwater, and wetlands comprising much of Maryland's geography is essential in the food chains of oyster, clams, and crabs, rock and other finfish, waterfowl and lowland animals. Wetlands provide flood protection, silt absorption, control of certain types of pollution, shoreline buffer to wave action and erosion, and serve as an important source of oxygen for marine life.

Many wetland areas in Maryland have been modified or destroyed in the past. The remaining wetland areas are in danger of being further modified or destroyed. It is recognized that there is a continuing need for certain works for both the public and private benefit: to control shore erosion, to gain access to water, to maintain a channel, etc. To preserve tidal wetlands to the extent possible, in the face of these varying demands for their use or modifications, the Wetlands Act was enacted in 1970.

Projects to dredge, or fill or otherwise alter wetlands may not individually destroy much of this type acreage, Thus, an applicant may feel that his particular project will have little effect on the overall amount of this resource and would be of little, if any, environmental significance. However, when added together, the acreages lost by these projects have been and would continue to be appreciable. It is therefore essential that each project be developed with the least involvement of wetlands as practicable, and so designed as to permit restoration or compensation by nature or by project mitigation within a reasonable period of time. You should be prepared to show that alternative designs involving less wetlands may not be practicable. An environmental impact statement may be required for those works involving extensive dredging or filling of wetlands.

LEGAL REQUIREMENTS

The regulation of dredging and/or filling on state wetlands is an extension of pre-existing Maryland policy, and is not new. Licenses have been required by the State Board of Public Works for these types of works for some years. In addition, the Corps of Engineers has required that any project to dredge and/or fill in navigable waters or marshes at or below the mean high water line (which are also known as state wetlands) and any project to dredge and/or fill tidal marshlands above the mean high water line (private wetlands) a federal permit must be obtained. Thus, any project involving state and/or private wetlands, as described in this pamphlet, requires that application be made to the Corps of Engineers for such federal permit, as well as to the State for appropriate state approval.

To obtain the federal permit application, which requires similar but frequently more detailed information that may be required by the State, contact the Permits Branch, Baltimore District, Corps of Engineers, Post Office Box 1715, Baltimore, Maryland 21203, telephone (301) 962-4500.

TYPES OF APPROVALS

The Wetlands Act provides that:

a) Proposed activities in the area below mean high water line (termed state wetlands) require a license from the State Board of Public Works. (An exception is the submerged lands held under valid grant or patent, issued prior to 1862, which would be considered private wetlands.)

b) The activities in the area landward of the mean high water line to limit of tidal influence and supporting aquatic growth (termed private wetlands) may require, dependent upon the nature of the work:

   1) No Notification to the Secretary of Natural Resources or
   2) Notification to the Secretary of Natural Resources or
   3) Permit from the Secretary of Natural Resources.

   The activities falling under each category are more fully explained in the Rules and Regulations for Private Wetlands for the county concerned. In general, normal hunting, fishing, shellfishing and agricultural practices in private wetlands do not require Notification. Permanent alterations or modifications of private wetlands to conserve soil, vegetation, fish and wildlife do require Notification. All other activities require Permit.

ADMINISTRATIVE PROCEDURE

The Water Resources Administration is a member agency of the Department of Natural Resources and acts for the Secretary of Natural Resources in administering the Wetlands Act. The Administration upon receiving the necessary form and plan will determine whether the wetlands involved are in the state and/or private wetland zones. The Administration will either accept the proposal form as Notification and so advise the property owner, or accept the proposal form as an Application for a state wetland license or private wetland permit. If a license or permit is required, the Administration will:

a) Gather relevant information from available sources, i.e., fish and wildlife surveys, boating activity records, topographic and hydropgraphic data, etc.
b) Consult with interested federal, state and local agencies as may be appropriate.
c) Visit the site as may be indicated.

d) Prepare a report on the findings, together with a recommendation as to whether the license or permit should be issued, and if so, the conditions attaching thereto.

e) Represent the Water Resources Administration at the public hearing before a Hearing Officer for the Secretary of Natural Resources (in the case of private wetlands) or for the Board of Public Works (in the case of state wetlands).

The applicant or his agent should be present at the hearing to respond to any questions from the Hearing Officer or other interested parties, and to make such additional statements as he may deem appropriate. Failure to be present may result in delaying consideration of the request.

The Board of Public Works (in the case of state wetlands) or the Secretary of Natural Resources (in the case of private wetlands) will then determine whether issuance of a license or permit is in the best interests of the State, and any terms, or conditions that should be attached thereto.

The law provides that if the project is to fill or erect shore erosion structure no more than 300 feet in length parallel to and in front of fast land and for no more than 10 feet channelward of mean high water line, the Secretary may recommend that the Board of Public Works issue state wetland license without holding a public hearing. This does not mean that in any project falling within these limits the Secretary will automatically make such recommendation to dispense with the public hearing. If the Secretary determines that the work can be done at a closer distance to or at the mean high water line rather than the distance proposed, the Secretary will recommend that a public hearing be held so that the Board of Public Works might consider such revision. Further, if there are any valid objections by the public, the project will be recommended for public hearing. The law also provides that a state wetland license may include provision for periodic maintenance dredging for 6 years beyond the date of issuance of a license. Said provision is limited to projects entailing the dredging of no more than 500 cubic yards of material.

PLANS

It is essential that a complete plan be submitted. The instruction sheet specifies the items that must be shown on the plan. Please follow these instructions carefully. Otherwise, it may be necessary to return your application for such correct completion. This will delay consideration of your application.

GENERAL

a) The processing of a complete application for license or permit will normally require about ninety (90) days (to allow for scheduling the hearing, advertising same and completing the procedures

mentioned above). It is strongly recommended that the application be submitted at least ninety (90) days in advance of the desired starting date. You should anticipate a similar ninety (90) day processing period for federal permit for any project involving filling or dredging. It is therefore suggested that applications for federal and state permits be made concurrently so that your project may be better coordinated by the respective reviewing agencies.

b) Complete application received by the 15th day of the month will normally be advertised in the Maryland Register and a leading newspaper printed in the county concerned and scheduled for public hearing in the succeeding month.

SUMMARY

1. DEVELOP THE PROJECT WITH LEAST ENVIRONMENTAL IMPACT.

   For example: What is the least amount of dredging required? Can a pier serve instead? Would stone revetment (riprap) rather than timber bulkhead enable placement of the structure closer to the mean high water line or better serve at the particular site? Can you avoid the filling or dredging of any marsh that might be present?

2. PREPARE COMPLETE, CLEARLY DRAWN PLAN ON 8½x11 SHEET.

3. SUBMIT NOTIFICATION/APPLICATION FORM WITH PLAN AT EARLIEST DATE TO:

   Department of Natural Resources
   Water Resources Administration
   Wetlands Permit Division
   Tawes State Office Building
   Annapolis, Maryland 21401

4. PLEASE CALL (301) 269-3871/72 OR VISIT OUR OFFICE IF YOU HAVE ANY QUESTIONS.

5. SUBMIT APPLICATION TO THE CORPS OF ENGINEERS PROMPTLY TO INSURE CONCURRENT PROCESSING.

   Permits Branch
   Baltimore District
   Corps of Engineers
   P. O. Box 1715
   Baltimore, Maryland 21203

   Telephone: (301) 962-4500

STATE OF MARYLAND
WATER RESOURCES ADMINISTRATION

INSTRUCTIONS FOR:

A. COMPLETION OF NOTIFICATION AND/OR APPLICATION FORM

Item 1: Name of the actual owner of the property involved.

2: This information is to assist in more precisely locating the property on maps, and in directing the evaluator on visit to the site.

3: Indicate the specific purpose(s) of the project: to control erosion, to obtain reasonable boat access, or to make other types of improvements. In doing so, describe the nature of the existing problem and why use of non-wetlands may not achieve the purpose(s) intended.

4: The applicant is not relieved from obtaining other federal, state or local permits or approvals that may be required.

5: If the contractor is known, please complete.

6: Recognizing the time required to obtain necessary approvals, indicate the approximate date on which work is to start.

7: If the applicant is not the property owner, but an authorized representative, he should indicate his address, if it is other than the property owner's.

B. COMPLETION OF PLAN OF PROJECT ON 8½x11 INCH PAPER

The plan to be submitted with the Notification and/or Application Form must be complete. It must show each of the following items that may be applicable (see SAMPLE PLAN):

Item 1: The mean high water (MHW) line and mean low water (MLW) line, and any marsh areas.

2: The area(s) of the proposed dredging and/or filling. Include location and cross section of the dikes to confine spoil.

3: The quantities (in cubic yards) of dredging and/or filling.

4: The depths of water (below MLW) in and surrounding the area to be dredged or filled.

5: The final depths (below MLW) of the dredged areas. The elevations (above MHW) of land areas to be filled and the final elevations.

6: The structures to be built.

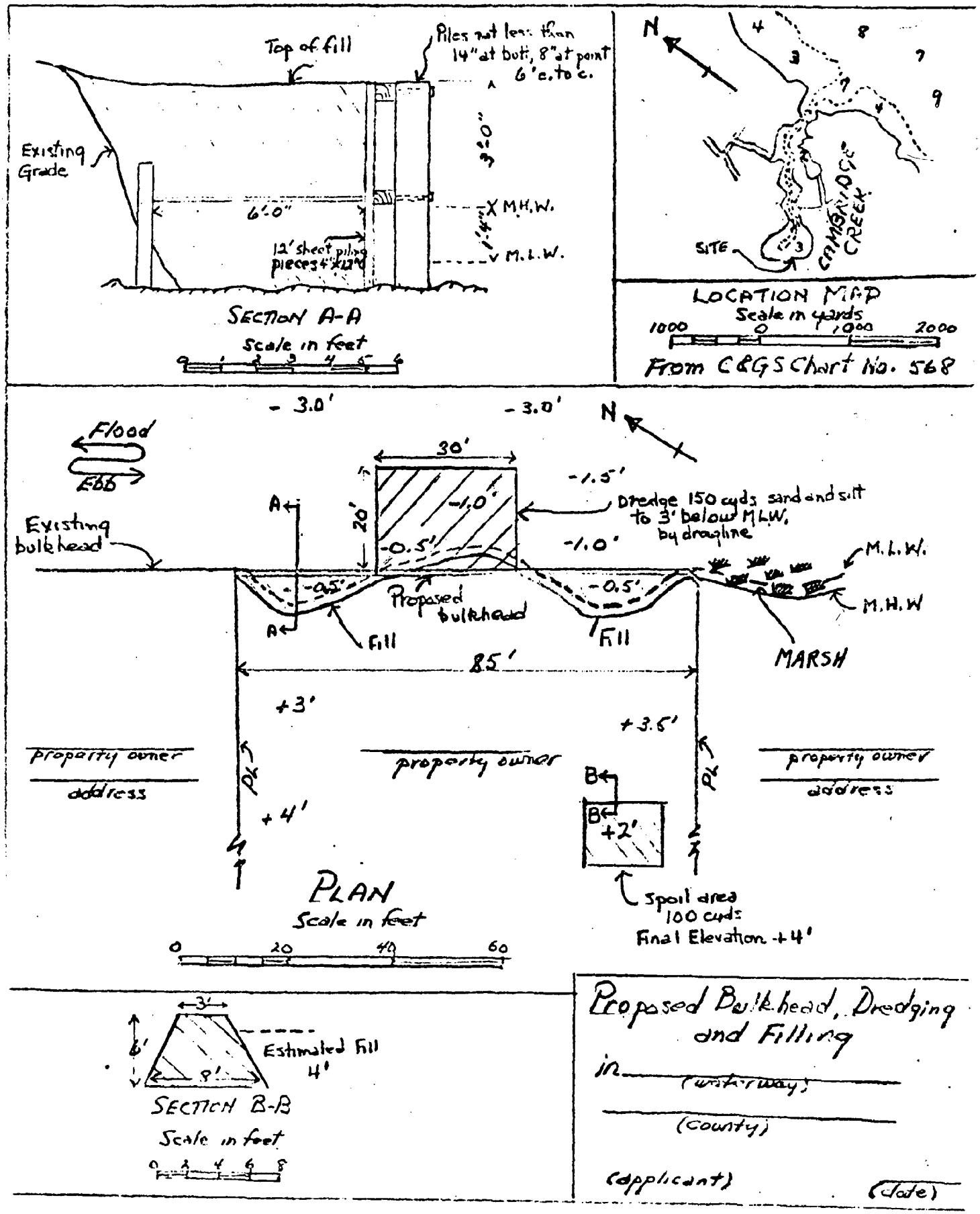
7: The property lines of adjoining properties, or indicate the distances in feet and directions thereto.

8: The names and correct mailing addresses of adjoining property owners.

9: The scale to which the plan is drawn.

10: [illegible] (see SAMPLE PLAN) [illegible]

SAMPLE PLAN


Top of fill
Piles not less than 14" at butt, 8" at point 6' c. to c.
Existing Grade
3'-0"
6'-0"
M.H.W.
1'-4"
12' sheet piling pieces 4"x12"
M.L.W.
SECTION A-A
Scale in feet
0 1 2 3 4 5 6
N
4
8
3
7
9
CAMBRIDGE CREEK
SITE
LOCATION MAP
Scale in yards
1000 0 1000 2000
From C&GS Chart No. 568
- 3.0'
- 3.0'
N
Flood
Ebb
30'
20'
-1.5'
-1.0'
Dredge 150 cyds sand and silt to 3' below M.L.W. by dragline
A
Existing bulkhead
-0.5'
-1.0'
M.L.W.
-0.5'
-0.5'
Proposed bulkhead
M.H.W
A
Fill
Fill
MARSH
85'
+3'
+3.5'
property owner
address
property owner
property owner
address
PL
PL
B
B
+2'
+4'
PLAN
Scale in feet
0 20 40 60
Spoil area 100 cyds
Final Elevation +4'
3'
6'
8'
Estimated Fill 4'
SECTION B-B
Scale in feet
0 2 4 6 8
Proposed Bulkhead, Dredging and Filling
in
(waterway)
(county)
(applicant)
(date)

STATE OF MARYLAND
WATER RESOURCES ADMINISTRATION
TAWES STATE OFFICE BUILDING
ANNAPOLIS, MARYLAND 21401

PROPOSAL TO DREDGE, FILL, REMOVE OR OTHERWISE ALTER WETLANDS
NOTIFICATION AND/OR APPLICATION
(Please complete in accordance with Instruction Sheet)

1. Name: _____ _____
(Property Owner) (Phone)

Address: _____ _____ _____ _____
(Street) (City/Town) (State) (Zip)

2. Project Location: County _____ Name of Waterway _____

Wetland Map No.: _____ (if known) on which property is shown.

Address of site itself if different from above address (Give Street and Lot Number):

Describe how to reach from nearest prominent town and road; give name or number and, in undeveloped areas, distance off road, other identification:

3. Purpose(s) of the project: (describe)

4. Indicate by check (✓) other permits or approvals required to carry out the project. (If permit or approval has been obtained, enter "obtained").

Building Permit _____ Health Department Permit _____
Zoning Approval _____ Soil Conservation District Approval _____
Corps of Engineers Permit _____ Other (specify) _____

5. If the project is to be done by a contractor, submit his name and address:

_____

_____

6. Proposed starting date: _____

7. Certification: I hereby certify that the information on this form and on the attached plan is true and accurate to the best of my knowledge and belief. Further, I understand that the State may request information in addition to that set forth herein as may be deemed appropriate in considering this proposal.

_____ _____
Printed Name of Property Owner (or authorized representative) Date

_____ _____
(address of other than above) Signature

THE PLAN COMPLETED IN ACCORDANCE WITH INSTRUCTION SHEET MUST ACCOMPANY THIS FORM.
(THE PLAN PREPARED FOR FEDERAL PERMIT MAY BE USED.)

KEEP THIS COPY FOR YOUR RECORDS

STATE OF MARYLAND
WATER RESOURCES ADMINISTRATION
TAWES STATE OFFICE BUILDING
ANNAPOLIS, MARYLAND 21401

PROPOSAL TO DREDGE, FILL, REMOVE OR OTHERWISE ALTER WETLANDS
NOTIFICATION AND/OR APPLICATION

(Please complete in accordance with Instruction Sheet)

1. Name: _____ (Property Owner) _____ (Phone)

   Address: _____ (Street) _____ (City/Town) _____ (State) _____ (Zip)

2. Project Location: County _____ Name of Waterway _____

   Wetland Map No.: _____ (if known) on which property is shown.

   Address of site itself if different from above address (Give Street and Lot Number):

   Describe how to reach from nearest prominent town and road; give name or number and, in undeveloped areas, distance off road, other identification:

3. Purpose(s) of the project: (describe)

4. Indicate by check (✓) other permits or approvals required to carry out the project. (If permit or approval has been obtained, enter "obtained").

   Building Permit _____ Health Department Permit _____
   Zoning Approval _____ Soil Conservation District Approval _____
   Corps of Engineers Permit _____ Other (specify) _____

5. If the project is to be done by a contractor, submit his name and address:

   _____

   _____

6. Proposed starting date: _____

7. Certification: I hereby certify that the information on this form and on the attached plan is true and accurate to the best of my knowledge and belief. Further, I understand that the State may request information in addition to that set forth herein as may be deemed appropriate in considering this proposal.

   _____ _____
   Printed Name of Property Owner (or authorized representative) Date

   _____ _____
   (address of other than above) Signature

THE PLAN COMPLETED IN ACCORDANCE WITH INSTRUCTION SHEET MUST ACCOMPANY THIS FORM. (THE PLAN PREPARED FOR FEDERAL PERMIT MAY BE USED.)

SUPPLEMENTAL FORM FOR STORM DRAIN PROJECTS

I. APPLICANT:

II. NAME OF PROJECT:

III. LOCATION OF PROJECT:

IV. PROJECT DETAIL:

A. What is the size of drainage area contributing runoff to the existing natural or man made system?

B. What is the nature of the drainage area affected (e.g., land use, terrain, soils)?

C. Does the project entail new construction or improvement of an existing system?

D. How many linear feet of drainage system are involved?

E. Will the type of system be open, closed or a combination thereof?

F. Will new flow directions or drainage patterns be established? If so, describe and show on plans.

G. What is the number and nature of proposed outlets?

H. What are the existing and/or proposed discharge volumes and velocities at each outlet?

I. Does design of the outlet include any structures (e.g., gabion apron, riprap) to dissipate energy and prevent erosion or any structures to trap sediments? If so describe and/or show on plans

J. What permanent pollution control devices (e.g., sediment traps, screening, grass strips, filter strips, sediment ponds, clean-out traps) are planned in the project?

K. What maintenance provisions or schedules are planned for these pollution control devices?

L. Will temporary sediment control measures be established and maintained during the construction period?

M. What site specific factors, if any, preclude utilization of any of the above environmental impact mitigation measures and/or alternative designs?

POLICY GUIDELINES FOR IMPLEMENTATION OF THE MARYLAND WETLANDS LAW

Purpose

To implement the public policy of the State to preserve its tidal wetlands and prevent their despoliation and destruction by unregulated dredging, dumping, filling and like activities, the Wetlands Permit Section uses the policy guidelines outlined below in the review and approval of these activities for State wetlands and Private wetlands in Maryland. Included are policy guidelines for recommendations of the Department of Natural Resources on all applications for Federal permits for any construction in the navigable waters of the State

Regarding State wetlands, the purpose of the guidelines is to safeguard the public interest in protecting those natural resources that are in State ownership. Alteration of State wetlands is authorized only when such alteration clearly serves the overall public interest, taking into account the affects upon the varying ecological, economic, developmental, recreational and aesthetic values of such wetlands.

Regarding Private wetlands, the purpose of the guidelines is to permit reasonable use by the owner if such use is carried out under the conditions of the permit, and in accordance with the regulations where applicable, to protect the natural resource values in both the Private wetlands and the State wetlands.

The purpose of the guidelines concerned with the recommendations on applications for Federal permits is to provide a basis for objective comment on each application that reflects the effect of the proposed construction, or the use of the facility after completion, upon public access and use and the effect upon the water quality of the surrounding area.

General Requirements of the Wetlands Act

The dredging or filling of "State Wetlands", as defined by the Wetlands Act, to preserve access from riparian land to navigable water or to protect the shore from erosion requires the issuance of a license from the State Board of Public Works (An exception is the submerged lands under valid grant or patent, which are Private wetlands). Dredging or filling in "Private Wetlands", as defined by the Act, requires a permit from the Water Resources Administration except in those cases specifically noted as exemptions (See "Order Establishing Wetland Boundaries and Rules and Regulations, Section III C).

Maps delineating the upland boundary of tidal wetlands for each county are available at the county seat of each county in the tidewater region, and at the Wetlands Permit Section of the Water Resources Administration. Any landowner proposing to dredge or fill within the area of Private or State wetlands should consult with the Water Resources Administration on the procedure for obtaining a permit or license. A Federal permit is also required for such work within navigable waters. The landowner must apply to the Baltimore District, Corps of Engineers, U.S. Army, for a Federal permit. Concurrent application is recommended.

The following outlines when a license or permit is required.

(1) A State wetlands license must be obtained before any person starts any dredging or filling within State wetlands, except for

a. dredging of seafood products by licensed operators
b. harvesting of seaweed
c. mosquito control and abatement work approved by the Maryland Department of Agriculture
d. improvement of wildlife habitat approved by the Department of Natural Resources
e. maintenance of agricultural drainage ditches approved by appropriate Soil Conservation District. Construction of new drainage ditches within State Wetlands requires a State wetlands license.

(2) Any dredging or filling in the area landward of the mean high waterline to the limit of tidal influence and supporting aquatic vegetation (termed Private Wetlands) may require, depending upon the nature of the work, Notification to the Secretary of Natural Resources or a Private wetlands permit.

The Secretary of Natural Resources has promulgated regulations concerning dredging, filling, removing or otherwise altering Private wetlands. The regulations do not grant any property rights, nor do they authorize any person to trespass upon or injure the property of another, nor do they excuse any person from complying with other applicable Federal, State, and local laws, regulations, or ordinances.

