



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

CECW-CO

OCT 21 2015

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Federal Standard Clarification Regarding Federal Dredging Mission and Interactions with Non-Federal Agencies

1. Purpose: This guidance clarifies proper interpretation and implementation of the U.S. Army Corps of Engineers (USACE) regulations 33 CFR Parts 335 through 338, and particularly those parts of the regulations relating to the federal standard, as those regulations relate to federal maintenance dredging for federal navigation channels.

2. Background: From time to time various state governments (e.g., sometimes acting through regional water quality control boards) include conditions in Clean Water Act (CWA) Section 401 Water Quality Certifications (WQC) that would require USACE to conduct maintenance dredging operations and/or placement of the resulting dredged material in ways departing from, and substantially more costly than, what would be required by the federal standard. In addition, at times those states indicate their belief that USACE, rather than the state, must pay all of the incremental costs caused by those departures from the federal standard that the state is seeking.

a. The situation, where a state attempts to use its authority under the CWA Section 401 or under the Coastal Zone Management Act (CZMA) to require USACE to perform its dredging operations in ways that depart from the federal standard, is familiar to most USACE officials nationwide who have been involved with USACE maintenance dredging activities over the years. For example, a common situation encountered by USACE involves requests from various states to USACE to place sand generated by federal maintenance dredging on state beaches at 100 percent federal expense. USACE can sometimes accommodate these requests for beach nourishment, but not at 100 percent federal cost. Rather, non-federal interests must pay all costs in excess of the federal standard placement alternative, which often is open water placement. Even in limited cases where the beach placement might be cost shared under certain statutory authorities available to USACE, the non-federal entity must still agree to pay its share of the entire incremental cost above the federal base plan.

b. Other states have tried to insist that all dredged material generated by federal maintenance dredging be used for the creation of wetlands at 100 percent federal expense, without the statutorily required non-federal cost sharing for that beneficial use of dredged material. In some situations, states propose WQC or CZMA conditions, controls or other requirements unrelated to those statutorily allowed under the CWA or CZMA, and that would change not only the locations of placement of dredged material

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generated by federal maintenance dredging, but also how USACE conducts the dredging operations. Other excessive requirements are manifest through a state's insistence on testing, data or exorbitant amounts of information prior to completion of the review process, thus delaying the dredging project beyond the time for completion within the boundaries of the fiscal year appropriations process. On other occasions a state has proposed inclusion of WQC requirements from another state agency or even on behalf of another federal agency, completely outside the bounds of a state's authority under the CWA or CZMA.

3. USACE Policy: USACE long-standing policy regarding such matters was first established by DAEN-CWO-M Memorandum for Division Engineers, subject: Maintenance Dredging Provisions of the Clean Water Act of 1977 (P.L. 95-217) (Enclosure 1). That document is a guidance memo that was issued from the Director of Civil Works dated 25 July 1978. The guidance of that memo was then incorporated into USACE regulations promulgated in 1988 after notice and comment rulemaking, and now contained in 33 CFR Parts 335 through 338. (Enclosure 2).

a. The 1978 guidance and USACE current regulations are predicated on the essential principle that federal funds available for maintenance of federal navigation channels nationwide are limited, and thus must be allocated and spent responsibly and carefully. To that end, USACE establishes the federal standard (in the manner prescribed by USACE regulations; see, e.g., 33 CFR 335.7) that will govern every federal maintenance dredging project. A state's desired dredging methods, placement locations, or other requirements that exceed the federal standard can usually be accommodated to "the maximum extent practicable," so long as the state or non-federal sponsor agrees to pay any difference between the cost of implementing the federal standard and the cost of implementing the state's requirements.

b. If USACE and a state cannot reach agreement regarding how federal maintenance dredging will take place, and if that state asserts its authority under the federal CZMA or CWA Section 401 or Subsection 404(t) to try to impose additional conditions that are inconsistent with the federal standard and that would have to be satisfied at federal expense, then USACE has a number of options available.

c. As a matter of legal authority, the Secretary of the Army (SA) could assert the Army's statutory authority to override the state's interference with navigation, by making use of CWA Subsection 511(a)(2) and/or 404(t). See 33 CFR 337.8(b)(5) (Enclosure 2). However, as a matter of USACE policy, the most likely circumstances in which USACE would recommend to the SA that the SA's override authority should be used would be if the state's action would interfere with navigation essential for the national defense of the United States, or if the state's action would interfere with navigation for

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some other state, or would jeopardize to an unacceptable degree interstate or international commerce.

d. If the state's action would not interfere with national defense or with the navigation interests of any other state, then, as a matter of policy, USACE would ordinarily defer dredging until the state alters its position or agrees to fund the difference between the cost of the state's wishes and the cost of implementing the federal standard. While 33 CFR 337.8(b)(5) (Enclosure 2) also allows USACE to consider seeking Congressional appropriations to address state conditions exceeding the federal standard, this option has not been utilized, because the timing of the appropriations process is not always conducive to performing the work and sufficient funds are generally not available to cover USACE authorized dredging needs under the federal standard for all the navigation projects for which we are responsible for maintaining.

#### 4. Guidance.

a. USACE regulations at 33 CFR 337.2(b)(2) (Enclosure 2) focus primarily on alternatives for the placement of dredged material, while not explicitly acknowledging the potential for other disagreements, such as disagreements regarding methods for conducting the dredging itself. However, such disagreements were contemplated in issuance of USACE dredging regulation, as reflected by (but not limited to) the regulation's discussion of potential disagreements between USACE and a state regarding compliance with the CZMA. The regulation in no way reflects any intent by USACE to take a fundamentally different approach regarding potential disagreements with states over dredging plans depending upon whether the disagreements arise under the CZMA or the CWA. In short, these disagreements can arise, and can be resolved under the regulation, regarding the method of dredging, the method or location of placement of the resulting dredged material, or both, as well as any other aspect of USACE dredging and dredged material placement plan. Nevertheless, under the statutory mandate of the CZMA, USACE tries to make its dredging projects consistent with the "enforceable policies" of a federally-approved state coastal zone plan "to the maximum extent practicable," as required by the CZMA statute 16 USC 1456(c)(1)(A).

b. The 25 July 1978 memorandum from the Director of Civil Works in paragraphs 7 and 8 explains deferral of dredging as an option when state requirements exceed federal requirements. The language of that memo was codified in the dredging regulation at 33 CFR 337.2.

c. Section 337.2(b)(3) (Enclosure 2) provides that dredging "...may be deferred" if the CWA Section 401 state water quality certification (WQC) is denied. In the event of

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such a denial, USACE effectively implements Section 337.2(b)(3) to reflect the fact that deferral of the dredging project is usually the only option that is available to USACE, as a practical matter, at least in the short run. This is because, absent a CWA Section 401 WQC (or waiver from the state, as allowed by CWA Section 401(a)(1)), USACE lacks a mandated legal prerequisite in order for USACE to place dredged material generated by a USACE dredging project in open waters regulated by the state.

d. Section 337.2(b)(3) provides that if the state denies the WQC, the project dredging "may be deferred," and in such a case, "a report ... will be forwarded ..." to HQUSACE. For purposes of USACE regulation, USACE effectively takes a WQC that includes conditions in excess of the federal standard as the equivalent of a denial of the WQC. When the state issues a WQC that the district engineer (DE) determines to be excessive of the federal standard, the DE should attempt to persuade the state either to accept the federal standard position or to pay for the excessive requirements. If the state does not accept either of those alternatives, the DE in most circumstances should defer dredging and determine if a report under 33 CFR 337.8 is needed. Routine deferral of maintenance dredging that does not involve significant adverse effects on national defense or international or interstate commerce usually does not rise to the threshold of a report unless the DE determines that further guidance from HQUSACE is needed.

e. Section 337.8 addresses "reports to higher echelons" and contemplates that such reports "may be necessary." This provision recognizes that there are a variety of potential reasons why a report to HQUSACE might be warranted, including reasons other than the WQC denial circumstance that is more directly anticipated in Section 337.2. It is important to note that Section 337.8 does not require such reports. The USACE regulations state that reports may be necessary "[w]hen the state denies or unreasonably delays a water quality certification or issues the certification with conditions or controls not related to maintenance or enforcement of state water quality standards or significantly exceeding the federal standard." As reflected in its language, including Section 337.8, the dredging regulation was written to authorize USACE Commanders in the field to make decisions about deferral of dredging because of disagreements with state governments. Annually, many USACE dredging projects are deferred as a routine course of fulfilling our navigation and budgetary responsibilities. Given the fact that Congress does not appropriate sufficient funds to allow USACE to perform maintenance dredging for every authorized navigation project, USACE often defers maintenance dredging for low commercial use projects where deferral of dredging would have local or regional impacts. Those deferrals are consistent with budget authority originating with the President's budget and the limitations imposed by appropriations provided by the Congress. USACE also defers less critical dredging on high and moderate commercial use projects, as well as for projects where the state has

