

***A COLLECTION OF FEDERAL LAWS, REGULATIONS,  
AND POLICY DOCUMENTS PERTAINING TO  
WETLANDS PROTECTION***



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# **Part I - The Clean Water Act**

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**PART I - THE CLEAN WATER ACT**

**Section 1**

**Clean Water Act of 1987**  
(summarized by section)

## **THE CLEAN WATER ACT SUMMARIZED, BY SECTION** (Summary by U.S. EPA)

### **TITLE I - Research & Related Programs**

Title I declares the ultimate objective of the Act is ". . . to restore and maintain the chemical, physical, and biological integrity of the Nation's water." Two national goals support that objective. First, eliminate all pollutant discharges to navigable waters by 1985. Second, achieve feasible and swimmable waters wherever attainable by 1983.

Four national policies support the goals. They are: (1) prohibit the discharge of toxic pollutants; (2) provide financial assistances for publicly owned wastewater treatment plant construction; (3) implement areawide waste treatment management processes; and (4) make a major effort to develop the technology needed for completely eliminating pollutant discharges.

The Act's ultimate objective is an ideal state that all of its practical aspects should contribute to in some way. But neither the objective nor the two goals supporting it are legally enforceable requirements. Only the four national policies contain programs and deadlines that can be enforced through the judicial process.

After stating the objectives, goals, and policies of the statute, the remaining sections of Title I describe a variety of coordinated research efforts intended to further the purposes of the Act. Section 102 discusses coordination between U.S. EPA and other federal agencies, and EPA and state agencies. Section 103 encourages multi-state compacts for pollution control. A long list of research, investigations, training, and information programs are authorized in section 104. Section 105 focuses tightly on research efforts designed to advance various facets of wastewater treatment technology.

State pollution control programs are supported in Section 106. Acid drainage from mines can be fought with the demonstration programs in Section 107, as can pollution problems of the Great Lakes in Section 108. Sections 109, 110, 111, and 112 outline a federal investment in operator training programs run by state agencies and institutions of higher learning.

Specific programs considered especially important when the Act was originally passed or amended appear in the remaining six sections of Title I. Section 117 and 118 are the latest additions to this collection. The Chesapeake Bay Program, in existence since 1972, is formally incorporated into the statute through Section 117, while a Great Lakes National Program Office is created at EPA by Section 118. Section 118 also recognizes U.S. commitments with Canada forged in the Great Lakes Water Quality Agreement of 1978.

### **TITLE II - Grants For Construction Of Treatment Works (See also Title VI).**

Title II creates a federal grant program to support construction of publicly-owned treatment works (POTWs). Its provisions authorize funding, define eligible projects, and set requirements for state and local participation in the grant program. It also creates four of the five comprehensive pollution control planning programs called for in the Act; the fifth program appears in Title III. The Title II programs are POTW facility planning in Section 201, statewide planning in Section 205, areawide planning in Section 208, and interstate river basin planning in Section 209. Of the programs created under this title, those in Sections



201 and 205 are the most active now.

Section 201 explains the specific purposes the grant program is designed to promote. Section 202 describes how different types of POTW construction qualify for different amounts of federal assistance. The necessary plans, specifications, and cost estimates for any grant project are set down in Section 203. Section 204 lists the conditions that a proposed project must meet before it can be approved. Noteworthy for the controversy they created during implementation are the limits on reserve capacity at POTWs, "two brand names or equal" clauses in any contracts let under a grant-funded project, and user charge mechanisms such as ad valorem taxes.

Section 205 is one of the most politically sensitive provisions in the law. It includes the allotment formula EPA must use to divide construction grant funds among the states and territories. Limits are set on how long states may keep allotted funds before they must earmark them for particular grants or return unobligated money to the U.S. Treasury for re-allotment among the remaining states. Small percentages of a state's annual allotment must be set aside for specific types of projects and for the state's own water quality management program.

Section 206 directs the federal government to partially reimburse POTWs that raised their treatment capabilities to the levels required by the Act prior to 1973. The amount of reimbursement for advance construction varies with the date of the improvements.

Section 207 contains the yearly authorizations for the construction grant program. For fiscal years 1982 through 1985, the federal government is authorized to appropriate \$2.4 billion annually. Authorization expired in 1986 until the Act's 1987 amendments were finally adopted. Those changes authorize four more years of grants: \$2.4 billion annually for fiscal 1987 and 1988, and \$1.2 billion annually for fiscal 1989 and 1990. The 1987 amendments retroactively authorize \$2.4 billion for fiscal 1986.

Section 208 creates the areawide waste treatment program. Congress wanted areawide plans to address point and non-point source pollution within areas delineated by a state or group of communities. Plans were produced through the 1970s, but no funds have been appropriated for this provision since 1980. Section 209 directs the President to prepare "Level B" plans for all river basins in the United States, as outlined in the Water Resources Planning Act.

Section 210 requires EPA's administrator to annually survey the efficiency of POTWs built or improved through the grant program in Section 201. Section 211 prohibits Title II grants to sewage collection systems (other than major interceptors) except in two types of projects. The various construction programs of Title II are limited by the definitions of "construction," "treatment works," and "replacement" appearing in Section 212.

Section 213 establishes a loan guarantee program for POTW construction. Through it the EPA Administrator guarantees loans issued by state and local governments to the Federal Financing Bank exclusively. A guarantee is only available if, without one, the originator cannot find enough credit on reasonable terms in the private market. The Secretary of the U.S. Treasury determines whether credit is available on reasonable terms. This section of the Act has not been used once since 1972.

Section 214 directs the EPA Administrator to create an ongoing public education program about recycling and reusing wastewater land treatment for effluents, and wastewater reduction methods. The "Buy America" requirement for anyone receiving a grant under Title II appears in Section 215. Deciding the relative priority of one type of grant project, compared to any other type, is a prerogative of state agencies, subject to the conditions set down in Section 216.

Sections 217 and 218 detail the cost-effective considerations that all participants in the grant

program must fulfill. "Life-cycle" cost analysis and "value engineering" are two of the better known requirements covered in these sections.

Section 219 is the final provision in Title II. It gives the EPA administrator 45 days to act on grant applications that a state certifies as meeting all relevant requirements in the Clean Water Act. If the Administrator does not act within 45 days, the application is automatically approved.

### **TITLE III - Standards and Enforcement**

Title III contains the standards and standard-setting procedures that must be used in the National Pollutant Discharge Elimination System (NPDES). Some Title III sections explain how to develop and apply "technology-based" effluent limits. Others outline the process for creating "water quality-based" effluent limits.

Technology-based limits prescribe minimum standards of pollution control for municipal and industrial dischargers without regard for the quality of the receiving waters. In contrast, water quality-based standards identify an intended use for the receiving waters and prescribe the biological and chemical conditions that must be met to sustain that use.

Permitting authorities (EPA or the states) use technology-based standards to set minimum control requirements for all discharges in a body of water. In some cases, however, technology-based standards are not enough. If water quality does not support the designated use even after every discharger meets his technology-based standards, additional controls must be applied. Water quality-based standards are the basis for such restrictions.

Section 301 makes any discharge of pollutants unlawful unless it complies with this section and sections 302, 306, 307, 318, 402, and 404. The limitations set forth in this section are the technology-based limits called for by the Act. Some of the substances controlled by technology-based limits are known as "priority pollutants" because they appear on the Priority Pollutant List created by Congress in the 1977 amendments to the Act. Several deadlines for meeting the various limits are built into Section 301. The most important are:

July 1, 1977 - The date by which industrial dischargers must apply "best practicable control technology" or BPT" to their effluents.

July 1, 1977 - The date by which industrial customers of municipal treatment systems must comply with local pretreatment requirements and the conditions in section 307.

July 1, 1977 - The date by which POTWs must meet effluent limitations based upon "secondary treatment," or more stringent limits if required by the state.

July 1, 1988 - The date by which POTWs unable to meet the 1977 deadlines because they could not finance needed construction must complete their improvements and attain secondary treatment.

"Promulgation of 3 years" - a date three years from the day an effluent limitation is promulgated by which industrial dischargers must meet that limit for toxic pollutants, for other pollutants, and "best conventional pollutant control technology" or "BCT."

March 31, 1989 - the latest possible date by which industrial dischargers must meet BCT, "best available technology" or "BAT," and any other effluent limits required by the Act.

Section 301 also contains several subsections that describe exceptions to the deadlines just listed. For example, coastal municipalities that discharge to the ocean can apply for waivers from the secondary treatment requirement in situations carefully circumscribed by the provisions in 301(b). Industrial dischargers can seek waivers based on "fundamentally different factors" under 301(b). Such waivers are known as "FDF variances." EPA may charge application fees for some of the waivers and variances contained in this section.

Finally, Section 301 describes the authority the EPA Administrator has to add or remove substances from the list of priority pollutants. It outlines a set of procedures that must be followed whenever a substance is moved on or off the list.

Section 302 requires "water quality-based" limits whenever meeting the technology-based standards in Section 301 fails to achieve or maintain the water quality called for in the river or stream. Public involvement in setting water quality-based standards for a particular body of water is required, and provisions are made to waive such standards for any discharger who can prove that meeting it is not worth the social and economic costs in his case.

Section 303 provides for a transition to the water quality standards required by the Act if states were in the process of setting their own standards immediately prior to the Act's adoption in 1972. It also details the way in which such standards are reviewed and modified by states. Section 303 also requires states to identify the waters within their boundaries that cannot meet water quality even after all dischargers apply technology-based limits. It then lays out a process to develop and apply the water quality-based limits called for in Section 302.

Since Sections 302 and 303 deal with the extremely complex matter of setting water quality standards, Section 304 mandates a long-term program of research and analysis to produce the information needed to create such limits. The standards must be based on ideal limits called "water quality criteria," tailored to the designated uses of the water body in question. Section 304 also tells U.S. EPA what it must do to adopt or revise the technology-based standards of Section 301.

Section 304 applies to programs in Title II as well. For example, it directs EPA to issue guidelines on identifying and controlling nonpoint sources of pollution. To fulfill its mission in this area, EPA investigates a range of activities that cause diffuse, intermittent flows of pollutants. Runoff from fields and forests, mining activities, construction, underground infection, and salt water intrusion are examples of nonpoint sources. Programs under the jurisdiction of the Secretaries of Agriculture, Interior, and the Army are affected by EPA's actions under Section 304, so the provision involves their departments in 304 programs, too.

Section 305 requires EPA and the states to prepare a nationwide inventory of point source discharges and of water quality in all navigable waters. The report must be presented to Congress by January 1, 1974, and updated every two years thereafter.

Section 306 establishes a list of particular industrial dischargers, arranged according to their activities, for which controls called "performance standards" must be set. These discharges are termed "sources." The Act orders EPA to set performance standards for "new sources" which start discharging after PL 92-500 is passed. New source performance standards require an industry to adopt the best pollution control technology and methods available at the time it begins discharging.

Section 307 returns to the Priority Pollutant List mentioned in Section 301. This section describes the factors that EPA must consider when setting effluent standards for priority pollutants. It requires public consideration of those standards before they are finalized and orders all standards reviewed every three years. There are two types of standards for priority pollutants. One group applies to industries that

discharge their effluents directly to receiving waters. The other group applies to industries that must pretreat their effluents before releasing them to public sewers.

Section 308 invests EPA with the authority needed to require all dischargers to maintain adequate monitoring and record-keeping facilities. It also prescribes how EPA and its authorized representatives can inspect a discharger's facilities or its records and monitoring stations.

Continuing with the theme of enforcement, Section 309 sketches the boundaries for federal enforcement programs. Under it, EPA has the authority to seek administrative, civil, or criminal penalties against violators. It may: issue administrative orders requiring a discharger to comply with its NPDES permit; take civil action against someone; or seek criminal penalties for negligent violations, knowing violations, or false statements in any of the documents required under the Act. This section also describes various forms of judicial review available to anyone assessed a civil penalty under the Act.

Section 310 acknowledges the international implications of national water pollution control. EPA has authority to locate U.S. sources of international pollution and then involve the states where such discharges reside in negotiations that are designed to reduce pollution endangering people in a foreign country. Negotiations must also include the Secretary of State or his representatives.

Pollution control moves offshore in Section 311. This section declares a U.S. policy prohibiting the discharge of oil or hazardous substances to navigable waters, waters in the "contiguous zone," or waters of the Outer Continental Shelf. At the heart of Section 311's requirements is the National Contingency plan for removing oil and hazardous substances. The National Contingency Plan and related programs are capitalized by a federal deposit of \$35 million, with supplemental appropriations considered by Congress whenever the balance drops below \$12 million. Section 311 authorizes the federal and state governments to recover the costs of pollution control and of damages caused by violations, depositing them in the Plan's account.

Section 312 addresses the use of marine sanitation devices. Programs and procedures created by Section 312 are intended to prevent the discharge of untreated or inadequately treated wastewater from vessels. Companies producing such devices must comply with certain provisions in the section, marina owners and vessel owners with other provisions.

Section 313 deals with the need to control water pollution from federal facilities. Military bases, national parks, and a myriad of other federal installations must obey the Clean Water Act as much as any nonfederal discharger. Waivers and exceptions to the Act's requirements can be obtained under certain circumstances.

The desire to protect water quality in publicly owned lakes is contained in Section 314. A "Clean Lakes" program is created in this section, through which states can survey their lakes and apply for federal assistance to improve the water quality in some of their more seriously degraded ones. Specific lakes are named as demonstration sites for pollution control and restoration techniques.

Section 315 creates a 15-member National Study Commission to investigate the technical, economic, and social aspects of meeting the requirements of Section 301. The Commission's report and any recommendations for improving the programs created by PL 92-500 were presented to Congress in 1976, some three years after the Act was passed.

Section 316 tackles the phenomenon of thermal pollution in receiving waters. The effluent standards presented in Section 301 include standards for controlling the temperature of discharges to receiving waters, since water temperature strongly influences the biological and chemical activities within a stream. Power plants are most directly affected by the requirements of this section.

In Section 317, Congress directs the EPA Administrator to study alternatives to the municipal construction grants program in Title II. The possibility of using a pollution abatement trust fund, analogous perhaps to the national Highway Trust Fund, is specifically mentioned as such an alternative. As directed by this section, EPA delivered a study to Congress in 1974 and recommended that the grants program be continued.

Aquaculture is granted special consideration under Section 318. In it, EPA is authorized to set special discharge requirements under controlled conditions for any aquaculture project approved under Section 402.

Section 319 is one of the 1987 amendments to the Act. It encapsulates much of what has been learned about nonpoint sources and their control in the last 15 years. States are directed to inventory waters within their jurisdiction that fail to meet water quality standards because of nonpoint source pollution. They present EPA with a plan for controlling nonpoint sources and a schedule for doing so. Once the inventory of affected waters and a plan for controlling them have been presented to EPA, the agency is authorized to make grants to any state that implements such a plan.

A second major 1987 addition is the National Estuary Program in Section 320. Through it, state governors can single out an estuary and ask EPA to convene a "management conference" to produce an overall plan for controlling water quality in the estuary. Eleven estuaries are given top priority. Among them are Long Island Sound, Narragansett Bay, Puget Sound, Delaware Bay, Galveston Bay, and San Francisco Bay.

#### **TITLE IV - Permits & Licenses**

Title IV is the heart of the Clean Water Act. It contains the National Pollutant Discharge Elimination System (NPDES) that limits discharges to the navigable waters of the United States. Every point source discharger must receive a permit from either EPA or an authorized state. Thus, the permit system is the key to enforcing the effluent limitations and water quality standards of the Act. Allowances are made, however, for additional pretreatment of conventional pollutants and the establishment of a partial permit program for discharges into navigable waters. Permits for separate storm sewers are required, as are permits for dredging and disposal of dredge spoils.

Dischargers without permits or in violation of their permits are considered unlawful and are subject to the civil and criminal penalties in Sections 301 and 309. Permit limitations are reviewed and changed as needed. But "anti-backsliding" provisions prevent renewal, re-issue, or modification of permits where effluent limitations are less stringent than those in the previous permit except in certain defined situations. Since wastewater treatment produces sludges composed of the solids removed from the waste stream, Title IV includes directions for managing the disposal or recycling of such sludges.

Section 401 requires everyone planning a pollution discharge to certify they will comply with all limitations placed on that discharge under the provisions of Title III. The certification procedure allows for public comment on the proposed discharge, interstate negotiations if an adjacent state objects to the discharge, and review of the discharger's operations to verify they can meet the limits. No discharger can receive an NPDES permit without certification.

After being certified, a discharger must comply with the provisions in Section 402. This section describes in great detail what must be done by each involved party when an NPDES permit is issued. It also spells out the authorities that a state must have if it wants to take over permit-writing responsibilities from the U.S. EPA. Partial assumption is possible, and provisions are made for returning authority to EPA, if necessary.

Some exemptions to the permit requirement are allowed. These are listed in Section 402, along with certain types of waivers from other permit requirements, cross-referenced to provisions in Title III. "Anti-backsliding" safeguards appear in Section 402, as do requirements for permitting separate storm sewer discharges.

Section 403 addresses the problem of issuing permits for ocean discharge. The Act prohibits discharges in marine waters unless they comply with guidelines EPA issues under this section. If the information on a proposed discharge and its effects is insufficient to make a reasonable judgment under the guidelines, no permit can be issued.

Section 404 authorizes a special permit program to control dredge and fill operations. It makes the Secretary of the Army responsible for issuing such permits. But the Secretary and the EPA Administrator are jointly responsible for setting the guidelines by which permits are to be judged. EPA is involved in the 404 permit program in other important ways, too. For example, EPA controls what areas can be listed as suitable disposal sites and can prohibit certain materials from being discharged at an approved site on certain grounds. Permits issued under Section 404 expire at the end of five years.

Section 405 brings the management of wastewater treatment sludge under the NPDES permit program. It requires EPA to identify by November 30, 1986, those substances whose toxicity and persistence can render a sludge hazardous to public health. By August 31, 1987, the Agency must publish a final set of regulations for the proper disposal of such sludges. A July 31, 1987, deadline is set for identifying a second set of sludge contaminants with final regulations for their control due by June 15, 1988. Finally, Section 405 allows a sludge management agency to meet its permit obligations in this area by complying with alternative sludge disposal provisions in a permit issued under the Solid Waste Disposal Act, the Safe Drinking Water Act, the Marine Protection, Research & Sanctuaries Act, the Clean Air Act, or an EPA-approved state permit program.

## **TITLE V - General Provisions**

Title V embraces a diverse set of programs, authorities, and responsibilities. Administrative procedures and judicial review provisions appear here. Specific terms whose exact definitions are important to understanding the scope of PL 92-500 programs are defined in this title. Important powers that are reserved to state governments, plus a citizen's right to sue under this statute fall under Title V's purview.

Section 501 gives the EPA Administrator the basic authority to carry out other sections of the law. Section 502 defines such key terms as "person," "pollutant," "navigable waters," and "discharge of pollutant," among others. Section 503 establishes a Water Pollution Control Advisory Board within EPA to advise the Administrator on policy matters arising under the implementation of the Act. Section 504 allows the Administrator to move swiftly through the U.S. district courts to restrain any discharge that threatens public health or the livelihood of people, such as shellfish harvesters.

Section 505 allows any citizen to take civil action on his or her own behalf against someone else who violates provisions in the law. Courts are allowed to award such a plaintiff the costs of their litigation if they prevail or "...substantially prevail..." in a civil suit. Section 505 also allows the Governor of a state to initiate action against the federal government in the person of the EPA Administrator if EPA fails to enforce the standards and limits in the Act, causing harm within that state.

Section 506 requires the U.S. Attorney General to represent the United States in any civil or criminal action in which the EPA Administrator is a party. However, the section permits EPA attorneys to represent the United States in civil actions when the Attorney General chooses not to do so.

Section 507 protects any employee who files or supports the filing of an enforcement action under the Clean Water Act. Employees cannot be fired or discriminated against in any way simply because they report violations of the Act. Along the same line, this section authorizes EPA to investigate any business that threatens to close its facility or reduce its workforce on the rationale that it cannot meet permit requirements without doing so.

A private business's ability to supply the federal government with goods and services is limited by Section 508. Anyone convicted of an offense under Section 309 cannot contract for new government work at facilities where the violations leading to the offense occurred. In extreme cases of national importance this procurement ban can be lifted, but the President must notify Congress whenever he makes an exception.

Administrative and judicial review procedures appear in Section 509, while authorities reserved to the states are treated in Section 510. Other responsibilities outside those covered in the Clean Water Act that relate to programs created under this statute are safeguarded in Section 511. Section 512 maintains the validity of the Act in all instances except where a provision is held invalid in a particular case. Section 513 applies the requirements of the Davis-Bacon Act to construction and labor supported by the construction grants program in Title II.

Section 514 requires the agency issuing NPDES permits under Section 402 to help a permit applicant coordinate the permit's requirements with those of the appropriate public health agencies. Section 515 sets up the Effluent Standards and Water Quality Information Advisory board. Section 516 directs EPA to produce several types of routine reports; among them are the Needs Survey of municipal wastewater construction addressed in Title II and the state revolving funds created in Title VI.

General authorizations to pay for programs elsewhere in the Act fall into section 517. Larger programs in other titles often have separate authorizations and thus are excluded from the scope of this section.

Section 518 is a 1987 amendment to the Act. It treats American Indian tribes as states for the purposes of the statute. Under this mandate, tribes may apply for municipal construction grants, establish their own water quality standards for water bodies under their control, receive grants for nonpoint source control, and forge cooperative agreements with any state in which the tribe's lands are situated to carry out Clean Water Act programs.

Title V concludes with Section 519, which allows the statute to be cited as the "Federal Water Pollution Control Act," and which acknowledges that it is commonly referred to as the "Clean Water Act."

## **TITLE VI - State Water Pollution Control Revolving Funds**

Section 601 empowers EPA to make capitalization grants to states so they can establish water pollution control revolving funds to: (1) construct municipal treatment works; (2) implement the management program called for in Section 319; and (3) prepare and carry out the conservation and management plan described in Section 320. Capitalization grants must be made in quarterly installments. Each payment must be completed no later than two years after funds are obligated by the state or four years after the funds are allotted to states, whichever is earlier.

Section 602 outlines a 10-point agreement with EPA. For example, they must match any federal contribution with a sum that equals 20% of that contribution. States also have to commit the monies in their fund within a year of receiving each sum. Each year, the state must report how the monies in the fund are

actually used, demonstrating it is maintaining progress towards the enforceable requirements of the Act.

How a state can actually use the money in its revolving fund is controlled by Section 603. In certain cases, money from the fund can be used to pay for the nonfederal share of POTW construction also receiving grant funds under Section 201. This special condition aside, only seven uses are allowed.

First, loans for wastewater treatment can be made at market rates, below market rates, or at no interest rate at all. Second, states can buy or refinance a POTW's own debt obligations, thus reducing the carrying cost to the original issuer. Third, states can guarantee or insure a local obligation to increase its attractiveness. Fourth, the fund can be used as a form of collateral on the state's own bond sales, provided the proceeds of the sales are deposited in the fund. Fifth, fund monies can be used to guarantee smaller revolving funds set up by local governments. Sixth, a state's fund can earn interest for itself. And seventh, a maximum of 4% of the federal deposits made to the fund can be used to pay for operating the fund.

Section 604 requires EPA to use the grant allotment formula in Title II to also set capitalization grants of revolving funds. The section permits states to reserve 1% or \$100,000--whichever is greater--to carry out the planning they must do under Sections 205 and 303. Liked grant allotments, revolving fund allotments are available in a state for two fiscal years. Any uncommitted monies return to EPA and are re-allotted to all other states.

Section 605 allows EPA to withhold capitalization grants if the agency determines that a state is not meeting its 10-point agreement. Once notified that they are not meeting the purposes of the revolving loan fund program, states have 60 days to correct their noncompliance. Any state that cannot correct its problems within a year of EPA's notice loses its remaining grants to the re-allotment process.

Section 606 stipulates the fiscal controls and accounting procedures that a state must use for its fund. Federal audits must be done at least once a year. States must prepare an intended Use Plan annually, describing exactly how they will commit the monies in the fund. At the beginning of each fiscal year, states must also tell EPA how well it did in meeting its goals and objectives the previous year. Finally, EPA must conduct an annual oversight review of each state's complete operation and can require revolving loan fund beneficiaries to provide reasonable amounts of information to complete that review.

Section 607 authorizes Congress to appropriate money for capitalization grants as follows:

1989: \$1.2 billion	1992: \$1.8 billion
1990: \$1.2 billion	1993: \$1.2 billion
1991: \$2.4 billion	1994: \$0.6 billion

#### Appendix A - Short-Term Precursors to the 1972 Act

Before PL 92-500 was enacted on October 18, 1972, Congress passed several short-term extensions to the Federal Water Pollution Control Act of 1956. Known as PL 84-660, that statute had already been amended several times before. For historical accuracy, certain sections of the extensions enacted in 1972 deserve to be listed with the 1972 law. They are short and relatively easy to understand. For this reason, no summaries of the provisions appear in this publication. Full text entries, however, appear on pages 291-299.

#### Appendix B - Stand-Alone Sections of PL 95-217, the 1977 Act

Several provisions in the 1977 amendments to PL 92-500 do not amend that statute. They stand



as separate mandates and requirements and are cited as provisions of PL 95-217 only. Nevertheless, they bear directly on the programs created by the 1972 law and reflect accommodations and adjustments important at the time.

#### **Appendix C - Section 26 of PL 97-117, the 1981 Act**

Section 26 of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 did not amend PL 92-500. However, it makes recommendations regarding consent decrees reached between EPA and certain plaintiffs before the 1981 law was enacted. Section 26 is short and need not be summarized here. Please see page 303 for the full text.

#### **Appendix D - List of Priority Pollutants Referred to in Section 307**

This appendix contains the list of toxic substances called "priority pollutants." Substances on this list have received special attention in EPA's standard-setting process since the list was incorporated into the statute by reference in the 1977 amendments to the act.

#### **Appendix E - Stand-Alone Sections of PL 100-4, the 1987 Act**

Below is a list of 18 provisions in PL 100-4 that do not amend the 1972 law. They bear directly on some of the programs created by the latter and reflect several important additions or changes to it. The full text of these stand-alone provisions starts on page 306.

- Sec. 317 - National Estuary Program**
- Sec. 381 - Unconsolidated Quaternary Aquifer**
- Sec. 407 - Log Transfer Facilities**
- Sec. 508 - Special Provisions Regarding Certain Dumping Sites**
- Sec. 509 - Ocean Discharge Research Projects**
- Sec. 510 - San Diego, California**
- Sec. 511 - Limitation on Discharge of Raw Sewage by New York City**
- Sec. 512 - Oakwood Beach and Red Hook Projects, New York**
- Sec. 513 - Boston Harbor and Adjacent Waters**
- Sec. 514 - Wastewater Reclamation Demonstration**

**PART I - THE CLEAN WATER ACT**

**Section 2**

**Section 404 of the Clean Water Act**

## Section 404 of the Clean Water Act

### Statute

- 404(a) -** Authorizes the Corps to issue permits for the discharge of dredged or fill material in navigable waters.
- 404(b) -** Directs EPA, in conjunction with the Corps, to develop guidelines for the evaluation of applications under 404(a). Guidelines are binding regulations except as provided in 404(b)(2) when the Corps determines a project is necessary for navigation and anchorage.
- 404(c) -** Allows the EPA to either predesignate a site as unsuitable for the discharge of dredged or fill material or "veto" a Corps issued permit. Such actions are based on an EPA determination of unacceptable adverse impacts to fish, shellfish, water supply, or wildlife.
- 404(e) -** Allows the Corps to issue general permits on a regional, statewide, or nationwide basis for specific categories of activities which have minimal individual and cumulative impacts.
- 404(f) -** Exempts certain emergency repairs to bridges, roads, dikes and so forth. Also exempts routine agricultural and silvicultural activities provided that they do not bring Waters of the United States into a use to which they were not previously subject or diminish the reach of such waters.
- 404(g)-(l)** These sections deal with EPA's responsibilities to delegate the 404 program to qualified states.
- 404(q) -** Directs the federal agencies involved with the program to develop MOAs with the Corps to shorten processing time and handle controversial cases.
- 404(r) -** Exempts congressionally authorized projects from permit requirements provided that an EIS is prepared which considers EPA's 404(b)(1) Guidelines.
- 404(s) -** Gives the Corps the authority to enforce against violations of permit conditions.

### Regulations

1. EPA Section 404(b)(1) Guidelines (40 CFR 230) - 12/24/80; 8/25/93
2. EPA State Program Regulations (40 CFR 232-233) - June 6, 1988
3. U.S. Army Corps Regulations (33 CFR 320-330) - 11/13/86; 8/25/93

#### **Sec. 404. Permits for Dredged or Fill Material**

(a) The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zones, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined areas as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) (1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) (1) Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material:

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

- (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
  - (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
  - (D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
  - (E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.
  - (F) resulting from any activity with respect to which a State has an approved program, under section 208(b)(4) which meets the requirements of subparagraphs (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this act (except for effluent standards or prohibitions under section 307).
- (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.
- (g) (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than 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 their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State or the interstate compact, as the case may be, provide adequate authority to carry out the described program.
- (2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.
- (3) No later than the ninetieth day after the date of the receipt by the Administrator of the

program and statement submitted by any State, under paragraph (1) of this subsection the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

- (h) (1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:
- (A) To issue permits which:
    - (i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 307 and 403 of this Act;
    - (ii) are for fixed terms not exceeding five years; and
    - (iii) can be terminated or modified for cause including, but not limited to, the following:
      - (I) violation of any condition of the permit;
      - (II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
      - (III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.
  - (B) To issue permits which apply, and assure compliance with, all applicable requirements of section 308 of this Act, or to inspect, monitor, enter, and require reports to a least the same extent as required in section 308 of this Act.
  - (C) To assure that the public, and any other State the waters of which may be affected, receive notice of any application for a permit and to provide an opportunity for public hearing before a ruling on each such application.
  - (D) To assure that the Administrator receives notices of each application (including a copy thereof) for a permit.
  - (E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendation to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.
  - (F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.
  - (G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

- (H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.
- (2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State:
  - (A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State, and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or
  - (B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.
- (3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.
- (4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.
- (5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.
  - (i) Whenever the Administrator determines after public hearing that a State is not administering a program approved under section (h)(2)(A) of this section, in accordance with this section, including but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the programs for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.
  - (j) Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the

Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E), or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 30 days after completion of the hearing or, if no hearing is required within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this Act.

(k) In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge with the State submitting such program.

(l) The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among class, types, and sizes within any category of discharges.

(m) Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

(o) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.



(p) Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 307, and 403.

(q) Not later than the one-hundred-eightieth day after the date of enactment of this subsection, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date of notice of such application is published under subsection (a) of this section.

(r) The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after the date of enactment of this subsection, is not prohibited by or otherwise subject to regulation under this section or a State program approved under this section, or section 301(a) or 402 of the Act (except for effluent standards or prohibitions under section 307) if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(9) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for each construction.

- (s) (1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such persons to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.
- (2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporation officers.
- (3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.
- ((4) (A) Any person who willfully or negligently violates under condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by fine of not more than \$50,000

per day of violation, or by imprisonment for not more than two years, or by both.]

[(B) For the purposes of this paragraph, the term "person" shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.]

- [(5)]** (4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed ~~[\$10,000 per day of such violation.]~~ *\$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.*
- (l)** Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

**PART I - THE CLEAN WATER ACT**

**Section 3**

**A Guide to Federal Wetlands Protection  
Under Section 404 of the Clean Water Act**



# Anadromous Fish Law Memo



Issue 46

August 1988

## A GUIDE TO FEDERAL WETLANDS PROTECTION UNDER SECTION 404 OF THE CLEAN WATER ACT

The link between wetlands protection and healthy fisheries is one often overlooked. Yet fully two-thirds of commercially harvested fish in the United States waters depend on wetlands for food or spawning and rearing grounds. Salmon are especially dependent on wetlands during the fresh water phase of their life cycle and in making the transition to the marine environment.

Although wetlands, such as swamps, marshes and bogs, are among the most productive sources of food protein -- more productive than the most fertile farms -- protecting wetlands has always been controversial. Wetland benefits are widely dispersed (although often poorly perceived) among fishers, hunters, and other users of water resources. But unlike most other areas of the aquatic environment, wetlands are capable of being privately owned. Since wetlands often supply attractive sites for industrial, agricultural, and residential developments, wetland owners have strong economic incentives to replace wetlands with airports, port facilities, soybean fields, and shoreland housing. It is therefore not surprising that around 55% of the nation's original wetland acreage has been lost, and we continue to lose over 300,000 acres a year.

Wetlands can be protected by government purchase; however, in an era of fiscal restraint it

is impractical to purchase more than a fraction of wetlands threatened by developments. Conservation easements are another possibility, but these too usually require government appropriation, and generally supply only short-term protection. Consequently, regulation is the principal source of wetlands protection, and the chief regulatory program is a federal one, authorized by section 404 of the Clean Water Act.

This Memo comprehensively reviews the 404 program, its history, its current operation, and its future. It focuses special attention on the intergovernmental tension between the U.S. Army Corps of Engineers, charged with issuing 404 permits, and the Environmental Protection Agency, responsible for overseeing the Corps. This tension, largely the product of regulatory ambivalence on the part of the Corps, has characterized 404 regulation from its inception over 15 years ago and continues to pose troublesome questions concerning the program's jurisdictional scope, permit criteria, and enforcement. This Memo, written with the assistance of D. Bernard Zaleha, J.D. 1987, Lewis and Clark Law School, analyzes these issues in detail and makes suggestions about how the program can better fulfill its mission of protecting the nation's diminishing wetland resources.

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**INSIDE:** History of 404 Regulation; Jurisdictional Issues; Permit Criteria; EPA's 404(c) Powers; Enforcement; the Takings Issue.

## I. History of 404 Regulation

Many of the peculiarities and complexities of 404 regulation are due to its antecedents: few environmental regulatory programs can trace their roots to the Nineteenth Century. This history accounts for the Corps of Engineers role as the permitting agency, which in turn has produced a considerable amount of intergovernmental tension, as Congress has been unwilling to assign the Corps plenary authority over wetlands regulation. Instead, it has ratified a complex system of interagency coordination and checks, described by Professor Rodgers as an example of "multiple loci of decisional power."<sup>1</sup> These tensions have produced a regulatory ambivalence, perhaps the chief characteristic of the 404 program as it evolved over the past decade and a half.

### A. The Nineteenth Century Antecedents

In 1802, Congress created the U.S. Army Corps of Engineers to erect and maintain frontier forts and other defense facilities.<sup>2</sup> Two decades later in 1824, Congress authorized the Corps to undertake river and harbor improvements promoting navigation.<sup>3</sup> In the post-Civil War Era, congressional navigation appropriations constituted the largest federal construction expenditures,<sup>4</sup> even though the era of large multiple use projects had not yet dawned.<sup>5</sup> At the same time that it entrusted navigation responsi-

bilities to the Corps, Congress made draining and filling of wetlands for land reclamation national policy.<sup>6</sup>

While responsible for river and harbor civil works, the Corps had no regulatory role until 1890.<sup>7</sup> That year, prompted by a Supreme Court decision holding that in the absence of a federal regulatory scheme, Oregon could authorize or prohibit dams, bridges, or other obstructions to navigation,<sup>8</sup> Congress required the approval of the War Secretary of all construction activities and the desposition or refuse into navigable waters.<sup>9</sup> Nine years later, Congress revised the regulatory scheme in the Rivers and Harbors Act of 1899.<sup>10</sup> Section 10 of that Act authorized the Secretary to regulate dredging, filling, and construction activities in navigable waters, while section 13 prohibited the deposit of refuse without permission of the Secretary. These provisions have remained essentially unchanged for nearly 90 years.<sup>12</sup>

### B. The Evolving Permit Program

Until the 1960s, the Corps confined its permit authority to reviewing the effects on navigation of proposed activities in navigable waters.<sup>13</sup> The 1899 Act thus remained a rela-

1. W. Rodgers, Environmental Law: Air and Water § 4.12 at 185 (1986).

2. Act of March 16, 1802, ch. 9, § 26, 2 Stat. 132, 137. On the evolution of the role of the Corps, see especially Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 Va. L. Rev. 503, 505-09 (1977).

3. Act of May 10, 1824, ch. 48, § 1, 2 Stat. 66, 67 (Act authorizing the Corps to deepen the harbor channel at Presque Isle, Pennsylvania and to restore Plymouth Beach, Massachusetts).

4. See Moser, Dig They Must, the Army Corps of Engineers, Securing Allies, and Acquiring Enemies, Smithsonian, Dec. 1976 at 43.

5. Large-scale dam building did not begin until the Progressive Era, when Congress passed the first Reclamation Act in 1902, Pub. L. No. 57-161, 36 Stat. 388 (codified in scattered sections of 13 U.S.C.). The Corps, which was slow to recognize the non-navigation benefits of water projects, was not given a role in the reclamation program. See S. Hays, Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920 at 108 (1959) (Corps wedded to single-use projects); A. Morgan, Dams and Other Disasters: A Century of Army Corps of Engineers in Civil Works 252-302 (1971) (Corps' resistance to reservoir development to control floods). The Corps' uneasy relationship with the Progressive conservationists is sketched in Blumm, The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act, 58 Wash. L. Rev. 175, 181-87 (1983).

6. The Swamp Lands Act of 1849, 1850, and 1860 granted 15 Western states nearly 65 million acres for swamp "reclamation." See U.S. Fish and Wildlife Service, U.S. Dep't of the Interior, Circular No. 39, Wetlands of the United States 5 (1956). Fortunately, because of the pervasive fraud in Nineteenth Century land grant programs, not all of the 65 million acres were actually wetlands, and much of what was wetland was never really reclaimed. See E. Dick, The Lure of the Land 358 (1970).

7. The Corps had sought such a role since 1877, however. See Power, above note 2, at 506 (describing the "Dolph Bill").

8. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

9. Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426, 453-54.

10. Act of March 3, 1899, ch. 425, 30 Stat. 1121. Although represented to Congress as a recodification of the 1890 Act, the 1899 Act enacted some significant changes, including the requirement in § 9 of congressional consent for bridges, dams or causeways. 33 U.S.C. § 401.

11. 33 U.S.C. §§ 403, 407.

12. However, § 13 has been superceded by the National Pollutant Discharge Elimination System (NPDES) permit authority of the Environmental Protection Agency and the states established by §§ 402 and 405 of the Clean Water Act, 33 U.S.C. §§ 1342, 1345. See generally W. Rodgers, above note 1, §§ 4.11-12; Barker, Sections 9 and 10 of the Rivers and Harbors Act of 1899: Potent Tools for Environmental Protection, 6 Ecology L.Q. 309 (1976); Went, Federal Wetlands Law: The Cases and the Problems, 8 Harv. Envtl. L. Rev. 1 (1984); 33 C.F.R. §§ 320.2, 321-22 (current Corps' regulations).

13. See generally Ablard & O'Neil, Wetland Protection and Section 404 of the Federal Water

lively uncontroversial federal control over aquatic development. However, three occurrences catapulted the old statute into the forefront of the burgeoning environmental movement in the 1960s and early 1970s.

First, the Supreme Court began to broadly construe the applicability of the Act to include industrial wastes, irrespective of any effect on navigation.<sup>14</sup> Thus, the Corps' permit program became a vehicle to control water pollution. Second, in 1967 the Secretaries of the Army and the Interior signed a Memorandum of Agreement in which the Army Secretary agreed to implement the Fish and Wildlife Coordination Act<sup>15</sup> by considering the views of Interior on the merits of proposed activities.<sup>16</sup> This led, a year later, to the promulgation of the Corps' fabled "public interest review" as the chief criteria for permit issuance.<sup>17</sup> Under this litmus, the Corps began to evaluate proposals on the basis of a broad-reaching nonquantitative cost-benefit analysis, including balancing project benefits against environmental costs.<sup>18</sup> Its authority to deny permits because of adverse effects on fish and wildlife was confirmed in a landmark case in 1970.<sup>19</sup>

The third development was President Nixon's 1970 Executive Order directing the Corps to institute a comprehensive permit program regulating the discharge of water pollutants.<sup>20</sup> Although the program was quickly enjoined by a federal district court,<sup>21</sup> the Executive Order gave significant impetus to the passage of the 1972 Federal Pollution Control Act Amendments.<sup>22</sup>

### C. The 1972 Federal Water Pollution Control Act Amendments and Their Aftermath

When Congress enacted its comprehensive regime to produce "fishable and swimmable" waters by 1983 and eliminate all pollutant discharges by 1985,<sup>23</sup> it defined "pollutant" extremely broadly. Because the definition included "dredged spoil,"<sup>24</sup> it was of no small concern to the Corps, the nation's largest nonnavigational dredger.<sup>25</sup> Not wishing to have its dredging operations subjected to regulation by the Environmental Protection Agency (EPA) and pointing out that it already was administering a permit system, the Corps succeeded in convincing Congress to create an exemption to the EPA pro-

#### Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance, 1 Vt. L. Rev. 51, 54-58 (1976).

14. United States v. Republic Steel Corp., 362 U.S. 482 (1960) (discharge of industrial solids prohibited by § 10); United States v. Standard Oil, 384 U.S. 224 (1966) (discharge of gasoline prohibited by § 13).

15. 16 U.S.C. §§ 661-666c (promising "equal consideration" of wildlife conservation with other features of water resources development by requiring federal agencies to (1) consult with federal and state wildlife agencies, (2) give "full consideration" to their recommendations, and (3) include "justifiable" measures considered by the federal action agency to maximize overall project benefits). For overviews of the Coordination Act, see Barton, Wetlands Preservation in National Audubon Society, The Audubon Wildlife Report 1985 at 218-29 [hereinafter Barton I]; Veiluva, The Fish Wildlife Coordination Act in Environmental Litigation, 9 Ecology L.Q. 489 (1980); Note, Environmental Protection Under the Fish and Wildlife Coordination Act: The Road Not Taken, 2 Va. Nat. Resources L. 53 (1982); The Fish and Wildlife Coordination Act and Columbia Basin Water Project Operations, Memo #6 (Mar. 1980).

16. Memorandum of Agreement between Secretary of the Army Stanley Resor and Secretary of the Interior Stewart Udall (July 13, 1967), reprinted at 33 Fed. Reg. 18,672-673 (1968). In the agreement the Army Secretary promised to "carefully evaluate" the advantages and benefits of the proposed activity when the Interior Secretary considered it to "unreasonably impair natural resources or the related environment." Id.

17. 33 Fed. Reg. 18, 672-673 (formerly codified at 33 C.F.R. § 209.120(d)(11)).

18. 33 C.F.R. § 320.4(a). See below notes 222-24 and accompanying text.

19. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). ("The Corps was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been routinely granted five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a Silent Spring-like disturbance of nature's economy.")

20. Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (1970).

21. Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971) (invalidating the permit program because it would have allowed the Corps to issue permits for discharges into tributaries of navigable waters, when § 13 authorized discharges only in navigable waters; also holding that the Corps could not issue permits without complying with the procedures established by the recently enacted National Environmental Policy Act).

22. Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251-1376. The Kalur decision (above note 21) placed thousands of dischargers in violation of the 1899 Act (due to decisions like those mentioned in note 14 above) without an administrative remedy, thus producing widespread interest in a congressional solution. In addition, the peculiar political dynamics of the day had numerous politicians competing for public credit as environmental defenders. See Elliott, Ackerman & Millian, Toward A Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J.L. Econ. & Org. 313, 324-26 (1985) (describing the competition among President Nixon, Senator Muskie, and Senator Jackson as the "Politicians' Dilemma").

23. 33 U.S.C. §§ 1251(a)(3), (1).

24. Id. § 1362(6).

25. W. Rodgers, above note 1, § 4.12, at 185. See also id. § 4.13, at 218-21.

gram for discharges of dredged or fill material in section 404 of the Act.<sup>26</sup> However, while section 404 authorized the Secretary of the Army, through the Corps, to regulate discharges of dredged or fill material, it also established an oversight role for EPA:<sup>27</sup> requiring EPA, "in conjunction" with the Corps, to promulgate "guidelines" governing the permit program<sup>28</sup> and authorizing EPA to veto permits.<sup>29</sup> However, it was not the EPA oversight role, but rather the geographic scope of the program that engendered controversy in the early 1970s.

Under the Rivers and Harbors Act, the Corps' regulatory jurisdiction is confined to activities affecting "navigable waters."<sup>30</sup> What constitutes a navigable water evolved over a century of judicial interpretation from those waters actually used to transport interstate or foreign commerce (navigable in fact)<sup>31</sup> to in-

26. 33 U.S.C. § 1344. See Sen. Comm. on Public Works, 93d Cong. 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 117 (Comm. Print 1973): "The Conferees were uniquely aware of the process by which dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." Congress gave no indication that it was concerned about the potential conflict of interest in the Corps' role as the nation's largest dredger and its role in regulating discharges of dredged spoil. Only two years later in 1974, similar conflict of interest led to the break-up of the Atomic Energy Commission. See W. Rodgers, above note 1, § 4.12, at 185 (warning that the Corps' dredging activities "may influence the scrutiny applied in its regulatory capacity"; cf. below note 94 and accompanying text -- Corps' exclusion of dredging from the scope of the regulatory program).

27. The EPA oversight role was imposed largely due to Senator Muskie's misgivings about exempting the Corps' program from EPA's National Pollutant Discharge Elimination System. For details on the legislative history, see Blumm, The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective, 8 Ecology L.Q. 409, 415 n.20 (1980) [hereinafter 404 Program Perspective].

28. 33 U.S.C. § 1344(b)(1); see below notes 58-60, 62-63, 73-76 and accompanying text and § III.D.

29. Id. § 1344(c) (vetoes based on unacceptable adverse effects "on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas"); see below IV.A.

30. Section 10 jurisdiction extends to activities affecting "the navigable capacity of any waters of the United States." 33 U.S.C. § 403. Section 13 regulates discharges "into any navigable water of the United States, or into any tributary from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407.

31. The foundation case is the Daniel Ball,

include also those waters that were navigable in the past<sup>32</sup> and that could become navigable with "reasonable improvements."<sup>33</sup> Although both the Corps and the courts increasingly recognized that activities outside navigable waters but affecting their course, condition,<sup>34</sup> or capacity were subject to federal regulation,<sup>35</sup> the limits of navigable waters remained the ordinary high water mark for fresh waters and mean high water for tidal waters.<sup>35</sup> These limits placed numerous wetland areas not subject to regular inundation from navigable waters outside the reach of the Corps' jurisdiction.

In the 1972 Amendments, in an attempt to regulate companies discharging pollutants on small, non-navigable tributaries, Congress asserted jurisdiction over "the waters of the United States."<sup>36</sup> Although the Act simply equated this term with "navigable waters,"<sup>37</sup> the legislative history made plain that Congress intended a dramatic expansion in federal jurisdiction.<sup>38</sup> While EPA quickly embraced a broad jurisdiction for its permit program under section 402 of the Act,<sup>39</sup> the Corps resisted --

77 U.S. (10 Wall.) 557 (1870) (waters are navigable in fact "when they form in their ordinary condition by themselves, or uniting with other waters, a continued highway" in the chain of interstate and foreign commerce). Although waters located entirely within one state may still be capable of carrying interstate commerce (see 33 C.F.R. § 329.7), some courts have demanded a demonstrable connection with interstate waterborne commerce. Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979) (inland Minnesota lake not navigable).

32. Economy Light & Power Co. v. U.S., 256 U.S. 113 (1921).

33. U.S. v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

34. U.S. v. Sexton Cove Estates, 526 F.2d 1293 (5th Cir. 1976); Weizman v. Dist. Engineer, 526 F.2d 1302 (5th Cir. 1976); U.S. v. Moretti, 526 F.2d 1306 (5th Cir. 1976). See Note, Section 10 of the Rivers and Harbors Act: Jurisdiction Shoreward of Mean High Tide Line, 31 U. Miami L. Rev. 697 (1977).

35. 33 C.F.R. §§ 329.11-12.

36. 33 U.S.C. § 1362(12).

37. Id. See also id. §§ 1321, 1322.

38. The Conference Report intended navigable waters to be given the broadest possible interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes. Sen. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). The Senate Report expressly stated that the Act extended the definition of navigable waters because "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971). See also 118 Cong. Rec. 33,756-757 (1972) (remarks of Rep. Dingell), relied on by the court in U.S. v. Ashland Oils Transportation Co., 504 F.2d 1317 (6th Cir. 1974) (federal jurisdiction extends to a non-navigable tributary of a nonnavigable tributary of a navigable water).

despite the fact that the same statutory terms governed the jurisdiction of both permit programs.<sup>40</sup> To the Corps, section 404 was simply an exemption from the new EPA permit system for its preexisting regulatory program.

### C. NRDC v. Callaway and Its Aftermath

The Corps' narrow reading of the reach of section 404 was quickly rejected by some courts,<sup>41</sup> and in response to a suit by the National Resources Defense Council and the National Wildlife Federation, the District Court for the District of Columbia ordered the Corps to revise its regulations to reflect the full regulatory mandate contained in the 1972 Amendments.<sup>42</sup> Two years, one political furor, and several congressional hearings later, the Corps complied with the court's order.<sup>43</sup> However, to reduce the administrative burden of expanded jurisdiction, the Corps included a "general permitting" mechanism enabling classes of activities with "insignificant" impacts to be authorized without individual permit processing.<sup>44</sup>

39. See the definition of "navigable waters" promulgated by EPA in early 1973, U.S. E.P.A. General Counsel Opinion (Feb. 6, 1973).

40. See 39 Fed. Reg. 12,115, 12,119 (1974) (Corps' regulations).

41. See U.S. v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) (containing detailed examination of the legislative history of the 1972 Amendments, concluding that the 1972 Amendments extended federal jurisdiction to all waters that might affect commerce, without regard to traditional navigability tests).

42. NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (invalidating 33 C.F.R. §§ 209.210(d)(1) and 209.260 (1974)). The Callaway suit became necessary when the Corps refused to revise its regulations to reflect decisions like Holland, above note 41.

43. Unhappy with the Callaway result, the Corps issued a press release warning that the regulations the court was forcing upon it would require permits from "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion." Press Release, Dep't of Army, Office of Chief of Engineers (May 6, 1975), reprinted in Hearings on Section 404 of the Federal Water Pollution Control Act Amendments Before the Senate Public Works Committee, 94th Comm., 2d Sess. 517-20 (1976). On the subsequent political furor, see Caplin, Is Congress Protecting Our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972, 31 U. Miami L. Rev. 445 (1977) (detailed analysis of congressional reaction to Callaway). The Corps responded to the Callaway decision by promulgating interim final regulations on July 25, 1975, to take effect in 3 phases over 2 years. 40 Fed. Reg. 31,320 (1975); see Comment, Corps Issues Interim Final Rules for Discharges of Dredged or Fill Material, 5 Env'tl. L. Rep. 10,143 (1975).

44. 40 Fed. Reg. at 31,335 (previously codified at 33 C.F.R. § 209.120(i)(2)(ix)

General permits have become an enduring, albeit controversial aspect of the 404 program.<sup>45</sup>

Another fallout of the Callaway litigation was the impetus it supplied to promulgate the "guidelines" Congress authorized in section 404(b) to supply the substantive criteria for 404 permit decisions.<sup>46</sup> Because they were to be promulgated by EPA "in conjunction with" the Corps, disagreements between EPA and the Corps over the function and content of the guidelines delayed their issuance for nearly three years.<sup>47</sup> However, on September 5, 1975, EPA finally published guidelines that, in addition to listing considerations and objectives to govern permit processing and technical evaluation procedures to assess the effects of dredged and fill material, established a pathbreaking presumption against wetland fills unless an activity was water dependent or other site or construction alternatives were impracticable.<sup>48</sup>

While Callaway produced a good deal of administrative activity, its chief legacy was to activate congressional interest in the 404 program. For two years, between 1975 and 1977, Congress debated the program's future.<sup>49</sup> At one point in 1976, the House of Representatives voted to confine 404 jurisdiction to traditionally navigable waters and adjacent wetlands.<sup>50</sup>

(1976).

45. See below notes 55, 59, 81-82, 86 and accompanying text and § 11.C.

46. 33 U.S.C. § 1344(b)(1) (guidelines to be based on "criteria comparable" to the ocean discharge criteria authorized by § 403 of the Act, 33 U.S.C. § 1343).

47. The Corps, never really accepting EPA's oversight function, believed that the guidelines should be merely advisory and the principal litmus for permit issuance should remain its public interest review, above note 18. EPA wanted the guidelines recognized as regulatory and binding on the Corps. The net result of this disagreement was that the 1975 interim guidelines evaded the issue and left it unresolved.

48. See 40 Fed. Reg. 41,292-298 (1975) (interim final guidelines). An example of the ambiguities in the guidelines (above note 47) is the strong suggestion (or weak directive) that discharges disrupting the aquatic food chain, destroying significant wetlands, degrading water quality, or damaging fish or shellfish populations were to be "avoid[ed]." Id. at 41,295.

49. See generally Caplin, above note 43, at 457-90.

50. Id. at 460-66 (discussing the "Wright Amendment" to H.R. 9560, which passed the House 234-121 on June 3, 1976 in response to Congressman Wright's analogy of 404 governmental over-regulation to government abuses leading to the signing of the Magna Carta). This bill would also have (1) eliminated historically navigable waters (above note 32 and accompanying text) from the definition of navigable waters; (2) allowed the Corps and the governor of a state to authorize 404 regulation in areas other than navigable waters and adjacent wetlands; (3) enabled the Corps to approve any or all of 404



The Senate, however, sought to maintain broad federal jurisdiction but authorize EPA, rather than the Corps, to issue 404 permits in areas beyond traditional Rivers and Harbors Act jurisdiction.<sup>51</sup> Neither approach succeeded, and the 94th Congress adjourned in 1976 leaving the fate of the 404 program unresolved.<sup>52</sup>

#### D. The 1977 Clean Water Act Amendments

Congressional attempts to restrict 404 jurisdiction ultimately failed, as the 1977 Amendments reaffirmed program coverage over all waters of the United States.<sup>53</sup> Nevertheless, the amendments responded to many of the critics of 404 regulation by exempting two categorical types of activities from the program,<sup>54</sup> ratifying the Corps' practice of issuing general permits,<sup>55</sup> and authorizing EPA to approve state programs in areas beyond traditional Rivers and Harbors Act jurisdiction.<sup>56</sup>

Each of these concessions to concerns of overregulation was limited, however. The exemption for activities with minor aquatic impacts, such as normal farming, forestry, and ranching activities, was restricted to operations that do not convert wetlands to a new use.<sup>57</sup> The exemp-

regulation upon finding it to be in the "public interest"; (4) authorized Corps general permits; (5) and excluded from regulation "normal" farming, forestry and ranching activities, other minor activities (including construction of irrigation ditches), and discharges in connection with congressionally authorized projects. Id.

51. Id. at 480-89 (discussing the "Baker-Randolph Amendment" which passed the Senate by voice vote on Sept. 1, 1976). This bill would also have (1) authorized EPA approval of state 404 programs; (2) authorized general permits for activities with minor environmental effects; and (3) exempted from regulatory coverage "normal" farming, forestry and ranching activities, as well as other activities, including irrigation ditches.

52. Id. at 489-90 (describing a deadlock in Conference Committee).

53. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (amending 33 U.S.C. §§ 1251-1376). See Thompson, Section 404 of the Federal Water Pollution Control Act Amendments of 1977: Hydrologic Modification, Wetlands Protection, and the Physical Integrity of the Nation's Waters, 2 Harv. Envtl. L. Rev. 264 (1977); Note, Clean Water Act of 1977: Mid-course Corrections in the Section 404 Program, 57 Neb. L. Rev. 1092 (1978).

54. 91 Stat. at 1600-01, 1605 (codified at 33 U.S.C. §§ 1344(f), (r)). See below notes 57-58 and accompanying text.

55. Id. at 1601 (codified at 33 U.S.C. § 1344(e)); see below note 59 and accompanying text.

56. Id. at 1601-03 (codified at 33 U.S.C. §§ 1344(g), (h), (i)); see below note 60 and accompanying text.

57. 33 U.S.C. § 1344(f)(2) (requiring permits for discharges "incidental to any activity

tion for federal activities was made available only for specifically authorized federal activities entirely planned, financed, and constructed by a federal agency, and only if the project has been of an adequate environmental impact statement specifically evaluating the project in light of the 404(b) guidelines.<sup>58</sup> The ratification of the general permit concept was accompanied by restrictions limiting its use to activities of a similar nature, with minimal individual and cumulative impacts, that comply with the 404(b) guidelines.<sup>59</sup> Finally, approval of state permit programs was made EPA's responsibility, not the Corps', and Congress prescribed a detailed set of criteria for states to meet, including issuing permits in compliance with the 404(b) guidelines and expressly providing for review of both state programs and permits by the U.S. Fish and Wildlife Service.<sup>60</sup>

In addition to endorsing broad program jurisdiction, the 1977 Amendments provided the first statutory mention of wetlands and supplied extensive legislative history confirming the 404 program's role in wetlands protection.<sup>61</sup> The amendments also arguably ratified the presumption against wetland fills contained in the 404(b) guidelines<sup>62</sup> and clearly expanded the role of the guidelines.<sup>63</sup> Further, the amendments reinforced the notion that the 404 program is one built on shared agency powers. EPA's oversight role was expanded to include state programs, its role as 404(b) promulgator was preserved, as was its veto authority under section 404(c).<sup>64</sup> The Corps retained its role as permit issuer, while the states were afforded the opportunity to displace Corps regulation in certain upland areas.<sup>65</sup> Finally, the U.S. Fish

having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced ...").

58. Id. § 1344(r); see 404 Program Perspective, above note 27, at 424-28.

59. 33 U.S.C. § 1344(e) (authorizing general permits on a state, regional, or nationwide basis for up to 5 years); see 404 Program Perspective, above note 27, at 430-32.

60. 33 U.S.C. §§ 1344(g), (h), (i); see 404 Program Perspective, above note 27, at 454-60 (state program criteria).

61. 33 U.S.C. § 1344(e). On the legislative history, see Myhrum, Federal Protection of Wetlands Through the Legislative Process, 7 B.C. Envtl. Affairs 567, 620-25 (1979).

62. See above note 48 and accompanying text; U.S. v. Riverside Bayview Homes, 106 S. Ct. 455, 464 (1985) ("[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it").

63. See above text accompanying notes 58-60.

64. See above note 29 and accompanying text.

and Wildlife Service was statutorily recognized as a review agency, although Congress did include provisions to speed commenting and reduce delays in permit processing.<sup>66</sup> Congress thus consciously ratified a 404 program characterized by power sharing, or "multiple loci of decisional power."<sup>67</sup>

#### E. EPA/Corps Relations, 1977-81: Stabilizing Program Implementation

When it became clear that Congress would not restrict the geographic scope of section 404, the Corps promulgated amended regulations implementing the program.<sup>68</sup> These regulations included a revised definition of wetlands that extended federal jurisdiction to areas indicated either by surface or groundwater and containing a "prevalence" of vegetation "typically adapted for life in saturated soil conditions."<sup>69</sup> The regulations also adopted the presumption against filling wetlands initiated by EPA's 1975 404(b) guidelines,<sup>70</sup> although the regulations limited the applicability of the presumption to wetlands considered "important."<sup>71</sup>

Because Congress simply left unchanged the

65. The notion that states could assume permit responsibility only in areas outside traditional Corps' Rivers and Harbors Act jurisdiction first surfaced in the "Administration Bill," proposed by President Ford in 1976, and was carried over in the "Baker Amendment." See Caplin, above note 43, at 472, 479; see also *id.* at 482 n.101 (discussing Senator Muskie's understanding of the extent of state jurisdiction).

66. 33 U.S.C. § 1344(m) (Fish and Wildlife Service comments required to be submitted to the Corps within 90 days); § 1344(q) (authorizing memoranda of agreement between the Corps and EPA, the Departments of Agriculture, Commerce, Interior and Transportation, and other appropriate federal agencies, to minimize delays in permit processing). These § 404(q) agreements became controversial, see below notes 83, 88-89, 239-46 and accompanying text. On the role of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in the federal program, see 404 Program Perspective, above note 27, at 442-45.

67. See above note 1 and accompanying text.

68. 42 Fed. Reg. 37,133 (1977) (codified at 33 C.F.R. §§ 320-29, revised by 51 Fed. Reg. 41,206-260 (1986)).

69. *Id.* at 37,144 (codified at 33 C.F.R. § 323.2(c)). This amendment expanded 404 jurisdiction over areas with wetland vegetation that failed to satisfy the previous requirement of being "periodically inundated." See *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 910-13 (5th Cir. 1983).