(3) Authorized Uses of Private Wetlands

The following uses do not require a Private wetlands permit and are permitted on Private wetlands if otherwise permitted by law:

a. Projects or activities requiring approval of other state or local agencies of officials

1) The maintenance of agricultural drainage ditches as approved by the appropriate Soil Conservation District.
2) Alterations or modifications for mosquito control purposes as approved by the Maryland Department of Agriculture.

b. Recurring activities

1) Trapping, hunting, fishing and shellfishing.
2) The cultivation and harvesting of shellfish, including such reasonable excavation in Private wetlands as normally is necessary in conducting such activities.
3) The cultivation and harvesting of agricultural or horticultural products, including grazing and haying.

c. Permanent alteration or modification not requiring Notification

1) The construction and maintenance of walkways, foot bridges, duckblinds, docks, boathouses, boat shelters, and other similar structures, provided that said structures are so constructed on pilings as to permit the unobstructed flow of the tide and preserve the natural contour of the private wetland;
2) Construction and maintenance of tide gates designed to prevent the encroachment of salt water into agricultural drainage ditches;
3) The repair and maintenance of earthen dikes about a single residential dwelling, provided that such work does not involve the extension or increase in dimension of the existing dike.

d. Permanent alteration or modification requiring Notification

The Water Resources Administration is to be notified in writing before any person starts to dredge, fill or otherwise alter Private Wetlands in any county to carry out any of the following work:

1) Alterations or modifications which are customary and permitted by existing regulations for the conservation of soil, vegetation, water, fish, shellfish, and wildlife, including fur-bearing animals;
2) Making improvements necessary to preserve access to navigable waters, or to protect Private wetlands against erosion; provided that any improvement authorized involving either the dredging or filling of State wetlands may not proceed unless a license for filling or dredging has been issued by the State Board of Public Works under the provisions of Title 9, Natural Resources Article of the Annotated Code of Maryland;
3) The installation and maintenance of underground utilities, provided that the surface of the wetland is restored substantially to its original condition.

(4) Uses and Activities Prohibited on Private Wetlands Without a Permit

The following types of work may not be done except under the conditions of a Private wetlands permit:

a. No person may fill, place, dump, or discharge on the Private wetlands any loam, peat, sand, gravel, soil, or other similar substance; or any trash, garbage, debris, junk, or other polluting substance.

b. No person may drain, excavate or dredge the Private wetlands or remove therefrom loam, peat, sand, gravel, soil, or other similar substance.

c. No person may perform any act or use Private wetlands in a manner which would destroy the natural vegetation, substantially alter existing patterns of tidal flow, or otherwise alter or permit the alteration of the natural and beneficial character of such wetland.

(5) Notification of Intent or Application for Permit and/or License to dredge, fill, remove, or otherwise alter State or Private wetlands

Except for the activites authorized under Section (3)a,b, or c, a person may not dredge, fill, remove or otherwise alter any Private wetlands in any county without first informing the Water Resources Administration and receiving approval or permit as applicable. A single form as prescribed by the Water Resources Administration shall serve either as Notification of Intent or Application for Permit and/or License.

a. NOTIFICATION of Intent

The form shall serve as the Notification prescribed in Section (3)d for activities not requiring permit and/or license. The proposed activity specified in the form may proceed upon advice from the Water Resources Administration.

b. APPLICATION for Permit and/or License

The form shall also serve as the Application for permit to conduct an activity on private wetland not permitted in Section (4) above, and for license to conduct any activity on State wetlands.

Policy Guidelines for Evaluating Applications

Dredging of Channels for Reasonable Riparian Access

The public policy of the State is to preserve the wetlands while providing for the rights of the riparian land owner for his access to navigable waters. Sections 9-202 and 9-306 describe procedures for obtaining state permission for making permanent changes to the wetlands in order to construct some artificial means for obtaining such access. The intent of the Act is carried out by the use of the following policy criteria in evaluating project plants submitted for recommendations or approval:

(1) In cases where reasonable access for a riparian property owner can be provided directly from fast land, such an alternative shall be taken as opposed to the creation of a channel through the vegetated wetlands or filling for access.

(2) In those cases where access is to be provided to a subdivision or other multi-home development or community, creation of one common access channel or pier is encouraged; thus, a centralized boating facility is preferable. In the case of isolated single family dwellings a pier from fast land to open water shall normally fulfill the right of reasonable riparian access.

(3) The ownership of land bordering upon tidal waters does not carry with it the right to extend boat access inland by means of artifical channels.

(4) Canals, channels, ponds or lagoons may not be excavated without the plans also being approved by the appropriate Soil Conservation District. As there are only a few types of usch excavations that do not by law require a wetlands permit from the Department of Natural Resources, the Soil Conservation District is asked to verify the existence of such permit prior to their approval of the Sediment Control Plan. Ponds or other excavations within 100 feet of an existing shoreline might not be approved by the Soil Conservation Districts without the written approval of the Water Resources Administration.

(5) The authorization by the state for any person to dredge a navigation channel through wetlands is coordinated to the maximum possible extent with the approval of such work by federal and local agencies.

Construction of Shore Erosion Protection Work

The owner of land bounding on navigable or tidal waters is entitled to protect his shore against erosion as described in Title 9 of the Natural Resources Article. To ensure this right, the Water Resources Administration uses the following criteria to review proposed projects in carrying out the state policy to preserve the wetlands while allowing the exercise of the right of a riparian owner to protect his shore against erosion.

(6) The construction of bulkheads or other shore protection measures shall include only such filling as necessary for effective use of such measures and shall generally be located at the mean high water line or no further channelward than needed for proper tie-back emplacement, or in cases of a steep bank or cliff, no further channelward than needed to obtain a stable slope.

(7) Where shore protection is needed and a marsh exists in front of an applicant's land, the shore protection structure shall be placed behind the marsh or low profile protection (preferably riprap) placed channelward of the marsh so that normal tidal flow into the marsh will be maintained.

(8) Bulkheads shall be constructed with adequate returns to fastland or connected to adjacent shore erosion control structures, as may be applicable.

(9) Because of their possible detrimental effect, shoreline protective structures may not be approved or recommended for approval in the following cases, except where there is no alternative means to achieve a necessary public benefit whose need significantly outweighs the harm done by the proposed work:

a. Marshland will be filled or otherwise destroyed.
b. Surface drainage channels will be filled or occluded.
c. Navigation will be adversely affected.
d. Unique or rare and endangered flora or fauna will be affected.
e. Important historical or archeological sites will be adversely affected
f. Private oyster leases or natural oyster bars in adjacent open waters will be affected.

(10) The provision of shoreline protection is encouraged in locations subject to severe erosion where conditions described in (9) above do not apply. In the review of such projects in locations determined by Maryland Geological Survey (where applicable) to have documented erosion, the Water Resources Administration recommends such protective works to be constructed in such way to have the minimum adverse effect upon the ecological, economic, hydrological, aesthetic, historical, and recreational values in the area.

(11) Permits or licenses may not be granted for shore protective structures or filling unless adequate provision is made for drainage from inland areas. The construction of bulkheads and other protective structures across wetland areas shall provide only such filling as is necessary for the effective operation of the shore protection work and shall not be used for the creation of fast land from wetlands except in those cases where the proposed activity is water dependent and the filling complies with other pertinent policy in these guidelines.

(12) Dredging for fill to be used for the efficient operation of shore erosion control work is allowed only where access to deposit land source material is not feasible or costs are excessive and it is determined not to have an extended or permanent adverse environmental impact. Dredging seaward of an existing bulkhead will alter the graduated bottom depth that helps dissipate wave energy. If dredging is used for fill, adequate compensation may be required by the state for this material. An example of cases where dredging to obtain backfill material may be permitted is where:

a. A steep bank or cliff exists and the nearshore water depths are shallow which makes trucking-in or barging-in fill material infeasible.

b. Large trees or buildings prevent trucking-in fill material.

In both a and b above, however, if grading is to be done, trucking-in fill material usually becomes feasible. The fact that dredged material may be less expensive than trucked-in fill is not a major factor.

(13) The shore protection measures used must satisfy the following criteria regarding quality and performance:

a. When site conditions permit the use of a sloping bank stabilized with vegetation, with or without riprap, this method should be encouraged as an economical solution while preserving the natural conditions.

b. Junk metal, tires, tree stumps and logs or other material that does not contain, and will not create pollutants, not placed as an interlocking structure shall not be used as part of any shore protection measures.

c. If jetties or groins are used, they must be designed at a minimum length and height to serve the purpose intended and only placed in a location not harmful to navigation or to the land of nearby land owners and the general public. The Water Resources Administration requests a determination from the Maryland Geological Survey on such works. Such work shall be approved only if it does not interfere with public access, create adverse sand transportation patterns or adversely disturb the aquatic ecosystem.

d. The approval by the Water Resources Administration of any shore protection measures does not constitute state certification of the adequacy of the fixed structures for the particular circumstances, or for any specified time period.

Other Construction Within Wetlands

To carry out the state policy in providing for the preservation of the wetlands as stated in Section 9-102, Natural Resources Article, the following criteria are used by this Administration in evaluating proposed construction within wetland areas and for preparing appropriate recommendations upon such projects. The preceding criteria deal with provision of access to navigable waters and with shore erosion protection. The following criteria deal with other activities as noted below.

(14) The general policy is to allow dredging and filling only for those water-dependent activities on State or Private wetlands which are of such nature that they must be along the shoreline or in the wetlands in order to function. Wherever possible construction shall occur on fast land instead of involving the filling of wetlands.

An example of a water-dependent facility is a boat facility which must be along a shoreline and could not function in an area away from the shore.

Some examples, but not an all-inclusive list, of structures, facilities and activities that generally are not appropriate uses of wetlands are:

Restaurants and businesses
Residences, apartments, motels, hotels, trailor parks
Parking lots and offices
Spoil and dump sites
Lagoons for sewage or industrial waste
Industries and factories
Storage areas for small boats
Recreational areas requiring filling above tide level such as athletic fields, parking, picnic areas

(15) The applicant shall clearly demonstrate that any proposed work which involves alteration or destruction of wetland areas is water-dependent and that there is no alternative upland site available and that the best public interest is served by this facility meeting a specific need clearly defined by the applicant.

(16) No dredging of private wetlands to obtain fill shall be permitted, except where there is no alternative means to achieve a necessary public benefit.

(17) All activites allowed on State or Private wetlands shall be undertaken in such a manner as to minimize adverse environmental effects.

(18) It is the general policy of the state not to allow the filling of State Wetlands for the purpose of creating fast land.

(19) In those cases where the best public interest justifies approval of the work, such projects involving the filling of Private or State wetlands including those involving the creation of fast land, approval of such project may be considered if the following conditions are satisfied:

a. The project cannot feasibly be undertaken on an adjacent or nearby fast land location.

b. It is not feasible to provide the service the project is intended to provide by an alternative means not involving the filling of wetlands.

c. The creation of fast land shall occur only in those areas adjoining existing fast lands.

d. No significant ecologically productive submerged wetlands, such as major finfish and shellfish spawning and habitat areas, shall be destroyed.

e. Fill utilized for the creation of fast land shall be obtained from a land-based source and not dredged from adjacent Private or State Wetlands.

f. The creation of fast land shall not obstruct navigational channels, adversely affect the public's use of the waters of the state including the public's right to navigation and fisheries, significantly affect major current patterns, or significantly alter the existing contour of the shoreline.

g. In all projects involving the filling of State wetlands, compensation for fast land created in the public domain shall generally be provided to the State in an amount determined by the State Board of Public Works.

(20) Title 9, Natural Resources Article, requires that in granting, denying or limiting any permit, the Department of Natural Resources shall consider the effect of the proposed work with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, economic benefits, the protection of life and property from flood, hurricane and other natural disasters, and the public policy set forth in Section 9-102 of that Article. In granting a permit or license, limitations or conditions may be imposed to carry out this public policy.

(21) The policy regarding approval of earthen dikes for the protection of structures constructed in Private wetlands is as follows:

a. The repair and maintenance of earthen dikes in Private wetlands are considered as works not requiring notification [Requirements of the Wetlands Act, 3(c)], provided that such work does not involve the extension or increase in dimension of an existing dike. The latter is considered under 3(d) or 4 of the Requirements, requiring notification and/or permit, depending upon the nature and magnitude of the work.

b. The construction of earthen dikes in Private wetlands about a single residential dwelling which is subject to encroachment by tidal waters, is considered under Requirement 3(d), as works requiring notification.

c. The construction of earthen dikes in Private wetlands about any structure, other than single residential dwelling, which is or may be subject to encroachment by tidal waters is considered under Requirement 4, as works requiring permit.

d. Favorable consideration is given to the construction of such earthen dikes as may be deemed reasonable to meet the state purpose and which will be of minimal adverse on adjoining wetlands.

(22) The policy with respect to road construction in or involving Private wetlands for timbering operations is to minimize adverse environmental impact with due consideration for the public and private benefits that may be derived from that industry. Such road construction for this purpose is that access required for the harvesting of ten (10) or more acres of forest to which reasonable direct access cannot be made available from fast land. The Department of Natural Resources gives favorable consideration to the construction of such access, temporary or permanent, preferably the former, under the following conditions:

a. That the placement of the road is for the least distance across wetlands and tidal guts that is necessary to make the operation economically feasible; and recognizing property rights involved.

b. That temporary road construction will be encouraged to the extent practicable, with such construction to consist of a roadbed no more than twenty (20) feet in width and an elevation no more than one (1) foot above adjacent wetlands and be built of excavated marsh or clean inorganic earth fill. While land source fill is preferable, excavation of adjacent marsh on either side, for a surface width of eight (8) feet and to no greater depth than three (3) feet below marsh surface is acceptable.

c. That permanent road construction will be permitted where the nature of the particular operation, including continued use for access to adjoining harvest areas, would make this environmentally and economically more feasbile. This road construction may be for a roadbed no more than thirty (30) feet in width with elevation no more than three (3) feet above adjacent wetlands, and composed of excavated marsh. The excavation of adjacent marsh for a surface width of ten (10) feet and no more than five (5) feet in depth on either side of the roadbed is acceptable. The installation of culverts may be required to adequately handle flushing and drainage of the wetland areas affected by the construction. The crossing of natural streams shall be by piered structures.

d. The temporary roads are those that are within the above described parameters, and will be used for no longer period than six (6) months, and for which provision will be made to remove any section of the roadbed that has temporarily closed any natural tidal gut so as to restore normal tidal flow when harvesting is completed.

e. The permanent roads are those that are within the above described parameters and for which periodic maintenance is to be provided to insure the continued operability of any culverts and drainage ditches incorporated.

f. The Department of Natural Resources recognizes that while temporary roads, as defined above, may be operationally of limited duration, the effect of the works constitute a more permanent alteration of Private wetlands. Accordingly, such proposed works require a permit. Proposals for permanent road construction, or for those temporary or permanent roads for access to less than or more than ten (10) acres of harvestable timber also require a permit.

(23) The policy with respect to the construction of ditches and sumps in Private wetlands for the purpose of allowing water to flow to fast land to be used for irrigation, is to permit the construction of such ditches within the following guidelines:

a. That the placement of the ditch is for the least possible distance across wetlands to allow a sufficient supply of water for irrigation purposes.

b. That the ditch be limited to four (4) feet in surface width and three (3) feet in depth at mean low tide.

c. That the sump adjacent to fast land be limited to a maximum surface area of 100 square feet and maximum depth of six (6) feet.

d. That spoil from such ditches be placed on either side within five (5) feet and in piles interrupted every 20 feet for a distance of five (5) feet, so as to permit the flow of water in the wetlands.

e. That the spoil from the sump be placed on fast land or within ten (10) feet of the sump if in wetlands.

f. The construction of irrigation ditches and sumps within these parameters is considered as permanent alteration not requiring notification or permit [Requirement 4(c)]. The construction of irrigation ditches and sumps not within each of the aforementioned parameters shall require notification and/or permit as the particular circumstances and magnitude of the works may dictate.

(24) The policy with respect to drainage ditches for mosquito control or agricultural drainage is to allow the construction or maintenance of such ditches when approved by the Maryland Department of Agriculture, and by the appropriate Soil Conservation District. Such work shall be in accordance with the following guidelines. This policy is to allow such ditches for the purpose of draining agricultural and related rural lands. All work shall be inaccordance with drainage practice standards and specifications of the United States Soil Conservation Service and shall conform to the following guidelines:

a. Ditches shall extend onto private wetlands for the least distance required to insure an outlet for adjacent lands, and shall follow the alignment having the least disturbance to wetlands.

b. Ditches in Private wetlands shall be sized according to good agricultural drainage practice and in no case shall exceed the following maximum size limitations:

   1) Top width -- 14 feet
   2) Depth -- 4 feet
   3) Side Slopes -- 1 to 1

c. The spoil from such ditches shall be placed either:

   1) wherever possible on fast land; or
   2) in piles interrupted every twenty (20) feet for a distance of five (5) feet so as to permit the flow of water in wetlands; or
   3) in continuous rows with tide gates at intervals to allow water movement in wetlands, if diking is needed to protect uplands from tidal flooding.

d. The fringe of natural vegetation at least 8 feet wide bordering both sides of the ditch shall be left intact as a filter strip without being disturbed or covered by spoil.

e. Where appropriate, revegetate spoil areas by either:

   1) Stripping, stockpiling and placing original vegetation on spoil area surfaces; or
   2) Plant and/or seed to species suited to local soils and salinity conditions.

WETLANDS LICENSING PROCEDURE

1. Applicant submits application to Department of Natural Resources on approved forms.

2. Department of Natural Resources - Water Resources Administration, reviews application as to completion, accuracy of drawings, State Wetlands involvement, etc.

3. Water Resources Administration schedules hearing, advises applicant and Board of Public Works Wetlands Administrator and arranges for the advertising of the hearing in local newspapers.

4. Water Resources personnel visit site of proposed works and prepare site inspection report.

5. The Wetlands Administrator or Board of Public Works' Hearing Examiner conducts the hearing. A representative of the Department of Natural Resources is present as well as other interested parties. Report and Recommendations of the Water Resources Administration is issued.

6. Based upon the Report and Recommendations of the Water Resources Administration and upon the evidence produced before, during and after the hearing, the Wetlands Administrator makes a recommendation as to whether or not a license be issued and, if so, under what terms and conditions. To secure the approval of these recommendations by the Board of Public Works, the Wetlands Administrator will use one of the following methods:

   A. Concurrence Cases (Cases of a routine nature wherein the Report and Recommendations of the Water Resources Administration and the Recommendation of the Board of Public Works Wetlands Administrator are in complete agreement as to approval of the project substantially as applied for by the Applicant without the imposition of compensation and/or bonding requirements). At least ten (10) days prior to a scheduled Board of Public Works meeting, the Wetlands Administrator will furnish to the office of the Secretary of the Board of Public Works, a written listing of cases on which he has completed his recommendation, are of a routine nature and are recommended for approval. This listing will contain the case number, name of applicant, description of the work authorized and location of the project. The listing would then become one agenda item under the heading:

   "Wetlands Licenses - Board of Public Works Approval of a Recommendation by the Wetlands Administrator that Licenses be Issued to the Following:"

See Attached Exhibit - 1

The listing will be approved by the Board as one item. (Note: The files on these cases will not be furnished to the Board members prior to the meeting unless otherwise requested, but will be available at the meeting.)

B. Extraordinary Cases (Cases wherein the Report and Recommendations of the Water Resources Administration and the Recommendation of the Board of Public Works Wetlands Administrator are not in agreement, and all cases involving denial, substantial modification to works as applied for, requirements for compensation and/or bonding, or requests by interested parties for a personal appearance before the Board of Public Works). At least ten (10) days prior to a scheduled meeting of the Board of Public Works, the Wetlands Administrator will advise the Secretary, in writing, that he has finalized a recommendation relating to a case (or cases) of non-routine nature and request that the Secretary present each of the recommendations as an individual item. Copies of each file will be furnished to the Secretary who, in turn, will distribute them to the Board members with other agenda material.

7. Immediately after the Board meeting, the Board Secretary will advise the Administrator, in writing, of the action taken by the Board.

8. Upon notification of the Board's action, the Wetlands Administrator shall:

A. Concurrence Cases

(1.) Immediately notify the Department of Natural Resources of the Board's action and forward a copy of the covering letter and a copy of the license granted in each case.

(2.) Immediately forward the original and one copy of each license to the Applicant, requesting the Applicant to sign the original and return same to the Board of Public Works Wetlands Administration, and further advising the Applicant of the requirement to notify the Water Resources Administration prior to the commencement of work.

See Attached Exhibit - 2

B. Extraordinary Cases

1.) Immediately notify the Department of Natural Resources of the Board's action and forward a copy of each covering letter issued and each License granted or formal notification of denial, as appropriate.

2.) In cases where a condition for issuance of a License is the posting of a performance and/or completion bond, the Wetlands Administrator will receive said bond from the Applicant and pass on its acceptability prior to delivery of the License to the Applicant.

3.) In cases involving the assessment of compensation to be paid by the Applicant, the Wetlands Administrator shall notify the Applicant of the Applicant's responsibility to contact the Enforcement Division of the Water Resources Administration pertaining to the payment thereof. A statement to this effect shall also be included among the terms and conditions of any license issued in a case involving compensation.

4.) In cases involving the denial of a License, the Wetlands Administrator shall formally notify the Applicant of said denial, stating the reasons therefor.

5.) Forward the original and one copy of each License approved by the Board to the Applicant, requesting the Applicant to sign the original as evidence of Applicant's agreement to abide by the terms and conditions thereof, and to return same to the Board of Public Works Wetlands Administration, and further advising the Applicant of the requirement to notify the Water Resources Administration prior to the commencement of work.

9. Upon receipt of notification from the Wetlands Administrator of the Board's action, the Water Resources Administration shall:

A. Concurrence Cases

Upon receipt of the copy of the License, the Department will immediately put into operation its procedures for monitoring the project and enforcing the provisions of the License.