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not approved the USACE federal standard by using the state's authority under CWA Section 401 and/or the CZMA. At least in part, Section 337.8 is intended to address those projects where the state attempts to impose, but not pay for, requirements in excess of the federal standard. HQUSACE and the relevant USACE division office should be made aware of these situations.


f. Section 337.8(b) outlines what should be in a report and seeks information "which will aid in determining whether to further defer the dredging and seek congressional appropriations for the added expense..." This provision contemplates that there might be a few extreme circumstances where USACE will consider whether to approach Congress about additional funding to dredge with state conditions in excess of the federal standard. One such circumstance might be a case where a project involves national security or interstate navigation issues, and for which USACE might consider, at least initially, the seeking of special approval and funding for such excess costs rather than exercising the SA's override authority under Section 511(a)(2) or 404(t). Section 337.8(b) was never intended to come into play in more common situations, where there is no compelling basis for a state's requested changes to USACE federal standard dredging plan, other than that state's own local preference for those changes. It also is worth noting that USACE navigation budget has generally remained flat over the past 40 years. Increases in appropriations cover some of the costs of inflation and maintenance that has been deferred due to budgetary constraints. As a general rule, Operation and Maintenance (O&M) budget packages submitted by a USACE district or division that include requests for additional funds for state requirements that exceed the federal standard are not considered or funded during the budget deliberation process. In other words, even if special congressional approval were granted to allow USACE to ignore the federal standard regulation and spend funds on such excess costs, the use of funds for this purpose would still have to come at the expense of other federal navigation projects because the Congress typically does not increase the total USACE Civil Works appropriations specifically to fund state requirements in excess of the federal standard. The result would be that other dredging projects necessary for national defense or interstate or international navigation and commerce would suffer from lack of needed maintenance dredging, if scarce appropriated funds are diverted to pay for state demands that exceed the federal standard. That is why USACE dredging regulations prescribe deferral of dredging as USACE appropriate response for most circumstances where a state tries to use its authority under the CZMA or the CWA to insist that USACE fund requirements that the state wishes to impose in excess of the federal standard.

5. Compliance with the federal standard is mandatory for all USACE dredging projects unless prior coordination with Major Subordinate Commands and HQUSACE has been completed to obtain an exception to that requirement.

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6. Point of contact for this guidance is Mr. Joe Wilson, Senior Navigation Environmental Program Manager, at (202) 761-7697 or [Joseph.R.Wilson@usace.army.mil](mailto:Joseph.R.Wilson@usace.army.mil). Legal questions relating to this subject should be directed to Mr. Lance D. Wood, Office of the Chief Counsel, at (202) 761-8556 or [lance.d.wood@usace.army.mil](mailto:lance.d.wood@usace.army.mil).



STEVEN L. STOCKTON, P.E.  
Director of Civil Works

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DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF ENGINEERS  
WASHINGTON, D.C. 20314

Enclosure 1

25 JUL 1978

REPLY TO  
ATTENTION OF:

DAEN-CWO-M

SUBJECT: Maintenance Dredging Provisions of the Clean Water Act  
of 1977 (P.L. 95-217)

SEE DISTRIBUTION

1. The purpose of this letter is to provide guidance for complying with provisions of the Clean Water Act of 1977 (PL 95-217) that relate to maintenance dredging activities of the U. S. Army Corps of Engineers.
2. The 1977 Act has included a new subsection (t) in Section 404 of the Federal Water Pollution Control Act. This new section 404(t) authorizes any State to regulate, in accordance with its laws, the discharge of dredged material in any portion of the navigable waters within the jurisdiction of the State that results from maintenance dredging involving Corps of Engineers navigation projects. District Engineers should communicate with States that have statutory procedural or substantive requirements concerning the discharge of dredged material to determine what will be necessary for the Corps of Engineers to comply with such requirements as they apply to maintenance dredging involving Corps of Engineers navigation projects. States should be urged to work toward a reasonable phase-in program that recognizes the immediate needs of navigation, the limitations of FY 1978 and FY 1979 funds, and the desirability of tight scheduling to achieve the most economical use of dredging equipment and funding. States should be made aware of the inherent delay of obtaining additional Federal funds necessary for compliance with State requirements.
3. Prior to commencing maintenance dredging, District Engineers shall obtain State water quality certification, unless the State elects to waive its right to certify. Such certification is required by Section 401(a) of the Federal Water Pollution Control Act, as a part of a Section 404 evaluation still prescribed by 33 CFR 209.145. The State water quality certification is used by the State to indicate compliance with its water quality standards which must be as stringent as those prescribed by EPA's "red book" (Quality Criteria for Water). In addition, District Engineers shall obtain a State permit for the disposal of maintenance dredged material required by Section 404(t), unless such requirement is specifically waived in accordance with the provisions of Section 404(t) after the submission of a report in accordance with paragraph 8 of this letter.

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SUBJECT: Maintenance Dredging Provisions of the Clean Water Act  
of 1977 (P.L. 95-217)

4. The excavation phase of dredging is not subject to State authority unless a discharge of dredged material, such as re-entry into the water, occurs during the operation itself. Nonetheless, District Engineers should cooperate with any State that desires special controls on the excavation phase of Corps of Engineers maintenance dredging activities. Expenses for employing such additional special controls should, however, be assumed by the State if not required by application of the EPA guidelines prescribed in 40 CFR 230.
5. District Engineers should develop a dredged material disposal plan that meets the requirements of Section 404(b) Guidelines, State dredged material permit conditions and State water quality certification. When a State requires on-land disposal, but a Section 404(b) determination, through application of the EPA guidelines prescribed in 40 CFR 230 using the EPA "red book" (Quality Criteria for Water) does not require on-land disposal, District Engineers should proceed as follows. In those cases where the project authorization requires a local sponsor to provide suitable disposal areas, the local sponsor should be advised of the need for disposal areas; disposal areas must be made available by a sponsor before dredging proceeds. In other cases where there are no local sponsor requirements to provide disposal areas the State or a prospective local sponsor should be advised that unless the State or the sponsor provides suitable disposal areas, including necessary containment, the added Federal cost of providing these disposal areas will affect the priority of performing dredging on that project. In either case, States should be made aware that additional costs to meet State standards may cause the project to become economically unjustified in accordance with paragraph 7 below. State or local provision of disposal areas to improve the priority of the project would be in line with one of the President's new water policy initiatives announced 6 June 1978 to encourage greater non-Federal financial participation in water resources projects. A suitable disposal area is defined as one of adequate capacity within a reasonable distance of excavation capable of being utilized without adversely affecting the environment of the surrounding waterway. The Corps of Engineers will assume the increased dredged material handling costs associated with placing the material in the furnished sites. The Corps of Engineers will continue with the disposal programs authorized prior to enactment of the subject legislation (such as the diked disposal program authorized by PL 91-611) by placing only material classified under Federal standards as being appropriate for containment in such disposal facilities.
6. Maximum beneficial use of dredged material, such as use for beach nourishment, should be realized where possible, consistent with existing policy. However, if States impose beneficial dredged material uses as permit conditions, any additional expense associated with such provisions will be the responsibility of local interests.