70. See note 48 and accompanying text.

71. *Id.* at 37, 137 (most recently codified at 33 C.F.R. § 320.4(b)(4) (1984)) (Corps District Engineers to "consider whether the proposed activity is primarily dependent on being located in, or in close proximity to, the aquatic environment and whether feasible alternatives are available").

jurisdictional provisions of the Act in the 1977 Amendments, whether EPA or the Corps possessed final authority to interpret the geographic scope of the program remained unclear. Consequently, the Secretary of the Army formally requested an Attorney General's opinion on the issue. On September 5, 1979, Attorney General Civiletti concluded that EPA, not the Corps, had final authority over all jurisdictional questions under the Clean Water Act, including section 404.<sup>72</sup> This interpretation subsequently confirmed by the courts,<sup>73</sup> established EPA as the ultimate interpreter of the scope of 404 regulation.

On December 24, 1980, EPA published revised 404(b) guidelines.<sup>74</sup> Perhaps emboldened by the Attorney General's opinion, the 1980 revision not only restated the presumption against wetland alterations for nonwater dependent uses or where or site or construction alternatives were available, but expanded it to include "special aquatic sites" including important fish and wildlife habitats, marine sanctuaries, and refuges.<sup>75</sup> The 1980 guidelines also imposed a burden of proof against proposed discharges, stipulating 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."<sup>76</sup> Moreover, EPA expressly declared that the guidelines were "regulatory," not advisory, in nature -- meaning that they were binding on the Corps -- and that they were an independent basis for prohibiting discharges, apart from the Corps' public interest review.<sup>77</sup>

#### F. Regulatory Relief and the MAF Settlement: Destabilizing Program Implementation

The election of Ronald Reagan brought new challenges to 404 implementation, as the 404

72. 43 Op. Atty. Gen. no. 15 (1979), summarized in 10 Current Developments, *Env't. Rep. (BNA)* 1278-79 (1979) (the overall structure of the Clean Water Act impliedly places responsibility on EPA to determine the scope of "navigable waters" for the entire statute). However, subsequent to the Civiletti opinion, EPA and the Corps signed a memorandum of understanding allowing the Corps to make wetlands jurisdiction determinations unless EPA identifies an area as a "special case." See Barton I, above note 15, at 385 (noting bottomland hardwoods and a California bay as designated "special cases").

73. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 903 n.12 (5th Cir. 1983); *In Matter of Alameda County Assessor's Parcels*, 672 F. Supp. 1278, 1285 (N.D. Cal. 1987).

74. 45 Fed. Reg. 85,336-357 (codified at 40 C.F.R. § 230); see generally Liebsman, *The Role of EPA's Guidelines in the Clean Water Act's § 404 Permit Program -- Judicial Interpretation and Administrative Application*, 14 *Env't. L. Rep.* 10,272 (1984).

75. 40 C.F.R. §§ 230.10, 230.3.

76. *Id.* at § 230.1(d).

77. 45 Fed. Reg. 85,336 (1980) (preamble).

program was quickly targeted for "reform" by the President's Task Force on Regulatory Reform in August 1981.<sup>78</sup> The Task Force's report, along with promulgation of Executive Order No. 12,291, requiring regulatory impact analysis,<sup>79</sup> encouraged the Corps to consider measures to expedite permit processing and expand the use of nationwide permits.<sup>80</sup> An expanded nationwide permit program was promulgated in July 1982,<sup>81</sup> an initiative that produced considerable controversy<sup>82</sup> and led the National Wildlife Federation and 15 other environmental groups to file suit, seeking to enjoin its implementation.<sup>83</sup> Also in 1982,

the Corps signed new Memoranda of Agreement under section 404(q) with the federal fishery agencies and EPA to speed permit processing that sharply curbed opportunities for administrative appeals and effectively reduced mitigation measures in permit conditions.<sup>84</sup> The Corps even proposed more drastic reforms in May 1983 in regulations that would have substantially revised the entire program, omitting any reference to the 404(b) guidelines and reversing the presumption against wetland discharges by stating that "a permit will be granted unless its issuance is found to be contrary to the public interest."<sup>85</sup> At the same time, the Corps waged a battle within the Administration to have the 404(b) guidelines declared to be advisory, not regulatory.<sup>86</sup>

78. See President's Task Force on Regulatory Reform, Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (May 7, 1982), described at 48 Fed. Reg. 21,466 (1983); see also Federal Notes, Section 404 Faces Test, National Wetlands Newsletter (Nov./Dec. 1981), at 2. In response to a request for comments from the Task Force, the American Petroleum Institute ranked the 404 program second in its "hit list" of burdensome regulatory programs. 13 Coastal Zone Mgmt. Newsletter no. 2, at 1 (Jan. 13, 1982).

79. 46 Fed. Reg. 13,193 (1981); see Comment, Reagan Orders Cost-Benefit Analysis of Regulations, Confers Broad Powers on O.M.B. and Regulatory Task Force, 11 Envtl. L. Rep. 10,044 (1981).

80. The Corps began considering these reforms prior to the completion of the Task Force report in May 1982. See Corps Reviews § 404, Nat'l Wetlands Newsletter (Sept./Oct. 1981) at 6-7. In addition to expanding the use of nationwide permits, the Task Force recommended (1) revising 404(q) Memoranda of Agreement to streamline permit processing and to reduce interagency appeals; (2) increasing reliance on state programs by issuing general permits where states have regulatory programs substantially similar to the Corps'; (3) "simplifying" the 404(b) guidelines and shortening the time for state action on water quality certification requests to reduce policy conflicts; and (4) redefining wetlands to "clarify" the program's scope. See Barton I, above note 15, at 240; see also Gianneli, Regulatory Reform Equals Good Government, Nat'l Wetlands Newsletter (July/Aug. 1983) at 6-7.

81. 47 Fed. Reg. 31,794 (1982) (interim final regulations, including 27 nationwide permits).

82. See, e.g., Parish & Morgan, History, Practice, and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act, 17 Land & Water L. Rev. 43 (1982); Blumm, Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response, 18 Land & Water L. Rev. 469 (1983).

83. National Wildlife Federation v. Marsh, No. 82-3632 (D.D.C. complaint filed Dec. 22, 1982), ELR Pend. Lit. 65,775; Federal Notes, Environmental Organizations Sue to Undo Reagan Administration Changes in Section 404 Program, National Wetlands Newsletter No. 6 (1982), at 4-6. The major concern of the environmental groups was the nationwide permits for isolated

waters (waters not part of a surface tributary system and adjacent wetlands) and waters above the "headwaters" (where there is less than 5 cubic feet per second mean annual flow and adjacent wetlands). Prior to promulgation of the new regulations, the Corps required an individual permit in isolated waters with a surface area of 10 acres or larger. The change, according to the Fish and Wildlife Service, would remove individual permit requirements from 700,000 to 900,000 acres of prairie potholes, 1 to 2 million lakes and wetlands in the upper Midwest, 335,000 acres of wetlands adjacent to the Great Salt Lake, and 70% of the lakes in Alaska. See Barton I, above note 15, at 243. The environmental groups alleged that the new permits were inconsistent with § 404(e) which authorizes general permits only for categories of activities, not for classes of waters or wetlands, and then only if there are minimal cumulative impacts. See 33 U.S.C. § 1344(e)(2).

84. Prior to 1982, the 404(q) Memoranda enabled EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service request further review of Corps District Engineer permit decisions by higher authorities in the Corps (and ultimately to the Secretary of the Army). Although four levels of appeal were possible, in practice few permit "elevations" occurred, largely because the threat of delays in permit issuance encouraged applicants to incorporate satisfactory mitigation measures. The 1982 Memoranda (1) made elevation possible only where there was insufficient interagency coordination, significant new information, or national policy issues (not because of a discharge's environmental effects); (2) provided for only one level of appeal; and (3) made all permit elevation decisions discretionary with the Assistant Secretary of the Army for Civil Works. See generally Barton I, above note 15, at 240-42; Barton, Federal Wetlands Protection Programs in Nat'l Audubon Society, Audubon Wildlife Report 1986 at 396 [hereinafter Barton II].

85. 48 Fed. Reg. 21,466, 21,469 (1983). See Liebsman, above note 74, at 10,275-276 (discussing EPA's objections to the Corps' proposals); Nagle, Wetlands Protection and the Neglected Stepchild of the Clean Water Act: A Proposal for Shared Custody of Section 404, 5 Va. J. Nat. Resources L. 227, 241-45 (1985).

86. See generally Liebsman, above note 74, at 10,274-275.

But regulatory reform efforts reached their high water mark with the 1983 Corps proposal. First, when William Ruckelshaus became EPA Administrator in 1983, he identified the 404 program as an agency priority, resisted changes to the guidelines, maintained their regulatory status, and identified the 404 program as a high priority for EPA.<sup>87</sup> Second, the parties in the National Wildlife Federation v. Marsh suit agreed to a settlement in February 1984 in which the Corps promised to promulgate new regulations (1) acknowledging the mandatory nature of the 404(b) guidelines; (2) preserving the presumption against wetland discharges; (3) applying the decision in Avoyelles Sportsmen's League v. Marsh<sup>88</sup> -- extending 404 regulatory coverage over all clearing, drainage, and channeling of wetlands -- nationwide; (4) reinstating a 10-acre limit in the isolated waters and "headwaters" nationwide permits; (5) including a pre-discharge notification for activities causing the "loss or substantial modification" of from 1 to 10 acres; and (6) and requiring the Corps to seek the views of EPA and fish and wildlife agencies of proposed discharges affecting between 1 to 10 acres of special aquatic sites.<sup>89</sup> Third, the 404(q) Memoranda of Agreement were revised, in large measure due to congressional pressure,<sup>90</sup> to provide increased flexibility in the timing of permit issuance and increased consultation at the Corps District Engineer level, greater opportunities to request administrative appeals (including noncompliance with the 404(b) guidelines), and a requirement that the Corps supply a written, reasoned decision when denying requests for appeals.<sup>91</sup>

Thus, many of the Corps' regulatory reform initiatives were ultimately frustrated by congressional opposition, resistance of EPA and the federal fishery agencies, and the willingness of environmental groups to challenge the Corps in court. Current Corps regulations, issued on November 13, 1986, reflect the compromises reached in the NWF settlement,<sup>92</sup> although they

fail to adopt the definition of "waters of the United States" contained in the 404(b) guidelines<sup>93</sup> and assume that dredging operations (such as those the Corps itself conducts) do not involve discharges and therefore do not require 404 permits.<sup>94</sup>

When Congress amended the Clean Water Act in 1987, it made only minor changes in section 404's enforcement authorities.<sup>95</sup> Nevertheless, a number of unresolved issues continues to hamper 404 implementation, including whether the Corps must accept EPA's interpretation of the 404(b) guidelines, and whether the Corps can determine on a case-by-case basis not to require permits of discharges into small waterbodies connected to a surface tributary system (isolated waters). Neither issue was resolved by the NWF settlement nor by the revised 404(q) memoranda. These issues are discussed further in the succeeding sections.<sup>96</sup>

## II. Jurisdictional Issues

The issues of which waters and which activities are subject to 404 regulation have been at the heart of most of the controversy surrounding the program. Geographic jurisdiction concerns the scope the Clean Water Act's intent to assert regulatory control over all waters to the limits of the commerce clause;<sup>97</sup> that is, all waters affecting interstate and foreign commerce. Because of its constitutional dimensions, this issue is ultimately a matter for judicial interpretation. Jurisdiction over activities, on the other hand, involves a greater degree of administrative discretion. But here, too, the courts are playing an important role in ascertaining congressional intent.

### A. Geographic Jurisdiction

In the wake of the Callaway decision,<sup>98</sup> the Corps promulgated final rules in 1977 expanding its jurisdiction to include not only wetlands adjacent to navigable waters but also wetlands adjacent to other waters, interstate wetlands, and intrastate wetlands "which could affect" interstate or foreign commerce.<sup>99</sup> In effect, this expansion of jurisdiction, which remains essentially unchanged,<sup>100</sup> seemed to assert federal control over all wetlands, since all wetlands arguably could affect interstate commerce. How-

§§ 330.5(c). The court upheld the grandfather clause as allowing for "a reasonable, fair transition." National Wildlife Federation v. Marsh, 22 E.R.C. 1417 (D.O.C. 1984).

93. See above notes 39-40 and accompanying text; see also below note 114.

94. 51 Fed. Reg. at 41,210.

95. Pub. L. No. 100-4 § 313(d). See below note 318 and accompanying text.

96. See below notes 133-37, 275 and accompanying text.

97. U.S. Const., art. I, § 8 cl. 3.

98. See above § I.C.

99. 51 Fed. Reg. 37,122, 37,144 (1977) (formerly codified at 33 C.F.R. § 323.2(a)).

100. Now codified at 33 C.F.R. § 328.3(a).

87. *Id.* at 10,275; Barton I, above note 15, at 244; Barton II, above note 84, at 392-93.

88. 715 F.2d 897 (5th Cir. 1983).

89. 25 E.L.R. 20,262, ¶¶ 12, 16, 25 (D.O.C. Feb. 12, 1985). See Liebsman, above note 74, at 10,275; Barton I, above note 15, at 243-44; Barton II, above note 84, at 390-92; Court Approves Settlement Agreement in NWF v. Marsh, Nat'l Wetlands Newsletter (Mar./Apr. 1984) at 4.

90. Senators Chaffee and Mitchell blocked Robert Dawson's nomination for Assistant Secretary of the Army for Public Works until the Corps agreed to revise the memoranda. Barton I, above note 84, at 395-96.

91. *Id.* at 397.

92. 51 Fed. Reg. 41,206 (1986) (codified at 33 C.F.R. §§ 320-30). See Army Issues Final Clean Water Act § 404 Regulations, Nat'l Wetlands Newsletter (Jan./Feb. 1987) at 8-10. However, the National Wildlife Federation challenged a "grandfather" provision in the regulations allowing discharges previously authorized under nationwide permits to continue for 18 months under certain conditions. See 33 C.F.R.

ever, while the Supreme Court ratified Clean Water Act jurisdiction over adjacent wetlands, the Corps has refused to assert jurisdiction over all wetlands not adjacent to other waters, claiming the right to decide on a case-by-case basis whether a permit should be required.

1. U.S. v. Riverside Bayview Homes and the Extent of Wetlands Jurisdiction

In its first consideration of section 404, the Supreme Court unanimously reversed a narrow construction of Clean Water Act jurisdiction by the Sixth Circuit that required "frequent flooding" of wetlands.<sup>101</sup> The case concerned a fill in a tract of marshy land near Lake St. Clair, Michigan that the Corps considered an "adjacent wetland" requiring a 404 permit because of its vegetation and saturated soils. The Sixth Circuit disagreed with the Corps' jurisdictional determination, worrying that that broad federal jurisdiction could produce an unconstitutional taking of property.<sup>102</sup>

The Supreme Court rejected as "spurious" the appellate court's takings clause concerns, concluding that its narrow construction avoided no constitutional difficulty while frustrating application of Clean Water Act regulation.<sup>103</sup> Unencumbered by the takings issue, the Court considered the case as one of simple statutory and regulatory construction: whether the area at issue was a wetland under the Corps regulations and, if so, whether the Clean Water Act authorized the Corps to assert jurisdiction over such an area. Pointing to the Corps' expanded definition of wetlands in its 1977 regulations,<sup>104</sup> Justice White concluded that in fashioning its "frequent flooding" requirement the Sixth Circuit improperly second-guessed the Corps on a jurisdictional question it specifically sought to resolve in its regulations.<sup>105</sup> Since the regulations include wetlands dependent on groundwater, frequent flooding by an adjacent waterbody was clearly unnecessary and inconsistent with the "plain language" of the regulations.<sup>106</sup> As for whether Congress authorized

Corps jurisdiction of wetlands adjacent to but not regularly flooded by "more conventionally identified waters," the Court held that the Corps' regulatory definition to be reasonable in light of language, policies, and legislative history of the Act.<sup>107</sup> Influencing the Court was the clear congressional intention to extend federal jurisdiction beyond traditionally navigable waters,<sup>108</sup> the repeated failure of attempts to amend the Act to restrict Corps' jurisdiction,<sup>109</sup> and reference to wetlands at two places in the Act, indicating congressional concern for the resource.<sup>110</sup>

Riverside Bayview thus confirmed federal jurisdiction over wetlands "adjacent" to other waterbodies, affirming the Corps' ecologically-based definition of wetlands.<sup>111</sup> This result is hardly surprising, since Congress clearly intended to regulate all waterbodies affecting interstate commerce,<sup>112</sup> and the flood and erosion

Id. at 460-61 (district court's determination not "clearly erroneous").

107. Id. at 461-62. ("In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulate waters, the Corps' ecological judgment provides an adequate basis for legal judgment that adjacent wetlands may be defined as waters under the Act.") Cf. *Chevron, U.S.A. v. NRDC*, 104 S. Ct. 2798 (1984) and *Chemical Manufacturers Ass'n v. NRDC*, 105 S. Ct. 1102 (1985) (federal courts must defer to agency construction of statutes where the interpretation is reasonable).

108. Id. at 464-65 (1972 Act demonstrates the "evident breadth of Congressional concern for protection of water quality and aquatic ecosystems").

109. Id. at 465 ("Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of navigable waters").

110. The Court cited §§ 404(g)(1) and 208(i)(2), 33 U.S.C. §§ 1344(g)(1), 1288(i)(2). The first provision withholds state 404 jurisdiction over traditionally navigable waters and adjacent wetlands. The latter provision authorizes a \$6 million National Wetlands Inventory to assist local, state, and federal agencies in identifying wetlands. See *Barton II*, above note 84, at 381 (reporting that the Inventory had completed mapping for 40% of the lower 48 states by 1985).

111. 106 S. Ct. at 465 (quoting 33 C.F.R. § 320.4(b)(2)(i)). See *U.S. v. Rivera Torres*, 656 F. Supp. 251, 254 (D.P.R. 1987) (construing *Riverside Bayview* to sanction federal jurisdiction based on humidity of soil and prevalence of wetland vegetation); *U.S. v. Larkins*, 657 F. Supp. 76, 81 n.15 (jurisdiction based on hydric soils and vegetation). An "adjacent" wetland is one that is bordering, contiguous to, or "neighboring" another waterbody. 33 C.F.R. § 328.3(c). No hydrological connection is apparently required.

112. See above note 38 and accompanying text. Congressional assertion that wetland

101. 474 U.S. 121 (1985), *rev'g*, 729 F.2d 391 (6th Cir. 1984) (ruling that it was not clear that Congress intended "navigable waters" to include bays, swamps, and marshes that are "rarely if ever flooded").

102. 729 F.2d at 397-98.

103. 106 S. Ct. at 459-60 (noting that "so long as compensation is available for those whose property is in fact taken" by regulation, the assertion of jurisdiction itself cannot be unconstitutional). See *First English Evangelical Lutheran Church v. City of Los Angeles*, 107 S. Ct. 2378 (1987) (compensation available for temporary regulatory taking).

104. See above note 69 and accompanying text.

105. 106 S. Ct. at 461.

106. Id. at 460. The Court thus affirmed the district court's conclusion that the wetland was an "adjacent wetland" within the terms of the Corps' regulation because of its wetland vegetation and saturated soil from groundwater.

control, water quality and fishery habitat values of wetlands ensure such an effect, especially considering the cumulative costs of wetland losses of between 300,000 and 450,000 acres annually.<sup>113</sup> In fact, EPA believes that Clean Water Act jurisdiction extends to all wetlands that could potentially supply habitat for migratory birds.<sup>114</sup> This would effectively assert federal jurisdiction over all wetlands -- both adjacent to other waterbodies and nonadjacent -- as a class. However, the Riverside Bayview Court expressly reserved judgment on the issue of nonadjacent wetland jurisdiction,<sup>115</sup> and the Corps maintains it must make jurisdictional determinations for such areas on a case-by-case basis.<sup>116</sup> The result is inconsistent assertions

of regulatory jurisdiction by 36 different Corps districts, including a refusal to assert jurisdiction over 30-acre playa lake in Texas, as discussed in the following section.

Riverside Bayview will encourage two trends. First, it confirms judicial approval of broad assertions of federal jurisdiction. Recently, lower courts approved all of the following as "waters of the United States": (1) usually dry arroyos with only occasional surface flows;<sup>117</sup> (2) an isolated lake;<sup>118</sup> (3) an isolated wetland;<sup>119</sup> (4) wetlands adjacent to a recreational lake used by interstate travelers;<sup>120</sup> (5) private lands flooded by a federal dam;<sup>121</sup> (6) artificial wetlands;<sup>122</sup> (7) a mangrove forest;<sup>123</sup> (8) and bottomland hardwoods.<sup>124</sup> The second trend the Supreme Court result will con-

fills substantially affect interstate commerce will be upheld if there is any rational basis for such a finding. Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 276; Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 258 (1964).

113. Barton II, above note 84, at 374. Congress may regulate activities having a substantial effect on interstate commerce as a class, even if individual activities have little or no effect on interstate commerce. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); Perez v. U.S., 402 U.S. 146, 154 (1971).

114. See Memorandum from Francis S. Blake, EPA Gen'l. Counsel to Richard E. Sanderson, EPA Acting Ass't, Office of External Affairs (Sept. 12, 1985) (Clean Water Act Jurisdiction Over Isolated Waters); see also 53 Fed. Reg. 20,764, 20765 (1988) (discussing the memorandum). The Corps sent this memorandum to its field staff under pressure from Congress, see Barton II, above note 84, at 399, and makes reference to its conclusions in the preamble to its current regulations, 51 Fed. Reg. 41,206, 41,217 (1986), but did not alter its wetlands definition, id. at 41,250 (33 C.F.R. § 328.3(a)(3)).

115. 106 S. Ct. at 458 n.2, 452. See Meyer, Navigating the Wetlands Jurisdiction of the Army Corps of Engineers, Resource Law Notes (Aug. 1986) (criticizing the Court for unnecessarily continuing the tortured development of wetlands jurisdiction and noting "[w]hile the Corps has edged along what it has perceived as a constitutional tightrope, it has in fact been treading on solid constitutional ground. Only poor vision and an apparent failure to read the case law made the ground seem so far away"). For other evaluations of Riverside Bayview, see Hedal, The Clean Water Act -- More SECTION 404: The Supreme Court Gets Its Feet Wet, 65 Boston U.L. Rev. 995 (1985); Adams, United States v. Riverside Bayview Homes, Inc.: Wetlands, Fish, or Waterfowl?, 32 Loyola L. Rev. 477 (1986); Rosenbaum, The Supreme Court Endorses a Broad Reading of Corps Wetland Jurisdiction Under FWPCA § 404, 16 E.L.R. 10,008 (1986); Nat'l Wetlands Newsletter (Jan./Feb. 1986), at 14.

116. See generally Jackson, The Constitutional Test for Wetlands Jurisdiction: Agencies in a Muddle, Nat'l Wetlands Newsletter (Sept./Oct. 1987) at 7 (noting that EPA and the Corps presume that all "adjacent" wetlands affect interstate commerce, but require an individual

showing of an effect on interstate commerce for "nonadjacent" wetlands).

117. Quivira Mining Co. v. E.P.A., 765 F.2d 126, 129 (10th Cir. 1985) ("It is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some").

118. Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984) (isolated lake providing migratory waterfowl habitat, recreational opportunities for interstate travelers, and irrigation for crops and habitat for a commercial fishery marketed in interstate commerce was within the Corps' jurisdiction); cf. EPA Memorandum, above note 114.

119. National Wildlife Federation v. Laubscher (Pond 12), 662 F. Supp. 548, 549 (S.D. Tex. 1987) ("[A] wetland visited by migratory birds is a wetland within the jurisdiction of the [EPA and the Corps]").

120. U.S. v. Byrd, 609 F.2d 1204 (7th Cir. 1979); Bailey v. U.S., 647 F. Supp. 44 (D. Ida. 1986).

121. Swanson v. U.S., 789 F.2d 1368 (9th Cir. 1986) ("The public right of navigation follows the stream and the authority of Congress goes with it," quoting Philadelphia Co. v. Stimson, 223 U.S. 605, 634-35 (1912)); see also Ninth Circuit Ruling on Corps Regulatory Jurisdiction, Nat'l Wetlands Newsletter (Nov./Dec. 1986), at 14.

122. U.S. v. Ciampitti, 583 F. Supp. 483, 492, 494 (D.N.J. 1984) ("Although the court is ... fascinated by the history of the site ... for purposes of the present controversy that history is of purely scientific value and is not dispositive of the legal issues before the court. [F]ederal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands"); Track 12, Inc. v. District Engineer, U.S. Army, 618 F. Supp. 448 (D. Minn. 1985); Bailey v. U.S., 647 F. Supp. 44 (D. Ida. 1986); U.S. v. Akers, 651 F. Supp. 320, 323 (E.D. Cal. 1987) ("[T]he statutory and administrative definitions of 'waters' and 'wetlands' are broad enough to encompass so called, 'man-made' wetlands").

123. U.S. v. Rivera Torres, 656 F. Supp. 251 (D.P.R. 1987).

124. U.S. v. Larkins, 657 F. Supp. 76 (W.D. Ky. 1987).

time is a very deferential judicial attitude toward the government's jurisdictional determinations.<sup>125</sup> Although the Corps' administrative record on permit applications must demonstrate a thorough study of an area's soils, hydrology, and vegetation,<sup>126</sup> when the government seeks to enjoin an unauthorized discharge, a situation where no administrative record exists, courts are even more deferential to the government's experts.<sup>127</sup> One noted commentator has cautioned

that such deferential should not, however, limit discovery and evidentiary review before a trial court to evaluate material facts, witness credibility, and ensure that the written record is not a mere fabrication supporting the government's jurisdictional conclusion.<sup>128</sup>

2. National Wildlife Federation v. Lamscher (Pond 12) and Jurisdiction Over Nonadjacent Wetlands

Riverside Bayview by no means ended the battles over the geographic scope of section 404. In fact, by declining to rule on the non-adjacent wetlands issue, the Court encouraged the Corps to continue to make jurisdictional decisions concerning these areas on a case-by-case basis on the basis of an area's connection to interstate commerce.<sup>129</sup> The result has been to sanction a number of fills of nonadjacent wetlands, especially playa lakes in the Great Basin and prairie potholes in the Northern Great Plains, by failing to assert jurisdiction. The authority of the Corps to decline jurisdiction over a 30-acre permanently inundated playa lake in Texas was recently affirmed by a district court, in a case known as Pond 12.

The Pond 12 case originated in January 1984, when officials of the U.S. Fish and Wildlife Service observed a channelization operation taking place without a 404 permit.<sup>130</sup> The Service requested that the Corps issue a cease and desist order, but the Corps declined, claiming its jurisdiction over isolated waters is "limited and not clearly defined."<sup>131</sup> Although the Service proceeded to document use of Pond 12 by some 50 species of waterfowl protected by the Migratory Bird Treaty Act, the Corps refused to assert jurisdiction, EPA did nothing, and Pond 12 was subsequently destroyed.

The National Wildlife Federation then filed suit, seeking to force the Corps and EPA to assert jurisdiction over all wetlands satisfying the regulatory definition and a declaration that all such wetlands are within the commerce clause power. The Corps admitted its determination that Pond 12 was not a "water of the United States" was erroneous but maintained that it possessed discretion to not take enforcement action against the discharge.<sup>132</sup> In a curious decision the court decided that because the case involved the issue of federal jurisdiction it

128. Tripp, Judicial Review of § 404 Wetlands Protection Actions: A Reaction, 14 Env't. L. Rep. 10,096 (1984).

129. See Jackson, above note 116 (arguing that since wetland fills as a class have a substantial affect on interstate commerce, all wetlands satisfying the soil, hydrology, and vegetation factors in the regulatory definition should be subject to 404 regulation).

130. See generally Environmentalists Sue Corps and EPA Over Isolated Wetlands Jurisdiction, Nat'l Wetlands Newsletter (Mar./Apr. 1986) at 13-14.

131. Id. at 14.

132. See Jackson, above note 116.

125. See Avoyelles Sportmen's League v. Marsh, 715 F.2d 897, 905 (5th Cir. 1983) (Corps' decisions to grant or deny § 404 permits reviewed "under the arbitrary and capricious standard on the basis of the administrative record"); Texas Committee on Natural Resources v. Marsh, 736 F.2d 262, 270 (5th Cir. 1984) ("Case law binds [the courts] to uphold the Corps' decision [regarding what alternatives to discuss in an EIS] unless it is arbitrary and capricious"); but see U.S. v. Brassey, No. 81-1072 (D. Ida. 1982) ("What is required in the opinion of this Court is that an area be saturated or inundated by water with sufficient regularity that an ordinary person would understand that the prevalent vegetation is indicative of a normally aquatic environment" (emphasis added) (quoted in Ortman, Wetlands Or Uplands -- Northwest Courts Make the Call, Nat'l Wetlands Newsletter (May/June 1986), at 13-14).

126. MWF v. Hanson, 623 F. Supp. 1539 (E.D.N.C. 1985) (visual observation not adequate); see also District Court Sets Aside Corps' Wetland Determination, Nat'l Wetlands Newsletter (May/June 1986), at 14-15.

However, the Corps is not required to give permit applicants an adjudicatory hearing. Buttrey v. U.S., 690 F.2d 1170, 1175 (5th Cir. 1982) ("Congress did not intend that the 'public hearings' called for in section 404 be trial-type hearings on the record"); MWF v. Marsh, 568 F. Supp. 985, 993 (D.N.C. 1982) ("[S]ection 404 requires only ... a speech-making hearing at which proponents and opponents of [a] project are allowed to be heard," quoting Buttrey, 690 F.2d at 1176). See also Comment, Section 404 Permit Program Survives Legal Challenges, Faces Congressional and Administrative Review, 11 E.K.L. 10,233, 10,237 (1981). Nor is the Corps required to provide an informal hearing unless one is requested during the comment period. AJA Associates v. Army Corps of Engineers, 817 F.2d 1070 (3d Cir. 1987).

127. U.S. v. Tilton, 705 F.2d 429 (11th Cir. 1983) (district court's injunction based on the Corps' conclusion that the swamp at issue was a wetland was "not clearly erroneous"); U.S. v. Lambert, 589 F. Supp. 366, 370 (M.D. Fla. 1984) (in a hearing for injunctive relief where no administrative record exists, "the court must give substantial deference to the well reasoned conclusions of those Government witnesses who are officials charged by law with administering the provisions of the Clean Water Act"); U.S. v. Lee Wood Contracting, 529 F. Supp. 119, 120 (E.D. Mich. 1981) (government provided "ample evidence" that the parcel at issue was a wetland within the Corps' jurisdiction requiring a permit).

could not be dismissed as a matter of discretionary nonenforcement.<sup>133</sup> Nevertheless, the court denied the Wildlife Federation's request on the ground that the group lacked standing to secure nationwide injunctive relief.<sup>134</sup> The court also refused to order restoration of the wetland or impose fines because neither the Corps nor EPA undertook enforcement against the discharger.<sup>135</sup>

If the Pond 12 result gains widespread judicial acceptance, it essentially will leave to the discretion of the Corps, subject to EPA oversight, the ability to exempt from the regulatory program nonadjacent wetlands on a case-by-case basis. Eliminating its jurisdiction over nonadjacent wetlands has been a Corps goal since 1972, pursued originally by a narrow construction of its jurisdiction, then by issuance of a nationwide permit, and now through selective determinations of no interstate commerce effects and a strategy of nonenforcement.<sup>136</sup> Pond 12 illustrates the failure of the 404 program to supply comprehensive wetlands protection. The Corps has long claimed that the 404 program is not a wetlands protection mechanism.<sup>137</sup> Through its case-by-case constitutional test for nonadjacent wetlands, the Corps seems committed to ensuring the truth of that contention.

#### B. Activities Exempt from Individual Federal Permits

Rather than restrict the geographic reach of section 404, in the 1977 Amendments, Congress created a number of mechanisms to reduce the regulatory burden of the program. Exempted from permit requirements were activities with minor effects and certain federal projects.<sup>138</sup> In

133. 662 F. Supp. 548, 549-50 (S.D. Tex. 1987) the court did determine that Pond 12 was "a water of the United States." Id.

134. Id. at 549.

135. Id. at 550. Cf. Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987) (Corps' decision of whether to compel compliance with permit conditions is an enforcement issue immune from judicial review); Missouri Coalition for the Environment v. Corps of Engineers, 678 F. Supp. 790 (E.D. Mo. 1988) (same).

136. See Jackson, above note 116, at 8-9 (recounting the history of Corps resistance, noting that the latest strategy was devised as a response to the MWF settlement, above note 87, in which the Corps committed to individual permits for nonadjacent wetlands larger than 10 acres, and describing as a Corps' "top priority" the issuance of a new nationwide permit to eliminate the 10-acre cutoff).

137. See, e.g., Testimony of Robert K. Dawson, ACTING Ass't Secretary of the Army for Civil Works Before the Senate Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 11 (May 11, 1985), reported in Senate Subcommittee Holds Clean Water Act & 404 Oversight Hearings, Nat'l Wetlands Newsletter (July/Aug. 1985) at 8-9.

138. 33 U.S.C. § 1344(f), (r).

addition, the Amendments ratified the Corps' practice of issuing general permits and authorized the states to displace the federal permit program in certain waters.<sup>139</sup> This section considers regulatory and judicial developments concerning these categorical exemptions.

#### 1. Exempted Minor Activities

Section 404(f) exempts from permit requirements a number of minor discharges thought by Congress to involve "routine activities, small actors, temporary effects, and avoidance of duplicate regulation,"<sup>140</sup> as well as five other categories of minor discharges. The key exemptions are those for (1) "normal" farming, ranching, and forestry activities, such as plowing, minor draining, and harvesting; (2) constructing or maintaining stock ponds or irrigation ditches or from maintaining drainage ditches; and (3) constructing or maintaining farm, forest, or mining roads.<sup>141</sup> No exemption is available, however, for an activity that would violate a toxic effluent standard<sup>142</sup> or constitute a new use impairing the flow, circulation or reach of waters.<sup>143</sup> Primary responsibility for interpreting these exemptions rests with EPA,<sup>144</sup>

139. Id. §§ 1344(e), (g-1).

140. W. Rodgers, above note 1, § 4.12, at 188. Section 404(f) was chiefly the product of intense lobbying by groups, such as the National Association of Home Builders and the National Forest Products Association, opposed to the court-ordered expansion of regulatory jurisdiction and who often invoked the specter of federal regulatory requirements overwhelming the family farm. See, e.g., id. at 187 (citing Sen. Muskie during the Senate debate).

141. 33 U.S.C. § 1344(f)(1) (also exempting maintenance or emergency reconstruction of currently serviceable structures, construction of temporary sedimentation basins on uplands, and activities regulated by an approved statewide "best management practices" programs authorized by § 208(b)(4) of the Act).

142. Id. § 1344(f)(1) (1982). Because toxic effluent standards and prohibitions established under § 307(a)(2) of the Clean Water Act, 33 U.S.C. § 1317(a)(2), supersede any other less stringent requirements in a discharger's NPDES permit, Inland Steel Co. v. EPA, 574 F.2d 367 (7th Cir. 1978), this caveat to the 404(f)(1) exemptions not only brings the activities back within the 404 permit process, but would seem to require permit denial. See 404 Program Perspective, above note 27, at 420 n.44.

143. Id. § 1344(f)(2).

144. According to the Civiletti Attorney General Opinion, above note 72. EPA promulgated revised definitions of the exemptions on June 6, 1988, 58 Fed. Reg. 20,764, 20,774-76 (to be codified at 40 C.F.R. § 232.3). These regulations also resolve a longstanding disagreement between the Corps and EPA over whether the 404 program or the National Pollution Discharge Elimination System (NPDES) authorized by § 402 of the Clean Water Act (33 U.S.C. § 1342) should regulate discharges of solid waste into waters. See 404 Program Perspective, above note 27, at



although the Corps has issued essentially identical interpretations.<sup>145</sup>

The exemptions have been construed narrowly, influenced no doubt by the knowledge that conversions of wetlands to agricultural use accounted for roughly 80% of the wetland losses in the 20 years preceding the enactment of the "normal farming" exemption.<sup>146</sup> "Normal" activities are those that are part of an "established (i.e., on-going)" operation; they are not those that establish a new agricultural use or even return an area farmed in the past to agriculture if hydrological modification is required.<sup>147</sup> The exemption for minor drainage activities is inapplicable to drainage that converts wetlands to non-wetlands or significantly modifies wetlands or other aquatic areas.<sup>148</sup> The regulations specify those activities qualifying for the exemption for irrigation facilities.<sup>149</sup>

The courts have strongly affirmed the narrow construction of the regulations, relying frequently on legislative history indicating that the exemptions apply only to narrowly defined activities causing little or no adverse effect, individually or cumulatively.<sup>150</sup> Thus, they have ruled ineligible for the exemption conversion of a bottomland hardwood forest to a soybean field;<sup>151</sup> road widening, plowing, draining,

and bulldozing wetlands for cranberry, corn, and barley planting;<sup>152</sup> construction of various dikes, ditches, channels, and roads to farm in wetlands;<sup>153</sup> and construction of fish farming ponds.<sup>154</sup> However, tree-cutting activities in connection with construction of an electric power line qualified for a permit exemption because no wetlands conversion took place.<sup>155</sup> Nevertheless, the burden of proof is on the applicant when an exemption is claimed.<sup>156</sup> While the case law has rejected attempts by dischargers to qualify for an exemption by placing artificial labels on their activities,<sup>157</sup> fulfillment of the congressional intent to exempt only slight modifications to areas currently used as farmlands having little or no effect on wetlands, rests uneasily on the shoulders of thousands of private actors making case-by-case decisions about whether their activities merit an exemption.<sup>158</sup>

## 2. Exempted Federal Projects

Fearing that the Executive Branch might employ section 404 to veto water projects specifically authorized by Congress,<sup>159</sup> the 1977 Amendments to the Clean Water Act also exempted from section 404 permit requirements federal construction projects specifically authorized by Congress.<sup>160</sup> Section 404(r) has received little

446-49. Under EPA's new definition of "fill material," such discharges will require a 404 permit. See 58 Fed. Reg. 20,764, 20,774 (to be codified at 40 C.F.R. § 232.2(i)); see also 51 Fed. Reg. 8871 (1986) (Memorandum of Agreement between EPA and the Corps on solid waste).

145. See 33 C.F.R. § 323.4 (Corps regulations).

146. Office of Technology Assessment, Wetlands: Their Use and Regulation 87 (1984).

147. 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 233.35(a)(1)(ii).

148. 33 C.F.R. § 323.4(a)(1)(iii)(C)(2); 40 C.F.R. § 233.35(A)(1)(iii)(C)(2).

149. The Corps' 1982 regulations granted § 404(f) exemption to discharges associated with irrigation facilities. See 47 Fed. Reg. 31,794, 31,795, 31,812 (1982). Pursuant to the National Wildlife Federation settlement, the Corps has clarified that only "discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches" fall within the exemption. 49 Fed. Reg. 39,478, 39,482 (1984) (codified at 33 C.F.R. § 323.4(a)(3) (1987); 40 C.F.R. § 233.35(a)(3) (1986)).

150. U.S. v. Akers, 785 F.2d 814, 819 (9th Cir.), cert. denied, 107 S. Ct. 107 (1986) (Senator Muskie's remarks entitled to substantial weight); U.S. v. Huebner, 752 F.2d 1235, 1241 (7th Cir. 1985); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 926 (5th Cir. 1983). See generally Liebsman, The Farming Exemption Under § 404(f) of the Clean Water Act -- Congressional Intent and Judicial Construction, Nat'l Wetlands Newsletter (July/Aug. 1985) at 14-17.

151. Avoyelles, 715 F.2d at 926; see also

U.S. v. Larkins, 657 F. Supp. 76, 85-86 (W.D. Ky. 1987).

152. Huebner, 752 F.2d at 1241-43.

153. Akers, 785 F.2d at 820-22; U.S. v. Cumberland Farms of Connecticut, 647 F. Supp. 1166, 1175-76 (D. Mass. 1986).

154. Conant v. U.S., 786 F.2d 1008, 1010 (11th Cir. 1986).

155. Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 647 (5th Cir. 1983) (sanctioning clearing of wooded swamplands with marsh buggies and helicopters).

156. U.S. v. Larkins, 657 F. Supp. at 76 n.22 (burden of proving an exemption to a regulatory scheme on applicant, especially given the remedial nature of the Clean Water Act).

157. Liebsman, above note 150, at 17.

158. See W. Rodgers, above note 1, § 4.12 at 189 (noting that only a "random element," the risk of federal enforcement, "can rise up to repudiate these institutionalized private judgments").

159. See Thompson, above note 53, at 284-86.

160. Section 404(r) provides:

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress ... is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section ... (except for effluent standards or prohibitions under § 307 [33 U.S.C. § 1317 (1982)]), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in

attention. Few projects have been exempted, and none have been judicially challenged.<sup>161</sup> However, the legislative history of § 404(r) indicates that like the 404(f) exemptions Congress intended only a narrow category of activities to qualify for the exemption. First, the exemption applies only to projects entirely planned, financed, and constructed by a federal agency.<sup>162</sup> Second, the sponsoring agency must submit an EIS to Congress analyzing the project's ability to comply with the 404(b)(1) guidelines.<sup>163</sup> Fin-

ally, absent an EIS adequately addressing the 404(b)(1) guidelines, federal projects remain subject to § 404 permit requirements.<sup>164</sup>

ufficiently explicit to focus attention on those aspects of Federal project dredge and fill material discharges [in the construction of the new projects] that could result in environmental degradation. And the Administrator must assist other agencies by carefully reviewing draft [EISs] to assure that the guidelines are being interpreted and implemented properly.

123 Cong. Rec. 39,188 (Dec. 15, 1977).  
164. As Senator Muskie explained:

The depth and quality of discussion of the effects of discharges, including consideration of the (b)(1) guidelines, are crucial to the operation of new subsection (r). The filing of an impact statement adequately exploring these issues is a condition precedent to the operation of subsection (r). Until and unless adequate impact statements, or amendments to statements, are circulated and filed in accordance with [NEPA] and the (b)(1) guidelines, the permit requirements of section 404 ... will remain in full force and effect as to any given project in question. The process of review of environmental impact statements by other agencies should provide the same degree of coordination now provided in the interagency review of permit applications.

123 Cong. Rec. 39,188 (Dec. 15, 1977) (emphasis added). Speaking in support of the conference committee report, Representative Roberts noted: "Congress is to have the benefit of all the necessary information when it makes a decision. It is emphasized that the failure of a project to meet these requirements will result in the project having to obtain a section 404 permit." 123 Cong. Rec. 38,970 (Dec. 15, 1977). The courts have split on whether private parties having standing to challenge the adequacy of EISs for legislative proposals. See *Chamber of Commerce of U.S. v. Dep't of the Interior*, 439 F. Supp. 762 (D.D.C. 1977); *Wingfield v. OMB*, 7 E.L.R. 20,362 (D.D.C. 1977) (no standing); *Atcheson, Topeka & Santa Fe Ry. Co. v. Callaway*, 431 F. Supp. 722 (D.D.C. 1977) (standing); see also D. Mandelker, *NEPA Law & Litigation* § 4:21 (1984). In *Andrus v. Sierra Club*, 442 U.S. 347 (1979), the Supreme Court ruled that agencies need not complete an EIS on appropriation requests. However, Congress has specifically mandated that an agency seeking a § 404(r) exemption must either accompany authorization or appropriation requests with an EIS applying the 404(b)(1) guidelines. See quoted text, above note 160. While an agency would be free under *Andrus* to not file an EIS with an appropriation request for a project within U.S. waters, it would lose any right to a § 404(r) exemption and

an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

33 U.S.C. § 1344(r).

161. Passing reference is made to § 404(r) in *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 51, n.92 (D.C. Cir. 1987) (exemption applies only to discharges integral to designated federal projects); and *South Carolina Wildlife Federation v. Alexander*, 457 F. Supp. 118, 128 (D.S.C. 1978) (§ 404(r) does not exempt federal projects from § 402 permit requirements).

162. Senator Stafford remarked in floor debate the following:

Projects, even though fully financed by the Federal Government, which are authorized under continuing authorities or lump sum appropriation shall be subject to 404 permits not withstanding the issuance by the responsible Federal agency of a programmatic or individual NEPA review document.... For the purposes of this act, Federal projects are those which are entirely planned, financed, and constructed by a Federal agency in every respect.

123 Cong. Rec. 39,193 (Dec. 15, 1977). Accord 123 Cong. Rec. 38,995 (Dec. 15, 1977) (statement of Rep. Stark); 123 Cong. Rec. 38,997 (Dec. 15, 1977) (statement of Rep. Harsha); 123 Cong. Rec. 39,209 (Dec. 15, 1977) (statement of Sen. Baker).

163. Senator Muskie, in describing the conference report, stated the following in floor debate:

The Congress must have adequate siting, engineering, and environmental information and analysis on each proposed Federal project, as well as on modifications recommended by reviewing agencies, in order to review the available alternatives to and potential adverse impacts of the proposed discharges. The Administrator [of EPA] will be expected to see that the section 404(b)(1) guidelines are suf-

Unless a Corps project meets the criteria for exemption under the § 404(r), § 313 of the Clean Water Act subjects the Corps, along with other federal agencies, to the requirements of § 404.<sup>165</sup> The Corps acknowledges this requirement in its regulations.<sup>166</sup> However, while the Corps must go through the same notice and comment process as other permit applicants, it need not issue itself a permit; instead, it issues a "statement of findings" supporting the proposed discharge.<sup>167</sup>

### C. General Permits

A key part of the 1977 Amendments' attempt to reduce the perceived burdens of 404 regulation was section 404(e), authorizing the Corps to issue "general permits" on a state, regional, or nationwide basis, thereby exempting certain categories of activities from the individual permit requirement.<sup>168</sup> Only activities "similar in nature" and having minimal individual or cumulative adverse effects may be authorized by general permits.<sup>169</sup> General permits must comply with the 404(b)(1) guidelines and contain management standards.<sup>170</sup> They are limited to five years duration and may be modified or revoked at any time.<sup>171</sup>

The Corps has issued 26 nationwide permits,<sup>172</sup> covering discharges associated with such activities as fish harvesting, bank stabilization, minor road crossing fills, and bridge building.<sup>173</sup> Nationwide permittees must satisfy a number of conditions that make a variety of

would have to seek a permit.

165. Section 313 provides that:

[e]ach ... instrumentality ... of the Federal government ... engaged in any activity ... which may result in the discharge or runoff of pollutants ... shall be subject to and comply with, all Federal, State, interstate, and local requirements ... respecting the control and abatement of water pollution in the same manner, and to the same extent as any non-governmental entity.

33 U.S.C. § 1323 (1982).

166. 33 C.F.R. § 209.145(b)(1) (1987). These regulations were prompted by *Save Our Sound Fisheries Ass'n v. Callaway*, 387 F. Supp. 292, 306 (D.R.I. 1974) ("Congressional intent that the permit issuance procedures apply to Corps projects is ... clear from Section 301(a) of the FWPCA").

167. *Id.* at § 209.145(f)(1)(vii). See *Minnesota v. Hoffman*, 543 F.2d 1198, 1204, n.20 (8th Cir. 1976) (the Corps' regulations provide "a procedure functionally equivalent to permit issuance for its own dredging projects").

168. 33 U.S.C. § 1344(e)(1).

169. *Id.*

170. *Id.*

171. 33 U.S.C. § 1344(e)(2).

172. See 33 C.F.R. § 330.5.

173. *Id.* at §§ 330.5(a)(4) (13-15).

activities ineligible for authorization under nationwide permits, including discharges in the proximity of public water supply intakes, in areas of concentrated shellfish production, jeopardizing endangered or threatened species or modifying their habitat, significantly disrupting the movement of indigenous aquatic species, with toxic pollutants, in designated or proposed national Wild and Scenic Rivers, or impairing reserved tribal rights.<sup>174</sup> In addition, in some states individual water quality certification and coastal zone management consistency must be secured.<sup>175</sup>

Also authorized by nationwide permit are discharges occurring in wetlands smaller than 10 acres located above the "headwaters" of non-tidal waters (where streamflow is less than 5 cubic feet per second) or in "isolated waters" not part of a surface tributary system.<sup>176</sup> These permits exempt from individual permit coverage some 17 million acres of wetlands in the contiguous states, thereby authorizing around 40,000 discharges annually.<sup>177</sup> Not surprisingly, they have proved to be quite controversial. When first proposed, EPA declared that "nationwide permits for classes of waters, in addition to categories of activities, has no basis and is inconsistent with congressional intent."<sup>178</sup> Section 404(e)(1) limits the issuance of general permits, nationwide or otherwise, to activities "similar in nature."<sup>179</sup> The National Wildlife Federation settlement did reduce the scope of these authorizations by reinstating the 10-acre limit and also requiring pre-discharge notification for discharges causing the "loss of or substantial adverse modification" to wetlands between 1 and 10 acres.<sup>180</sup> Nevertheless, the statute nowhere authorizes exempting entire classes of waters from the requirement of obtaining individual permits.

There is also question whether the entire general permit program meets the statutory requirement that activities permitted under the program produce only "minimal cumulative adverse effects,"<sup>181</sup> especially in view of the alarming

174. *Id.* at §§ 330.5(b) (1-5, 7, 10).

175. *Id.* at §§ 330.7(a)(10, (2), (5).

176. *Id.* at § 330.5(a)(26) (authorizing discharges into waters above the "headwaters" and "isolated" waters except those causing "the loss or substantial adverse modification" of 10 acres or more). See also *id.* § 330.2(b) (definition of "headwaters").

177. See Nagle, above note 85, at 237; Tomasello, *Section 404 of the Clean Water Act: Risks of Regulatory Reform*, 58 Fla. Bar. J. No. 4, at 232 (1984).

178. Letter from William N. Hedeman, Jr. to Major General E.R. Heiberg III (Dec. 31, 1980), quoted in Nagle, above note 177, at 247.

179. 33 U.S.C. § 1344(e)(1); see Blumm, above note 82, at 483-84. The Corps appears to have amended the statute by authorizing general permits for activities "substantially similar in nature." 33 C.F.R. § 322.2(f)(1).

180. See above note 83 and text accompanying note 89.

rate of wetland loss -- up to 450,000 acres annually, according to the U.S. Fish and Wildlife Service.<sup>182</sup> Implied in the 5-year limit that Congress attached to its authorization of general permits is the notion that the Corps would periodically review the program to ensure that the permits actually satisfied the congressional mandates of complying with the 404(b)(1) guidelines and producing "minimal cumulative effect."<sup>183</sup> However, when the permits expired in 1987, the Corps simply reissued them, with no discussion of why its experience with the permits showed they satisfied the statutory standards.<sup>184</sup> If the Corps' assertions of regulatory jurisdiction must be based on thorough study,<sup>185</sup> its regulatory abdication warrant no less.<sup>186</sup> Because only some permittees are required to notify the Corps of their proposed discharge activities,<sup>187</sup> the Corps is poorly equipped to gather information on numerous activities authorized by nationwide permits, let alone those authorized by regional and "programmatic" permits<sup>188</sup> and "letters of permission."<sup>189</sup> There is simply no way to know

whether the general permit program is functioning as Congress intended.

Corps District Engineers have the authority to modify, condition, and override general permits to ensure greater environmental protection.<sup>190</sup> The conditions limiting the applicability of nationwide permits have eliminated some particularly damaging activities from that program.<sup>191</sup> And the courts have generally interpreted narrowly the scope of the nationwide permits, at least where the government is pursuing an enforcement action.<sup>192</sup> Still, as in the case of the 404(f) exemptions,<sup>193</sup> the general permit program reduces section 404 to a position of having to react to the decisions of a myriad of private decision makers, usually after they have undertaken an alteration to the aquatic environment. In effect, the general permit program reverses the burden of taking action that otherwise is imposed on a permit applicant. It is a peculiar regulatory scheme that saddles itself with such a burden, explainable in large measure by the Corps' long history of ambivalence toward the 404 program.<sup>194</sup> Given the costs of the current general permit program in annual wetland losses, it seems badly in need of overhaul.

181. 33 U.S.C. § 1344(e)(1).

182. See Barton II, above note 84, at 374.

183. 33 U.S.C. §§ 1344(e)(1) (compliance with 404(b) guidelines, minimum cumulative effect), (e)(2) (5-year limit).

184. 51 Fed. Reg. at 41,217 (1986) ("We are reissuing the 26 nationwide permits ... as modified and conditioned").

185. See *MWF v. Hanson*, above note 126 and accompanying text.

186. See *W. Rodgers*, above note 1, § 412, at 191 (nationwide permits are exemptions by rule in everything but name, transferring individualized permitting into an administrative rule based on a one-time only guess that effects will be minimal).

187. See 33 C.F.R. §§ 330.5(7) (outfall structures), (17) (small hydropower projects), (21) (surface coal mining activities), (26) (activities above the "headwaters" and in "isolated" waters between 1 and 10 acres). See also *id.* § 330.7 (notification procedures for activities above the "headwaters" and in "isolated" waters, requiring 20 days advanced written notice to the Corps prior to discharge).

188. Only nationwide permits are issued through notice and comment rulemaking and published in the Corps regulations. 33 C.F.R. §§ 325.2, 330. Regional permits are issued by Division or District Engineers, after public notice. *Id.* §§ 325.2(e)(2), .5(c)(1), .3(b). "Programmatic" permits are a type of general permit "founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program," *id.* § 325.5(c)(2). While the Corps' regulations restrict activities authorized by general permits to those causing minimal individual and cumulative environmental impacts, they seem to have eliminated the requirement that activities be "similar" in nature (or "substantially similar," see above note 179) when the general permit is one designed to avoid "unnecessary duplication of regulatory control." See 33 C.F.R. §§ 322.2(f), 323.3(h).

## D. State Programs

In addition to the statutory exemptions and the Corps general permits, state permit programs were part of the 1977 congressional compromise that maintained broad geographic jurisdiction but sought to limit the accompanying regulatory burden. In waters other than traditionally navigable waters, states may displace Corps permitting if EPA ascertains that the state program satisfies a detailed set of statutory criteria.<sup>195</sup> EPA promulgated state program approval

189. Letters of permission are "a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation but without the publishing of an individual public notice." 33 C.F.R. § 325.2(e)(1). See also *id.* § 325.5(b)(2).

190. *Id.* § 325.7.

191. See above notes 174-75 and accompanying text. See also *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (dam not eligible for nationwide permit because of distant downstream effects on endangered whooping crane habitat).

192. See *U.S. v. Wickard*, 718 F.2d 1094 (4th Cir. 1983); *U.S. v. Lambert*, 589 F. Supp. 366, 371 (M.D. Fla. 1984); *U.S. v. Winters*, No. EC 82-155-LS (W.D. Miss. June 4, 1984) (all ruling discharges ineligible for authorization under the "headwaters" nationwide permit).

193. See above note 158 and accompanying text.

194. See above § 1.

195. 33 U.S.C. §§ 1344(g)-(h). For an overview of the statutory and regulatory requirements of state 404 programs, see 404 Program

regulations in 1979 which only one state, Michigan, has managed to satisfy.<sup>196</sup> The principal reasons for the lack of state interest are a lack of federal grant money to administer the program and the fact that the Corps' general permit program exempts numerous activities from individual permits. Thus, there is less interest among the regulated to eliminate the federal presence than there was in the case of the National Pollutant Discharge Elimination System, authorized by section 402 of the Clean Water Act, where over 30 state programs have received EPA approval. Nevertheless, the Task Force on Regulatory Relief thought the lack of state programs was due to the stringency of the EPA approval regulations and directed EPA to revise them to make it easier for states to obtain approval.<sup>197</sup> Whether the new rules induce a state rush to implement section 404 remains uncertain.<sup>198</sup>

Although not authorized to approve state 404 programs, the Corps has attempted to employ its general permit program to effectively substitute state regulatory programs for 404 regulation, an effort which seems to have subsidized somewhat in the wake of the National Wildlife Federation Settlement.<sup>199</sup> Statewide programmatic permits could effectively undermine EPA's role in approving state 404 programs, as well as the statutory standards Congress established for program approval in section 404(g) and (h).<sup>200</sup> Nevertheless, Corps regulations still authorize such permits and do not appear to reflect the statutory requirement that the authorized

Perspective, above note 27, at 454-60.

196. 44 Fed. Reg. 32,918 (1979) (now codified at 40 C.F.R. § 233) (consolidated regulations for state programs under §§ 402 and 404 of the Act). On Michigan's program, see *id.* § 233.42; see also Harrington, Michigan 404 Program Assumption, 7 Nat'l Wetlands Newsletter No. 1, at 10-11 (1985).

197. See Barton I, above note 15, at 245.

198. Revised state program approval rules were promulgated on June 6, 1988, 53 Fed. Reg. 20,764. Their principal inducement for states is a relaxed federal oversight policy whereby EPA will waive federal oversight of categories of discharges. See 53 Fed. Reg. 20,784 (to be codified at 40 C.F.R. § 233.51). EPA explained that it intends to employ this waiver to focus only on proposed discharges with potentially serious adverse environmental effects, noting that in Michigan (the only state with an approved 404 program) only 1% of permit applications received federal review in 1985 and only about 1.5% in 1986. 58 Fed. Reg. 20,772.

199. See Barton I, above note 15, at 245 (reporting that the count in the National Wildlife Federation suit concerning statewide general permits was dismissed because the Corps had made "little headway in issuing such permits, and that the Corps claims most" of those apply only to certain actions and only in certain waters).

200. 33 U.S.C. §§ 1344(g), (h). In particular, such permits may not ensure that authorized activities comply with the 404(b) guidelines.

activities be similar in nature.<sup>201</sup>

### III. Permit Criteria

This section reviews the process by which 404 permits are issued and the standard governing their issuance. Because the decision whether to issue a 404 permit is often the result of the opinion of an agency other than the Corps, the substance of the regulatory program is tied closely to the procedures by which permits are reviewed. Thus, the consultation and review procedures required by the Fish and Wildlife Coordination Act warrant special attention. The section also examines substantive permit criteria, such as the duty to consider alternatives and the findings required by the 404(b) guidelines. Also considered is the recent administrative controversy over the force and effect of the guidelines, as well as recent judicial interpretations. Finally, some 404 program peculiarities, such as "after the fact" permits and interagency agreements are assessed.

#### A. Permit Procedures In General

##### 1. Individual Permits

Individual 404 permits are issued both in advance of and after a discharge occurs.<sup>202</sup> General permits are issued on a regional basis by Corps Districts under procedures similar to individual permits.<sup>203</sup> Nationwide permits, of course, employ a different path, notice and comment rulemaking.<sup>204</sup> Permit applicants must submit their proposals to the local Corps' District Engineer<sup>205</sup> who notifies interested parties and the general public,<sup>206</sup> decides whether to hold a hearing,<sup>207</sup> and analyzes the environmental effects of the proposal in an environmental assessment (EA).<sup>208</sup> If the action may have a significant effect on the quality of the human environment, an environmental impact statement (EIS) is prepared.<sup>209</sup> Based on the analysis of the EA and/or EIS, the District Engineer decides whether and under what conditions to grant the permit.<sup>210</sup> Where either EPA, the Fish and Wild-

201. 33 C.F.R. §§ 322.2(f), 323.3(h), 325.5(c)(3). See above notes 179, 188.

202. 33 C.F.R. §§ 325.8, 326.3(e).

203. *Id.* §§ 325.2(e)(2), .5(c)(1).

204. *Id.* §§ 325.5(c)(2), 330.

205. *Id.* § 325.1.

206. *Id.* § 325.3(d).

207. *Id.* §§ 325.2(a)(5), 327.4.

208. *Id.* §§ 230.7(e), .9, 230 App. B.

209. *Id.* §§ 230.6, 230 App. A. See National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4332(2)(C) (§ 102(2)(C) of the National Environmental Policy Act). However, Corps decisions to prepare EISs on permit applications are relatively rare. For example, in 1986 the Corps prepared only 20 EISs on some 10,000 proposals. See Baldwin, CEQ Supports the Corps on NEPA, Nat'l Wetlands Newsletter (July/Aug. 1987), at 2.