Extraordinary Cases

Upon receipt of the copy of the License, the Department will immediately put into operation its procedures for monitoring the project and enforcing the provisions of the License, including the collection of any financial compensation assessed by the Board. All amounts collected will be deposited in a special fund maintained by the Department for purchasing additional wetlands to be added to the State inventory thereof.

10. Procedures when Applicants take exception to conditions contained in the Wetlands License.

The Wetlands Administrator shall receive all correspondence pertaining to exceptions raised by an Applicant to conditions contained in a Wetlands License, and said Administrator shall coordinate the review of said matters with the Applicant and the Water Resources Administration.

11. License Follow-up Letters

The Wetlands Administrator shall cause a follow-up letter to be sent to an Applicant whenever the License issued to the Applicant is not signed and returned by said Applicant within 30 days of the date of issuance thereof.

See Exhibit 3.

BOARD OF PUBLIC WORKS

EXHIBIT 1.

February 5, 1975

Secretary's Agenda

BOARD OF PUBLIC WORKS - WETLANDS LICENSES

Approval of a recommendation by the Wetlands Administrator that licenses be issued to the following:

74-270	Mr. James Oliver Stallings - to dredge a 150 foot long, 50 foot wide channel from 1 to 4 feet depths at mean low water; to deposit 700 cubic yards of spoil behind the existing bulkhead and on low areas at the property - at the head of Madison Bay off the Little Choptank River in Dorchester County.
74-286R	Bethlehem Steel Corporation - to dredge area 400 by 175 feet adjacent to Pier 1 from 21 to 25 foot depth at mean low water and to deposit 20,000 cubic yards of spoil on upland site, Arundel Corporation, Fairfield, at Sparrows Point on Patapsco River, Baltimore County.
74-431	Mr. A.V. Williams - to construct three (3) groins, each 90 feet long with 30 foot wide base centered 150 feet apart at property, on Nanticoke River at Ragged Point, Wicomico County.
75-102	Mr. Allan P. Poole - to construct 150 foot bulkhead within five (5) feet of mean high water line; to backfill with 70 cubic yards of land source borrow; to construct 140 foot pier - on Potomac River at extreme northern end of St. George Island, St. Mary's County.
75-111	Mrs. Bernice C. Garbisch - to emplace varying lengths of riprap totalling 1,724 feet within five (5) feet of mean high water line and existing concrete bulkhead - on Lecompte Bay just north of mouth of Lecompte Creek, Dorchester County.
75-133	Catherine M. Sinclair - to construct three (3) stone jetties extending 25 feet channelward of the mean high water line - Middle River at Turkey Point, Baltimore County.

EXHIBIT 2

State of Maryland

Board of Public Works

Annapolis, Maryland

Marvin Mandel
Governor
Louis L. Goldstein
Comptroller
William S. James
Treasurer
Andrew Hendrick, Jr.
Secretary

Wetlands Administration
Post Office Box 1510
Annapolis, Maryland 21404
Phone: 301-267-1664

June 9, 1975

Mr. Sam E. Hull
5201 59th Avenue
Hyattsville, Maryland 20781

Dear Mr. Hull:

I am enclosing the original and one (1) copy of Wetlands License 74-161"A", dated April 24, 1975, which is being issued to you pursuant to your application of September 11, 1973.

After you have read all the conditions of the license, please sign and return the original to this office immediately. No works may begin until the original license, signed by you, has been mailed to this office. Your license is valid for a period of three (3) years from the date shown thereon.

Your attention is also directed to the fact that you must notify the Water Resources Administration, Enforcement Division, in writing, prior to undertaking any work authorized by this license. This written notification should directed to:

Water Resources Administration
Enforcement Division
Tawes State Office Building
580 Taylor Avenue
Annapolis, Maryland 21401
Phone: 301-267-5551

Please retain the copy of the license for your records. For your convenience, we are enclosing an envelope for you to return the signed original to our office.

If you have inquiries concerning any of the terms or conditions of the attached license, please contact the Board of Public Works Wetlands Administrator at the address and telephone number shown above.

Very truly yours,

Lawrence B. Goldstein
Wetlands Hearing Administrator

LBG:tjn

Enclosure

EXHIBIT 3

State of Maryland

Board of Public Works
Annapolis, Maryland

Martin Mandel
Governor
Louis L. Goldstein
Comptroller
William S. James
Treasurer
Andrew Hertzberg, Jr.
Secretary

April 26, 1975

Mr. James R. Vest, Jr.
1804 Chesapeake Place
Pasadena, Maryland 21122

Re: Wetlands Case No. 74-90

Dear Mr. Vest:

On March 1, 1975, this office forwarded to you a State Wetlands License pertaining to the subject case together with instructions to sign and return the original of said license.

As of this date, the signed original has not been received, and you are hereby reminded that no works are to be commenced until such time as the signed original has been returned to this office.

You are further advised that if signed original of said license has not been received in this office on or before May 26, 1975, that said license will on that date automatically be considered as withdrawn, requiring the submission of a new application and a new hearing for the performance of the works in question.

Very truly yours,

Lawrence B. Goldstein
Wetlands Hearing Administrator

LBG:hme

cc: Mr. Roger A. Kanerva
Enforcement Division
Water Resources Administration

EXHIBIT 3

APPENDIX G

MARYLAND DNR - COASTAL RESOURCES DIVISION GUIDELINES

Guidelines for CRD Involvement in Coastal Zone Related Projects

The guidelines which follow are not intended to be hard and fast criteria. Flexibility is essential in that projects will undoubtedly arise which do not meet some thresholds but will require the Division's involvement.

1. Marina Development

   a. Guidelines:

      (1) The Coastal Resources Division will be involved in the regulatory process for new marina proposals of 50 or more slips.

      (2) The Division will be involved in marina expansion proposals for 25 or more slips.

   b. Review factors. Congestion, existing and potential; water quality impacts; flushing characteristics; dredging impacts on fisheries and flushing; locational characteristics (headwater areas vs. mouth of river); demand for boat slips.

2. Shoreline Residential Development

   a. Guidelines

      (1) The Coastal Resource Division will review proposed residential developments involving 100 acres or 1,000 housing units within 2 miles of tidal floodplains.

      (2) The Division will review proposed residential developments, regardless of size, in which proposed location is within tidal or non-tidal floodplain.

   b. Review Factors. Potential sedimentation and non-point source pollution problems; potential impacts on valuable natural resources - wildlife habitat, productive agricultural land, State critical areas; adequacy of existing public services - water supply, waste treatment and transportation; natural hazards - shore erosion, flooding; consistency with State development and local comprehensive plans; impacts of any proposed water-related activity, i.e., marina (see Marine Development above).

3. Dredging and Filling of Wetlands and Filling of Floodplains

a. Guidelines: Dredging and filling of wetlands.

(1) The Coastal Resources Division will be involved in the review of projects requiring the dredging or filling of 1/4 acre or more of marshland.

(2) The Division will be involved in the review of projects involving the filling of open tidal waters for the creation of new fastland.

b. Review Factors. Riparian access consideration; shore erosion control; water dependent vs. non-water-dependent activity; wildlife and fisheries impacts; economic benefits; public benefits.

c. Guidelines: Filling of floodplains.

(1) The Coastal Resources Division will be involved in the review of all projects requiring a State Watershed Management permit that involve landscaping or filling of more than 1 acre, or which require any construction in the floodplain.

d. Review Factors. Water quality impacts; impact on upstream and downstream flooding; biological impacts - wildlife habitat, productive agricultural land, wetlands; adequate floodproofing; potential surface water runoff and sedimentation problems, alternative locations.

4. Transportation Projects

a. Guidelines

(1) The Coastal Resources Division has the option of participating in the Department of Transportation's system planning activities at the statewide, regional, and local levels for the following non-routine types of projects: interstate highways, two-lane to four-lane improvement, railroad lines, airports, public ports, and any roadway serving a peninsula area, or which crosses tidal waters.

(2) The Division will be involved in the review of the specifics of each project proposal at the DEIS and FEIS stages.

b. Review Factors. Biological impacts to valuable resource areas such as wetlands, wildlife habitat, State critical areas; stream crossing and relocations; mitigation measures; alternatives, including no-build; socio-economic impacts.

5. Other Major Facility Proposals

This category of projects includes OCS-related oil/natural gas facilities, electric generating facilities, ports, industrial parks, mineral extraction facilities, and sewage treatment facilities. Due to the magnitude and nature of potential impacts of these types of projects, the Coastal Resources Division will be involved in the review of all such project proposals. Under existing State and Federal laws, a comprehensive review of the socio-economic and environmental impacts of such proposals is required.

6. Projects Impacting State Critical Areas

a. Guidelines. The Coastal Resources Division will be involved in any project proposal which would result in adverse or irreversible impacts to any recommended or designated State Critical Area.

b. Review Factors. Extent of impact(s); consideration of alternative locations.

STATE OF MARYLAND
Coastal Zone Management Program
Federal Consistency Program

The following pages document the procedures used by the Coastal Resource Division in making Federal Consistency determinations and discuss the way these procedures relate to other review procedures within the Department of Natural Resources. Also summarized, in tabular form, are the activities of the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the U.S. Environmental Protection Agency, which require a Federal Consistency determination.

The first section gives an overview of Federal Consistency and describes the types of Federal actions to which it applies. This is followed by a discussion of the review procedures used by the State, how the review relates to other project reviews within the Department of Natural Resources, and how appropriate Federal agencies are notified of a Federal Consistency determination.

General

Maryland's procedures for Federal Consistency are in response to the Federal Coastal Zone Management Act of 1972, as amended, and as specified in 15 CFR 930 (43 FR 10510, March 13, 1978). The consistency requirement is that any Federally conducted or supported activities which affect the State's coastal zone be consistent, to the maximum extent practicable, with an approved state program. This affects applicants for Federal licenses and permits, State or local recipients of Federal funding, and Federal agencies proposing projects and programs.

The purposes of the Federal Consistency requirement are several:

- to plan for and manage impacts resulting from Federal programs;
- to develop a factual analysis of the effects of a proposed Federal action;
- to determine consistency by examining the results of the analysis in the context of the goals, objectives, and policies of the Program; and
- to screen all Federal actions for those with significant potential for impact, individually or cumulatively, on coastal resources or activities.

The basis for determining consistency of Federal actions within Maryland's Coastal Zone Management Program are the goals, objectives, and policies of the Program.[1] A Federal action is reviewed in terms of its consistency with these goals, objectives, and policies.

The types of Federal activities subject to Federal Consistency fall within four general categories:

1. Projects proposed and carried out by Federal agencies;

2. Activities requiring a Federal license or permit;

3. Outer Continental Shelf activities; and

4. Federal assistance to state or local governments.

Table 1 summarizes the requirements and procedures that are applied to each type of Federal action. Specifically, the table indicates who makes the consistency determination, who must notify the State, and what the Federal agency's responsibilities are.

Review and Administrative Procedures

In reviewing any Federal action or project requiring a Federal Consistency determination, it must be emphasized that the actual review of the activity does not differ from one in which there is no Federal involvement. That is, the activity is reviewed in terms of its consistency with the goals, objectives, and polciies of the Coastal Zone Management Program. The only difference is that, based on the results of the State's review, the appropriate Federal agency must be notified whether the State concurs or disagrees with the consistency certification made by the Federal agency or applicant for a Federal permit or license.

Within the Department of Natural Resources, the review of a proposed Federal action is first assigned to a lead agency within the Department. In the case of a Federal permit (i.e., Corps of Engineers) that also requires a State permit (i.e., Wetlands), the agency adminstering the permit program is the lead agency. The Coastal Resources Division will generally be the lead agency for all Federal permits that do not require a State permit. This is always true in

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[1] *Refer to State of Maryland Coastal Management Program and Final Environmental Impact Statement for a listing of the Program's goals and objectives.*

CZMA Section	307(c)(1) & (2) (Subpart C)	307(c)(3)(A) (Subpart D)	307(c)(3)(B) (Subpart E)	307(d) (Subpart F)
Federal Action	Direct Federal activities including development projects	Federally licensed and permitted activities	Federally licensed and permitted activities described in detail in OCS plans	Federal assistance to State and local governments
Coastal Zone Impact	"Significantly affecting the coastal zone"	"Significantly affecting the coastal zone"	"Significantly affecting the coastal zone"	"Significantly affecting the coastal zone"
Responsibility to notify State agency	Federal agency proposing the action	Applicant for Federal license or permit	Person submitting OCS Plan	A-95 Clearinghouse receiving State or local government application for Federal assistance
Notification procedure	Alternatives chosen by Federal agency (subject to NOAA regulations)	Consistency certification	Consistency certification	OMB Circular A-95 notification procedure
Consistency requirement	Consistent to the maximum extent practicable with CZM Program	Consistent with the CZM Program	Consistent with the CZM Program	Consistent with the CZM Program
Consistency determination	Made by Federal agency (Review by State agency)	Made by Applicant with State agency concurrence	Made by Applicant with State Agency concurrence	Made by State agency
Federal agency responsibility following a disagreement	Federal agency not required to disapprove action following State agency disagreement (unless judicially impelled to do so)	Federal agency may not approve license or permit following State agency objection	Federal agency may not approve Federal licenses or permits described, in detail in the OCS Plan following State agency objection	Federal agency may not grant assistance following State agency objection
Administrative Conflict resolution	Mediation by the Secretary of Commerce (Subpart G)	Appeal to the Secretary of Commerce by applicant or independent Secretarial review (Subpart H)	Appeal to the Secretary of Commerce by person or independent Secretarial review (Subpart H)	Appeal to the Secretary of Commerce by applicant agency or independent Secretarial review (Subpart H)

TABLE I
FEDERAL CONSISTENCY MATRIX DIAGRAM

the case of Corps permits. In the case of Clearinghouse reviews, the lead agency is assigned by the Clearinghouse Review Officer in the Office of the Secretary.

It is the lead agency's responsibility to coordinate the Department's review of the proposed Federal action. Regardless of the lead agency, it is the responsibility of the Coastal Resources Division to formulate the Department's position concerning Federal Consistency.* The Federal Consistency determination then becomes a part of the Department's position on the proposed Federal action. Due to the broad nature of the goals, objectives, and policies of Coastal Zone Management Program, the Federal Consistency determination may be based in whole, or in part, on the positions taken by other agencies. For this reason, the Coastal Resources Division must be in close contact with the appropriate agencies during the review of a proposed Federal action.

With the exception of U.S. Army Corps of Engineers permits, the review procedures are essentially the same for all Federal agencies. The majority of proposed Federal actions are reviewed through the Clearinghouse process. For any Federal actions that are not reviewed through Clearinghouse, the Coastal Resources Division is notified directly by the Federal agency involved. The reason that Corps of Engineers permits are singled out is due to the continuous, ongoing nature of the permit program. Thus, the Federal actions subject to Federal Consistency review fall within the following categories:

1. Direct notification - Corps of Engineers permits

2. Clearinghouse Review - Federally funded projects, including OCS activities

3. Direct notification - other Federal activities.

**Consistency determinations within Coastal Resources Division are made by the Project Evaluation Program, managed by Elder Ghigiarelli. Within CRD are various staff who review permits and other Federal actions according to specified areas:*

Wetlands (Corps permits) - Elder Ghigiarelli, Jeff Hutchins
Transportation - Terry Anthony, Jeff Hutchins
Sewer and Water - Rick Wagner
Dredging - Rick Wagner, Elder Ghigiarelli, Jeff Hutchins

Replies are coordinated by Elder Ghigiarelli and forwarded to appropriate agencies.

The details of the review procedures for each of these categories follows.

1. Corps of Engineers Permits

This category constitutes approximately 80 percent of the Federal Consistency reviews made by the State. The Department is notified of all Corps permits through the Public Notices issued by the regional office. There are two State approvals necessary before the Corps may issue a permit: (1) water quality certification from the Department of Health and Mental Hygiene; and (2) consistency with the Coastal Zone Management Program from the Department of Natural Resources.

In the review procedures described below, close coordination is maintained during the review with personnel handling the water quality certification. When a State permit/license is involved, water quality certification will not be issued until the Water Resources Administration has made a decision (in the case of a wetlands permit) or recommended a decision to the State Board of Public Works (in the case of a wetlands license). Regardless of the review procedure, all projects for which the Corps of Engineers have not received comments, either verbal or written, from the Coastal Resources Division by the deadline date on the Public Notice are to be considered consistent with the Coastal Zone Management Program assuming that:

(a) There are no major issues associated with the issuance of Water Quality Certification;

(b) There are no major issues resulting in the delay of issuance of a license and/or permit from the Water Resources Administration; and

(c) The applicant has not revised the project plans such that the resultant impacts differ significantly from the plan(s) associated with the initial public notice.

There are two review procedures dependent upon the nature of the proposed action. If dredging or filling is involved, a State license and/or permit is required from the Water Resources Administration. In these cases, the Coastal Resources Division has the responsibility to document to the Water Resources Administration any inconsistencies between a permit application and the Coastal Zone Management Program. If the Coastal Resources Division does not submit comments on a permit application, it is assumed by the Water Resources Administration that the proposal is not inconsistent. In

these cases involving a State license and/or permit, the Federal Consistency determination is inherent in the permit decision.

The second review procedure involves those Corps permit applications in which there is no dredging or filling involved. In these cases, the Coastal Resources Division becomes the lead agency in the Department of Natural Resources for the review. Upon consultation with all relevant agencies in the Department, comments are sent directly to the Corps. The comments include a consistency determination.

2. State Clearinghouse Review

Aside frm Corps permits, the majority of the Federal actions subject to Federal Consistency are reviewed through the State Clearinghouse Review process. This includes Federal assistance to state and local governments as well as direct Federal actions. Federal Consistency review through the Clearinghouse process is outlined in Figure 1.

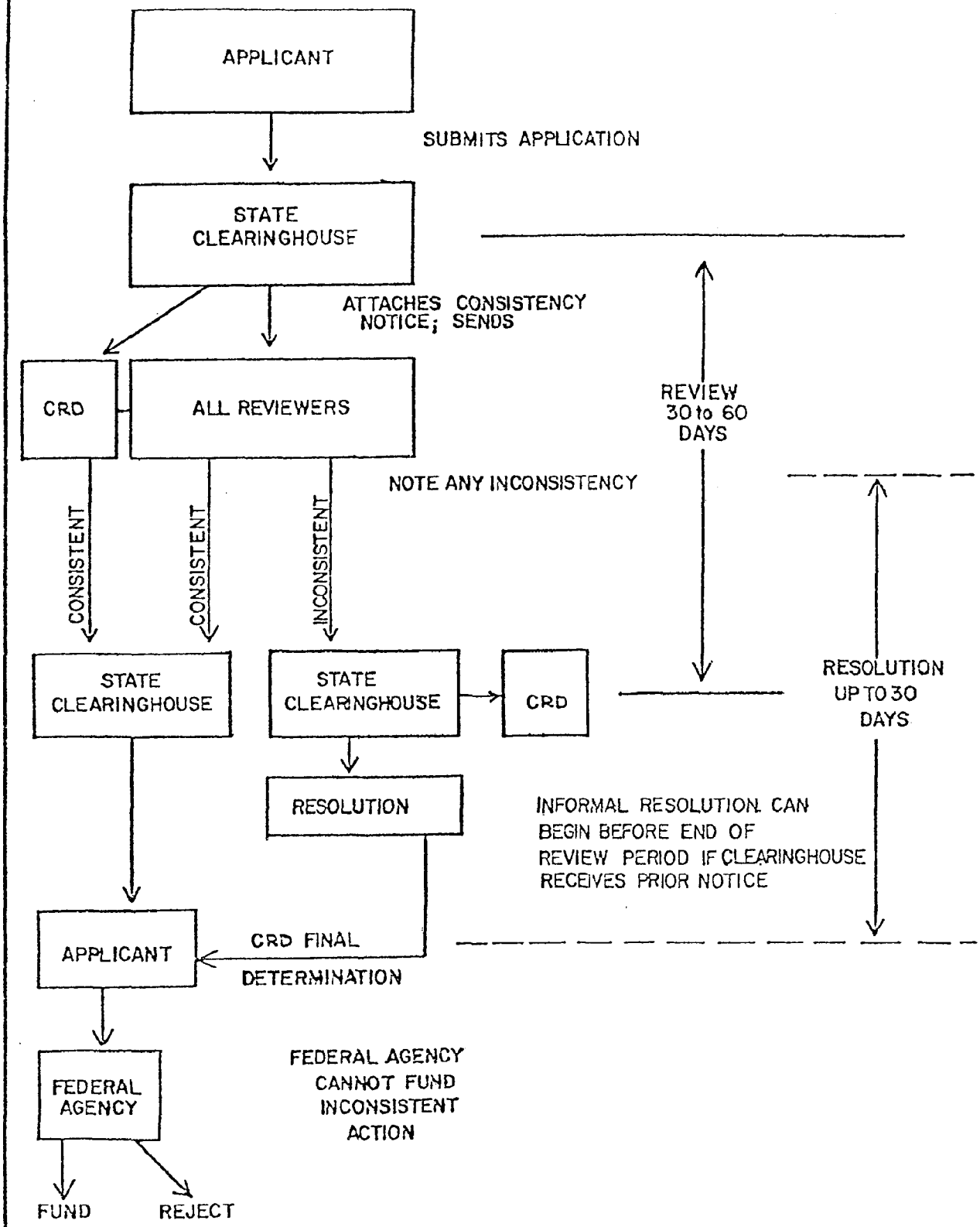
State Clearinghouse projects are received by the Department and assigned to a lead agency by the Clearinghouse Review Officer. The lead agency is responsible for coordinating the comments of all appropriate agencies of the Department and for preparing the Department's response. The Department's position is then forwarded to State Clearinghouse through the Clearinghouse Review Officer. The Coastal Resources Division responsibility is to document consistency or inconsistency with the Coastal Zone Management Program to the lead agency for inclusion in the Department's position on the Federal action.