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7. District Engineers should evaluate funding requirements to provide for the increased cost of meeting State requirements relating to dredged material disposal, in accordance with existing policy as stated in Chapter 4, paragraph 4 of ER 11-2-101. Funds should be requested so that each waterway and harbor project will be adequately maintained consistent with the reasonable needs of existing commerce and traffic as long as the project remains economically justified. Increased costs to meet State requirements, including cost for such items as additional monitoring, sampling, and handling shall be added to project maintenance costs to determine if the total cost for performing maintenance remains economically justified. For the purpose of determining economic justification, costs will be compared with current traffic use, tonnage, drafts or other available indicators of project need. A determination not to request maintenance funds for a project because the expense exceeds the anticipated economic benefits of continued use of the improvement is consistent with the duty imposed on the Corps of Engineers to apply money appropriated for improvements of rivers and harbors as may be most economical and advantageous to the Federal Government and to discontinue appropriations for any river and harbor work which is deemed unworthy of further improvement (ref: Section 3 of the Act of August 11, 1888 (25 Stat. 423), as amended, (33 U.S.C. 622) and Section 7 of the Act of March 3, 1899 (30 Stat. 1150; 33 U.S.C. 549)). This responsibility is reinforced in Report No. 450, 83rd Congress, 1st Session on the Civil Functions, Department of the Army, Appropriations Bill, Fiscal Year 1954 as follows: "While the Federal Government may have an obligation to maintain navigable waterways, it has no such obligation to maintain those whose use is no longer economical."

8. No maintenance dredging will be performed unless disposal activities are in full compliance with State requirements. If District Engineers are unable to reach agreement with the States, or a State refuses to issue a water quality certificate, or disposal areas will not be provided in accordance with paragraph 5, project dredging will be deferred and a report of facts shall be forwarded to HQDA (DAEN-CWO-M) WASH DC 20314. The report should include justification showing the economic need for dredging, the impact on States outside the permitting jurisdiction if the project is not dredged, a description and estimated cost of State requirements which are additional to Section 404(b) guidelines and/or EPA water quality criteria and the relative urgency of dredging based on threat to national security, life or property. The report should also contain any other facts which will aid in determining whether to further defer the dredging, the priority of the project compared to other national

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requirements, and the need to obtain a waiver of State requirements pursuant to Section 404(t) and Section 511(a) of the Federal Water Pollution Control Act.

FOR THE CHIEF OF ENGINEERS:

  
CHARLES I. MCGINNIS  
Major General, USA  
Director of Civil Works

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## THE FEDERAL STANDARD

## ENCLOSURE 2

AUTHORITY: 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 53 FR 14911, Apr. 26, 1988, unless otherwise noted.

### **33 CFR Part 335 - OPERATION AND MAINTENANCE OF ARMY CORPS OF ENGINEERS CIVIL WORKS PROJECTS INVOLVING THE DISCHARGE OF DREDGED OR FILL MATERIAL INTO WATERS OF THE U.S. OR OCEAN WATERS**

#### **§ 335.1 Purpose.**

This regulation prescribes the practices and procedures to be followed by the Corps of Engineers to ensure compliance with the specific statutes governing Army Civil Works operations and maintenance projects involving the discharge of dredged or fill material into waters of the U.S. or the transportation of dredged material for the purpose of disposal into ocean waters. These practices and procedures should be employed throughout the decision/management process concerning methodologies and alternatives to be used to ensure prudent operation and maintenance activities.

#### **§ 335.2 Authority.**

Under authority delegated from the Secretary of the Army and in accordance with section 404 of the Clean Water Act of 1977 (CWA) and section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, hereinafter referred to as the Ocean Dumping Act (ODA), the Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States and the transportation of dredged material for the purpose of disposal into ocean waters. Section 404 of the CWA requires public notice with opportunity for public hearing for discharges of dredged or fill material into waters of the U.S. and that discharge sites can be specified through the application of guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army. Section 103 of the ODA requires public notice with opportunity for public hearing for the transportation for disposal of dredged material for disposal in ocean waters. Ocean disposal of dredged material must be evaluated using the criteria developed by the Administrator of EPA in consultation with the Secretary of the Army. Section 103(e) of the ODA provides that the Secretary of the Army may, in lieu of permit procedures, issue regulations for Federal projects involving the transportation of dredged material for ocean disposal which require the application of the same criteria, procedures, and requirements which apply to the issuance of permits. Similarly, the Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters, but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.

#### **§ 335.3 Applicability.**

This regulation (33 CFR parts 335 through 338) is applicable to the Corps of Engineers when undertaking operation and maintenance activities at Army Civil Works projects.

#### **§ 335.4 Policy.**

The Corps of Engineers undertakes operations and maintenance activities where appropriate and environmentally acceptable. All practicable and reasonable alternatives are fully considered on an equal basis. This includes the discharge of dredged or fill material into waters of the U.S. or ocean waters in the least costly manner, at the least costly and most practicable location, and consistent with engineering and environmental requirements.

#### **§ 335.5 Applicable laws.**

**(a)** The Clean Water Act (33 U.S.C. 1251 *et seq.*) (also known as the Federal Water Pollution Control Act Amendments of 1972, 1977, and 1987).

**(b)** The Marine Protection, Research, and Sanctuaries Act of 1972 ([33 U.S.C. 1401](#) *et seq.*) (commonly referred to as the Ocean Dumping Act (ODA)).

§ 335.6 Related laws and Executive Orders.

- (a)** The National Historic Preservation Act of 1966 ([16 U.S.C. 470a](#) *et seq.*), as amended.
- (b)** The Reservoir Salvage Act of 1960 ([16 U.S.C. 469](#)), as amended.
- (c)** The Endangered Species Act ([16 U.S.C. 1531](#) *et seq.*), as amended.
- (d)** The Estuary Protection Act ([16 U.S.C. 1221](#)).
- (e)** The Fish and Wildlife Coordination Act ([16 U.S.C. 661](#) *et seq.*), as amended.
- (f)** The National Environmental Policy Act ([42 U.S.C. 4341](#) *et seq.*), as amended.
- (g)** The Wild and Scenic Rivers Act ([16 U.S.C. 1271](#) *et seq.*) as amended.
- (h)** Section 307(c) of the Coastal Zone Management Act of 1976 ([16 U.S.C. 1456](#) (c)), as amended.
- (i)** The Water Resources Development Act of 1976 (Pub. L. 94-587).
- (j)** Executive Order 11593, *Protection and Enhancement of the Cultural Environment*, May 13, 1971, (36 FR 8921, May 15, 1971).
- (k)** Executive Order 11988, *Floodplain Management*, May 24, 1977, (42 FR 26951, May 25, 1977).
- (l)** Executive Order 11990, *Protection of Wetlands*, May 24, 1977, (42 FR 26961, May 25, 1977).
- (m)** Executive Order 12372, *Intergovernmental Review of Federal Programs*, July 14, 1982, (47 FR 3959, July 16, 1982).
- (n)** Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions*, January 4, 1979.

§ 335.7 Definitions.

The definitions of 33 CFR parts [323](#), [324](#), [327](#), and [329](#) are hereby incorporated. The following terms are defined or interpreted from parts [320](#) through [330](#) for purposes of 33 CFR parts [335](#) through [338](#).

*Beach nourishment* means the discharge of dredged or fill material for the purpose of replenishing an eroded beach or placing sediments in the littoral transport process.

*Emergency* means a situation which would result in an unacceptable hazard to life or navigation, a significant loss of property, or an immediate and unforeseen significant economic hardship if corrective action is not taken within a time period less than the normal time needed under standard procedures.

*Federal standard* means the dredged material disposal alternative or alternatives identified by the Corps which represent the least costly alternatives consistent with sound engineering practices and meeting the environmental standards established by the 404(b)(1) evaluation process or ocean dumping criteria.

*Navigable waters of the U.S.* means those waters of the U.S. that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, have been used in the past, or may be susceptible to use with or without reasonable improvement to transport interstate or foreign commerce. A more complete definition is provided in 33 CFR part [329](#). For the purpose of this regulation, the term also includes the confines of Federal navigation approach channels extending into ocean waters beyond the territorial sea which are used for interstate or foreign commerce.

*Practicable* means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

*Statement of Findings (SOF)* means a comprehensive summary compliance document signed by the district engineer after completion of appropriate environmental documentation and public involvement.

*Territorial sea* means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, extending seaward a distance of three miles as described in the convention on the territorial sea and contiguous zone, 15 U.S.T. 1606.

### **33 CFR Part 336 - FACTORS TO BE CONSIDERED IN THE EVALUATION OF ARMY CORPS OF ENGINEERS DREDGING PROJECTS INVOLVING THE DISCHARGE OF DREDGED MATERIAL INTO WATERS OF THE U.S. AND OCEAN WATERS**

#### **§ 336.0 General.**

Since the jurisdiction of the CWA extends to all waters of the U.S., including the territorial sea, and the jurisdiction of the ODA extends over ocean waters including the territorial sea, the following rules are established to assure appropriate regulation of discharges of dredged or fill material into waters of the U.S. and ocean waters.