210. 33 C.F.R. § 325.4 (permit conditions must be "directly related to the impacts of the proposal, appropriate to the scope and degree of

life Service, or the National Marine Fisheries Service objects to the proposal, additional administrative procedures take place.<sup>211</sup>

## 2. "After-the-Fact" Permits

Applicants may also apply for "after the fact," retroactive permits to cure discharges made illegally without a permit. Upon discovering an illegal discharge, the District Engineer must conduct an investigation<sup>212</sup> and, if the activity is still in progress, issue a cease and desist order.<sup>213</sup> After consulting with other federal agencies, the District Engineer may either recommend legal action against the discharger or request that the discharger apply for an "after the fact" permit.<sup>214</sup>

After-the-fact permits pose a number of troublesome issues. These post-hoc ratifications of illegal discharges conflict with the concept of a regulatory program grounded on assessing the impacts of activities before they take place. Their widespread use is perhaps attributable to the Corps' regulations which actually seem to instruct District Engineers to presume after-the-fact permits are the appropriate response to unauthorized discharges, not formal enforcement procedures.<sup>215</sup> Questions persist about whether such authorizations, termed a "policy of mass amnesty" by one commentator,<sup>216</sup> could possibly satisfy the permit criteria contained in the 404(b)(1) guidelines,<sup>217</sup>

those impacts, and reasonably enforceable"). See also *id.* § 325.4(a)(3) (authorizing both on-site and off-site mitigation conditions for "significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment"). See also *id.* § 320.4(r) (Corps general mitigation policy).

211. See below notes 245-52 and accompanying text.

212. 33 C.F.R. § 326.3(b).

213. *Id.* § 326.3(c)(1).

214. *Id.* § 326.3(e).

215. See 33 C.F.R. § 326.3(e).

[f]ollowing the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines ... (i) ... restoration ... has been completed, ... (ii) ... legal action is appropriate ..., (iii) a Federal, state, or local authorization ... has already been denied [and/or] (iv) enforcement litigation ... has been initiated ....

(Emphasis added.) The regulations note that civil penalties are appropriate in the case of violations which are "willful, repeated, flagrant, or of substantial impact." *Id.* at § 326.5(a).

216. W. Rodgers, above note 1, § 4.13, at 217.

217. 33 C.F.R. § 326.3 (1987) (requiring after-the-fact permits to comply with the

and whether they serve to insulate the discharge from citizen suit enforcement.<sup>218</sup>

These questions have received little judicial attention.<sup>219</sup> The leading case is a First Circuit opinion briefly addressing when the Corps may refuse to accept an after-the-fact permit application, sustaining a Corps refusal to consider such an application until the discharger complied with a cease and desist order requiring restoration of the area to its wetland condition.<sup>220</sup> The court ruled that the Corps regulations "clearly require that remedial work be completed before the Corps will accept an after-the-fact permit application."<sup>221</sup>

While perhaps after-the-fact permits are simply a reflection of hard realities of administering a permit program regulating numerous diverse activities, by failing to supply specific

404(b)(1) guidelines).

218. While a permit puts a discharger in compliance with the Clean Water Act from the date of its issuance, see § 404(p), 33 U.S.C. § 1344(p), the Supreme Court recently ruled that citizen suits had to be based on good faith allegations of intermittent or ongoing violations. *Gwaltney v. Chesapeake Bay Foundation*, 108 S. Ct. 376 (1987). Since the good faith allegation is measured from the time of the notice of intent to file a suit, a subsequently issued after-the-fact permit would not defeat the suit, although it might heavily influence the penalty imposed.

219. See, e.g., *Quinones Lopez v. Coco Lagoon Development Corp.*, 562 F. Supp. 188 (D.P.R. 1983) (sustaining the issuance of an after-the-fact permit issued without public hearings or a state coastal zone certificate); *U.S. v. Alleyne*, 454 F. Supp. 1164 (S.D.N.Y. 1978) (holding that an illegal discharge was entitled to an evidentiary hearing on the issues of whether he should be issued an after-the-fact permit, despite the fact he never applied for such a permit and whether the Corps had improperly selected defendant for enforcement based on race).

220. *U.S. v. Cumberland Farms of Connecticut*, 826 F.2d 1151 (1st Cir. 1987).

221. *Id.* at 1163: "When [the defendant] refused to comply with the Corps remedial order, and instead continued further destruction of the wetland, the Corps was within its rights, and indeed was left with no other recourse, but to seek judicial enforcement of the remedial restoration order, rather than to process administratively an after-the-fact permit." The court's "no other recourse" language is an overstatement, as whether to require remedial measures before considering an after-the-fact permit is discretionary with the Corps. See *id.* § 326.3(d)(1) ("If the district engineer determines ... that initial corrective measures are required, he should issue an appropriate order"). *Cumberland Farms* stands for the proposition that the Corps has discretion to refuse to consider an after-the-fact permit until corrective measures have been taken, but not that it must do so.

criteria governing their issuance.<sup>222</sup> the Corps has encouraged dischargers to pursue a form of "self help for the impatient"<sup>223</sup> that undermines the integrity of the permit program.

## B. The Public Interest Review

Since the late 1960s, all Corps of Engineers regulatory programs have governed by the Corps' public interest review.<sup>224</sup> This broad-based balancing of a host of economic and environmental factors has been described as a "parody of standardless administrative choice."<sup>225</sup> Yet while it authorizes Corps District Engineers to weigh a panoply of values on a case-by-case basis, the public interest review is not entirely without standards that curb administrative discretion. Some of these limits are imposed by the Corps regulations, others by interagency consultation requirements. This section examines each in turn.

### 1. The Corps' Balancing Act

The heart of the public interest review is the Corps' commitment to perform a "careful weighing" of the "benefits which may reasonably be expected to accrue" from a proposed discharge against its "reasonably foreseeable detriments."<sup>226</sup> Assuming that District Engineers possess the wisdom of Solomon, the Corps regulations promise that this balancing will consider public and private need for the project, alternative locations and means of accomplishing the objective where there exist unresolved resource use conflicts, effects on public and private uses, cumulative impacts, and some 20 other factors ranging from environmental concerns to energy needs, to "considerations of property ownership."<sup>227</sup> All of these factors are

evaluated reflecting "the national concern for both protection and utilization of important resources," and results, reportedly, are permit decisions that serve "the needs and general welfare of the people."<sup>228</sup> an archetypical New Deal decision-making limus that seems humorously anachronistic in an era that long ago rejected the New Deal paradigm of dispassionate agency expertise.<sup>229</sup>

Yet while review of decision making under this apparently open-ended charter is predictably of the "soft glance" variety,<sup>230</sup> courts have found some limits to public interest balancing.<sup>231</sup> Others are evident in the Corps' regulations, which require permit denial for discharges into "important" wetlands unless the benefits to the discharge outweigh the damage to the wetlands resource, applying 404(b) guidelines.<sup>232</sup> Overcoming this presumption of no discharge requires a reasoned administrative record<sup>233</sup> and probably absence of dissent from other resource agencies.<sup>234</sup> The limits that the

economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.

228. *Id.*

229. See, e.g., Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 Minn. L. Rev. 299 (1983).

230. E.g., Environmental Coalition of Brorward County v. Myers, 831 F.2d 984, 986 (11th Cir. 1987) (deferential judicial review especially appropriate given the complexity of the Clean Water Act and Corps decision making involving balancing under the public interest review). On "soft glance" review, see generally W. Rodgers, above note 1, at § 3.2.

231. *Mall Properties v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987) (Corps cannot reject a permit for mall exclusively on economic competition grounds where the economic concerns were unrelated to the project's environmental impacts, relying on *Metropolitan Edison v. PANE*, 460 U.S. 766 (1983)).

232. 33 C.F.R. § 320.4(b)(4). Wetlands "performing functions important to the public interest" include those serving significant biological functions such as habitat, nesting, spawning, rearing and resting sites for wildlife; those set aside for study; those performing drainage, flood control, recharge and water purification functions; and those unique in nature or scarce in the local area. *Id.* § 320.4(b)(2).

233. *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1031 (2d Cir. 1983) (enjoining the Corps initial decision on the Westway Highway).

222. Some years ago, a recommendation was made that the Corps regulations take into account the size of the fill, the value of the wetlands, and the good faith of the applicant. See Blumm, above note 82, at 487 n.97.

223. W. Rodgers, above note 1, § 4.13, at 217.

224. See above notes 17-19 and accompanying text. In addition to issuing 404 permits, the Corps issues permits for dams and dikes in navigable waters under section 9 of the 1899 Rivers and Harbors Act (33 U.S.C. § 401), see 33 C.F.R. § 321; for structures or work in or affecting navigable waters under § 10 of the 1899 Act (33 U.S.C. § 403), see 33 C.F.R. § 322; and for the transportation of dredged material for the purpose of ocean disposal under section 103 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. § 1413), see 33 C.F.R. § 324.

225. W. Rodgers, above note 1, § 4.12, at 205. Accord, *Mall Properties v. Marsh*, 672 F. Supp. 561, 566 (D. Mass. 1987).

226. 33 C.F.R. § 320.4(a).

227. *Id.*

... All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation,

Corps' presumption against wetland fills imposes on public interest balancing are not yet clear, but denial of other required federal, state, and local authorizations clearly requires 404 permit denial.<sup>235</sup> On the other hand, other permit approvals tilt the public interest balancing toward permit issuance.<sup>236</sup> And, although public interest balancing requires a consideration of alternatives,<sup>237</sup> the Corps will, with the blessing of the Council on Environmental Quality (but over EPA's objection) apparently limit its consideration to alternatives to granting the permit, not alternative projects.<sup>238</sup> This will

234. See below notes 253-56 and accompanying text.

235. 33 C.F.R. § 320.4(j). However, it is Corps policy to attempt to eliminate "duplicative" permit processing by issuing general "programmatic" permits, or, where not practice, to develop joint permit processing procedures. *Id.* § 320.4(b)(5). Denial of state water quality or coastal zone management consistency certification produces 404 permit denial unless EPA or the Secretary of Commerce, respectively, overrides the state denial. *Id.* §§ 320.4(d), (h).

236. *Id.* §§ 320.4(j)(2), (4) (absent "overriding national factors of public interest" 404 permits generally issued after state and local approval; federal authorizations entitled to "substantial consideration").

237. The requirement to consider alternatives whenever there are unresolved resource conflicts springs from § 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(E).

238. Current Corps regulations, 33 C.F.R. § 230 App. B § 8.4, require the Corps to consider "whether or not the entire project subject to the permit requirement could have significant effects on the environment." However, in 1984 the Corps proposed changes narrowing its environmental analysis to those effects produced by granting the permit, limiting its consideration of the need for the permit, not need for the project, and similarly curbing its evaluation of alternatives. 49 Fed. Reg. 1387-99 (1984). This proposal was prompted by two circuit court decisions, *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980), cert. denied, 449 U.S. 900 (1980) (Corps need only assess the impacts of a 1.25-mile transmission line crossing a navigable river and not the impacts of the entire 67-mile line); and *Save the Bay, Inc. v. Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), cert. denied, 449 U.S. 900 (1980) (Corps issuance to a chemical manufacturing plant of a pipeline construction permit was not a "major federal action," in part because EPA had already issued an NPDES permit). However, EPA objected to the proposed changes, citing its need for information on project impacts and reasonable alternatives to fulfill its duties under § 404 and § 309 of the Clean Air Act, 42 U.S.C. § 7609 (giving EPA authority to review and comment on all federal unsatisfactory actions to the Council on Environmental Quality), and referred the matter to CEQ (see 40 C.F.R. § 1504) which sided with the Corps, although it did rule that they must analyze

surely result in fewer Corps EISs, as it constricts the "small federal handle" rule by which a federal permit requirement effectively legalized the entire project for NEPA purposes.<sup>239</sup> Limiting the scope of alternatives may also skew the public interest balancing toward applicant's visions of the purpose and need for projects.<sup>240</sup>

## 2. Interagency Consultation

Consultation requirements have been a hallmark of Corps regulation since 1967<sup>241</sup> but proved to be quite controversial in the 1980s.<sup>242</sup> They are a critical aspect of the 404 program's ability to protect wetlands, since the agencies with the most wetlands expertise -- the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and state fish and wildlife agencies -- are not authorized permit agencies. Moreover, the public interest review frequently involves the Corps in socioeconomic decisions far beyond its traditional navigation expertise.<sup>243</sup> Thus, the Corps must often rely on the participation of state and federal fish and wildlife agencies and EPA for assistance in assessing the costs and benefits of proposed activities. The Corps regulations acknowledge this dependence by guaranteeing "full consideration" to the views of the federal and state fish and wildlife agencies.<sup>244</sup> However,

alternatives to non-water dependent uses, as required by the 404(b) guidelines, below notes 257-59 and accompanying text. See generally Baldwin, EPA Refers Proposed Corps NEPA Procedures to CEQ, *Nat'l Wetlands Newsletter* (May/June 1985) at 3-5; Baldwin, CEQ Supports Corps on NEPA, *Nat'l Wetlands Newsletter* (July/Aug. 1987) at 2-3.

239. See D. Mandelker, NEPA Law & Litigation § 8.16 (1984).

240. An applicant's economic objectives may limit the scope of alternatives. *South Louisiana Environmental Council v. Sand*, 629 F.2d 1005, 1017 (5th Cir. 1980); *National Wildlife Federation v. Marsh*, 586 F. Supp. 985, 1000 (D.D.C. 1983).

241. See above notes 15-16 and accompanying text.

242. See above notes 80-84 and accompanying text.

243. See, e.g., *Hill Properties v. Marsh*, above note 231.

244. 33 C.F.R. § 320.4(c). Between 1973 and 1984, the Corps attached "great weight" to these views, see 33 C.F.R. § 209.120(g)(4) (1974) and 33 C.F.R. § 320.4(c) (1977). "Great weight" was transformed into "full consideration" in the 1984 regulations implementing the National Wildlife Federation Settlement, 49 Fed. Reg. 39,478, 39,482 (1984). The Corps explained the change was necessary to more accurately reflect the language of the Fish and Wildlife Coordination Act and NEPA. 49 Fed. Reg. at 39,478 (1984). While stating in the preamble to its 1986 regulations that "[i]t is not our intention to reduce or discount the value or expertise of fish and wildlife agency comments or those of any other experts in any field," 51 Fed. Reg. at 41,207, the Corps declared in its 1986 regula-



in the early 1980s the perceived need to expedite permit processing undermined this guarantee and prompted a number of interagency battles between the Corps and the reviewing agencies.

Expediting permit processing was a concern of the 1977 Amendments, which responded to allegations that interagency consultation produced lengthy permit delays by requiring section 404(q) interagency agreements to speed permit processing.<sup>243</sup> Memoranda of Agreement were signed between the Corps and reviewing agencies in 1980,<sup>246</sup> but these were revised in 1982 in the wake of the President's Task Force on Regulatory Reform to substantially reduce the reviewing agencies' opportunities to invoke administrative appeals.<sup>247</sup> Reviewing agency dissatisfaction with these limits, along with congressional pressure, forced revisions in 1985.<sup>248</sup> However, while the new agreements make administrative appeals more possible,<sup>249</sup> discretion to grant or deny an appeal remains with the Assistant Secretary of the Army, and only one level of appeal is possible.<sup>250</sup> Thus, if EPA and the Corps disagree over how to apply the 404(b) guidelines to a particular discharge, and the Assistant Army Secretary denies EPA's request for review, EPA's only recourse is to invoke permit veto procedures under section 404(c).<sup>251</sup> And the only recourse of a federal or state fish and wildlife agency is to convince EPA to institute 404(c) proceedings.<sup>252</sup>

tions that whether to accord any permit issuance factor "great weight" will be discretionary. 33 C.F.R. § 320.4(a)(3) (1987). Acknowledging the expertise of the fish and wildlife agencies may not be the same as according their comments "great weight" in determining all permit decisions. Notice that federal permit approvals are accorded "substantial consideration," above note 236.

245. 33 U.S.C. § 1344(q); see above note 66 and accompanying text.

246. For a review of some of the difficulties the agencies encountered in reaching the 1980 agreements, see 404 Program Perspective, above note 27, at 443-45.

247. See above notes 78-80, 84 and accompanying text.

248. See, e.g., letter from G. Ray Arnett, Ass't Sec. of Interior for Fish and Wildlife to Robert K. Dawson, Acting Ass't Sec. of the Army for Civil Works (Nov. 7, 1984), discussed in Barton I, above note 15, at 242. On the congressional pressure, see above note 90.

249. See text accompanying above note 91.

250. See EPA and FWS Sign New § 404(q) MOAs With Army, Nat'l Wetlands Newsletter (Jan./Feb. 1986) at 2-4.

251. Memorandum of Agreement Between the Environmental Protection Agency and the Dep't of the Army (Nov. 12, 1985). To enable EPA to invoke its veto authority under section 404(c) (see below § IV.A), the agreement requires the Corps to supply EPA with a written record at least 10 days prior to the discharge. Id. at 5 ¶ 8.

252. The agreement between the Fish and Wildlife Service and the Corps does require the

It is true that, while the Corps must give "full consideration" to the views of federal and state fish and wildlife agencies, ultimately the Corps need not agree with their conclusions.<sup>253</sup> Nevertheless, the written records produced as a result of the consultation process are critical not only to assist EPA in ascertaining whether a project complies with the 404(b) guidelines or merits a 404(c) veto, but also in facilitating judicial review. Courts increasingly employ these records to determine whether the Corps has complied with section 404 as well as other statutory requirements.<sup>254</sup> For example, there is a welter of cases finding violations of the National Environmental Policy Act where administrative records reflect reviewing agency opposition.<sup>255</sup> Thus, through artful use of the con-

Corps to require permit applications for compliance with the Council on Environmental Quality's mitigation regulation (40 C.F.R. § 1508.20), see Nat'l Wetlands Newsletter, above note 250, at 4, but it does not clarify whether the regulation implies a "sequencing" of mitigation techniques (e.g., to prefer avoiding impacts altogether over minimizing impacts by limiting the action, and to prefer minimizing impacts over restoration efforts, operating conditions, and supplying substitute resources).

253. Sierra Club v. U.S. Army Corps of Engineers (Westway II), 772 F.2d 1043, 1054 (2d Cir. 1985) (only "serious consideration" warranted); River Road Alliance v. Corps of Engineers, 764 F.2d 445, 452 (7th Cir. 1985); Texas Committee on Natural Resources v. Marsh, 736 F.2d 262 (5th Cir. 1984).

254. See, e.g., Sierra Club v. U.S. Army Corps of Engineers (Westway I), 701 F.2d 1011, 1021-24 (resource agency opposition), 1030-31 (NEPA violation), 1032-33 (404 violation) (2d Cir. 1983); Westway II, 772 F.2d at 1053 (NEPA and 404 violations, despite fulfilling consultation requirements); National Wildlife Federation v. FERC, 801 F.2d 1505 (9th Cir. 1986) (violations of Federal Power Act and Northwest Power Act); Washington Dep't of Fisheries v. FERC, 801 F.2d 1516 (9th Cir. 1986) (violations of the Federal Power Act and Fish and Wildlife Coordination Act; Coordination Act imposes a duty to consider and respond); Confederated Tribes v. FERC, 746 F.2d 466 (9th Cir. 1984), cert. denied, 105 S. Ct. 2358 (1985) (violations of Federal Power Act, NEPA, the Northwest Power Act, and the Coordination Act; Coordination Act imposes an affirmative duty on action agency to consult with fish and wildlife agencies -- mere notice insufficient). For an analysis of the latter case, see Blumm, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 Harv. Envtl. L. J., 34-46 (1986).

255. Oregon Natural Resources Council v. Marsh, 820 F.2d 1051 (9th Cir. 1987), cert. granted, \_\_\_ S. Ct. \_\_\_ (1988) (EIS inadequate); Northwest Indian Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986) (EIS inadequate); violations of state water quality standards); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) (Environmental Assessment inadequate); The Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985) (Environmental Assessment inadequate);

sultation process, fish and wildlife agencies can help achieve NEPA's neglected goal of elevating the position of agencies with environmental expertise.<sup>256</sup>

#### D. The 404(b) Guidelines

First published in the wake of the Calaway decision in 1975,<sup>257</sup> and then subjected to vigorous collateral attack by the Corps under the guise of regulatory reform,<sup>258</sup> the 404(b) guidelines are now the chief environmental criteria governing the 404 program.<sup>259</sup> The Corps acquiesced to their binding nature as part of the National Wildlife Federation settlement and promulgated regulations to that effect.<sup>260</sup> 404 permits may not be issued for discharges that do not comply with the guidelines, although the Corps may also deny permits to activities that comply with the guidelines based on its public interest review.<sup>261</sup> The guidelines and the public interest review are therefore independent grounds for permit denial.

##### 1. Basic Requirements

Unlike the Corps' public interest review, which emphasizes utilitarian balancing, the premise of the 404(b) guidelines is that discharges will not be authorized unless shown not to have an unacceptable adverse impact on the aquatic ecosystem.<sup>262</sup> To implement this precept, the guidelines establish a revolutionary presumption against discharges where there exist practicable alternatives having a less damaging impact on the aquatic ecosystem, so long as the alternative does not have other significant environmental consequences.<sup>263</sup> "Practicable alternatives" are a function of cost, technical and logistic factors; although they must be capable of achieving the basic purpose of the proposed activity, the lack of property owner-

ship does not necessarily determine what is practicable.<sup>264</sup> Discharges into "special aquatic sites," like wetlands, for non-water dependent uses are presumed to have practicable alternatives.<sup>265</sup> The guidelines declare that "the guiding principle should be that degradation or destruction of special aquatic sites may represent an irretrievable loss of valuable aquatic resources."<sup>266</sup> In addition, they expressly prohibit certain types of discharges<sup>267</sup> and forbid any discharge causing or contributing to "significant degradation of the waters of the United States."<sup>268</sup> Also proscribed are all discharges unless "appropriate and practicable" mitigation measures have been taken.<sup>269</sup>

To effectuate these presumptions and limitations, the guidelines require documented factual determinations of the potential short- and long-term effects of proposed discharges on the aquatic environment,<sup>270</sup> including cumulative

264. *Id.* §§ 230.10(a)(1), (2).

265. *Id.* § 230.10(a)(3) ("Where the activity associated with a discharge which is proposed for a special aquatic site ... does not require access or proximity within the special aquatic site to fulfill its basic purpose (i.e., is not 'water dependent') practicable alternatives that do not involve special aquatic sites are presumed to exist unless clearly demonstrated otherwise.") Special aquatic sites are areas "possessing special ecological characteristic of productivity, habitat, wildlife protection or other important and easily disrupted ecological values ... significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region." *Id.* §§ 230.3(g-1). In addition to wetlands, they include sanctuaries and refuges, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. *Id.* §§ 230.40-.45.

266. *Id.* § 230.10(b) (discharges causing or contributing to violations of state water quality standards, violating toxic effluent standards of prohibitions, jeopardizing the continued existence of endangered or threatened species or resulting in the likely destruction or adverse modification of their critical habitat, or violating a requirement imposed to protect a marine sanctuary).

267. *Id.* § 230.1(d).

268. *Id.* § 230.10(c) (including significant adverse effects on (1) human health and welfare, (2) life stages of aquatic life and other wildlife dependent on aquatic ecosystems, (3) aquatic ecosystem diversity, productivity and stability, and (4) recreational, aesthetic, and economic values).

269. *Id.* § 230.10(d). Mitigating conditions include both alternative locations and operating conditions, including water releases from dams for fish and wildlife needs and water quality controls in dredging operations. *Id.* §§ 230.70-71.

270. *Id.* § 230.11. See *id.* §§ 230.20-.25 (potential physical and chemical effects), 230.30-.32 (potential biological effects), 230.40-.45 (potential effects on special aquatic

*Forelows on Board v. Johnson*, 743 F.2d 677 (9th Cir. 1984) (EIS required); *Foundation for North American Wild Sheep v. U.S. Dep't of Agriculture*, 681 F.2d 1172 (9th Cir. 1982) (EIS required).

256. 42 U.S.C. § 4332(2)(C).

257. See above notes 46-48 and accompanying text.

258. See above notes 74-77 and accompanying text.

259. 40 C.F.R. § 230.

260. See 33 C.F.R. §§ 320.4(a)(1), .4(b)(4), 323.6(a), 325.2(a)(6), .3(c)(2), fulfilling *National Wildlife Federation v. Marsh*, 14 Env't. L. Rep. 20,262, 20,264 ¶ 18 (D.D.C. Feb. 11, 1984).

261. 33 C.F.R. § 320.4(b)(4); see also 40 C.F.R. § 230.10 (note). The guidelines are promulgated "in conjunction with" the Corps, 33 U.S.C. § 1344(b)(1), a directive unique in U.S. environmental law.

262. 40 C.F.R. § 230.1(c) (unacceptable adverse impacts include both individual and cumulative impacts).

263. *Id.* § 230.10(a) (areas not presently owned by the applicant must be "reasonably" obtainable).

effects.<sup>271</sup> Before any 404 permit may be issued, specific findings of compliance with the guidelines must be made.<sup>272</sup> a requirement the Corps, formerly found particularly objectionable.<sup>273</sup> While ultimately acceding their binding nature,<sup>274</sup> the Corps has succeeded in exacting from EPA an acknowledgment that the Corps may interpret the guidelines.<sup>275</sup> Thus, EPA may not use its interpretation of the guidelines to override a Corps permit decision outside the context of a formal permit veto under section 404(c).

The 404(b) guidelines, it should be noted, do not simply govern the issuance of individual Corps permits, they also apply to general permits,<sup>276</sup> permits issued under approved state 404 programs,<sup>277</sup> and federal projects exempted from 404 permit requirements by section 404(r).<sup>278</sup> In short, they constitute, as one court noted, the yardstick by which all significant discharges are scrutinized.<sup>279</sup>

## 2. Judicial Interpretation

The 404(b) guidelines have fared rather well in court. They have been interpreted to proscribe discharges "likely to result in significant loss of or damage to fisheries,"<sup>280</sup> to require 404 permits of dams licensed by the Federal Energy Regulatory Commission,<sup>281</sup> and to bind

sites), 230.50-.54 (potential effects on water supplies, fisheries, recreation, aesthetics, and preserves); see also *id.* § 230.60-.61 (evaluation and testing procedures).

271. *Id.* § 230.11(g).

272. *Id.* § 230.12.

273. See generally Liebsman, above note 74, at 10,274-76 (detailing the Corps' objections to the binding nature and detailed provisions of the guidelines and its efforts to have them revised during 1983).

274. See above note 260 and accompanying text.

275. See EPA/Corps Memorandum of Agreement, above note 251, at 2 (§ 5(d)).

276. 33 U.S.C. § 1344(e)(1), 40 C.F.R. § 230.7 (expressly limiting activities authorized under general permits to those that are similar in nature and similar in their effect on the aquatic environment; also requiring a prediction of the number of discharges likely to take place in order to assess cumulative effects).

277. 33 U.S.C. § 1344(h)(1)(A); see above notes 195-201 and accompanying text.

278. *Id.* § 1344(r); see above notes 159-67 and accompanying text.

279. *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 50-51 (N.C. Cir. 1987) ("Section 404 transmits a crisp and unwavering message: all significant discharges, whether or not exempt from the permit requirement must be subjected to Section 404(b)(1) scrutiny or its equivalent").

280. *Sierra Club v. U.S. Army Corps of Engineers (Westway II)*, 772 F.2d 1043, 1050 (2d Cir. 1985) (interpreting 40 C.F.R. §§ 230.1(c), 231.2(e)).

281. *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir. 1987), *rev'g* *Monongahela*

the Corps.<sup>282</sup> The presumption against discharges for nonwater dependent uses has received favorable judicial treatment, sanctioning Corps permit denials,<sup>283</sup> and even leading to a reversal of a Corps decision affirming a fill for a residential development.<sup>284</sup>

The chief controversy has been over whether there in fact are practicable, less damaging alternatives available. In general, the courts have given the Corps wide berth to interpret this requirement, although there is an anomalous decision overturning a Corps permit denial for an industrial park.<sup>285</sup> The guidelines have hardly proved to be a bar to all development, as some applicants have succeeded in defining their project purposes so as to eliminate the availability of practicable alternatives. Consequently, the courts have upheld as consistent with the guidelines wetland losses of considerable magnitude, a 127-acre fill for a New Jersey commercial development,<sup>286</sup> the conversion of 5,200 acres of Louisiana bottomland hardwoods for soybean production,<sup>287</sup> and a 17-acre fill

*Power Co. v. Alexander*, 507 F. Supp. 392 (D.D.C. 1980).

282. *Id.* at 50; *Westway II*, 772 F.2d at 1050; *Shoreland Assoc. v. Marsh*, 555 F. Supp. 169, 179 (D. Md. 1983), *aff'd*, 725 F.2d 677 (4th Cir. 1984).

283. *Buttery v. U.S.*, 690 F.2d 1170, 1180 (5th Cir. 1982) (affirming permit denial for a stream channelization project and stating, "the Clean Water Act and the applicable regulations do not contemplate that wetlands will be destroyed simply because it is more convenient than not to do so"); *Shoreline Assoc.*, 555 F. Supp. at 169 (nonaquatic site a practicable alternative).

284. *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982) (Corps permit for a quarter-acre fill for two houses and a tennis court remanded because a letter from a realtor claiming that the site was the only one suitable for the project was not a sufficient basis to conclude there were no available alternatives).

285. *1902 Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381 (E.D. Va. 1983), which reversed Corps permit denial on the ground that the Corps over-emphasized environmental concerns and failed to consider the benefits of increased jobs and tax revenue in its general balancing. The case is explainable by the fact that it predated the Corps' acknowledgment of the binding nature of the 404(b) guidelines (see above note 260 and accompanying text).

286. *National Audubon Society v. Hartz Mountain Development Co.*, 14 E.L.R. 20,724 (D.N.J. 1983) (feasible alternatives not available because other sites would offer a less attractive marketing package to purchasers; project incorporated mitigating measures but those were deemed insufficient by EPA and federal fish and wildlife agencies).

287. *Louisiana Wildlife Federation v. York*, 761 F.2d 104 (5th Cir. 1985) (affirming 6 Corps general permits against charges that the Corps limited its consideration to alternatives that would fulfill the applicant's avowed purpose of

for a log storage and export facility in Washington.<sup>288</sup> These losses have been sustained despite the fact that the guidelines require permit denial for activities producing "significant degradation to the aquatic ecosystem," irrespective of whether there exist practicable alternatives.<sup>289</sup> The problem seems to be in the Corps' interpretation of this directive, which could be cured either by amending the guidelines<sup>290</sup> or through increased use of permit vetoes by EPA.

#### IV. EPA's Section 404(c) Powers

Permit vetoes, authorized by section 404(c), are a sort of court of last resort. When inter-agency consultation breaks down, when the Corps denies administrative appeals, and when it interprets the 404(b) guidelines to sanction discharges damaging to the aquatic ecosystem, EPA has the authority to veto permit issuance. Section 404(c) has been a relatively unused provision, but it is now receiving a good deal of attention, and reliance on it will surely increase in the future. In addition to authorizing permit vetoes, section 404(c) also authorizes EPA to identify areas unsuitable for discharge in advance of any permit application, a kind of proactive zoning power not typically assigned to a federal agency. This section considers both the reactive and proactive sides to section 404(c), along with the most notorious

increasing soybean production and failed to consider alternative economic uses not envisioned by the applicant, reasoning that the guidelines imposed a duty to take into account the objectives of the applicant; not all requested fills were permitted, some mitigating measures were included; and EPA did not object). See Fifth Circuit Upholds Corps Permits to Clear Bottomland Hardwoods, Nat'l Wetlands Newsletter (Sept./Oct. 1985) at 19.

288. *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986) (affirming a Corps after-the-fact permit where alternative sites were rejected as either too costly or logistically infeasible; EPA and fish and wildlife agencies did not oppose the permit because it was conditioned on a mitigation agreement committing the applicant to acquire substitute wetlands). See Ortman, Ninth Circuit Upholds Corps Issuance of After-the-Fact Permit, Nat'l Wetlands Newsletter (Nov./Dec. 1986) at 11.

289. 40 C.F.R. § 230.12(a)(3)(ii); see also id. §§ 230.10(b), (c); Westway II, above note 280 and accompanying text.

290. One potential approach was suggested by the plaintiffs in the York litigation, above note 287: to prohibit wetland fills for non-water dependent uses unless the applicant demonstrates no economically viable uses, irrespective of the proposed project. Alternatively, the guidelines could reinstate a version of the requirement contained in § 230.5(p)(8) of the 1975 guidelines that sanctioned wetland fills "only when it can be demonstrated that the site is the least environmentally damaging alternative." See *Monongahela Power v. Marsh*, 809 F.2d at 52 n.100.

404(c) action to date, the Sweden's Swamp fill.

#### A. Permit Veto Authority

Section 404(c) was enacted in 1972 as part of the compromise that allowed the Corps to retain its permit authority. Uneasy with authorizing the nation's largest dredger to regulate discharges of dredged or fill material, Congress established EPA's oversight role in sections 404(b) and (c).<sup>291</sup> Under section 404(c), EPA may prohibit discharges within specified areas when it determines, after public notice and an opportunity for a public hearing, as well as consultation with the Corps, there would be an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas."<sup>292</sup> This broad charge confirms EPA's role as the chief 404 agency<sup>293</sup> and equips it with unprecedented, if largely overlooked, federal authority to protect aquatic wildlife habitat.

The regulations implementing section 404(c) direct EPA to consider relevant portions of the 404(b) guidelines when considering a 404(c) action,<sup>294</sup> since a basic function of section 404(c) is to police application of the guidelines.<sup>295</sup> Consequently, avoidability of resource loss is a relevant 404(c) inquiry.<sup>296</sup>

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291. See Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 117 (Comm. Print 1973) (joint conference report):

The Conferees were uniquely aware of the process by which dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the committee did not believe that there could be any justification for permitting the Secretary of the Army to make the determination as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site. Thus, the Conferees agreed that the Administrator of the [EPA] should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.

292. 33 U.S.C. § 1344(c).

293. See above note 72 and accompanying text (describing the Civiletti opinion).

294. 40 C.F.R. § 231.2(e).

295. 44 Fed. Reg. 58,078 (1979) (preamble).

296. 50 Fed. Reg. 33,835, 33,836 (1980) (Proposed Determination to Prohibit or Restrict the Specification of an Area for Use as a Disposal Site; Notice of Public Hearing -- "It is appropriate under section 404(c) to take into

However, EPA has used section 404(c) to veto only 5 permits in 15 years,<sup>297</sup> in part because uncertainty over the force and effect of the 404(b) guidelines,<sup>298</sup> and in part because of the relatively low priority accorded the 404 program within EPA, at least until recently. As the Sweden's Swamp controversy illustrates, EPA is prepared to be a much more aggressive implementer of 404(c) in the future.

#### B. The Sweden's Swamp Veto

The controversy over the Sweden's Swamp fill illustrates the tension between EPA and the Corps, and their divergent interpretations of when practicable alternatives are available and the circumstances under which mitigation in the form of substitute resources can justify a discharge. The controversy arose when a developer, Pyramid Companies, decided to construct a shopping mall in the Attleboro, Massachusetts area.<sup>299</sup> Pyramid surveyed available sites, including one in North Attleboro containing only one acre of wetlands, but decided to purchase Sweden's Swamp, a 49-acre red maple swamp which EPA, the Fish and Wildlife Service, and the New England Division of the Corps determined furnished excellent wildlife habitat. In July 1984, Pyramid applied to the Corps for a permit to fill 32 acres of the swamp, proposing to mitigate the loss by attempting to convert 9 acres of uplands into a marsh and to create another 36 acres off-site at a gravel pit some 2 miles away.

EPA objected to issuance of the permit, and the Corps' New England Division initially indicated it would deny the permit based on the availability of the North Attleboro site. How-

account whether the loss of the resource is avoidable." *Id.* at 33,836).

297. The first veto was the North Miami landfill in 1981. In 1984, EPA vetoed another permit at the M.A. Norden site in Mobile, Alabama, see EPA Final 404(c) Determination on Mobile Bay Disposal Site Issued, Nat'l Wetlands Newsletter (July/Aug. 1984) at 6. In 1985, 3 more vetoes took place: the Jack May bank site of Jehosse Island, South Carolina, the Bayou Aux Carpes site in Jefferson Parish, Louisiana, and Sweden's Swamp. See Pending EPA Proposals Under Section 404(c) of the Clean Water Act, Nat'l Wetlands Newsletter (Mar./Apr. 1984) at 7; 52 Fed. Reg. 29,431, 38,519 (1987) (notices of proposed § 404(c) vetoes in Hackensack Meadows, N.J. and Taylor Slough, near Miami, FL).

298. See above notes 47-48, 86 and accompanying text.

299. See generally EPA Issues Final § 404(c) Determination Prohibiting Filling of Sweden's Swamp, Nat'l Wetlands Newsletter (July/Aug. 1986) at 10-12; Liebsman, The "Sweden's Swamp" Controversy -- Focusing on EPA's Role in the Clean Water Act § 404 Program, Nat'l Wetlands Newsletter (Nov.-Dec. 1987) at 15; see also 51 Fed. Reg. 22,977 (1986) (Final Determination of the Assistant Administrator for External Affairs Concerning the Sweden's Swamp Site); 50 Fed. Reg. 33,835-33,836 (1985).

ever, because that site was subsequently purchased by a competing developer, the Corps' Deputy Director for Civil Works directed that the permit be issued. He further determined that because of Pyramid's proposed mitigation measures, no other site could be environmentally preferable.<sup>300</sup> EPA's Regional Administrator recommended a veto on grounds of adverse wildlife effects and the availability of alternative sites.<sup>301</sup> EPA headquarters agreed, reasoning that (1) even if Pyramid's wetland creation plan was entirely successful, the new wetlands would adversely affect wildlife; (2) this loss was "unacceptable" within the meaning of section 404(c) because it was avoidable through use of an available alternative; and (3) the North Attleboro site was available to Pyramid, even though it was subsequently purchased by another developer, because the determination of availability is not limited to the time of permit application but includes the developer's entire site selection process.<sup>302</sup> According to

300. See 50 Fed. Reg. 33,836 (1985) (see above note 296). The reasoning went as follows:

If mitigation measures can fully compensate for all adverse impacts of a proposed discharge on the aquatic environment, then the adverse effects of [that] ... discharge ... [are] zero. Since no alternative could have [a] less adverse environmental effect than zero, 100 [percent] mitigation would allow the satisfaction of the ... guidelines requirement, even if a practicable upland alternative site might be available.

Eggert, Out With the Old, In With the New: The Corps' Controversial Interpretation of the § 404(b)(1) Guidelines, Nat'l Wetlands Newsletter (Sept./Oct. 1985), at 3; see also 33 C.F.R. § 320.4(r) (1987) (Corps' mitigation policy). The Corps regulations state that this mitigation policy is not a substitute for the mitigation requirements in the 404(b)(1) guidelines, and note that an interagency working group is developing guidance to implement the guidelines' mitigation requirements. 33 C.F.R. § 320.4(r) n.l.

301. See EPA Issues Final § 404(c) Determination, above note 299, at 11. Pyramid sought unsuccessfully to overturn the Regional Administrator's decision, arguing that he had taken too long to make his decision. See *Bersani v. Deland*, 640 F. Supp. 716 (D. Mass. 1986) (neither the Clean Water Act nor applicable regulations place a time limit on the Regional Administrator). Earlier, Pyramid unsuccessfully sought to persuade a different district court to enjoin the initiation of 404(c) proceedings. *Newport Galleria Group v. Deland*, 618 F. Supp. 1179 (U.D.C. 1985).

302. 51 Fed. Reg. 22,977 (1986); see EPA Issues Final § 404(c) Determination, above note 299, at 11-12:

Whether the North Attleboro site is or is not the best site within the trade

EPA, given the primitive state of wetland creation science, mitigation measures based on man-made wetlands cannot substitute for analysis of available alternative sites, since such a policy would encourage developers to turn first to the uncertain technology of wetland creation, replacing established, naturally functioning wetlands with man-made creations of questionable value.<sup>303</sup> These determinations were upheld as reasonable by a district court in late 1987 and affirmed by the Second Circuit in mid-1988.<sup>304</sup>

The Sweden's Swamp result shows a decided

area from a specific applicant's perspective is not the issue. The practicable alternatives test requires only that other sites be feasible, not that they be equal or better. Neither the Act nor the Guidelines require an applicant to probe the availability of a site that the applicant believes is unsuitable for its project. That is a judgment for the applicant to make. But in making that judgment, the applicant runs the risk that the marketplace will call into question the determination of unsuitability, and that the applicant will then be left without proof that the alternative site was also unavailable. That is the case here.

303. EPA's reasoning went as follows:

To accept [mitigation] under these conditions would ... encourage developers to seek novel mitigation measures, not alternatives, and would undermine the predictability of the permit process. We would find ourselves drawn, as in this case, into assessments of mitigation approaches for which we will be able to make, at best, only qualitative judgments based on uncertain knowledge. As the technology develops, there might well be a case in which even offsite, out of kind wetland creation would be so beneficial and so reliable as to justify an exception. This plainly is not the case here.

Id. at 12. For a review of the state of the art in wetland mitigation, see Focus on Mitigation Nat'l Wetlands Newsletter (Sept./Oct. 1986); see also Kunz, Rylko & Somers, An Assessment of Wetland Mitigation Practices in Washington State, Nat'l Wetlands Newsletter (May-June 1988) at 2 (finding, among other things, that 35 planned mitigation projects between 1980 and 1986 still resulted in a substantial loss of wetland acreage and diversity, that mitigation designs were not effectively incorporated into 404 permits, and that monitoring was sparse).

304. Bersani v. U.S. E.P.A., 674 F. Supp. 405 (N.D.N.Y. 1987), aff'd sub nom., Bersani v. Robicand, \_\_\_ F.2d \_\_\_, 56 U.S.L.W. 2724 (2d Cir. 1988).

judicial deference to EPA. Three district courts in three different circuits all declined to interfere with EPA's 404(c) determinations.<sup>305</sup> Thus, EPA may employ 404(c) to conduct an independent evaluation to override aberrant interpretations of the 404(b) guidelines by the Corps, such as its conclusion that wetlands loss accompanied by compensation of man-made mitigation could be the environmentally preferred alternative.<sup>306</sup> Moreover, judicial ratification of EPA's "market entry" test to judge the availability of alternative sites and sanction of EPA's hard look at the feasibility of alternatives make 404(c) a potent vehicle for wetlands protection.<sup>307</sup> Whether EPA will invoke 404(c) on a regular basis, and whether the Corps will recognize the precedents established in 404(c) proceedings in its interpretation of the 404(b) guidelines remain key, unanswered questions.<sup>308</sup>

### C. 404(c) Prospective Prohibitions

Section 404(c) also enables EPA to identify areas unsuitable for dischargers before a discharge is proposed.<sup>309</sup> These prohibitions, referred to as "advanced identifications" by EPA, could supply an important means to protect critical aquatic areas prior to the development of site specific controversies and would also help to increase predictability of 404 regulation.<sup>310</sup> Prospective use of 404(c) in this manner could be encouraged by areawide studies conducted under the National Wetlands Inventory<sup>311</sup> or state coastal zone management programs.<sup>312</sup> The 404(c) regulations ought to enable federal and state agencies and members of the public to submit petitions for prospective

305. According to the Corps/EPA Memorandum of Agreement, the Corps retains the authority to interpret the 404(b) guidelines, see above note 260 and accompanying language.

306. See above note 300.

307. See Liebsman, above note 299, at 16-17 (noting also, however, that the case leaves unanswered how far back in time an applicant must search under the "market entry" test).

308. EPA is in the process of revising its 404(c) regulations to make 404(c) vetoes procedurally less cumbersome.

309. 33 U.S.C. § 1344(c) ("the Administrator is authorized to prohibit the specification ... of any defined area as a disposal site ..."); see 40 C.F.R. § 231.1; see also id. § 230.80 (tentative identification of sites).

310. See Cooper, Wetlands or Wastelands?, Nat'l Wetlands Newsletter (July/Aug. 1985) at 4-5; Nagle, above note 85, at 49-50.

311. See Barton II, above note 84, at 381-82; 404 Regulation: A Response, above note 82, at 479-80 (advocating use of wetland maps for regulatory purposes).

312. On the relationship between state coastal planning and 404 regulation, see Blumm, Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency, 5 Colum. J. Envtl. L. 69 (1978) (state coastal zone plans cannot eliminate application of 404(b) guidelines).

prohibitions and establish a process for evaluating the merits of the petitions. However, to date EPA has yet to devote the resources necessary to make 404(c) an effective vehicle to designate high value wetlands and special aquatic sites unsuitable for discharges, although a recent effort undertaken in York County, Maine offers hope for the future.<sup>313</sup>

## V. Enforcement

Enforcement cases increasingly occupy center stage in 404 regulation, not surprising for a program with around 400 cases pending in mid-1987.<sup>314</sup> Section 404 divides enforcement responsibilities between EPA and the Corps, restricting the latter to permit violations.<sup>315</sup> Only EPA possesses authority to enforce against unauthorized discharges<sup>316</sup> which constitute by far the largest bulk of enforcement cases.<sup>317</sup> The 1987 amendments to section 404 expanded the enforcement powers of both the Corps and EPA to include imposition of administrative penalties,<sup>318</sup> but the amendments left the general division of enforcement authority intact. Remedies for violations include injunctive relief, including restoration orders, and civil and criminal penalties. In addition to government-initiated enforcement, citizens may institute enforcement actions. This section surveys the chief 404 enforcement issues.

### A. Detecting Violations

The intergovernmental nature of the 404 program is nowhere better illustrated than in enforcement. In addition to the division of enforcement powers between EPA and the Corps, federal and state fish and wildlife agencies are frequently the motivating forces behind enforcement actions, since they often first detect alleged violations.<sup>319</sup> Corps regulations encourage reporting of violations by other agencies and the public; also encouraged are joint surveillance procedures.<sup>320</sup> Aerial surveillance is not uncommon,<sup>321</sup> and search warrants to con-

firm suspected discharges not unprecedented.<sup>322</sup>

Once a violation is detected, both EPA and the Corps may issue cease and desist orders prohibiting further discharges and perhaps ordering initial corrective measures.<sup>323</sup> The Corps' regulations instruct District Engineers to consult EPA, federal fish and wildlife agencies, and other interested agencies for advice on the appropriate nature of these corrective measures.<sup>324</sup> The Corps may nevertheless ratify an illegal discharge by issuing an after-the-fact permit, but not without applying the 404(b) guidelines, and not if EPA or any other federal, state or local agency is pursuing enforcement action, unless "clearly appropriate."<sup>325</sup>

### B. Restoration Orders

Injunctions to restrain discharges are the usual remedy sought by government enforcement actions,<sup>326</sup> but because of cease and desist authority possessed by both EPA and the Corps, there is less urgency to obtain temporary equitable relief. Instead, the focus is on permanent relief, often including restoration orders. Restoration orders, by which the courts direct unauthorized dischargers to remove their fills or replace the aquatic resources destroyed by their activities, were first authorized in section 12 of the 1899 Rivers and Harbors Act.<sup>327</sup> They supply an important means to carry out the Clean Water Act's policy of preserving and restoring the physical and biological integrity of the nation's waters,<sup>328</sup> which the legislative history makes clear includes protection and restoration of wetlands.<sup>329</sup>

Since injunctive relief is not automatic for violation of Clean Water Act permit requirements,<sup>330</sup> neither is an order to restore the environment. Nevertheless, courts have issued

Torres, 656 F. Supp. 251, 251 (D.P.R. 1987); U.S. v. Edwards, 667 F. Supp. 1204, 1207 (W.D. Tenn. 1987).

322. See, e.g., Matter of Alameda County Assessor's Parcels, 672 F. Supp. 1278, 1286-87 (N.D. Cal. 1987) (sanctioning a search warrant for EPA under § 308 of the Act, 33 U.S.C. § 1318).

323. See 33 U.S.C. §§ 1319(a)(3) (EPA authority), 1344(s)(1) (Corps authority).

324. 33 C.F.R. § 326.3(d).

325. *Id.* §§ 326.3(e)(2), (e)(1)(iv).

326. See, e.g., U.S. v. Rivera Torres, 656 F. Supp. 251 (D.P.R. 1987); U.S. v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984). Section 309(b) of the Clean Water Act authorizes both temporary and permanent injunctions. 33 U.S.C. § 1319(b).

327. 33 U.S.C. § 406.

328. *Id.* § 1251(a).

329. Sen. Comm. on the Environment, Legislative History of the Clean Water Act Amendments of 1977, 95th Cong., 2d Sess. 532 (committee explanation), at 869-70 (Comm. Print) (statement of Sen. Muskie).

330. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (§ 402 permit violation does not automatically warrant injunction).

313. See Shields, Wetlands Advance Identification Program in Southern Maine, Nat'l Wetlands Newsletter (Jan.-Feb. 1988) at 2.

314. Oral remarks of Peggy Strand at Conference on the Clean Water Act's Section 404 Program (May 29, 1987, Washington, D.C.).

315. 33 U.S.C. § 1344(s).

316. Authorized discharges, as well as permit violations, are violations of section 301(a) of the Act, 33 U.S.C. § 1311(a), subject to EPA's enforcement authority under § 313, 33 U.S.C. § 1319.

317. Remarks of Ms. Strand, above note 314.

318. See § 314 of the Water Quality Act of 1987 (Pub. L. No. 100-4).

319. See, e.g., Matter of Alameda County Assessor's Parcels, 672 F. Supp. 1278, 1279 (N.D. Cal. 1987); U.S. v. Larkins, 687 F. Supp. 76, 83 (W.D. Ky. 1987); U.S. v. Edwards, 667 F. Supp. 1204, 1207 (W.D. Tenn. 1987).

320. 33 C.F.R. § 326.3(a).

321. See, e.g., U.S. v. Larkins, 657 F. Supp. 76, 82-83 (W.D. Ky. 1987); U.S. v. Rivera

restoration orders with some frequency.<sup>331</sup> The usual prerequisite is a government restoration plan that confers maximum environmental benefits, is feasible, and is equitably related to the aquatic damage inflicted.<sup>332</sup> The equities often demand only partial restoration;<sup>333</sup> and sometimes restoration has been denied when the advance of federal jurisdiction confused both the discharger and the Corps.<sup>334</sup> When the court determined discharge to be *de minimis*,<sup>335</sup> or where there was no specific restoration plan submitted,<sup>336</sup> however, plans meeting the criteria above are regularly imposed upon illegal dischargers.<sup>337</sup>

### C. Civil Penalties

The remedial nature of restoration orders is complemented by the authority to seek civil penalties which clearly include a punitive element.<sup>338</sup> A number of courts have imposed penalties in excess of \$50,000, largely for deterrent effect.<sup>339</sup> However, often a civil penalty is a means to ensure that restoration work is completed: by reducing or eliminating the penalty

under completion of the work, courts command the discharger's attention to remedial measures.<sup>340</sup>

Judicial imposition of civil penalties will become more complex in the wake of the Supreme Court's decision in *Tull v. U.S.*, where the Court ruled that the Seventh Amendment guarantee -- that all common law suits involving more than \$20 be tried before a jury -- requires a jury trial on the issue of whether civil penalties should be imposed.<sup>341</sup> According to the Court, civil penalties are intended, at least in part, to punish;<sup>342</sup> they therefore are analogous to common law actions in debt which necessitated jury trials.<sup>343</sup> But while the issue of whether to impose civil penalties, the Court made plain that the amount of the penalty remains in the discretion of the trial judge.<sup>344</sup> *Tull* means that imposition of civil penalties will require more litigation resources, but dischargers are unlikely to benefit significantly. First, the result should not affect the imposition of administrative penalties which the 1977 amendments authorized.<sup>345</sup> Second, it clearly makes no change regarding injunctive relief such as restoration orders.<sup>346</sup> It is possible, however, that *Tull* might make less likely the imposition of alternative relief, whereby substantial civil penalties are forgiven upon completion of remedial work.<sup>347</sup>

331. See generally W. Rodgers, above note 1, § 4.13 at 212-16; Wanf, above note 12, at 46-51 (1984) (provides thorough discussion of pre-1984 § 10 and § 404 cases).

332. The most well-known restoration cases are the Fifth Circuit's trilogy, *U.S. v. Sexton Cove Estates*, 526 F.2d 1293, 1301 (5th Cir. 1976); *Weiszmann v. District Engineer*, 526 F.2d 1302 (5th Cir. 1976), later decision, 489 F. Supp. 1331 (M.D. Fla. 1980); *U.S. v. Moretti*, 526 F.2d 1306 (5th Cir. 1976).

333. *U.S. v. Context-Marks Corp.*, 729 F.2d 1294 (11th Cir. 1984) (restoration orders should be based on examination of environmental factors and practicalities); *U.S. v. Sunset Cove, Inc.*, 514 F.2d 1089 (9th Cir. 1975); *U.S. v. Sexton Coves*, 526 F.2d (5th Cir. 1976); *U.S. v. Lambert*, 589 F. Supp. 366 (M.D. Fla. 1984).

334. *Buccaneer Point Estates v. U.S.*, 729 F.2d 1297 (11th Cir. 1984).

335. *U.S. v. Lambert*, 589 F. Supp. at 373.

336. *U.S. v. MCC of Florida*, 772 F.2d 1501 (11th Cir. 1985).

337. *U.S. v. Edwards*, 667 F. Supp. 1204 (W.D. Tenn. 1984); *U.S. v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987); *U.S. v. Tull*, 615 F. Supp. 610 (E.D. Va. 1983), *rev'd on other grounds*, 107 S. Ct. 1831 (1987); *U.S. v. Cumberland Farms*, 647 F. Supp. 1166 (D. Mass. 1986).

338. See *Tull v. U.S.*, 107 S.Ct. 1831, 1838 (1987) (relying on the 1977 legislative history and EPA's penalty to conclude that Congress intended civil penalties to serve retributive and deterrent functions as well as compensatory; retribution to be based on seriousness of violation and lack of good faith).

339. See, e.g., *U.S. v. Conrad*, 745 F.2d 30 (11th Cir. 1984) (affirming a penalty of \$100,000); *U.S. v. Tull*, 769 F.2d 182 (4th Cir. 1985) (affirming a penalty of \$325,000), *rev'd*, 107 S. Ct. 1831 (1987); *U.S. v. Cumberland Farms of Connecticut*, 647 F. Supp. 1166 (D. Mass. 1986) (\$150,000); *U.S. v. Ciampitti*, 669 F. Supp. 684 (D.N.J. 1987) (\$235,000).

340. See, e.g., *U.S. v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987) (\$40,000 penalty, to be forgiven if restoration complete within 6 months); *U.S. v. Lambert*, 589 F. Supp. 366 (M.D. Fla. 1984) (\$50,000 penalty reduced to \$25,000 upon completion of restoration work by date certain).

341. 107 S. Ct. 1831 (1987). See U.S. Const. amend. VII. ("in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....")

342. See above note 338.

343. 107 S. Ct. at 1838-39 (also distinguishing civil penalties from public nuisance where the remedy is usually injunctive relief).

344. *Id.* at 1839-40.

345. See above note 318 and accompanying text. In *Atlas Roofing v. OSHA*, 430 U.S. 442 (1977), the Court determined that imposition of administrative penalties did not require a jury trial, as by authorizing such penalties Congress so did not intend "to choke the already crowded federal courts." *Id.* at 455. See Openchowski, *Changing the Nature of Federal Enforcement of Environmental Laws*, 17 *Envl. L. Rep.* 10,304, 10,307-10 (1987) (also suggesting that *Tull* might produce greater reliance on negotiated settlements).

346. One court did employ *Tull* to conclude that, because they are retributive in nature, civil penalties do not survive the death of the discharger. However, his estate was nevertheless liable for restoration measures. *U.S. v. Edwards*, 667 F. Supp. 1204, 1214-15 (W.D. Tenn. 1987). Note that because the Seventh Amendment does not apply to the states, *Minneapolis & St. L. R.R. v. Bondholders*, 241 U.S. 211 (1916), *Tull* should have no effect on state enforcement.



## D. Citizen Suits

While citizen suits have proved critical to compelling the Corps to recognize and maintain the scope of the 404 program,<sup>348</sup> the citizen role in enforcement has not been as prominent as elsewhere in the Clean Water Act.<sup>349</sup> This may be explainable by the fact that 404 enforcement often turns on whether in fact a discharge occurred in a "water of the United States," while most enforcement actions claiming violations of section 402 involve no such arguable terms.<sup>350</sup>

The Supreme Court's recent decision in Gwaltney v. Chesapeake Bay Foundation, where the Court ruled that citizens could not bring suits based wholly on past violations,<sup>351</sup> is unlikely to affect 404 citizen enforcement.<sup>352</sup> Illegal discharges of dredged or fill material remain statutory violations until they are permitted; they therefore are not past, but present violations of the statute.<sup>353</sup> However, two other recent decisions, one ruling that the Corps cannot be compelled to enforce its permit conditions,<sup>354</sup> and the other denying judicial relief in the absence of government enforcement efforts,<sup>355</sup> are potentially severe limitations

347. See above note 340 and accompanying text. At least one jury has found a landowner-developer had unlawfully discharged fill into wetlands in western Pennsylvania, see Miller, Jury Finds Defendant in Violation of Clean Water Act § 404, Nat'l Wetlands Newsletter (Jan.-Feb. 1988) at 8.

348. See above §§ I.C and F (discussing NRDC v. Callaway and NWF v. Marsh).

349. See Meir, 'Citizen Suits' Become a Popular Weapon in the Fight Against Industrial Polluters, Wall St. J., Apr. 17, 1987 at 17 (discussing the "citizen suit campaign" under § 402 of the Clean Water Act); Thomas, Citizen Suits and the NPDES Program: A Review of Clean Water Act Decisions, 17 Envl. L. Rep. 10,050 (1987); see generally J. Miller, Citizen Suits: Private Enforcement of Federal Pollution Control Laws (1987); Comment, The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 Northwestern U.L. Rev. 220 (1987).

350. See Thomas, above note 349 (discussing suits where permit noncompliance is based on the permittee's own periodic discharge monitoring reports).

351. 108 S. Ct. 376 (1987) (good faith allegations of intermittent or ongoing violations necessary).

352. See above note 218 and accompanying text.

353. In order to transform a present violation into a past violation, the discharger should have to demonstrate "remedial steps that had clearly achieved the effect of curing all past violations by the time the [citizen] suit was brought." 108 S. Ct. at 388 (concurring opinion of Justice Scalia).

354. Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987).

to effective citizen enforcement.

## VI. The Takings Issue

The Fifth Amendment prohibition against the taking of private property for public use has always lurked in the background of 404 regulation.<sup>356</sup> Once it became clear that jurisdiction extended beyond the traditional navigability confines, permit denials could no longer be insulated from scrutiny under the takings clause by the obscure navigation servitude doctrine.<sup>357</sup> Since the theory behind the takings clause is that justice and fairness limit the burdens society can impose on individual property owners,<sup>358</sup> the issue in 404 regulation is: when has a permit denial transgressed those ideals so that compensation is due? To date, judicial declarations of takings due to 404 permit denial have been virtually nonexistent.<sup>359</sup> Nevertheless, recent Supreme Court rulings are sure to encourage increased allegations of regulatory takings.<sup>360</sup> This section examines the taking issue and 404 regulation in the context of these developments.

### A. 404 Takings Jurisprudence

404 takings claims seeking monetary compensation in excess of \$10,000 are heard initially in the Claims Court, not federal district courts.<sup>361</sup> Until 1986, the leading 404 takings

355. National Wildlife Federation v. Laubscher, 662 F. Supp. 548, 550 (S.D. Tex. 1987) (declining to order restoration or impose a fine for an illegal fill where the Corps and EPA took no enforcement action).

356. U.S. Const., amend. V. See generally D. Callies, F. Bosselman & J. Banta, The Takings Issue (1973); 40 C.F.R. § 233.23 (state 404 program approval requirement that state Attorney General analyze state law of regulatory takings).

357. See W. Rodgers, above note 1, § 4.14 (examining the navigation servitude); see also Kaiser Aetna v. U.S., 444 U.S. 164, 174 (1979) (navigation servitude part of the federal government's commerce power).

358. Agins v. Tiburon, 447 U.S. 255, 263 (1980); Andrus v. Allard, 444 U.S. 51, 65 (1979); see L. Tribe, American Constitutional Law § 9-6 (2d ed. 1988).

359. The only reported case not subsequently overturned to declare the denial of a 404 permit to be a taking was 1902 Atlantic v. Hudson, 543 F. Supp. 1381 (E.D. Va. 1983), discussed in Went, The Takings Defense To Wetlands Regulation, 14 Envl. L. Rep. 10,169, 10,173-75 (1984) (distinguishing the case on the court's willingness to overrule the Corps on the value of the wetlands at issue, and its faulty rulings on Rivers and Harbors Act jurisdiction and the water dependency test).