3. Other Federal Activities

For any Federal activities that are not reviewed through Clearinghouse, the Coastal Resources Division receives direct notification from the Federal agency. The Division acts as the lead agency for the Department, consulting all relevant agencies prior to making the consistency determination. A consistency statement is then sent directly to the Federal agency.

It is important to note that any negative Federal Consistency determination made by the Coastal Resources Division must receive approval from the Secretary's Office. In this manner, any conflicting positions among units of the Department or between Departments are resolved by the Secretary prior to a final consistency determination.

Figure 1- FEDERAL CONSISTENCY REVIEW THROUGH CLEARINGHOUSE



Federal Agency Actions Subject to Consistency Review

The preceding pages have discussed the review procedures applied by the State to the various types of Federal actions subject to consistency review. Table 2 lists the specific actions of the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and the Environmental Protection Agency which require a Federal Consistency determination. Also noted is the type of notification.

TABLE 2
Specific Federal Agency Actions
Subject to Federal Consistency Review

Federal Agency	Action	Notification
U.S. Army Corps of Engineers	Permit Actions: - construction of dams or ditches across navigable waters - obstruction or alteration of navigable waters (including structures of the OCS) - establishment of harbor lines - temporary occupation of sea wall, bulkhead, jetty, dike, level, wharf, pier or other work built by the U.S. - discharge of dredged spoil into waters of the U.S. - approval of plans for improvements made under Corps supervision at private expense - transportation of dredged spoil for the purpose of dumping in ocean waters - permit for artificial islands and fixed structures on the OCS	Public Notice/ Corps of Engrs.
	Corps Navigation Projects, Beach Erosion Control Projects, Flood Control Projects	Clearinghouse and/ or Direct Notification
U.S. Fish and Wildlife Service	Assistance Programs: - Fish Restoration - Wildlife Restoration - Rare and Endangered Species Conservation	Clearinghouse and/ or Direct Notification
National Marine Fisheries Service	Assistance Programs: - Anadromous and Great Lakes Fisheries Conservation - Commercial Fisheries Disaster Assistance - Commercial Fisheries Research and Development - Sea Grant Support	Clearinghouse and/ or Direct Notification
U.S. Environmental Protection Agency	Permit Actions: - NPDES permits for discharges into the contiguous zone and ocean waters - NPDES permits for federal installations	Direct Notification
	Assistance Programs: - Solid Waste Disposal Planning Grants - Solid Waste Disposal Demonstration Grants - Construction Grants for Wastewater Treatment Works - Water Pollution Control-Research, Development, and Demonstration Grants	Clearinghouse

APPENDIX H

MARYLAND HISTORICAL TRUST REGULATIONS AND GUIDELINES

federal register

TUESDAY, JANUARY 30, 1979
PART IV

ADVISORY COUNCIL ON HISTORIC PRESERVATION

PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Final Amendments

[4310-10-M]

Title 36—Parks, Forests, and Public Property

CHAPTER VIII—ADVISORY COUNCIL ON HISTORIC PRESERVATION

PART 800—PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Amendments to Existing Regulations

AGENCY: Advisory Council on Historic Preservation.

ACTION: Final amendments to regulations.

SUMMARY: These regulations implement Section 106 of the National Historic Preservation Act 1966, as amended (16 U.S.C. 470), and two Presidential directives issued pursuant to Section 106—Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment" (36 FR 8921, 16 U.S.C. 470), and the President's Memorandum on Environmental Quality and Water Resources Management, July 12, 1978. The regulations have been amended to reflect changes and additions to the Council's authorities, as well as experience gained in working with the process since the last publication of regulations in 1974. These amendments are intended to expedite and clarify the commenting process required by Section 106 of the National Historic Preservation Act.

EFFECTIVE DATE: March 1, 1979.

FOR FURTHER INFORMATION CONTACT:

John M. Fowler, Acting General Counsel, Advisory Council on Historic Preservation, 1522 K Street, NW, Washington, D.C. 20005, 202-254-3967.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Advisory Council on Historic Preservation is publishing these final amendments to its existing regulations to implement Section 106 of the National Historic Preservation Act, as amended (16 U.S.C. 470f). The purpose of Section 106 is to protect properties included in or eligible for inclusion in the National Register of Historic Places through review and comment by the Council on Federal undertakings that affect such properties. Properties are listed on the National Register or declared eligible for listing by the Secretary of the Interior. As implemented through these regulations, the Section 106 process is a public interest process in which the Federal agency proposing an undertaking, the State Historic Preservation Officer, the Council, and interested organizations and individuals participate. The process is designed to assure that alternatives to avoid or mitigate an adverse effect on a National Register or eligible property are adequately considered in the planning processes. The regulations are binding on all Federal agencies and specify the manner in which the Council will render its comments to Federal agencies when their undertakings affect properties included in or eligible for inclusion in the National Register of Historic Places. To facilitate processing of the large volume of cases submitted for Council comment each year, the regulations provide for agency consultation with the Council staff and State Historic Preservation Officers to reduce the number of undertakings that require consideration by the full Council.

The purpose of the present amendments is to reduce procedural delay, encourage agencies to develop internal regulations to comply with the requirements of the Act and these regulations, to clarify the process since the last publication of the Council's regulations in 1974, and to implement the directives in the President's Memorandum on Environmental Quality and Water Resources Management.

In late 1977, the Council staff began a reassessment of the existing regulations codified in 1974 in 36 CFR Part 800, in an effort to determine what changes, clarifications, or modifications were necessary. In July of 1978, the President issued the Memorandum on Environmental Quality and Water Resources Management which directed the Chairman of the Council to review and promulgate regulations implementing the Act and the Memorandum by March 1, 1979. Accordingly, the existing regulations were amended to reflect changes in statutory authority, experience gained in implementing the procedures since 1974, and to meet the demands of the President's Memorandum.

The Council published proposed amendments to the existing regulations in the FEDERAL REGISTER on October 30, 1978, and invited public comment for a 30 day period. A number of Federal agencies and others requested extension of the comment period. On November 28, 1978, the Council published notice in the FEDERAL REGISTER extending the comment period for an additional thirty days until December 29, 1978, providing for a 60 day comment period in total. A public briefing for interested agencies, organizations, and individuals on the proposed amendments was held on December 11, 1978. Council staff also actively cooperated with the Secretary of the Interior's Water Policy Implementation Task Force on Environmental Statutes. The Task Force was convened in response to the directives contained in the President's Memorandum. The Task Force was charged with reviewing the draft regulations and informally offering comments to the Council on whether the regulations comply with the directive.

Pursuant to the President's Memorandum, agencies with consultation responsibilities under the Act must develop regulations to be approved by the Chairman of the Council in response to these regulations. Such agencies must publish regulations no later than three months after the effective date of these regulations. Other agencies may choose to adopt counterpart regulations specifically tailored to their particular program needs as stipulated in these regulations.

These regulations issued pursuant to 16 U.S.C. 470s were adopted by unanimous vote of the full Council in open session on January 17, 1979. As directed by the President, the amended regulations will be effective March 1, 1979.

SUMMARY OF MAJOR CHANGES

The flow of the commenting process established by the 1974 regulations remains basically unchanged in the present amendments. However, the regulations have been renumbered and rearranged from the 1974 publication for greater clarity. The following major changes have been made in the regulations:

1. Section 800.4(a) has been substantially revised to provide further guidance to Federal agencies on the identification of National Register and eligible properties.

2. A new § 800.5 has been added to define the responsibilities of State Historic Preservation Officers in the commenting process.

3. Section 800.6(d) authorizes the Chairman to appoint a panel of five members of the Council to consider undertakings in lieu of consideration by the full Council.

4. A new § 800.7 has been added dealing with resources discovered during construction.

5. A new § 800.8 has been added dealing with Programmatic Memoranda of Agreement allowing an agency to obtain the Council's comments for a particular program or class of undertakings that would otherwise require numerous individual requests for comments.

6. Section 800.9 revises the original section dealing with the National Environmental Policy Act to reflect new Council on Environmental Quality regulations.

7. A new § 800.11 has been added to authorize counterpart regulations permitting agencies to develop regulations which, if approved by the Chair-

tion 202 and will consider matters in the public interest.

SECTION 800.13 REPORTS TO THE COUNCIL

This section sets standards for information that should be provided to the Council to enable it to make informed comments on Federal undertakings. Sections 800.13(a) and (b) were previously included in the Supplementary Guidelines section. A large number of commenters requested that these standards for adequate documentation be codified. The Council agrees with these comments and believes that codifying these sections will make the requirements clear to all the consulting parties and the public. Section 800.13(c) dealing with Reports for Council Meetings includes a new section prescribing the Secretary of the Interior's Report. This section requests the Secretary to verify existing information on the historical or cultural significance of a National Register or eligible property and reflects the current practice of the Council. A number of commenters felt that the section was not entirely clear concerning how reports for Council meetings should be coordinated. The section has been re-drafted to respond to these comments.

SECTION 800.14 SUPPLEMENTARY GUIDANCE

This is a new section which provides that the Executive Director may issue further guidance to interpret certain portions of the regulations.

SECTION 800.15 PUBLIC PARTICIPATION

This is a new section which is designed to encourage public participation throughout the process established by the regulations. A number of comments urged that the regulations contain more explicit direction concerning the means of involving the public. Several suggested that such reference to public participation be included in various specific sections. The Council believes that a specific section dealing with public participation will best serve to fulfill the intended purpose of involving the public. The Council notes that its process is advisory and does not constitute formal administrative hearings. Therefore, this section is intended for guidance and is not to be construed as setting a strict legal standard. For example, the use of the word "notice" in subsection (b) is not intended to be a formal legal requirement, but rather a means of informing the public of an opportunity to participate in the process.

OTHER

The Supplementary Guidelines contained in the publication of the draft amendments have been deleted. Supplementary Guidelines II and IV have been codified as part of § 800.13. Supplementary Guideline I, the Criteria of the National Register of Historic Places, is contained in 36 CFR 60.6. Supplementary Guideline III, Determinations of No Effect and No Adverse Effect for Archeological Resources, will not be published at the present time. The Council's Task Force on Archeology will be considering this guideline and it will be revised based upon recommendations of the Task Force. This Guideline received numerous comments and they have been provided to the Task Force for its consideration.

CONCLUSION

The Council made a conscientious effort to incorporate all valid comments in these final amendments. As noted, revisions have been made to the regulations which we believe will serve to make the Section 106 commenting process an open and public process that can be tailored to the needs of individual agencies. The Council believes that the regulations set a clear standard for agencies to follow in meeting their Section 106 responsibilities, while being sufficiently flexible to respond to the wide variety of agency programs and needs.

The Council has determined that these amendments are not significant regulations within the meaning of Executive Order 12044 and consequently do not require a regulatory analysis. The purpose of these amendments is to simplify existing regulations and to clarify language in conformance with the goals enunciated by Executive Order 12044.

The Council has determined that an Environmental Impact Statement under the National Environmental Policy Act is not required.

PRINCIPAL AUTHORS

Kenneth C. Tapman, Legislative and Policy Counsel; John M. Fowler, Acting General Counsel; Peter H. Smith, Acting Director, Office of Intergovernmental Programs and Planning; and Katherine Raub Ridley, Legal Assistant, Office of Intergovernmental Programs and Planning.

ROBERT R. GARVEY, Jr.,
Executive Director.

Part 800 is revised to read as set forth below:

PART 800—PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Sec.
800.1 Purpose and authorities.
800.2 Definitions.
800.3 Criteria of effect and advance effect.

REVIEW OF INDIVIDUAL UNDERTAKINGS

800.4 Federal Agency Responsibilities.
800.5 State Historic Preservation Officer Responsibilities.
800.6 Council comments.
800.7 Resources discovered during construction.

FEDERAL PROGRAM COORDINATION

800.8 Programmatic Memorandum of Agreement.
800.9 Coordination with the National Environmental Policy Act (42 U.S.C. 4321 et seq.)
800.10 Coordination with the Presidential Memorandum on environmental quality and water resources management.
800.11 Counterpart regulations.

OTHER PROVISIONS

800.12 Investigation of threats to historic properties.
800.13 Reports to the Council.
800.14 Supplementary guidance.
800.15 Public participation.

AUTHORITY: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978); E.O. 11593, 3 CFR 1971 Comp, p. 154; President's Memorandum on Environmental Quality and Water Resources Management, July 12, 1978.

§ 800.1 Purpose and authorities.

(a) The National Historic Preservation Act of 1966, as amended, established the Advisory Council on Historic Preservation as an independent agency of the United States to advise the President and the Congress on historic preservation matters, recommend measures to coordinate Federal historic preservation activities, and comment on Federal actions affecting properties included in or eligible for inclusion in the National Register of Historic Places. Its members are the Secretary of the Interior, the Secretary of Housing and Urban Development, the Secretary of Commerce, the Administrator of General Services, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Transportation, the Secretary of State, the Secretary of Defense, the Secretary of Health, Education, and Welfare, the Chairman of the Council on Environmental Quality, the Chairman of the Federal Council on the Arts and Humanities, the Architect of the Capitol, the Secretary of the Smithsonian Institution, the Chairman of the National Trust for Historic Preservation, the President of the National Conference of State Historic Preservation Officers, and 12 citizen members from outside the Federal Government appointed for five-year terms by the President on the basis of their interest and experience in the matters to be considered by the Council.

(b) The Council protects properties of historical, architectural, archeological, and cultural significance at the na-

tional, State, and local level by reviewing and commenting on Federal actions affecting National Register and eligible properties in accordance with the following authorities:

(1) Section 106 of the National Historic Preservation Act. Section 106 requires that Federal agencies with direct or indirect jurisdiction over a Federal, federally assisted or federally licensed undertaking afford the Council a reasonable opportunity for comment on such undertakings that affect properties included in or eligible for inclusion in the National Register of Historic Places prior to the agency's approval of any such undertaking.

(2) Section 1(3) of Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment." Section 1(3) requires that Federal agencies, in consultation with the Council, institute procedures to assure that their plans and programs contribute to the preservation and enhancement of non-federally owned historic and cultural properties.

(3) Section 2(b) of Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment." Federal agencies are required by Section 2(a) of the Executive Order to locate, inventory, and nominate properties under their jurisdiction or control to the National Register. Until such processes are complete, Federal agencies must provide the Council an opportunity to comment on proposals for the transfer, sale, demolition, or substantial alteration of federally owned properties eligible for inclusion in the National Register.

(4) The President's Memorandum on Environmental Quality and Water Resources Management. The Memorandum directs the Council to issue final regulations under the National Historic Preservation Act by March 1, 1979, and further directs Federal agencies with water resource responsibilities and programs to publish procedures implementing the Act not later than three months after promulgation of final regulations by the Council. Federal agencies' procedures are to be reviewed and, if they are consistent with the Council's regulations, approved by the Council within 60 days and published in final form.

§ 800.2 Definitions.

As used in these regulations:

(a) "National Historic Preservation Act" means Pub. L. 89-665, approved October 15, 1966, an "Act to establish a program for the preservation of additional historic properties throughout the Nation and for other purposes" (80 Stat. 915, 16 U.S.C. 470, as amended; 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978)), hereinafter referred to as "the Act."

(b) "Executive Order" means Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment" (36 FR 8921, 16 U.S.C. 470).

(c) "Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-Federal action, activity, or program. Undertakings include new and continuing projects and program activities (or elements of such activities not previously considered under Section 106 or Executive Order 11593) that are: (1) Directly undertaken by Federal agencies; (2) supported in whole or in part through Federal contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance; (3) carried out pursuant to a Federal lease, permit, license, certificate, approval, or other form of entitlement or permission; or, (4) proposed by a Federal agency for Congressional authorization or appropriation. Site-specific undertakings affect areas and properties that are capable of being identified at the time of approval by the Federal agency. Non-site-specific undertakings have effects that can be anticipated on National Register and eligible properties but cannot be identified in terms of specific geographical areas or properties at the time of Federal approval. Non-site-specific undertakings include Federal approval of State plans pursuant to Federal legislation, development of comprehensive or area-wide plans, agency recommendations for legislation and the establishment or modification of regulations and planning guidelines.

(d) "National Register" means the National Register of Historic Places. It is a register of districts, sites, buildings, structures, and objects of national, State, or local significance in American history, architecture, archeology, and culture that is expanded and maintained by the Secretary of the Interior under authority of section 2(b) of the Historic Sites Act of 1935 (49 Stat. 666, 16 U.S.C. 461) and Section 101(a)(1) of the National Historic Preservation Act implemented through 36 CFR Part 60. The National Register is published in its entirety in the FEDERAL REGISTER each year in February. Addenda are usually published on the first Tuesday of each month.

(e) "National Register property" means a district, site, building, structure, or object included in the National Register.

(f) "Eligible property" means any district, site, building, structure, or object that meets the National Register Criteria.

(g) "National Register Criteria" means the criteria established by the Secretary of the Interior to evaluate properties to determine whether they are eligible for inclusion in the National Register. (See 36 CFR 60.6.)

(h) "Decision" means the exercise of or the opportunity to exercise discretionary authority by a Federal agency at any stage of an undertaking where alterations might be made in the undertaking to modify its impact upon National Register and eligible properties.

(i) "Agency Official" means the head of the Federal agency having responsibility for the undertaking or a designee authorized to act for the Agency Official.

(j) "Council" means the Advisory Council on Historic Preservation as established by Title II of the Act.

(k) "Chairman" means the Chairman of the Advisory Council on Historic Preservation or a member designated to act for the Chairman.

(l) "Executive Director" means the Executive Director of the Advisory Council on Historic Preservation as established by Section 205 of the Act, or a designee authorized to act for the Executive Director.

(m) "State Historic Preservation Officer" means the official, who is responsible for administering the Act within the State or jurisdiction, or a designated representative authorized to act for the State Historic Preservation Officer. These officers are appointed pursuant to 36 CFR Part 61.2 by the Governors of the 50 States, Guam, American Samoa, the Commonwealth of Puerto Rico, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Mariana Islands, and the Mayor of the District of Columbia.

(n) "Secretary" means the Secretary of the Interior or a designee authorized to carry out the historic preservation responsibilities of the Secretary under the Act, Executive Order 11593, and related authorities.

(o) "Area of the undertaking's potential environmental impact" means that geographical area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur and thus cause a change in the historical, architectural, archeological, or cultural qualities possessed by a National Register or eligible property. The boundaries of such area should be determined by the Agency Official in consultation with the State Historic Preservation Officer as early as possible in the planning of the undertaking.

(p) "Consulting parties" means the Agency Official, the State Historic Preservation Officer, and the Executive Director.

§ 800.3 Criteria of effect and adverse effect.

The following criteria shall be used to determine whether an undertaking has an effect or an adverse effect in accordance with these regulations.

(a) *Criteria of Effect.* The effect of a Federal, federally assisted or federally licensed undertaking on a National Register or eligible property is evaluated in the context of the historical, architectural, archeological, or cultural signficance possessed by the property. An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the criteria of the National Register. An effect occurs when an undertaking changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property that contributes to its significance in accordance with the National Register criteria. *An* effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or farther removed in distance, but are still reasonably foreseeable. Such effects may include changes in the pattern of land use, population density or growth rate that may affect on properties of historical, architectural, archeological, or cultural significance.

(b) *Criteria of Adverse Effect.* Adverse effects on National Register or eligible properties may occur under conditions which include but are not limited to:

(1) Destruction or alteration of all or part of a property;

(2) Isolation from or alteration of the property's surrounding environment;

(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(4) Neglect of a property resulting in its deterioration or destruction.

(5) Transfer or sale of a property without adequate conditions or restrictions regarding preservation, maintenance, or use.

REVIEW OF INDIVIDUAL UNDERTAKINGS

§ 800.4 Federal Agency responsibilities.

As early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any action that would foreclose alternatives or the Council's ability to comment, the Agency Official shall take the following steps to comply with the requirements of Section 106 of the National Historic Preservation Act and Section 2(b) of Executive Order 11593. It is the primary responsibility of each Agency Official requesting Council comments to conduct the appropriate studies and to provide the information necessary for an adequate review of the effect a proposed undertaking may have on a National Register or eligible property, as well as the information necessary for adequate consideration of modifications or alterations to the proposed undertaking that could avoid, mitigate, or minimize any adverse effects. It is the responsibility of each Agency Official requesting consultation with a State Historic Preservation Officer under this section to provide the information that is necessary to make an informed and reasonable evaluation of whether a property meets National Register criteria and to determine the effect of a proposed undertaking on a National Register or eligible property. Although a Federal agency may require non-Federal parties to undertake certain steps required by these regulations as a prerequisite to Federal action and may authorize non-Federal participation under this section and in the consultation process under Section 800.6 pursuant to approved counterpart regulations, the ultimate responsibility for compliance with these regulations remains with the Federal agency and cannot be delegated by it.

(a) *Identification of National Register and Eligible Properties.* It is the responsibility of each Federal agency to identify or cause to be identified any National Register or eligible property that is located within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.