- (a)** The disposal into ocean waters, including the territorial sea, of dredged material excavated or dredged from navigable waters of the U.S. will be evaluated by the Corps in accordance with the ODA.
- (b)** In those cases where the district engineer determines that the discharge of dredged material into the territorial sea would be for the primary purpose of fill, such as the use of dredged material for beach nourishment, island creation, or construction of underwater berms, the discharge will be evaluated under section 404 of the CWA.
- (c)** For those cases where the district engineer determines that the materials proposed for discharge in the territorial sea would not be adequately evaluated under the section 404(b)(1) guidelines of the CWA, he may evaluate that material under the ODA.

#### **§ 336.1 Discharges of dredged or fill material into waters of the U.S.**

**(a) Applicable laws.** Section 404 of the CWA governs the discharge of dredged or fill material into waters of the U.S. Although the Corps does not process and issue permits for its own activities, the Corps authorizes its own discharges of dredged or fill material by applying all applicable substantive legal requirements, including public notice, opportunity for public hearing, and application of the section 404(b)(1) guidelines.

**(1)** The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S.

**(2)** Section 307 of the Coastal Zone Management Act (CZMA) requires that certain activities that a Federal agency conducts or supports be consistent with the Federally-approved state management plan to the maximum extent practicable.

**(b) Procedures.** If changes in a previously approved disposal plan for a Corps navigation project warrant re-evaluation under the CWA, the following procedures should be followed by district engineers prior to discharging dredged material into waters of the U.S. except where emergency action as described in § 337.7 of this chapter is required.

**(1)** A public notice providing opportunity for a public hearing should be issued at the earliest practicable time. The public notification procedures of § 337.1 of this chapter should be followed.

**(2)** The public hearing procedures of 33 CFR part 327 should be followed.

**(3)** As soon as practicable, the district engineer will request from the state a 401 water quality certification and, if applicable, provide a coastal zone consistency determination for the Corps activity using the procedures of § 336.1(b) (8) and (9), respectively, of this part.



(4) Discharges of dredged material will be evaluated using the guidelines authorized under section 404(b)(1) of the CWA, or using the ODA regulations, where appropriate. If the guidelines alone would prohibit the designation of a proposed discharge site, the economic impact on navigation and anchorage of the failure to use the proposed discharge site will also be considered in evaluating whether the proposed discharge is to be authorized under CWA section 404(b)(2).

(5) The EPA Administrator can prohibit or restrict the use of any defined area as a discharge site under 404(c) whenever he determines, after notice and opportunity for public hearing 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 recreation areas. Upon notification of the prohibition of a discharge site by the Administrator the district engineer will complete the administrative processing of the proposed project up to the point of signing the Statement of Findings (SOF) or Record of Decision (ROD). The unsigned SOF or ROD along with a report described in § 337.8 of this chapter will be forwarded through the appropriate Division office to the Dredging Division, Office of the Chief of Engineers.

(6) In accordance with the National Environmental Policy Act (NEPA), and the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), an Environmental Impact Statement (EIS) or Environmental Assessment (EA) will be prepared for all Corps of Engineers projects involving the discharge of dredged or fill material, unless such projects are included within a categorical exclusion found at 33 CFR part 230 or addressed within an existing EA or EIS. If a proposed maintenance activity will result in a deviation in the operation and maintenance plan as described in the EA or EIS, the district engineer will determine the need to prepare a new EA, EIS, or supplement. If a new EA, EIS, or supplement is required, the procedures of 33 CFR part 230 will be followed.

(7) If it can be anticipated that related work by other Federal or non-Federal interests will occur in the same area as Corps projects, the district engineer should use all reasonable means to include it in the planning, processing, and review of Corps projects. Related work normally includes, but is not necessarily limited to, maintenance dredging of approach channels and berthing areas connected to Federal navigation channels. The district engineer should coordinate the related work with interested Federal, state, regional, and local agencies and the general public at the same time he does so for the Corps project. The district engineer should ensure that related work meets all substantive and procedural requirements of 33 CFR parts 320 through 330. Documents covering Corps maintenance activities normally should also include an appropriate discussion of ancillary maintenance work. District engineers should assist local interests to obtain from the state any necessary section 401 water quality certification and, if required, the section 307 coastal zone consistency concurrence. The absence of such certification or concurrence by the state or the denial of a Corps permit for related work shall not be cause for delay of the Federal project. Local sponsors will be responsible for funding any related work. If permitting of the related work complies with all legal requirements and is not contrary to the public interest, section 10, 404, and 103 permits normally will be issued by the district engineer in a separate SOF or ROD. Authorization by nationwide or regional general permit may be appropriate. If the related work does not receive a necessary state water quality certification and/or CZMA consistency concurrence, or are determined to be contrary to the public interest the district engineer should re-examine the project viability to ensure that continued maintenance is warranted.

**(8) State water quality certification:** Section 401 of the CWA requires the Corps to seek state water quality certification for dredged material disposal into waters of the U.S. The state certification request must be processed to a conclusion by the state within a reasonable period of time. Otherwise, the certification requirements of section 401 are deemed waived. The district engineer will request water quality certification from the state at the earliest practicable time using the following procedures:

(i) In addition to the Corps section 404 public notice, information and data demonstrating compliance with state water quality standards will be provided to the state water quality certifying agency along with the request for water quality certification. The information and data may be included within the 404(b)(1) evaluation. The district engineer will request water quality certification to be consistent with



the maintenance dredging schedule for the project. Submission of the public notice, including information and data demonstrating compliance with the state water quality standards, will constitute a valid water quality certification request pursuant to section 401 of the CWA.

**(ii)** If the proposed disposal activity may violate state water quality standards, after consideration of disposal site dilution and dispersion, the district engineer will work with the state to acquire data to satisfy compliance with the state water quality standards. The district engineer will use the technical manual "Management Strategy for Disposal of Dredged Material: Contaminant Testing and Controls" or its appropriate updated version as a guide for developing the appropriate tests to be conducted on such dredged material.

**(iii)** If the state does not take final action on a request for water quality certification within two months from the date of the initial request, the district engineer will notify the state of his intention to presume a waiver as provided by section 401 of the CWA. If the state agency, within the two-month period, requests an extension of time, the district engineer may approve one 30-day extension unless, in his opinion, the magnitude and complexity of the information contained in the request warrants a longer or additional extension period. The total period of time in which the state must act should not exceed six months from the date of the initial request. Waiver of water quality certification can be conclusively presumed after six months from the date of the initial request.

**(iv)** The procedures of § 337.2 will be followed if the district engineer determines that the state data acquisition requirements exceed those necessary in establishment of the Federal standard.

**(9) State coastal zone consistency:** Section 307 of the CZMA requires that activities subject to the CZMA which a Federal agency conducts or supports be consistent with the Federally approved state management program to the maximum extent practicable. The state is provided a reasonable period of time as defined in § 336.1(b)(9)(iv) to take final action on Federal consistency determinations; otherwise state concurrence can be presumed. The district engineer will provide the state a consistency determination at the earliest practicable time using the following procedures:

**(i)** The Corps section 404 public notice and any additional information that the district engineer determines to be appropriate will be provided the state coastal zone management agency along with the consistency determination. The consistency determination will consider the maintenance dredging schedule for the project. Submission of the public notice and, as appropriate, any additional information as determined by the district engineer will constitute a valid coastal zone consistency determination pursuant to section 307 of the CZMA.

**(ii)** If the district engineer decides that a consistency determination is not required for a Corps activity, he may provide the state agency a written determination that the CZMA does not apply.

**(iii)** The district engineer may provide the state agency a general consistency determination for routine or repetitive activities.

**(iv)** If the state fails to provide a response within 45 days from receipt of the initial consistency determination, the district engineer will presume state agency concurrence. If the state agency, within the 45-day period, requests an extension of time, the district engineer will approve one 15-day extension unless, in his opinion, the magnitude and complexity of the information contained in the consistency determination warrants a longer or additional extension period. The longer or additional extension period shall not exceed six months from the date of the initial consistency determination.

**(v)** If the district engineer determines that the state recommendations to achieve consistency to the maximum degree practicable exceed either his authority or funding for a proposed dredging or disposal activity, he will so notify the state coastal zone management agency indicating that the Corps has complied to the maximum extent practicable with the state's coastal zone management program. If the district engineer determines that state recommendations to achieve consistency to the maximum degree practicable do not exceed his authority or funding but, nonetheless, are excessive, he will follow the procedures of § 337.2.