360. See below notes 380-86 and accompanying text.

361. The Tucker Act, 28 U.S.C. § 1491, gives the Claims Court (formerly the Court of Claims) exclusive jurisdiction over suits for money damages in excess of \$10,000 against the federal

case concerned Deltona Corporation's plans to convert thousands of acres of mangrove wetlands on Marco Island in coastal Florida to "finger-fill" residential development. Deltona was caught in the expansion of 404 jurisdiction, having purchased the property in 1964 and received section 10 permits to develop two of its five tracts prior to enactment of section 404.<sup>362</sup> However, in 1976 the Corps denied 404 permits for two of the three remaining tracts, and Deltona claimed a regulatory taking.<sup>363</sup> The Court of Claims rejected Deltona's assertion, even though conceding that the Corps "substantially frustrated" the developer's "reasonable investment-backed expectations."<sup>364</sup> The court ruled that Deltona failed to show the denial left it with "no economically viable use of its land,"<sup>365</sup> citing the fact that development was foreclosed only on one-third of its total planned lots; even on those tracts denied permits there was sufficient uplands not requiring permits to double Deltona's initial investment.<sup>366</sup> Specifically rejected was Deltona's argument that its property was taken because it was denied its most profitable use.<sup>367</sup> Also rejected was the allegation that the earlier permit approvals created a reasonable expectation of subsequent approvals; the only expectation that was reasonable, according to the Deltona court, was an economical use, looking at the property as a whole.<sup>368</sup>

The Deltona test is one that few frustrated developers can satisfy.<sup>369</sup> Its broad view of

government. Claims Court decisions are appealed to the Federal Circuit, 28 U.S.C. § 1295(a)(3).

362. Deltona received one § 10 permit for the Marco River area in 1964, when the Corps' permit criteria was limited to considering likely effects on navigation, and another for the Roberts Bay area in 1969 under the Corps' public interest review. See Deltona Corp. v. U.S., 657 F.2d 1184, 1188 (Ct. Cl. 1981).

363. The Corps denied permits for Barfield Bay and Big Key, while granting permits for development of the Collier Bay tract. Id. at 1188-89.

364. Id. at 1191-92 (relying on Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

365. Id. at 1192 (relying on Agins v. Tiburon, 447 U.S. 255, 260 (1980) and other Supreme Court authority).

366. Id. (noting the existence of 111 acres of uplands with the Barfield Bay and Big Key tracts with a total market value of \$2.5 million, while Deltona paid only \$1.24 million for all of those tracts).

367. Id. at 1193 (diminution of value alone insufficient for a taking).

368. Id. at 1192-93 (relying on Penn Central Transp. Co. v. New York City, 438 U.S. at 130-31).

369. In a companion case to Deltona, Jentgen v. U.S., 657 F.2d 1210 (Ct. Cl. 1981), the Court of Claims rejected a similar taking claim based on denial of permits to fill Florida mangroves. The court found no taking because the upper range of the estimated value of the

the property to be considered in determining whether there is an economically viable use -- accounting for both permitted activities and activities beyond the reach of regulation -- should insulate most 404 decisions from takings Clause violations, because most permits are not denied outright,<sup>370</sup> and most developers own adjacent uplands. A successful takings claim apparently would require a tract of property almost entirely wetlands, the economic viability of which was wholly dependent on transforming those wetlands.

Such an unusual situation in fact materialized, again in Florida, where a limestone miner wished to transform its suburban Miami wetlands into a lake in the process of its mining operations. Denied a 404 permit, in large measure due to objections by EPA, the Fish and Wildlife Service, and other federal, state, and local agencies,<sup>371</sup> Florida Rock Industries claimed a taking and was awarded over \$1 million dollars by a Claims Court judge.<sup>372</sup> This result was overturned by the Federal Circuit in 1986 because, while the 404 permit denial foreclosed mining, it did not inhibit other economically viable uses such as sale of the property. According to the appellate court, the government could successfully defend against a taking if it could show that the burdened property had a fair market value, even if that value was due to speculators willing to purchase the property in the hope that regulatory policies might change in the future.<sup>373</sup>

Although the peculiar value of the limestone wetlands in suburban Miami may foreclose a taking in that situation, and the Federal Circuit's fair market value test is effectively another expansion in how broadly the property at issue is to be characterized, dicta in the Florida Rock decision is sure to encourage other Takings Claims. In describing the nature of 404 regulation, the court lapsed into the wooden dichotomy of distinguishing between regulation that secures a public benefit from that which prevents a public harm.<sup>374</sup> Worse, the court class-

property's uplands (20 acres) and those wetlands that the Corps offered to permit (20 of the 80 acres applied for) was equal to the amount Jentgen originally paid for the property.

370. See, e.g., the Deltona and Jentgen examples, above notes 362 and 369; see also Barton II, above note 84, at 388-89 (in fiscal year 1985 the Corps denied only 365 of 8,500 applications for 404 permits, roughly 4.3%). In effect, when it restricts and conditions permit approvals, the Corps is engaging in a form of "transferable development right" authorization, a concept the Supreme Court approved in Penn Central Transp. v. New York City, 438 U.S. at 137.

371. See Florida Rock Industries v. U.S., 791 F.2d 893, 895 (Fed. Cir. 1986).

372. See Id. at 897.

373. Id. at 902-03 (rejecting exclusive reliance on an "immediate use" value); see Meyers, Murky Waters: Florida Rock Revisited, Nat'l Wetlands Newsletter (July-Aug. 1986) at 17.

ified preserving the wetland & t issue as falling into the former category, convincing itself that destruction of the wetland would produce no serious water pollution, thus doing "no harm."<sup>375</sup> Reliance on such an artificial dichotomy has led some state courts to conclude that wetland development prohibitions were regulatory takings.<sup>376</sup> The Florida Rock court seemed prepared to countenance a federal extension of this misguided interpretation,<sup>377</sup> despite widespread recognition that wetland fills produce a variety of public harms, including increased flood risks, shoreline destabilization, diminished groundwater recharge, increased sedimentation of surface waters, and damage to commercial and sport fisheries as a result of habitat destruction and food chain alteration.<sup>378</sup> Nevertheless, especially in view of the Supreme Court's recent pronouncements, Florida Rock's legacy is likely to be increased challenges to 404 permit denials as unconstitutional takings. This is especially likely in situations where EPA has exercised its veto authority under section 404(c).<sup>379</sup>

### B. Recent Supreme Court Cases

The Supreme Court seems to have ensured a spate of cases alleging takings due to 404 per-

374. Id. at 904. For criticism of the public benefit vs. public harm dichotomy, see Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1196-97 (1967) (illustrating the difficulty of classifying regulations as compensable or not according to whether they prevent harms or extract benefits); see also Penn Central, above note 368, at n.43, where the Supreme Court suggested that the "prevention of harm" cases actually "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy ... expected to produce widespread public benefit and applicable to all similarly situated property."

375. 791 F.2d at 904.

376. See, e.g., State v. Johnson, 265 A.2d 711 (Me. 1970).

377. See 791 F.2d at 904. ("Denial of the permit requires [Florida Rock] to maintain at its own expense a facility, the wetlands, which by presently received wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaining such a facility. This appears to be a situation where the balancing of public and private interest is much more deserving of compensation for any loss actually incurred.")

378. See, e.g., Barton II, above note 84, at 373.

379. See above § IV.A. In 404(c) situations, the applicant will have already invested substantial time and expense in the administrative process. Moreover, the record for judicial review will be one in which two government agencies ultimately disagreed in their views of the public interest.

mit denials. First, in Riverside Bayview it instructed courts not to interpret 404 jurisdiction so as to avoid takings claims.<sup>380</sup> Second, in First English Evangelical Lutheran Church v. County of Los Angeles the Court finally approved awarding money damages for temporary regulatory takings.<sup>381</sup> This result will not only encourage takings cases but will focus the litigation in the Claims Court and the Federal Circuit where indications are that some claimants may succeed.<sup>382</sup> Third, the Court has in fact found some regulations to have worked takings.<sup>383</sup> Most of these cases have concerned situations where the regulation seemed to be seizing an easement,<sup>384</sup> disrupting a bargain,<sup>385</sup> or eliminating a "fundamental attribute of property ownership."<sup>386</sup>

In defending 404 regulation in the anticipated welter of takings cases, the government will want to emphasize the distinctions between these cases and the 404 program. First, denials of 404 permits do not represent seizures of property interests, or attempts to secure public benefits without payment. Instead, they are driven by a broad-based set of comprehensive environmental guidelines designed to prevent public harms associated with wetlands losses.<sup>387</sup> In essence, permit denials restrain property uses that are tantamount public nuisances; such regulation, the Court recently affirmed, rarely requires compensation.<sup>388</sup> Second, 404 permit denials hardly involve broken bargains; the geographic scope of the program is now well settled, and the only constitutional guarantee landowners may assert against regulatory programs is denial of economic viability, taking

380. See above note 103 and accompanying text.

381. 107 S. Ct. 2378 (1987) confirming the strong signal sent in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), where a four-Justice dissent and a concurrence opined that monetary damages should be awarded for regulatory takings.

382. See above note 377 and accompanying text.

383. On the takings cases from the Court's 1986 term, see Large, The Supreme Court and the Takings Clause: The Search For A Better Rule, 18 Envl. L. J. (1987).

384. Mollan v. California Coastal Commission, 107 S. Ct. 3141 (1987); Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982); Kaiser Aetna v. U.S., 444 U.S. 164 (1979).

385. Kaiser Aetna v. U.S., 444 U.S. at 167 (Corps earlier indicated it had no § 10 permit jurisdiction).

386. Hodel v. Irving, 107 S. Ct. 2076 (1987) (right to transfer); Kaiser Aetna v. U.S., 444 U.S. 164 (right to exclude).

387. In Penn Central Transp. v. New York City, 438 U.S. at 453-55, the Court indicated that broad-based comprehensive planning was less likely to run afoul of the takings clause because it tends to secure an "average reciprocity of advantage."

388. Keystone Bituminous Coal Ass'n v. DeBenedictus, 55 U.S.L.W. 4327, 4332 (1987).

into account all the property at issue.<sup>389</sup> Del-  
tona and Florida Rock indicate that a very broad  
view of the property will be taken, including  
upland uses and permitted uses, in ascertaining  
economic viability.<sup>390</sup> Moreover, EPA's inter-  
pretation of the 404(b) guidelines, which  
requires applicants to focus first on means of  
accomplishing their project purposes without  
filling wetlands,<sup>391</sup> should help eliminate some  
potential takings claims and help answer others.  
Finally, unlike the right to exclude and trans-  
fer, the right to develop has never been held to  
be a fundamental attribute of property owner-  
ship. Given the high social costs associated  
with ongoing wetlands losses,<sup>392</sup> it ought to be  
too late in the day to recognize a fundamental  
right to a wetland fill over government objec-  
tion.<sup>393</sup>

VII. Conclusion

404 regulation is characterized by a healthy, pluralistic review process, a good deal of regulatory ambivalence, and a considerable amount of intergovernmental tension. Pluralistic review is a consequence of the program's expansive scope, both in terms of geographic jurisdiction and in the great variety of activities it regulates. With such a broad canvass, making permit decisions only after an opportunity for affected individuals and agencies to become involved is an essential to the program's legitimacy.<sup>394</sup> Moreover, pluralistic review improves prospects for identifying practicable, less damaging alternatives, the heart of the permit criteria.<sup>395</sup> While the Corps of Engineers has made some attempts to reduce the influence of comment agencies in permit decisions,<sup>396</sup> the courts have been sensitive to adverse comments by agencies with environmental expertise.<sup>397</sup> This is a healthy development for a program heavily dependent on value judgments about the availability of alternatives, the efficacy of mitigation measures, and the existence or significance of adverse effects on the

aquatic environment. The emphasis on 404's pluralistic review process has helped the program overcome some of the problems associated with the regulatory ambivalence that also has been a hallmark of the program.

Nevertheless, 404 regulation has experienced an extremely rocky first fifteen years. In fact, without the aid of the courts, especially the Callaway decision<sup>398</sup> and the National Wildlife Federation settlement,<sup>399</sup> it is unlikely that the program could have survived the hostile reception given it by the Corps. Predictions in the middle 1970s that section 404 would produce a Corps "renaissance"<sup>400</sup> were surely premature, as the "regulatory reform" years soon showed.<sup>401</sup> The Corps has consistently resisted asserting regulatory control over inland wetlands, first claiming a lack of jurisdiction,<sup>402</sup> then attempting a categorical exemption through the general permit program,<sup>403</sup> and most recently, claiming the right to decline to exercise jurisdiction on a case-by-case basis.<sup>404</sup> If the courts ultimately sanction selective assertion of jurisdiction, the program cannot hope to materially reduce the annual rate of wetlands loss.

Just as disturbing as the failure to assert jurisdiction is the approval of large-scale commercial and agricultural developments by allowing applicants to define the project so as to eliminate practicable alternatives.<sup>405</sup> The Sweedens Swamp case does make clear that EPA need not take an applicant's analysis of alternatives at face value.<sup>406</sup> But if the 404 program is to effectively contain wetlands loss, the 404(b) guidelines must be interpreted to forbid significant wetland losses irrespective of whether there are practicable alternatives to particular projects,<sup>407</sup> so long as the applicant retains an economically viable use of its property as a whole.<sup>408</sup> Because the Corps maintains it may interpret the guidelines independent from EPA,<sup>409</sup> such a change will require an amendment to the guidelines.

The guidelines also ought to exercise closer supervision over the Corps' general permits and

389. See above notes 365, 368, 373 and accompanying text.

390. See above notes 368-69, 373 and accompanying text.

391. See above § III.D.

392. See text accompanying note 378; Barton I, above note 15, at 214 (annual wetland losses of 300,000 to 450,000 acres).

393. See Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) (takings necessarily involve a weighing of public and private interests).

394. See, e.g., above notes 243-44 and accompanying text.

395. See above notes 262-65 and accompanying text.

396. See above note 244 (elimination of "great weight" accorded to the views of federal and state fish and wildlife agencies); above notes 80, 245-50 and accompanying text (limitations on administrative appeals); note 275 and accompanying text (Corps' ability to interpret 404(b) guidelines independent of EPA).

397. See above notes 254-56 and accompanying text.

398. See above § I.C.

399. See above note 89 and accompanying text.

400. See Ablard & O'Neill, above note 13.

401. See above § I.F.

402. See above notes 39-43 and accompanying text.

403. See above notes 81-83 and accompanying text.

404. See above notes 129-37 and accompanying text.

405. See above notes 286-88 and accompanying text..

406. See above note 307 and accompanying text.

407. See above notes 280, 289 and accompanying text.

408. See above notes 290, 365, 373 and accompanying text.

409. See above note 275 and accompanying text.

after-the-fact permits. Since they effectively reverse the burden of proof against discharges,<sup>410</sup> EPA should demand much greater documentation of the anticipated effects of general permits. The guidelines should proscribe reissuance of any general permit unaccompanied by findings, supported by documentation, that previously authorized activities were in fact similar in nature and produced only minimal cumulative impacts.<sup>411</sup> State program general permits warrant special scrutiny on the issue of whether they authorize only similar activities.<sup>412</sup> The guidelines also need to address issuance of after-the-fact permits and clarify that they are not the preferred alternative to undertaking enforcement against unauthorized discharges.<sup>413</sup>

As presently constituted, the ability of the program to reduce wetlands loss is heavily dependent on EPA's ability and willingness to exercise its 404(c) veto authority.<sup>414</sup> Although EPA has indicated it is prepared to veto more permits than it has in the past,<sup>415</sup> an effective regulatory program cannot finally depend upon vetoes or threats of vetoes. Veto decisions may also be more vulnerable to takings claims than permit denials.<sup>416</sup> Use of 404(c) in a prospective fashion to protect especially important aquatic areas could avoid some vetoes,<sup>417</sup> especially if a public petitioning process was established,<sup>418</sup> but these designations are likely to be controversial, time consuming and limited to relatively few sites.

The 404 program needs more than use of 404(c) in a prospective manner to adequately preserve the nation's wetland resources, however. The program badly needs congressionally established goals against which to measure the adequacy of administrative implementation. Congress could supply the necessary direction by enacting the following 3 measures: (1) establish a national goal to preserve, protect, and where possible, enhance the nation's wetland acreage; (2) require EPA to annually report on the cumulative losses of wetlands on a nationwide, regional, and statewide basis; and (3) specifically proscribe any discharge or general permit producing a significant loss of wetlands (quantitatively and qualitatively).

Ultimately, it is hard to avoid the conclusion that most of the 404 program's problems have to do with the permit issuing agency.<sup>419</sup>

While not exactly "a fox in the chicken coup,"<sup>420</sup> the Corps' ambivalence is longstanding and still evident. As recently as 1985, the head of the Corps informed Congress that 404 was not designed to be a wetlands protection program,<sup>421</sup> despite legislative history<sup>422</sup> and Supreme Court authority<sup>423</sup> to the contrary. While "shared custody" of the program has its merits,<sup>424</sup> after fifteen years it seems clear that Congress could have chosen better custodians. Perhaps it is time for Congress to reduce intergovernmental tensions and eliminate regulatory ambivalence by removing the Corps' permit authority, as the Senate nearly did in 1976.<sup>425</sup> This could be accomplished by (1) elevating the role of federal and state fish and wildlife agencies in the permit process, especially in the determination of whether an area is a water of the United States,<sup>426</sup> (2) transferring Corps personnel to EPA and federal fish and wildlife agencies, and (3) increasing grant money to induce states to assume permit responsibilities.<sup>427</sup> These changes need not necessarily increase the cost of administering the program; by reducing intergovernmental tensions, they should reduce the transaction costs of considering most proposed discharges.

In the final analysis, it is not the cost of administering the 404 program that should concern Congress, but the social costs associated with wetland losses on the order of a million acres every three years. Those costs make the current 404 program too expensive to maintain.

420. See Power, above note 2.

421. See above note 137 and accompanying text.

422. See above note 329 and accompanying text.

423. See Nagle, above note 85.

424. See notes 108-110 and accompanying text.

425. See above note 51 and accompanying text.

426. Under the National Wetlands Inventory, 33 U.S.C. § 1288(i)(2), Congress has subsidized wetland mapping for over a decade. See Barton II, above note 84, at 381. If these maps are used to make jurisdictional determinations, they could substantially reduce administrative costs.

427. See above text between notes 194-95. There seems to be no compelling reason not to authorize state permit program jurisdiction over all waters, thus entirely displacing Corps 404 permits. In this event, Congress might want to confine Corps § 10 permits (see above note 11 and accompanying text) to navigation concerns, assuming state 404 programs provide opportunity for public and interagency review and comment, apply the 404(b) guidelines, and are subject to EPA veto. See 33 U.S.C. §§ 404(g)-(h).

410. See above text between notes 193-94.

411. See above notes 178-89 and accompanying text.

412. See above note 188.

413. See above note 215 and accompanying text.

414. See above § IV.A.

415. See above note 297 (no vetoes until 1981, one each in 1981 and 1984, 3 in 1985).

416. See above note 379.

417. See above § IV.C.

418. See above text following note 312.

419. See Jackson, above note 116, at 9 (arguing that Congress should relieve the Corps of its permit responsibilities).

**PART I - THE CLEAN WATER ACT**

**Section 4**

**Federal Wetlands Law: Part II**  
by Margaret N. Strand

# Federal Wetlands Law: Part II

by Margaret N. Strand

*Editors' Summary: In this second of a three-part series on federal wetlands law, the author continues her comprehensive review of the current state of federal wetlands laws and regulations. The author first analyzes individual permits under the Clean Water Act §404 program, including the application process, interagency consultations, the substantive standards for §404 permits, and EPA's §404(c) veto authority. She next covers enforcement mechanisms in the §404 program, including administrative enforcement options and civil and criminal judicial enforcement. She then analyzes judicial review of §404 wetlands actions, including review of permits, regulatory decisions, and citizen suits. The author next analyzes the controversial takings issues associated with regulating wetlands. She includes coverage of recent takings cases involving wetlands and assesses the potential impacts to wetlands issues from the U.S. Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*, 22 ELR 21104. Finally, the author explores state program authority under §404, including the process for state authorization and the preservation of other state powers.*

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## Chapter 6. Individual Permits Under §404

The individual wetlands permit process and standards under the CWA derive primarily from §404(a), (b), and (c). However, virtually all of the operative requirements are found in regulations, rather than the statute. Section 404(a) gives the Corps authority to issue permits; from this, the Corps has established procedural and substantive regulations to govern individual permit review. Section 404(b) authorizes EPA to set the environmental standards that must be met by each permit, for the disposal of fill; EPA's §404(b)(1) guidelines thus constitute the substantive environmental criteria for evaluating §404 permit applications. Finally, §404(c) allows EPA to override or veto a Corps' permit if its issuance would adversely affect certain environmental values. Dividing these authorities between the Corps and EPA has produced a permit process replete with interagency consultation. Other laws, including the Fish and Wildlife Coordination Act (FWCA),<sup>1</sup> NEPA,<sup>2</sup> and the Endangered Species Act (ESA),<sup>3</sup> impose additional substantive and coordination obligations on the Corps, EPA, and other agencies involved in the §404 permit process.

### I. Processing the Corps' Permits

The Corps' permit regulations, reissued in 1986,<sup>4</sup> set forth the process for issuing §404 permits.<sup>5</sup> Although the regulations provide detailed information, applicants should work closely with the Corps' personnel before and during the permit process to avoid mistakes.

#### A. Applications for Individual Permits

**Preapplication Consultation.** For activities requiring a §404 permit, the Corps encourages preapplication consultations with district engineer staff.<sup>6</sup> These consultations allow the staff to advise potential applicants on studies and other information that may be required to process permit applications. District engineers are required to provide potential applicants with all useful information necessary for pursuing an application, including all the factors that the Corps must consider. The Corps will designate a single district staff member as the point of contact to coordinate NEPA's procedures and all attendant reviews, meetings, and hearings.

**Application Form and Content.** All applicants for a §404 permit must use standard application form ENG Form 4345. The application must include a complete description of the proposed activity and detailed information sufficient to satisfy all applicable substantive standards.<sup>7</sup> The application must contain sufficient data to demonstrate compliance with the

requirements of EPA's §404(b)(1) guidelines. District engineers may request specific additional information on a by-case basis. The application must be signed by the person who will undertake the proposed activity, or a duly authorized agent. Where a company is the applicant, an officer of the company must sign the application.<sup>8</sup> There is a \$100 fee for processing a §404 permit application.

Typically, the Corps will determine that an application is complete when it decides that it has sufficient information to issue public notice of the application.<sup>9</sup> The Corps may however, issue public notice before it receives all the information necessary to evaluate the application.<sup>10</sup>

#### B. Processing Applications

**The General Process.** The Corps' regulations provide standard procedures for processing permit applications.<sup>11</sup> While these work for routine applications, applications for major projects requiring §404 permits rarely, if ever, are processed within the time limits set forth in the standard procedures.

In general, upon receipt of a permit application, the Corps assigns a number for identification, acknowledges receipt of the application, and advises the applicant of the number assigned. The regulations require the Corps to review the application for completeness and, if not complete, request additional information within 15 days.<sup>12</sup> If the Corps determines that the application is complete, it will issue a public notice as detailed in 33 C.F.R. §325.3.

The public notice is the primary method both of advising interested parties of the proposed activity for which a permit is sought, and of soliciting comments and information that are necessary to evaluate the activity's effects on the public interest. Thus, the notice must include sufficient information to give a clear understanding of the nature and magnitude of the proposed activity. The notice also must advise the public that any person may request in writing a public hearing. In addition, each public notice must include a paragraph describing the various evaluation factors on which decisions will be based.<sup>13</sup>

Public notices must be distributed for posting in post offices or other appropriate public places in the vicinity of the proposed work site, published in local news media, and sent to pertinent government agencies. Notice must also be sent to all parties who have specifically requested copies of public notices and to the appropriate officials at EPA, the FWS, the National Marine Fisheries Service, and state historic preservation officers.

A district engineer must consider any comments received in response to the public notice,<sup>14</sup> and all comments become part of the administrative record of the application. District

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1. 16 U.S.C. §§661-666c.

2. 42 U.S.C. §§4321-4370c; ELR STAT. NEPA 001-014.

3. 16 U.S.C. §§1531-1544; ELR STAT. ESA 001-027.

4. 51 Fed. Reg. 41206 (1986).

5. 33 C.F.R. pts. 320, 323, 325-30 (1992).

6. See *infra* Part III (listing of the Corps' district offices).

7. 33 C.F.R. §325.1(d) (1992).

8. *Id.* at §325.1(d)(7).

9. See 33 C.F.R. §§325.1(d), 325.3(a).

10. *Id.* at §325.1(d)(9).

11. *Id.* at §325.2(d).

12. *Id.* at §325.2(a)(1).

13. *Id.* at §325.3(c). The regulations include the precise language for this paragraph.

14. *Id.* at §325.2(a)(3).



engineers may also seek comments from the applicant. The regulations also provide that at the earliest practicable time, other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. The applicant may contact directly parties submitting objections in an attempt to resolve objections, but is not required to do so.<sup>15</sup>

□ **Hearings.** A district engineer will evaluate an application to determine the need for a public hearing.<sup>16</sup> As mentioned, any interested member of the public may request a hearing.<sup>17</sup> The Corps is not required to hold a hearing, however, if none is requested. Moreover, in *AJA Associates v. U.S. Army Corps of Engineers*,<sup>18</sup> the court held that due process does not require the Corps to grant a permit applicant a hearing, absent a request for a hearing while the application is being considered.

If a hearing is requested in writing, the district engineer may still assess whether a hearing is "needed for making a decision on such permit application."<sup>19</sup> The district engineer may try to resolve the issues informally or, if not successful, will set a time and place for a public hearing and give notice.<sup>20</sup> Public notice must be given at least 30 days prior to the hearing. The notice is sent to all federal agencies, affected state and local agencies, and other parties having an interest in the hearing.<sup>21</sup> Also, the district engineer may deny a hearing request if he determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing.<sup>22</sup> The Corps' headquarters may require a hearing in any case.

The hearings are informal in nature,<sup>23</sup> and an adjudicatory or trial-type hearing is not required.<sup>24</sup> A district engineer normally serves as the presiding officer at a hearing, although he may designate a deputy district engineer or some other qualified person. Any person may present oral or written statements concerning the subject matter of the hearing and may also call witnesses who may present statements. Although participants are afforded a reasonable opportunity for rebuttal,<sup>25</sup> there is no cross-examination of witnesses. After a hearing, the presiding officer must allow at least 10 days for the submission of written comments.<sup>26</sup>

15 33 C.F.R. §325.2(a)(3) (1992). See also *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 574-75, 18 ELR 20135, 20140 (D. Mass. 1987), appeal dismissed, 641 F.2d 440, 18 ELR 20829 (1st Cir. 1985) (developer was entitled to notice of objections raised by governor in meeting with the Corps' representatives).

16 33 C.F.R. §§325.2(a)(4), 327.4(a) (1992)

17 *Id.* at §327.4(b). See *Buttrey v. United States*, 690 F.2d 1170, 1176, 13 ELR 20055, 20057 (1982)

18 817 F.2d 1070, 1073-74, 17 ELR 20657, 20659 (3d Cir. 1987)

19 33 C.F.R. §327.4 (1992). See *Hough v. Marsh*, 557 F. Supp. 74, 79-80, 13 ELR 20610, 20612-13 (D. Mass. 1982)

20 33 C.F.R. §327.4 (1992). See also 33 C.F.R. §327.11.

21 33 C.F.R. §327.11 (1992)

22 *Id.* at §327.4

23 *Id.* at §327.8

24 See *Buttrey v. United States*, 690 F.2d at 1175, 13 ELR at 20087 (no right to trial-type hearing and the CWA does not trigger the trial-type hearing procedures in the Administrative Procedure Act); see also *Shoreline Assoc. v. Marsh*, 555 F. Supp. 169, 174-77, 13 ELR 20421, 20422-24 (D. Md. 1983); *Nofelco Realty Corp. v. United States*, 521 F. Supp. 458, 11 ELR 21090 (S.D.N.Y. 1981); *National Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 993, 13 ELR 20735, 20741 (D.D.C. 1983)

25 33 C.F.R. §327.8 (1992)

26 *Id.* at §327.8(g)

The regulations provide that a public hearing also may be held when the Corps proposes to modify or revoke a permit.<sup>27</sup> The Corps, however, is not required to hold a hearing where the applicant is seeking renewal of an expired permit.<sup>28</sup>

□ **The Corps' Decision.** District engineers are required to prepare a statement of findings (SOF) or, when an EIS has been prepared, a record of decision (ROD) on whether to issue or deny the permit.<sup>29</sup> The SOF or ROD includes a statement of the facts, an environmental assessment or EIS, the district engineer's views on the proposed project's effect on the public interest, and analysis indicating conformity with the §404(b)(1) guidelines. A district engineer's decision acts as notice to EPA and other agencies that, absent their objection, the Corps intends to issue the permit. If no interagency issues arise, the permit will be forwarded to the applicant for signature.

There is no administrative appeal of a district engineer's decision. An applicant may appeal the denial of a permit by filing a civil action in the appropriate U.S. District Court.<sup>30</sup> If another federal agency objects to the Corps' decision, there are procedures for addressing these objections at the local level and at the headquarters of either agency. This interagency consultation process is described below.

### C. Consultation With Other Agencies

The Corps' obligation to consult with other agencies on §404 permit applications arises from several legal sources. Section 404(q) of the CWA requires the Corps to enter into MOAs with EPA, the DOI, and other federal agencies to facilitate the coordination of permit review.<sup>31</sup> Through this procedural duty, the Corps recognizes the substantive responsibilities of other agencies under laws relating to wetlands. For example, EPA has the authority under §404(c) to review individual permits, as mentioned.<sup>32</sup> Also, the FWS has statutory consultation rights under the FWCA and the ESA.<sup>33</sup> Further, the Corps' regulations recognize that many additional federal laws are related or applicable to §404 permits.<sup>34</sup> Through consultation, the Corps leaves room in the processing of permit applications for complete coordination with other federal agencies. Applicants will always be asked to provide information sufficient to enable the Corps to satisfy or resolve the views of the consulting agencies. The Corps, however, remains the ultimate decisionmaker.<sup>35</sup>

□ **Section 404(q) MOAs.** Pursuant to §404(q), the Corps has executed and from time to time revised MOAs with

27 *Id.* at §327.4

28 See *Banker's Life & Casualty Co. v. Callaway*, 530 F.2d 625, 634-35 (5th Cir. 1976), *reh'g denied*, 536 F.2d 1387 (5th Cir. 1976), *cert denied*, 429 U.S. 1073 (1977)

29 33 C.F.R. §325.2(a)(6) (1992)

30 See *infra* Chapter 8, Judicial Review of §404 Wetlands Actions

31 33 U.S.C. §1344(q), ELR STAT. FWPCA 062

32 *Id.* at §1344(c), ELR STAT. FWPCA 062. This authority is addressed more fully *infra* section III

33 16 U.S.C. §§661-668ec, 16 U.S.C. §§1531-1544, ELR STAT. ESA (01) 027

34 33 C.F.R. §320.3 (1992)

35 See also RGL No. 92-1, Federal Agency Roles and Responsibilities, May 13, 1992 (expires Dec. 31, 1997), 57 Fed. Reg. 23574 (1992)

EPA, the FWS, and the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce. In 1992, new MOAs were signed,<sup>36</sup> revising the elevation process that had been in place since 1985.<sup>37</sup> The MOAs establish procedures and time frames for elevating disputes over both specific permit applications and general policy matters. The elevation process provides a "safety valve," so that local offices can obtain higher level agency review of significant disputes. The primary concern of the elevation process is finding a balance between reasonably speedy processing of individual permits and resolving policy issues that may arise in the context of individual applications. Additional concerns include allowing autonomy for decentralized permit issuance in the Corps' districts while assuring the uniform application of §404 standards nationwide.

The 1992 interagency MOAs address general coordination procedures, including setting standards for interagency communication, cooperation with site visits and other application review matters, and rapid notification of comments.<sup>38</sup> The MOAs also provide distinct routes for elevation of policy issues and issues involving specific permit applications.<sup>39</sup> This approach is designed to avoid delay in individual permit applications where the interagency dispute involves broad policy issues, rather than permit-specific matters. To this end, the MOAs provide that individual permit decisions will not be delayed during policy issue elevations.<sup>40</sup>

The MOAs establish a significant threshold for elevating disputes over individual permits. Such elevation is limited to cases involving aquatic resources of national importance.<sup>41</sup> Permit disputes can be elevated only where such resources will suffer net unacceptable adverse impacts after consideration of any proposed mitigation. The standard is comparable to the standard for invoking §404(c).<sup>42</sup> In contrast, policy issues may be elevated if an action or series of actions raises concerns about the application of any procedural or substantive policies.<sup>43</sup> Where policy issues are elevated, the Corps will decide, after review, whether public comment is warranted and whether any formal changes in rules are needed. The final decision on permit applications rests with the Corps. The final decision on policy issues depends on whether the matter falls under the

Corps' authority or the legal authority of the commenting agency. For example, EPA has legal authority to issue the §404(b)(1) guidelines, so resolution of policy issues involving those guidelines would rest with EPA.

□ *Coastal Zone.* In areas affecting the coastal zone, an applicant must provide the district engineer with a certification that the proposed activity complies with, and will be conducted in a manner that is consistent with, the applicable state coastal zone management plan.<sup>44</sup> NOAA administers the federal Coastal Zone Management Act (CZMA),<sup>45</sup> and must be consulted when §404 permits are proposed in the coastal zone.<sup>46</sup> The applicant must demonstrate that its project has been certified as consistent with the state coastal zone management plan, or that consistency has been waived. If actual construction will occur in the coastal zone, an applicant may also need to obtain a separate permit from the relevant state coastal zone management officer or commission.

The Corps issued two RGLs in 1992 addressing consultation under the CZMA. RGL 92-3 encourages the Corps' districts to participate, where appropriate, as states develop Special Area Management Plans (SAMPs), which are designed to guide development in sensitive areas of the coastal zone.<sup>47</sup> RGL 92-4 explains the kinds of conditions that the states may impose on the Corps' nationwide permits under authority of either the CZMA or CWA §401.<sup>48</sup> The Corps explains that it will not allow imposition of unreasonable or illegal conditions on the nationwide permit program through the vehicle of state consultation.

□ *Historic Properties.* Pursuant to §106 of the National Historic Preservation Act (NHPA)<sup>49</sup> and the Corps' regulations,<sup>50</sup> the Corps must take into account "the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S." Further, where the undertaking that is the subject of a permit action may directly and adversely affect any national historic landmark, as defined in the NHPA,<sup>51</sup> the Corps shall, to the maximum extent possible, place conditions in permits to minimize harm to such landmarks.<sup>52</sup> Archaeological sites may also be protected historic properties.

In making these determinations the Corps must consult with the applicable state historic preservation officers and the Federal Advisory Council on Historic Preservation (Advisory Council).<sup>53</sup> If there are properties on or eligible for listing on

36 Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army, Concerning Clean Water Act Section 404(q) (Aug. 11, 1992) (Corps-EPA 404(q) MOA); Memorandum of Agreement Between the Department of Commerce and the Department of the Army, Concerning Clean Water Act Section 404(q) (Aug. 11, 1992) (Corps-NOAA 404(q) MOA); Memorandum of Agreement between the Department of the Interior and the Department of the Army, Concerning Clean Water Act Section 404(q) (Dec. 21, 1992) (Corps-FWS 404(q) MOA).

37 See EPA and FWS Sign New Section 404(q) MOAs With Army, NAT'L WETLANDS NEWSL. (Environ. L. Inst.), Jan./Feb. 1986, at 2.

38 Part I of each interagency MOA listed *supra* note 36, contains these procedures and standards.

39 Each of the MOAs are essentially the same in terms of the process and time frames for elevation, the differences between the MOAs largely involve references to the statutory authority and the specific resource concerns of EPA, the FWS, and NOAA.

40 See e.g., Corps EPA 404(q) MOA *supra* note 36, at pt. I, ¶3.

41 See MOAs *supra* note 36, at pt. IV, ¶1.

42 Corps EPA MOAs *supra* note 36, at pt. IV, ¶1.

43 See MOAs *supra* note 36, at pt. III, ¶2.

44 16 U.S.C. §1456(c), ELR STAT. CZMA 011. See *supra* Part III, Chapter 13(VIII).

45 16 U.S.C. §§1451-1464, ELR STAT. CZMA 1-15.

46 33 C.F.R. §§320.3(b), 320.4(h) (1992).

47 RGL 92-3, Extension of Regulatory Guidance Letter (RGL) 86-10, Special Area Management Plans (SAMPs) (Aug. 19, 1992), 57 Fed. Reg. 45773 (1992).

48 RGL 92-4, Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits, 57 Fed. Reg. 53724 (1992).

49 16 U.S.C. §470f (1988).

50 33 C.F.R. pt. 325, app. C, §2a (1992).

51 36 C.F.R. §800.2(j) (1992).

52 *Id.*

53 16 U.S.C. §470f (1988). See discussion in *Hough v. Marsh*, 557 F. Supp. 74, 86-88, 13 ELR 20610, 20616-17 (D. Mass. 1982) (The Corps is required to follow procedural consultation requirements of the NHPA).

the National Register of Historic Places,<sup>54</sup> and if the permitted activities will have an adverse effect on the places, the parties must attempt to enter into an MOA<sup>55</sup> that contains provisions specifying how the project will be conducted to avoid or mitigate adverse effects on the properties. If no agreement is reached, the Corps may request comments from the Advisory Council. However, the Corps can proceed with the action without accepting the views of the Advisory Council.<sup>56</sup> The commenting authority is extensive, however, and delays caused by reviewing effects on historic properties may defeat a project. In addition, district engineers may add those permit conditions which they determine are necessary to avoid or reduce effects on historic properties.<sup>57</sup>

□ **Endangered Species.** The Corps must also consider the effect of permit activities on endangered species. Section 7 of the ESA requires federal agencies to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize . . . any endangered or threatened species," or to adversely affect such species' critical habitat.<sup>58</sup> Thus, the Corps must consider how any listed species may be impacted by issuance of a §404 permit.<sup>59</sup>

The scope of the analysis of the effects from permit activities on endangered species that is necessary for making §404 permit decisions has caused controversy. Generally, the Corps assesses permit activity effects only in the permit area.<sup>60</sup> The Corps, however, will assess such effects beyond the immediate permit area in three situations. First, the Corps will consider activity effects on species that are physically caused by the activity authorized by the Corps. Thus, when the activity authorized by the Corps has a physical effect on threatened or endangered species outside the permit area, the Corps will look outside this area to evaluate those effects.<sup>61</sup> Second, the Corps will consider activity effects beyond the permit area when the Corps is advised of a linear project, such as a pipeline, that will affect critical habitat outside the permit area and the Corps, through its control over the placement of a river crossing, can reasonably steer the route of the linear project around the critical

habitat. The third area where the Corps may enlarge the scope of the ESA's review to include an entire linear project is when "the linear project requires the Corps to issue such a significant number of permits, or permits, authorizing such a large portion of the project length, that by granting the permits, the Corps essentially would be authorizing the entire project or segments thereof."<sup>62</sup> When none of the three situations are present, the Corps will confine its ESA review to the permit area.

#### D. State Water Quality Certification

Section 401 of the CWA requires the district engineers to obtain a certification from the applicable state<sup>63</sup> that water quality standards will not be violated as a result of a discharge of fill material. This requirement is reiterated in the §404(b)(1) guidelines.<sup>64</sup>

To implement this requirement, the Corps sends the draft §404 permit to the relevant state agency for a determination that the filling of the wetlands in question will not cause a violation of the state's water quality standards.<sup>65</sup> The Corps' RGL 90-04<sup>66</sup> addresses water quality considerations. The RGL provides that a state certification of compliance with applicable effluent limitations and water quality standards will be conclusive with respect to water quality considerations, unless EPA advises the district engineer of other water quality aspects that he should examine.

Normally, district engineers can presume that a state's water quality certification satisfies the requirements of CWA §401, the §404(b)(1) guidelines, 40 C.F.R. §230.10(b)(1), and the Corps' regulations at 33 C.F.R. §320.4(d). However, the Corps may take into account EPA's objections and concerns over water quality outside the scope of the state's §401 certification, indirect impacts on water quality that the state's certification does not address, and matters in the certification with which EPA has a different viewpoint. In those cases where EPA has advised a district engineer of "other water quality aspects," the district engineer must make his own independent judgment regarding compliance with the §404(b)(1) guidelines and the consideration of water quality issues in the public interest review process, but is to coordinate his actions with the state certifying agency and EPA.

#### E. After-the-Fact Permits

The Corps' regulations provide for after-the-fact (ATF) permits in certain circumstances.<sup>67</sup> The ATF permits are

54. See 36 C.F.R. §800.4(b).

55. 36 C.F.R. §800.5(e)(2).

56. The DOI, which decides which properties gain a listing in the national register, has provided in its regulations:

Having complied with [the] procedural requirement[s] the federal agency may adopt any course of action it believes is appropriate. While the Advisory Council comments must be taken into account and integrated into the decisionmaking process, program decisions rest with the agency implementing the undertaking.

36 C.F.R. §60.2(a)

57. 33 C.F.R. pt. 325, app. C §10(a) (1992).

58. 16 U.S.C. §1536; ELR STAT. ESA 010.

59. See Letter from Major General Arthur E. Williams, Director of Civil Works, U.S. Army Corps of Engineers, to Hon. John Turner, Director, U.S. Fish and Wildlife Service (Nov. 27, 1991) [hereinafter ESA Correspondence].

60. See *id.* at 2. The permit area is defined as the immediate area and that area immediately affected by the permitted activity.

61. See, e.g., *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 15 ELR 20333 (10th Cir. 1985); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 10 ELR 20243 (8th Cir. 1980), cert. denied, 449 U.S. 836 (1980); and *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 10 ELR 20185 (5th Cir. 1980), cert. denied, 449 U.S. 900 (1980).

62. ESA Correspondence *supra* note 59, at 2.

63. 33 U.S.C. §1362(3); ELR STAT. FWPCA 064, provides that

The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

*Id.*

64. 40 C.F.R. §230.10(b) (1992). See also 33 C.F.R. §320.4(d).

65. See also *Hough v. Marsh*, 557 F. Supp. 74, 85-86, 13 ELR 20610, 20615-16 (D. Mass. 1982) (reversing issuance of permit, in part, for failure of the Corps, as part of public interest review, to consider local laws affecting wetlands).

66. 57 Fed. Reg. 6591 (1992).

67. 33 C.F.R. §320.3(e) (1992).

addressed as part of the Corps' enforcement policy. Thus, any unpermitted discharge must be investigated by the appropriate district engineer;<sup>66</sup> if the activity is still in progress, a cease and desist order is issued.<sup>67</sup> After consulting with other federal agencies, the district engineer may either recommend legal action against the discharger, or request that the discharger apply for an ATF permit.<sup>68</sup> An ATF permit cannot be entertained until the applicant completes any remedial work required by the Corps, and it cannot be issued if any enforcement litigation is ongoing.<sup>69</sup>

Also, ATF permits must comply with the §404(b)(1) guidelines.<sup>70</sup> There has been limited judicial review of ATF permits.<sup>71</sup> The First Circuit Court of Appeals sustained a Corps' decision to refuse an ATF permit application until the discharger complied with the cease and desist order requiring restoration of the area to its wetland condition.<sup>72</sup> The court held that the Corps' regulations "clearly require that remedial work be completed before the Corps will accept an after-the-fact permit application."<sup>73</sup>

#### F. Permit as Shield

Section 404(p) of the CWA<sup>74</sup> provides that "compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 309 and 505 with sections 301, 307 and 403." Thus, a permit issued under §404 acts as a shield to enforcement actions, so long as the permittee complies with all of the terms of the permit.

### II. Substantive Standards for §404 Permits

The substantive standards for §404 permits are found in EPA §404(b)(1) guidelines, the Corps' public interest review regulations, and policy memoranda of the two agencies. Permits may be conditioned or denied based on these governing standards. Compliance with NEPA may also result in imposition of additional permit conditions.

#### A. The §404(b)(1) Guidelines

Congress authorized EPA to establish guidelines setting out environmental criteria for issuing permits. These §404(b)(1) guidelines are binding substantive rules,<sup>75</sup> promulgated by

66 16 Fed. Reg. 33263 (1981).

69 *Id.* at §3263(c)(1).

70 *Id.* at §3263(c).

71 *Id.* at §263(c)(1)(iv).

72 *Id.* at §326.

73 See *Quiñones Lopez v. Coco Lagoon Dev. Corp.*, 562 F. Supp. 188, 13 ELR 20700 (D.P.R. 1983) (sustaining the issuance of an ATF permit, issued without public hearings or state coastal zone certification); *United States v. Alleyne*, 454 F. Supp. 1164 (S.D.N.Y. 1978) (holding that an illegal discharge was enjoined to evidentiary hearing on the issues of whether an ATF permit should be issued).

74 *United States v. Cumber Land Farms of Conn., Inc.*, 826 F.2d 1151, 17 ELR 21270 (1st Cir. 1987).

75 *Id.* at 1163, 17 ELR 21276. See also 33 C.F.R. §3263(d)(1).

76 33 U.S.C. §1344(p); ELR 51A-FWPCA 062.

77 See *Burley v. United States*, 690 F.2d 170, 180, 13 ELR 20085, 20089 (5th Cir. 1982); *Shoreline Assoc. v. Marsh*, 555 F. Supp. 169, 172, 10 ELR 20421, 20423 (D. Md. 1983), *aff'd*, 725 F.2d 677, 14 ELR 23914 (4th Cir. 1984).

EPA in consultation with the Corps,<sup>76</sup> and no §404 permit can be issued unless the guidelines are satisfied.<sup>77</sup>

While the §404(b)(1) guidelines have been described as the cornerstone of the §404 permit program, applying the guidelines in specific, major cases is often controverted. The criteria set forth in the guidelines are qualitative, rather than quantitative. As such, applying the guidelines requires the exercise of judgment, which has given rise to differences of opinion on the meaning of the guidelines in particular circumstances.

All wetlands are considered to be "special aquatic sites" under the §404(b)(1) guidelines.<sup>80</sup> Special aquatic sites are subject to greater protection than other waters under the guidelines, because of their significant contribution to "the general overall environmental health or vitality of the entire ecosystem of a region."<sup>81</sup> The guidelines identify the valuable functions and characteristics of wetlands that warrant this special protection.<sup>82</sup>

The guidelines also require the evaluation of practicable alternatives to any proposal to fill, and establish a presumption that there are practicable, upland alternatives to filling in wetlands. Under the guidelines, impacts of the filling must be fully analyzed, and the permitted activity may not violate any other applicable law or cause a significant degradation of the waters. Further, the guidelines establish policies to mitigate the impacts of filling. Each of these elements is addressed next.

□ **Practicable Alternatives.** The §404(b)(1) guidelines provide a "practicable alternatives" test, which is designed to assess whether a project that depends on filling can be located elsewhere. The guidelines provide that:

[N]o 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.<sup>83</sup>

The guidelines contain a presumption that a project involving a proposal to fill that is not water dependent (does not require access or proximity to, or siting within, a wetland),<sup>84</sup> will have practicable, upland alternatives, unless clearly demonstrated otherwise.<sup>85</sup> In addition, where a discharge is proposed for a wetland, there is a regulatory presumption that all practicable alternatives to the proposed discharge, which do not also involve a discharge into a wetland, have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.<sup>86</sup>

78 45 Fed. Reg. 85336 (1980) (codified at 40 C.F.R. §230.2).

79 33 C.F.R. §323.6.

80 40 C.F.R. §230.41 (1992).

81 *Id.* at §230.3(q)(1).

82 *Id.* at §230.4(b).

83 *Id.* at §230.10(a).

84 *Id.* at §230.10(a)(3).

85 However, the §404(b)(1) guidelines do not contain a presumption that practicable alternatives exist if the project is water dependent. See 40 C.F.R. §230.10(a)(3). See also *James City County, Va. v. U.S. Environmental Protection Agency*, 758 F. Supp. 349, 21 ELR 20371 (E.D. Va. 1990), *aff'd in part and remanded*, 955 F.2d 254 (4th Cir. 1992).

86 40 C.F.R. §230.10(a)(3) (1992).

The Corps summarized its construction of the practicable alternatives test for water dependent and nonwater dependent projects in RGL 92-2.<sup>87</sup> The RGL notes that even for water dependent projects, 40 C.F.R. §230.10(a) requires a showing that the proposed action is the least environmentally damaging, taking into account alternatives as appropriate. The RGL uses cranberry production as an example, since it is conceded to be water dependent. Even for such projects, the Corps requires consideration of upland alternatives as part of the regulatory evaluation of environmental damage.<sup>88</sup>

The applicant bears the burden of demonstrating that there are no practicable alternatives,<sup>89</sup> and the burden is difficult to meet.<sup>90</sup> As mentioned, if a proposed project is not water dependent, it will be presumed that a practicable alternative site exists.<sup>91</sup> In order to meet its burden, an applicant must conduct a survey of all practicable alternatives and submit the results to the Corps during the permit process.<sup>92</sup> To succeed in meeting its burden, an applicant must demonstrate that there are no upland areas that can accommodate, or are available for, the project purpose.

Perhaps the stickiest part of the practicable alternatives standard has been measurement of the project purpose: how much weight can or must the Corps give to the applicant's own description of the purpose of the project in determining whether alternatives are practicable.<sup>93</sup> Current Corps guid-

ance, provided in lengthy opinions issued when certain permits were elevated under §404(q), provides that the Corps must independently evaluate the project purpose in light of the public interest, rather than relying solely on the applicant's view of the purpose and alternatives.<sup>94</sup>

The courts have held that the Corps has a duty to consider the applicant's view of the project purpose when applying the practicable alternatives test. In *Louisiana Wildlife Federation, Inc. v. York*,<sup>95</sup> the U.S. Court of Appeals for the Fifth Circuit stated: "[T]he Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."<sup>96</sup> Further, the applicant's purpose must be legitimate,<sup>97</sup> and the Corps cannot reject an applicant's genuine and legitimate project purpose. The Corps, however, is not required to issue a permit to accommodate incidental components of a project.<sup>98</sup> But, the Corps may consider a portion of a project in light of the entire project.<sup>99</sup>

In addition, the Corps may legitimately consider the costs and logistics to the applicant.<sup>100</sup> One court has held that additional cost alone is a sufficient reason for classifying an alternative as impracticable only when competing alternatives can reasonably be viewed as equivalent with respect to technological feasibility, potential for environmental harm, and other relevant factors.<sup>101</sup> It is important to remember, however, that the §404(b)(1) guidelines treat alternatives as practicable even if the alternative involves property not owned by the applicant.<sup>102</sup> Practicable alternatives are not limited to those which can be carried out by the applicant.<sup>103</sup>

87. RGL 92-2, Water Dependency and Cranberry Production, 57 Fed. Reg. 32523 (1992).

88. *Id.*

89. The §404(b)(1) guidelines define "practicable" as follows:

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.

40 C.F.R. §230.10(a)(2).

90. See *Bersani v. U.S. Environmental Protection Agency*, 850 F.2d 36, 18 ELR 20874 (2d Cir. 1988), cert. denied, 109 S. Ct. 1556 (1989) (applicant for permit to build shopping mall on 25 acres of wetlands in southeast Massachusetts, was denied its permit (pursuant to EPA's §404(c) veto authority) on "market entry" standard, because there was a practicable alternative available to it at the time it first visited the area and considered purchasing the property. Significantly, at the time it finally purchased property, there were no alternatives available).

91. See *Louisiana Wildlife Fed'n, Inc. v. York*, 603 F. Supp. 518, 527, 15 ELR 20620, 20624 (W.D. La. 1984), aff'd in part and vacated in part, 761 F.2d 1044, 15 ELR 20614 (5th Cir. 1985) (classification of an activity as nonwater dependent does not bar issuance of a permit, but necessitates a more persuasive showing than otherwise concerning the lack of alternatives.). See also *Hough v. Marsh*, 557 F. Supp. 74, 83-84, 13 ELR 20610, 20614-15 (D. Mass. 1982) (applicant must "clearly demonstrate" that no nonwetland alternative exists).

92. But see *Borough of Ridgefield v. U.S. Army Corps of Eng'rs*, 20 ELR 21387, 21393 (D.N.J. July 2, 1990) (failure of permit objector to submit suggested alternative sites and supporting data during permit comment period precluded objector from raising such alternatives before the court).

93. For example, an applicant may define the project purpose narrowly so as to fit only one property, such as for the construction of a marina-restaurant-hotel complex near a particular waterway. The Corps may define the project purpose very broadly, and separately, as provision of marina services in the community, and a restaurant and a hotel. Under the applicant's description, all parts are integrated and alternatives must meet all of the integrated criteria, under the Corps' description, there would be many alternatives for provision of the same basic purposes.

94. See, e.g., *Department of the Army, Permit Elevation, Plantation Landing Resort, Inc.* (Apr. 21, 1989); *U.S. Army Corps of Engineers, Headquarters Findings, Hartz Mountain 404(q) Elevation* (July 25, 1989); *Department of the Army, Permit Elevation, Old Cutler Bay Associates* (Sept. 13, 1990); *U.S. Army Corps of Engineers, Headquarters Review and Findings, Twisted Oaks Joint Venture Permit 404(q) Elevation* (Mar. 15, 1991).

95. 761 F.2d 1044, 1048, 15 ELR 20614, 20616.

96. *Id.* See also *National Audubon Soc'y v. Hartz Mountain Dev. Corp.*, 14 ELR 20724, 20730-32 (D.N.J. 1983) (alternatives must meet project proponent's objectives).

97. See *Friends of the Earth v. Hintz*, 800 F.2d 822, 833, 17 ELR 20030, 20036 (9th Cir. 1986).

98. See *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169, 13 ELR 20421 (D. Md. 1983), aff'd, 725 F.2d 677, 14 ELR 20269 (4th Cir. 1984) (the Corps' rejection of developer's proposal to locate townhouses near boat houses and launching facility upheld, because alternative site existed for townhouses, and the boat houses and launching facilities were held to be merely "incidental" to the townhouse project).

99. See *Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409, 19 ELR 21348, 21348-49 (9th Cir. 1989) (golf course held to be integral part of alpine resort development for practicable alternatives analysis).

100. See *id.* See also *Friends of the Earth v. Hintz*, 800 F.2d 822, 833-34, 17 ELR 20030, 20036 (9th Cir. 1986).

101. *Friends of the Earth v. Hall*, 693 F. Supp. 904, 946-47, 19 ELR 20298, 20315-16 (W.D. Wash. 1988).

102. 40 C.F.R. §230.10(a)(2) (1992).

103. The Corps and EPA allow a less demanding practicable alternatives test for power plant modifications required by the CAA's Amendments of 1990, since the applicant's choices are restricted by that law. See RGL 92-5, *Alternatives Analysis Under the Section 404(b)(1) Guidelines for Projects Subject to Modification Under the Clean Air Act*, 57 Fed. Reg. 62312 (1992).

In weighing whether an alternative might have more significant adverse environmental consequences than the activity proposed by the permit applicant, EPA and the Corps have previously differed on the role of mitigation. EPA maintains that possible mitigation of a project's adverse effects should not be considered in evaluating practicable alternatives.<sup>104</sup> The Corps has previously considered an applicant's proposals for mitigation as part of overall project proposals, which could be weighed against alternative sites.<sup>105</sup> However, by joining with EPA in an MOA on mitigation, discussed below, the Corps has adopted EPA's policy as an interpretation of its own regulations.

**No Significant Degradation.** The §404(b)(1) guidelines also prohibit permits for discharges of dredged or fill material that will "cause or contribute to significant degradation of the waters of the United States."<sup>106</sup> Findings of significant degradation must be based on:

- the effect of the fill on the water bottom;<sup>107</sup>
- the effect of the fill on water flow and circulation;<sup>108</sup>
- the effect of the fill on turbidity;<sup>109</sup>
- the effect of any contaminant added to the water;<sup>110</sup>
- the effect of fill on the aquatic ecosystem and organisms;<sup>111</sup> and
- the secondary effects of the fill on the aquatic ecosystems, such as downstream impacts.<sup>112</sup>

These determinations provide information on the immediate physical impacts caused by the fill activity.<sup>113</sup> They are rarely stumbling blocks in obtaining a §404 permit, unless they support a finding that the filling will cause or contribute to significant degradation of the waters of the United States,<sup>114</sup> based on an evaluation of this information.

**Mitigation or Minimizing Impacts.** The §404(b)(1) guidelines require that filling activities must be performed to achieve minimal adverse impacts:

[N]o 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.<sup>115</sup>

<sup>104</sup> 51 Fed. Reg. 22977 (1986) (EPA vetoed a site in part because the Corps considered an applicant's mitigation proposal, which resulted in a net increase of wetland acreage, as the Corps' basis for finding that other alternatives were not less damaging).

<sup>105</sup> See, e.g., 33 C.F.R. §§320.4(b), 325.4(a), and 51 Fed. Reg. 41208 (1986).

<sup>106</sup> 40 C.F.R. §230.0(c) (1992).

<sup>107</sup> *Id.* at §230.1(a).

<sup>108</sup> *Id.* at §230.1(b).

<sup>109</sup> *Id.* at §230.1(c).

<sup>110</sup> *Id.* at §230.1(d).

<sup>111</sup> *Id.* at §230.1(e).

<sup>112</sup> *Id.* at §230.1(f).

<sup>113</sup> The regulations describe these potential impacts in greater detail, with examples, to assist permit writers. See 40 C.F.R. pts. C-F.

<sup>114</sup> 40 C.F.R. §230.0(c) (1992).

<sup>115</sup> *Id.* at §230.10(d).

Subpart H sets forth a number of standards to minimize specific kinds of impacts. These rules have been construed to encompass a duty to mitigate impacts, not only through proper management of the filling itself, but also by compensating for wetlands destroyed by filling.

Mitigation is also addressed in the Corps' regulation under which district engineers have authority to impose permit conditions to mitigate significant losses.<sup>116</sup> In addition, the Corps must comply with the regulation on Council on Environmental Quality (CEQ), which requires federal agencies to mitigate adverse environmental impacts when issuing permits.<sup>117</sup> In reviewing mitigation proposals and establishing permit conditions, the Corps relies heavily on the FWS.<sup>118</sup> Applicants may find it advantageous to work with the FWS prior to submitting a mitigation proposal.

In addressing mitigation, these agencies focus on three aspects: avoiding damages, minimizing impacts, and replacing the ecological resources lost as a result of a §404 authorized fill activity. The government's current mitigation policy is embodied in an MOA between EPA and the Department of the Army concerning mitigation under CWA §404(b)(1) guidelines.<sup>119</sup> The *Mitigation MOA* provides that mitigation is to be approached in the following sequence:

**Avoidance.** An applicant must mitigate the impact of a project in the first instance by avoiding the filling of any wetlands in order to fulfill the project purpose.

**Project modifications.** If impacts cannot be avoided, they must be reduced or minimized to the extent practicable through project modifications, such as design changes.

**Compensation.** If all practicable project modifications have been accomplished and the project nonetheless will result in the loss of wetlands, the applicant must compensate for the loss. The compensation may take several forms, including on-site and off-site restoration or creation of wetlands.

The goal of compensation, however, is to replace lost wetland values or functions, not just to replace wetlands acre for acre. The *Mitigation MOA* specifically provides that mitigation for wetlands losses "should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan."<sup>120</sup> The *Mitigation MOA* allows for less than one to one mitigation under certain circumstances.

In 1992, the Bush administration proposed to amend the §404(b)(1) guideline requirements of sequential mitigation for the filling of wetlands in Alaska.<sup>121</sup> The proposal

<sup>116</sup> 33 C.F.R. §325.4(a)(3) (1992). The Corps may require the applicant to post a bond to assure satisfactory completion of any required permit condition, including mitigation. 33 C.F.R. §325.4(d). See also 33 C.F.R. §320.4(r) (mitigation as part of public interest review).

<sup>117</sup> 40 C.F.R. §1508.20 (1992).

<sup>118</sup> The FWS has a mitigation policy as well. See 46 Fed. Reg. 7644-63 (1981).

<sup>119</sup> Memorandum of Agreement Between the U.S. Environmental Protection Agency and U.S. Department of the Army, Determination of Mitigation Under the Clean Water Act §404(b)(1) Guidelines (effective Feb. 7, 1990) [hereinafter *Mitigation MOA*]. A lawsuit challenging the issuance of the *Mitigation MOA* for not complying with the rulemaking procedures of the Administrative Procedure Act was dismissed as not ripe for judicial review. See *Municipality of Anchorage v. United States*, 21 ELR 20119 (D. Alaska 1990).

<sup>120</sup> *Mitigation MOA*, *supra* note 119, at pt. II(B).