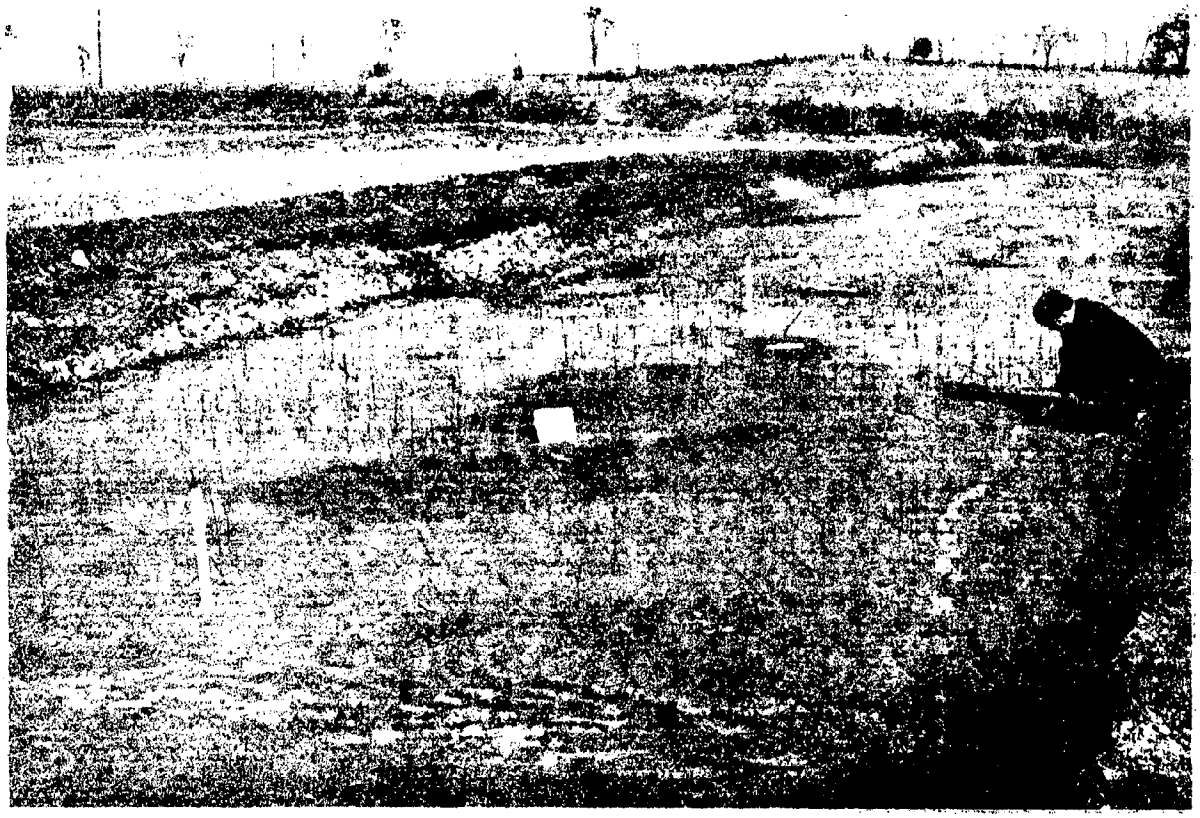
(1) The Agency Official shall consult the State Historic Preservation Officer, the published lists of National Register and eligible properties, public records, and other individuals or organizations with historical and cultural expertise, as appropriate, to determine what historic and cultural properties are known to be within the area of the undertaking's potential environmental impact. The State Historic Preservation Officer should provide the Agency Official with any information available on known historic and cultural properties identified in the area (whether on the National Register or not), information on any previous surveys performed and an evaluation of their quality, a recommendation as to the need for a survey of historic and cultural properties, and recommendations as to the type of survey and/or survey methods should a survey be recommended, and recommendations on boundaries of such surveys.

(2) The Agency Official shall, after due consideration of the information obtained pursuant to § 800.4(a)(1), determine what further actions are necessary to discharge the agency's affirmative responsibilities to locate and identify eligible properties that are within the area of the undertaking's potential environmental impact and that may be affected by the undertaking. Such actions may include a professional cultural resource survey of the environmental impact area, or parts of the area, if the area has not previously been adequately surveyed. The recommendations of the State Historic Preservation Officer should be followed in this matter.

(3) The Agency Official, in consultation with the State Historic Preservation Officer, shall apply the National Register criteria to all properties that may possess any historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact. If either the Agency Official or the State Historic Preservation Officer finds that a property meets the National Register Criteria or a question exists as to whether a property meets the Criteria, the Agency Official shall request a determination of eligibility from the Secretary of the Interior in accordance with 36 CFR Part 63. The opinion of the Secretary respecting the eligibility of a property shall be conclusive for the purposes of these regulations. If the Agency Official and the State Historic Preservation Officer agree that no identified property meets the Criteria, the Agency Official shall document this finding and, unless the Secretary has otherwise made a determination of eligibility under 36 CFR Part 63, may proceed with the undertaking.

(4) The Agency Official shall complete the preceding steps prior to requesting the Council's comments pursuant to Section 800.4(b)-(d). The Agency Official may, however, initiate a request for the Council's comments simultaneously with a request for a determination of eligibility from the Secretary when the Agency Official and the State Historic Preservation Officer agree that a property meets the National Register Criteria. Before the Council completes action pursuant to § 800.6, the Secretary must find the property eligible for inclusion in the National Register.

(b) *Determination of Effect.* For each National Register or eligible property that is located within the area of the undertaking's potential environmental impact, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Effect, (§ 800.3(a)), to determine whether the undertaking will have an effect upon the historical, architectural, archeological, or cultural characteristics of



Guidelines for Archeological Investigations in Maryland

Prepared by
Joseph M. McNamara
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Maryland Geological Survey

Maryland Historical Trust Technical Report Number 1

GUIDELINES FOR

ARCHEOLOGICAL INVESTIGATIONS IN MARYLAND

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with assistance of a grant-in-aid from the

Heritage Conservation and Recreation Service
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administered by the

Maryland Historical Trust
Department of Economic and Community Development

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FORWARD

The need for written guidelines useful to archeologists, engineers, planners, administrators, and others charged with conserving archeological resources in Maryland has been recognized for many years. Report format was discussed at a 1974 meeting prior to organizing the Council for Maryland Archeology, but serious efforts toward developing formal guidelines began as part of Heritage Conservation and Recreation Service archeological resources management grant-in-aids to the Maryland Geological Survey in 1978 and 1979. The task of preparing the document was assigned to Joe McNamara who coordinated his efforts with the Council for Maryland Archeology and the State Historic Preservation Officer.

Users of the guidelines will find that not all circumstances are addressed, and some innovative approaches may not be easily accommodated. Inadequacies in the guidelines should be brought to the attention of McNamara or myself for consideration in future revisions.

The guidelines set down the general approach, organization, and content that are expected of modern investigations and reports in Maryland archeology. If major departures are contemplated for projects and reports subject to state review of adequacy, advance discussion with the reviewing agency(ies) is recommended. It will be a tragedy for the future of Maryland archeology, however, if mechanical adherence to the guidelines by either investigators or reviewers discourages innovation.

Tyler Bastian
State Archeologist
Maryland Geological Survey

PREFACE

Following the passage of the National Historic Preservation Act of 1966, the National Environmental Policy Act of 1969, and the Archeological and Historic Preservation Act of 1974, a number of rules and regulations have been developed by various federal agencies for the implementation of these and other historic preservation acts. The purpose of the archeological investigations and report guidelines presented in this document is not to supplant the federal rules and regulations which have been developed. Each sponsor supporting compliance archeological investigations and each archeologist conducting the investigations is responsible for complying with the complex series of rules and regulations established by the relevant federal agencies. These guidelines were developed to provide project sponsors and contracting archeologists with the minimum standards of fieldwork, analysis and data reporting essential for the State Historic Preservation Office and the State Archeologist's review of archeological reports. The guidelines should prove useful in assisting a project sponsor in developing a scope of work for compliance investigations. The different levels of survey and the type of investigations required at each level have been clearly defined. The investigation and reporting standards presented were developed based on ten years of review and report writing experience on the part of the archeologists at the Division of Archeology, the Maryland Historical Trust, and the Council for Maryland Archeology. Many of the topics discussed include those problem areas which have resulted in constant delays in review due to adverse comments by the reviewing agency. Adherence to the minimum standards outlined in these guidelines will greatly facilitate project clearance while significantly increasing the value of the archeological reports as research and management documents.

Wayne E. Clark
Maryland Historical Trust

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The author wishes to acknowledge and express his gratitude to the following groups and individuals for their support and assistance in preparing these guidelines. The guidelines have been prepared with the assistance of a grant-in-aid from the Heritage Conservation and Recreation Service of the U.S. Department of Interior. The grant was administered by the State Historic Preservation Office at the Maryland Historical Trust, an agency of the Department of Economic and Community Development. Information for Sections I and II was developed from the "Recovery of Scientific, Prehistoric, Historic, and Archeological Data: Methods, Standards, and Reporting Requirements" (36 CFR 66), Maryland State Highway Administration "Draft Guidelines for Archeological Studies", and guidelines used in other states. The guidelines in draft form were distributed to the Council for Maryland Archeology at the 9 February 1980 meeting. A Guidelines Review Committee was formed by the Council and met 16 April 1980 at the Maryland Geological Survey. Special thanks are extended to the members of that committee: Dennis Curry, MGS; Wayne Clark and Gordon Fine, MHT; Steve Israel, U. S. Army Corps of Engineers Baltimore District; June Evans, American University; Ron Thomas, Mid-Atlantic Archeological Research, Inc.; and Tim Thompson, Thunderbird Research Corporation and Catholic University. Special thanks also go to Tyler Bastian for his assistance with the final review and editing. Any errors or misinformation are strictly the responsibility of the author. The success of these guidelines will be measured by the quality of future archeological work in the state.

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GUIDELINES

FOR

ARCHEOLOGICAL INVESTIGATIONS IN MARYLAND

INTRODUCTION

This document outlines some of the resources, procedures, and standards used in recommending and evaluating archeological investigations: (1) on state lands or (2) for compliance with federal regulations. Recognizing the variety of training, skills, methodologies, and research interests among archeologists working in Maryland, the guidelines describe minimum requirements without discouraging experimentation and diversity in conducting and reporting archeological work.

Adequate background preparation, field work, and reporting are critical to protect the interests of the sponsoring agency, to enable reviewers to do their jobs, and to insure future usefulness of the findings. Inadequate investigations may:

1) endanger the archeological record through failure to record significant resources or to communicate their significance,

2) delay the review process,

3) delay final payment to the archeologist, and/or

4) delay construction.

The major sections of this document:

1) describe the principal phases of archeological field research, and

2) present appropriate content and format for archeological reports.

Standards for Recording Archeological Data

These preliminary standards indicate minimal procedures and material quality believed necessary to insure long-term preservation and usefulness of archeological data collected in Maryland.

Field methods - quantify by indicating distance between surface survey swaths, size of screen mesh, etc.

Constraints - time, access in field and to data files, ground cover, weather, etc.

Photographs - use only film of major manufacturers (not Sears, Fotomat, etc.)

Black and white (Kodak Plus-X Pan recommended) - The basic record. Minimum negative size for Preliminary Site Examination and Full Excavation phases: 2-1/4" x 2-1/4"; 35mm is acceptable for Preliminary Reconnaissance and Intensive Survey.

Hand process to archival standards.

Color transparency (Kodachrome recommended) - Secondary to black and white as permanent record.

Processing by manufacturer only.

Field records - use durable acid-free paper.

Mapping - indicate permanent reference points, scale, direction, and date.

Cataloging of specimens - use MGS D/A system and forms (described in Appendix III) for sites on lands owned or controlled by the state unless otherwise specified in the Antiquity Permit.

Disposition of cataloged artifacts and field notes - with MGS D/A for lands owned or controlled by the state unless specified otherwise in the Antiquity Permit.

Standards for Archeological Resource Management Reports

The following special requirements were developed to facilitate review of Preliminary Reconnaissance and Intensive Survey archeological resource management reports. Reports will not be accepted for review unless these minimum standards are adhered to.

Title page that clearly identifies the principal author(s) by name(s); date of report.

Abstract.

Description of field procedures.

Description of field findings, including individual features, and relevant natural environment.

Standard site numbers as issued by MGS must be incorporated into the text for all sites in project area.

Quantify artifacts by provenience, material, type; illustrate diagnostics.

Assessment of possible impact.

Discussion of National Register eligibility, when appropriate.

Specific recommendations, including budget, for further work, if needed.

List of references cited and documents consulted.

Maps that include (all with scale, directional arrow, and source):

- regional location of project (approximating entire state)
- project limits and all sites in and near the project indicated on appropriate section of 7.5' USGS quadrangles
- project specific plans (may be combined with project limit map on USGS quadrangle) to show areas actually investigated in the field; quantify nature/intensity of investigation and field conditions for each area (preferably by map symbol rather than narrative text).
- intra-site - show test units, artifact raw data distribution, natural features, datum point.

Scope of Work.

Antiquity Permit approval data, if work is on land owned or controlled by state.

Indicate dispositon of field records and artifacts.

Standard Maryland archeological site survey forms with attached portions of 7.5' USGS quad (completed forms may be submitted separately from the report, but must accompany or precede it).

More detailed discussion of report requirements is provided in Section II. Innovation and variability beyond these minimum standards are encouraged.

I. Phases of Archeological Work

Archeological work normally falls within one of five phases or steps:

A. Pre-Fieldwork Preparation

B. Preliminary Archeological Reconnaissance

C. Intensive Archeological Survey

D. Preliminary Site Examination, and

E. Full Scale Excavation.

The phases are detailed below.

The investigation ordinarily progresses in the order listed above, but in many cases it does not proceed beyond Intensive Archeological Survey when it is concluded that the archeological resources for any of a number of reasons do not warrant further investigation. Among the reasons that may decide that further investigation is not needed are research priorities, resource conservation needs, deletion of potential adverse project impact (including project modification), and non-significance in terms of National Register eligibility criteria.

Archeological considerations, project needs (such as planning stage), and available funds will indicate the appropriate phases and how they should be combined or omitted. For example, work on an area or site already well-known might begin with Preliminary Site Examination and include a minimum of Pre-Fieldwork Preparation. In other cases, as with urban archeology, the Pre-Fieldwork Preparation is normally a major independent project in itself.

A. Background Research. Investigations appropriate to both historic and prehistoric archeology should be pursued for each project unless one has been done previously. Urban archeology presents special problems addressed in a separate subsection below.

Pre-Fieldwork Preparation: the general situation.

1) Purpose: to inventory known sites and to develop predictions of the locations of historic and prehistoric archeological sites through a search of relevant documents and maps prior to the initiation of the fieldwork.

2) Goals:

a. the identification of potential historic archeological sites

based on early maps, atlases, and documented standing structures,
b. a description of historic and prehistoric settlement patterns and land use trends for the study area based on literature and maps,
c. identification of possible areas of racial and ethnic diversity,
d. the identification of industry, commerce and growth in the study area and its relationship to regional patterns,
e. a predictive model for prehistoric site location based on available water, soil drainage, lithic resources, topography, cultural processes, and known site locations.

3) Sources to be Considered:

a. project planning maps
b. Maryland Archeological Site Survey (MASS) which consists of:

(1) a file of site forms and supplementary data for each numbered site
(2) 7.5' USGS quadrangles with site locations marked
(3) a checklist of numbered sites
(4) miscellaneous data on reported but unconfirmed sites

c. reports on previous archeological investigations
d. relevant biogeographic data
e. National Register of Historic Places
f. Inventory of Historic Sites at the Maryland Historical Trust
g. early state and county maps and atlases
h. early USGS topographic quadrangles (15' and 7.5')
i. local collectors (some information available at D/A)
j. consult with the offices of the State Archeologist and SHPO
k. county soil maps (available for all counties from U.S. Soil Conservation Service)
l. county geologic maps (for sale by MGS, available for about half of the counties)
m. aerial photos (complete state coverage by USDA about every decade since the late 1930's)
n. environmental reconstructions (local and regional)
o. ecological area maps
p. slope and erosion maps
q. county tax maps (since 1950's)
r. county planning and zoning maps (available from county planning offices)
s. vegetation maps (e.g. Brush, et al. 1976)

4) Included in the Background Research section of the Report (see Section II - Archeological Report Guidelines)

a. statement of methodology and resources utilized
b. descriptive prehistoric and historic overviews
c. predictive models for historic and prehistoric archeological site location
d. recommendations (i.e., alignment alternatives, fieldwork, archival research)

e. a series of maps showing the project location within the state, a base map at 1:24,000 (USGS 7.5' quad) showing the project and known potential site locations, and more detailed maps or sketches as appropriate

Pre-Fieldwork Preparation: the urban situation.

1) Purpose: to inventory and locate or predict, through archival study, prehistoric and historic sites occuring within a prescribed sampling area. Prehistoric archeological site locations in urban areas should be predicted by utilizing available site data information in the Maryland Archeological Site Survey (MASS) files in conjunction with early maps to delineate potential undisturbed (unbuilt) areas. Potential historic archeological site locations in urban areas can be identified by comparing early maps, directories, etc. with the modern situation.

2) Goals: Archeological research within the urban environment should be conducted within the framework of a specific set of research objectives. This approach should include the perspective of the city or urban area as the archeological site (Salwen 1973). The following provide suggestions for structuring archival research:

   a. determine the evolutionary growth of the area
   b. identify the range of social and economic activities that have taken place in the area
   c. identify social groups associated with each activity
   d. identify the types of property that may be associated with each social group
   e. identify past construction activities which might have destroyed various types of archeological resources in the study area
   f. development of research questions that will assist in assigning significance to particular properties once they are discovered
   g. determination of significant types of historic archeological sites in the project area

3) Archival Sources to be Considered:

   a. city archives
   b. insurance records and maps
   c. early maps and atlases
   d. early lithographs
   e. tax maps
   f. court records (deeds and mortgages)
   g. port records (especially ship manifests)
   h. real property records (including city plats)
   i. ordinances and resolutions
   j. rail and freight records
   k. city histories
   l. city directories

m. wills and probate records
n. census records
o. health department records
p. utility company records

These resources may be found in the following repositories:

- Maryland Historical Society (library and manuscript collection)
- Baltimore City Museum
- Pratt Library (Maryland Room)
- National Archives
- Library of Congress
- Industrial Museum Files
- Hall of Records (Annapolis)

4) Urban Background Research Report should conform to Section II (Archeological Report Guidelines) and should include

a. statement of methodology and resources utilized
b. descriptive prehistoric and historic overviews
c. predictive models for prehistoric and historic archeological site location
d. satisfaction of archeological research questions (a - g)
e. recommendations (i.e., alignment alternatives, further archival research, and/or Intensive Archeological Survey) If Intensive Archeological Survey is recommended, it must be justified by the archeological research and subsequent model development. Research and sampling designs, scope of work and an estimated budget are required.

B. Preliminary Archeological Reconnaissance

1) Purpose: to locate and describe significant or potentially significant sites and areas by conducting an on-the-ground surface and sub-surface examination of the study area, adequate to assess the nature and number of archeological resources present. The reconnaissance should be sufficiently thorough to indicate if any potentially significant archeological resources are present, but not necessarily of such intensity as to locate all such sites. Determinations of National Register eligibility are usually not possible in this phase.

2) Goals:

a. determine the presence/absence of archeological resources in the project area from a representative sample, or, in the case of a small area, locate all sites
b. interpretation (i.e., cultural affiliation, site size, site function and possible significance as can be determined). In

the case of historic sites, where information is available and relevant, socio economics, race and ethnicity, and their relationship to the region and standing structures should be discussed.

c. assess the project impact on sites (direct and indirect)
d. determine the need for further work
e. recommend alternate alignments

3) Fieldwork: consists of a selective examination of the project area including the use of shovel test-pitting, usually within an explicit sampling framework. The fieldwork should be designed to furnish complete coverage of areas with high archeological potential, and should provide an agency or applicant with an overview of project impacts and recommendations for completing the required level of investigation.

4) Report: See Section II.

C. Intensive Archeological Survey

1) Purpose: to identify and delineate all sites in an area previously subject to a Preliminary Archeological Reconnaissance which, for reasons of heavy ground cover, property entry problems, and limitations of time and funds, requires a more intensive investigation. The investigation will consist of a surface and sub-surface examination of the entire area thought to require additional work. The area must have at least a moderate potential for significant archeological sites to warrant such work. In some instances, this may be the first field investigation required.

2) Goals:

a. inventory all sites in the project area
b. interpret sites in context of study area and region
c. evaluate impact on archeology by the project
d. develop recommendations for eligibility or non-eligibility for the National Register, if possible
e. determine the need for further work
f. evaluate predictive models of site location

3) Fieldwork: Should be designed to provide complete ground coverage of the project area or those areas previously determined by a Preliminary Archeological Reconnaissance survey to be of high archeological potential. The work should be sufficient to document whether individual archeological sites meet National Register criteria.

4) Report: See Section II.

D. Preliminary Site Examination

1) Purpose: to further examine sites previously identified as having potential significance in order to provide sufficient information to allow a determination of effect and a determination of eligibility for inclusion into the National Register of Historic Places.

2) Goals:

a. to delimit the horizontal and vertical extent of each site in relation to the proposed alignments
b. interpretation of cultural affiliations and time span of the component(s) of the site, site functions and significance
c. develop reasons for recommending eligibility or non-eligibility for National Register of Historic Places
d. hypotheses testing
e. to determine need for further archeological investigation

3) Background research

a. review previous studies
b. examine local collections
c. deed searches in the case of historic sites

4) Fieldwork: should employ a research design that utilizes controlled surface collecting and/or test excavations to satisfy the above-mentioned goals. The fieldwork should also relate to areas outside the right-of-way and should also document the vertical and horizontal integrity of the remains.

5) Report: See Section II.

E. Full Scale Excavation

1) Purpose: to recover the maximum amount of archeological and environmental data (e.g., artifactual, floral, faunal, geomorphological...) through full-scale archeological excavation as a mitigation aternative prior to the destruction of a site.

2) Goals:

a. maximize data retrieval
b. determination of intra and inter-site variability
c. hypotheses testing

3) Background Reséarch

a. summarize previous work
b. analyze known collections from site
c. formulation of hypotheses to be tested
d. excavation strategies suitable for particular project

4) Fieldwork: total excavation or a system of excavation units that intensively samples all areas of the site. If the site will not be completely destroyed, the salvage may be limited to the area of the site within the project right-of-way with other areas sampled if critical to interpretation. Archeologists are encouraged to maximize data and minimize costs through well-thought-out sampling.

5) Report: See Section II.

II. ARCHEOLOGICAL REPORT GUIDELINES

Reports should be lucid and succinct with emphasis on procedures and findings.