**(c) Evaluation factors.** The following factors will be used, as appropriate, to evaluate the discharge of dredged material into waters of the U.S. Other relevant factors may also be evaluated, as needed.

**(1) Navigation and Federal standard.** The maintenance of a reliable Federal navigation system is essential to the economic well-being and national defense of the country. The district engineer will give full consideration to the impact of the failure to maintain navigation channels on the national

and, as appropriate, regional economy. It is the Corps' policy to regulate the discharge of dredged material from its projects to assure that dredged material disposal occurs in the least costly, environmentally acceptable manner, consistent with engineering requirements established for the project. The environmental assessment or environmental impact statement, in conjunction with the section 404(b)(1) guidelines and public notice coordination process, can be used as a guide in formulating environmentally acceptable alternatives. The least costly alternative, consistent with sound engineering practices and selected through the 404(b)(1) guidelines or ocean disposal criteria, will be designated the Federal standard for the proposed project.

**(2) Water quality.** The 404(b)(1) guidelines at 40 CFR part 230 and ocean dumping criteria at 40 CFR part 220 implement the environmental protection provisions of the CWA and ODA, respectively. These guidelines and criteria provide general regulatory guidance and objectives, but not a specific technical framework for evaluating or managing contaminated sediment that must be dredged. Through the section 404(b)(1) evaluation process (or ocean disposal criteria for the territorial sea), the district engineer will evaluate the water quality impacts of the proposed project. The evaluation will include consideration of state water quality standards. If the district engineer determines the dredged material to be contaminated, he will follow the guidance provided in the most current published version of the technical manual for contaminant testing and controls. This manual is currently cited as: Francingues, N.R., Jr., et al. 1985. "Management Strategy for Disposal of Dredged Material: Contaminant Testing and Controls," Miscellaneous Paper D-85-1, U.S. Army Waterways Experiment Station, Vicksburg, Mississippi. The procedures of § 336.1(b)(8) will be followed for state water quality certification requests.

**(3) Coastal zone consistency.** As appropriate, the district engineer will determine whether the proposed project is consistent with the state coastal zone management program to the maximum extent practicable. The procedures of § 336.1(b)(9) will be followed for coastal zone consistency determinations.

**(4) Wetlands.** Most wetland areas constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. The district engineer will, therefore, follow the guidance in 33 CFR 320.4(b) and EO 11990, dated May 24, 1977, when evaluating Corps operations and maintenance activities in wetlands.

**(5) Endangered species.** All Corps operations and maintenance activities will be reviewed for the potential impact on threatened or endangered species, pursuant to the Endangered Species Act of 1973. If the district engineer determines that the proposed activity will not affect listed species or their critical habitat, a statement to this effect should be included in the public notice. If the proposed activity may affect listed species or their critical habitat, appropriate discussions will be initiated with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, and a statement to this effect should be included in the public notice. (See 50 CFR part 402).

**(6) Historic resources.** Archeological, historical, or architectural resource surveys may be required to locate and identify previously unrecorded historic properties in navigation channels and at dredged or fill material disposal sites. If properties that may be historic are known or found to exist within the navigation channel or proposed disposal area, field testing and analysis may sometimes be necessary in order to evaluate the properties against the criteria of the National Register of Historic Places. Such testing should be limited to the amount and kind needed to determine eligibility for the National Register; more detailed and extensive work on a property may be prescribed later, as the outcome of review under section 106 of the National Historic Preservation Act. Historic properties are not normally found in previously constructed navigation channels or previously used disposal areas. Therefore, surveys to identify historic properties should not be conducted for maintenance dredging and disposal activities proposed within the boundaries of previously constructed navigation channels or previously used disposal areas unless there is good reason to believe that historic properties exist there.

**(i)** The district engineer will establish whether historic properties located in navigation channels or at disposal sites are eligible for inclusion in the National Register of Historic Places in accordance with applicable regulations of the Advisory Council on Historic Preservation and the Department of the Interior.

(ii) The district engineer will take into account the effects of any proposed actions on properties included in or eligible for inclusion in the National Register of Historic Places, and will request the comments of the Advisory Council on Historic Preservation, in accordance with applicable regulations of the Advisory Council on Historic Preservation.

**(7) Scenic and recreational values.**

(i) Maintenance dredging and disposal activities may involve areas which possess recognized scenic, recreational, or similar values. Full evaluation requires that due consideration be given to the effect which dredging and disposal of the dredged or fill material may have on the enhancement, preservation, or development of such values. Recognition of these values is often reflected by state, regional, or local land use classification or by similar Federal controls or policies. Operations and maintenance activities should, insofar as possible, be consistent with and avoid adverse effects on the values or purposes for which such resources have been recognized or set aside, and for which those classifications, controls, or policies were established. Special consideration must be given to rivers named in section 3 of the Wild and Scenic Rivers Act and those proposed for inclusion as provided by section 4 and 5 of the Act, or by later legislation.

(ii) Any other areas named in Acts of Congress or Presidential Proclamations, such as National Rivers, National Wilderness Areas, National Seashores, National Parks, and National Monuments, should be given full consideration when evaluating Corps operations and maintenance activities.

**(8) Fish and wildlife.**

(i) In those cases where the Fish and Wildlife Coordination Act (FWCA) applies, district engineers will consult, through the public notification process, with the Regional Directors of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of fish and wildlife resources by considering ways to prevent their direct and indirect loss and damage due to the proposed operation and maintenance activity. The district engineer will give full consideration to these views on fish and wildlife conservation in evaluating the activity. The proposed operations may be modified in order to lessen the damage to such resources. The district engineer should include such justifiable means and measures for fish and wildlife resources that are found to be appropriate. Corps funding of Fish and Wildlife Service activities under the Transfer of Funds Agreement between the Fish and Wildlife Service and the Corps is not applicable for Corps operation and maintenance projects.

(ii) District engineers should consider ways of reducing unavoidable adverse environmental impacts of dredging and disposal activities. The determination as to the extent of implementation of such measures will be done by the district engineer after weighing the benefits and detriments of the maintenance work and considering applicable environmental laws, regulations, and other relevant factors.

**(9) Marine sanctuaries.** Operations and maintenance activities involving the discharge of dredged or fill material in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the ODA should be evaluated for the impact on the marine sanctuary. In such a case, certification should be obtained from the Secretary of Commerce that the proposed project is consistent with the purposes of Title III of the ODA and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

**(10) Other state requirements.** District engineers will make all reasonable efforts to comply with state water quality standards and Federally approved coastal zone programs using the procedures of §§ 336.1(b) (8), (9), and 337.2. District engineers should not seek state permits or licenses unless authorized to do so by a clear, explicit, and unambiguous Congressional waiver of Federal sovereign immunity, giving the state authority to impose that requirement on Federal activities (e.g., CWA sections 401 and 404(t), and CZMA section 307 (c)(1) and (c)(2)).

**(11) Additional factors.** In addition to the factors described in paragraphs (c)(1) through (9) of this section, the following factors should also be considered.

(i) The evaluation of Corps operations and maintenance activities involving the discharge of dredged or fill material into waters of the U.S. is a continuing process and should proceed concurrently with the processing of state water quality certification and, if required, the provision of a coastal zone

consistency determination to the state. If a local agency having jurisdiction over or concern with the particular activity comments on the project through the public notice coordination, due consideration should be given to those official views as a reflection of local factors.

**(ii)** Where officially adopted state, regional, or local land use classifications, determinations, or policies are applicable, they normally will be presumed to reflect local views and will be considered in addition to other national factors.

§ 336.2 Transportation of dredged material for the purpose of disposal into ocean waters.

**(a)Applicable law.**Section 103(a) of the ODA provides that the Corps of Engineers may issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for disposal into ocean waters.

**(b)Procedures.** The following procedures will be followed by district engineers for dredged material disposal into ocean waters except where emergency action as described in § 337.7 of this chapter is required.

**(1)** In accordance with the provisions of section 103 of the ODA, the district engineer should issue a public notice giving opportunity for public hearing, following the procedures described in § 337.1 of this chapter for Corps operation and maintenance activities involving disposal of dredged material in ocean waters, as well as dredged material transported through the territorial sea for ocean disposal.