<sup>121</sup> 57 Fed. Reg. 52716 (1992).

identifies several special circumstances in Alaska to support allowing deviation from sequential mitigation. First, Alaska has historically lost less than one percent of the state's wetland acreage. Since most potential wetlands mitigation land is found at degraded wetlands sites, this low historic loss rate means that there is very little potential mitigation land available in Alaska.<sup>122</sup> Second, 40 percent of Alaska's wetlands are already in federal or state conservation units, including parks, refuges, and other controlled ownership.<sup>123</sup> Third, because of topography and the high percentage of land in Alaska that is wetlands, there are often no practicable alternatives to wetlands filling for development. The proposal states that requiring strict mitigation for wetlands filling would unduly hamper development in the state.<sup>124</sup> EPA and the Corps recognized in their *Mitigation MOA* that some areas, like Alaska, might not be appropriate for sequential mitigation and one-to-one wetlands mitigation.<sup>125</sup> EPA has requested comment on this proposed amendment.

One means of satisfying wetlands mitigation requirements is to establish "mitigation banks." In 1971, President Bush announced an effort to create and encourage the use of a mitigation banking system.<sup>126</sup> In theory, mitigation banking allows a developer to create, restore, or enhance wetlands as compensation not only for wetland losses and impacts from a particular project, but also to plan broader mitigation projects that can be available to compensate for future wetland losses and impacts. Congress has also shown an interest in mitigation banking. The 1991 Surface Transportation Act included a provision that authorizes funding for state transportation departments to establish wetland mitigation banks.<sup>127</sup>

The availability of mitigation banking would provide greater economic and planning flexibility to developers, and a mechanism to halt the dwindling number of wetland acres nationwide. For example, mitigation banks could encourage the creation, restoration, and enhancement of large wetland areas, which generally have higher success rates and lower costs per acre than smaller ones. Moreover, mitigation banking could improve the success of wetlands mitigation if wetland banks were maintained in locations known to be hydrologically and ecologically favorable to wetlands, such as previously degraded wetlands. On the other hand, environmentalists and scientists are concerned that too much emphasis on off-site mitigation banking will result in destruction of natural wetlands at project sites, rather than project alterations to minimize impacts. Because many wetland functions are site-specific and are lost when wetlands are destroyed, wetland mitigation projects offsite cannot replace these values.<sup>128</sup>

Mitigation banking offers a structure within which the

scientific values of wetlands and the economic development pressures for wetland acres can be coordinated and addressed. However, many issues need to be resolved, including who will manage the wetland mitigation bank and how rights to use the mitigation wetlands will be distributed. And even if mitigation banking is available, the mitigation requirements for individual permits will still be subject to the sequenced evaluations by the Corps and EPA, absent a change in government policy.

### B. The Corps' Public Interest Review

The Corps bases its decisions to issue §404 permits on an evaluation of

[T]he probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.<sup>129</sup>

In making public interest determinations, the Corps balances the benefits that are reasonably expected to accrue from the proposal against reasonably foreseeable detriments.<sup>130</sup> The Corps' district engineers consider a range of factors in making public interest determinations, including: conservation, economics,<sup>131</sup> aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion, recreation, water supply and conservation, water quality, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.<sup>132</sup> Subject to these considerations, and in accordance with other regulations such as the §404(b)(1) guidelines, a permit will be granted unless a district engineer determines that it would be contrary to the public interest.<sup>133</sup>

While this public interest review is far-reaching, it has its limits. In *Mall Properties, Inc. v. Marsh*,<sup>134</sup> the district engineer, as part of his public interest review, considered the socioeconomic impacts that a shopping mall project in North Haven, Connecticut, would have on New Haven, Connecticut. The district engineer concluded that the impacts were contrary to the public interest and that the permit should be denied.<sup>135</sup> The court, however, held that the Corps' reliance on the socioeconomic impacts of the mall project on New Haven was not consistent with CWA §404 or the Corps' public interest regulations. The court held

129. 33 C.F.R. §320.4(a) (1992) (emphasis added).

130. *Id.*

131. With regard to economics, the regulations provide:

When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the marketplace. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest.

33 C.F.R. §320.4(q) (emphasis added)

132. The weight of each of these factors is to be determined by its importance and relevance for each proposal. 33 C.F.R. §320.4(a)(3) (1992). See *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169, 178, 13 ELR 20421 (D Md 1983).

133. 33 C.F.R. §320.4(a) (1992).

134. 672 F. Supp. 561, 18 ELR 20135 (D Mass 1987), appeal dismissed, 841 F.2d 440, 18 ELR 20829 (1st Cir. 1988).

135. *Id.* at 672 F. Supp. at 565, 18 ELR at 20136.

122. *Id.*

123. *Id.*

124. *Id.* at 52717.

125. *Mitigation MOA*, *supra* note 119.

126. White House Wetlands Press Release, Fact Sheet: Protecting America's Wetlands (Aug 9, 1991) (for mention of the mitigation banking system).

127. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991).

128. See generally *Focus Issue, Wetland Mitigation Banking*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst.), Jan/Feb 1992.

that the Corps may consider economic effects that are proximately related to changes in the physical environment, but it may not consider and give significant weight to "economic effects unrelated to the impact which a proposed project will have on the environment."<sup>136</sup> The court found that there was no basis in either the CWA or the RHA to support the Corps' expanded view of authority to assess a permit on socioeconomic grounds not affecting the physical environment.<sup>137</sup> In another 1987 case, a federal district court held, in the context of a NEPA public interest review, that the Corps was required to consider the water supply needs of the receiving community before issuing a permit for a water service pipeline.<sup>138</sup>

The Corps' public interest regulations specifically identify a concern for wetlands. These regulations provide that "most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."<sup>139</sup> Moreover, the regulations provide that no permit of any kind that involves the alteration of wetlands identified as important to the public interest will be granted, unless the district engineer concludes that the

136. *Id.* at 672 F. Supp. at 566, 18 ELR at 20136.

137. *Id.* at 672 F. Supp. at 566-68, 18 ELR at 20136-37. The court further held that NEPA does not authorize the Corps' analysis of the socioeconomic impacts in this case. *Id.* 672 F. Supp. at 571, 18 ELR at 20139. See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773, 774, 13 ELR 20515 (1983) ("[t]o determine whether [NEPA] requires consideration of a particular effect [e.g., psychological or economic], we must look at the relationship between that effect and the change in the physical environment caused by the . . . federal action. . . ." (Emphasis added.) NEPA requires a reasonably close causal relationship between a change in the physical environment and the effect at issue.). Compare *Hough v. Marsh*, 557 F. Supp. 74, 86, 13 ELR 20610 (D. Mass. 1982) (the Corps must consider economic impacts of proposed structure that would block scenic view).

138. *North Carolina v. Hudson*, 665 F. Supp. 428, 17 ELR 21260 (E.D.N.C. 1987).

139. 33 C.F.R. §320.4(b)(1) (1992). The regulations further provide that:

Wetlands that are 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 floodwaters;
- vi. Wetlands which are groundwater discharge areas that maintain minimum base flows important to aquatic resources and those which are prime natural recharge areas;
- vii. Wetlands which serve significant water purification functions; and
- viii. Wetlands which are unique in nature or scarce in quantity to the region or local area.

*Id.* at §320.4(b)(2) (emphasis added). Compare 40 C.F.R. §230.41 (wetlands as special aquatic sites)

benefits of the proposed alteration outweigh the damage to the wetlands resource.<sup>140</sup>

In addition to wetlands, the Corps also takes into consideration other ecological concerns in its public interest view, such as fish and wildlife; water quality; historical, cultural, scenic, and recreational values; and marine sanctuaries.<sup>141</sup> Many of these areas of concern occur in wetlands.

### C. The National Environmental Policy Act

NEPA<sup>142</sup> applies to the Corps' decisions on permit applications and requires the consideration of broad environmental factors. The CEQ, which is responsible for administering NEPA, has promulgated implementing regulations that the Corps follows.<sup>143</sup> Further, the Corps has promulgated its own NEPA procedures for the Corps' programs, including the §404 permit program.<sup>144</sup>

NEPA's primary function is to assure that all federal agencies make informed, environmentally responsible decisions when considering federal actions that may have a significant impact on the environment. Generally, this requires agencies to evaluate potential environmental consequences of proposed actions. For major federal actions, impacts are required to be assessed in EISs.<sup>145</sup>

The Corps' regulations require that an environmental assessment (EA) must be prepared before the agency can approve a §404 permit.<sup>146</sup> Thereafter, the Corps must either issue a finding of no significant impact (FONSI) or develop more extensive information in the form of an EIS. Most §404 permits are issued on the basis of EAs rather than full EISs.<sup>147</sup>

□ *Environmental Assessments.* The purpose of an EA is to help an agency determine whether there is enough likelihood of significant environmental consequences from a proposed action to justify the time and expense of preparing an EIS. Although no special format is required for an EA, it should include a brief discussion of the need for the proposed action, the environmental impacts of the action, potential alternatives, and a list of the agencies, interested groups, and the public consulted.<sup>148</sup> The EA may be incorporated into planning and/or engineering reports, and should not normally exceed 15 pages.

After a Corps' district reviews an EA, it must decide whether to prepare a full EIS. If the Corps determines that an action will not have a significant effect on the human

140. 33 C.F.R. §320.4(b)(4) (1992). See *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169, 179, 13 ELR 20421, 20425 (the Corps upheld its denying permit based on finding that wetlands were important within meaning of 33 C.F.R. §320.4(b)(2)).

141. *Id.* at §320.4(c)-(e), (i).

142. 42 U.S.C. §§4321-4370a, ELR STAT. NEPA 001 012

143. 40 C.F.R. §§1500-1517 (1992).

144. 33 C.F.R. pt. 230, 53 Fed. Reg. 3127 (1988), 33 C.F.R. pt. 325, app. B.

145. 42 U.S.C. §4332, ELR STAT. NEPA 003

146. 33 C.F.R. pt. 325, app. B, §7a (1992).

147. The Corps processes approximately 10,000 §404 permits per year, but, on average, requires the preparation of EISs for less than 20 of those permits. Telephone conversation with Lance Wood, U.S. Army Corps of Engineers, Office of Chief Counsel (Dec. 9, 1992).

148. 33 C.F.R. pt. 325, app. B, §7 (1992).



environment, it explains that finding in the FONSI. Either the EA, or a summary of it, is included with the FONSI.<sup>149</sup>

For the most part, the courts have deferred to and upheld the Corps' decisions that an EIS was not required for particular projects. However, there is a split of judicial authority over the applicable standard for reviewing a FONSI decision. In the U.S. Court of Appeals for the Seventh and D.C. Circuits, a Corps' determination to do a FONSI rather than an EIS will be set aside only if it is an "abuse of discretion."<sup>150</sup> Alternatively, the Second, Third, Fifth, Ninth, and Eleventh Circuits apply a "reasonableness test."<sup>151</sup> The Seventh Circuit has opined, however, that there is little practical difference between the two tests.<sup>152</sup>

In determining whether a FONSI decision should be reversed, one court has held that it must determine, based on the evidence before it, whether "contrary to the Corps' finding, the project may have a significant impact or the [Corps'] review of the project was flawed in such a way that it cannot be said whether the project may have a significant impact."<sup>153</sup>

In *River Road Alliance, Inc. v. U.S. Corps of Engineers*, however, the court held that a four page EA, which was supplemented by 17 pages of additional findings, was a sufficient basis for the Corps' FONSI regarding the permitting of a temporary barge floating facility on the Mississippi River.<sup>154</sup> The courts have also upheld the Corps' determinations that no EIS was required on the basis of a FONSI in conjunction with mitigating conditions imposed by the Corps.<sup>155</sup>

19. *Id.*

20. See *River Rd. Alliance, Inc. v. U.S. Army Corps of Eng'rs*, 764 F.2d 445, 449, 15 ELR 20518, 20519 (7th Cir. 1985) citing *Wisconsin v. Weinberger*, 745 F.2d 412, 417, 14 ELR 20744, 20746 (7th Cir. 1984); *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 126 (D.C. Cir. 1985).

151. See *Louisiana v. Lee*, 758 F.2d 1081, 1083, 15 ELR 20609, 20610 (5th Cir. 1985), cert. denied, 475 U.S. 1044 (1986); *Jones v. Gordon*, 792 F.2d 821, 827, 16 ELR 20920, 20922-23 (9th Cir. 1986); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030, 13 ELR 20326, 20335 (2d Cir. 1983); *National Wildlife Fed'n v. Marsh*, 721 F.2d 767, 782, 14 ELR 20172, 20179-80 (11th Cir. 1983); *Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732, 742, 12 ELR 21029, 21030 (3d Cir. 1982). However, the D.C. Circuit joins the Seventh Circuit in applying an abuse of discretion standard. See *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 126 (D.C. Cir. 1985).

52. *River Rd. Alliance*, supra note 150, at 449, 15 ELR at 20519.

53. *Mississippi ex rel. Moore v. Marsh*, 710 F. Supp. 1488, 1503, 19 ELR 21266, 21273-74 (S.D. Miss. 1989), citing *Fritofson v. Alexander*, 772 F.2d 1225, 1239, 15 ELR 21070, 21077 (5th Cir. 1985). See also *People ex rel. Van de Kamp v. Marsh*, 687 F. Supp. 495, 499 (N.D. Cal. 1988) (decision on part of the Corps not to prepare EIS prior to issuing permit to fill 180 acres of wetlands was unreasonable, where the Corps merely relied on other agencies' evaluations of project's cumulative effect on wetlands and wildlife, and did not discuss cumulative impacts on air and water quality, or noise pollution in its decision document).

54. *River Rd. Alliance*, supra note 150, at 449, 15 ELR at 20519.

55. See *Oklahoma Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 1470, 1489-90, 18 ELR 21357, 21367 (N.D. Okla. 1988) (appropriate mitigating conditions eliminated the need for an EIS for project to transfer reservoir water from one lake to another for municipal and industrial water purposes). See also *Park County Resource Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 17 ELR 20851 (10th Cir. 1987); *Friends of the Earth v. Hintz*, 800 F.2d 822, 836-38, 17 ELR 20030, 20037-39 (9th Cir. 1986); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 15 ELR 20455 (9th Cir. 1985); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851,

□ *Environmental Impact Statements*. When an EIS is required for major wetlands projects, the EIS and the necessary predicate studies generally are paid for and prepared by the permit applicant.<sup>156</sup> The Corps, however, must investigate independently when an applicant's EIS information is credibly challenged as inaccurate.<sup>157</sup> If an interagency dispute arises over the adequacy of an EIS, the matter can be referred to the CEQ for review.<sup>158</sup>

Many other NEPA compliance issues arise in the §404 permit process. Because NEPA applies to federal actions other than §404 permitting, NEPA case law involving other federal agencies may be pertinent to §404 disputes. However, this primer identifies only some of the §404 matters that have arisen under NEPA; practitioners should consult additional sources on NEPA for more full treatment.

*Scope of Project Subject to NEPA*. The Corps' regulations provide that an EIS should evaluate those portions of a project that are in waters of the United States, rather than looking in detail at upland portions of a project.<sup>159</sup> This regulation was upheld by the Ninth Circuit in *Sylvester v. U.S. Army Corps of Engineers*.<sup>160</sup> After upholding the regulations, the *Sylvester* court held that the Corps was not required to consider the impact of the entire proposed resort project in deciding that issuance of a permit to fill only 11 acres of wetlands for a golf course did not require an EIS. The court found that the golf course and the rest of the resort were not "joined to each other," and that the developer's plans to place part of the golf course in wetlands did not turn the entire resort complex into a major federal action.<sup>161</sup>

However, projects that are segmented or conducted in discrete parts may require an EIS. The CEQ's regulations provide in pertinent part that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated

12 ELR 20410 (9th Cir. 1982); *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 12 ELR 21058 (D.C. Cir. 1982); *Environmental Defense Fund v. Andrus*, 619 F.2d 1368, 1376, 10 ELR 20252, 20255 (10th Cir. 1980).

156. See the Corps' RGL No. 87-5, *Environmental Impact Statement (EIS) Costs That Can Be Paid by the Applicant* (May 28, 1987) (expired).

157. See *Van Abbema v. Fornell*, 807 F.2d 633, 642, 17 ELR 20429, 20434 (7th Cir. 1986); *Sierra Club v. Sigler*, 695 F.2d 957, 13 ELR 20210 (5th Cir. 1983); *Sierra Club v. Marsh*, 701 F. Supp. 886, 912, 19 ELR 20692, 20702 (D. Me. 1988); *Lake Erie Alliance for the Protection of the Coastal Quarter v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1072-73 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir. 1983), cert. denied, 464 U.S. 915 (1983); *Missouri Coalition for Environment v. U.S. Army Corps of Eng'rs*, 678 F. Supp. 790, 802 (E.D. Mo. 1988).

158. 40 C.F.R. pt. 1504 (1992).

159. 33 C.F.R. pt. 325, app. B, §7(b) (1992).

160. 871 F.2d 817, 821 (9th Cir. 1989). This decision was amended at 884 F.2d 394, 19 ELR 20652.

161. 871 F.2d at 823. See also *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272-73, 10 ELR 20243, 20244-45 (8th Cir. 1980) (upheld the Corps' decision to consider, in its NEPA analysis, only the 1.25 miles of river crossing of a 67-mile power line, the Corps did not have sufficient responsibility for entire project). See *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 326-27, 10 ELR 20185, 20186-87 (5th Cir. 1980) (the Corps' decision to limit NEPA's analysis to 24-inch outfall pipe and not to expand to cover entire titanium dioxide manufacturing facility upheld).

in a single [EIS].<sup>162</sup> This is a factual determination and is to be made on a case-by-case basis.<sup>163</sup>

**Adequacy of the EIS/Need for Supplemental EIS.** If an EIS is prepared, the Corps must review it to determine whether it complies with the CEQ and the Corps' NEPA regulations.<sup>164</sup> As mentioned, a primary purpose of an EIS is to provide decisionmakers with sufficient detailed environmental information to aid in the decision whether to take an action in light of its environmental consequences. Thus, the courts will find an EIS inadequate when it fails to identify major environmental consequences of the proposed action.<sup>165</sup>

Even after an EIS is prepared, a supplemental EIS may be needed. The passage of time, a change of circumstances, or a change in the project may result in significant impacts on the environment that were not considered in the original EIS.<sup>166</sup> However, courts have interpreted NEPA's regulations to require that the new circumstance must "present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."<sup>167</sup>

### III. The EPA's §404(c) Veto Authority

Although EPA has used its §404(c) veto power infrequently, that authority has presented some of the most controversial issues facing the §404 program. In practice, the §404(c) veto has been invoked when the Corps and EPA have a major disagreement over whether a discharge of fill should be allowed; the permit applicant and both agencies have engaged in multiple efforts to resolve the disagreement short of a veto; and, generally, fundamental issues concerning the regulations and the aquatic environment are at issue. It should be no surprise that many §404(c) actions have ended in litigation.

Section 404(c) authorizes EPA to veto a Corps' decision to issue a §404 permit when EPA "determines, after notice and opportunity for public hearings, that the discharge of [dredge and fill] materials into [a specified] area will have an unacceptable adverse effect on [five enumerated resources]."<sup>168</sup> EPA

may exercise this veto in advance of a specific permit application, by designating particular areas as unavailable for filling. In most cases, however, the §404(c) veto arises in connection with specific permit proposals.<sup>170</sup>

EPA's §404(c) implementing regulations define "acceptable adverse effect" as an impact on aquatic or wet ecosystems that is likely to result in significant degradation of municipal water supplies, including surface water, or significant loss of or damage to fisheries, fishing, wildlife habitat, or recreational areas.<sup>171</sup> The regulations further provide that "in evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the 404(b)(1) guidelines."<sup>172</sup> In fact EPA uses §404(c) as authority to police adherence to the §404(b)(1) guidelines. Neither §404(c) nor EPA's regulations provide detailed substantive standards for the veto; rather, EPA has used its interpretation of the §404(b)(1) guidelines as the basis for most §404(c) vetoes.

#### A. Procedures

An EPA regional administrator (RA) can initiate a §404(c) proceeding on a finding that "an unacceptable adverse effect" could result from filling a particular site.<sup>173</sup> An RA initiates such an action by providing written notice to the appropriate district engineer, the site owner of record, and the applicant.<sup>174</sup> If the RA is not satisfied within 15 days of providing notice to the district engineer that no unacceptable adverse effects will occur, the RA will publish notice of his proposed determination.<sup>175</sup> If a permit is pending, the district engineer may not issue the permit until final action is taken pursuant to §404(c).<sup>176</sup> The RA must give public notice in the *Federal Register* and send a copy to the appropriate district engineer.<sup>177</sup>

The RA then allows a comment period of between 30 and 60 days following the date of publication. During this period any interested persons may submit written comments, which are to be considered by the RA in making his

that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C. §1344(c), ELR STAT. FWPCA 060

169. 40 C.F.R. §231.3 (1992).

170. EPA's advanced identification program, 40 C.F.R. §230.80, is not an exercise of §404(c) veto power. See *supra* Chapter 2(11)(B).

171. 40 C.F.R. §231.2(c) (1992).

172. *Id.*

173. 40 C.F.R. §231.3(a) (1992). See *Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 16 ELR 20033 (D.D.C. 1985) (initiation of §404(c) proceedings is not final agency action and therefore not subject to judicial review).

174. 40 C.F.R. §231.3(a) (1992).

175. *Id.* at §231.3(a)(2).

176. A note accompanying 40 C.F.R. §231.3(a)(2), provides that it is anticipated that the procedures of the §404 referral process (see discussion *infra* Chapter 6(1)(C)) will normally be exhausted prior to any final decision on whether to initiate a §404(c) proceeding.

177. 40 C.F.R. §231.3(d) (1992).

162. 40 C.F.R. §150.2 (1992). But see *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 836 F.2d 760, 18 ELR 20444 (2d Cir. 1988).

163. See *National Audubon Soc'y v. Hartz Mountain Dev. Corp.*, 14 ELR 20 24 (D.N.J. 1983).

164. 33 C.F.R. pt. 325, app. B (1992).

165. See *Friends of the Earth v. Hall*, 693 F. Supp. 904, 19 ELR 20298 (W.D. Wash. 1988). See also *Sierra Club v. Sigler*, 695 F.2d 957, 13 ELR 20210 (5th Cir. 1983) (failure of EIS to fully disclose and analyze costs of project activities sufficiently tainted the Corps' permit decision to require reversal). Compare *Sierra Club v. U.S. Army Corp. of Engineers*, 01 F.2d 1011, 1029, 13 ELR 20326, 20334-35 (9th Cir. 1983) (EIS not rule EIS inadequate if agency has made adequate compilation of relevant information, has analyzed it reasonably, has not ignored pertinent data, and has made disclosure to public).

166. See *Louisiana v. United Fed'n v. York*, 761 F.2d 1044, 1051, 15 ELR 20614, 20615 (5th Cir. 1985) (supplemental EIS was required).

167. *Id.* at 1052, 15 ELR 20617-18, citing *Wisconsin v. Weinberger*, 745 F.2d 411, 421, 14 ELR 20744, 20748.

168. Section 404(c) provided in 40 C.F.R. §231.3(a).

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of an defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings,

recommended determination.<sup>178</sup> If there is significant public interest, the RA may hold an informal hearing.<sup>179</sup> Within 30 days after the conclusion of the public hearing or, if no hearing is held, within 15 days after the expiration of the comment period, the RA will either withdraw the proposed determination or prepare a recommended determination to deny the permit or restrict the permit activities.<sup>180</sup>

The recommended determination is then forwarded to the EPA Administrator for review.<sup>181</sup> After reviewing the RA's recommendations and the record, the Administrator, within 30 days, initiates consultation with the Corps and the permit applicant.<sup>182</sup> The Corps and the permit applicant then have 15 days to notify the Administrator of any intent to take corrective action that is acceptable to the Administrator to prevent unacceptable adverse effects.<sup>183</sup> Within 60 days of receiving the record, the Administrator must make a final determination affirming, modifying, or rescinding the RA's recommended determination.<sup>184</sup>

### B. Substantive Standards

As identified above, EPA's §404(c) regulations lack any meaningful substantive veto provisions. Rather, most of the core issues at stake in §404(c) vetoes have concerned the application of the §404(b)(1) guidelines. A veto may result when EPA and the Corps disagree over how to apply the §404(b)(1) guidelines, or over a project's impacts. This exposes a permit applicant to the possibility that an unexpressed difference of opinion between the Corps and EPA may endanger his or her permit application. Applicants often feel unfairly surprised by §404(c) proceedings, even when EPA has commented while a permit is under review at the Corps. The fact that the veto is used to enforce EPA's interpretation of the §404(b)(1) guidelines also makes it difficult to identify, in any meaningful fashion, the circumstances under which EPA might exercise §404(c) authority.

As mentioned, there have been very few §404(c) vetoes.<sup>185</sup> However, the threat of a veto encourages the Corps to consider EPA's comments on a proposed permit and to make considerable effort to accommodate EPA's concerns. Some observers feel that EPA has become more willing to veto permits in recent years. A description of a few of the vetoes that have been litigated serves to illustrate the issues that can arise under §404(c).

#### EPA's §404(c) veto of a mall project in Attleboro, Mas-

178. *Id.* at §231 4(a)

179. *Id.* at §231 4(b)

180. These time periods may be extended by EPA. See *Bersani v. Deland*, 640 F. Supp. 716, 16 ELR 20795 (D. Mass. 1986).

181. 40 C.F.R. §231.5 (1992)

182. *Id.* at §231 6

183. *Id.*

184. *Id.*

185. As of 1991, EPA had vetoed the following 11 projects: (1) North Miami landfill, Fla. (Jan. 19, 1981), (2) M. A. Norden site, Mobile, Ala. (June 15, 1984), (3) Jack Maybank site, Jehossee Island, S.C. (Apr. 5, 1985), (4) Bayou Aux Carpes site, Jefferson Parish, La. (Oct. 16, 1985), (5) Sweedens Swamp site, Attleboro, Mass. (May 13, 1986), (6) Russo Development Corporation site, Hackensack Meadows, N.J. (Mar. 21, 1988), (7) Henry Rem Estates site, East Everglades, Fla. (June 15, 1988), (8) Lake Alma, Macon County, Ga. (Dec. 16, 1988), (9) Ware Creek, James City County, Va. (July 10, 1989), (10) Two Forks Dam & Reservoir, Denver, Colo. (Nov. 23, 1990), and (11) Big River Reservoir, R.I. (Mar. 1, 1990).

sachusetts, received considerable publicity.<sup>186</sup> In this case, the Pyramid Company proposed to develop a shopping mall on an 80-acre tract that contained 25 acres of wetlands. EPA and the Corps disagreed, among other things, on whether there were available practicable alternative sites and whether the applicant's mitigation proposal made the applicant's preferred site environmentally preferable to other alternatives. When the Corps released its notice of intent to issue a permit, EPA's Region I initiated §404(c) proceedings. The developer's legal challenge to the initiation of the proceedings was dismissed as premature.<sup>187</sup> After review by the RA and headquarters, EPA concluded that the permit should be denied because it would not comply with the §404(b)(1) guidelines due to the availability of a practicable alternative site.

Pyramid challenged EPA's final §404(c) decision in *Bersani v. U.S. Environmental Protection Agency*,<sup>188</sup> alleging that there was no practicable alternative site available, and that EPA's §404(c) authority was limited to a determination that the project would have an unacceptable adverse effect on the five resources enumerated in the statute. The *Bersani* court upheld EPA's decision, and the Second Circuit affirmed.<sup>189</sup> The courts affirmed EPA's view that the available practicable alternatives must be measured by a market entry theory. This approach, which EPA articulated during the veto process, requires an applicant to assess all potential alternative sites for its project and demonstrate that nonwetland sites are not available, when it enters the market and plans its proposed project. The courts upheld the market entry standard as most consistent with the wetland protection features of EPA's §404(b)(1) guidelines. The courts thus agreed that EPA had the authority to consider compliance with the §404(b)(1) guidelines in exercising its §404(c) authority.

EPA's §404(c) veto of a James City County, Virginia, water project was also based on its view that less damaging alternatives were available. Applying the practicable alternatives test of the §404(b)(1) guidelines, EPA vetoed the Corps' decision to grant the county a permit to create a water supply reservoir by damming Ware Creek and flooding adjacent wetlands and woodlands, which provided substantial wildlife habitat. The Corps concluded that the county should be granted the permit, because no agency, including EPA, had identified practicable alternatives to flooding 425 wetland acres required to create the reservoir, and the county had taken appropriate steps to mitigate the adverse impacts. EPA, however, suggested that alternative sources of water might be obtained either without any dam and reservoir, or by constructing several smaller impoundments instead of one large dam. EPA did not argue that

186. The veto is commonly referred to as either the Attleboro Mall or Sweeden's Swamp veto.

187. *Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 16 ELR 20033 (D.D.C. 1985). Pyramid tried to argue that EPA was arbitrary and capricious in initiating a veto, because there was no basis for concluding that "an unacceptable adverse effect" could result from the issuance of the permit where the applicant's mitigation plan would result in a net improvement for the aquatic ecosystem. The developer's defense had to wait until after EPA completed its process.

188. 674 F. Supp. 405, 18 ELR 20001 (N.D.N.Y. 1987).

189. *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988), cert. denied, 109 S. Ct. 1556 (1988).

these alternatives necessarily could be implemented, but rather concluded that there was insufficient information in the record to show that the alternatives were not available. In short, EPA vetoed the permit because it felt the applicant had the burden of proof to disprove the availability of practicable alternatives. However, EPA's veto did not survive judicial challenge.<sup>190</sup>

In *James City County, Virginia v. U.S. Environmental Protection Agency*, the court found that EPA had employed a presumption that there are alternatives, unless disproved by the applicant. The court held that this presumption was invalid under the circumstances, because the §404(b)(1) guidelines establish that presumption only for projects that are not water dependent.<sup>191</sup> A water supply reservoir, of course, is a water-dependent project. On appeal, the Fourth Circuit affirmed the district court, but based its decision on the lack of substantial evidence that there were practicable alternatives.<sup>192</sup> The court remanded to allow EPA to consider alternative grounds for a veto, which had not been addressed, and in particular, whether the adverse environmental effects on wildlife alone justified the veto.<sup>193</sup>

On March 27, 1992, EPA issued its decision on remand, again vetoing the Corps' decision to issue the permit, this time based solely on adverse environmental effects.<sup>194</sup> In its final determination, EPA described the extensive ecosystem values that are served by the wetlands that would be flooded by the proposed water project and maintained that its veto would protect both the wetlands and marshlands that the Chesapeake Bay depends on for fish habitat. With respect to the proposed project's purpose of satisfying the county's predicted shortage of water, EPA maintains that water supplies can and should be addressed regionally, rather than locally. EPA's decision notes that four municipalities and James City County have formed a regional water study group that has identified 31 regional solutions. This decision was challenged in court, and again reversed.<sup>195</sup>

The district court found that in its second veto, EPA neglected to properly consider James City County's need for water in evaluating the acceptability of the reservoir project. Since the §404(c) regulations require consideration of filling on municipal water supplies,<sup>196</sup> the court held that EPA could not veto a permit solely considering the environmental concerns of the filling. The court also found that the environmental data in the record did not support EPA's conclusion that the reservoir would impose significant adverse impacts.

In *City of Alma v. United States*,<sup>197</sup> EPA's veto of the Lake Alma dam and impoundment project in Bacon County,

Georgia, was upheld. This proposal, which called for developing a recreational lake, entailed almost two decades of environmental litigation, culminating in EPA's §404(c) veto.<sup>198</sup> After considering a number of EPA's prior actions, the court examined EPA's conclusion under §404(c) that the proposed lake would have an unacceptable adverse impact on wildlife. The veto resulted from a disagreement between EPA and the Corps over the value of the parcel filled or not filled, as wildlife habitat. The Corps felt that alternative wildlife values would be enhanced by the lake while EPA put a greater value on the undisturbed wetland habitat. In upholding EPA, the court reviewed the veto decision by examining the sufficiency of the evidence on the record. The court explained that its role was to decide "whether the Agency considered relevant factors and articulated a satisfactory explanation for its decision."<sup>199</sup> On review, therefore, EPA did not have to meet any enhanced burden to explain why it overruled contrary findings by the Corps, but merely had to explain its own decision. This, the court found EPA had done.<sup>200</sup>

The cases that address EPA's §404(c) vetoes illustrate the uncertainties that permit applicants face under the administrative and judicial systems governing the §404 program. The CWA's compromise enacted in 1972,<sup>201</sup> which established EPA's §404(c) oversight role, has resulted in great potential for lengthy disputes between EPA and the Corps at the expense of private project applicants. EPA has structured its §404(c) veto role in a manner that deprives parties of predictability—in a given case, one cannot consult preexisting rules to ascertain whether a veto is likely. While the goals of the CWA may be advanced from the protections afforded by §404(c), surely 20 years after enactment of the CWA the public should not be surprised each time a veto is invoked. Until a §404(c) process is developed that provides all interested entities—the applicant, the Corps, EPA, and the public—with the certainty necessary to make plans, this aspect of the program will remain very controversial.

#### IV. Summary of Individual Permits

The individual permit application process is, in most instances, manageable and governed by clear regulatory standards. Major actions in wetlands, however, are subject to a multilayer administrative process, requiring compliance with the Corps' and EPA's regulations, consultation with many other governmental units, public participation, possible EISs, and sometimes a veto procedure. Many years of administering the process and litigating the results have illuminated the parameters of the major permit requirements. The process can be cumbersome and, where §404(c) vetoes are involved, may be unpredictable. The best strategy for applicants, as well as other interested parties, is early and consistent communication with the Corps and EPA regarding project plans.

<sup>190</sup> *James City County, Va. v. U.S. Environmental Protection Agency*, 758 F. Supp. 348, 21 ELR 20371 (E.D. Va. 1990).

<sup>191</sup> *Id.* at 350-51, 21 ELR at 20372-73. See 40 C.F.R. §230.10(a)(1).

<sup>192</sup> 955 F.2d 254, 22 ELR 20566 (4th Cir. 1991).

<sup>193</sup> *Id.* at 260, 22 ELR at 20569 (4th Cir. 1991).

<sup>194</sup> Final Determination on Remand of the U.S. Environmental Protection Agency's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Ware Creek Water Supply Impoundment, James City County, Virginia, March 27, 1992.

<sup>195</sup> *James City County v. EPA*, No. 89-156 NN (E.D. Va. Aug. 5, 1992) (memorandum up).

<sup>196</sup> 40 C.F.R. §230.1(a) (1992).

<sup>197</sup> 744 F. Supp. 1540, 21 ELR 20226 (S.D. Ga. 1990) (§404(c) litigation).

<sup>198</sup> *National Wildlife Fed'n v. Marsh*, 721 F.2d 767 (11th Cir. 1983) (NEPA litigation).

<sup>199</sup> *City of Alma*, *supra* note 197, at 1562, 21 ELR at 20371-34.

<sup>200</sup> Other EPA vetoes were upheld in *Crepel v. U.S. Army Corps of Engineers*, 19 ELR 20134 (E.D. La. 1988) and *Russo Dev. Corp. v. Reilly*, 20 ELR 20938 (D.N.J. 1990) (veto of an after-the-fact permit application).

<sup>201</sup> See *supra* Chapter 1(III).

## Chapter 7. Enforcement of §404

A variety of enforcement options are available under the CWA. Section 404 can be enforced through administrative orders and penalties, civil judicial enforcement by the government or by citizens, and criminal prosecutions. Both the Corps and EPA possess enforcement authorities, and the Department of Justice (DOJ), which includes the U.S. Attorneys throughout the country, may bring enforcement actions for wetlands violations. For federal court prosecutions, cases may be brought only by or under the direction of the DOJ, so other agencies must refer cases to the DOJ for judicial enforcement.

Generally, enforcement of the CWA's violations involving wetlands commences after illegal filling is observed in the field. The Corps' or EPA's personnel may become aware of violations in the course of other field work, or because alert citizens provide information about illegal activities. The Corps encourages citizens to report wetlands violations.<sup>1</sup> In addition, field personnel from state or local governments, and other federal agencies, such as the FWS, NOAA, or the SCS, may report violations. Where egregious violations are suspected, trained criminal investigators from the resource agencies or the Federal Bureau of Investigation may participate. Unlike some provisions in other environmental laws, §404 contains no routine reporting or monitoring requirements that might disclose the existence of violations.

After evaluating the information available about a violation, the federal government can select among the various enforcement options. The government is not obligated to pursue one form of enforcement before another, or to elect among enforcement options. As a matter of policy, however, the federal agencies try to provide the appropriate persons with notice of a violation, and if possible, attempt to resolve violations without using additional enforcement tools.<sup>2</sup>

The Corps and EPA entered into an MOA in January 1989, to allocate the enforcement responsibilities shared by the agencies under the CWA.<sup>3</sup> The *Enforcement MOA* recognizes that the Corps has greater field resources than EPA and, thus, will conduct the initial investigation in most cases.<sup>4</sup> The investigating agency makes an initial §404 geographical determination and an initial determination of whether a violation has occurred. EPA may assume authority for geographical determinations in problem cases or where it invokes a "special case" authority.<sup>5</sup>

Under the *Enforcement MOA*, the Corps is the lead enforcement agency for violations of Corps-issued permits, and EPA is the lead enforcement agency for violations

involving unpermitted discharges. EPA is also the lead agency for special cases. However, if the lead agency declines to enforce, the other agency is not prevented from taking enforcement actions.<sup>6</sup> Also, the *Enforcement MOA* establishes working relations between the two agencies to promote the efficient use of their joint resources. And it does not give any rights or defenses to property owners.<sup>7</sup> For example, a violator prosecuted by one agency cannot rely on the *Enforcement MOA* to argue that the prosecution should have been brought by the other agency.

### I. Who May Be Held Liable for Violations?

The obligations under the CWA apply to "person[s]," a term defined in the statute, the regulations, and the case law. Under the CWA, "person" is broadly defined to include:

[A]n individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.<sup>8</sup>

This general definition applies for purposes of administrative and civil enforcement. In addition, the CWA includes a supplementary definition of "person" for purposes of criminal enforcement. For criminal violations, the term also includes "any responsible corporate officer."<sup>9</sup>

Although the Corps' regulations do not further define "person," EPA's §404 regulations do. Under those regulations, EPA uses the same terms as the statute, but adds that "person" includes "an agent or employee" of any of the other organizations identified within the definition.<sup>10</sup>

Under these definitions, any person or entity responsible for an unpermitted discharge may be prosecuted for a violation of the CWA. This includes the owner of the property, a nonowner who discharges fill onto the property of another, and contractors who are employed to conduct physical work involved in filling. Consulting and design engineers involved in construction projects also have been held liable for illegal filling under §404.<sup>11</sup>

To determine liability, courts may inquire whether the defendant performed the work that violated the Act, or exercised control over or had responsibility for the violative activities. In *United States v. Board of Trustees of Florida Keys Community College*, the court held a construction company liable for the CWA's violations in the face of claims that the landowner was supposed to obtain the required permits.<sup>12</sup> The court relied on the fact that the CWA does not penalize only intentional violations. In *United States v. McLeskey & Associates*,<sup>13</sup> Mr. McLeskey, presi-

1 33 C.F.R. §326.3(a) (1992)

2 *Id.* at §326.3(c)-(d)

3 Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989) [hereinafter *Enforcement MOA*] reprinted in *LAW OF WETLAND REGULATIONS*, *supra* Chapter I, note 14, at app. B. Such an MOA was suggested in a recommendation included in the Conference Report on the Water Quality Act 1987, amending the CWA to authorize administrative penalties.

4 *Enforcement MOA*, *supra* note 3, at II.A

5 *Id.* at II.B. See also 1989 MOA, *supra* Chapter 2(II)(A) (1989 MOA on Geographic Jurisdiction of the §404 Program)

6 *Enforcement MOA*, *supra* note 3, at II.D.

7 *Id.* at V.B.

8 33 U.S.C. §1362(5). ELR STAT. FWPCA 064.

9 *Id.* at §1319(c)(6). ELR STAT. FWPCA 040

10 40 C.F.R. §232.2(m) (1992).

11 See *United States v. Board of Trustees of Florida Keys Community College*, 531 F. Supp. 267, 274-75, 12 ELR 20391, 20393-94 (S.D. Fla. 1981); *United States v. Weisman*, 489 F. Supp. 1331, 10 ELR 20698 (M.D. Fla. 1980); *United States v. County of Stearns*, No. 3-89-0616, slip op. (D. Minn. Mar. 15, 1990)

12 531 F. Supp. at 274-75, 12 ELR at 20393-94

13 No. 89-54-N, slip op. (11.D. Va. Aug. 3, 1989)

dent and a member of the board of corporate codefendant Bel-Aire, sought to escape liability by claiming that the corporate codefendant was the sole owner of the property and controlled the filling. Mr. McLeskey claimed that any action he took was as Bel-Aire's agent, rather than in his own capacity. This defense was rejected because Mr. McLeskey actually participated in the filling, and because the court found him liable as president and a member of the board of directors of the corporation. The court relied on two non-CWA environmental cases, which held corporate officers liable for actions by the corporations.<sup>14</sup>

Because the discharge of a pollutant without a permit is the violative action under the CWA, subsequent purchasers of illegally filled property should not be liable for their predecessors' violations. However, illegal filling actions have been described as "continuing violations," which remain until corrected by removal of the fill or other remediation.<sup>15</sup> And one court has held that the owner of property containing illegally filled wetlands must allow the previous owner, who performed the illegal filling, access to enter and remediate the damaged wetlands, even though remediation would reduce the value of the land.

In *United States v. Norris*,<sup>16</sup> a landowner constructed an unpermitted levee to control flooding and to facilitate farming. Subsequently, the landowner mortgaged the land to a bank, and after the landowner defaulted on the loan, the bank acquired title by foreclosure. Meanwhile, the federal government entered into a settlement with the former landowner requiring him to restore the property to its wetland status. The bank appealed the district court's order requiring the bank to allow the restoration work to proceed, claiming that it had acquired the land without notice of any illegality, and thus, was under no duty to let the agricultural value of the property be compromised.

The *Norris* court held that the district court had not abused its discretion in weighing the equities surrounding the bank's "innocent purchaser" claim. The illegal levee had been in place for five months before the bank acquired its mortgage on the land. The court explained that "[i]f the bank lent more than a quarter of a million dollars without inspecting the property . . . , the bank acted imprudently. It acted no less imprudently . . . if it saw the new levee and failed to satisfy itself that the necessary permit had been issued."<sup>17</sup>

Under the CWA, a court must find a person liable for an illegal CWA discharge before any relief can be ordered. Thus, a person does not violate the CWA by owning filled land, but rather by discharging fill without a permit. In this context, the *Norris* decision is troubling, because it seems to establish a threshold level of due diligence for purchasers or lenders related to illegally filled wetlands, based on equitable principles outside the language of the CWA. The decision does not alter the fact that under the CWA, only the person whose illegal filling caused the "continuing

violation" is held liable for remediating the damage. And there may be circumstances where a subsequent landowner both benefits from prior illegal filling and continues the minimis filling on its own, which would warrant require broad remediation from the subsequent landowner. However, the *Norris* decision will hold immediate ramifications for purchasers and lenders in the Sixth Circuit, and for other purchasers and lenders in other circuits that might adopt the *Norris* court's holding.

## II. Administrative Enforcement Options

### A. Administrative Compliance Orders and Cease and Desist Orders

The CWA authorizes the Corps and EPA to issue orders to violators directing them to cease activities or undertake steps to correct violations. Under §309(a)(3), EPA may issue orders requiring compliance with the CWA or a state-issued permit for filling.<sup>18</sup> The Corps is authorized to issue compliance orders for federal §404 permit violations.<sup>19</sup> The documents EPA issues are entitled administrative orders, while the Corps sends documents called "cease and desist" letters. Each agency is required to provide a copy of any such order or letter to the state in which the violation occurs and any other states affected by the violation.<sup>20</sup> The documents must specify both the nature of the violation and a deadline for compliance. Corps orders must require compliance in no more than 30 days; EPA orders generally must require compliance within 30 days, but may identify a longer period if the EPA deems it appropriate.<sup>21</sup>

These administrative orders generally remind the recipient that failure to comply with the CWA carries the potential for civil penalties and even criminal sanctions. However, the administrative compliance orders are not independently enforceable against a violator. If the orders are disobeyed or ignored, the agencies must refer the violation to the DOJ for either civil or criminal judicial enforcement.

Administrative orders and cease and desist letters should be taken seriously. These documents put the recipient on notice that his or her actions may violate federal law, and that continued filling may be a knowing, criminal act. The government has succeeded in convincing courts that these orders are not immediately subject to court review,<sup>22</sup> so the recipient must either stop and apply for a permit, or risk serious prosecution.

### B. Administrative Penalty Orders

In the 1987 CWA amendments, Congress added authority to impose administrative penalties against violators. After receiving an administrative penalty order from either EPA or the Corps, recipients are confronted with required steps and time limitations for obtaining agency and judicial review.

**EPA's Penalty Authority.** Most of the CWA's enforcement authority is vested in EPA, including the authority to

18 33 U.S.C. §1319(a)(3), ELR STAT. FWPCA 039.

19 *Id.* at §1344(s), ELR STAT. FWPCA 062.

20 *Id.* at §§1319(a)(4), 1344(s)(2), ELR STAT. FWPCA 039, 062.

21 *Id.* at §§1319(a)(5)(A), 1344(s)(2), ELR STAT. FWPCA 039, 062.

22 See *infra* section (IV)(C).

14 See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743, 17 ELR 20603, 20611 (8th Cir. 1986), cert. denied 484 U.S. 848 (1987); *United States v. Pollution Abatement Servs. of Oswego, Inc.*, 763 F.2d 133, 15 ELR 20543 (2d Cir.), cert. denied 474 U.S. 1037 (1985).

15 See *infra* section (III)(A) (addressing "continuing violation" definitions).

16 917 F.2d 286 (6th Cir. 1991).

17 *Id.* at 288.

assess administrative penalties for violations involving the unpermitted filling of wetlands. The §309 administrative penalty authority applies to any violations of the CWA. The statute establishes two classes of penalties, with Class I available for less egregious conduct, and Class II available for more serious violations.

Class I administrative penalties may not exceed \$10,000 per violation, with a maximum amount not to exceed \$25,000. For example, a Class I penalty order may identify several violations, but the total penalty is "capped" at \$25,000. The violator must receive written notice and has a right to request a hearing within 30 days of receipt. The CWA does not require a formal, trial-type hearing, but does require an opportunity to present evidence.<sup>23</sup> Judicial review of a Class I penalty must be filed within 30 days after final issuance of the penalty order, in either the U.S. District Court for the District of Columbia or the federal district in which the violation occurs.<sup>24</sup>

Class II penalties may not exceed \$10,000 per day "for each day during which the violation continues," with a maximum amount or "cap" at \$125,000.<sup>25</sup> Significantly, the manner of describing the duration of a violation differs for Class I and Class II penalties; the phrase used in Class II expressly recognizes that a violator may be penalized for each day that a violation continues. Recipients of Class II penalty assessments are entitled to notice and the opportunity for a hearing "in accordance with Section 554 of Title 5."<sup>26</sup> That provision of the APA requires adjudicatory or trial-type hearings before a hearing officer. EPA has promulgated regulations governing these hearings, including discovery rights.<sup>27</sup> A Class II penalty may be appealed to the U.S. Court of Appeals for the District of Columbia Circuit, or any other federal circuit court of appeals in which the recipient resides or does business.<sup>28</sup> A petition for judicial review of Class II penalties must be filed within 30 days of final issuance of the penalty order.

EPA's regulations for assessing CWA Class II penalties are incorporated in the Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Penalties.<sup>29</sup> These are comprehensive procedural regulations, which address each of the steps of the administrative penalty process. When an administrative complaint is issued, the respondent has 20 days to file an answer and request a hearing if desired.<sup>30</sup> Failure to answer, appear, or respond to motions can result in a default order, which is due and payable "without further proceedings" 60 days after the default.<sup>31</sup> EPA encourages settlement through prehearing conferences.<sup>32</sup> The regulations further estab-

lish procedures for introducing evidence, conducting hearings, and briefing matters to the hearing officer. The hearing officer is generally an administrative law judge, but may be another official.

After a hearing officer issues an initial decision, parties may seek to reopen the hearing by filing a motion within 20 days that provides reasons why additional evidence is necessary.<sup>33</sup> Appeals of initial decisions may be made to the EPA Administrator. The regulations also authorize limited grounds for interlocutory appeals before the hearing is completed,<sup>34</sup> and allow an appeal as of right for any final penalty order of any adverse ruling.<sup>35</sup> Appeals must be filed within 20 days of the decision, and must be accompanied by a written brief setting forth the reasons for the appeal. Within 15 days thereafter, other parties may respond to the appellant's brief and arguments. EPA authorizes interested parties to intervene and authorizes the participation of amicus curiae in both the hearing and the appeal process.<sup>36</sup>

Prior to 1992, appeals to the EPA Administrator were heard by the Agency's chief judicial officer, pursuant to a delegation of authority. The Agency has now established an Environmental Appeals Board to hear these administrative appeals.<sup>37</sup> Any motion for reconsideration of a Board decision must be filed within 10 days and does not stay the effective date of the order, unless such relief is specifically requested and granted.<sup>38</sup>

EPA's supplemental rules address the CWA's requirements for notification to states and public notice of Class II civil penalty orders.<sup>39</sup> The supplemental rules also identify the 30-day period for filing for judicial review of a Class II civil penalty.

**The Corps' Penalty Authority.** The Corps has authority under §404 to penalize violations of permit conditions or violations of the Corps' orders; violators are subject to penalties of up to \$25,000 per day per violation.<sup>40</sup> The Corps also shares authority with EPA under CWA §309.<sup>41</sup> As a result, the Corps utilizes the §309 structure for exercising its administrative penalty authority against wetlands violators. The Corps has promulgated regulations governing Class I penalties.<sup>42</sup>

The Corps' Class I penalty procedures are less formal than Class II. A violator has 30 days from receipt of a Class I penalty order to request a hearing.<sup>43</sup> The public is also given notice of the order and 30 days to provide comments.<sup>44</sup> If a hearing is requested and held, it is informal and evidence

33. *Id.* at §22.28.

34. *Id.* at §22.29(a), (b).

35. *Id.* at §22.30.

36. *Id.* at §§22.11 (intervention and amicus), 22.30 (participation in appeals to the EPA Administrator).

37. 57 Fed. Reg. 5320 (1992).

38. 40 C.F.R. §22.32 (1992). See 57 Fed. Reg. 5320-26 (1992) (technical amendments to conform penalty appeal procedures to establishment of new Environmental Appeals Board).

39. 40 C.F.R. §22.38 (1992).

40. 33 U.S.C. §1344(s)(4), ELR STAT. FWPCA 062.

41. *Id.* at §1319(g)(1)(B), ELR STAT. FWPCA 040.

42. 33 C.F.R. §326.6 (1992).

43. *Id.* at §326.6(b)(2)(v).

44. *Id.* at §326.6(c).

23. 33 U.S.C. §1319(g)(2)(A), ELR STAT. FWPCA 040, specifies that the proceedings do not have to follow 5 U.S.C. §§554, 556 (the APA).

24. 33 U.S.C. §1319(g)(8)(A), ELR STAT. FWPCA 041.

25. *Id.* at §1319(g)(2)(B), ELR STAT. FWPCA 040.

26. *Id.*

27. 40 C.F.R. pt. 22 (1992).

28. 33 U.S.C. §1319(g)(8)(B), ELR STAT. FWPCA 041.

29. 40 C.F.R. pt. 22 (1992) Supplemental rules for the CWA's Class II penalties are found at 40 C.F.R. §22.38, addressing unique provisions for the CWA's penalties.

30. 40 C.F.R. §22.15 (1992).

31. *Id.* at §22.17(a).

32. *Id.* at §22.18.

may be presented orally or in writing.<sup>45</sup> A district engineer makes the decisions, although other of the Corps' staff may be appointed to conduct the hearing. And there are no provisions for administrative appeals beyond the district engineer. Although not required to do so by law, the Corps has established the policy that if it pursues an administrative penalty, it will not refer the case for judicial enforcement for court-imposed civil penalties.<sup>46</sup>

□ **Administrative Penalty Criteria.** The CWA provides EPA and the Corps with criteria for imposing the administrative penalties in §309(g)(3). The agencies are to consider:

- (t)he nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.<sup>47</sup>

Similar criteria for the Corps' civil penalty are set forth in §404(s)(4), requiring consideration of:

- (t)he seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.<sup>48</sup>

EPA has developed a §404 penalty policy that expands on the statutory penalty criteria.<sup>49</sup> The *Penalty Policy* is designed to obtain a level of uniformity and consistency among the various EPA regions of the country. It sets standards for evaluating the environmental significance and compliance significance of violations. From this, EPA has set initial penalty levels in a "gravity-based" matrix, with violations of minor significance assigned low penalty levels while the maximum penalties are available for major violations.<sup>50</sup> The gravity-based penalty is subject to further adjustment up or down based on other factors, including the violator's cooperation or recalcitrance, the violator's ability to pay (which can only adjust the penalty downward), and litigation considerations.<sup>51</sup>

EPA's *Penalty Policy* emphasizes that penalties "should, at a minimum, remove any economic benefit resulting from failure to comply with the law."<sup>52</sup> In this regard, the *Penalty Policy* requires that the economic benefit of the violation must be calculated, and gives examples and instructions for this calculation. If a violator claims an inability to pay as grounds for reducing a penalty, the violator must present documentation verifying his or her financial status, such as

45. *Id.* at §326.6(h)

46. *Id.* at §326.6(a)(2).

47. 33 U.S.C. §1319(g)(3), ELR STAT. FWPCA 040.

48. *Id.* at §1344(s)(4), ELR STAT. FWPCA 062.

49. Memorandum from LaJuana S. Wilcher, Asst. Administrator for Water, and James M. Srock, Asst. Administrator for Enforcement, U.S. Environmental Protection Agency, to regional administrators, Clean Water Act Section 404 Administrative Penalty Actions, Guidance on Calculating Settlement Amounts (Dec. 14, 1990) (hereinafter *Penalty Policy*)

50. *Penalty Policy* *supra* note 49, at 5-7.

51. *Id.* at p. 8

52. *Id.* at 2

tax returns, business statements, loan documents, or other instruments.<sup>53</sup> Thus, the burden is on the violator to show an inability to pay the penalty imposed. In determining culpability, the prime criteria that EPA will consider includes the violator's past experience with the permit requirements and the violator's degree of control over the illegal conduct giving rise to the penalty.<sup>54</sup>

Appendix B to the *Penalty Policy* provides a dition guidance on the relationship of administrative penalties to other enforcement tools and the administration of §404. Significantly, EPA may use its §308 information collecting authority<sup>55</sup> to demand information relating to §404 violations. Most administrative penalty cases are resolved by settlement.<sup>56</sup>

**C. Judicial Review of Administrative Compliance and Penalty Orders**

As set out above, the CWA provides for judicial review of administrative penalty orders.<sup>57</sup> However, few cases have reviewed §404 administrative penalty assessments. In *Hanson v. United States*,<sup>58</sup> the court upheld a \$24,000 Class I penalty. In *Hoffman Homes, Inc. v. U.S. Environmental Protection Agency*,<sup>59</sup> a Class II civil penalty for filling small, isolated wetlands was reviewed by the Seventh Circuit Court of Appeals. The court initially found that the wetlands were not "waters of the United States" as defined in the CWA,<sup>60</sup> but subsequently vacated its opinion and assigned the case to a settlement track.<sup>61</sup>

Section 404 administrative compliance orders, in contrast, are not subject to immediate judicial review. The CWA does not provide for the review of such orders, and the federal government has successfully resisted this review on grounds of prematurity and lack of finality. Attempts to obtain judicial review of compliance orders and cease and desist orders have been rejected by most courts.<sup>62</sup>

**III. Civil Judicial Enforcement**

**A. General Standards**

The DOJ and its U.S. Attorneys' offices can file §404 civil enforcement actions in federal court upon referral of

53. *Id.* at 2, 8.

54. *Id.* at 3.

55. 33 U.S.C. §1318(a), ELR STAT. FWPCA 038.

56. U.S. EPA, REPORT TO CONGRESS ON CLEAN WATER ACT ENFORCEMENT MECHANISMS 21 (Mar. 27, 1992).

57. 33 U.S.C. §1319(g)(8)(A), (B), ELR STAT. FWPCA 041.

58. 710 F. Supp. 1105, 21 ELR 21074 (E.D. Tex. 1989).

59. 961 F.2d 1310, 22 ELR 21148 (7th Cir. 1992).

60. See *supra* Chapter 2(III)(D) (discussing jurisdictional waters and the CWA's authority over isolated wetlands).

61. 975 F.2d 1554 (7th Cir. 1992).

62. See *infra* Chapter 8(III); See also, e.g., *Southern Pines Assn. v. United States*, 912 F.2d 713, 21 ELR 20033 (4th Cir. 1990) (no preenforcement review of compliance order); *Hoffman Group, Inc. v. U.S. Environmental Protection Agency*, 902 F.2d 567, 20 ELR 20884 (7th Cir. 1990) (same); *McGown v. United States*, 747 F. Supp. 539, 21 ELR 20344 (E.D. Mo. 1990) (no review of the Corps' cease and desist order); and *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143, 20 ELR 20107 (E.D. Va. 1989) (same)



cases from the Corps or EPA.<sup>63</sup> These actions are used to obtain injunctions, either to command a party to cease its violations or to obtain orders for restoration or other physical relief. Courts may award civil penalties of up to \$25,000 per day per violation.<sup>64</sup> A number of cases have held that each day illegal fill remains in place is a separate day of violation.<sup>65</sup> The government adheres to this view that illegal fill remaining on a site is a "continuing violation" for civil penalty purposes.

Civil enforcement actions must be brought in the federal court district in which the defendant is located, resides, or does business; generally cases are filed where the property involved is located. The only other statutory requirement is that notice of the action must be given to the appropriate state.<sup>66</sup> There is no requirement that the government must elect between pursuit of an administrative order or filing of a judicial enforcement action.<sup>67</sup> Nor does prior or contemporaneous state enforcement preclude federal enforcement.<sup>68</sup> As a general matter, however, neither the federal nor state government will expend resources to enforce against violations that are satisfactorily addressed by the other sovereign.

The CWA does not establish a statute of limitations for civil enforcement, so the courts apply the general five-year statute of limitations provided for civil penalty actions.<sup>69</sup> However, the limitations period starts to run when the government becomes aware of the violation, not when the filling occurred.<sup>70</sup> The government takes the position that the five-year statute of limitations only prevents the assessment of civil penalties for more than five years, but does not bar disposition of equitable relief for illegal discharges that originated more than five years previously.<sup>71</sup>

A §404 defendant has a right to a jury trial. Although

the CWA does not provide for jury trials, the U.S. Supreme Court in *Tull v. United States*,<sup>72</sup> held that the constitutional right to a jury trial applies to the CWA's civil enforcement actions. While the Court allowed a jury trial on the issue of liability for a CWA's violation, it also held that the imposition of specific remedies for violations, whether penalties or other relief, was up to the judge, not the jury. This distinction, which has been confirmed in a subsequent decision,<sup>73</sup> is significant because it means that the jury will not decide the punishment for §404 violations. Nor will a jury hear cases where the government seeks only equitable relief.

There have been several §404 jury trials since the Supreme Court's *Tull* decision. In most of these cases, the government obtained liability verdicts,<sup>74</sup> although one jury found certain Missouri farmers not liable for constructing dikes in wetlands to prevent flooding of their farmlands.<sup>75</sup>

### B. Defenses

The CWA is a strict liability statute,<sup>76</sup> which means that violators may be held liable under the law based solely on the consequences of their actions. Thus, it is not necessary for the government to prove that a violator knew about the law and was aware that particular activities were unlawful. As explained in *United States v. Sinclair Oil Co.*,<sup>77</sup> the defendant's intent is irrelevant to liability under the CWA.

The CWA does not enumerate any statutory defenses. Violators seeking to avoid liability, however, have attempted to raise a number of defenses. Although many of these defenses have not been accepted by courts in deciding liability, the same evidence involved in asserting the defenses is often considered by courts in deciding what remedy should be awarded. Equitable factors, for example, may serve to ameliorate the remedy.

A violator cannot defend a civil enforcement action by arguing that either the DOJ, EPA, or the Corps lacks authority to enforce §404. The various enforcement agreements among the agencies do not give rise to any private defenses, and the courts have rejected claims by defendants that EPA and the Corps cannot delegate and allocate enforcement duties.<sup>78</sup> The U.S. Supreme Court has also ruled that enforcement cannot be avoided by claiming that application of §404 constitutes a taking of property with-

72. 481 U.S. 412, 17 ELR 20667 (1987).

73. *United States v. M.C.C. of Florida, Inc.*, 848 F.2d 1133, 18 ELR 21080 (11th Cir. 1988), *reh'g denied per curiam*, 863 F.2d 802 (11th Cir. 1989).