Suggested basic outline:

- Title Page
- Abstract
- Table of Contents
- Introduction
- Project Location and Description
- Culture History and Paleo-ecological Setting
- Background Research-Previous Investigations
- Research Goals
- Field Investigation/Descriptive Artifact Analysis
- Interpretation
- Assessment of Possible Impact
- National Register Eligibility
- Recommendations
- References Cited and/or Examined
- Appendices
  - Qualifications of investigators
  - Glossary
  - Budget for additional work
  - Scope of work (as prepared/approved by sponsoring agency)
  - Artifact provenience/category
  - Correspondence from SHPO, State Archeologist, etc.
  - Other
  - Maps (location of project within state; entire project and site(s) on USGS 7.5' quads; project maps showing specific sites; site plans)
  - Standard Maryland site survey forms
  - Illustrations (figures, plates) (May be incorporated in text)

A. Title Page
1) title of report including name and location of project
2) author(s) and/or principal investigator(s)
3) organizational affiliation of author(s)/investigator(s)
4) agency report was prepared for
5) date of report

B. Abstract
1) Normally one-half page or less in length and concisely stating:

a. findings
b. significance
c. project impact
d. recommendations

C. Table of Contents: useful for any report of over 20 pages

D. Introduction

1) reason for survey
2) project administration and organization; identify sponsors
3) description of proposed project and general location
4) date(s) when survey was conducted
5) size of crew
6) survey constraints
7) methodology

E. Project Location and Description

1) physical features of the project area: geomorphology, soil types and hydrology
2) present land use patterns: commercial, industrial, residential, and agricultural
3) general description of ground cover
4) past features of the land (if known), e.g., early historic vegetation, structures and land use

F. Culture History and Paleo-ecological Setting

1) concise synopsis of the prehistoric and historic cultural record of the physiographic area and archeological research unit in which the project is located
2) the paleo-ecological setting should attempt to reconstruct the changing pattern of the environment by culture period for the specific study area, based on recently published regional reconstructions of past environments
3) treatment of 1 and 2 should allow predictions to be made of areas with high potential for archeological remains within the project area

G. Previous Investigations

1) descriptions of types and extent of previous investigations
2) when and by whom
3) indicate communication with local residents, amateurs, collectors, etc.
4) review of Maryland Archeological Site Survey and Historic Sites Inventory
5) communication with the State Archeologist and SHPO staff archeologist concerning project area

H. Research Goals: research plan and objectives (must address all the archeological resources.)

I. Field Investigations

1) description and justification for the method of survey chosen, the limits of the total project area <u>versus</u> the area actually surveyed, sampling design used and reason for choice, intensity

and method of surface examination, testing method used.

2) site description

a. setting, nearest water, probable extent (horizontal-vertical)
b. ground cover and percent of exposed ground
c. findings
d. show site locations, study area, and proposed project on maps (preferably on appropriate portions of USGS 7.5' quads)
e. descriptive artifact inventory (type, context, material) including:

- artifact quantification by provenience unit
- artifact tables which show context, type and material
- historic and prehistoric artifact identification should include the reference cited (e.g., Ivor Noel Hume 1976)
- diagnostic artifacts important to the interpretations of the site must be photographed (with metric scale included) or drawn with concise line or stipple drawings which show the visible attributes of the artifacts. Outline drawings are not acceptable.
- in the case of Intensive Survey, Preliminary Site Examination and Full Scale Excavation this section should include artifact interpretation based on spatial, temporal and artifact class data.

3) disposition of the data

J. Interpretations

1) discussion of how sites relate to the archeological record of the area
2) predict site locations (if only percentage of area sampled)
3) general theories or models (if relevant)
4) reliability of data
5) where possible and/or relevant, a description of historic artifacts should include information on socio economic, race and ethnicity, relationship to region and standing structure
6) results related to stated goals
7) future research potential

K. Assessment of Possible Impact

1) direct impact: which sites will be directly impacted by the proposed construction; what percentage of each site will be impacted; show site(s) on map (ca. 1"-200' scale) showing site location in relation to proposed project
2) indirect impact: possibility of impact by associated or resulting projects
3) assess if effect may be adverse (See: "Guidelines for Making 'Adverse Effect' and 'No Adverse Effect' Determinations for Archeological Resources in Accordance with 36 CFR 800")

L. National Register Eligibility

1) assessment of a site's significance may be premature or undeterminable at the preliminary reconnaissance levels, although a statement as to potential significance is usually possible. See "Archeological Property Nominations" by Tom King in 11593 vol. 1, no. 2, pp. 7-9 (1976).
2) sufficient documentation must be provided at the Preliminary Site Examination stage to enable the SHPO to make an opinion as to site eligibility
3) if the archeologist at any stage feels the site(s) are not eligible to the National Register, documentation must be provided to support this conviction.

M. Recommendations

1) clear project, no impact on archeological resources (support why),
2) additional work to determine National Register eligibility and appropriate mitigation alternatives (support why),
3) mitigation alternatives (support why): realign project to avoid site(s), monitor, Full Scale Excavation,
4) other kinds of cultural resources (architecture, folklore, etc.) appropriate for study by other specialists,
5) append a proposed budget, suggested scope of work, and timetable for the further work at each site to be impacted.

N. References

1) references cited
2) additional bibliography of items examined
3) maps consulted
4) personal communications
5) artifact collections examined

O. Appendices

1) qualifications of investigator(s)

   a. at minimum, include principal investigator and principal assistants
   b. include education, years of experience, area of experience, membership in SOPA or other accredited organizations

2) glossary (directed at the non-archeologist)
3) budget for additional work: include hourly rates for each class of worker broken down by background, field, and lab time; travel; per diem; field and lab supplies; report duplication. Do not include overhead, indirect expenses, profit, etc., as these vary among archeologists.

4) scope of work: copy of original documents as agreed to by consultant and sponsor
5) artifact provenience data: tabulations of all artifacts by site and excavation unit not included in text
6) documentation of private artifact collections
7) correspondence
8) standard Maryland Site Forms (required in all reports for SHPO approval)
9) illustrations (figures, maps, plates)

   a. each report should include a state map showing project location on Council for Maryland Archeology's Research Unit Map and USGS 1:24,000 (7.5') vicinity maps
   b. large scale site specific maps or sketches should be included as appropriate (should include: field conditions, actual areas investigated, and archeological sites)
   c. maps must include title, legend, metric scale, and directional arrow
   d. photographic plates must include metric scale, and caption (on facing pages if no room on plate)
   e. of particular interest are: soil profiles, archeological cross sections, artifact sketches, artifact distribution maps, and site plan maps (must show test units and datum).

III. CRITERIA FOR REVIEW OF ARCHEOLOGICAL REPORTS

- Are all methods used detailed in full?
- Was the work related to the research design?
- Was the methodology appropriate for the level of investigation?
- Are the findings properly related to the environmental/cultural settings?
- Are the historical/archival data adequately integrated into the overall interpretation of the survey area and sites investigated?
- Are the previous investigations adequately detailed?
- Is the current work properly related to previous investigations/findings?
- Are all sites adequately described?
- Are artifact inventories and appropriate statistical manipulations presented?
- Are all artifacts identified in an acceptable, correct and thorough manner?
- Are the artifact categories, type names and nomenclature used in the report those which are standard and acceptable in professional archeology?
- Are artifactual data (type, style, function, distribution, etc.) garnered into interpretation/site definition?
- Are objects/features interpreted in terms of human behavior?
- Are all of the sites related to an archeological context?
- Is site significance adequately assessed based on data manipulation, context, interpretation, integrity, etc.?
- Is potential impact <u>fully</u> detailed for every site?
- Are recommendations appropriate based on amount/degree of impact?
- Are recommendations appropriate based on site significance?
- Are recommendations appropriate based on cost-effectiveness?
- Is the report properly illustrated?
- Are the maps adequate?
- Were appropriate references/persons consulted?

APPENDIX I. STATE ARCHEOLOGICAL SITE NUMBER AND SITE SURVEY FORMS

The Maryland Archeological Site Survey, other records, and the collections at the Division of Archeology are numbered according to the trinomial system in wide use by archeologists in the United States. The first unit is a numerical prefix identifying the state (18 is the designation for Maryland); the second unit consists of two letters identifying the county; and the third unit is the inventory number of the particular site in the county. Site numbers for Maryland are issued only by the Division of Archeology. Persons requesting a site number must complete D/A's Maryland Archeological Site Survey form and attach a photocopy of the relevant portion of a 7.5' USGS quad with the site marked on it before a number will be assigned. Blocks of numbers will not be assigned to investigators in advance of a project. Use of D/A site numbers is mandatory for all final reports. All requests for site numbers will be expedited quickly upon receipt of the completed site forms. Requests should be sent to the attention of Lois Brown at Maryland Geological Survey, Division of Archeology, Merryman Hall, Johns Hopkins University, Baltimore, Maryland 21218.

APPENDIX II. HANDLING OF SKELETAL REMAINS

All archeologists working in Maryland should adhere to the policy statement prepared by the Council for Maryland Archeology on 6 September 1980 concerning the proper handling of human skeletal remains. It was agreed that:

1) all burials will be treated with respect;
2) matters concerning the excavation and dispositon of human remains will be handled on a case by case basis; and
3) a reasonable effort will be made to notify appropriate representatives of ethnic groups within the State of Maryland that have expressed concern.

In the event of locating human remains in the course of survey or excavation, the archeologist should notify the State Archeologist's office at once.

APPENDIX III. NOTES ON CURATION

Both the Division of Archeology and the Maryland Historical Trust have the capacity to curate collections. Both agencies use the trinomial system for site numbering and use that number in cataloging each specimen from a site. The two systems differ in the assigning of lot numbers and catalog guidelines are available from each agency. If the collections are to be donated to either agency, the contracting firm should procure the respective catalog as a guide. The items presented below apply to either agency or if the firm doing the work has the capacity to curate the collection. Storage of the collections in the state repository (MGS) is encouraged, particularly for smaller collections.

A. Bagging

1) outer bags - heavy brown paper (or cloth) on which label can be written
2) inner bags - use small plastic bag (medium weight) to separate like items: glass, metal, bone, etc. (fragile items should be placed in plastic vials)

B. Labeling of bags: use permanent felt marker only, and include the following information on every outer bag:

1) Maryland trinomial site number
2) provenience within site

   a. square coordinates
   b. feature number (if any)
   c. depth below surface (level or layer number)
   d. additional information - soil color or texture, etc.

3) date
4) names of excavators

C. Cleaning: artifacts should be cleaned and cataloged before shipping to D/A lab:

1) pottery and glass - wash carefully with small brush, do not soak; air dry
2) mineralized glass - brush carefully
3) bone - brush off loose dirt (soft/mushy bone should be left in situ and allowed to dry slowly or treated with PVA (polyvinyl acetate)- the latter treatment should not be used on objects intended for C-14 dating
4) metal - brush gently, do not handle more than necessary. If some objects are wet upon excavation - let dry out slowly, do not place in direct sunlight.

D. Artifact numbering

Each artifact (or group of artifacts) is to be marked with a trinomen, example - 18 CE 29:

18 - refers to Maryland
CE - refers to the County (here, Cecil)
29 - refers to the 29th site recorded in the county

Under the trinomen (18 CE 29) go the Lot numbers which are recorded on the catalog sheets along with the artifact description. The lot number can refer to one object, to a group of objects from one provenience unit, such as the excavated level, or one section of a surface collection.

E. Artifact Marking Procedures

1) Materials list:

a. permanent black ink (such as Koh-i-Noor, Rapidograph, Pelican or Higgins)
b. pen with small metal quill point (such as Hunt's Crowquill #104 pen point) (as points wear rapidly from the abrasion of rough surfaces, extra points are needed)
c. gesso or white hyplar (acrylic polymer emulsion artists' medium such as Liquitex)
d. short-bristled, moderately stiff brushes (at least 2) 1/4 inch wide
e. plastic bags, heavy weight, assorted small and medium sizes
f. small plastic vials, assorted sizes
g. acid-free paper for labels
h. small tags with strong strings (such as used by water repairmen)

2) Marking description

After object is cleaned and thoroughly dry, it is ready for labeling. Some artifacts, such as bone and glazed ceramics, can be marked on directly with ink. However, most aboriginal material (sandstone, quartz, pottery, etc., is dark and has porous, rough surfaces, and therefore needs a base on which to write. With white gesso, a small rectangular patch is applied in an unobtrusive position on the artifact. When the patch is dry, the site and lot numbers can be applied in ink. Then a sealer of gloss polymer should be put on, in one single stroke to avoid smearing the ink.

Some artifacts, due to the small size or uneven surfaces, are not practical to label and should be placed in plastic vials or bags with a label cut to fit from acid-free paper. Some objects can be tagged in lieu of actual on-surface marking or bagging.

APPENDIX IV. GUIDE TO ORDERING OF ARTIFACTS FOR THE CATALOG

ABORIGINAL INDIAN ARTIFACTS (List first unless SITE, not just a particular lot number, is primarily Historic)

Ceramics
- sherds
- pipes

Chipped Stone
- points & spears
- knives
- drills
- other bifaces (blanks, preforms)
- scrapers
- cores
- choppers
- cobble or pebble tools
- flakes and chips

Ground Stone
- gorget
- bannerstone
- celt
- ax
- pestle
- grinding stone or muller
- grinding basin
- abrading stone
- pitted stone
- hammerstone

Other stone
- hematite
- fossils
- fire-fractured rock

Bone Artifacts
- awl
- fishook

Shell Artifacts
- beads
- pendants
- trade goods (separate from Euro-American artifacts only if their use by Indians is established)

Faunal & Floral Remains
- bones (including teeth)
- seeds and nuts
- charcoal
- shell

HISTORIC ARTIFACTS (List first if there are few or no Aboriginal artifacts from SITE, not a particular lot)

Ceramics
- historic sherds
- pipes
- bricks
- mortar
- glass

Metal
- buttons
- buckles
- other ornaments
- knives
- nails
- etc.

Bone
- buttons
- combs
- etc.

Shell
- buttons
- etc.

Stone
- gunflints
- whetstones

Faunal & Floral Remains
- bones (including teeth)
- seeds and nuts
- charcoal
- shells

APPENDIX V. MARYLAND REVIEW/RESOURCE AGENCIES

The D/A is specifically mandated to regulate archeological investigations on state lands and to coordinate archeological action in the state; it serves as the lead agency for archeological matters in the DNR. The MHT is responsible for administering the National Historic Preservation Act in Maryland, including project review, development of a state plan, administering grant-in-aids, advising of eligibility and effect of sites, National Register Program, and coordination of archeological research.

Together, the Division of Archeology (D/A) and the Maryland Historical Trust (MHT) serve as formal review agencies for archeological work conducted in the state.

A. DIVISION OF ARCHEOLOGY (D/A)

The Division of Archeology was created by the Maryland Archeological Resources Act of 1968 (Natural Resources Title 2, Subtitle 3, revised 1977). The Division of Archeology is part of the Maryland Geological Survey, an agency of the Department of Natural Resources. Personnel at D/A consist of three state merit system employees paid by annual general fund appropriations from the state legislature (the State Archeologist and two archeologists). Other personnel (archeologists, collections manager, field assistants, and clerical help) are employed subject to availability of funds from other sources to pursue specific projects such as highway survey, archeological resource management, and regional survey. The State Archeologist is directly responsible to the Director of the Maryland Geological Survey. The Survey is advised on archeological matters at quarterly meetings of the Advisory Committee on Archeology which consists of five persons knowledgeable in archeology.

The purpose of the Division of Archeology is to increase and disseminate knowledge of Maryland's prehistoric and historic archeology through a program of research, conservation, publication, public education, and coordination. Legislatively-assigned duties (NR Title 2, Subtitle 3, Section 303) include:

1) encourage, coordinate, and engage in fundamental research
2) cooperate with other state agencies in archeological excavations
3) work for the preservation of archeological sites on private lands
4) curate archeological objects discovered during public construction
5) cooperate with and assist other organizations in preserving archeological materials
6) make archeological materials available for demonstration to organizations in the state
7) make archeological exhibits available to schools and assist in instruction
8) make available information on archeology
9) enforce the state's antiquities law

Adequate funding has not been available to carry out all of the tasks assigned, and recent years have seen an increasing emphasis on management of cultural resources.

The Division of Archeology assigns site numbers to all prehistoric and historic archeological sites reported in the state, and maintains a file on each site. The Division is the principal repository for artifacts and field records from survey and/or excavations either sponsored by state agencies or on state property. The Division of Archeology also reviews Department of Natural Resources internal clearinghouse documents, most of which pertain to acquisition or development of state and other public lands with federal Program Open Space funds. Upon request, the Division of Archeology reviews the work of professional archeologists conducting cultural resource management studies in Maryland.

Resources available to professional archeologists at the Division of Archeology are:

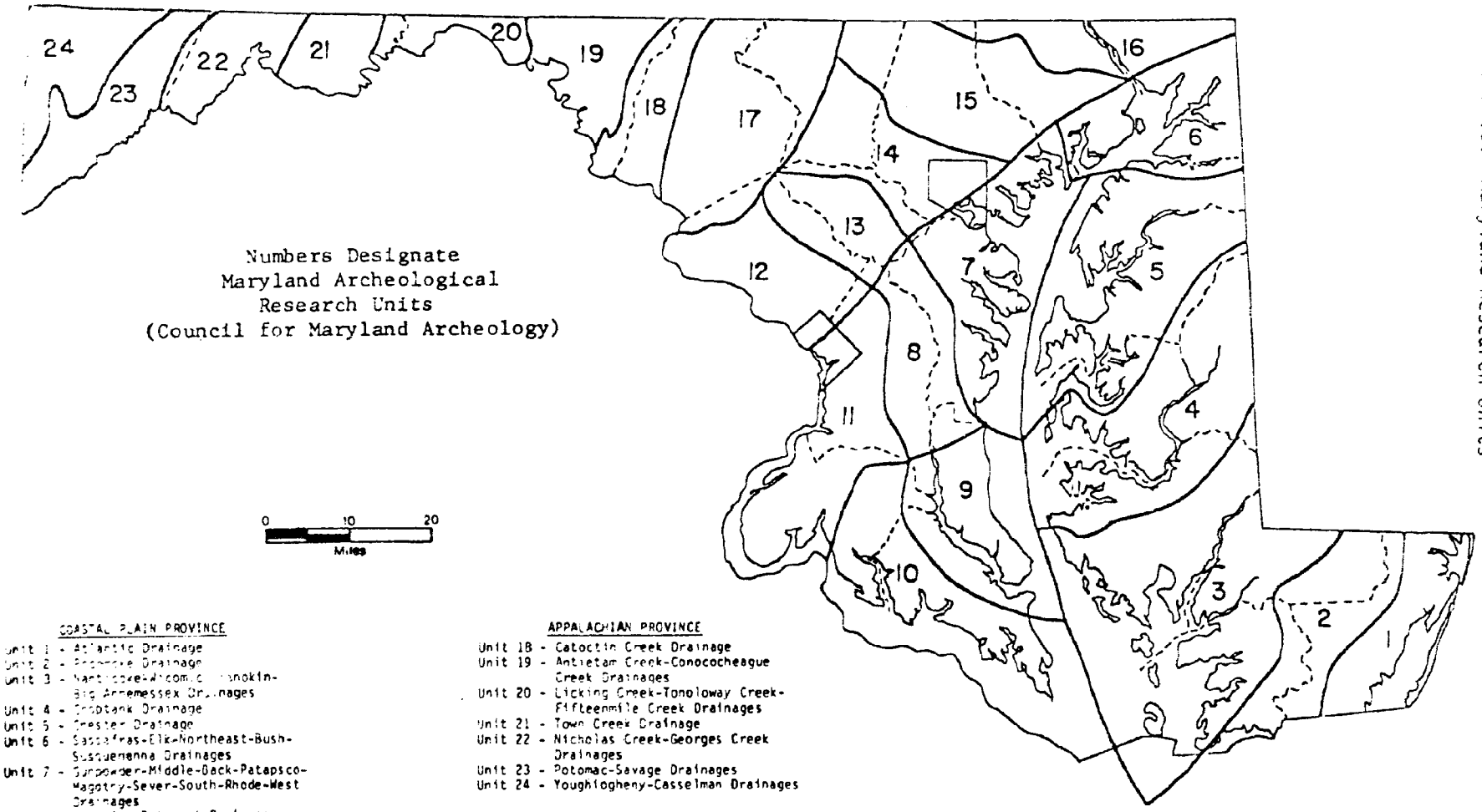
1) The Maryland Archeological Site Survey consists of site survey forms and a set of USGS 7.5' topographic quadrangles showing the locations of all prehistoric and historic archeological sites reported to the Division of Archeology; areas surveyed are also shown on the maps.
2) field notes, collection catalogs, photographs, maps, and other records for some sites
3) extensive collections from Maryland
4) a library containing essentially all known published and unpublisted archeological and related reports for Maryland, many published and unpublished reports from surrounding Middle Atlantic states, selected journals, historic maps, atlases, environmental information, and selected Maryland Geological Survey publications
5) Maryland Geological Survey county geologic and topographic maps as well as several editions of USGS 15' and 7.5' quadrangle maps (current editions of the latter are for sale at MGS).
6) technical advice from the State Archeologist's staff

The Division issues a quarterly newsletter, Current Maryland Archeology, reporting on archeological activity in the state, and has a formal monograph series and some popular leaflets. Much of the Division's work is reported in a limited edition, informal series of "File Reports"; a list with map key of these reports is available upon request.