**(2)** The public hearing procedures of 33 CFR part 327 should be followed.

**(c)State permits and licenses.** The terms and legislative history of the ODA leave some doubt regarding whether a state has legal authority to exert control over ocean dumping activities of the Corps in the territorial sea covered under the Act (see section 106(d)). Notwithstanding this legal question, the Corps will voluntarily as a matter of comity apply for state section 401 water quality certification and determine consistency with a Federally-approved coastal zone management plan for Corps ocean disposal of dredged material within the three-mile extent of the territorial sea. Moreover, the Corps will attempt to comply with any reasonable requirement imposed by a state in the course of the 401 certification process or the CZMA consistency determination process. Nevertheless, the Corps reserves its legal rights regarding any case where a state unreasonably denies or conditions a 401 water quality certification for proposed Corps ocean disposal of dredged material within the limits of the territorial sea, or asserts that such disposal would not be consistent with an approved state CZMA plan. If such a circumstance arises, the district engineer shall so notify the division engineer who then decides on consultation with CECW-D, CECW-Z, and CECC-E for purposes of determining the Corps of Engineers' appropriate response and course of action.

**(d)Evaluation factors.**

**(1)** In addition to the appropriate evaluation factors of § 336.1(c), activities involving the transportation of dredged material for the purpose of disposal in ocean waters will be evaluated by the Corps to determine whether the proposed disposal will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, the district engineer, in addition to considering the criteria developed by EPA on the effects of the dumping, will also consider navigation, economic and industrial development, and foreign and domestic commerce, as well as the availability of alternatives to ocean disposal, in determining the need for ocean disposal of dredged material. Where ocean disposal is determined to be appropriate, the district engineer will, to the extent feasible, specify disposal sites which have been designated by the Administrator pursuant to section 102(c) of the ODA.

**(2)** As provided by the EPA regulations at 40 CFR 225.2(b-e) for implementing the procedures of section 102 of the ODA, the regional administrator of EPA may make an independent evaluation of dredged material disposal activities regulated under section 103 of the ODA related to the effects of dumping. The EPA regulations provide that the regional administrator make said evaluation within 15 days after receipt of all requested information. The regional administrator may request from the district engineer an additional 15-day period for a total of to 30 days. The EPA regulations provide that the regional administrator notify the district engineer of non-compliance with the environmental



impact criteria or with any restriction relating to critical areas on the use of an EPA recommended disposal site designated pursuant to section 102(c) of the ODA. In cases where the regional administrator has notified the district engineer in writing that the proposed disposal will not comply with the criteria related to the effects of dumping or related to critical area restriction, no dredged material disposal may occur unless and until the provisions of 40 CFR [225.3](#) are followed and the Administrator grants a waiver of the criteria pursuant to section 103(d) of the ODA.

**(3)** If the regional administrator advises the district engineer that the proposed disposal will comply with the criteria, the district engineer will complete the administrative record and sign the SOF.

**(4)** In situations where an EPA-designated site is not feasible for use or where no site has been designated by the EPA, the district engineer, in accordance with the ODA and in consultation with EPA, may select a site pursuant to section 103. Appropriate NEPA documentation should be used to support site selections. District engineers should address site selection factors in the NEPA document. District engineers will consider the criteria of 40 CFR parts [227](#) and [228](#) when selecting ocean disposal sites, as well as other technical and economic considerations. Emphasis will be placed on evaluation to determine the need for ocean disposal and other available alternatives. Each alternative should be fully considered on an equal basis, including the no dredging option.

**(5)** If the regional administrator advises the district engineer that a proposed ocean disposal site or activity will not comply with the criteria, the district engineer should proceed as follows.

**(i)** The district engineer should 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 will evaluate the engineering and economic feasibility and environmental acceptability of the alternative sites.

**(ii)** If the district engineer makes a determination that there is no economically feasible alternative method or site available, he will so advise the regional administrator of his intent to proceed with the proposed action setting forth his reasons for such determination.

**(iii)** 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 ODA to prohibit use of a proposed disposal site, the case will be forwarded through the respective Division office and CECW-D to the Secretary of the Army or his designee for further coordination with the Administrator of EPA and final resolution. The report forwarding the case should be in the format described in § [337.8](#) of this chapter.

**(iv)** The Secretary of the Army or his designee will evaluate the proposed project and make a final determination on the proposed disposal. If the decision of the Secretary of the Army or his designee is that ocean disposal at the proposed site is required because of the unavailability of economically feasible alternatives, he will seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with section 103(d) of the ODA.

### **33 CFR Part 337 - PRACTICE AND PROCEDURE**

#### **§ 337.0 Purpose.**

The practices and procedures part of this regulation apply to all Corps operations and maintenance activities involving the discharge of dredged or fill material in waters of the U.S. and ocean waters and related activities of local interests accomplished to ensure continued functions of constructed Corps projects.

#### **§ 337.1 Public notice.**

Presently, public notification of proposed discharges of dredged or fill material is required by the provisions of section 103 of the ODA and sections 401 and 404 of the CWA. District engineers are encouraged to develop procedures to avoid unnecessary duplication of state agency procedures. Joint public notification procedures should be a primary factor in the development of Memoranda of Agreement with the states as described in § [337.4](#).

**(a)** With the possible exception of emergency actions as discussed in § 337.7, the district engineer should issue a public notice for projects involving the discharge of dredged or fill material into waters of the U.S. or ocean waters unless the project is authorized by a general permit. Public notices for Corps operation and maintenance activities are normally issued for an indefinite period of time and are not reissued unless changes in the disposal plan warrant re-evaluation under section 404 of the CWA or section 103 of the ODA. The public notice is the primary method of advising all interested parties of Federal projects and of soliciting comments and information necessary to evaluate the probable impact of the discharge of dredged or fill material into waters of the U.S. or ocean waters. The notice should, therefore, include sufficient information to provide a clear understanding of the nature of the activity and related activities of local interests in order to generate meaningful comments. A single public notice may be used for more than one project in appropriate cases. The notice normally should include the following items:

- (1)** The name and location of the project and proposed disposal site.
- (2)** A general description of the project and a description of the estimated type, composition, and quantity of materials to be discharged, the proposed time schedule for the dredging activity, and the types of equipment and methods of dredging and conveyance proposed to be used.
- (3)** A sketch showing the location of the project, including depth of water in the area and all proposed discharge sites.
- (4)** The nature, estimated amount, and frequency of known and anticipated related dredging and discharge to be conducted by others.
- (5)** A list of Federal, state, and local environmental agencies with whom the activity is being coordinated.
- (6)** A statement concerning a preliminary determination of the need for and/or availability of an environmental impact statement.
- (7)** Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any.
- (8)** A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing except in emergency situations where the procedures of § 337.7 will be followed, within which interested parties may express their views concerning the proposed project.
- (9)** If the proposed Federal project would occur in the territorial seas or ocean waters, a description of the project's relationship to the baseline from which the territorial sea is measured.
- (10)** A statement on the status of state water quality certification under section 401 of the CWA.
- (11)** For activities requiring a determination of consistency with an approved state coastal zone management plan, the following information will be included in the notice:
  - (i)** A statement on whether or not the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the state management program.
  - (ii)** Sufficient information to support the consistency determination to include associated facilities and their coastal zone effect.
  - (iii)** Data and supporting information commensurate with the expected effects of the activity on the coastal zone.
- (12)** A statement on historic resources, state of present knowledge, likelihood of damage or other adverse effect on such resources, etc.
- (13)** A statement on endangered species.
- (14)** A statement on evaluation factors to be considered, adapted from that presented at 33 CFR 325.3(b).
- (15)** The name, address, and telephone number of the Corps employee from whom additional information concerning the project may be obtained.
- (16)** The signature of the district engineer or his designee on all maintenance dredged material disposal public notices.
- (17)** For activities regulated under section 103 of the ODA, the following additional information should be integrated into the public notice:
  - (i)** A statement on the designation status of the disposal site.

**(ii)** If the proposed disposal site is not a designated site, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible.