74. *See, e.g., United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 20 ELR 20005 (S.D. Fla. 1989); *United States v. Keberl*, No. 86-86, entry of judgment (M.D. Pa. Nov. 18, 1987); *United States v. Hobbs*, 736 F. Supp. 1406, 20 ELR 21299 (E.D. Va. 1990), *aff'd*, 947 F.2d 941 (1991), *cert. denied*, 112 S. Ct. 2274 (1992).

75. *United States v. Moseley*, No. 89-0107 (E.D. Mo. Apr. 19, 1991) (entry of judgment).

76. *See, e.g., United States v. Ohio Edison Co.*, 725 F. Supp. 928, 934, 20 ELR 20633, 20636 (N.D. Ohio 1989); *United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 14 ELR 20533 (W.D. Mo. 1984); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374, 9 ELR 20542-20544 (10th Cir. 1979); *Minnchaha Creek Watershed Dist v. Hoffman*, 597 F.2d 617, 627, 9 ELR 20334, 20338 (8th Cir. 1979).

77. 767 F. Supp. 200, 21 ELR 21323 (D. Mont. 1990).

78. *See United States v. Kelcourse*, 721 F. Supp. 1472, 20 ELR 20208 (D. Mass. 1989) (EPA's enforcement delegation to the Corps authorized).

As an internal governmental matter, referrals from EPA must go to the DOJ, and cannot go directly to an office of the U.S. Attorney.

64. 33 U.S.C. §1319(d), ELR STAT. FWPCA 040. Prior to the 1987 amendments, the CWA authorized civil penalties of \$10,000 per day of violation.

65. *See, e.g., United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166, 1183, 17 ELR 20301, 20309 (D. Mass. 1986), *aff'd*, 826 F.2d 1151, 17 ELR 21270 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); *United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd*, 769 F.2d 182, 15 ELR 21061 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412, 17 ELR 20667 (1987); *United States v. Ciampitti*, 669 F. Supp. 684, 18 ELR 20419 (D.N.J. 1987). In a lawsuit pending during 1992, a §404 defendant has argued that the "continuing violation" principle applies at most for calculation of civil penalties, but not for statute of limitations purposes. *See United States v. Windward Properties*, No. 1:91-CV-348-RLV (N.D. Ga. Feb. 14, 1991).

66. 33 U.S.C. §1319(b), ELR STAT. FWPCA 039.

67. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 9 ELR 20542 (10th Cir. 1979).

68. *See United States v. Rayle Coal Co.*, 129 F.R.D. 135 (N.D. W. Va. 1989).

69. 28 U.S.C. §2462 (1988).

70. *See United States v. Hobbs*, 736 F. Supp. 1406, 20 ELR 21299 (E.D. Va. 1990), *aff'd*, 947 F.2d 941 (1991), *cert. denied*, 112 S. Ct. 2274 (1992); *North Carolina Wildlife Fed'n v. Woodbury*, 19 ELR 21308 (E.D.N.C. 1989). *See also Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 75, 20 ELR 21216, 21220-21 (3d Cir. 1990), *cert. denied*, 115 S. Ct. 1018 (1991); *Atlantic States Legal Found., Inc. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 17 ELR 20125 (N.D.N.Y. 1986).

This position is being contested in a §404 enforcement case. *Windward Properties*, *supra* note 65.

out just compensation.<sup>79</sup> A defendant is not excused from compliance with the law because he or she may suffer economic losses as a result. A challenge or claim for compensatory relief must be brought separately, and is not a defense to enforcement.

General equitable defenses have not fared well in §404 enforcement actions either. Defendants' claims that the government should be estopped from enforcing the law have generally been rejected. Although defendants have claimed that the government's conduct led them to believe that their filling was acceptable, the law imposes a heavy burden on someone raising an estoppel defense against the federal government, and these claims are usually unsuccessful.<sup>80</sup> Additionally, several courts have declined to apply the equitable defense of laches to the government's enforcement of §404.<sup>81</sup> However, since equitable defenses depend on specific facts and circumstances, individuals should be careful in considering whether these prior, pro-government holdings apply to their situations.

### C. Available Injunctive Remedies

When feasible, the federal government will seek injunctive orders requiring the restoration of illegally filled wetlands by removal of the fill and such grading or planting as is appropriate to restore the wetlands. If restoration is not feasible, in whole or in part, a remedy may require mitigation of the physical harm and establishment of compensatory wetlands. Although there is considerable flexibility in what the government will seek and what a court will order, the objective will be generally to restore the physical environment to a status that replicates the contribution of the wetlands prior to being filled.<sup>82</sup>

The courts have been willing to impose remedies that meet these objectives. Courts have entered preliminary injunctions preventing defendants from conducting any further illegal filling pending resolution of the enforcement action.<sup>83</sup> Also, a temporary restraining order to stop illegal activity has been upheld.<sup>84</sup> The courts have even imposed preliminary injunctions ordering the defendant to remove illegal fill, prior to further trial of the enforcement case.<sup>85</sup>

It is customary for courts to enjoin violators from any further filling after they have been found liable for a §404

violation. Such injunctions against filling have been entered by many courts.<sup>86</sup> It is also common for the courts to impose restoration orders requiring the removal of illegally placed fill, unless it is infeasible, due to subsequent construction or sale of the filled parcel.<sup>87</sup>

Courts will give great weight to reasonable restoration plans prepared by government agencies. In one case however, the court rejected the government's restoration plans on the grounds that it would be "draconian" to require destruction of a 10-acre cranberry bed to restore the parcel.<sup>88</sup> Another court would not, in equity, require innocent purchasers of filled property to remove the fill as part of a restoration plan.<sup>89</sup>

Courts have ordered mitigation or alternative environmental benefits in addition to, and in lieu of, other sanctions. For example, in *United States v. Key West Towers, Inc.*,<sup>90</sup> the defendant was ordered to dedicate certain property for wildlife habitat and a \$250,000 penalty would be awarded if the mitigation land was not provided.

The CWA specifically authorizes emergency actions to stop pollution, including filling, in the event of an "imminent and substantial endangerment" to health or public welfare.<sup>91</sup> However, §504 does not authorize EPA to issue orders, but the Agency may bring suit in federal district court for an injunction to stop the pollution or for other relief. The availability of this relief does not restrict the government from invoking the equitable powers of courts to support injunctions, rather than relying solely on this emergency power.

### D. Civil Penalties

Civil penalties imposed for §404 violations vary widely, depending on the court and the region of the country. However, in general, civil penalty award levels are increasing and are likely to continue on that trend. The CWA establishes criteria for civil penalty amounts, instructing courts to consider:

([t]he seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.<sup>92</sup>

79 *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, 16 ELR 20086 (1985). See also *United States v. Moseley*, 761 F. Supp. 90 (E.D. Mo. 1991) (dismissing defendants' takings claim). See *infra* Chapter 9 (addressing the takings issue).

80 See, e.g., *United States v. Boccanfuso*, 882 F.2d 666, 19 ELR 21388 (2d Cir. 1989) (estoppel defense rejected); *United States v. Huebner*, 752 F.2d 1235, 1244, 15 ELR 20083, 20087 (7th Cir.) (estoppel defense rejected), cert. denied, 474 U.S. 817 (1985); *United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 17 ELR 21270 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

81 See, e.g., *United States v. Hobbs*, 736 F. Supp. 1406, 1410, 20 ELR 21299, 21300-01 (E.D. Va. 1990).

82 See U.S. EPA, REPORT TO CONGRESS ON CLEAN WATER ACT ENFORCEMENT MECHANISMS 21 (Mar. 27, 1992).

83 See, e.g., *United States v. Rivera Torres*, 656 F. Supp. 25, 17 ELR 20513 (D.P.R.), aff'd, 826 F.2d 151, 17 ELR 21285 (1st Cir. 1987); *United States v. Ciampitti*, 583 F. Supp. 483 (D.N.J. 1984).

84 *United States v. Bayshore Assocs., Inc.*, 934 F.2d 139, 12 ELR 21243 (6th Cir. 1991).

85 See *United States v. Malibu Beach, Inc.*, 711 F. Supp. 130, 19 ELR 21247 (D.N.J. 1989).

86 See, e.g., *United States v. Tilton*, 705 F.2d 429, 13 ELR 20583 (11th Cir. 1983); *United States v. Ciampitti*, 583 F. Supp. 483 (D.N.J. 1984); *United States v. D'Annolfo*, 474 F. Supp. 220 (D. Mass. 1979).

87 See, e.g., *United States v. Robinson*, 570 F. Supp. 1157, 14 ELR 20056 (M.D. Fla. 1983) (restoration plan approved); *United States v. Bradshaw*, 541 F. Supp. 884, 12 ELR 20630 (D. Md. 1982) (approved government restoration plan); *United States v. Weisman*, 489 F. Supp. 1331, 10 ELR 20698 (M.D. Fla. 1980) (restoration of property to original condition).

88 See *United States v. Huebner*, 752 F.2d 1235, 1245, 15 ELR 20083, 20087-88 (7th Cir.), cert. denied, 474 U.S. 817 (1985); see also *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976) (restoration must bear an equitable relation to the degree and kind of harm).

89 *United States v. Ciampitti*, 669 F. Supp. 684, 698, 18 ELR 20419, 20425-26 (D.N.J. 1987).

90 720 F. Supp. 963, 20 ELR 20005 (S.D. Fla. 1989).

91 33 U.S.C. §1364, ELR STAT. FWPCA 065.

92 33 U.S.C. §1319(d), ELR STAT. FWPCA 040.

These judicial penalty criteria are very similar to the statutory criteria for administrative penalties.<sup>93</sup> EPA's §404 *Penalty Policy*<sup>94</sup> is also used by the Agency in civil judicial cases. EPA strongly resists settling court cases without some level of civil penalty.

The highest civil penalty imposed in a §404 case came in a settlement with a company developing a golf resort on Guam. The violator paid a \$1.3 million penalty, gave an additional \$200,000 to two wetlands funds on Guam, and incurred additional expenses of approximately \$300,000 to restore and mitigate for the impacts of the illegal actions.<sup>95</sup> In *United States v. Tull*,<sup>96</sup> the defendant was ordered to pay \$75,000 in civil penalties and an additional \$250,000, which was suspended on the condition that the filled property be restored.<sup>97</sup> And in another large penalty case, a court imposed a \$540,000 penalty, with \$390,000 to be remitted if the damaged wetland was satisfactorily restored.<sup>98</sup> Each of these penalties is well below the statutory maximum that could have been imposed under the CWA on a per day basis for each day the fill remained.

As a general rule, courts have broad discretion in setting penalty levels in enforcement cases.<sup>99</sup> Courts of Appeal will not generally "second-guess" federal district courts' §404 penalty awards.<sup>100</sup> On the other hand, courts have withheld civil penalty awards where fairness or other considerations so warrant. For example, in *United States v. Lambert*,<sup>101</sup> the court declined to award any penalty against a woman who was a joint property owner with her husband, but who had not been personally involved in the illegal filling. And in *United States v. Bradshaw*,<sup>102</sup> no penalties were awarded against a defendant who stopped illegal filling upon receipt of a Corps' cease and desist notice.

Application of the penalty factors to each case requires an individual calculation. Increasingly, the government emphasizes the need for higher penalties to deter violations and to recoup the economic benefit a violator may have obtained from avoiding legal requirements. The case law defining "economic benefit" in the wetlands context is in its early stages of development. EPA's §404 *Penalty Policy* suggests that economic benefit from a violation may include: increased property value resulting from filling; de-

layed costs by obtaining an after-the-fact permit; avoided costs, such as costs of upland disposal rather than wetland disposal of dredged materials; profit from use of illegally filled property, such as for crops; or profit made by the contractor conducting the filling.<sup>103</sup> This policy provides that several measures of economic benefit may be appropriate and can be combined to determine the overall economic benefit of the violation. Even though courts do not have to follow EPA's policies, they often find them persuasive. In any event, EPA will invoke this policy in negotiating civil litigation under §404.

#### IV. Criminal Enforcement

Wetlands prosecutions have increased since the federal government expanded its environmental criminal enforcement efforts in the mid-1980s. Criminal enforcement is used in cases involving egregious conduct, such as significant environmental harm, abusive conduct, continued illegal conduct after warnings, and in cases involving other serious, knowing, and willful violations.

The 1987 CWA amendments strengthened the statute's criminal enforcement provisions. The CWA allows prosecution for negligent violations,<sup>104</sup> knowing violations,<sup>105</sup> and for "knowing endangerment," which is placing another person in danger of death or injury.<sup>106</sup> Negligent violations carry misdemeanor sanctions, including penalties from \$2,500 to \$25,000 per day and imprisonment of up to one year. Knowing violations are felonies, carrying fines of \$5,000 to \$50,000 per day and imprisonment of up to three years. Persons convicted of knowing endangerment may be punished with fines of up to \$250,000 and imprisonment of up to 15 years, and organizations can be fined up to \$1,000,000. It is also a felony to make "any false material statement" on applications, records, reports, plans, or other documents filed under the CWA. False statements are subject to fines up to \$10,000 and imprisonment of two years; subsequent convictions are subject to \$20,000 fines and imprisonment of up to four years.<sup>107</sup>

Prosecutors in the CWA's criminal enforcement actions have additional enforcement tools available, because acts illegal under the CWA may also violate other federal criminal laws. For example, 18 U.S.C. §1001 may be used to penalize submission of any false reports to the U.S. government. Landowners should take seriously any warnings or notices concerning wetlands or filling activities, because of the potential for criminal enforcement. Moreover, although administrative orders and civil actions are not mandatory prerequisites to criminal enforcement,<sup>108</sup> filling after

93. See *id.* at §§1319(g)(3), 1344(s)(4), ELR STAT. FWPCA 040, 062.

94. See *supra* textual discussion of EPA's Penalty Policy accompanying footnotes 47 through 56.

95. *United States v. Sumitomo Corp.*, No. 90-00030 (D. Guam settlement filed May 21, 1990, entered Aug. 27, 1990). See U.S. DOJ, Record Settlement Reached in Guam Wetlands Case (May 21, 1990) (Press Release).

96. 615 F. Supp. 610 (E.D. Va. 1983), *aff'd*, 769 F.2d 182, 15 ELR 21061 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412, 17 ELR 20667 (1987).

97. The *Tull* penalties were subsequently renegotiated after the U.S. Supreme Court reversed on the grounds that a jury trial was required.

98. *United States v. Cumberland Farms of Connecticut, Inc.*, 644 F. Supp. 319, 17 ELR 20310 (D. Mass. 1980), *aff'd*, 826 F.2d 1151, 17 ELR 21270 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

99. See, e.g., *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 230 n.6 (1975).

100. See *Weiszmann v. District Engineer*, 526 F.2d 1302, 1306, 6 ELR 20219, 20221 (5th Cir. 1976).

101. 569 F. Supp. 366, 374, 14 ELR 20588, 20591 (M.D. Fla. 1984).

102. 541 F. Supp. 880, 12 ELR 20629 (D. Md. 1981), *vacated*, 541 F. Supp. 884, 12 ELR 20630 (1982).

103. *Penalty Policy*, *supra* note 49, at 4.

104. 33 U.S.C. §1319(c)(1), ELR STAT. FWPCA 039.

105. *Id.* at §1319(c)(2), ELR STAT. FWPCA 039.

106. *Id.* at §1319(c)(3), ELR STAT. FWPCA 039.

107. *Id.* at §1319(c)(4), ELR STAT. FWPCA 040.

108. See *K. W. Thompson Tool Co. v. United States*, 656 F. Supp. 1077, 1084 (D.N.H. 1987), *aff'd*, 836 F.2d 721, 729 (1st Cir. 1988); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1184, 5 ELR 20308, 20309 (D. Ariz. 1975); *United States v. Frezzo Bros.*, 461 F. Supp. 266, 268, 9 ELR 20139 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123, 1126, 9 ELR 20556 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

receipt of an administrative order may well be treated as a knowing and willful violation.<sup>109</sup>

There have been a number of well-publicized wetlands criminal prosecutions. In one case, the federal government was criticized for criminally prosecuting John Pozgai, an immigrant who filled wetlands on his property.<sup>110</sup> Although the filled property was relatively small, Mr. Pozgai repeatedly ignored the Corps' warnings that his filling activity was illegal, and even continued to fill after receiving a cease and desist order and a court ordered temporary restraining order. The egregiousness of the conduct was the basis for the criminal prosecution and severe sentence.<sup>111</sup>

A substantial wetlands criminal enforcement action was resolved by a plea agreement in *United States v. Jones*.<sup>112</sup> The owner of Tudor Farms, a large property in coastal Maryland, failed to obtain a \$404 permit to commence filling activities to develop hunting and recreational uses of the parcel. The plea agreement included a \$1 million fine and a \$1 million payment in restitution for the destruction of wetlands and endangered species habitat, to be held in trust for the purchase and management of habitat for the nearby Blackwater National Wildlife Refuge. The landowner also agreed to a restoration plan developed by the Corps and recorded a conservation easement for 2,500 acres of the property.

Subsequently, the project manager of the Tudor Farms development, William Ellen, was prosecuted. In *United States v. Ellen*,<sup>113</sup> the project manager's conviction was upheld against a number of challenges. In particular, Mr. Ellen claimed that the government's methods of establishing wetlands jurisdiction were unconstitutional. Specifically, Mr. Ellen argued that the government's use of the 1989 *Joint Manual*<sup>114</sup> for the charged violations, which had occurred in 1987 and 1988, was improper. Mr. Ellen argued that this constituted an ex post facto law. The Fourth Circuit disagreed, finding that the 1989 *Joint Manual* was not a law but rather guidance, which did not have the force of law.

Other significant examples of wetlands criminal enforcement actions involve cases brought in New Hampshire,<sup>115</sup> Florida,<sup>116</sup> and Massachusetts.<sup>117</sup> In Colorado, the federal government obtained both criminal and civil

relief against a wetlands violator. In *United States v. Bill L. Walters Cos.*,<sup>118</sup> a criminal plea agreement and civil settlement were reached. In the criminal action, a \$15,000 fine was imposed, and restoration of the property was ordered in the civil settlement.

### V. Citizen Enforcement

The CWA authorizes enforcement actions by citizens directly against violators. Under §505, any citizen may sue any person alleged to be in violation of the act or a permit.<sup>119</sup> District courts may enter injunctions and/or penalties against violators in citizen suits. Prevailing citizen plaintiffs may be awarded their costs, including attorney fees, in these actions.<sup>120</sup>

Citizen enforcement is intended only as a supplement to governmental enforcement.<sup>121</sup> The CWA provides that citizens may not sue unless (1) they give notice of their intent to sue to the violator and the state and federal governments 60 days prior to suit, and (2) neither the federal or state government is prosecuting the violation.<sup>122</sup> The 60-day notice provision is considered jurisdictional, and thus is mandatory.<sup>123</sup> If the federal or state government prosecutes, the citizen may intervene in the case as a matter of right. If the citizen sues, a copy of the complaint must be sent to the government;<sup>124</sup> the government also must be given any proposed consent judgment and be allowed 45 days to review it.<sup>125</sup> Through these mechanisms, the government can monitor the suit and review possible settlements to protect against misuse of the citizen suit provisions. Together, these procedures are designed to allow governmental enforcement first, and reserve citizen enforcement for those cases where government resources will not be used.

The objective of citizen enforcement is the same as governmental enforcement. Courts have viewed these actions as "private attorney general" suits, and have held that the purpose of the suits must be to protect the environment, rather than to promote private interests.<sup>126</sup> The CWA's citizen suit provision enhances citizen participation in enforcing the law, but does not create a cause of action for private damage recoveries.<sup>127</sup>

A few cases have considered what constitutes "diligent prosecution" by the state or federal government sufficient to preclude a citizen suit. State administrative action has been held not to constitute diligent prosecution.<sup>128</sup> Also, municipal enforcement has been held not to preclude citizen

109. See, e.g., *United States v. Pozgai*, 757 F. Supp. 21 (E.D. Pa. 1991) (discussed *infra*).  
110. *United States v. Pozgai*, No. 88-00450 (E.D. Pa. Dec. 30, 1988), *aff'd*, 897 F.2d 524 (3d Cir.), *cert. denied*, 111 S. Ct. 48 (1990).  
111. The defendant was convicted and sentenced to three years imprisonment and a \$200,000 fine, and ordered to restore the filled wetlands. Subsequently, Mr. Pozgai's request for a reduction of sentence was denied, 757 F. Supp. 21, 22 ELR 20536 (E.D. Pa. 1991), and the Third Circuit affirmed the prison term, but reversed the \$200,000 penalty and remanded for a hearing on the defendant's ability to pay, No. 91-1203, 22 ELR 22353 (3d Cir. Oct. 16, 1991).  
112. No. S-90-0216 (D. Md. May 24, 1990).  
113. 961 F.2d 462, 22 ELR 21282 (4th Cir. 1992).  
114. See *supra* Chapter 2(II)(C) (addressing the 1989 JOINT MANUAL on delineating wetlands).  
115. *United States v. Lambert, Inc.*, No. 89-53-01/02-L (D.N.H. Jan. 22, 1990) (one year imprisonment, suspended, two years probation and no fine in light of \$100,000 spent on restoration).  
116. *United States v. Mills*, No. 88-03100-WEA (N.D. Fla. Jan. 25, 1989) (21 months prison, \$10,500 in fines, and full restoration).  
117. *United States v. Ocean Spray Cranberries, Inc.*, No. 88-13-N (D. Mass. Dec. 20, 1988) (plea agreement with \$400,000 fine and \$100,000 improvements to sewage treatment facility as restitution).

118. 88 Cr. 375 (D. Colo. Feb. 7, 1989).  
119. 33 U.S.C. §1365(a)(1), (f), ELR STAT. FWPCA 065.  
120. *Id.* at §1365(d), ELR STAT. FWPCA 065.  
121. See *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136, 7 ELR 20488 (D.R.I. 1977).  
122. 33 U.S.C. §1365(b), ELR STAT. FWPCA 065.  
123. See *National Envtl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 21 ELR 20800 (11th Cir. 1991).  
124. 40 C.F.R. §135.1-3 (1992).  
125. 33 U.S.C. §1365(c)(3), ELR STAT. FWPCA 065.  
126. See *Pennsylvania Envtl. Defense Found. v. Bellefonte B. Co.*, 18 F. Supp. 431, 20 ELR 20286 (M.D. Pa. 1989).  
127. See *Middlesex County Sewerage Auth. v. National Sea Clam Ass'n*, 453 U.S. 1, 17, 11 ELR 20684 (1981).  
128. *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 20 ELR 21152 (N.D. Ind. 1990).

actions.<sup>129</sup> And actions taken by a state after a citizen suit is filed have been held not to preclude the citizen's action.<sup>130</sup>

A series of cases has limited the scope of the citizen enforcement authority. The CWA allows a citizen suit against a person "alleged to be in violation" of the law.<sup>131</sup> This phrase, in conjunction with constitutional principles of standing, has been held generally to limit citizen enforcement to cases where there is an actual, on-going violation; stated alternatively, citizen suits are not available in situations where the only violations have occurred in the past.<sup>132</sup> However, this issue has not arisen as an obstacle to citizen enforcement of wetlands violations, perhaps because of the case law holding that illegal fill constitutes a continuing violation until it is corrected.

Citizens also have tried to use §505 to force the government to undertake enforcement action. In part, because the citizen can bring his or her own suit if the government declines to enforce, these attempts have been largely unsuccessful.<sup>133</sup> These decisions also rely on the proposition that enforcement by the government is discretionary, not mandatory. The citizen suit to compel government action is only available to compel mandatory duties.<sup>134</sup>

The federal government uses its authority to intervene or present amicus briefs in citizen suit litigation to address matters that impact law enforcement generally. Any litigant in a citizen suit may request that the government participate by writing to the Environment and Natural Resources Division of the DOJ. The government has entered into suits in this way to address the scope of relief, arguing, for example, that civil penalties collected must be deposited in the U.S. Treasury. For example, in *Pennsylvania Environmental Defense Foundation v. Bellefonte Borough*,<sup>135</sup> the district court accepted arguments by the government and declined to enter a consent decree that imposed no penalty and provided only for a \$35,000 payment to an environmental group. On the other hand, in *Sierra Club v. Electronic Controls Design, Inc.*,<sup>136</sup> the court disagreed with the government's position that certain payments to an environmental group were civil penalties that had to be deposited in the U.S. Treasury. The decision authorizes a citizen suit consent decree in which funds are used for environmentally beneficial purposes, even if there is no civil penalty. This will remain an area of concern for the government, not only to protect the U.S. Treasury, but to avoid unsupervised "sweetheart deals" in which citizens obtain private, rather than public, benefits from their enforcement actions.

## VI. Federal Enforcement Objectives

Although the government pursues a number of objectives through its enforcement of wetlands laws, it is fair to say that a significant goal is to compel property owners to obtain permits before filling and to restore damaged wetlands caused by illegal filling. In 1990, the Corps, EPA, and the DOJ contemplated a wetlands enforcement initiative.<sup>137</sup> The Corps published memoranda describing the "target cases" for this wetlands initiative, which the agencies circulated to their regional and field offices. These memoranda provide insight on the federal enforcement priorities under §404.

The wetlands enforcement initiative identified the following kinds of cases for wetlands enforcement priorities:

- cases involving discharges into high value wetlands, such as those on a regional priority wetlands list;
- cases where a high deterrence value may exist by focussing on an industry that engages in filling activities; or
- cases involving repeat or flagrant violators, such as persons who fill after being denied a permit.<sup>138</sup>

In an attachment to the notice for the wetlands enforcement initiative entitled, *Guidance on Judicial Civil and Criminal Enforcement Priorities*, the government identified certain priority factors for consideration in wetlands enforcement. The guidance describes the following significant factors in enforcement decisions: (1) quality of the waters affected; (2) impact of the discharge; (3) culpability of the violator; (4) deterrence value; (5) benefit to discharge from the violation; and (6) equitable considerations.<sup>139</sup>

The types of wetlands and the roles they play in aquatic and wildlife habitat vary around the country. Each of the 10 EPA regional offices has established focus areas for wetlands enforcement, to which they will devote enforcement resources. EPA provides this information in annual reports on the CWA's enforcement accomplishments and priorities.<sup>140</sup> However, the establishment of enforcement priorities does not bind the government to prosecute only cases within the priority categories. Rather, it provides only some indication of the goals of the wetlands enforcement program, and the kinds of violations that are likely to be of interest to enforcement personnel.

129. *New York Pub. Interest Research Group v. Limco Mfg. Corp.*, 697 F. Supp. 608 (E.D.N.Y. 1987).

130. *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 16 ELR 20596 (D. Conn. 1985).

131. 33 U.S.C. §1365(a)(1), ELR STAT. FWPCA 065

132. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 491, 18 ELR 20142 (1987).

133. *See Harmon Cove Condominium Ass'n v. Marsh*, 815 F.2d 949, 17 ELR 20747 (3d Cir. 1987); *Missouri Coalition for the Env't v. U.S. Corps of Eng'rs*, 678 F. Supp. 790, 19 ELR 20551 (E.D. Mo. 1988), *aff'd*, 866 F.2d 1025, 19 ELR 20588 (8th Cir.), *cert. denied*, 493 U.S. 820 (1989).

134. *See infra* Chapter 8(II)

135. 715 F. Supp. 431, 20 ELR 20286 (M.D. Pa. 1984).

136. 909 F.2d 1350, 20 ELR 21081 (9th Cir. 1991).

137. 56 Fed. Reg. 2408, 2414 (1991); 57 Fed. Reg. 6589, 6594 (1992).

138. 57 Fed. Reg. 6589, 6595 (1992).

139. *Id.* at 6596.

140. EPA's geographic enforcement priorities for wetlands in 1991 were Region I—southern Maine, southern New Hampshire, Burlington, Vermont area, eastern Massachusetts and Cape Cod, coastal Connecticut and Hartford, Connecticut area; Region II—New York/New Jersey metropolitan area; Region III—Chesapeake Bay watershed, Pocono and northwestern regions of Pennsylvania, Chincoteague Virginia, Delaware Inland Bays, and Delaware River wetlands; Region IV—coastal areas of Georgia, Alabama, and Florida; Region V—Great Lakes shoreline and all standard metropolitan statistical areas; Region VI—coastal Louisiana and lower Mississippi Valley; Region VII—priorities set by wetlands inventory; Region VIII—Prairie Pothole region and moraine (moraine areas are geological configurations resulting from glacier movement) and urban wetlands; Region IX—southern and central California and the San Francisco Bay area; and Region X—priorities set by resource value and recalcitrance of violator.

## VII. Summary of Enforcement

The government's authority to enforce §404 was enhanced by the 1987 CWA amendments, which added administrative penalties and greater criminal sanctions. Thus, an increase in enforcement activity should be expected. Property owners and developers must be aware of the enforcement exposure

that they will face from the unpermitted filling of wetland. Environmental groups and concerned citizens also must be aware of the citizen suit provisions available to them, and the limitations on such suits. After years of established enforcement precedent, the government and the courts approach enforcement of the CWA very seriously and private parties must do the same.

## Chapter 8. Judicial Review of §404 Wetlands Actions

Many Corps and EPA administrative actions under CWA §404 are subject to judicial review in the federal courts. The CWA does not, however, provide for judicial review of wetlands decisions. Rather, such review is available pursuant to the standards of the Administrative Procedure Act (APA),<sup>1</sup> and is based on general federal question jurisdiction.<sup>2</sup> Administrative enforcement penalties under §309 are the only wetlands-related actions for which the CWA expressly provides review.<sup>3</sup> Section 509(b) establishes federal court of appeals review for many administrative actions taken by EPA, but does not apply to actions under §404.<sup>4</sup>

### I. Permits and Regulatory Decisions

The Corps' final decisions to grant or deny a permit application are reviewable in federal district courts.<sup>5</sup> If the Corps grants a permit, the applicant's acceptance (signing) of the permit constitutes acceptance of all conditions in the permit.<sup>6</sup> As a result, the applicant cannot challenge a permit decision unless he or she declines to accept the permit. Other parties may challenge a permit, assuming they can meet judicial standards for maintaining an action in federal court.

A Corps' permit decision may be overturned only if it is arbitrary and capricious, or otherwise not in accordance with law.<sup>7</sup> As a general matter, the Corps' permit decisions are reviewed on the administrative record, and not with a de novo trial in federal court.<sup>8</sup> Review on the record means that a court will not hear testimony, but will only review the administrative record developed while the Corps was evaluating the permit application. The government almost always argues that review should be limited to the administrative record. However, courts sometimes take de novo evidence in challenges to the Corps' decisions.<sup>9</sup> This is proper if it is done to evaluate whether the record was complete in a pertinent respect,<sup>10</sup> but judges will sometimes go beyond this limited area.

1. 5 U.S.C. §706. ELR STAT. ADMIN. PROC. 007.

2. 28 U.S.C. §1331.

3. 33 U.S.C. §1319(g)(8). ELR STAT. FWPCA 066. See *supra* Chapter 7(II)(C).

4. See 33 U.S.C. §1369(b). ELR STAT. FWPCA 066.

5. See, e.g., *Friends of the Earth v. Hintz*, 800 F.2d 822, 17 ELR 20030 (9th Cir. 1986).

6. 33 C.F.R. pt. 325, app. A (1992).

7. See *Morgan v. Walter*, 728 F. Supp. 1483, 20 ELR 20731 (D. Idaho 1989); *Missouri Coalition for the Env't v. U.S. Army Corps of Eng'rs*, 678 F. Supp. 790, 19 ELR 20581 (E.D. Mo. 1988); *1902 Atlantic, Ltd. v. Hudson*, 574 F. Supp. 1381, 14 ELR 20023 (E.D. Va. 1983); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 13 ELR 20326 (2d Cir. 1983).

8. See *Bailes v. United States*, 647 F. Supp. 44, 17 ELR 20501 (D. Idaho 1986); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904-05, 13 ELR 20942, 20945 (5th Cir. 1983); *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169, 13 ELR 20421 (D. Md. 1983); *aff'd*, 725 F.2d 677, 14 ELR 20269 (4th Cir. 1984).

9. See, e.g., *Sierra Club v. Sigler*, 532 F. Supp. 1222, 12 ELR 20381 (S.D. Tex. 1982); *aff'd in part, rev'd in part, remanded*, 695 F.2d 957, 13 ELR 20310 (5th Cir. 1983).

10. *Lake Erie Alliance for the Protection of the Coastal Quarter v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063 (W.D. Pa. 1981); *aff'd*, 707 F.2d 1392 (3d Cir. 1983); *cert. denied*, 464 U.S. 915 (1983).

EPA's and the Corps' regulations implementing the §404 program have been subject to judicial review.<sup>11</sup> EPA's permit vetoes under §404(c) are also subject to review under an arbitrary and capricious standard in federal district courts.<sup>12</sup>

A reviewing court generally has limited remedies available when §404 permit decisions or regulations are challenged, primarily because the court does not issue permits, change permit terms, or revise the regulations. Rather, if a court finds an error by the Corps, the remedy most frequently entered is a declaration of the error, reversal of the agency decision, and a remand of the action to the agency for revision in light of the court's findings.<sup>13</sup> This remand remedy is based on the APA, which authorizes reviewing courts to "set aside" unlawful agency action, but does not authorize those courts to undertake the action in lieu of the agency.<sup>14</sup> When a permit or other decision, such as a §404(c) veto, is remanded, the Corps or EPA is able to reconsider its action, and either change the decision or develop a new record basis for the same decision.<sup>15</sup> Private parties need to be aware that a "victory" in judicial review generally sends the matter back to the "defeated" federal agency for another round of administrative proceedings.

### II. Citizen Suit Review

The CWA's citizen suit provision authorizes persons to bring suit against EPA for failure to perform mandatory duties under the CWA.<sup>16</sup> Like citizen suits against violators,<sup>17</sup> the mandatory duty suit requires that 60 days' notice be given to the government prior to suit.<sup>18</sup> Courts are authorized to award the costs of litigation, including attorneys fees and expert witness fees, to any "prevailing or substantially prevailing" party, upon a determination that "such award is appropriate."<sup>19</sup>

These "mandatory duty" citizen suits are not available for routine judicial review of agency action. Rather, citizens can sue to force the agency to perform nondiscretionary actions. Such actions are subject to a court order compelling the agency to perform a clear duty, such as meeting a statutorily prescribed deadline for promulgating regulations. The citizen suit section

11. See, e.g., *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

12. See *James City County, Va. v. U.S. Environmental Protection Agency*, 758 F. Supp. 348, 21 ELR 20371 (E.D. Va. 1990); *aff'd in part, remanded*, 955 F.2d 254 (4th Cir. 1992); *City of Alma v. United States*, 744 F. Supp. 1546, 21 ELR 20226 (S.D. Ga. 1990); *Bersani v. U.S. Environmental Protection Agency*, 674 F. Supp. 405, 18 ELR 20001 (N.D.N.Y. 1987); *aff'd*, 850 F.2d 36, 18 ELR 20874 (2d Cir. 1988); *cert. denied*, 489 U.S. 1089 (1989).

13. See, e.g., *James City County, Va. v. U.S. Environmental Protection Agency*, 955 F.2d 254 (4th Cir. 1992); *Sierra Club v. Sigler*, 695 F.2d 957, 984 (5th Cir. 1983).

14. 5 U.S.C. §706. ELR STAT. ADMIN. PROC. 007. *But see* 1902 *Atlantic, Ltd. v. Hudson*, 574 F. Supp. 1381 (E.D. Va. 1983).

15. See *Chicago & N.W. Transp. Co. v. United States*, 574 F.2d 926 (7th Cir. 1978).

16. 33 U.S.C. §1365(a)(2). ELR STAT. FWPCA 065.

17. See *supra* Chapter 7(V), Citizen Enforcement.

18. *Id.* at §1365(b)(2). ELR STAT. FWPCA 065.

19. *Id.* at §1365(d). ELR STAT. FWPCA 065.

also authorizes suit only against the EPA Administrator, but not against officials of the Corps. In limited circumstances, some courts have allowed the CWA mandatory duty suits against the Corps, notwithstanding the plain language of the statute.<sup>20</sup> However, most of the EPA's and the Corps' functions in administering §404 are discretionary, rather than mandatory. Thus the mandatory duty cause of action should not be viewed as a routine means of obtaining review of §404 actions.

The courts have generally rejected citizen suits claiming that EPA or the Corps has a mandatory obligation to enforce the CWA against §404 violators.<sup>21</sup> Whether and how to enforce federal law is considered a matter of prosecutorial discretion.<sup>22</sup> Because the enforcement function involves government discretion, it is not mandatory and cannot be compelled by a citizen suit. Moreover, since a citizen can bring suit on his or her own if the government fails to enforce, courts have been unsympathetic to efforts to compel the government to prosecute violators.<sup>23</sup>

### III. Limitations on Judicial Review

The government has mounted a strong campaign to limit judicial review of many agency actions involving wetlands by arguing that federal courts lack jurisdiction over intermediate agency decisions. For example, the government resists judicial review of affirmative wetlands jurisdictional determinations, arguing that the aggrieved party should apply for a permit before complaining about the jurisdictional determination.

The case law favors the government by finding that the CWA impliedly bars preenforcement review.<sup>24</sup> These cases rely on the related doctrines of finality of agency action, statutory preclusion of judicial review, ripeness, primary jurisdiction, and exhaustion of administrative remedies. The Corps' decision that an activity requires an individual permit and does not qualify for a nationwide permit has been held not subject to judicial review.<sup>25</sup> The government will likely continue to assert that agency decisions under the CWA, other than permit decisions, should not be reviewed, on the basis that the only consequence of such decisions is that the property owner must

apply for a permit. If a permit is issued, the dispute will disappear; and if it is not issued, the property owner can raise all disputes in an appeal of the permit denial. The government has succeeded in persuading courts that the time and expense of going through a permit process does not justify immediate judicial review of a contested wetlands determination.<sup>26</sup>

As discussed above, the government has also successfully resisted review of administrative enforcement orders where the recipient is complaining that the property in question is not within the jurisdiction of the CWA.<sup>27</sup> The Corps' cease and desist order letters are also not reviewable.<sup>28</sup>

Where an agency's CWA jurisdictional decision is negative, the government has not resisted judicial review of findings that the CWA does not apply to specific activities, because there are no further administrative steps to be taken. Where courts have reviewed these negative jurisdictional determinations, they have done so on the administrative record.<sup>29</sup> For the most part, even courts that have reviewed affirmative jurisdictional determinations over government objections, have conducted the review on the administrative record.<sup>30</sup> However, some courts have held trials on the CWA's jurisdiction.<sup>31</sup>

### IV. Other Procedural Matters

Unlike many other federal environmental statutes,<sup>32</sup> the CWA contains no statutory time limit for filing a challenge to wetlands actions taken by EPA or the Corps. Other common sense factors generally control the time for filing lawsuits and most wetlands cases are brought quickly, before physical changes occur. The general six-year statute of limitations for civil actions against the United States applies to court challenges to agency actions under §404.

There are also no special CWA provisions concerning the rights of other parties to intervene in wetlands actions.<sup>33</sup> Such interventions are judged by the normal standards of the Federal Rules of Civil Procedure.<sup>34</sup> It is fairly common for a permit applicant to intervene in lawsuits challenging

20. See, e.g., *Golden Gate Audubon Soc'y, Inc. v. U.S. Army Corps of Eng'rs*, 700 F. Supp. 1549, 1553, 18 ELR 20992, 20994-95 (N.D. Cal. 1988) (citizen suit against the Corps for failure to exercise regulatory jurisdiction); *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 18 ELR 21509 (4th Cir. 1988) (citizen suit attorneys fees awarded against Corps, where Corps and EPA named in suit).

21. See, e.g., *Nat'l Wildlife Fed'n v. Laubscher*, 662 F. Supp. 548, 550, 17 ELR 20892 (S.D. Tex. 1987); *Sierra Club v. Train*, 557 F.2d 485, 7 ELR 20670 (5th Cir. 1977); but see *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 8 ELR 20757 (D.S.C. 1978).

22. See *Harmon Cove Condominium Ass'n v. Marsh*, 815 F.2d 949, 17 ELR 20747 (3d Cir. 1987).

23. See *Marathon Oil Co. v. U.S. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977).

24. See *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Route 26 Land Dev. Ass'n v. United States*, 753 F. Supp. 532, 21 ELR 21199 (D. Del. 1990); *Hampton Venture No. One v. United States*, 765 F. Supp. 174 (E.D. Va. 1991). See also *Fercom Aquaculture Corp. v. United States*, 740 F. Supp. 736, 20 ELR 21431 (E.D. Mo. 1990); *USI Properties Corp. v. U.S. Environmental Protection Agency*, 517 F. Supp. 1235, 11 ELR 20971 (D.P.R. 1981).

25. *Avella v. U.S. Army Corps of Eng'rs*, 20 ELR 20920 (S.D. Fla. 1990); *aff'd*, 916 F.2d 721, 21 ELR 20542 (11th Cir. 1990); *Lotz Realty Co. v. United States*, 757 F. Supp. 692 (E.D. Va. 1990).

26. See, e.g., *Route 26 Land Dev. Ass'n v. United States*, 753 F. Supp. 532, 541 (D. Del. 1990).

27. See, e.g., *Hoffman Group, Inc. v. U.S. Environmental Protection Agency*, 902 F.2d 567, 20 ELR 20884 (7th Cir. 1990).

28. See *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143, 20 ELR 20107 (E.D. Va. 1989); but see *Swanson v. United States*, 600 F. Supp. 802 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986); *Bailey v. U.S. Army Corps of Eng'rs*, 647 F. Supp. 44 (D. Idaho 1986).

29. See, e.g., *Nat'l Wildlife Fed'n v. Hanson*, 623 F. Supp. 1539, 16 ELR 20388 (E.D.N.C. 1985).

30. See, e.g., *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 19 ELR 20672 (E.D. Va. 1988), *aff'd without opinion*, 885 F.2d 866, 20 ELR 20008 (4th Cir. 1989); *Swanson v. United States*, 600 F. Supp. 802 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986).

31. See *Leslie Salt Co. v. United States*, 660 F. Supp. 183, 17 ELR 21006 (N.D. Cal. 1987).

32. See, e.g., the time bars for judicial review in 33 U.S.C. §1369(b)(1), ELR STAT. FWPCA 066 (other CWA rules), 42 U.S.C. §9613(a), ELR STAT. CERCLA 038 (Superfund rules), 42 U.S.C. §6976(a), ELR STAT. RCRA 036 (RCRA hazardous waste rules).

33. 28 U.S.C. §2401(a) (1988).

34. But see *supra* Chapter 7(V) (discussing special intervention rights in citizen suits).

35. 28 U.S.C. §121.



the Corps' decision to issue a permit. Similarly, citizens or public interest groups often intervene to help defend the Corps' decisions to deny permits when challenged by unsuccessful permit applicants.

**V. Summary of Judicial Review**

The Corps' and EPA's final decisions are reviewable in

federal district courts. The government resists review prior to permit issuance or denial, for what it considers to be intermediate decisions. If a decision is reversed, the matter will be remanded to the applicable agency to be reassessed and revised in accordance with the court's decision. This means that the "successful" litigant wins the privilege of facing another administrative proceeding with the Corps and/or EPA.

## Chapter 9. The Takings Issue

During the 1980s, increased judicial and public policy attention was given to whether the regulation of wetlands under §404 constituted a compensable taking under the U.S. Constitution. Property owners who were denied permits to fill and develop wetlands sought to recover their economic losses by claiming that the government should pay for preserving wetlands on private property. Establishing what constitutes a regulatory taking is part of an ongoing judicial, and perhaps legislative, process. This section is not intended to provide a comprehensive examination of takings law, but rather to identify a few of the issues that are pertinent to §404.

Takings law involves significant constitutional principles. The Fifth Amendment to the U.S. Constitution provides that "[n]o . . . private property [shall] be taken for public use without just compensation."<sup>1</sup> This phrase, known as the Takings Clause, enables property owners to seek payment when the government takes their property for any public purpose or project, such as building a road, expanding a park, or constructing offices. In routine takings situations, the entire property is physically taken away and the government must pay.<sup>2</sup> However, constitutionally compensable takings may also occur when a government regulatory action restricts what an owner may do with private property, even though the government does not physically seize the land or take legal title away from the property owner. Such an action may constitute a taking of that property for which just compensation must be paid. These are called regulatory takings. However, the mere existence of environmentally protective regulations does not constitute a taking, but rather the property owner must show that the regulations were applied to his or her property in a way that "took" the property for a public use.<sup>3</sup>

A takings claim is not a defense to a §404 regulatory or enforcement action. The property owner subject to §404 must comply with the CWA and the regulations. He or she may, after a permit is denied, seek a compensation remedy against the United States. Takings claims seeking over \$10,000 in compensation must be filed in the U.S. Claims Court.<sup>4</sup> Generally, a takings claim is not considered ripe for adjudication until the government has made a final determination concerning restrictions on the property.

### I. Selected Takings Cases

The current, increased interest in regulatory takings is generally attributed to several U.S. Supreme Court decisions in the mid-1980s. In a significant CWA case, the Court specified that regulation may effect a compensable taking if it "goes too far," depriving a property owner of a significant economic use.<sup>6</sup> Other cases in the same period recognized the right to pursue a takings remedy based on the claim that government regulation deprived an owner of the use of his or her property.<sup>7</sup> There remains, however, ongoing judicial evaluation of when a regulation goes too far and "takes" property.

#### A. Examples of §404 Takings Cases

Takings claims also arise in cases where §404 permits have been denied. The §404 program is an obvious candidate for takings claims, since denial of a fill permit may greatly diminish the economic use value of a piece of property. This diminution of value forms the basis for landowners to claim that the government has rendered the property useless, for which compensation should be paid.

For the most part, older §404 cases raising takings claims were generally decided in favor of the United States, while more recent decisions have awarded compensation to owners who were denied permits. The early cases, arising in the 1970s and early 1980s, reflect a willingness by the courts to allow considerable land use regulation and restriction without requiring compensation.<sup>8</sup> These cases turned, in part, on courts finding that the permit denial did not deprive the landowner of all economic use of his or her property. In these cases, parts of the property, such as uplands, remained fully usable, and sometimes alternative uses were available for the regulated wetland portions as well.<sup>9</sup> In addition, courts accepted that wetlands regulation carried out the valuable function of protecting water quality, so that government control of discharges into wetlands was viewed as the exercise of a power to protect against pollution.<sup>10</sup>

By 1990, however, the Claims Court had held, in a pair

1 U.S. CONST. amend V, cl. 4.

2 These are referred to as "physical invasion" takings. Generally, there is no question that the property was taken by the government, but litigation may arise over the level of compensation. Usually the government acquires property by purchase or eminent domain, but physical takings may occur under emergency circumstances or as a result of other unplanned events. However, the government may take an easement or other estate which is less than the full fee simple.

3 See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 11 ELR 20569 (1981).

4 See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985). See also *1902 Atlantic, Ltd. v. United States*, 31 Env't Rep. Cas. (BNA) 1225 (Cl. Ct. 1990) (no res judicata or collateral estoppel to prevent relitigating takings claim); cf. *1902 Atlantic, Ltd. v. Hudson*, 574 F. Supp. 1381, 14 ELR 20023 (E.D. Va. 1983).

5 The Tucker Act, 28 U.S.C. §§1346, 1491, vests exclusive jurisdiction in the Claims Court for claims over \$10,000, under \$10,000, jurisdiction is shared with the federal district courts.

6 *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27, 16 ELR 20086 (1985).

7 See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 17 ELR 20787 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 17 ELR 20918 (1987).

8 Cases involving permit denials, in which no takings were found, include *Smithwick v. Alexander*, 12 ELR 20790 (E.D.N.C. 1981), *aff'd*, 673 F.2d 1317, 12 ELR 20432 (4th Cir. 1981); *Deltona Corp. v. United States*, 657 F.2d 1184, 11 ELR 20905 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210, 11 ELR 20910 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

9 For a discussion of the "economic impact" standard, see generally *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 8 ELR 20528 (1978); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986).

10 For a discussion of protecting public health interests, compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 17 ELR 20440 (1987). See also *Mugler v. Kansas*, 123 U.S. 623 (1887); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990).

of seminal §404 cases, that denial of a §404 permit constituted a compensable taking. In *Florida Rock Industries v. United States*,<sup>11</sup> the plaintiff sought compensation after the Corps denied its permit application for filling associated with a limestone quarry in a wetland. Mining the limestone beneath the wetland converted marshland to an acidic lake. The court found that Florida Rock's planned activities were not a public nuisance, and discounted the Corps' finding that the filling associated with limestone mining caused significant pollution. In large measure, the court followed its own view of whether the discharge of fill material constituted pollution, rather than accepting the prohibition on discharging fill expressed in the CWA. The court also found that because there was a 95 percent reduction in property value without the permit, the permit denial took all economic use of the property, warranting compensation. An award of \$1,029,000 plus interest was entered.<sup>12</sup>

The same year, compensation for a taking was awarded in *Loveladies Harbor, Inc. v. United States*.<sup>13</sup> Loveladies Harbor had developed the majority of a 250-acre residential parcel prior to the CWA's requirement to obtain a permit. When the plaintiff was denied a §404 permit to fill a remaining 11.5-acre segment, it sought compensation. The court found that the filling would not constitute a nuisance or violate water quality standards. In addition, the court looked solely at the 11.5 acres to decide whether there was any remaining economic use in the property, rather than considering the landowner's return on the entire, original investment, or even on the remaining property, which included upland as well as the 11.5-acre wetland. The court concluded that the value of the property was diminished by 99 percent, and awarded \$2,658,000 plus interest.<sup>14</sup>

Subsequently in *Formanek v. United States*,<sup>15</sup> the Claims Court followed its decisions in *Florida Rock* and *Loveladies Harbor* by awarding a Minnesota landowner \$933,921 in compensation after he was denied a §404 permit. Much of the evidence discussed in *Formanek* concerned whether the property could have been developed for industrial uses even if the Corps had issued a §404 permit. The government defended its denial by challenging the plaintiff's claims based on the "highest and best use of the property," which is the legal standard designed to replicate property use in the marketplace. In short, the government maintained that the §404 permit denial was not the reason why the property was undevelopable. The court rejected arguments that industrial development of the wetlands would have been contrary to state and local plans, laws, and regulations, finding

that the Corps denial was the "stopper," warranting payment of just compensation.<sup>16</sup>

### B. Temporary Takings

A takings claim can arise from a temporary deprivation. In the §404 context, parties have brought takings claims based on the delay in obtaining a permit, and based on the delay that resulted from the Corps issuing a cease and desist order, which was subsequently set aside. A party claiming a temporary taking due to steps in the §404 regulatory process must meet a very heavy burden to prevail.

In *Tabb Lakes, Inc. v. United States*,<sup>17</sup> a land developer sought compensation for an alleged taking during the period of time between the Corps' issuance of a cease and desist order and final judicial resolution of the Corps' authority. This temporary takings case involved isolated wetlands over which the Corps asserted jurisdiction, based on a nexus to interstate commerce by usage of the wetland by migratory birds.<sup>18</sup> The Claims Court rejected Tabb Lakes' claim that it suffered complete economic loss during the period that the property was considered by the Corps to be a regulated wetland. The court found that even while the Corps maintained regulatory jurisdiction over the property, Tabb Lakes was able to sell lots and continue economic uses of the property. Because the Corps' actions did not constitute any deprivation of economic use, there was no taking.<sup>19</sup>

### C. Supreme Court's Recent Lucas Decision

Although not a §404 case, the standards for regulatory takings were recently addressed by the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council*.<sup>20</sup> Lucas purchased property on the Isle of Palms, near Charleston, South Carolina, in 1986. In 1989, South Carolina enacted legislation designed to protect and manage beachfront areas, which had the effect of precluding Lucas from building on these lots. Lucas sought takings compensation under the U.S. Constitution, although he sued South Carolina in state court. The South Carolina Supreme Court denied Lucas any compensation, finding that the new state law was based on protecting a valuable public resource from harmful consequences. The court denied a takings remedy under the precedent that compensation is not required when the government acts to thwart or abate a public health nuisance.

A divided U.S. Supreme Court reversed and found that

11. 21 Cl. Ct. 161, 20 ELR 21201 (1990). The case had been appealed to the Federal Circuit on an earlier takings finding and was retried in part on remand. See 791 F.2d 893, 16 ELR 20671 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987).

12. The government has appealed this decision. *Florida Rock Indus. v. United States*, No. 91-5156 (Fed. Cir. appeal filed Sept. 30, 1991).

13. 21 Cl. Ct. 153, 20 ELR 21207 (1990). The standards for a taking were also addressed in an earlier opinion in this action. See *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 19 ELR 20092 (1988).

This decision has also been appealed. See *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir. appeal filed Feb. 15, 1991) (briefs in the appeal are digested at 22 ELR 66143, 66148, and 66203) (PENSU Lit. Under).

15. 22 ELR 20893 (Cl. Ct. 1992).

16. Other recent regulatory takings cases include *Ciampetti v. United States*, 22 Cl. Ct. 310, 21 ELR 20866 (1991) (finding no taking because property owner was aware of regulatory conditions and recouped significant economic value from property); *Hendler v. United States*, 952 F.2d 1364, 22 ELR 20646 (Fed. Cir. 1991) (takings found in the placement of a monitoring well as part of government hazardous waste cleanup).

17. 23 ELR 20104 (Cl. Ct. Oct. 2, 1992).

18. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (table). See *supra* Chapter 2(11)(C).

19. See also *Dufau v. United States*, 22 Cl. Ct. 156 (1990), *aff'd*, 940 F.2d 677 (Fed. Cir. 1991) (table) (even extended time necessary to obtain a permit does not constitute a temporary taking).

20. 22 ELR 21104 (U.S. June 24, 1992).

there could be a taking in these circumstances.<sup>21</sup> The Court reiterated the standard that when a regulation deprives a real property owner of all economically viable uses, a taking has occurred. Although prior case law allowed government regulation to withstand takings claims if the government was protecting public health from a perceived danger, the majority rejected this as a basis for evaluating which regulatory actions will and will not constitute takings. Instead, the Court focused on the state of the law at the time the landowner took title. In this way, the takings inquiry looks at what expectations of regulatory restrictions were reasonably part of the proscribed uses at the time the landowner made his investment. This does not mean that every regulatory restriction imposed after property acquisition is per se a taking, since some changes in regulation, from time to time, are to be expected.

In *Lucas*, the Court remanded the case to the South Carolina Supreme Court for reevaluation in accordance with the standards articulated. The lower court will have to determine, as a matter of state law, whether regulatory constraints such as those imposed by the 1989 state legislation, were contemplated in state nuisance and property law, in order to allow prohibition of the uses of private property. The Court summarized:

We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim. . . . Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.<sup>22</sup>

While it remains to be seen how lower courts will respond to the *Lucas* decision, which has generated considerable commentary,<sup>23</sup> one lower court has assessed the *Lucas* Court's decision. In *Tabb Lakes*,<sup>24</sup> the Claims Court described the *Lucas* test as a two-part standard: if the regulatory action deprived all economic use, a taking occurred; but if less than all value was removed, a court has to consider a range of factors to determine if a compensable taking occurred.<sup>25</sup> This articulation of the takings standard is not particularly different from pre-*Lucas* case law.

Others see the Court's new *Lucas* test for regulatory takings as more demanding and fear that many regulatory programs will not be able to satisfy this standard. Takings cases over the next few years will establish the parameters of the *Lucas* standard, through application to specific state and federal enactments. Section 404 permit denials will, no

21 Five Justices (Rehnquist, White, O'Connor, Scalia, and Thomas) joined in the majority. Justice Kennedy filed a concurring opinion. Justices Blackmun and Stevens filed dissents, and Justice Souter filed a separate statement, equivalent in content to a dissent.

22 *Lucas* supra note 20, at 21111.

23 See e.g. Barry M. Hartman, *Lucas v. South Carolina Coastal Council: The Takings Test Turns a Corner*, 23 ELR 0003 (1993); and Barry I. Pershkov & Robert F. Housman, *In the Wake of Lucas v. South Carolina Coastal Council: A Critical Look at Six Questions Practitioners Should Be Asking*, 23 ELR 0008 (1993).

24 23 ELR 20104 (CI Ct Oct. 2, 1992).

25 *Id.* at 20111.

doubt, be among the cases decided under these emerging standards for regulatory takings.<sup>26</sup>

## II. Executive and Congressional Action Regarding Takings

While the Supreme Court was addressing regulatory takings, the federal executive branch established a policy in the mid 1980s regarding the relationship between government action and compensation to property owners. In 1988, President Reagan issued E.O. 12630, which requires federal agencies to assess the potential for their regulatory actions to impact private property rights, resulting in a constitutional taking.<sup>27</sup> E.O. 12630 has come to be known as the "Takings Executive Order," and was accompanied by an analysis of the past and emerging takings case law. As a matter of executive branch housekeeping, E.O. 12630 requires federal agencies to establish procedures, subject to review by the DOJ, to assure that the potential for effecting a taking becomes part of regular decisionmaking. To this end, agencies are to prepare a takings impact analysis (TIA) to accompany major regulatory actions, evaluating the likelihood of a taking and the likely cost if a taking is found. While E.O. 12630 does not expressly direct federal agencies to avoid implementing a regulation that will result in a taking, it does instruct those agencies to take the impacts on private property into account to the extent permissible with other applicable law. However, E.O. 12630 does not create any private rights; private parties cannot compel the government to prepare a TIA or challenge the adequacy of a TIA.

Congress has also ventured into the regulatory takings arena. Senator Steven D. Symms (R-Idaho) sponsored legislation during the 102d Congress to codify E.O. 12630, with the additional mandate that federal agencies should minimize the potential for their regulatory actions to result in compensable takings.<sup>28</sup> Although the Symms Amendment passed the Senate as part of the Senate Surface Transportation Efficiency Act,<sup>29</sup> it was deleted in conference.<sup>30</sup>

Among the wetlands bills that have been introduced in Congress, several address compensation for property owners that are denied permission to fill or alter wetlands on their property. Although advanced on the theory that the government should "look before it leaps" and understand the full fiscal consequences of regulatory actions, there are questions concerning whether the bills provide appropriate compensation.<sup>31</sup>

26 For example, *Florida Rock and Loveladies Harbor*, pending review in the Federal Circuit (see supra notes 11 and 13) will be among the first post-*Lucas* decisions.

27 Exec. Order No. 12630, 3 C.F.R. §554 (1989) (Governmental Actions and Interference with Constitutionally Protected Property Rights).

28 S. 50, 102d Cong., 1st Sess. (1991) (Private Property Rights Act). Similar bills were introduced in the House during the 1st Session of the 102d Congress: H.R. 905 (McEwen), H.R. 1650 (Solomon), H.R. 3092 (Hanse) and H.R. 1572 (Olin).

29 S. 1204, 102d Cong., 2d Sess. (1992).

30 As passed the Surface Transportation Efficiency Act, Pub. Law No. 2-240, 105 Stat. 1914, did not include the Symms Amendment.

31 Examples include H.R. Res. 404, 102d Cong., 1st Sess. (1992) (providing that private property concerns required to be added to the regulatory factors evaluated under CWA §404), H.R. Res. 1330, 102d Cong., 1st Sess. (1992), and its companion bill S. 1463, 102d Cong., 1st Sess. (1992) (compensation with a more specific regime, having as an expressed policy the balancing of public and private interests in wetlands). See also H.R. 1330, 102d Cong., 1st Sess. §2(b) (1992).

Under these bills, all federally regulated wetlands are to be classified as one of three types, based on their value. Type A wetlands are of critical significance, while Types B and C represent wetlands that are less valuable. Moreover, under the bills, designation of a wetland as Type A would be declared to be a taking; if the property owner obtained compensation, title would pass to the United States. The owner of Type A wetlands would not need to apply for a permit before pursuing this takings remedy. In 1992, Congress held a number of hearings on this legislation, but no legislation was enacted.

**III. Summary of the Takings Issue**

Broad predictions for future judicial, executive, and legislative actions with respect to takings law are of limited value in assessing individual situations. As a result of the *Lucas* decision, congressional interest, and E.O. 12630, many observers expect two results: regulatory agencies will likely act more cautiously in denying permits; and a greater number of applicants will pursue takings claims after a permit is denied. The individual takings case, however, remains a highly fact-specific matter, where success or failure will turn on finer nuances of takings law than can be addressed in this section.

# Chapter 10. State §404 Program Authority

**E**mbodied in the CWA's statement of policies is Congress' intent to encourage state implementation of the permit programs.<sup>1</sup> The CWA establishes parallel regimes by which states can obtain authorization to administer the federal NPDES program under §402 and the federal §404 permit program. Most states have assumed NPDES' authority, but only Michigan has received authorization to administer the federal §404 program.<sup>2</sup> While many states have their own wetlands laws,<sup>3</sup> this Primer does not try to catalog state programs. Rather, this section presents a summary of the CWA's process available to states to obtain authorization to administer the §404 permit program. Apart from the state program authorization process, the CWA preserves state authority and is nonpreemptive.