B. MARYLAND HISTORICAL TRUST (MHT)

The Maryland Historical Trust, an agency of the Department of Economic and Community Development, was created in 1961 to guide preservation activity in the State. The Trust maintains a continuing inventory of the State's historic sites and provides technical advice and information on preservation to private and public agencies and to individuals. Through its association with local and county historical groups, the MHT encourages public awareness of the importance of historic preservation. Under its acquisition program, all federally funded, licensed, permitted or loan related projects in the state must be reviewed by the State Historic Preservation Officer for their effect on architectural and archeological

APPENDIX VI: Maryland Research Units



COASTAL PLAIN PROVINCE

Unit 1 - Atlantic Drainage
Unit 2 - Pocomoke Drainage
Unit 3 - Nanticoke-Wicomico-Manokin-Big Annemessex Drainages
Unit 4 - Choptank Drainage
Unit 5 - Chester Drainage
Unit 6 - Sassafras-Elk-Northeast-Bush-Susquehanna Drainages
Unit 7 - Gunpowder-Middle-Back-Patapsco-Magothy-Sever-South-Rhode-West Drainages
Unit 8 - Riverine Patuxent Drainage
Unit 9 - Estuarine Patuxent Drainage
Unit 10 - Estuarine Potomac Drainage
Unit 11 - Riverine Potomac Drainage

PIEDMONT PROVINCE

Unit 12 - Potomac Drainage
Unit 13 - Patuxent Drainage
Unit 14 - Patapsco-Back-Middle Drainages
Unit 15 - Gunpowder-Bush Drainages
Unit 16 - Susquehanna-Elk-Northeast Drainages
Unit 17 - Monocacy Drainage

APPALACHIAN PROVINCE

Unit 18 - Catoctin Creek Drainage
Unit 19 - Antietam Creek-Conococheague Creek Drainages
Unit 20 - Licking Creek-Tonoloway Creek-Fifteenmile Creek Drainages
Unit 21 - Town Creek Drainage
Unit 22 - Nicholas Creek-Georges Creek Drainages
Unit 23 - Potomac-Savage Drainages
Unit 24 - Youghiogheny-Casselman Drainages

resources. All reports resulting from such research and issues dealing with determination of effect and significance of the sites discovered must be reviewed by the State Historic Preservation Officer. Such reviews are coordinated by the Staff Archeologist of the Maryland Historical Trust. To facilitate this work, Regional Preservation Offices with staff archeologists have been established in St. Mary's City and Salisbury, with others being planned. Archeologists working within the area of the established regional centers are encouraged to contact the regional center archeologist concerning planned research within the area (Regional Center Map).

Personnel at the State Historic Preservation Office, in addition to the State and Deputy State Historic Preservation Officer, consists of two staff archeologists, four architectural historians and one National Register Coordinator. Additional archeologists are employed to conduct research funded by grants, private contributions, or state and local government contributions. The collections and records resulting from these investigations are stored at the Maryland Historical Trust.

Resources available at the MHT to the professional archeologist include:

1) inventory and records of National Register of Historic Places in Maryland
2) Maryland Inventory of Historic Sites (county site distribution maps available to purchase)
3) a library containing county histories, county atlases, regional histories, architectural histories, and biographical accounts
4) the MHT staff archeologist's office includes

    a. a copy of the Maryland Archeological Site Survey (updated on a monthly basis) and locations of areas that have been surveyed by professionals
    b. published and unpublished archeological reports for Maryland and selected published and unpublished regional reports
    c. various historic and environmental maps
    d. archeological collections
    e. technical advice on historic preservation and compliance issues

The Trust issues a monthly newsletter, SWAP (Some Words About Preservation) which includes reports on archeological activities in the State. The Trust also has a formal monograph, technical papers and manuscript series for the dissemination of significant architectural and archeological research and management reports. In addition, the Trust puts out popular and technical brochures on various preservation-related issues.

APPENDIX VII

MARYLAND ARCHEOLOGICAL SITE SURVEY

Name of site Number

Other designations County

Type of site Cultural affiliation

How to reach site

Landmarks to aid in finding site

Position of site with respect to surrounding terrain

Latitude north. Longitude west.

(or distance from printed edge of map: bottom edge right edge

Map used (name, producer, scale, date)

Owner/tenant of site, address and attitude toward investigation

Description of site (size, depth, soil, features, test pits)

Present use and condition of site, erosion

Reports or evidence of disturbance by excavation, construction or "pothunting"

Nature, direction and distance of natural water supply (fresh or salt)

Natural fauna and flora

Specimens collected (specify kinds and quantities of artifacts and materials)

Specimens observed, owner, address

Specimens reported, owner, address

Other records (notes, photos, maps, bibliography)

Recommendations for further investigations

Informant Address Date

Site visited by Date

Recorded by Address Date

(Use reverse side of sheet and additional pages for sketches of site and artifacts)

Send completed form to: State Archeologist, Maryland Geological Survey
The Johns Hopkins University, Baltimore, Md. 21218

APPENDIX VIII

C-28

ARCHEOLOGICAL SPECIMEN CATALOG

Site number:

Division of Archeology, Maryland Geological Survey

Name of site:

County:

Lot Number	Provenience	Description (and old number)	Date Collected	Collector and/or Donor

APPENDIX I

BALTIMORE CITY GUIDELINES

DEVELOPMENT GUIDEBOOK: 2

Requirements for Building in Baltimore City

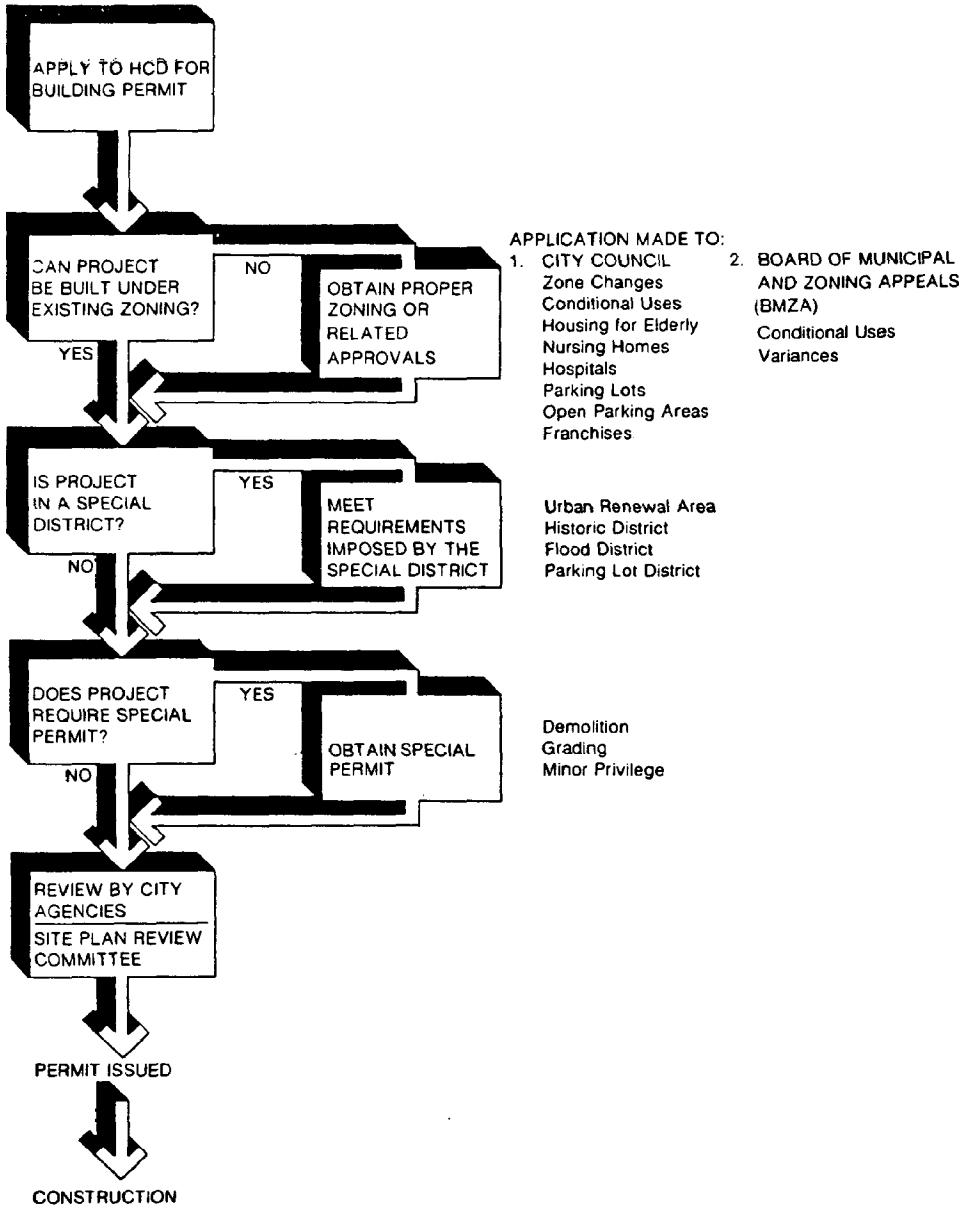
REQUIREMENTS FOR BUILDING IN BALTIMORE CITY

The Development Guidebook is a digest of the most frequently encountered regulations required to build in Baltimore. It is designed to help you understand how plans are reviewed and what to expect at each stage of review.

In a City as diverse as Baltimore, we cannot anticipate all conditions which you may encounter as you try to build. Therefore, the Development Guidebook also provides information on those City agencies best equipped to provide answers and assistance.

The Development Guidebook is a part of Baltimore's continuing effort to improve the review process and to reduce the time required to issue permits. I welcome your suggestions about how to improve this process.

William Donald Schaefer
Mayor



Prepared by the Baltimore City Department of Planning

March 1981

DEVELOPERS CHECK LIST

If you are contemplating any new construction or major alterations to an existing building, you will need a:

- ☐ BUILDING PERMIT See Page 2

Before a building permit will be issued, all necessary regulations must be met. If your development involves any of the following, you must make sure you have met all of their requirements:

- ☐ ZONE CHANGE OR CONDITIONAL USE APPROVAL (CITY COUNCIL) See Page 4
- ☐ SUBDIVISION OR DEVELOPMENT PLAN See Page 6
- ☐ VARIANCE OR CONDITIONAL USE APPROVAL (BMZA) See Page 7
- ☐ DEMOLITION PERMIT See Page 8
- ☐ GRADING PERMIT See Page 9
- ☐ FRANCHISES AND MINOR PRIVILEGES See Page 9
- ☐ STREET CLOSING See Page 9
- ☐ SALE OF CITY PROPERTY See Page 10

If your property is in a "special area," you may require additional review and may need to meet development standards. If the development lies in a:

- ☐ URBAN RENEWAL AREA See Page 10
- ☐ HISTORIC AREAS AND LANDMARKS See Page 12
- ☐ FLOOD HAZARD AREA See Page 12
- ☐ PARKING LOT DISTRICT See Page 12

JILDING PERMITS

: City requires developers to obtain *lding permits* to guarantee compli- e with ordinances concerning access, '-street parking, setbacks, fire and .lding codes, plumbing code, National ·ctrical Code, and with State and eral laws, including regulations on ess to buildings by the handicapped.

lding permit applications are handled the Department of Housing and Commu- y Development (HCD). The process ·ins with submission of an application the *HCD Zoning Enforcement Officer 6-4126), Room 100, 222 East Saratoga eet*.

HCD circulates the building permit application and accompanying drawings to all appropriate agencies for review. Site plans are reviewed by a special interagency group, the Site Plan Review Committee. If any of the review agencies has significant problems with the plans, HCD will not issue a building permit until the matter has been settled.

The following drawings are required when filing a building permit application:

1. Three (3) sets of construction drawings, including architectural, structural, plumbing, electrical and mechanical plans.
2. Six (6) copies of a sediment and erosion control plan, if 5,000 square feet or more of earth are to be disturbed.
3. Nine (9) copies of site plan. Add three (3) copies if the site plan includes new driveways, curb cuts, or parking areas.

In addition, if a street or utilities must be extended to serve the development, it will be necessary to execute a Developers Agreement with the Department of Public Works to assure that work is done according to City requirements and specifications.

ROCESS	APPLICANT	PROCESSING AGENCY
1 Zoning Enforcement (HCD)	Obtains application and instruction sheet; prepares required plans and maps.	Checks if proposed use is in compliance with existing zoning requirements; if not, refers for *Zone Change or Conditional Use (page 6)* or for *Variance or Conditional Use (page 9)*.
2 Special Referrals (HCD)		Checks if project is in an area subject to additional review and/or development standards, such as: *Urban Renewal Area (page 12); Historic Area or Landmark (page 14); Flood Hazard Area (page 14); Parking Lot District (page 14)*.
3 Plans Examining (HCD)		Reviews plans for completeness of structural calculations, materials specifications, engineers' certificate, etc. Issues receipt for plans. Sends copies to review agencies and keeps record of stage of plan review.
4A Other Agencies	Meets with agency if necessary to answer questions about plans.	Plans reviewed by some or all of the following: Department of Public Works (DPW) Property Location Section Plan and Records Section Grades and Studies Section Highway Design Section Sediment and Erosion Control Waste Water Division (Permits and Records Section) Water Supply Division Consumer Services Division (Footways) Health Department Fire Department Agency will communicate directly with applicant if there are questions about the plans. Approved plans are returned to HCD Plans Examining.

4B Site Plan Review Committee

Because several agencies are concerned with site design issues, the City established a special interagency committee to review the site plans which accompany *Building Permit applications, Subdivision and Development Plans, Zone Change and Conditional Use requests, and Variances and Conditional Use appeals.* The Committee consists of representatives of the Departments of Transit and Traffic, Public Works, Housing and Community Development, and Planning. By meeting regularly, the Committee provides a "one-stop" service on site plan related issues. If necessary, the Committee will invite the applicant to explain the proposed development and will visit the site to obtain a better understanding of the property and its relationship to neighboring properties.

The most frequent matters commented on by the Committee include:

1. pedestrian safety
2. access for the handicapped
3. fire lanes
4. driveway location and design
5. parking lot standards and layout
6. off-street loading
7. landscaping
8. street and alley closings/openings
9. impact of traffic generated by the development on the design and capacity of surrounding streets and intersections.

Other site design matters may come up because of special conditions unique to an individual property.

Call the *Planning Department (396-5900), Room 800, 222 East Saratoga Street* for further information.

If requested by the applicant, the Site Plan Review Committee will review preliminary plans before an application is formally submitted in order to expedite the approval process.

PROCESS	APPLICANT	PROCESSING AGENCY
5 Plans Examining (HCD)	Pays fees and receives building permit.	Notifies applicant when processing is complete. Calculates fees. Prepares and issues building permits.
6 Construction Inspections (HCD)	At various stages in construction, developer MUST notify City so work can be inspected before it is covered over.	Construction inspections by: HCD, Building Inspections DPW, Sediment and erosion control DPW, Utility connections DPW, Footways and driveways
7 Construction Inspections (HCD)	Pays fee for certificate of completion.	Building inspector certifies adequacy and completion of work.

ZONE CHANGES AND CONDITIONAL USES / CITY COUNCIL

Information on zoning standards, including permitted and conditional uses, set-back requirements, allowable building heights, and parking is to be found in the Zoning Ordinance, which is available from the *Twentieth Century Printing Company, Inc., 406 W. Redwood Street*. Maps showing the zoning district boundaries are available from the *DPW Surveys and Records Section (396-3643), Room 309, Municipal Building, Lexington and Holliday Streets*.

The *HCD Zoning Enforcement Officer (396-4126), Room 100, 222 East Saratoga Street* maintains a file, by address, of the zoning classification and use of each property in the City. Guidance on how the Zoning Ordinance affects use and development of a property is available in this office as well as at the *Planning Department (396-5171), Room 800, 222 East Saratoga Street*.

Zoning of a property can be changed only by an ordinance passed by City Council and signed by the Mayor. Some conditional uses also require an ordinance. Builders should understand that it is often difficult to obtain a change of zoning, especially when opposed by nearby interests.

As a courtesy to constituents, Council representatives will introduce zone change and conditional use requests. The applicant and/or his attorney must arrange for preparation of plats and a statement explaining why the rezoning or conditional use approval is desired, for posting the property, and for advertising for the public hearing.

The *Department of Legislative Reference (396-4732), Room 626, City Hall*, will provide assistance in preparing the text of an ordinance for introduction. The *City Council Secretary (396-4800) Room 409, City Hall*, will schedule the time of hearing with the consent of the chairman of the Judiciary Committee and will provide the forms and instructions for advertising the public hearing.

PROCESS	APPLICANT	PROCESSING AGENCY
1 City Council Introduction (1st Reader)	Prepares ordinance plats and statement required for introduction. Requests Council representative to introduce zone change or conditional use ordinance.	After introduction by the Council representative, Council Secretary refers ordinance to the Planning Commission, the Board of Municipal and Zoning Appeals, and other agencies for recommendations.
2A Agency Review	Provides information to assist agency review, may be asked to meet with neighborhood groups to explain proposal.	Agency staff studies proposed zone change or conditional use and submits recommendations to the Council.
2B Planning Commission Review	Attends Planning Commission meeting to answer questions posed by Commissioners; answers questions posed by staff prior to meeting.	Planning Department staff analyzes proposal and prepares report for Planning Commission which hears the proposal at a public meeting and sends its recommendation to the Council. Staff notifies applicant of meeting date and time.

3 City Council Public Hearing

Arranges for "public hearing notice" sign to be placed on the property and for a legal notice to be published in a newspaper at least fifteen days before the hearing which is open to the public.

Council Secretary schedules hearing; Council hears discussion for and against rezoning or conditional use proposal.

4 City Council Judiciary Committee Report (2nd Reader)

Makes recommendation; favorable report allows for printing in final form. Unfavorable report usually is indication passage is not likely.

5 City Council Passage (3rd Reader)

Final vote on bill. City Council President signs ordinance after passage by Council. Ordinance sent to Mayor for signature.

6 Mayor (Signature)

After Mayor has signed ordinance, copies are sent to the City Treasurer's office for official record.

A limited number of copies of approved ordinances are available from the City Council Secretary or from the Department of Legislative Reference.

SUBDIVISION AND DEVELOPMENT PLANS

The Planning Commission is required, by the City Charter, to approve subdivision and development plans.

A *subdivision plan* is required when an owner wants to divide a property into two or more parcels, each of which may be sold separately. A *development plan*, showing where the building will be located, may be required whenever there is substantial new construction on a parcel. Through review of a development plan, City agencies can provide guidance on requirements for zoning, driveway and road construction, parking lot layout, landscaping, on-site vehicular circulation, public and private utility services, public safety services, and related matters.

In addition, if the proposed development covers two or more lots or if streets or utilities must be extended, it will be necessary to execute a Developers Agreement with the Department of Public Works to assure that work is done according to City requirements and specifications.

Review of subdivision plans or development plans begins at the *City Planning Department (396-5171), Room 800, 222 East Saratoga Street*.

PROCESS	APPLICANT	PROCESSING AGENCY
1 Preliminary Review: Site Plan Review Committee (Planning Department)	Retains engineer, architect, and/or surveyor to prepare plans. Preliminary sketch of property showing subdivision lines, buildings, parking areas, changes in grading, location of utility lines and significant landscape features should be shown to the Site Plan Review Committee. Six (6) copies of the preliminary plan are required.	Planning Department staff provides information on subdivision and development plan requirements. Staff arranges for preliminary plan review by the Site Plan Review Committee.
2 Review by City Agencies	Prepares plans for review by City agencies including revisions suggested by the preliminary review. Submits fourteen (14) paper prints and three (3) opaque linen prints for subdivision plan review, and fourteen (14) paper prints for development plan review.	Planning staff refers plans to: Department of Public Works (DPW) Property Location Section Plats and Records Section Grades and Studies Section Highway Design Section Sediment and Erosion Control Section Waste Water Division (Permits and Records Section) Water Supply Division Consumer Services Division (Footways Section) Street Lighting - Conduit Section Health Department Fire Department
3 Planning Commission Review	Attends Planning Commission meeting to provide information on the proposed subdivision and/or development plan and to answer questions asked by the Commissioners.	Planning staff schedules time for subdivision and/or development plans to be considered by the Planning Commission after agency comments are received. Notifies applicant and community groups of date and time of the Commission meeting. Planning staff presents significant agency comments and recommends approval, conditional approval, or disapproval of the plans.
	SUBDIVISION PLAN: Files three (3) linen copies of approved plan at Land Records, Superior Court of Baltimore City. Informs Planning Department of reference number of the recorded plan. DEVELOPMENT PLAN: One (1) copy returned	Planning staff marks drawings as approved or approved with conditions. Sends approval letter with plans and agency comments to applicant.

VARIANCES AND CONDITIONAL USES/ BOARD OF MUNICIPAL AND ZONING APPEALS (BMZA)

Variances are approved exceptions from the specified requirements of the zoning ordinance. Examples of variances include: reduction in the required size of front, side, or rear yards; increases in the allowable ground coverage of buildings; reductions in the number of required parking spaces.

Conditional uses generally are activities compatible with the permitted uses in a classification but, because of an unique characteristic of the use such as noise, odor, or heavy traffic generation, require special permission of the Board of Municipal and Zoning Appeals. Examples of activities which require conditional use approval include: gasoline stations; day nurseries; private non-profit clubs in residentially zoned areas.

For the full list of variances and conditional uses, see the Zoning Ordinance or discuss with the HCD Zoning Enforcement Officer (396-4126), Room 100, 222 East Saratoga Street, the Board of Municipal and Zoning Appeals (396-4301), Room 701, 222 East Saratoga Street, or the Planning Department, Current Planning Section (396-5171), Room 800, 222 East Saratoga Street.

Although variances and conditional uses must be approved by the BMZA, processing begins with the HCD Zoning Enforcement Officer (396-4126), Room 100, 222 East Saratoga Street.

Applicants for variances and conditional uses must file nine (9) copies of the present and/or proposed building floor plans at a scale of one-quarter inch equals one foot, and sixteen (16) copies of an area plat showing the general neighborhood affected by the appeal. In the case of variances, the applicant must file thirteen (13) copies of the area plat.