**(iii)** A brief description of known dredged material discharges at the proposed disposal site.

**(iv)** Existence and documented effects of other authorized disposals that have been made at the disposal area.

**(v)** An estimated length of time during which disposal would continue at the proposed site.

**(vi)** Information on the characteristics and composition of the dredged material, and the following paragraph:

The proposed transportation of this dredged material for disposing of it in ocean waters is being evaluated to determine that the proposed disposal will not unreasonably degrade or endanger human health, welfare, or amenities or the marine environment, ecological systems, or economic potentialities. In making this determination, the criteria established by the Administrator, EPA pursuant to section 102(a) of the ODA, will be applied. In addition, based upon an evaluation of the potential effect which the failure to utilize this ocean disposal site will have on navigation, economic and industrial development, and foreign and domestic commerce of the United States, an independent determination will be made of the need to dispose of the dredged material in ocean waters, other possible methods of disposal, and other appropriate locations.

**(b)** The following statement should be included in the public notices:

Any person who has an interest which may be affected by the disposal of this dredged material may request a public hearing. The request must be submitted in writing to the district engineer within the comment period of this notice and must clearly set forth the interest which may be affected and the manner in which the interest may be affected by this activity.

**(c)** Public notices should be distributed as described in 33 CFR [325.3\(c\)](#). In addition, public notices should be sent to CECW-D, Office of the Chief of Engineers, Washington, DC 20314, if the project involves the discharge of dredged material in waters of the U.S. or ocean waters. District engineers should also develop, as appropriate, regional mailing lists for Corps maintenance dredging and disposal activities to the extent that property owners adjacent to the navigation channel and disposal area are notified of the proposed activity. In order to effect compliance with Executive Order 12372, district engineers should provide copies of public notices to concerned state and local elected officials.

**(d)** The district engineer should consider all comments received in response to the public notice in his subsequent actions. All comments expressing objections to or raising questions about the project should be acknowledged. Comments received as form letters or petitions, however, may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments are received which relate to matters within the special expertise of another agency, the district engineer may seek the advice of that agency. The receipt of comments as a result of the public notice normally should not extend beyond the stated comment period; however, at his discretion, the district engineer may provide an extension.

**(e)** Notices sent to several agencies within the same state may result in conflicting comments from those agencies. Many states have designated a state agency or individual to provide a single and coordinated state position regarding Federal activities. Where a state has not so designated a single source, the district engineer, as appropriate, may seek from the Governor an expression of his views and desires concerning the proposed and subsequent similar projects.

**(f)** All comments received from the public notice coordination should be considered in the public interest review process. Comments received from Federal or state agencies which are within the area of expertise of another agency will be communicated with that other agency if the district engineer needs the information to make a final determination on the proposed project.

§ 337.2 State requirements.

The procedures of this section should be followed in implementing state requirements.

**(a)** District engineers should cooperate to the maximum extent practicable with state agencies to prevent violation of Federally approved state water quality standards and to achieve consistency to the maximum degree practicable with an approved coastal zone management program.

**(b)** If the state agency imposes conditions or requirements which exceed those needed to meet the Federal standard, the district engineer should determine and consider the state's rationale and provide to the state information addressing why the alternative which represents the Federal standard is environmentally acceptable. The district engineer will accommodate the state's concerns to the extent practicable. However, if a state agency attempts to impose conditions or controls which, in the district engineers opinion, cannot reasonably be accommodated, the following procedures will be followed.

**(1)** In situations where an agency requires monitoring or testing, the district engineer will strive to reach an agreement with the agency on a data acquisition program. The district engineer will use the technical manual "Management Strategy for Disposal of Dredged Material: Contaminant Testing and Controls" or its appropriate updated version as a guide for developing the appropriate tests to be conducted. If the agency insists on requirements which, in the opinion of the district engineer, exceed those required in establishment of the Federal standard, the agency will be asked to fund the difference in cost. If the agency agrees to fund the difference in cost, the district engineer will comply with the request. If the agency does not fund the additional cost, the district engineer will follow the guidance in paragraph (b) (3) of this section.

**(2)** When an agency requires special conditions or implementation of an alternative which the Federal standard does not, district engineers will proceed as follows: In those cases where the project authorization requires a local sponsor to provide suitable disposal areas, disposal areas must be made available by a sponsor before dredging proceeds. In other cases where there are no local sponsor requirements to provide disposal areas, the state or the prospective local sponsor will be advised that, unless the state or the sponsor provides suitable disposal areas, the added Federal cost of providing these disposal areas will affect the priority of performing dredging on that project. In either case, states will be made aware that additional costs to meet state standards or the requirements of the coastal zone management program which exceed those necessary in establishment of the Federal standard may cause the project to become economically unjustified.

**(3)** If the state denies or notifies the district engineer of its intent to deny water quality certification or does not concur regarding coastal zone consistency, the project dredging may be deferred. A report pursuant to § 337.8 of this section will be forwarded to CECW-D, Office of the Chief of Engineers, Washington, DC 20314-1000 for resolution.

#### § 337.3 Transfer of the section 404 program to the states.

Section 404(g-1) of the CWA allows the Administrator of the EPA to transfer to qualified states administration of the section 404 permit program for discharges into certain waters of the U.S. Once a state's 404 program is approved, the district engineer will follow state procedures developed in accordance with section 404(g-1) of the CWA for all on-going Corps projects involving the discharge of fill material in transferred waters to the state agency responsible for administering the program. Corps projects involving the discharge of dredged or fill material in waters not transferred to the state will be processed in accordance with this regulation.

#### § 337.4 Memoranda of Agreement (MOA).

The establishment of joint notification procedures for Corps projects involving disposal of dredged or fill material should be actively pursued through the development of MOAs with the state. The MOAs may be used to define responsibilities between the state and the Corps district involved. The primary purpose of MOAs will be to avoid or eliminate administrative duplication, when such duplication does not contribute to the overall decision-making process. MOAs for purposes of this regulation will not be used to implement provisions not related to the maintenance or enforcement of Federally-



approved state water quality standards or coastal zone management programs. District engineers are authorized and encouraged to develop MOAs with states and other Federal agencies for Corps projects involving the discharge of dredged or fill material. Copies of all MOAs will be forwarded to CECW-D, Office of the Chief of Engineers, Washington, DC 20314-1000 for approval.

#### § 337.5 General authorizations.

Under the provisions of sections 404(e) of the CWA and 104(c) of the ODA certain categories of activities may be authorized on a regional, statewide, or nationwide basis. General authorizations can be a useful mechanism for implementation of the procedural provisions of the CWA, CZMA, and ODA while avoiding unnecessary duplication and paperwork. Through the general authorization process, compliance with all environmental laws and regulations including coastal zone consistency, if applicable, and water quality certification can be accomplished in a single process for a category of activities. Since the emphasis of particular environmental issues for most Corps projects is more regional than nationwide, district engineers are encouraged to develop general authorizations for routine Civil Works activities involving the discharge of dredged or fill material to address the specific requirements of a particular geographic region. When evaluating general categories of activities, the district engineer should follow the same procedure as outlined for individual Federal activities including the water quality certification and/or coastal zone consistency requirements of part [336 of this chapter](#). General authorizations should include related activities of local interests. Additionally, district engineers should use existing general permits authorized on a statewide or regional basis and the nationwide permits at 33 CFR part [330](#) for Federal projects involving the disposal of dredged material. The development of new statewide or regional general authorizations for Federal activities should be in accordance with the requirements of §§ [336.1](#) and [336.2](#) of this chapter. General permits for related activities of local interests should be developed using the procedures of 33 CFR parts [320](#) through [330](#).

#### § 337.6 Statement of Findings (SOF).

Upon completion of the evaluation process including required coordination, receipt or waiver of required state certifications, and completion of the appropriate environmental documents, an SOF will be prepared. In cases involving an EIS, a ROD will be prepared in accordance with 33 CFR part [230](#) and should be used in lieu of the SOF, providing the substantive parts of this section are included in the ROD. The SOF need not duplicate information contained in supporting environmental documents but rather may incorporate it by reference. The SOF should include a comprehensive summary and record of compliance and should be prepared in the following format except that the procedures of 33 CFR [325.2](#) should be followed for related activities of local interests.

- (a)** The SOF should identify the name of the preparer, date (which may not necessarily correspond to the date signed), and name of waterway.
- (b)** The proposed action for which the findings are made should be described.
- (c)** A coordination section should be provided. The coordination section should reference the public notice number and date. The letters of comment and appropriate responses should be summarized. Any coordination undertaken by local or state agencies should also be discussed.
- (d)** An environmental effects and impacts section should be used to document compliance with the applicable environmental laws. This section should include the views and/or conditions of the state concerning water quality certification and, if required, the results of the coastal zone consistency process.
- (e)** A determinations section should reference the results of the EA and/or EIS and any conditions necessary to meet the state's water quality standards or coastal zone management program. Appropriate conditions or modifications should be included in the project specifications. This section should also contain a subsection on consideration of alternatives and cumulative impacts.
- (f)** A section on the district engineer's findings and conclusions concerning the proposed project should be included.
- (g)** The SOF should be dated and signed by the district engineer or his designee except in those cases requiring referral to higher authority.