## I. Process for State Authorization

EPA administers state program authorizations, although consultation with the Corps and the FWS is mandatory.<sup>4</sup> The CWA establishes conditions under which state governors may request authority to administer the §404 program.<sup>5</sup> Section 404(g)(1) provides that state authorization may not include traditionally navigable waters or waters seaward of the high watermark.<sup>6</sup> And EPA must act on a state's request within 120 days; EPA's failure to act within the prescribed time period is deemed approval of the state program.<sup>7</sup>

To be approved, a state program must include authority to issue permits that apply the same requirements and standards as federal permits. In particular, states must show that they will assure compliance with the standards of the §404(b)(1) guidelines.<sup>8</sup> The term of state permits must be for no more than five years, and states must have the authority to revoke or modify permits on the same grounds that federal permits can be terminated or modified.<sup>9</sup> Other requirements for state programs include inspection and monitoring provisions analogous to federal standards; opportunity for public notice and public hearings on permit applications; notice to other affected states; assurance that permits which interfere with navigation will not be issued; sufficient enforcement authority including civil and criminal penalties; and coordination with federal and federal/state water-related planning processes.<sup>10</sup> In addition, the state

attorney general must certify that the state has the authority to carry out the described program.<sup>11</sup>

EPA's regulations elaborate on the submissions required for an approvable state program.<sup>12</sup> EPA will not approve partial state programs. However, a state may be authorized even if it declines to administer existing federal general nationwide permits.<sup>13</sup> In those circumstances, a state would have been subject to a federal general or nationwide permit will be subject to individual permit review in the authorized state. In addition, a state's possible inability to administer a permit program on Indian lands is not considered to be a partial approval.<sup>14</sup> While states may adopt programs of broader scope than the federal program, only the portions consistent with the federal program will be part of the federally approved state program.<sup>15</sup>

The CWA requires that a state with an approved program must provide EPA a copy of every permit application it receives, and of every general permit it intends to promulgate.<sup>16</sup> EPA must circulate these permits to the Corps and the FWS. The federal government has 90 days to decide whether to object to a state permit, and the permit cannot be issued if EPA interposes an objection. If a state does not revise the permit to meet any federal objections, the authority to issue that permit reverts to the federal government.<sup>17</sup>

To assure day-to-day coordination between the Corps' authority over traditionally navigable waters and a state's authority under its approved state program, the state must enter into an MOA with the Corps prior to program approval.<sup>18</sup> The MOA will clarify the respective roles and responsibilities of each permit issuer. To address EPA's oversight authority for the §404 program, the authorized state must enter into an MOA with the appropriate EPA RA, which will describe procedures for enforcement and periodic reporting, and which sets forth the classes of permits that EPA will review.<sup>19</sup>

Because Michigan is the only state to receive authorization to administer the federal §404 permit program, there have been very few cases addressing the state program authority. One case arose in connection with the Homestead Resort project in Glen Arbor, Michigan, after EPA reviewed a fill permit that Michigan had intended to issue under its approved §404 program. EPA's Region V objected to issuance of the permit based on impacts to natural resources, including the Crystal River, which flows through the project area and into Lake Michigan. The objection was reviewed at EPA headquarters by the Assistant Administrator for Water, who reversed, and concluded that the permit should be issued.

That decision was challenged in *Friends of the Crystal River*

<sup>1</sup> 33 U.S.C. §1251(b) (ELR STAT. FWPCA 003)  
<sup>2</sup> 40 C.F.R. §233.60 (1992)  
<sup>3</sup> For a thorough survey of state wetlands laws, see generally LAW OF WETLANDS REGULATION, *supra* Chapter 1, note 14  
<sup>4</sup> 33 U.S.C. §1344(g)(2) (ELR STAT. FWPCA 061)  
<sup>5</sup> *Id.* at §1362(d) (ELR STAT. FWPCA 064) "State" includes the 50 states as well as American Samoa, the Commonwealths of the Northern Mariana Islands, Puerto Rico, the District of Columbia, Guam, the U.S. Trust Territory of the Pacific Islands, and the Virgin Islands  
<sup>6</sup> *Id.* at §1344(i)(1) (ELR STAT. FWPCA 061)  
<sup>7</sup> *Id.* at §1344(h)(1) (ELR STAT. FWPCA 061)  
<sup>8</sup> *Id.* at §1344(h)(1)(A) (ELR STAT. FWPCA 061) See *supra* Chapter 6 (discussing the §404(b)(1) guidelines)  
<sup>9</sup> *Id.* at §1344(h)(1)(B) (ELR STAT. FWPCA 061)  
<sup>10</sup> *Id.* at §1344(h)(1)(C) (ELR STAT. FWPCA 061)

<sup>11</sup> *Id.* at §1344(g)(1) (ELR STAT. FWPCA 061)  
<sup>12</sup> 40 C.F.R. pt. 233 (1992)  
<sup>13</sup> See *supra* Chapter 5(III) (describing the general permit program)  
<sup>14</sup> 40 C.F.R. §233.1(b) (1992)  
<sup>15</sup> *Id.* at §233.1(c)  
<sup>16</sup> 33 U.S.C. §1344(j) (ELR STAT. FWPCA 062)  
<sup>17</sup> See also 40 C.F.R. §233.50-53 (federal oversight)  
<sup>18</sup> 40 C.F.R. §233.14 (1992)  
<sup>19</sup> *Id.* at §233.13(b)

v. *U.S. Environmental Protection Agency*.<sup>20</sup> The court reversed, holding that the CWA requires that permit-issuing authority reverts to the federal government under §404(j), where EPA objects to a state-issued permit and the state does not accept EPA's comments. By virtue of EPA's objection and the passage of time, the state lost authority over the permit, which authority had passed back to the Corps. As a result, the EPA Assistant Administrator for Water lacked authority to decide that the state could, in fact, issue the permit. Thus, EPA's attempt to correct an error by its region was thwarted. The consequence of the decision is that project applicants must pursue their permit application with the Corps, which will add more time to the process.

Approval of a state program can be withdrawn if EPA determines that a state is not administering the program in accordance with the federal standards.<sup>21</sup> States must be warned of any deficiency, and given up to 90 days to correct it. EPA has established procedures that afford the states opportunity for a hearing when the Agency seeks to withdraw program approval.<sup>22</sup>

To encourage greater state participation in §404 matters, the Corps has considered the issuance of statewide general permits under the authority of §404(e).<sup>23</sup> Under this arrangement, a federal, statewide general permit would establish a category of filling activity for which the issuance of a state permit would be deemed to satisfy §404. The state permit would not have to be part of an authorized state program, but would have to satisfy any criteria set forth in the federal general permit. Such statewide general permits would be equivalent to authorizing state permit issuance for a defined category of discharges of fill. Of course, to qualify under the §404(e) federal general permit authority, the authorized filling would have to meet the standard of "minimal adverse environmental effects" and "minimal cumulative adverse effect on the environment."<sup>24</sup> No such statewide general permits have, as yet, been issued.

## II. Preservation of Other State Powers

The CWA addresses two other concerns of particular interest

- 20 No. 192 CV.325, 1992 WL 142240 (W.D. Mich. June 9, 1992) (order) (W.D. Mich. June 23, 1992) (opinion).
- 21 33 U.S.C. §1344(i), ELR STAT. FWPCA 061.
- 22 40 C.F.R. §233.53 (1992).
- 23 33 U.S.C. §1344(e). See *supra* Chapter 5(III) (describing general permits).
- 24 33 U.S.C. §1344(e)(1), ELR STAT. FWPCA 060.

to states. Section 404(t) specifically preserves the ability of states to regulate discharges of fill:

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency . . . . This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.<sup>25</sup>

Thus, no argument can be maintained that the existence of the federal §404 program in any way preempts state law governing the discharge of fill material. This has been confirmed in the courts.<sup>26</sup>

Moreover, Congress made clear that it did not intend any elements of the federal CWA, including §404, to interfere with traditional state control over water allocation. Section 101(g), known as the *Wallop Amendment* after its sponsor, provides that the water allocation authority of states "shall not be superseded, abrogated or otherwise impaired by" the CWA.<sup>27</sup> The section goes on to provide specific protection for private water users under state allocations: "It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."<sup>28</sup> The relationship between the §404 program and state water rights has been recognized by the courts.<sup>29</sup>

## III. Summary of State Programs

The §404 state program process has been underutilized, notwithstanding expressions of interest by the federal government in authorizing states to administer §404 permits. Regulated persons should be aware that even though only one state is currently administering the federal program, many state and local laws are not preempted by the federal statute and will govern activities occurring in wetlands. Good practice dictates that individuals must be aware of their local laws when undertaking actions in wetlands.

25. *Id.* at §1344(t), ELR STAT. FWPCA 062.

26. See *Trice v. State*, 712 S.W.2d 842, 846 (Tex. Ct. App. 1986); *Barrell v. State*, 284 N.W.2d 834, 837, 10 ELR 20183, 20185 (Minn. 1979).

27. 33 U.S.C. §1251(g), ELR STAT. FWPCA 003.

28. *Id.*

29. See *United States v. Akers*, 785 F.2d 814, 820-21, 16 ELR 20536, 20541-42 (9th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513, 15 ELR 20333, 20334-35 (10th Cir. 1985).

## Glossary of Abbreviations and Acronyms

APA	Administrative Procedure Act
ASCS	Agricultural Stabilization and Conservation Service
ATF	after-the-fact (permit)
BMP	best management practices
CBRS	Coastal Barrier Resource System
CEQ	Council on Environmental Quality
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
DOI	Department of the Interior
DOJ	Department of Justice
EA	environmental assessment
EIS	environmental impact statement
EO	executive order
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FEMA	Federal Emergency Management Agency
FmHA	Farmer's Home Administration
FONSI	finding of no significant impact
FSA	Food Security Act of 1985
FWCA	Fish and Wildlife Coordination Act
FWS	Fish and Wildlife Service
GAO	General Accounting Office
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NAS	National Academy of Sciences
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOAA	National Oceanic and Atmospheric Administration
NPDES	national pollutant discharge elimination system
NPS	National Park Service
NTCHS	National Technical Committee for Hydric Soils
OTA	Office of Technology Assessment
PDN	predischarge notification
RA	regional administrator
RCRA	Resource Conservation and Recovery Act
RGL	regulatory guidance letter
RHA	Rivers and Harbors Act
ROD	record of decision
SAMP	special area management plan
SCS	Soil Conservation Service
SMCRA	Surface Mining Control and Reclamation Act
SOF	statement of findings
TIA	takings impact analysis
USDA	United States Department of Agriculture
WBA	Water Bank Act



## Part II - Executive Orders

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**PART II - EXECUTIVE ORDERS**

**Section 1**

**Executive Order 11988 - Floodplain Management**

## EXECUTIVE ORDER 11988 - FLOODPLAIN MANAGEMENT

### Executive Order 11988—Floodplain management

SOURCE: The provisions of Executive Order 11988 of May 24, 1977, appear at 42 FR 26951, 3 CFR, 1977 Comp., p. 117, unless otherwise noted.

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001 *et seq.*), and the Flood Disaster Protection Act of 1973 (Public Law 93-234, 87 Stat. 975), in order to avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative, it is hereby ordered as follows:

SECTION 1. Each agency shall provide leadership and shall take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains in carrying out its responsibilities for (1) acquiring, managing, and disposing of Federal lands, and facilities; (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, regulating, and licensing activities.

SEC. 2. In carrying out the activities described in Section 1 of this Order, each agency has a responsibility to evaluate the potential effects of any actions it may take in a floodplain; to ensure that its planning programs and budget request reflect consideration of flood hazards and floodplain management; and to prescribe procedures to implement the policies and requirements of this Order, as follows:

(a) (1) Before taking an action, each agency shall determine whether the proposed action will occur in a floodplain—for major Federal actions significantly affecting the quality of the human environment, the evaluation required below will be included in any statement prepared under Section 102(2) (C) of the National Environmental Policy Act. This Determination shall be made according to a Department of Housing and Urban Development (HUD) floodplain map or a more detailed map of an area, if available. If such maps are not available, the agency shall make a determination of the location of the floodplain based on the best available information. The Water Resources Council shall issue guidance on this information not later than October 1, 1977.

(2) If an agency has determined to, or proposes to, conduct, support, or allow an action to be located in a floodplain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplains. If the head of the agency finds that the only practicable alternative consistent with the law and with the policy set forth in this Order requires siting in a floodplain, the agency shall, prior to taking action, (i) design or modify its action in order to minimize potential harm to or within the floodplain, consistent with regulations issued in accord with Section 2(d) of this Order, and (ii) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain.

(3) For programs subject to the Office of Management and Budget Circular A-95, the agency shall send the notice, not to exceed three pages in length including a location map, to the state and area-wide A-95 clearinghouses for the geographic areas affected. The notice shall in-

clude: (i) the reasons why the action is proposed to be located in a floodplain; (ii) a statement indicating whether the action conforms to applicable state or local floodplain protection standards and (iii) a list of the alternatives considered. Agencies shall endeavor to allow a brief comment period prior to taking any action.

(4) each agency shall also provide opportunity for early public review of any plans or proposals for actions in floodplains, in accordance with Section 2(b) of Executive Order No. 11514, as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969, as amended.

(b) Any requests for new authorizations or appropriations transmitted to the Office of Management and Budget shall indicate, if an action to be proposed will be located in a floodplain, whether the proposed action is in accord with this Order.

(c) Each agency shall take floodplain management into account when formulating or evaluating any water and land use plans and shall require land and water resources use appropriate to the degree of hazard involved. Agencies shall include adequate provision for the evaluation and consideration of flood hazards in the regulations and operating procedures for the licenses, permits, loan or grants-in-aid programs that they administer. Agencies shall also encourage and provide appropriate guidance to applicants to evaluate the effects of their proposals in floodplains prior to submitting applications for Federal licenses, permits, loans or grants.

(d) As allowed by law, each agency shall issue or amend existing regulations and procedures within one year to comply with this Order. These procedures shall incorporate the Unified National Program for Floodplain Management of the Water Resources Council, and shall explain the means that the agency will employ to pursue the nonhazardous use of riverine, coastal and other floodplains in connection with the activities under its authority. To the extent possible, existing processes, such as those of the Council on Environmental Quality and the Water Resources Council, shall be utilized to fulfill the requirements of this Order. Agencies shall prepare their procedures in consultation with the Water Resources Council, the Director of the Federal Emergency Management Agency, and the Council on Environmental Quality, and shall update such procedures as necessary.

[Sec. 2 amended by EO 12148 of July 20, 1979, 44 FR 43239, 3 CFR, 1979 Comp., p. 412]

SEC. 3. In addition to the requirements of Section 2, agencies with responsibilities for Federal real property and facilities shall take the following measures:

(a) The regulations and procedures established under Section 2(d) of this Order shall, at a minimum, require the construction of Federal structures and facilities to be in accordance with the standards and criteria and to be consistent with the intent of those promulgated under the National Flood Insurance Program. They shall deviate only to the extent that the standards of the Flood Insurance Program are demonstrably inappropriate for a given type of structure or facility.

(b) If, after compliance with the requirements of this Order, new construction of structures or facilities are to be located in a floodplain, accepted floodproofing and other flood protection measures shall be applied to new construction or rehabilitation. To achieve flood protection, agencies shall, wherever practicable, elevate structures above the base flood level rather than filling in land.

(c) If property used by the general public has suffered flood damage or is located in an identified flood hazard area, the responsible agency shall provide on structures, and other places where appropriate, conspicuous delineation of past and probable flood height in order to enhance public awareness of and knowledge about flood hazards.

(d) When property in floodplains is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, the Federal agency shall (1) reference in the conveyance those uses that are restricted under identified Federal, State or local floodplain regulations; and (2) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successors, except where prohibited by law; or (3) withhold such properties from conveyance.

SEC. 4. In addition to any responsibilities under this Order and Sections 202 and 205 of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4106 and 4128), agencies which guarantee, approve, regulate, or insure any financial transaction which is related to an area located in a floodplain shall, prior to completing action on such transaction, inform any private parties participating in the transaction of the hazards of locating structures in the floodplain.

SEC. 5. The head of each agency shall submit a report to the Council on Environmental Quality and to the Water Resources Council on June 30, 1978, regarding the status of their procedures and the impact of this Order on the agency's operations. Thereafter, the Water Resources Council shall periodically evaluate agency procedures and their effectiveness.

SEC. 6. As used in this Order:

(a) The term "agency" shall have the same meaning as the term "Executive agency" in Section 105 of Title 5 of the United States Code and shall include the military departments; the directives contained in this Order, however, are meant to apply only to those agencies which perform the activities described in Section 1 which are located in or affecting floodplains.

(b) The term "base flood" shall mean that flood which has a one percent or greater chance of occurrence in any given year.

(c) The term "floodplain" shall mean the lowland and relatively flat areas adjoining inland and coastal waters including floodprone areas of offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year.

SEC. 7. Executive Order No. 11296 of August 10, 1966, is hereby revoked. All actions, procedures, and issuances taken under that Order and still in effect shall remain in effect until modified by appropriate authority under the terms of this Order.

SEC. 8. Nothing in this Order shall apply to assistance provided for emergency work essential to save lives and protect property and public health and safety, performed pursuant to sections 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

**PART II - EXECUTIVE ORDERS**

**Section 2**

**Executive Order 11990 - Protection of Wetlands**

# Protection of Wetlands: Executive Order 11990

42 Fed. Reg. 26961 (1977)

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), in order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative, it is hereby ordered as follows:

**SECTION 1. (a)** Each agency shall provide leadership and shall 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, regulating, and licensing activities.

(b) This Order does not apply to the issuance by Federal agencies of permits, licenses, or allocations

to private parties for activities involving wetlands on non-Federal property.

**SEC. 2. (a)** In furtherance of Section 101(b)(3) of the National Environmental Policy Act of 1969 (42 U.S.C. 4331(b)(3)) to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may attain the widest range of beneficial uses of the environment without degradation and risk to health or safety, each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

(b) Each agency shall also provide opportunity for early public review of any plans or proposals for new construction in wetlands in accordance with Section 2(b) of Executive Order No. 11514, as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require



*The peregrin falcon,  
an endangered species*

the preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended.

SEC. 3. Any requests for new authorizations or appropriations transmitted to the Office of Management and Budget shall indicate, if an action to be proposed will be located in wetlands, whether the proposed action is in accord with this Order.

SEC. 4. When Federally-owned wetlands or portions of wetlands are proposed for lease, easement, right-of-way or disposal to non-Federal public or private parties, the Federal agency shall (a) reference in the conveyance those uses that are restricted under identified Federal, State or local wetlands regulations; and (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohib-

ited by law; or (c) withhold such properties from disposal.

SEC. 5. In carrying out the activities described in Section 1 of this Order, each agency shall consider factors relevant to a proposal's effect on the survival and quality of the wetlands. Among these factors are:

(a) public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion;

(b) maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber and food and fiber resources; and

(c) other uses of wetlands in the public interest including recreational, scientific, and cultural uses.

SEC. 6. As allowed by law, agencies shall issue or amend their existing procedures in order to comply with this Order. To the extent possible, existing processes, such as those of the Council on Environmental Quality and the Water Resources Council shall be utilized to fulfill the requirements of this Order.

SEC. 7. As used in this Order:

(a) The term "agency" shall have the same meaning as the term "Executive agency" in Section 101 of Title 5 of the United States Code and shall include the military departments; the directives contained in this Order, however, are meant to apply only to those agencies which perform the activities described in Section 1 which are located in or affecting wetlands.

(b) The term "new construction" shall include draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after the effective date of this Order.

(c) The term "wetlands" means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

SEC. 8. This Order does not apply to projects presently under construction, or to projects for



which all of the funds have been appropriated through Fiscal Year 1977, or to projects and programs for which a draft or final environmental impact statement will be filed prior to October 1, 1977. The provisions of Section 2 of this Order shall be implemented by each agency not later than October 1, 1977.

SEC. 9. Nothing in this Order shall apply to assistance provided for emergency work, essential to save lives and protect property and public health and safety, performed pursuant to Section 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

SEC. 10. To the extent the provisions of Sections

2 and 5 of this Order are applicable to projects covered by Section 104(h) of the Housing and Community Development Act of 1974, as amended (88 Stat. 640, 42 U.S.C. 5304(h)), the responsibilities under those provisions may be assumed by the appropriate applicant, if the applicant has also assumed, with respect to such projects, all of the responsibilities for environmental review, decision-making, and action pursuant to the National Environmental Policy Act of 1969, as amended.

JIMMY CARTER

The White House,  
May 24, 1977.

## Statement by the President Accompanying Executive Order 11990

The Nation's coastal and inland wetlands are vital natural resources of critical importance to the people of this country. Wetlands are areas of great natural productivity, hydrological utility, and environmental diversity, providing natural flood control, improved water quality, recharge of aquifers, flow stabilization of streams and rivers, and habitat for fish and wildlife resources. Wetlands contribute to the production of agricultural products and timber, and provide recreational, scientific, and aesthetic resources of national interest.

The unwise use and development of wetlands will destroy many of their special qualities and important natural functions. Recent estimates indicate that the United States has already lost over 40 percent of our 120 million acres of wetlands inventoried in the 1950's. This piecemeal alteration and destruction of

wetlands through draining, dredging, filling, and other means has had an adverse cumulative impact on our natural resources and on the quality of human life.

The problem of loss of wetlands arises mainly from unwise land use practices. The Federal Government can be responsible for or can influence these practices in the construction of projects, in the management of its own properties, and in the provisions of financial or technical assistance.

In order to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative, I have issued an Executive order on the protection of wetlands.

**PART II - EXECUTIVE ORDERS**

**Section 3**

**Executive Order 12630 - Governmental Actions and  
Interference with Constitutionally Protected Property  
Rights**

# Presidential Documents

Title 3—

Executive Order 12630 of March 15, 1988

The President

## Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

**Section 1. Purpose.** (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

**Sec. 2. Definitions.** For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

**Sec. 3. General Principles.** In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking.

property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

**Sec. 4. Department and Agency Action.** In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

**Sec. 5. Executive Department and Agency Implementation.** (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 18, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

**Sec. 6. Judicial Review.** This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

*Ronald Reagan*

THE WHITE HOUSE  
March 15, 1988.

# Part III - Guidelines and Regulations

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# **PART III - GUIDELINES AND REGULATIONS**

## **Section 1**

### **Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR Part 230) Environmental Protection Agency**



# Federal Register

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Wednesday  
December 24, 1980

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## Part IV

# Environmental Protection Agency

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**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 an y section 404 permit requirements, and gave the Corps enforcement authority. These amendments 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 required. 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 not been met. See, for example, § 230.6 and § 230.60, and introductory sentence in § 230.10.

*Statutory Scheme and How the Guidelines Fit In*

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 also issue unacceptable discharge section 404(c). Others were certain 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 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. Froehle*, 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, 43 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 itself, 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 look 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 discrepancy 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 can not authorize or mandate a discharge of dredged or fill material which fails to comply with the requirements of these Guidelines. Of course, CZM plans contain a requirement that all activities conducted under them 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 this delay and duplication of effort be avoided by consolidating alternative 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 satisfied. 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).

<sup>1</sup> EPA may foreclose the use of a site by exercising its authority under section 404(c). The advance identification here 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 require 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 of 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 whenever possible.

(3) Where development and restoration techniques proposed or 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 OR FILL MATERIAL

##### Subpart A—General

Sec.	
230.1	Purpose and policy.
230.2	Applicability.
230.3	Definitions.
230.4	Organization.
230.5	General procedures to be followed.
230.6	Adaptability.
230.7	General permits.

##### Subpart B—Compliance With the Guidelines

230.10	Restrictions on discharge.
230.11	Factual determinations.
230.12	Findings of compliance or non-compliance with the restrictions on discharge.

##### Subpart C—Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

230.20	Substrate.
230.21	Suspended particulates/turbidity.
230.22	Water.
230.23	Current patterns and water circulation.
230.24	Normal water fluctuations.
230.25	Salinity gradients.

##### Subpart D—Potential Impacts on Biological Characteristics of the Aquatic Ecosystem

230.30	Threatened and endangered species.
230.31	Fish, crustaceans, mollusks, and other aquatic organisms in the food web.
230.32	Other wildlife.

##### Subpart E—Potential Impacts on Special Aquatic Sites

230.40	Sanctuaries and refuges.
230.41	Wetlands.
230.42	Mud flats.
230.43	Vegetated shallows.
230.44	Coral reefs.
230.45	Riffle and pool complexes.

##### 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.

(n) 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 Convention 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 (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 minimize 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 minimize 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).

(j) If there is a reasonable probability of chemical contamination, conduct the appropriate tests according to the section on Evaluation and Testing (§ 230.51).

(k) 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.

(l) Make and document Factual Determinations in § 230.11.

(i) 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 demonstrated 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 C, 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 deposition 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 maximum 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 siliceous 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-consumptive, 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 II.

**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 material 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;

(i) Selecting the disposal site, the discharge point, and the method of discharge to minimize the extent of any future discharge.

(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 berms, 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 nonpoint contaminated material with clean earth or selectively discharging the most contaminated material to be capped with the remaining material;

(c) Maintaining a discharge point for 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 bed 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 and machinery using 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 wheel 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 sediment 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 discharging 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 III - GUIDELINES AND REGULATIONS**

**Section 2**

**Regulatory  
Programs of the Corps of Engineers; Final Rule  
33 CFR Parts 320 through 330  
Department of Defense**



# REGISTERED REGISTERED

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Thursday  
November 13, 1986

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## Part II

## Department of Defense

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Corps of Engineers, Department of the  
Army

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33 CFR Parts 320 through 330  
Regulatory Programs of the Corps of  
Engineers; Final Rule

## 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

Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Final rule.

**SUMMARY:** We are hereby issuing final regulations for the regulatory program of the Corps of Engineers. These regulations consolidate earlier final, interim final, and certain proposed regulations along with numerous changes resulting from the consideration of the public comments received. The major changes include modifications that provide for more efficient and effective management of the decision-making processes, clarifications and modifications of the enforcement procedures, modifications to the nationwide permit program, revision of the permit form, and implementation of special procedures for artificial reefs as required by the National Fishing Enhancement Act of 1984.

EFFECTIVE DATE: January 12, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson or Mr. Bernie Goode, HQDA (DAEN-CWO-N), Washington, DC 20314-1000, (202) 272-0199.

**SUPPLEMENTARY INFORMATION:**

**Consolidation of Corps Permit Regulations**

These final regulations consolidate and complete the six following rulemaking events affecting the Corps regulatory program:

1. *Interim Final Regulations.* These regulations contained Parts 320-330 and were published (47 FR 31794) on July 22, 1982, to incorporate policy and procedural changes resulting from legislative, judicial, and administrative actions that had occurred since the previous final regulations had been published in 1977. Because it had been almost two years since we had proposed changes to the 1977 regulations, we published the 1982 regulations as "interim final" and asked for public comments. We received nearly 200 comments.

2. *Proposed Regulatory Reform Regulations.* On May 12, 1983, we published (48 FR 21486) proposed revisions to the interim final regulations to implement the May 7, 1982, directives of the Presidential Task Force on Regulatory Relief. The Task Force

directed the Army to reduce uncertainty and delay, give the states more authority and responsibility, reduce conflicting and overlapping policies, expand the use of general permits, and redefine and clarify the scope of the permit program. Since these regulations proposed changes to our existing nationwide permits and the addition of two new nationwide permits, a public hearing was held in Washington, DC, on October 12, 1983, to obtain comments on these proposed changes. As a result of the public comments received, nearly 500 in response to the proposed regulations and 22 at the public hearing, we have determined that some of the proposed revisions should be adopted and some should not. We have adopted some of the provisions that were designed to clarify policies for evaluating permit applications, to revise certain permit processing procedures, to add additional conditions to existing nationwide permits, and to modify certain nationwide permit procedures. We have not adopted some of the other proposed changes, including the two proposed new nationwide permits.

3. *Settlement Agreement Final Regulations.* On October 5, 1984, we published (49 FR 39478) final regulations to implement a settlement agreement reached in a suit filed by 18 environmental organizations in December of 1982 against the Department of the Army and the Environmental Protection Agency (*NWF v. Marsh*) concerning several provisions of the July 22, 1982, interim final regulations. The court approved the settlement agreement on February 10, 1984, and on March 29, 1984, we published (49 FR 12660) the implementing proposed regulations. We received over 150 comments on these proposed regulations covering a full range of views. Those comments which were applicable to the provisions of the March 29, 1984, proposals were considered and addressed in the final regulations published on October 5, 1984. The remaining comments have been considered in the development of the final regulations we are issuing today.

In the October 5, 1984, final rule there were several new provisions relating to the 404(b)(1) guidelines. In 33 CFR 320.4(a)(1) we clarified the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines.

If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. In 33 CFR 323.6(a) we stated that district engineers will deny permits for discharges which fail to comply with

the 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to section 404(b)(2) of the Clean Water Act. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to issuance), the 404(b)(1) evaluation is conducted simultaneously with the public interest review set forth in 33 CFR 320.4(a).

4. *Proposed Permit Form Regulations.* On May 23, 1985, we published (50 FR 21311) proposed revisions to 33 CFR Part 325 (Appendix A), which contains the standard permit form used for the issuance of Corps permits and the related provisions concerning special conditions. This proposal provided for the complete revision of the permit form and its related provisions to make them easier for permittees to understand. General permit conditions were written in plain English and greatly reduced in number; unnecessary material was deleted, and material which is informational in nature was reformatted under a "FURTHER INFORMATION" heading. We received 18 comments on this proposal.

5. *Proposed Regulations to Implement the National Fishing Enhancement Act of 1984 (NFEA).* On July 26, 1985, we published (50 FR 30479) proposed regulations to implement a portion of the Corps regulatory responsibilities pursuant to the NFEA. Specialized procedures relative to the processing of Corps permits for artificial reefs were proposed for inclusion in Parts 322 and 325. Eight organizations commented on these proposed regulations. The NFEA also authorizes the Secretary of the Army to assess a civil penalty on any person who, after notice and an opportunity for a hearing, is found to have violated any provision of a permit issued for an artificial reef. Procedures for implementing such civil penalties will be proposed at a later date. In addition, we are hereby notifying potential applicants for artificial reef permits that the procedures contained in Part 323 relating to the discharge of dredged or fill materials and those in Part 324 relating to the transportation of dredged material for the purpose of dumping in ocean waters will be used in the processing of artificial reef permits when applicable.

6. *Proposed Regulations (Portion of Part 323 and All of Part 326).* On March 20, 1986, we published (51 FR 9691) a proposed change to 33 CFR 323.2(d), previously 323.2(j), to reflect the Army's policy regarding *de minimis* or incidental soil movements occurring

during normal dredging operations and a proposed, complete revision of the Corps of Engineers enforcement procedures (33 CFR Part 326). Seventeen comment letters were received on these proposed regulations. These comments and the resulting changes reflected in the final regulations for § 323.2(d) and Part 326 are discussed in detail below.

#### Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Appropriate environmental documentation has been prepared for all permit decisions. Environmental assessments for each of the nationwide permits previously issued or being modified today are available from the Corps of Engineers. You may obtain these assessments by writing to the address listed in this preamble. Considering the potential impacts, we have determined that none required an environmental impact statement.

#### Discussion of Public Comments and Changes

##### Part 320—General Regulatory Policies

**Section 320.1(a)(6):** In order to provide clarity to the public, we have added a provision to codify existing practice that when a district engineer makes certain determinations under these regulations, the public can rely on that determination as a Corps final agency action.

**Section 320.3(a):** The National Fishing Enhancement Act of 1984 has been added to the list of related laws in § 320.3.

**Section 320.4:** In the May 12, 1983, proposed rule and the March 29, 1984, proposed rule we proposed changes to § 320.4(a)(1)—public interest review, 320.4(b)(5)—effect on wetlands, 320.4(c)—fish and wildlife, 320.4(g)—consideration of property ownership, and 320.4(j)—other Federal, state or local requirements. Changes to these paragraphs were adopted in the October 5, 1984, final rule. The various comments relating to these proposals have been fully discussed in the October 5, 1984 final rule (49 FR 39476).

**Section 320.4(a)(3):** Many commenters objected, some strongly, to the deletion in the October 5, 1984, final regulations of the term "great weight" from § 320.4(c), the paragraph concerning the consideration of opinions expressed by fish and wildlife agencies. Many stated that fish and wildlife agencies had the expertise and knowledge to know the impact of work in wetlands; therefore, their opinions should be given strong

consideration. Some commenters supported removal of the "great weight" statement expecting less value would be given fish and wildlife agency views. It is not our intention to reduce or discount the value or expertise of fish and wildlife agency comments or those of any other experts in any field. Comments also varied from support of to objection to the deletion of the "great weight" statement from the other policy statements such as energy and navigation in § 320.4. Therefore, we added a new paragraph (a)(3) to clarify our position on how we consider comments from the public, including those from persons or agencies with special expertise on particular factors in the public interest review.

**Section 320.4(b)(1):** One commenter objected to the placement of the word "some" in this paragraph as a rewrite of E.O. 11990 which places no qualifier on "wetlands" indicating that all wetlands are vital. We have found through experience in administering the Section 404 permit program that wetlands vary in value. While some are vital areas, others have very little value; however, most are important. We recognize that "some wetlands are vital . . ." is being read by some people as "Some wetlands are important . . ." This was not our intent. To avoid this confusion we have revised this paragraph by deleting "some wetlands are vital areas . . ." and indicating that "most" wetlands are important.

**Section 320.4(b)(2)(vi):** We have included in the list of important wetlands those wetlands that are ground water discharge areas that maintain minimum baseflows important to aquatic resources. Scientific research now indicates that wetlands more often serve as discharge areas than recharge areas. Those discharge areas which are necessary to maintain a minimum baseflow necessary for the continued existence of aquatic plants and animals are recognized as important.

**Section 320.4(b)(2)(viii):** We have included in the list of important wetlands those which are unique in nature or scarce in quantity to the region or local area.

**Section 320.4(d):** We have revised this paragraph to clarify that impacts from both point source and non-point source pollution are considered in the Corps public interest review. However, section 208 of the Clean Water Act provides for control of non-point sources of pollution by the states.

**Section 320.4(j)(1):** Clarifying language has been added to this section to eliminate confusion regarding denial procedures when another Federal, state,

and/or local authorization or certification has been denied.

**Section 320.4(p):** Some commenters felt that environmental considerations should take precedence over other factors. Other commenters believed that guidance should be given as to who determines whether there are environmental benefits to a project. Many commenters indicated that the regulation does not define the possible range of environmental benefits that will be considered. Environmental benefits are determined by the district engineer and the district staff based on responses received from the general public, special interest groups, other government agencies and staff evaluation of the proposed activity. Defining the possible range of environmental benefits would be almost impossible to cover in the rules in sufficient detail, since circumstances vary considerably for each permit application. After considering all the comments we have decided to make the change as proposed on May 12, 1983.

**Section 320.4(q):** Some commenters believed that this rule would distort review criteria by inserting inappropriate economic assumptions and minimizing environmental criteria. Some commenters suggested that the Corps revise this paragraph to include a provision to challenge an applicant's economic data and that of governmental agencies as well. Other commenters believe that economic factors do not belong in these regulations since the intent of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters"; therefore, any regulation under the CWA should have, as its primary objective, provisions which give environmental factors the greatest weight. They were concerned that this part may be applied to allow economic benefits to offset negative environmental effects. Some commenters, however, believed that the Corps should assume that projects proposed by state and local governmental interests and private industry are economically viable and are needed in the marketplace. They also believed that the Corps and other governmental agencies should not engage in detailed economic evaluations. Economics has been included in the Corps list of public interest factors since 1970. However, there has never been a specific policy on economics in the regulations. The Corps generally accepts an applicant's determination that a proposed activity is needed and will be economically viable, but makes its own decision on whether

a project should occur in waters of the U.S. The district engineer may determine that the impacts of a proposed project on the public interest may require more than a cursory evaluation of the need for the project. The depth of the evaluation would depend on the significance of the impacts and in unusual circumstances could include an independent economic analysis. The Corps will balance the economic need for a project along with other factors of the public interest. Accordingly, § 320.4(q) has been modified from the proposed rule to provide that the district engineer may make an independent review of the need for a project from the perspective of the public interest.

*Section 320.4(r):* Many comments were offered as to the intent, scope and implementation of the proposed mitigation policy. Comments were almost equally divided between those who felt that the policy should be expanded and those that felt it should be more limited. The issues that were raised include: mitigation should not be used to outweigh negative public interest factors; mitigation should not be integrated into the public interest review; mitigation should be on-site to the maximum extent practicable; off-site mitigation extends the range of concerns beyond those required by Section 404. A wide range of views were expressed on our proposed mitigation policy, but virtually all commenters expressed need for a policy. The Corps has been requiring mitigation as permit conditions for many years based on our regulations and the 404(b)(1) guidelines. Because of the apparent confusion on this matter, we have decided to clarify our existing policy at 320.4(r).

The concept of "mitigation" is many-faceted, as reflected in the definition provided in the Council on Environmental Quality (CEQ) NEPA regulations at 40 CFR 1508.20. Viewing "mitigation" in its broadest sense, practically any permit condition or best management practice designed to avoid or reduce adverse effects could be considered "mitigation." Mitigation considerations occur throughout the permit application review process and are conducted in consultation with state and Federal agencies responsible for fish and wildlife resources. District engineers will normally discuss modifications to minimize project impacts with applicants at pre-application meetings (held for large and potentially controversial projects) and during the processing of applications. As a result of these discussions, district engineers may condition permits to

require minor project modifications, even though that project may satisfy all legal requirements and the public interest review test without those modifications.

For applications involving Section 404 authority, mitigation considerations are required as part of the Section 404(b)(1) guidelines analysis; permit conditions requiring mitigation must be added when necessary to ensure that a project complies with the guidelines. To emphasize this, we have included a footnote to § 320.4(r) regarding mitigation requirements for Section 404, Clean Water Act, permit actions. Some types of mitigation measures are enumerated in Subpart H of the guidelines. Other laws such as the Endangered Species Act may also lead to mitigation requirements in order to ensure that the proposal complies with the law. In addition to the mitigation developed in preapplication consultations and through application of the 404(b)(1) guidelines and other laws, these regulations provide for further mitigation should the public interest review so indicate.

One form of mitigation is "compensatory mitigation," defined at 40 CFR 1508.20(e) to mean "compensating for the impact by replacing or providing substitute resources or environments." Federal and state natural resource agencies sometimes ask the Corps to require permit applicants to compensate for wetlands to be destroyed by permitted activities. Such compensatory mitigation might be provided by constructing or enhancing a wetland; by dedicating wetland acreage for public use; or by contributing to the construction, enhancement, acquisition or preservation of such "mitigation lands." Compensatory mitigation of this type is often referred to as "off-site" mitigation. However, it can be provided either on-site or off-site. Such mitigation can be required by permit conditions only in compliance with 33 CFR 325.4, and specifically with 33 CFR 325.4(a)(3). In addition to those restrictions, the Corps has for many years declined to use, and does now decline to use, the public interest review to require permit applicants to provide compensatory mitigation unless that mitigation is required to ensure that an applicant's proposed activity is not contrary to the public interest. If an applicant refuses to provide compensatory mitigation which the district engineer determines to be necessary to ensure that the proposed activity is not contrary to the public interest, the permit must be denied. If an applicant voluntarily offers to provide

compensatory mitigation in excess of the amount needed to find that the project is not contrary to the public interest, the district engineer can incorporate a permit condition to implement that mitigation at the applicant's request.

*Part 321—Permits for Dams and Dikes in Navigable Waters of the United States*

The Secretary of the Army delegated his authority under Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 to the Assistant Secretary of the Army (Civil Works). The Assistant Secretary in turn delegated his authority under Section 9 for structures in intrastate navigable waters of the United States to the Chief of Engineers and his authorized representative. District engineers have been authorized in 33 CFR 325.8 to issue or deny permits for dams or dikes in intrastate navigable waters of the United States" under Section 9 of the Rivers and Harbors Act of 1899. This section of the regulation and §§ 325.5(d) and 325.8(a) have been revised to reflect this delegation.

*Part 322—Permits for Structures or Work in or Affecting Navigable Waters of the United States*

*Section 322.2(a):* We have revised the term "navigable waters of the United States" to reference 33 CFR Part 329 since it and all other terms relating to the geographic scope of the Section 10 program are defined at 33 CFR Part 329.

*Section 322.2(b):* Commenters on the definition of structures indicated that several terms needed further amplification. It was suggested that the term "boom" be defined to exclude a float boom, as would be used in front of a spillway. The term was not redefined because those dams constructed in Section 10 waters do require a permit for a float boom. However, most dams in the United States are constructed in non-Section 10 waters and do not require a permit for a boom (floating or otherwise) unless it involves the discharge of dredged or fill material. It was suggested that the term "obstacle or obstruction" be modified to reinstate the language from the July 19, 1977, final regulations. We have adopted the suggestion which will clarify our intent that obstacles or obstructions, whether permanent or not, do require a permit. It will also assist in jurisdictional decisions on enforcement. It was suggested that "boat docks" and "boat ramps" be included in the list of structures, since these are frequently proposed structures. These have been included. It was suggested that the term "artificial gravel island" be added, as

Congress, by Section 4(e) of the Outer Continental Shelf Lands Act of 1953, extended the regulatory program to the Outer Continental Shelf, and specifically cited artificial islands as falling under Section 10 jurisdiction. This type of structure is also constructed on state lands within the territorial seas. Accordingly, artificial islands have been included.

**Section 322.2(c):** Two commenters discussed the definition of "work", one stated that it was too broad and the other that it should be expanded. The present definition of the term "work" has remained unchanged for many years and has achieved general acceptance by the regulators and those requiring a permit. The present language has been retained.

**Sections 322.2(f)(2) and 323.2(n)(2):** Both of these sections are concerned with the definition of general permits. Several commenters expressed support for the additional criteria contained in the May 12, 1983 proposed rule. Other commenters expressed concern that the proposed criteria were illegal. Some commenters believed that the proposal would amount to a delegation of the Section 404 program to the states, and that this is not a prerogative of the Corps of Engineers. Many commenters expressed serious concern that state programs were not comprehensive enough to properly represent the public interest review. Still others objected to the proposal because there were no assurances that the state approved projects themselves were "similar in nature" or would have "minimal adverse environmental effects"; those objections extended to the proposal to assess the impacts of the differences in the State/Corps decisions. Some commenters suggested that an automatic "kick-out" provision, whereby concerned agencies could cause the Corps to require an individual application on a case-by-case basis, may provide sufficient safeguards for the proposal to go forward. Some commenters suggested that a preferred approach to reducing duplication would be for the Corps to express, in its regulations, direction for its districts to vigorously pursue joint processing, permit consolidation, pre-application consultation, joint applications, joint public notices and special area management planning. This change was proposed in 1983. At that time we believed that additional flexibility in the types of general permits which could be developed was necessary to effectively administer the regulatory program. Our experience since then has shown that the existing definitions of general permit at both of these sections is flexible

enough to develop satisfactory general permits. Therefore we have decided not to adopt this proposed change. Because several definitions previously found in Part 323 have been moved to Part 328, § 323.2(n) has been redesignated § 323.2(h).

**Section 322.2(g):** This section adds the definition of the term "artificial reefs" from the National Fishing Enhancement Act and clarifies what activities or structures the term does not include. Two commenters suggested modifications, or clarifications, to this definition to ensure that old oil and gas production platforms can be considered for use as artificial reefs. We agree with their suggestion. The definition would include the use of some production platforms, either abandoned in place or relocated, as artificial reefs as long as they are evaluated and permitted as meeting the standards of Section 203 of the Act.

**Section 322.2(h):** This section was proposed to add the definition of the term "outer continental shelf" from the Outer Continental Shelf Lands Act (OCSLA). Two commenters suggested that the territorial sea off the Gulf Coast of Florida and Texas is greater than three nautical miles from the coast line. We have determined that this is not the case, and have decided not to include a definition of the term "outer continental shelf" in these regulations and to rely instead on the definition of this term that is already in the OCSLA.

**Sections 322.3(a) and 322.4:** Activities which do not require a permit have been moved from § 322.3 and included in § 322.4. The limitation of the applicability of Section 154 of the Water Resource Development Act of 1976 in certain waterbodies has been deleted because no such limitation exists in that Act.

**Section 322.5(b):** This section addresses the policies and procedures for processing artificial reef applications. One commenter suggested that the opportunity for a general permit should not be precluded by this section. A general permit for artificial reefs is not precluded by this regulation change. Furthermore, the opportunity for the issuance of general permits may be enhanced with the implementation of the National Artificial Reef Plan by the Department of Commerce.

**Section 322.5(b)(1):** This section cites the standards established under section 203 of the National Fishing Enhancement Act. These standards are to be met in the siting and construction, and subsequent monitoring and managing, of artificial reefs. Two commenters insisted that these should

be called goals or objectives, and several commenters said that more specific guidelines or criteria are needed to evaluate proposed artificial reefs against the standards or goals. Section 204 of the Act states that the Department of Commerce will develop a National Artificial Reef Plan which will be consistent with the standards established under Section 203, and will include criteria relating to siting, constructing, monitoring, and managing artificial reefs. Specification of such criteria in these rules would be inappropriate in view of the intent of Congress to have the Department of Commerce perform this function. The National Marine Fisheries Service (NMFS), acting for the Department of Commerce, has consulted with us in developing the National Artificial Reef Plan, and we will continue to consult with them to ensure permits are issued consistent with the criteria established in that plan. The Department of Commerce announced the availability of the National Artificial Reef Plan in the Federal Register on November 14, 1985.

The U.S. Coast Guard was particularly concerned that these rules be more specific with regard to information and criteria that will be used to ensure navigation safety and the prevention of navigational obstructions. Section 204 of the National Fishing Enhancement Act requires that the Department of Commerce consult the U.S. Coast Guard in the development of the National Artificial Reef Plan regarding the criteria to be established in the plan. One of the standards with which the criteria must be consistent is the prevention of unreasonable obstructions to navigation. In addition, the district engineer shall consult with any governmental agency or interested party, as appropriate, in issuing permits for artificial reefs. This includes pre-application consultation with the U.S. Coast Guard, and placing conditions in permits recommended by the U.S. Coast Guard to ensure navigational safety.

**Section 322.5(b)(2) and (3):** These sections state that the district engineer will consider the National Artificial Reef Plan, and that he will consult with governmental agencies and interested parties, as necessary, in evaluating a permit application. Two commenters supported this coordination. The NMFS requested notification of decisions to issue permits which either deviate from or comply with the plan. Paragraph (b)(2) requires the district engineer to notify the Department of Commerce of any need to deviate from the plan. In addition, the NMFS receives a monthly list of permit applications on which the

district engineer has taken final action. This should be sufficient notification for those permits which do not deviate from the plan.

**Section 322.5(b)(4)** Although some commenters strongly supported this section describing the liability of permittees authorized to build artificial reefs, several expressed concern that this provision was not clearly written or required specific criteria to assist the district engineer in determining financial liability. This paragraph has been rewritten to correspond closely with the wording in the National Fishing Enhancement Act, and examples of ways an applicant can demonstrate financial responsibility have been added.

**Section 322.5(g)** We have revised this paragraph on canals and other artificial waterways by eliminating procedural-only provisions which are redundant with requirements in 33 CFR Parts 325 and 328.

**Section 322.5(i)** A new section on fairways and anchorage areas has been added. This section was formerly found at 33 CFR 209.135. We are moving this provision to consolidate all of the permit regulations on structures to this part. We will delete 33 CFR 209.135 by separate notice in the Federal Register.

#### **Part 323—Permits for Discharges of Dredged or Fill Material Into Waters of the United States**

**Section 323.2:** Several commenters supported moving the definitions relating to waters of the United States to a separate paragraph. As proposed on May 12, 1983, we have moved the term "waters of the United States" and all other terms related to the geographic scope of jurisdiction of Section 404 of the CWA to 33 CFR Part 328 which is titled "Definition of the Waters of the United States." We believe that, by setting these definitions apart in a separate and distinct Part of the regulation and including in that Part all of the definitions of terms associated with the scope of the Section 404 permit program, we are better able to clarify the scope of our jurisdiction. We have not changed any existing definitions nor added any definitions proposed on May 12, 1983. Comments related to these definitions are addressed in Part 328 below.

We have not changed the definition of fill material at § 323.2(e). However, the Corps has entered into a Memorandum of Agreement with the Environmental Protection Agency to better identify the difference between section 402 and section 404 discharges under the Clean Water Act.

**Section 323.2(d)—Previously 323.2(j):** The proposed modification of this paragraph states that "de minimis or incidental soil movement occurring during normal dredging operations" is not a "discharge of dredged material," the term defined by this paragraph.

Eight commenters raised concerns relating to this provision. Most of these supported the regulation of "de minimis or incidental soil movement occurring during normal dredging operations" in varying degrees. Two specifically expressed a belief that the fallback from dredging operations constituted a discharge within the intent of section 404 of the Clean Water Act. One of these stated that the proposed provision was contrary to a binding decision by the U. S. District Court for the Northern District of Ohio in *Reid v. Marsh*, No. C-81-690 (N. D. Ohio, 1984). Another commenter objected to the provision on the basis that it would force states that perceived a need to regulate dredging operations to regulate such activities under their National Pollutant Discharge Elimination System authority. The recommendations of the above group of commenters included the regulation of dredging activities on an individual or general permit basis or on a selective basis that would take into account the scopes and anticipated effects of the projects involved. Two commenters expressed concern over the fact that discharge activities such as the sidestepping of dredged material might be considered "soil movement" that was "incidental" to a "normal dredging operation." The final concern raised related to the list of dredging equipment cited as examples. This list was seen, alternatively, as too limited or as not limited enough in reference to the types of equipment that may be used in a "normal dredging operation." Four commenters supported the proposed provision as a reasonable interpretation of the section 404 authority of the Corps.

Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404. The purpose of dredging is to remove material from the water, not to discharge material into the water. Therefore, the fallback in a "normal dredging operation" is incidental to the

dredging operation and *de minimis* when compared to the overall quantities removed. If there are tests involved, we believe they should relate to the dredging operator's intent and the result of his dredging operations. If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a "normal dredging operation" that is not subject to section 404.

Based on the above discussion, we have not adopted any of the recommendations relating to the revision or deletion of this provision for the purpose of bringing about the regulation of "normal dredging operations" in varying degrees. We have replaced the "or" between the words "de minimis" and "incidental" with a comma to more clearly reflect the fact that the incidental fallback from a "normal dredging operation" is considered to be *de minimis* when compared to the overall quantities removed. In addition, we have deleted the examples of dredging equipment at the end of the proposed provision to make it clear that *de minimis* or incidental soil movement occurring during any "normal dredging operation" is not a "discharge of dredged material." However, we wish to also make it clear that this provision applies only to the incidental fallback occurring during "normal dredging operations" and not to the disposal of the dredged material involved. If this material is disposed of in a water of the United States, by sidestepping or by other means, this disposal will be considered to be a "discharge of dredged material" and will be subject to regulation under section 404.

**Section 323.4:** We have made some minor corrections to this section to be consistent with EPA's permit exemption regulations at 40 CFR Part 233.

#### **Part 324—Ocean Disposal**

**Section 324.4(c):** The language of this section on the EPA review process has been rewritten to clarify the procedures the district engineer will follow when the Regional Administrator advises that a proposed dumping activity does not comply with the criteria established pursuant to section 102(a) of the Marine Protection, Research and Sanctuaries Act (MPRSA), or the restrictions established pursuant to section 102(c) thereof, in accordance with the provisions of 40 CFR 225.2(b).

#### **Part 325—Permit Processing**

Several minor changes have been made in this part. These changes involve requesting additional information from

an applicant, providing for a reasonable comment period, combining permit documentation, and documenting issues of national importance.

**Section 325.1(b).** This section has been rewritten to clarify the pre-application consultation process for major permit applications. No significant changes have been made in the content of this section.

**Section 325.1(d)(1).** One commenter on this content of applications paragraph asked that where, through experience, it has been found that specific items of additional information are routinely necessary for permit review, the district engineer should be allowed to develop supplemental information forms. Another observed that restricting production of local forms may inhibit joint permit application processes. If it becomes necessary to routinely request additional information, the Corps can change the application form, but that must be done at Corps headquarters with the approval of the Office of Management and Budget. This change does not place any additional restrictions on developing local forms. As is now the case, local forms may be developed for joint processing with a Federal or state agency.

**Section 325.1(d)(8).** This is a new section requiring an applicant to include provisions for siting, construction, monitoring and managing the artificial reef as part of his application for a permit. One commenter suggested that the criteria for accomplishing these activities must be completed in the National Artificial Reef Plan before establishment of such reefs can be encouraged. Another recommended that the regulation describe more specifically the information to be supplied by an applicant with regard to monitoring and maintaining an artificial reef. The plan includes general mechanisms and methodologies for monitoring the compliance of reefs with permit requirements, and managing the use of those reefs. It can be used as a guide for the information to be supplied by the permit applicant. Specific conditions for monitoring and managing, as well as for maintaining artificial reefs generally need to be site-specific and should be developed during permit processing.

The U.S. Coast Guard requested that they be provided copies of permit applications for artificial reefs, and that a permittee be required to notify the Coast Guard District Commander when reef construction begins and when it is completed so timely information can be included in notices to mariners. The district engineer may elect to consult with the Coast Guard, when appropriate, during the pre-application

phase of the permit process. At any rate, the Coast Guard will receive public notices of permit applications, and may make recommendations to ensure navigational safety on a case-by-case basis. Appropriate conditions can be added to permits to provide for such safety.

**Section 325.1(e).** Several commenters expressed concern with language changes requiring only additional information "essential to complete an evaluation" rather than the former requirement for information to "assist in evaluation of the application." They felt this change would reduce the data base on which decisions would be made. They indicated further that without necessary additional information, district engineers would not be able to make a reasonable decision, the public's ability to provide meaningful comments would be limited, and resource agencies would have to spend more time contacting the applicant and gathering information. They felt this could increase delays rather than limiting them. Several commenters asked that the regulations be altered to specifically require submission of information necessary for a 404(b)(1) evaluation. Similar concerns were expressed with the change stating that detailed engineering plans and specifications would not be required for a permit application. Commenters advised that without adequate plans or the ability to routinely require supplemental information it may be impossible to insure compliance with applicable water quality criteria or make reasonable permit decisions. Other commenters wanted further restrictions placed on the district engineer's ability to request additional information. Suggestions included altering the regulations to specify the type, need for, and level of detail which could be requested, and requiring the district engineer to prepare an analysis of costs and benefits of such information. Some commenters objected to requirements for providing information on project alternatives and on the source and composition of dredged or fill material.

This paragraph has been changed as proposed. The intent of this change was to assure that information necessary to make a decision would be obtained, while requests for non-essential information and delays associated with such requests would be limited.

**Section 325.2(a)(6).** The new requirement to document district engineer decisions contrary to state and local decisions was adopted essentially as proposed. The reference to state or local decisions in the middle of this paragraph incorrectly did not reference

§ 320.4(j)(4) in addition to § 320.4(j)(2). The adopted paragraph references state and local decisions in both of these paragraphs.

**Section 325.2(b)(1)(ii).** The May 12, 1983, proposed regulations sought to speed up the process by reducing the standard 60 day comment/waiver period to 30 days for state water quality certifications. Commenters on this paragraph offered a complete spectrum of views from strong support for the proposed changes to strong opposition to the proposal. Comments within this spectrum included opinions that states must have 60 days; certification time should be the same as allowed by EPA (i.e. 6 months); the proposal is illegal; it conflicts with some state water quality certification regulations and procedures; and it would reduce state and public input to the decision-making process. Most states objected to this reduction with many citing established water quality certification procedures required by statute and/or regulations which require notice to the public (normally 30 days) and which allow requests for public hearings which cannot be completed within the 30-day period. We have, therefore, retained the 60 day period in the July 22, 1982, regulations. Some Corps districts have developed formal or informal agreements with the states, which identify procedures and time limits for submittal of water quality certifications and waivers. Where these are in effect, problems associated with certifications are minimized.

Many commenters objected to the May 12, 1983, proposal to delete from the July 22, 1982, regulations the statement "The request for certification must be made in accordance with the regulations of the certifying agency." Deleting this statement will not delete the requirement that valid requests for certification must be made in accordance with State laws. However, we have found that, on a case-by-case basis in some states, the state certifying agency and the district engineer have found it beneficial to have some flexibility to determine what constitutes a valid request. Furthermore, we believe that the state has the responsibility to determine if it has received a valid request. If this statement were retained in the Corps regulation, it would require the Corps to determine if a request has been submitted in accordance with state law. To avoid this problem, we have decided to eliminate this statement.

**Section 325.2(d)(2).** Numerous commenters expressed concern with comment periods of less than 30 days. They were concerned that, in order to expedite processing times, 15 day

notices would become the norm. These commenters stated that 15 days was insufficient to prepare substantive comments and would not allow the public adequate participation in the permit process as mandated by Section 101 of the CWA. State agencies noted that, with internal and external mail requiring as much as a week each for the Corps and the state, 15 days would not provide any time for consideration of a project. Several commenters noted that such expedited review times might actually be counter-productive, as Federal and state agencies might routinely oppose projects and request permit denial so that they would then have sufficient time to review a project and to work with an applicant to resolve conflicts. We recognize that 15 days is a very short comment period considering internal agency processing and mail time. We expect that comment periods as short as 15 days would be used only for minor projects where experience has shown there would be little or no controversy. Some districts have been routinely using comment periods of less than 30 days (20 and 25 days) while others have used such procedures in only a limited number of special cases. In adopting this provision, we have modified the May 12, 1983, proposal to require the district engineer to consider the nature of the proposal, mail time, the need to obtain comments from remote areas, comments on similar proposals, and the need for site visits before designating public notice periods of less than 30 days. Additionally, after considering the length of the original comment period as well as those items noted above, the district engineer may extend the comment period an additional 30 days if warranted. We believe this provides the desired flexibility with the necessary restraints on when to use comment periods of less than 30 days.

**Sections 325.2(e)(1) and 325.5(b)(2):** Commenters supporting the use of letters of permission (LOP) for minor section 404 activities stated that applicants will realize significant time savings for minor requests while there will be no loss in environmental protection. Objectors believe that the Corps is seeking administrative expediency at the cost of environmental protection. Issues raised by commenters include: the legality of the 404 LOP procedure without providing for notice and opportunity for public hearing (Section 404(a) of the CWA); the legality of issuing a permit which would become effective upon the receipt or waiver of 401 certification and/or a consistency certification under the CZMA; the need

to be more definitive as to the criteria for making a decision as to the categories of activities eligible for authorization under the LOP; and the lack of coordination with Federal and state resource agencies. A few commenters were concerned that the notice in the May 12, 1983, Proposed Rules was insufficient because it did not give the scope and location of the work to be covered. The commenting states also indicated that the notice was insufficient for water quality certification and coastal zone consistency determination purposes. Other commenters were concerned that while LOPs would be coordinated with Federal and state fish and wildlife agencies, other resource agencies such as EPA should also review Section 404 LOPs. Based on the comments on the proposed 404 LOP procedures, we have decided not to adopt the 404 LOP procedures as proposed. We are not changing § 325.5(b)(2), LOP format, nor are we changing the section 10 LOP provisions. Rather, we have revised § 325.2(e)(1) to describe a separate section 404 LOP process. Unlike the section 10 LOP process, the section 404 process involves the identification of categories of discharges and a generic public notice. This LOP process is a type of abbreviated permit process which could and has been developed under the July 22, 1982, Interim final regulations. These procedures will avoid unnecessary paperwork and delays for many minor section 404 projects in accordance with the intent of Section 101(f) of the Clean Water Act.

**Section 325.7(b):** We have added a provision that, when considering a modification to a permit, the district engineer will consult with resource agencies when considering a change to terms, conditions, or features in which that agency has expressed a significant interest.

**Section 325.9:** One commenter generally supported this section on the district engineer's authority to determine jurisdiction but indicated that § 325.9(c) should not be adopted because it reflects the provisions of a Memorandum of Understanding (MOU) with EPA and would not be applicable if the MOU is revised or deleted. We have determined that this paragraph is not now needed and have decided not to adopt it.

#### Appendix A—Permit Form and Special Conditions

##### A. Permit Form

**Project Description:** A comment was received stating that intended use should be specified for all permitted

work and not just for the fills involved. A comment was also received suggesting that we be more specific on what discharges are covered by permit authorizations. We agree with these points and have made appropriate changes to the instructional material relating to project descriptions.