PROCESS	APPLICANT	PROCESSING AGENCY
1 Zoning Enforcement (HCD)	Obtains instructions and application for variance or conditional uses. Prepares and submits required plans and maps.	Refers application to the BMZA and other City agencies for review. Directs applicant to the BMZA office to obtain instructions for the appeal.
2A BMZA	Obtains application and instructions; prepares and files application.	Holds appeal application until agency reports are received. After receiving agency reports, notifies applicant by letter to come to BMZA office to make arrangements for the hearing.
2B Review by City Agencies	Provides agencies with information as requested.	Reviews by the Departments of Health, Public Works, Transit and Traffic, Fire, Planning and Housing and Community Development (in renewal areas), and the Site Plan Review Committee.
3 BMZA Hearing	Arranges for posting of property prior to the hearing. Attends hearing.	Sends resolution approving, approving with conditions, or disapproving appeal.
	If appeal approved or approved with conditions, it is still necessary to obtain a *Building Permit* and/or an *Occupancy Certificate*.	

DEMOLITION PERMIT

A permit is required for razing any structure. The applicant must protect adjacent buildings, must fill any excavation with clean fill and plant grass, and must parge the exposed walls of adjacent structures with a waterproof material. Environmental Protective Agency requirements for control of hazardous air pollutants must be complied with.

Actual demolition work must be done by a licensed and bonded demolition contractor.

Special review will be required prior to issuance of demolition permits in:

1. *Urban Renewal Areas (Page 12)*
2. *Historic Areas and Landmarks (Page 14)*
3. *Parking Lot District (Page 14)*

Review of applications for demolition permits begins at *HCD Special Referrals (396-3360), Room 100, 222 East Saratoga Street*.

PROCESS	APPLICANT	PROCESSING AGENCY
1 Special Referrals (HCD)	Obtains application and instructions; notifys adjoining property owners of proposed demolition; prepares and files application.	Refers for special review if property is an *Historic Landmark* or is located in an *Historic Area*, *Urban Renewal Area*, or *Parking Lot District*. or Sends application on for routine processing.
2 Agency Review		Application reviewed by: Department of Finance Bureau of Collections Department of Public Works Waste Water Division Water Supply Division Footways Section
3 Building Inspection (HCD)	Pays fees and receives demolition permit. Arranges for cut-off and capping of all utilities - Electric Gas Telephone Water Sewers and drains	Issues demolition permit. Inspects work in progress and after completion.

GRADING PERMITS

Grading permits are required for any work which alters 5,000 square feet or more of earth. The permit is required for basement, foundation and footing excavations, as well as for earth removal and filling activity.

Review of an application for a grading permit begins at *HCD Plans Examining (396-3460) Room 100, 222 East Saratoga Street*. The City's Sediment Control Representative (396-3175), 3rd floor, 231 E. Baltimore Street is responsible for the detailed review of the grading permit application, site inspection and enforcement, and referral to the State Department of Natural Resources if a Surface Mining Permit is required in addition to the City's grading permit.

Before a *Building Permit* or *Grading Permit* is issued, it is necessary to execute a Sediment Control Agreement to insure compliance with all City and State regulations.

FRANCHISES AND MINOR PRIVILEGES

Projection of any private construction into the area of a public sidewalk or street requires that the City grant a limited right to permit encroachment. These rights are given through a Minor Privilege, which may be approved by a resolution of the Board of Estimates, or through a Franchise, which requires approval of an ordinance of the Mayor and City Council.

Minor Privileges

Balconies, entrance canopies, dumpsters, awnings, and sidewalk cafes are some of the approximately one hundred (100) projections into the public right-of-way which may be approved by the Board of Estimates as a minor privilege, for which there are set annual fees. Construction permitted by a minor privilege will also require a *Building Permit*, which will not be issued until after the minor privilege permit is issued. The owner must sign the application and adjoining property owners must be notified by certified mail, that permission is being sought to construct a projection into the area of the sidewalk or street. Review of minor privilege applications begins at the *HCD Minor Privileges (396-3346, Room 100, 222 East Saratoga Street*.

Franchises

For projections which exceed those which are listed as minor privileges, a franchise ordinance approved by the Mayor and City Council is required. Bridgeways between two buildings, underground electric conduits, and underground electric snow melting systems are examples of work for which a franchise ordinance is required.

The process for introducing a franchise ordinance is similar to that described in *Zone Changes* and *Conditional Uses (pages 6-7)*. Franchise fees are approved by the Board of Estimates.

Further information on franchises is available from the *DPW Contracts and Legislation Section (396-3312), Room 600, Municipal Building*.

STREET CLOSINGS

Requests for street closings are submitted by letter to the *Director of Public Works (396-3100), Room 600, Municipal Building, Lexington and Holliday Streets*, stating the reasons for the request. Twenty (20) copies of a plat showing the street and the abutting properties must be included.

Copies of the request are circulated through the Bureaus of Department of Public Works, the Department of Transit and Traffic and the Planning Department to determine what public interests may be affected by the closing. City agencies will be particularly concerned about abandonment and/or relocation of utility lines and access to areas of future development. The applicant for a street closing will be responsible for the cost of a title search, payment of the appraised value of the land, the cost of utility abandonment and/or utility relocation, advertising and other administrative costs.

If the agencies which review the street closing request indicate their approval, the applicant is asked to provide a title search to show the rights both the applicant and other parties may have in the street. Prior to introduction and approval of an ordinance of the Mayor and City Council, it is also necessary for the applicant to enter into an agreement, with the City, for payment of all costs and to hold the City harmless from any claims which may be made against the City for closing of a street.

The whole process of closing and sellir a street may take from six months to several years because of the many legal requirements for advertising and for hearings. In addition, if the title search indicates that other parties have rights to the bed of the street, it will be necessary for the applicant to negotiate surrender of those rights

After a street closing ordinance is passed, there is an opportunity for appeals to be made to the Board of Municipal and Zoning Appeals contesting the right to close the street. If no appeal is made within the twenty (20) day time limit, the street is official closed.

Further information on street closings is available from the *DPW Contracts an Legislation Section (396-3312), Room 600, Municipal Building*.

ALE OF CITY PROPERTY

ıle of Properties Acquired ırough Tax Foreclosure

ı May of each year, the City holds an ıction of properties upon which taxes ıre not paid during the previous tax ıar. Properties not redeemed or ıherwise acquired by private parties ımain in City ownership, are "fore-.osed" and may be sold by the City.

ısidential tax foreclosed properties ·e sold through the *Home Ownership ıvelopment Program (396-4113), Depart-ınt of Housing and Community Develop-ınt, 401 North Charles Street*.

.cant lots or commercial tax fore-osed properties are handled by the *al Estate Department (396-4769), om 304, City Hall*.

ale of Surplus City Property

needed City-owned buildings, excess nd from highway or other condemnation, land which was specifically acquired r public development require an ordi-nce of the Mayor and City Council thorizing their sale.

·oposals for reuse of surplus proper-.es are reviewed by the City's Space .ilization Committee, which also so-cits the views of the City Council, :e Planning Commission, City agencies, ıd established community associations. :quiries regarding sale of surplus City ·operty should be addressed to the ·al Estate Department (396-4769), ıom 304, City Hall, or the *HCD Deve-ıpment Center (396-4121), Room 530, ?2 East Saratoga Street*.

URBAN RENEWAL

Many areas of the City have been designated for urban renewal, a process which begins with study of need by the *HCD Planning Division (396-4220), Room 510, 222 East Saratoga Street*. A representative neighborhood group, known as the Project Area Committee (PAC), is established to participate in the renewal planning process. A renewal plan, including authorization to acquire property, development standards, land disposition controls, and other related standards must be adopted by the Mayor and City Council. Final decisions on interpretation of the renewal standards are made by the Commissioner of the Department of Housing and Community Development. In many instances, the urban renewal plan calls for changes in zoning.

Design Advisory Panel

The Design Advisory Panel (DAP) is a board of architects, landscape architects and architectural critics delegated by the Commissioner of HCD to review the design of new development and rehabilitation projects in urban renewal areas. The DAP functions to assure a high standard of design in the rebuilt areas of the City. Among the concerns of the DAP are the appearance of structures, the relationship of buildings to their surroundings, and the quality of landscaping.

The Design Advisory Panel will often arrange a field trip to see the site and its surroundings. It will meet with the architect and developer on three occasions: a pre-drawing conference, a preliminary design conference, and a final design conference. At the last stage, the DAP will review samples of proposed construction materials. After each review, the DAP prepares minutes containing its recommendations for revisions.

The DAP also reviews the design of public buildings, planned unit developments and housing for the elderly.

To arrange for design review for development in an urban renewal area, call the *HCD Development Center (396-4121), Room 530, 222 East Saratoga Street*. For review of development in other parts of the City, call the *Planning Department (396-5171), Room 800, 222 East Saratoga Street*.

Assistance in Housing and Economic Development

The City has established several offices to promote and assist residential, commercial, and industrial developers.

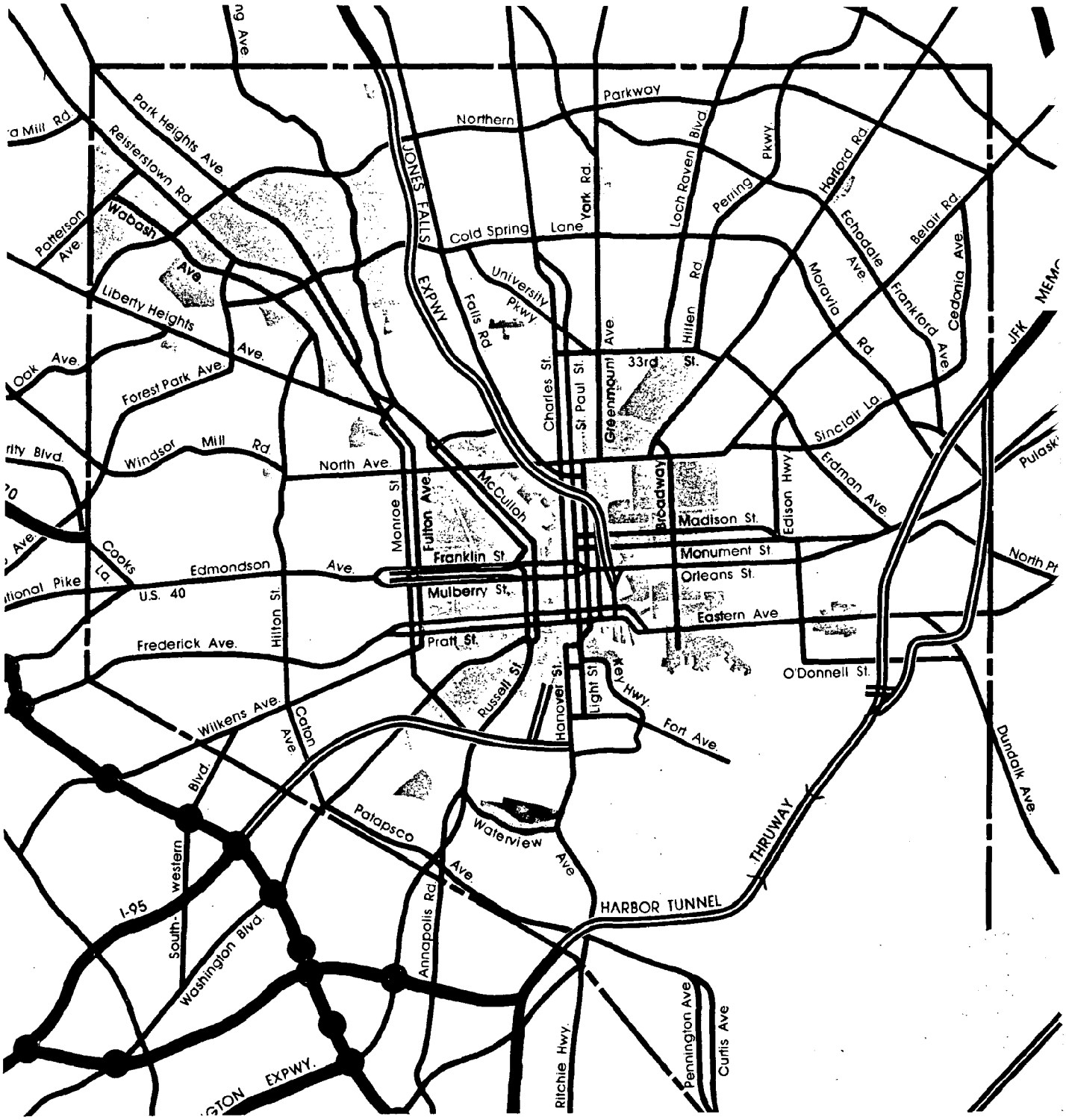
Charles Center-Inner Harbor Management, Inc. (CCIH) is a private non-profit corporation formed to provide management services for downtown redevelopment projects. Under its contract with the City, CCIH provides special marketing, managerial, and planning assistance required for large commercial and residential development projects in the Downtown and the Inner Harbor areas. CCIH offers downtown developers a convenient one-stop contact for all negotiations with the City, minimizing the need to deal with many different departments and agencies. CCIH can be reached by calling *(301) 837-0862* or by writing to the *President, Charles Center-Inner Harbor Management, Inc., 1444 World Trade Center Building, Baltimore, Maryland 21202*.

The Land Development Division at the Department of Housing and Community Development is responsible for marketing City owned properties, primarily in urban renewal areas. A developer considering residential or commercial development on cleared sites, or rehabilitation of City owned structures should call *(301) 396-4109* or write to the *Director of Land Development, Department of Housing and Community Development, 222 East Saratoga Street, Baltimore, Maryland 21202*.

The Market Center Development Corporation (MCDC) is a quasi-public non-profit corporation under contract to the Mayor and City Council to manage planning and development of the City's retail district. In addition, MCDC is working on developmer opportunities for two transit station areas: Reisterstown Road Plaza, and Penn North Avenues. MCDC can be reached b calling *(301) 752-5400* or by writing to the *President, Market Center Development Corporation, Suite 102, 15 Charles Plaza, Baltimore, Maryland 21201*.

Finally, the City has established the Baltimore Economic Development Corporation (BEDCO), a private non-profit corporation to promote industrial development within the City. BEDCO can be reached by calling *(301) 837-9305* or by writing to the *President, BEDCO, 22 Light Street, Baltimore, Maryland 21202*.

URBAN RENEWAL AREA MAP



HISTORIC AREAS AND LANDMARKS

A historic area or landmark is one which has been identified by the Commission for Historical and Architectural Preservation as having particular historical or architectural significance and has been designated through an ordinance of the Mayor and City Council as worthy of protection.

Once an area or landmark has been designated by the City, any exterior painting or refinishing, alteration, construction, or demolition must be approved by Commission for Historical and Architectural Preservation.

Included among the work and materials reviewed by the Commission are color of paint, restoration of cornices and other decorative architectural features, replacement of windows and doors, erection of fences and walls, reconstruction of porches and staircases and similar types of exterior work. New construction is also subject to review by the Commission to insure that the architectural design does not detract from or conflict with the overall environment and scale of the historic area.

The Commission does not deal with interior renovations of buildings in historic areas or of landmarks unless they affect the exterior character of a structure.

Before a building permit may be issued for any exterior work, or interior work which may affect the exterior character, the Commission must issue a "notice to proceed." Application forms are available from the *Commission for Historical and Architectural Preservation (396-4866), Room 601, City Hall*. The Commission requires plans and samples of paint or other materials proposed to be used in any exterior work.

FLOOD HAZARD AREAS

To minimize the incidence of flood damage, the City has enacted special provisions of the Building Code, Zoning Ordinance, and Subdivision Regulations applying to all properties which lie within flood hazard areas.

The Federal Government has defined flood hazard areas within Baltimore City. Those areas are described very generally on maps which are available for reference at the *Zoning Enforcement Officer (396-4126), Room 100, 222 East Saratoga Street*, or at the *Planning Department (396-5171), Room 800, 222 East Saratoga Street*.

These maps, however, are only approximations. If the property is in or near a flood hazard area, the precise elevation of the proposed development must be checked in order to determine whether the proposal is inside a flood hazard area and must then conform to the special regulations.

If the property lies within a flood hazard area, all of the special requirements of the Building Code, Zoning Ordinance, and Subdivision Regulations must be met.

Included among the regulations are:

1. No construction may take place within the floodway.
2. Selection, placement, and stabilization of fill materials must be done in accordance with the specifications of the Maryland Department of Natural Resources.
3. The lowest floor elevation of residential structures must be above the flood level.
4. Below grade spaces in non-residential structures must be waterproofed.
5. Buildings constructed within the flood hazard area must meet requirements for resistance to flotation and ability to resist hydrostatic forces.

PARKING LOTS

Parking Lot District

The *parking lot district* covers downtown Baltimore, several adjacent neighborhoods, and Charles Village. Within this district, an ordinance of the Mayor and City Council is required before a property may be used for a parking lot or before a permit may be issued for demolition of buildings for parking.

Before the City Council considers an authorizing ordinance, the Site Plan Review Committee checks all parking lot plans for adherence to access, landscaping, drainage, and layout requirements.

All lots in the parking lot district must be screened with masonry walls or metal grill fences, and landscaping. Use of the universal parking lot sign is encouraged.

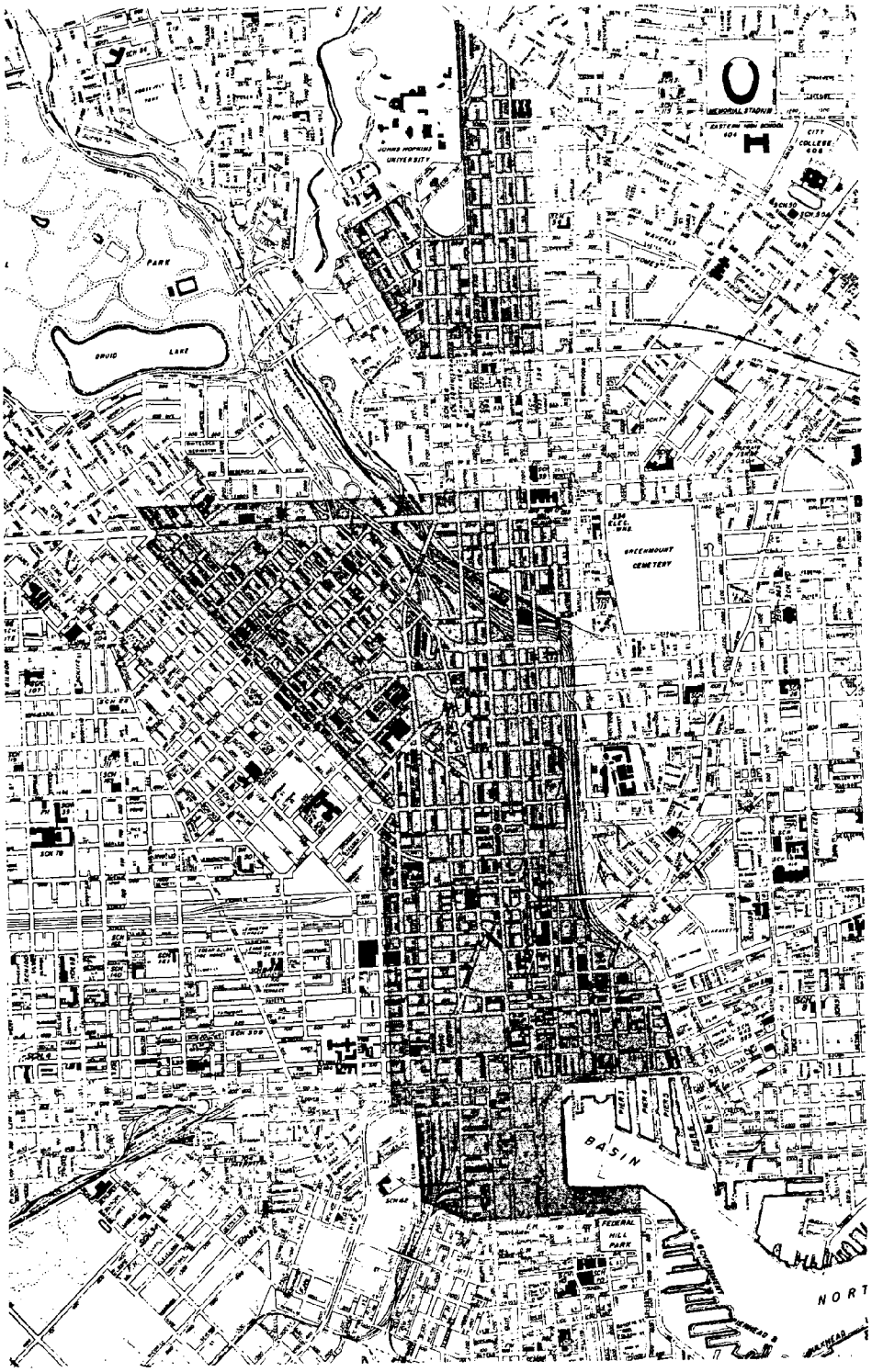
Review of applications for lots in the parking lot district begins at the desk of the *HCD Zoning Enforcement Officer (396-4126), Room 100, 222 East Saratoga Street*. The *Department of Legislative Reference (396-3732), Room 626, City Hall* will assist in preparing an ordinance for introduction by the Council representatives.

After passage of an ordinance to demolish a building in the parking lot district, it is still necessary to obtain a *Demolition Permit* and a *Building Permit*.

Parking Lots

In all Residence and Office-Residence districts, in the B-1, B-2, and B-4 Business districts, and in the M-1 Industrial district, open parking areas (other than accessory parking on the same lot with the principal use) must be approved through an ordinance of the Mayor and City Council. Further information on parking lots is available from the *HCD Zoning Enforcement Officer (396-4126), Room 100, 222 East Saratoga Street*, or from the *Site Plan Review Committee (396-5900), Room 800, 222 East Saratoga Street*.

PARKING LOT DISTRICT MAP



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Board of Municipal and Zoning Appeals

Commission for Historical and Architectural Preservation

Department of Health

Department of Housing and Community Development

Department of Legislative Reference

Department of Public Works

Department of Real Estate

Department of Transit and Traffic

APPENDIX J

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