(h) In accordance with the provisions of section 104(g) of the ODA, the district engineer will forward a copy of the SOF to the District Commander, U.S. Coast Guard, if the activity involves the ocean disposal of dredged material.

(i) The Findings of No Significant Impact or ROD, as appropriate, required by 33 CFR part 230 may be incorporated into the SOF, as appropriate.

#### § 337.7 Emergency actions.

After obtaining approval from the division engineer, the district engineer will respond to emergency situations on an expedited basis, complying with the procedures of this regulation to the maximum degree practicable. The district engineer will issue a public notice describing the emergency in accordance with § 337.1, if such a notice is practicable in view of the emergency situation; such a public notice should be forwarded to all appropriate Federal and state agencies. The district engineer should prepare a section 404(b)(1) evaluation report and, as necessary, an environmental assessment, if this is practicable in view of the emergency situation. If comments are received from the public notice which, in the judgment of the district engineer, reveal the necessity of modifying the emergency operation, the district engineer should take appropriate measures to modify the emergency operation to reduce, avoid, or minimize adverse environmental impacts. If the district engineer, after receiving comments from the public notice, determines that the emergency action would constitute a major Federal action significantly affecting the quality of the human environment, he should, after consultation with the division engineer, coordinate with the Council on Environmental Quality about alternative arrangements for compliance with the NEPA in accordance with 40 CFR 1506.11 to the extent that it is practicable in view of the emergency situation. District engineers should consult with the appropriate state officials to seek water quality certification or waiver of certification, and should certify that the Federal action is consistent to the maximum extent practicable with an approved coastal zone management plan for emergency activities, to the extent that is practicable in view of the emergency.

#### § 337.8 Reports to higher echelons.

**(a) Certain activities involving the discharge of dredged or fill material require action by the division engineer or Chief of Engineers.** Such reports should be prepared in the format described in paragraph (b) of this section. Reports may be necessary in the following situations:

- (1) When there is substantial doubt as to the authority, law, regulations, or policies applicable to the Federal project;
- (2) When higher authority requests the case be forwarded for decision;
- (3) When the state does not concur in a coastal zone consistency determination or attempts to concur with conditions or controls;
- (4) When the state denies or unreasonably delays a water quality certification or issues the certification with conditions or controls not related to maintenance or enforcement of state water quality standards or significantly exceeding the Federal standard;
- (5) When the regional administrator has advised the district engineer, pursuant to section 404(c) of the CWA, of his intent to prohibit or restrict the use of a specified discharge site; or notifies the district engineer that the discharge of dredged material in ocean waters or territorial seas will not comply with the criteria and restrictions on the use of the site established under the ODA; and the district engineer determines that the proposed disposal cannot be reasonably modified to alleviate the regional administrator's objections; and
- (6) When the state fails to grant water quality certification or a waiver of certification or concurrence or waiver of coastal zone consistency for emergency actions.

**(b) Reports.** The report of the district engineer on a project requiring action by higher authority should be in letter form and contain the following information:

- (1) Justification showing the economic need for dredging.
- (2) The impact on states outside the project area if the project is not dredged.

(3) The estimated cost of agency requirements which exceed those necessary in establishment of the Federal standard.

(4) The relative urgency of dredging based on threat to national security, life or property.

(5) Any other facts which will aid in determining whether to further defer the dredging and seek Congressional appropriations for the added expense or the need to exercise the authority of the Secretary of the Army to maintain navigation as provided by sections 511(a) and 404(t) of the CWA if the disagreement concerns water quality certification or other state permits.

(6) If the disagreement concerns coastal zone consistency, the district engineer will follow the reporting requirement of this section and § 336.1(b)(9) of this chapter.

§ 337.9 Identification and use of disposal areas.

(a) District engineers should identify and develop dredged material disposal management strategies that satisfy the long-term (greater than 10 years) needs for Corps projects. Full consideration should be given to all practicable alternatives including upland, open water, beach nourishment, within banks disposal, ocean disposal, etc. Within existing policy, district engineers should also explore beneficial uses of dredged material, such as marsh establishment and dewatering techniques, in order to extend the useful life of existing disposal areas. Requests for water quality certification and/or coastal zone consistency concurrence for projects with identified long-term disposal sites should include the length of time for which the certification and/or consistency concurrence is sought. The section 404(b)(1) evaluation and environmental assessment or environmental impact statement should also address long-term maintenance dredging and disposal. District engineers should use the guidance at 40 CFR 230.80 to shorten environmental compliance processing time. The Corps of Engineers will be responsible for accomplishing or assuring environmental compliance requirements for all disposal areas. This does not preclude the adoption of other agencies NEPA documents in accordance with 40 CFR parts 1500 through 1508.

(b) The identification of disposal sites should include consideration of dredged material disposal needs by project beneficiaries. District engineers are encouraged to require local interests, where the project has a local sponsor, to designate long-term disposal areas.

§ 337.10 Supervision of Federal projects.

District engineers should assure that dredged or fill material disposal activities are conducted in conformance with current plans and description of the project as expressed in the SOF or ROD. Conditions and/or limitations required by a state (e.g., water quality certification), as identified through the coordination process, should be included in the project specifications. Contracting officers should assure that contractors are aware of their responsibilities for compliance with the terms and conditions of state certifications and other conditions expressed in the SOF or ROD.

### **33 CFR Part 338 - OTHER CORPS ACTIVITIES INVOLVING THE DISCHARGE OF DREDGED MATERIAL OR FILL INTO WATERS OF THE U.S.**

§ 338.1 Purpose.

(a) The procedures of this part, in addition to the provisions of 33 CFR parts 335 through 337, should be followed when undertaking Corps operations and maintenance activities involving the discharge of fill material into waters of the U.S., except that the procedures of part 336 of this chapter will be used in those cases where the discharge of fill material is also the discharge of dredged material, i.e., beach nourishment, within banks disposal for erosion control, etc.

(b) After construction of Corps Civil Works water resource projects, certain operations and maintenance activities involving the discharge of fill material require evaluation under the CWA. These activities generally include lakeshore management, installation of boat ramps, erosion protection along the banks of navigation channels, jetty maintenance, remedial erosion control, etc. While these activities are normally addressed in the existing environmental impact statement for the project, new technology or unexpected events such as storms or high waters may require maintenance or remedial work not fully addressed in existing environmental documents or state permits. In determining compliance with the applicable environmental laws and regulations the

district engineer should use the CWA exemptions at 404(f) and NEPA categorical exclusions to the maximum extent practicable. If the district engineer decides that the changes have not been adequately addressed in existing environmental documentation, the procedures of this part should be followed.

[53 FR 14920, Apr. 26, 1988]

§ 338.2 Activities involving the discharge of dredged or fill material into waters of the U.S.

**(a)** Generally, fill activities conducted by the Corps for operations and maintenance of existing Civil Works water resource and navigation projects are routine and have little, if any, potential for significant degradation of the environment. District engineers are encouraged to develop general authorizations in accordance with section 404 of the CWA and 104 of the ODA following the procedures of § 337.5 of this chapter for categories of such routine activities. The general authorization should satisfy all compliance requirements including water quality certifications and, if applicable, coastal zone consistency determinations. For activities which are not conducive to the development of general authorizations or are more appropriately evaluated on an individual basis, the following procedures should be followed.

**(b)** A public notice should be issued using the procedures § 337.1 of this chapter.

**(c)** Water quality certifications should be requested and, if applicable, coastal zone consistency determinations should be provided using the procedures of § 336.1(b) (8) and (9) of this chapter.

**(d)** The discharge site should be specified through the application of the section 404(b)(1) guidelines.

**(e)** The procedures of 40 CFR part 230 should be used to determine the NEPA compliance requirements.

**(f)** The factors of § 336.1(c) of this chapter should be followed when evaluating fill activities.

**(g)** Upon completion of all required coordination and after receipt of the necessary state certifications, the district engineer should prepare an SOF in accordance with § 337.6.

[53 FR 14920, Apr. 26, 1988]