##### General Conditions

**General Condition 1:** Several commenters stated that the specified three month lead time on the requesting of permit extensions was too long. We agree with these commenters and have, therefore, reduced this lead time from three to one month.

**General Condition 2:** One commenter recommended that the wording of this condition, relating to the maintenance of authorized work, be modified to indicate that restoration may be required if the permittee fails to comply with the condition. We agree and have modified the condition accordingly. Another commenter stated that it would not be reasonable to enforce this condition when a permitted underground facility is abandoned. We generally agree with this statement. However, we believe the procedures governing the enforcement of permit conditions are flexible enough to allow a reasonable approach in such situations.

**General Condition 3:** One commenter indicated that this condition should be modified to require the permittee to halt work that could damage discovered historic resources and to protect those resources from inadvertent damage. That commenter also indicated that under certain circumstances it would not be necessary to notify the Corps or to halt work. This notification requirement has been in effect since 1982, and the continuation of this requirement provides for the Corps to be notified in a timely manner. With this notification, the Corps can react quickly to determine the appropriate course of action. We believe this approach has proven to be satisfactory. Therefore, this condition is being adopted as proposed.

**Proposed General Condition 4:** In our proposal, we specifically requested comments on this condition, which would require recording the permit on the property deed. More than half the comments received were on this proposal. All but one of the commenters who addressed this condition were critical of it to a greater or lesser degree. Institutional interest observed that this condition would only add to their costs, since once lands were purchased they were seldom sold. Institutional and industrial interests observed that permits often relate to easements and



not to fee simple ownership and that compliance with the proposed condition in such situations, would not be possible or meaningful in some locations. One commenter stated that a recordation condition should not be necessary, provided permittees complied with proposed General Condition 5, which requires owners to notify the Corps when property is transferred. To strengthen the property transfer condition, we have modified the statement preceding the transferee's signature to specify that the requirement to comply with the terms and conditions of the permit moves with the property. One commenter stated that a general condition requiring recordation where possible would be unfair, since it would not be uniformly applicable to all permittees. Further coordination with our field offices indicates that compliance with and use of the proposed condition probably occurs only in a few locations. This coordination also indicates that for some jurisdictions, where recordation is possible, the cost of recordation may be so great that it exceeds the benefits. Given that recordation may not be practical or appropriate for all Corps permits, we have deleted this general condition from the permit form and renumbered the remaining general conditions accordingly. On the other hand, the recordation requirement is appropriate and useful for many types of structures needing Corps permits, to provide fundamental fairness toward future purchasers of real property and to facilitate enforcement of permit conditions against future purchasers. For example, if the Corps were to issue a permit for a pier, that permit would require the owner to maintain the pier in good condition and in conformance with the terms and conditions of the permit. If the builder of the pier were to allow the pier to deteriorate, he could easily transfer the pier and associated property with no notice to the purchaser of the legal obligation to repair and maintain the pier, unless the permit were recorded along with the title documents relating to the associated property. This failure to give notice to prospective purchasers would be unfair, and would increase the Federal Government's difficulty in enforcing permit conditions against future purchasers. Because of this important notice function, we have added a recordation condition under B Special Conditions, for use wherever recordation is found to be reasonably practicable and appropriate.

*General Condition 4 (Proposed General Condition 5):* One commenter suggested that this condition, relating to

the transference of the permit with the property, be modified to provide for notice and approval from the Corps before the permit is transferred. The reason given for this suggestion was that the Corps may have special knowledge of the particular transferee's history and capabilities and may wish to modify the terms and conditions of the permit accordingly. The suggested change would require the issuing office to conduct a review and prepare decision documentation every time property is transferred and there is a Corps permit involved. We believe that such a review in every case involving the transfer of a permit would constitute an inefficient use of available resources. Under the procedures contained in 33 CFR 325.7, a permit is subject to suspension, modification, or revocation at any time the Corps determines such action is warranted. We believe this is a better approach, and have, therefore, retained the proposed wording of this condition.

*General Condition 5 (Proposed General Condition 6):* One commenter recommended that this proposed condition, which relates to compliance with the provisions of the water quality certification, be changed to provide for the modification of the Corps permit if EPA promulgates a revised Section 307 standard or prohibition which applies to the permitted activity. We agree that permits must be modified when circumstances warrant. Procedures governing modifications are contained in 33 CFR 325.7, and we advise permittees of these procedures in Item 5 (Reevaluation of Permit Decision) under the "Further Information" heading. Therefore, since we believe this potential requirement for permit modifications is adequately covered under the "Further Information" heading, we have retained the proposed wording of this condition.

*General Condition 6 (Proposed General Condition 7):* One commenter noted that compliance inspections should be conducted during normal working hours. As a general rule, this observation seems reasonable. However, since we believe that compliance inspections will be scheduled during normal working hours when possible, we have not made any changes to the proposed wording of this condition.

#### Further Information

*Limits of Federal Liability:* One commenter suggested that the Government could, under certain circumstances, be held liable for damages caused by activities authorized by the permit and suggested that Item 3, which limits the Government's liability,

be deleted in its entirety. While it is true that some courts have found the United States liable for damages sustained by the owners of permitted structures or by individuals injured in some way by those structures, it has never been the intent of the Corps to assume either type of liability or to insure that no interference or damage to a permitted structure will occur after it has been built. In permitting structures within navigable waters, the Corps does not assume any duty to guarantee the safety of that structure from damages caused by the permittee's work or by other authorized activities in the water, such as channel maintenance dredging. This is viewed as an acceptable limitation on the privilege of constructing a private structure for private benefit in a public waterway, particularly since insurance is readily available to protect the permittee from any damage his structure may sustain. Accordingly, the language in Item 3 has been further clarified to preclude any inference that the Government assumes any liability for interference with or damage to a permitted structure as a result of work undertaken by or on behalf of the United States in the public interest.

*Reevaluation of Permit Decision:* One commenter recommended that reevaluations be limited to the three circumstances listed. Although we believe that the vast majority of the reevaluations required will qualify under one of the three listed circumstances, we cannot exclude the possibility of non-qualifying unique situations where the public's good may require a reevaluation of a permit decision. Therefore, we have retained the wording which states that reevaluations will not necessarily be limited to the circumstances listed. Another commenter recommended that we add to this item that we have the authority to issue administrative orders to require compliance with the terms and conditions of permits and to initiate legal actions where appropriate. The procedures governing these actions are contained in 33 CFR 326.4 and 326.5 and reference was made to these procedures in the proposed wording. However, we agree that it would be helpful to modify the proposed wording to provide permittees with a better understanding of our enforcement options. We have modified the text accordingly.

#### B Special Conditions

One commenter suggested that Special Condition 5, which requires permittees authorized to perform certain types of work to provide advance notifications to the National Ocean

Service and the Corps before beginning work, be changed to allow verbal notifications followed by written confirmations. We have determined that this suggestion, if adopted, would greatly increase the chance of errors in notice documents published by the Government and would not be in the best interest of mariners. Two weeks advance notice is a reasonable period of time both for construction scheduling and for Government notification to mariners. Therefore, we have not adopted this suggestion.

One commenter suggested that a special condition be added, for use when appropriate, to require the permittee to carry out a historic preservation plan attached to the permit. The wording of special conditions are normally determined on a case-by-case basis. Only those that are used often and are subject to standardized wording are listed in Appendix A (B, Special Conditions). While we agree that special conditions of this nature may be required, we do not believe they lend themselves sufficiently to standardized wording to warrant adding a specific special condition to Appendix A.

Three comments were received which related to General Condition (n) on the previous permit form. This condition required the permittee to notify the issuing office of the date when the work authorized would start and of any prolonged suspensions before the work was complete. Two of the commenters recommended that this provision be retained as a general condition, and one commenter recommended that it be specified as a special condition. Our research indicates that this condition, as a general condition applicable to all permitted activities, has been virtually unenforceable in most areas and of limited use as a permit monitoring tool. We agree that special conditions requiring permittees to notify the Corps in advance of the dates permitted activities will start, are appropriate in certain situations. Two of these situations are covered by Special Condition 3 (maintenance dredging) and Special Condition 5 (chartering of activities by National Ocean Service). Since we believe our field offices are in the best position to identify any other situations in which similar special conditions would be appropriate, we have not adopted these recommendations.

As discussed under Proposed General Condition 4 above, we have added a sixth special recordation condition for use where recordation is found to be reasonably practicable.

**General:** In addition to several editorial changes, we have added

definitions for the word "you" and its derivatives and the term "this office" at the beginning of the permit form. We have substituted the term "this office" for references to the district engineer throughout the form.

#### Part 326—Enforcement

**General:** Three commenters objected to what they perceived as a lack of specific requirements and recommended that the word "should" be changed to "shall" throughout Part 326. Another commenter stated that the proposed regulations were too specific and recommended that a significant amount of the procedures in this Part be deleted and addressed in internal guidance. The word "should," where used, allows district engineers to base their enforcement actions on an assessment of what is the best approach on a case-by-case basis. The word "shall" would require district engineers to implement specified actions even though such actions may be obviously inappropriate in relation to a particular case. We believe this flexibility is appropriate and have, therefore, retained the word "should" in most of the places where it occurred in the proposed regulations. However, the word "will" is used at various places in this Part where flexibility is not appropriate. We believe that the proposed language achieves a proper balance between the providing of necessary guidance and flexibility.

Finally, one commenter suggested that Part 326 be rewritten to include only two requirements: orders for immediate restoration of filled wetlands and referrals for legal action if these orders are not complied with. When Congress established the Corps regulatory authorities, it allowed for the issuance of permits. To ignore the issuance of permits as one means of resolving violations would be inappropriate.

**Section 326.1:** As a result of further internal coordination, we have determined that it would be appropriate to make it clear that nothing in this Part establishes a non-discretionary duty on the part of a district engineer. Further, nothing in this Part should be considered as a basis for a private right of action against a district engineer. Therefore, we have modified this paragraph accordingly.

**Section 326.2:** One commenter recommended that this statement of general enforcement policy be expanded to provide priority guidance on enforcement actions. Two other commenters recommended strengthening of this paragraph, with one recommending that it cite the firm and fair enforcement of the law to prohibit and deter damage, to require

restoration, and to punish violators as the purpose of the Corps enforcement program. In that we refer in this paragraph to unauthorized activities, we are reflecting the fact that these activities are unauthorized and subject to enforcement actions pursuant to the legal authorities cited at the beginning of this Part. Further, the other recommended changes would simply duplicate the discussions of enforcement methods and procedures already contained in §§ 326.3, 326.4, and 326.5. However, we have added a statement to this provision to reflect the fact that EPA has independent enforcement authorities under the Clean Water Act, and thus, district engineers should normally coordinate with EPA.

**Section 326.3(b):** One commenter recommended that this paragraph be amended to require the establishment of numbered file systems for violations. Most Corps districts already assign control numbers to enforcement actions, and since this is an administrative function, we have determined that it would be inappropriate to include this requirement in a Federal regulation designed to provide enforcement policy.

**Section 326.3(c)(2):** One commenter suggested rewording of this paragraph to make it clear that a violation involving a completed activity may or may not be resolved through the issuance of a Corps permit. The reference in the proposed wording to not initiating "any additional work before obtaining required Department of the Army authorizations" apparently led to the commenter misunderstanding this paragraph. The intent of this wording related to warning a violator not to initiate work on other projects before obtaining required Corps permits. Since the violator is in the process of being made aware of the legal requirements for obtaining Corps permits, we have determined that this warning is unnecessary and have, therefore, deleted it.

**Section 326.3(c)(3):** One commenter recommended that this paragraph be amended to indicate that the information requested will also be used for determining whether legal action is appropriate in addition to determining what initial corrective measures may be required. We agree that the information obtained from violators may provide a basis for enforcement decisions other than those relating to interim corrective measures. Therefore, we have revised this provision to provide for notifying violators of potential enforcement consequences and for the more generalized use of the information provided by violators in the

identification of appropriate enforcement measures.

*Section 326.3(c)(4)* One commenter recommended that this provision be reworded to indicate that the limitations on unauthorized work of an emergency nature are to be established in conjunction with Federal and state resource agencies. We believe it is understandable that actions of this type will be completed on an expedited basis with the procedures in § 326.3(c-d) being followed concurrently. Since § 326.3(d) already provides for interagency consultations, in appropriate cases, we do not believe it is necessary to duplicate that guidance in this provision.

*Section 326.3(d)(1)*: One commenter recommended that "initial corrective measures" be defined as measures "which substantially eliminate all current and future detrimental impacts resulting from the unauthorized work." This commenter also recommended that the procedures in 33 CFR 320.4 and 40 CFR Part 230 be referenced for use in determining what "initial corrective measures" are required. Essentially, this commenter is recommending that all violators be denied a Corps authorization and required to undertake full corrective measures in the initial stage of an enforcement action. This would not be a reasonable or practical approach, since it would eliminate public participation and would result in the removal of work that may have been permitted under normal circumstances. Another commenter objected to the statement that further enforcement actions "should normally" be unnecessary if the initial corrective measures substantially eliminate all current and future detrimental impacts. This commenter sees this provision as barring legal action in appropriate cases such as those involving willful, flagrant, or repeated violations. This is not the case. To say that such corrective measures "should normally" resolve a violation does not mean that they will "always" resolve a violation. Another commenter stated that consultations with the Fish and Wildlife Service and the National Marine Fisheries Service should be made mandatory in this paragraph pursuant to the Fish and Wildlife Coordination Act. The reason given was that this provision would result in the issuance of permits which would require such consultations. This paragraph deals with initial corrective measures and not with the issuance of permits. These agencies will be given an opportunity to comment in response to a public notice before any decision is made on an after-the-fact permit application. In view of the above

discussion, we have retained the proposed wording of this paragraph.

*Section 326.3(d)(2)*: One commenter recommended that this paragraph be deleted on the basis that it provided the district engineer with too much discretion and questioned the cross-reference to § 326.3(3). This paragraph was intended to provide guidance to district engineers in situations involving prior initiations of litigation or denials of essential authorizations or certifications by other Federal, state or local agencies. We believe district engineers should have the discretionary authority to determine what is a reasonable and practical course of action for the Corps under these circumstances. However, we have revised this paragraph to clarify its intent and to correct the cross-reference.

*Section 326.3(d)(3)*: As a result of further review within the Corps, we have determined that the provision proposed as § 326.3(e)(1)(i), which states that it is not necessary to issue a Corps permit for initial corrective measures, should be moved to § 326.3(d) to more appropriately reflect the sequence of enforcement procedures. Therefore, we have modified this provision and established it as new § 326.3(d)(3).

*Section 326.3(e)*: One commenter objected to the after-the-fact permit process, and observed that the process was generally seen as a mechanism to avoid compliance with the law. Exceptions to the processing of after-the-fact permit applications are contained in § 326.3(e)(i-iv). However, in most cases, the public participation associated with the processing of an application is necessary before a violation can be appropriately resolved.

*Section 326.3(e)(1)*: One commenter recommended that this paragraph be amended to specify the criteria for legal action and to require that public notices associated with after-the-fact permit applications clearly identify that a violation is involved. The criteria for legal actions are given in § 326.5(a), and permit decisions are based on whether an activity complies with the section 404(b)(1) Guidelines, where applicable, and on whether it is or is not found to be contrary to the public interest. Permit decisions are not based on whether a permit application is before or after-the-fact. We have, therefore, retained the proposed wording of this paragraph.

*Proposed Section 326.3(e)(1)(i)*: We have deleted this provision here and have moved a modified version of it to new § 326.3(d)(3), see discussion under § 326.3(d)(3).

*Section 326.3(e)(1)(i)*—*Proposed as 326.3(e)(1)(ii)*: This provision indicates

that the processing of an after-the-fact permit application will not be necessary "when" detrimental impacts have been eliminated by restoration. One commenter recommended that district engineers be required to consult with EPA before determining that restoration has been completed that eliminates current and future detrimental impacts. We have addressed this comment by modifying § 326.2 and § 326.3(g) to provide for such coordination when the district engineer is aware of an enforcement action being considered by EPA under its independent enforcement authorities. Another commenter observed that the word "when" appeared to be in error and recommended substituting the word "unless." This would indicate that the Corps should process an after-the-fact permit application only after restoration had taken place and there is no work requiring a permit. This obviously would not be reasonable. In view of the above discussion, we have retained the proposed wording of this provision.

*Section 326.3(e)(1)(iii)*—*Proposed as 326.3(e)(1)(iv)*: One commenter recommended that a provision be added to this paragraph to prohibit the acceptance of an application for a Corps permit where an activity is not in compliance with other Federal, state, or local authorizations or certifications. In essence, this amounts to requiring district engineers to take steps to enforce the terms and conditions of another agency's authorization or certification. We believe this is the issuing agency's responsibility and not the responsibility of the Corps. Of course, where that other agency has denied a requisite authorization, the Corps would not accept an application for processing.

*Section 326.3(e)(1)(iv)*—*Proposed as 326.3(e)(1)(v)*: Two commenters recommended rewording of this paragraph to prohibit the acceptance or processing of any after-the-fact permit application when the Corps is aware of litigation or other enforcement actions that have been initiated by other Federal, state or local agencies. We believe the Corps should, in appropriate situations, be able to take positions on cases that are in conflict with the viewpoints of other agencies. Therefore, we have retained the wording of this paragraph essentially as proposed. However, since EPA has independent enforcement authorities, we have provided for coordination with EPA in §§ 326.2 and 326.3(g).

*Section 326.3(g)*: One commenter indicated that this paragraph should delineate EPA's responsibility over

recognizing and reporting unpermitted discharges. This paragraph deals only with cases where EPA is considering an enforcement action. The reporting of violations is covered under § 326.3(a). Another commenter recommended that this paragraph be reworded to ensure that Corps actions under Part 326 are not in conflict with EPA enforcement actions. Another commenter, a state agency, suggested that this provision be expanded to require similar consultations with state agencies that have initiated enforcement actions. The reason we have provided for consultations with EPA in this paragraph is due to the fact that both the Corps and EPA have overlapping authorities pursuant to the Clean Water Act. This is not the case with state agencies. Nevertheless, we believe district engineers will wish to consult with state agencies in appropriate circumstances. In any event, as we stated in our discussion relating to the wording of § 326.3(e)(iv), we believe the Corps should have the right to take a position that may conflict with another agency's viewpoint. However, we have revised this provision to emphasize that district engineers should coordinate with EPA when they are aware of enforcement actions being considered by EPA under its independent enforcement authorities.

**Section 326.4(a-b):** As a result of further internal coordination, we have determined that § 326.4(a) should make it clear that district engineers have the discretionary authority to determine when the inspection of permitted activities is appropriate. We have modified § 326.4(a) accordingly. In addition, we have added a new § 326.4(b) to further discuss inspection limitations.

**Section 326.4(d)—Proposed as 326.4(c):** One commenter, a state agency, objected to the provisions in this paragraph for attempting to obtain voluntary compliance before issuing a formal compliance order. The rationale given was that the absence of a formal order would make coordination between the Corps and the state difficult. Another state agency recommended consultations with state agencies and with EPA. The proposed, non-compliance procedures do not prohibit early coordination with other regulatory agencies, when appropriate, and presumably, if the permittee quickly brings his work into compliance, such coordination should not be necessary.

One commenter objected to allowing a district engineer to issue a compliance order and to not making the use of Corps suspension/revocation procedures or

legal actions mandatory. Another commenter recommended that suspension/revocation procedures or legal actions be made mandatory if a violator fails to comply with a compliance order. The issuance of a compliance order is provided for in section 404(s) of the Clean Water Act, and in most cases, we believe that the methods available for obtaining voluntary compliance should be used before discretionary consideration is given to using the Corps suspension/revocation procedures or initiating legal action.

Another commenter objected to the term "significantly serious to require an enforcement action" on the basis that all violations are worthy of some enforcement action. Minor deviations from the terms and conditions of a Corps permit may not always warrant an enforcement action. For example, would a dock authorized to be constructed with a length of 50 feet but inadvertently constructed with a length of 51 feet constitute a violation warranting an enforcement action? We agree there may be extenuating circumstances, such as the additional length of the dock being just enough to impact the water access of a neighbor. However, this is a judgment that is best made by the district engineer involved.

One Commenter objected to the term "mutually agreeable solution" on the basis that such a solution could invalidate the prior results of coordination with resource agencies. Since this term refers to bringing the permitted activity into compliance or the resolution of the violation with a permit modification using the modification procedures in 33 CFR 325.7(b), such resolutions would not invalidate prior coordination. In view of the above discussion, we have retained the proposed wording of this paragraph.

**Section 326.5(a):** One commenter requested that the words "willful" and "repeated" be deleted from this paragraph, the rationale being, apparently, that most violators are not repeat or willful offenders and that the Corps should take the one opportunity it has to bring legal action against these one-time violators. We do not agree with this approach as being either reasonable or practical. Another commenter recommended adding violations that result in substantial impacts to the list of violations that should be considered appropriate for legal action. We agree with this recommendation and have modified the wording of this provision accordingly.

**Section 326.5(c):** One commenter recommended rewording of this

paragraph to require that copies be provided to EPA of Corps referrals to local U.S. Attorneys. We believe it would be more appropriate to address matters relating to the detailed aspects of interagency coordination in interagency agreements. Therefore, we have retained the proposed wording of this paragraph.

**Section 326.5(d)(2):** As a result of further internal coordination, we have determined that litigation cases involving isolated water no longer need to be referred to the Washington level on a routine basis. Therefore, we have deleted this provision.

**Section 326.5(e):** One commenter recommended that the word "may" be replaced with the words "encouraged to" in the provision relating to sending litigation reports to the Office of the Chief of Engineers when the district engineer determines that an enforcement case warrants special attention and the local U.S. Attorney has declined to take legal action. We agree with this recommendation and have made the change.

Another commenter suggested that wording be added to this paragraph to address circumstances in which permits are not required. The fact that a legal option may not be available does not mean that a permit is not required. If the district engineer chooses to close the case record, the activity in question will still be unauthorized and therefore illegal. Such unauthorized activities will be taken into account if the responsible parties become involved in future violations. One commenter suggested that Corps attorneys initiate legal actions as an alternative to actions by local U.S. Attorneys. However, the Corps does not have the authority under existing Federal laws to initiate legal actions on its own.

Another commenter recommended that this paragraph be modified to provide for joint Federal/state prosecution of violators. Since this involves discretionary decisions on the part of the Department of Justice, it would not be appropriate to include a provision of this nature in the Corps enforcement regulations.

#### Part 326—Definition of Waters of the United States

This part is being added in order to clarify the scope of the Section 404 permit program. This part was added in direct response to many comments expressed by both the public and the Presidential Task Force on Regulatory Relief. We have not made changes to existing definitions; however, we have provided clarification to the following

them apart in a separate and distinct Part 328 of the regulation.

The format for Part 328 has been changed slightly from the proposed regulation in order to improve clarity and reduce duplication. The content of the proposed § 328.2 "General Definitions" has been partially combined with § 328.3 "Definitions." The remainder has been reestablished as § 328.5. "Changes in Limits of Waters of the United States." Section 328.2 has been established as "General Scope." The proposed §§ 328.4 and 328.5 have been combined into § 328.4 and renamed "Limits of Jurisdiction."

A number of commenters appeared to have misinterpreted the intent of this part. Many thought we were trying to reduce the scope of jurisdiction while others believed we were trying to expand the scope of jurisdiction. Neither is the case. The purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted.

**Section 328.3: Definitions.** This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

The term "navigable waters of the United States" has not been added to this section since it is defined in Part 329.

A number of comments were received concerning the proposed change to the definition of the terms "adjacent" and the proposed definitions for the terms "inundation", "saturated", "prevalence", and "typically adapted." A number of commenters believed that these terms may better define the scope of jurisdiction of the section 404 program, but such definitions should more rightfully be within the province of the Environmental Protection Agency in order to remain consistent with the opinion of Benjamin Civiletti, Attorney General (September 5, 1979). These definitions would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time.

To respond to requests for clarification, we have added a definition for "tidal waters." The definition is consistent with the way the Corps has traditionally interpreted the term.

**Section 328.4: Limits of Jurisdiction.** Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.

**Section 328.5: Changes in Limits of Waters of the United States.** This section was changed to reflect both natural and man-made changes to the limits of waters of the United States. This change was made for clarification and resulted from consultation with the Environmental Protection Agency.

**Section 328.6: Supplemental Clarification.** Most commenters favored the Corps plans to give special consideration to unique areas such as Arctic Tundra that do not easily fit the generic "wetlands" definition. Several

commenters indicated that the Corps should clarify its intended use of this section, and one questioned the need to "describe" unique areas in the Federal Register. A number of commenters indicated that criteria should be specified for determining wetland types to be included as unique areas. Some commenters stated that close coordination between the Corps and the Environmental Protection Agency will be necessary when selecting unique areas and developing procedures for making wetland determinations in such areas, since the Environmental Protection Agency has the final authority to determine the scope of "Waters of the United States."

While we believe that supplemental clarification of unique areas will be a positive step in clarifying the scope of jurisdiction under the section 404 permit program, we have determined that such supplemental clarification can be done under existing regulations of the Environmental Protection Agency and the Corps and therefore have deleted this section.

#### Part 329—Definition of Navigable Waters of the United States

We are currently planning to propose a complete revision of Part 329 in the near future, to simplify and clarify the procedures involved, while retaining the essential aspects of the relevant policy. In the interim, we are making the two minor changes discussed below.

**Section 329.11:** This section has been modified to clarify that the lateral extent of jurisdiction in rivers and lakes extends to the edge of all such waterbodies as it does in bays and estuaries (§ 329.12(b)).

**Section 329.12(a):** This section has been corrected to reflect that the territorial seas, for the purpose of Rivers and Harbors Act of 1899 jurisdiction, extend 3 geographic miles everywhere and are measured from the baseline.

#### Part 330—Nationwide Permits

We are reissuing the 26 nationwide permits at § 330.5(a) as modified and conditioned. The nationwide permits will be in effect for 5 years beginning with the effective date of this regulation, unless sooner revised or revoked.

**Section 330.1:** This section was restructured and updated in order to improve its readability and technical accuracy. The definition concerning the division engineer's discretionary authority was deleted from this section since similar language appears in § 330.2. "Definitions." The discussion concerning the applicability of nationwide permits as they relate to

other Federal, state, and local authorizations was deleted from this section and relocated to § 330.5(d) "Further Information."

**Section 330.2** The definition of the term "headwaters" was deleted from Part 323 and relocated to § 330.2(b), since the definition was used as part of the nationwide permit program. The definition of the term "natural lake" which was proposed at § 330.2(c) has been deleted. Changes to the "headwaters"/"isolate waters" nationwide permit which is found at § 330.5(a)(26) have addressed the need for this definition.

**Section 330.5.** In order to better inform the public of the statutory authority under which each nationwide permit has been issued, we have added the authority by parenthetical expression at the end of each nationwide permit.

We had proposed nationwide permits for activities funded or authorized by another Federal agency or department and for activities adjacent to Corps of Engineers civil works projects. Most commenters discussed the two proposed nationwide permits together. The most frequent comments questioned whether they would comply with section 404(e) of the CWA. They believed these nationwide permits could authorize a wide variety of Federal projects that would not be similar in nature and projects which could have significant adverse environmental impacts on aquatic resources. Numerous commenters stated that the Corps would be delegating its 404(b)(1) compliance responsibilities to other agencies and that there is a natural tendency of such agencies to be self-serving. Many commenters, including some states, objected that the public and other agencies would not have an opportunity to review some large individual projects. Many commenters encouraged the adoption of these nationwide permits. In most cases they based their opinion upon reduction in duplication and the expediting of project authorization. Based on the comments received we have decided that clarification of activities that could be covered by nationwide permits would be necessary to insure proper understanding and field application. Because of the complexity of doing this and an evaluation of the comments received, we have decided not to adopt these two nationwide permits.

**Section 330.5(a)(3):** This nationwide permit for repair, rehabilitation or replacement of existing structures or fill has been clarified to show that beach restoration is not authorized by this nationwide permit.

**Section 330.5(a)(6):** This nationwide permit for survey activities was clarified to show that it does not authorize the drilling of exploration-type bore holes for oil and gas exploration.

**Section 330.5(a)(7):** This nationwide permit for outfall structures was clarified by adding language concerning minor excavation, filling and other work which is routinely associated with the installation of intake and outfall structures.

**Section 330.5(a)(18):** This nationwide permit for discharges up to 10 cubic yards was clarified by indicating that it does not authorize discharges for the purpose of stream diversion. The footnote was deleted because it was redundant with the terms of the nationwide permit itself.

**Section 330.5(a)(19):** This nationwide permit for dredging up to 10 cubic yards was clarified by indicating that it does not authorize the connection of canals or other artificial waterways to navigable waters of the United States.

**Section 330.5(a)(22):** This nationwide permit for the removal of obstructions to navigation was clarified by indicating that it does not authorize maintenance dredging, shoal removal, or riverbank snagging.

**Section 330.5(b)(3):** This condition for the protection of endangered species was modified to set forth more clearly options available to the district engineer to satisfy section 7 of the Endangered Species Act when it has been determined that an activity may adversely affect any listed endangered species or its critical habitat.

**Section 330.5(b)(7):** This condition for the protection of wild and scenic rivers was modified to define more clearly components of the National Wild and Scenic River System by showing that it includes any Congressionally designated "study river."

**Section 330.5(b)(9):** This condition for the protection of historic properties was added in response to numerous comments which expressed concern for an apparent lack of consideration which was being given historic properties. This condition outlines the procedures to be followed by both the permittee and the district engineer to provide for modification, suspension, or revocation of a nationwide permit or contact with the Advisory Council on Historic Preservation if an activity authorized by a nationwide permit may adversely affect an historic property.

**Section 330.5(b)(10):** This condition was added as a result of comments which expressed concern that activities performed under the nationwide permits could impair reserved tribal rights.

**Section 330.5(b)(11) and (12):** These conditions were adopted as proposed to provide notification to the public within certain states, authorize the activity may have been denied without prejudice as a result of a state's water quality certification denial or nonconcurrence with Coastal Zone Management consistency. These conditions trigger the provisions of §§ 330.9 and 330.10.

**Section 330.5(b)(13):** This condition was added to alert the public that regional conditions may have been added by the division engineer in accordance with § 330.8(a).

**Section 330.5(c):** The Grandfathering provision included in the October 5, 1984, final regulations expires on April 5, 1986, before the effective date of these regulations and is, therefore, no longer needed and has been deleted. A new paragraph has been added to provide the public further information on nationwide permits as they relate to such things as compliance with conditions, other required authorizations, property rights, Federal projects, and revised or modified water quality standards.

**Section 330.5(d):** This paragraph has been added to clarify that the Chief of Engineers has the authority to modify, suspend, or revoke any nationwide permit.

Some states indicated in their comments that there might be other ways to reduce burdens on the public within their state other than the nationwide permits. One state suggested that it might be appropriate to revoke all the nationwide permits in favor of regional permits subject to interagency review. The authority exists for the Chief of Engineers to revoke some or all of the nationwide permits within a state. There are also existing provisions in the regulations for district engineers and the states to develop a permit system designed around specific state authorities. These existing provisions include regional general permits, programmatic general permits, transfer of the 404 program (see 33 CFR 323.5), joint processing, permit consolidation, preapplication consultation and special areas management planning. Before adopting a permit system designed around specific state authorities, a public notice providing an opportunity for a public hearing would be issued outlining the proposed permit system within the state and the proposal to revoke the nationwide permits. If such a system is developed, the Chief of Engineers will consider revoking all or most of the nationwide permits within a state.

**Section 330.8(a):** The concept of case-by-case regional conditioning authority received overwhelming support. This new paragraph allows the division engineer through discretionary authority to add activity specific conditions to nationwide permits on a case-by-case basis. The district engineer may do the same when there is mutual agreement with the permittee or when conditions are necessary based on conditions of a state 401 certification.

**Section 330.8(c):** This paragraph was modified to clarify that, although the division engineer has used discretionary authority to require individual permits, he may subsequently allow the activity to be authorized by nationwide permit if the impediment to using the nationwide permit, which triggered the discretionary authority, has been removed.

**Section 330.8(c)(2):** This paragraph has been modified to allow division engineers the discretionary authority to require individual permits for categories of activities or specific geographic areas. This authority was previously exercised by the Chief of Engineers. However, the Chief of Engineers is retaining this authority on a statewide or nationwide basis.

**Section 330.9:** Many commenters objected to the issuance of nationwide permits when a state denies 401 certification. Their objections were based on the Clean Water Act requirement that "No license or permit shall be granted until the certification . . . has been obtained or has been waived." Commenters expressed strong concerns about the validity of such permits, and stated that issuance would constitute a de facto transfer of the administration of this portion of the 404 permit program to the objecting states. An attendant concern was that, if states were unable to respond within the time specified by the Corps, a waiver would be presumed, and the nationwide permit would become effective, whether or not this would have been the intent of the state. Some commenters suggested that states would be forced to deny certifications because of inadequate time to ensure that proposed activities would not violate water quality standards. Most commenters opposed district engineers having discretionary authority over conditions to the 401 certification. One commenter believes this authority conflicts with states' rights. Another suggested that the proposed action could prod states into adopting their own wetland laws and regulatory programs. Several commenters supported the proposal, stating that it was a means of preserving the utility of the general permit program.

Section 330.9 has been modified to provide that, if a state denies a required 401 certification for a particular nationwide permit, then authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. We did not adopt the 30 day waiver period but rather will rely on the language at § 325.2(b)(1) which defines a reasonable period of time. This section was also modified to notify the public that the district engineer will include conditions of the 401 water quality certification as special conditions of the nationwide permit.

**Section 330.9(b):** This subsection has been added to notify the public of the certification requirements of the various nationwide permits.

**Section 330.10:** A number of coastal states commented that consistency determination or waiver thereof must have been obtained prior to the promulgation of the nationwide permits. Some commenters asserted that such a requirement is not a statutory prerequisite to permit issuance. Others contend that assuming a waiver of certification preempts the individual state's authority and thwarts Congressional intent that the permit process involves oversight by the state as well as Federal agencies.

Section 330.10 has been modified to state that, in certain instances where a state has not concurred that a particular nationwide permit is consistent with its coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has either concurred in that determination or waived its right to do so.

**Section 330.11:** This subsection was added to clarify existing procedures to establish a time limit in which a permittee may rely on confirmation from the district engineer that an activity is covered by a nationwide permit, and to specify procedures to modify, suspend, or revoke the permittee's right to proceed under the nationwide permit after the district engineer notified the permittee that the activity may proceed.

**Section 330.12:** This subsection was modified to provide a twelve month transition period for projects which may be affected by future changes in

nationwide permits. After considering equity established in reliance on the nationwide permit and that the public will in all likelihood receive ample notice of proposed changes, we believe that this transition period is both reasonable and equitable. In addition, if necessary on a case-by-case basis we can, even though there is a grandfather provision, exercise discretionary authority pursuant to § 330.8 or modify, suspend or revoke individual authorization pursuant to 33 CFR 325.7.

#### *State Certification of Nationwide Permits*

Most states have issued or waived 401 certification and/or Coastal Zone Management consistency concurrence for one or more of the twenty six nationwide permits. Many states have issued a conditional certification and some have denied certification/consistency concurrence. Final action is still pending in some of the states but is imminent. The primary mechanism for keeping the public informed of the status and/or changes in state certifications or Coastal Zone Management consistency concurrence will be public notices issued by the district engineers within the affected states. The district engineers will be issuing public notices concurrent with the publication of these regulations. Subsequent notices will be issued as changes occur.

Listed below are those states which, as of the date of this printing, have either denied or conditionally issued 401 certification and/or coastal zone management consistency concurrence for one or more of the nationwide permits. For more current and detailed information you should consult with the appropriate district engineer.

Alaska, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia and Wisconsin.

Determinations under Executive Order 12291 and the Regulatory Flexibility Act. The Department of the Army has determined that the revisions to these regulations do not contain a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. The Department of the Army certifies, pursuant to section 805(b) of the Regulatory Flexibility Act of 1980, that these regulations will not have a significant economic impact on a substantial number of entities.

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.

#### 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 328

Navigation. Water pollution control.  
Waterways.

##### 33 CFR Part 329

Waterways.

##### 33 CFR Part 330

Navigation. Water pollution control.  
Waterways.

Dated: November 4, 1986.

Robert K. Dawson,

Assistant Secretary of the Army (Civil  
Works).

Accordingly, the Department of the  
Army, is revising 33 CFR Parts 320, 321,  
322, 323, 324, 325, 326, 327, 329, and 330  
and adding Part 328 to read as follows:

#### PART 320—GENERAL REGULATORY POLICIES

##### Sec.

320.1 Purpose and scope.

320.2 Authorities to issue permits.

320.3 Related laws.

##### Sec.

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 1966, 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 has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been delegated 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 is neither a proponent nor opponent of any permit proposal. However, the Corps believes that applicants are due a timely decision. 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. The Corps uses general permits, joint processing procedures, interagency review, coordination, and authority transfers (where authorized by law) to reduce duplication.

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to

this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

(b) *Types of activities regulated.* This Part and the Parts 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 (DA) permits for controlling certain activities in waters of the United States or the oceans. This part identifies the various federal statutes which require that DA permits be issued before these activities can be lawfully undertaken, and related Federal laws and the general policies applicable to the review of those activities. Parts 321-324 and 330 address special policies and procedures applicable to the following specific classes of activities:

(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 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 activities (Part 330).

(c) *Forms of authorization.* DA permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of individual applications and general permits that authorize a category or categories of activities in specific geographical regions 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 which are issued by the Chief of Engineers through publication in the Federal Register and are 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 DA 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 DA permit. In certain cases pre-notification may be required before initiating construction. (See 33 CFR 330.7)

(d) *General instructions.* General policies for evaluating permit applications are found in this part. Special policies that relate to particular activities are found in Parts 321 through 324. The procedures for processing individual permits and general permits are contained in 33 CFR Part 325. 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 Rivers and Harbors Act of 1899. "Waters of the United States" are defined in 33 CFR Part 328. 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 Rivers and Harbors 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 (See 33 CFR Part 321.) Section 9 also pertains to bridges and causeways but 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)). A DA 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 Rivers and Harbors 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 excavating 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 navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, by section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See 33 CFR Part 322.)

(c) Section 11 of the Rivers and Harbors 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 Rivers and Harbors 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, (33 U.S.C. 1342 and 1345) (See 40 CFR Parts 124 and 125.)

(e) Section 14 of the Rivers and Harbors 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 at 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 Part 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers shall consider the economic impact on navigation and anchorage of such a prohibition in reaching his decision. Furthermore, the Administrator can deny, prohibit, restrict or withdraw the use of any defined area as a disposal site 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 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 hearing, 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 220-228. 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 33 CFR Part 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 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, 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 325.)

(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), 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 or 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 Federal Energy Regulatory Agency (FERC) to issue licenses for the construction and the 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 water 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 DA recommendation to FERC for the inclusion of appropriate provisions in the FERC license rather than the issuance of a separate DA permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction and the operation and maintenance of physical structures licensed by FERC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *c. 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 DA 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 30 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 U.S. 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 50 CFR Part 17 and 50 CFR Part 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 section 320.2 and the policies specified in section 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, section 103 and other DA 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 most 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 U.S. Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

(o) The National Fishing Enhancement Act of 1984 (Pub. L. 98-823) provides for the development of a National Artificial Reef Plan to promote and facilitate responsible and effective efforts to establish artificial reefs. The Act establishes procedures to be followed by the Corps in issuing DA permits for artificial reefs. The Act also establishes the liability of the permittee and the United States. The Act further creates a

civil penalty for violation of any provision of a permit issued for an artificial reef.

#### § 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for DA permits. Additional policies specifically applicable to certain types of activities are identified in 33 CFR Parts 321-324.

(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, 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 this 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, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to 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 is likely to have on the public and private uses to which the area is suited.

(3) The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise.

(b) *Effect on wetlands.* (1) Most wetlands 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 or partially or entirely funded by a federal, state, or local agency, additional requirements on wetlands considerations are 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 ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas.

(vii) Wetlands which serve significant water purification functions; and  
(viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

(3) Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of 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, where appropriate, reviews of particular wetland areas in consultation with the Regional Director of the U. S. 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) of this section or 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 discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR Part 230.10(a) (1), (2), (3)).

(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 considered.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this section) district engineers 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. The Army will give full consideration to the

views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits.

(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. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. 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 DA permits 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, historic properties and National 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 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) *Effects 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 low tide 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, DC 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) *Consideration of property ownership.* Authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) An inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.

(2) Because a landowner has the general right to protect 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 appears contrary to 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.

(3) 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.

(4) 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 Rivers and Harbors 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.

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

(6) A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application. The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps' public interest decision.

(h) *Activities affecting coastal zones.* Applications for DA 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 interest of national security. Federal agency and Indian tribe applicants for DA 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 DA 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 DA permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the DA 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 authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application, the district engineer will, after considering the likelihood of subsequent approval of the other authorization and/or certification and the time and effort remaining to complete processing the Army permit application, either immediately deny the Army permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, he will conclude by either denying the permit as contrary to the public interest, or denying it without prejudice indicating that except for the other Federal, state or local denial the Army permit could, under appropriate conditions, be issued. Denial without prejudice means that there is no prejudice to the right of the applicant to reinstate processing of the Army permit.

application if subsequent approval is received from the appropriate Federal, state and/or local agency on a previously denied authorization and/or certification. 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) The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

(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 Parts 320-324, and the applicable statutes have been considered and followed, 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. Similarly, 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) Where general permits to avoid duplication are not practical, district engineers shall develop joint procedures with those local, state, and other Federal agencies having ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for DA permits may be processed jointly with the state or other federal applications to an independent conclusion and decision by the district engineer and the 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 this 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 structures comply with established state dam safety criteria or have 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 values (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 11888,

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 are restored and preserved.

(3) In accordance with Executive Order 11888, the district engineer should avoid authorizing floodplain developments whenever practicable alternatives exist outside the floodplain. If there are no such practicable alternatives, the district engineer shall 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 effect the availability of water for alternative uses including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. Actions affecting water quantities are subject to Congressional policy as stated in section 101(g) of the Clean Water Act which provides 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 are major national objectives. District engineers will give high priority to the processing of permit actions involving energy projects.

(o) *Navigation.* (1) Section 11 of the Rivers and Harbors 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 19, 1979 (33 CFR 209.150) which declared that permits would 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 27 May 1970 do not require specific authorization.

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

(3) Protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government.

(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.

(p) *Environmental benefits.* Some activities that require Department of the Army permits result in beneficial effects to the quality of the environment. The district engineer will weigh these benefits as well as environmental detriments along with other factors of the public interest.

(q) *Economics.* When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values. Many projects also contribute to the National Economic Development (NED), (i.e., the increase in the net value of the national output of goods and services).

(r) *Mitigation.*<sup>1</sup> (1) Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application

<sup>1</sup> This is a general statement of mitigation policy which applies to all Corps of Engineers regulatory authorities covered by these regulations (33 CFR Parts 320-326). It is not a substitute for the mitigation requirements necessary to ensure that a permit action under section 404 of the Clean Water Act complies with the section 404(b)(1) Guidelines. There is currently an interagency Working Group formed to develop guidance on implementing mitigation requirements of the Guidelines.

review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location. Mitigation requirements generally fall into three categories.

(i) Project modifications to minimize adverse project impacts should be discussed with the applicant at pre-application meetings and during application processing. As a result of these discussions and as the district engineer's evaluation proceeds, the district engineer may require minor project modifications. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need. Such modifications can include reductions in scope and size; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed. For example, erosion control features could be required on a fill project to reduce sedimentation impacts or a pier could be reoriented to minimize navigational problems even though those projects may satisfy all legal requirements (paragraph (r)(1)(ii) of this section) and the public interest review test (paragraph (r)(1)(iii) of this section) without such modifications.

(ii) Further mitigation measures may be required to satisfy legal requirements. For Section 404 applications, mitigation shall be required to ensure that the project complies with the 404(b)(1) Guidelines. Some mitigation measures are enumerated at 40 CFR 230.70 through 40 CFR 230.77 (Subpart H of the 404(b)(1) Guidelines).

(iii) Mitigation measures in addition to those under paragraphs (r)(1)(i) and (ii) of this section may be required as a result of the public interest review process. (See 33 CFR 325.4(a).) Mitigation should be developed and incorporated within the public interest review process to the extent that the mitigation is found by the district engineer to be reasonable and justified. Only those measures required to ensure that the project is not contrary to the public interest may be required under this subparagraph.

(2) All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the

human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. District engineers will require all forms of mitigation, including compensatory mitigation only as provided in paragraphs (r)(1)(i) through (iii) of this section. Additional mitigation may be added at the applicants' request.

## 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 the Army (DA) permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to section 9 of the Rivers and Harbors 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 DA permits under section 404 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for DA 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, for the purposes of section 9, any impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce. The term does not include a weir. Weirs are regulated pursuant to section 10 of the Rivers and Harbors 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 permit applications under this regulation:

(a) The Assistant Secretary of the Army (Civil Works) will decide whether DA authorization for a dam or dike in an interstate 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 Assistant Secretary of the Army (Civil Works), through the Chief of Engineers.

(b) District engineers are authorized to decide whether DA authorization for a dam or dike in an intrastate navigable water of the United States will be issued (see 33 CFR 325.8).

(c) Processing a DA 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 an intrastate waterbody (i.e., the navigable portion of 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	Activities not requiring permits
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 the Army (DA) permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) (hereinafter referred to as section 10). See 33 CFR 320.2(b). Certain structures

or work in or affecting navigable waters of the United States are also regulated under other authorities of the DA. 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 DA 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 DA 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" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 329. Generally, they are 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.

(b) The term "structure" shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, 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 DA 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 Part 325, and a

determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320

(f) The term "general permit" means a DA authorization that is issued on a nationwide or regional 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.)

(g) The term "artificial reef" means a structure which is constructed or placed in the navigable waters of the United States or in the waters overlying the outer continental shelf for the purpose of enhancing fishery resources and commercial and recreational fishing opportunities. The term does not include activities or structures such as wing deflectors, bank stabilization, grade stabilization structures, or low flow key ways, all of which may be useful to enhance fisheries resources.

**§ 322.3 Activities requiring permits.**

(a) General DA 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 § 322.4 below. Certain activities specified in 33 CFR Part 330 are permitted by that regulation ("nationwide general permits"). Other activities may be authorized by district or division engineers on a regional basis ("regional general permits"). If an activity is not exempted by section 322.4 of this part or authorized by a general permit, an individual section 10 permit will be required for the proposed activity. Structures or work are in 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 its navigable capacity. 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.

(b) Outer continental shelf DA permits are required for the construction



of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf, pursuant to section 4(f) 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 paragraph, activities of the type described in paragraphs (a) and (b) of this section, done by or on behalf of any Federal agency are subject to the authorization procedures of these regulations. 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, unless covered by a nationwide or regional general permit issued pursuant to these regulations, are subject to the procedures of separate 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 in section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States, upon recommendation of the Chief of Engineers. 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 Activities not requiring permits.

(a) Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR 320.4(o)) do not require section 10 permits, however, if these 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.)

(b) Pursuant to section 154 of the Water Resource Development Act of 1976 (Pub. L. 94-587), Department of the Army permits are not 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.

#### § 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.* DA 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) *Artificial Reefs.* (1) When considering an application for an artificial reef, as defined in 33 CFR 322.2(g), the district engineer will review the applicant's provisions for siting, constructing, monitoring, operating, maintaining, and managing the proposed artificial reef and shall determine if those provisions are consistent with the following standards:

(i) The enhancement of fishery resources to the maximum extent practicable;

(ii) The facilitation of access and utilization by United States recreational and commercial fishermen;

(iii) The minimization of conflicts among competing uses of the navigable waters or waters overlying the outer continental shelf and of the resources in such waters;

(iv) The minimization of environmental risks and risks to personal health and property;

(v) Generally accepted principles of international law; and

(vi) The prevention of any unreasonable obstructions to navigation. If the district engineer decides that the

applicant's provisions are not consistent with these standards, he shall deny the permit. If the district engineer decides that the provisions are consistent with these standards, and if he decides to issue the permit after the public interest review, he shall make the provisions part of the permit.

(2) In addition, the district engineer will consider the National Artificial Reef Plan developed pursuant to section 204 of the National Fishing Enhancement Act of 1984, and if he decides to issue the permit, will notify the Secretary of Commerce of any need to deviate from that plan.

(3) The district engineer will comply with all coordination provisions required by a written agreement between the DOD and the Federal agencies relative to artificial reefs. In addition, if the district engineer decides that further consultation beyond the normal public commenting process is required to evaluate fully the proposed artificial reef, he may initiate such consultation with any Federal agency, state or local government, or other interested party.

(4) The district engineer will issue a permit for the proposed artificial reef only if the applicant demonstrates, to the district engineer's satisfaction, that the title to the artificial reef construction material is unambiguous, that responsibility for maintenance of the reef is clearly established, and that he has the financial ability to assume liability for all damages that may arise with respect to the proposed artificial reef. A demonstration of financial responsibility might include evidence of insurance, sponsorship, or available assets.

(i) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall not be liable for damages caused by activities required to be undertaken under any terms and conditions of the permit, if the permittee is in compliance with such terms and conditions.

(ii) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall be liable, to the extent determined under applicable law, for damages to which paragraph (i) does not apply.

(iii) Any person who has transferred title to artificial reef construction materials to a person to whom a permit is issued in accordance with these regulations shall not be liable for damages arising from the use of such materials in an artificial reef, if such materials meet applicable requirements

of the plan published under section 204 of the National Artificial Reef Plan, and are not otherwise defective at the time title is transferred.

(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 be accorded to the fullest extent possible to both Federal and non-Federal operations. 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 it in ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* (1) 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. District engineers will encourage cooperative or group use facilities in lieu of individual proprietary 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 of this section, 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 Rivers and Harbors Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of its 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 330.5(a)(1)). 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.* Artificial islands, installations, and other devices located on the seabed, to the seaward

limit of 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 Mineral Management Service, 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 artificial waterways connected to navigable waters of the United States.* 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. The district engineer will consider, for applications for canal work, 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.

(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 nuclear

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)(c), 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 and/or things, to or from a foreign country. (Executive Order 11423, August 16, 1968).

(5) A DA permit under section 10 of the Rivers and Harbors 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 DA 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 and 324.)

(i) **Power transmission lines.** (1) Permits under section 10 of the Rivers and Harbors 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 power project, the applicant will be instructed to submit 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 or span, and type of supports as outlined in the National Electrical Safety Code.

Normal system voltage, kV	Minimum additional clearance (feet) above clearance required for bridges
115 and below	20
138	22
161	24
230	26
300	30
500	35
750	42
750-765	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.

(4) Corps of Engineer regulation ER 1110-2-4401 prescribes minimum vertical clearances for power and communication lines over Corps lake projects. In instances where both this regulation and ER 1110-2-4401 apply, the greater minimum clearance is required.

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

(2) The FAA must be notified 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 Department of Transportation, 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 36 CFR 327.4.

(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.

(l) **Shipping safety fairways and anchorage areas.** DA permits are required for structures located within shipping safety fairways and anchorage areas established by the U.S. Coast Guard.

(1) The Department of the Army will grant no permits for the erection of structures in areas designated as fairways, except that district engineers may permit temporary anchors and attendant cables or chains for floating or semisubmersible drilling rigs to be placed within a fairway provided the following conditions are met:

(i) The installation of anchors to stabilize semisubmersible drilling rigs within fairways must be temporary and shall be allowed to remain only 120 days. This period may be extended by the district engineer provided reasonable cause for such extension exists.

be shown and the extension is otherwise justified.

(ii) Drilling rigs must be at least 500 feet from any fairway boundary or whatever distance necessary to insure that minimum clearance over an anchor line within a fairway will be 125 feet.

(iii) No anchor buoys or floats or related rigging will be allowed on the surface of the water or to a depth of 125 feet from the surface, within the fairway.

(iv) Drilling rigs may not be placed closer than 2 nautical miles of any other drilling rig situated along a fairway boundary, and not closer than 3 nautical miles to any drilling rig located on the opposite side of the fairway.

(v) The permittee must notify the district engineer, Bureau of Land Management, Mineral Management Service, U.S. Coast Guard, National Oceanic and Atmospheric Administration and the U.S. Navy Hydrographic Office of the approximate dates (commencement and completion) the anchors will be in place to insure maximum notification to mariners.

(vi) Navigation aids or danger markings must be installed as required by the U.S. Coast Guard.

(2) District engineers may grant permits for the erection of structures within an area designated as an anchorage area, but the number of structures will be limited by spacing, as follows: The center of a structure to be erected shall be not less than two (2) nautical miles from the center of any existing structure. In a drilling or production complex, associated structures shall be as close together as practicable having due consideration for the safety factors involved. A complex of associated structures, when connected by walkways, shall be considered one structure for the purpose of spacing. A vessel fixed in place by moorings and used in conjunction with the associated structures of a drilling or production complex, shall be considered an attendant vessel and its extent shall include its moorings. When a drilling or production complex includes an attendant vessel and the complex extends more than five hundred (500) yards from the center of the complex, a structure to be erected shall be not closer than two (2) nautical miles from the near outer limit of the complex. An underwater completion installation in an anchorage area shall be considered a structure and shall be marked with a lighted buoy as approved by the United States Coast Guard.

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

##### Sec.

323.1 General.

323.2 Definitions.

323.3 Discharges requiring permits.

323.4 Discharges not requiring permits.

323.5 Program transfer to states.

323.6 Special policies and procedures.

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 DA 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 (CWA) (33 U.S.C. 1344) (hereinafter referred to as section 404). (See 33 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 Rivers and Harbors 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 Rivers and Harbors Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A DA 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 DA 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 part, the following terms are defined:

(a) The term "waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 328.

(b) 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.

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

(d) 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 (See § 323.4 for the definition of these terms). The term does not include *de minimis*, incidental soil movement occurring during normal dredging operations.

(e) 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 a 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.

(f) 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 for 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, groin, 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. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms)

(g) 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 part and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(h) The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional 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 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 of this Part, DA 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 Part 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 and must be in accordance with definitions in § 323.4(a)(1)(iii). 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. (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 discharges 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 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 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 as described above 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 siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(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 the 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 Part 233.22(i), 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 roads 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 the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 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, 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. For example,

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 conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. 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 the CWA are exempt from section 404 permit requirements, but may be subject to other state or Federal requirements.

#### § 321.5 Program transfer to states.

Section 404(h) of the CWA allows the Administrator of the Environmental Protection Agency (EPA) to transfer administration of the section 404 permit program for discharges into certain waters of the United States to 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 49 CFR Parts 233 and 124 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved and in effect, 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.

#### § 321.6 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. The district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated

by the Administrator, EPA, under authority of section 404(b)(1) of the CWA. (see 40 CFR Part 230.) Subject to consideration of any economic impact on navigation and anchorage pursuant to section 404(b)(2), a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be contrary to 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 U.S.C. 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 (DA) 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 49 CFR Part 228 pursuant to 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). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require DA permits under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) for the dredging in navigable waters of the United States. Applicants for DA 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 conveyance and related handling of dredged material by a vessel or other vehicle.

#### § 324.3 Activities requiring permits.

(a) *General.* DA 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 is 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 320.143.

(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 responsible for conformance with such laws and policies. (See EO 12088, October 18, 1978.) Federal agencies are not required 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, amenities, or the marine environment, ecological systems, or economic potentialities. District engineers will apply the criteria established by the Administrator of EPA pursuant to section 102 of the Marine Protection, Research and Sanctuaries Act of 1972 in making this evaluation. (See 40 CFR Parts 220-229) 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.

(c) *EPA review.* When the Regional Administrator, EPA, in accordance with 40 CFR 225.2(b), advises the district engineer, in writing, that the proposed dumping will comply with the criteria, the district engineer will complete his evaluation of the application under this part and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the district engineer, in writing, that the proposed dumping does not comply with the criteria, the district engineer will proceed as follows:

(1) The district engineer will 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 them in accordance with 33 CFR Parts 320, 322, 323, and 325 and this Part, as appropriate.

(2) If the district engineer determines that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be not contrary to the public interest, he will so advise the Regional Administrator setting forth his reasons for such determination. If the Regional Administrator has not removed his objection within 15 days, the district engineer will submit a report of his determination to the Chief of Engineers

for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain the analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(d) *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.
- 325.2 Processing of applications.
- 325.3 Public notice.
- 325.4 Conditioning of permits.
- 325.5 Forms of permits.
- 325.6 Duration of permits.
- 325.7 Modification, suspension, or revocation of permits.
- 325.8 Authority to issue or deny permits.
- 325.9 Authority to determine jurisdiction.
- 325.10 Publicity.

Appendix A—Permit Form and Special Conditions

Appendix B—Reserved (For Future NEPA Regulation)

Appendix C—Reserved (For Historic Properties Regulation)

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

#### § 325.1 Applications for permits.

(a) *General.* The processing procedures of this Part apply to any Department of the Army (DA) permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324, 327 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for DA 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 foreseeably required for later Federal action. The district engineer will establish local procedures and policies including appropriate publicity programs which will allow

potential applicants to contact the district engineer or the regulatory 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 potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application. The district engineer will endeavor, at this stage, to provide the potential 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 DA permit and which may 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 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 potential applicant or his consultants so as to assure that the potential 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) in accordance with 33 CFR Part 230, Appendix B.

(c) *Application form.* Applicants for all individual DA permits must use the standard application form (ENG Form 4345, OMB Approval No. OMB 49-R0420). Local variations of the application form for purposes of facilitating coordination with federal, state and local agencies may be used. The appropriate form may be obtained from the district office having



jurisdiction over the waters in which the activity is proposed to be located. Certain activities have been authorized by general permits and do not require submission of an application form but may require a separate notification.

(d) *Content of application.* (1) The application must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice (detailed engineering plans and specifications are not required); the location, purpose and need for 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 § 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms but may request specific information on a case-by-case basis. (See § 325.3(e)).

(2) All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA 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 into 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) *Signature on application.* The application must be signed by the person who desires to undertake the proposed activity (i.e. the applicant) or by a duly authorized agent. When the applicant is represented by an agent, that information will be included in the space provided on the application or by a separate written statement. The signature of the applicant or the agent will be an affirmation that the applicant possesses or will possess 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.

(8) If the activity would involve the construction or placement of an artificial reef, as defined in 33 CFR 322.2(g), in the navigable waters of the United States or in the waters overlying the outer continental shelf, the application must include provisions for siting, constructing, monitoring, and managing the artificial reef.

(9) *Complete application.* An application will be determined to be complete when sufficient information is received to issue a public notice (See 33 CFR 325.3(d) and 325.3(a)). The issuance of a public notice will not be delayed to obtain information necessary to evaluate an application.

(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 make a public interest determination including, where applicable, a determination of compliance with the section 404(b)(1) guidelines or ocean

dumping criteria. 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 Rivers and Harbors 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 not contrary to the public interest. 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 an application the district engineer will either determine that the application is complete (see 33 CFR 325.1(d)(9)) and issue a public notice as described in § 325.3 of this Part, unless specifically exempted by other provisions of this

regulation or that it is incomplete and notify the applicant of the information necessary for a complete application. 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, if appropriate, 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 advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see § 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process. The district engineer should not delay processing of the application unless the applicant requests a reasonable delay, normally not to exceed 30 days, to provide additional information or comments.

(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 decision on 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 into 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 district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 326.4(f) (2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. 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 Section 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 a 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. District engineers will generally combine the SOF, environmental assessment, and findings of no significant impact (FONSI), 404(b)(1) guideline analysis, and/or the criteria for dumping of dredged material in ocean waters into a single document.

(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 the permit to the applicant for signature accepting the conditions of the permit. The permit is not valid until signed by the issuing official. Letters of permission require only the signature of the issuing official. 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, DC 20390 Attention, Code NS12, and to the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, 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 the Defense Mapping Agency, Hydrographic Center and National Ocean Service as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreation Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(iii) If the activity involves the erection of an aerial transmission, submerged cable, or submerged pipeline

across a navigable water of the United States, to the Charting and Geodetic Services N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852

(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) *Section 401 Water Quality Certification.* 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 § 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 determines 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 Part 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. A 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. 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) *Coastal Zone Management Consistency.* 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 (CZM) 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 CZM Act's directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved CZM 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 CZM 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 CZM 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 CZM 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 CZM 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 will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

(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) *Historic Properties.* 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 Historic Preservation Act implementing regulations.

(4) *Activities Associated with Federal Projects.* If the proposed activity would consist of the 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 § 322.5(c).)

(5) *Endangered Species.* Applications will be reviewed for the potential impact on threatened or endangered species pursuant to section 7 of the Endangered Species Act as amended. The district engineer will include a statement in the public notice of his current knowledge of endangered species based on his initial review of the application (see 33 CFR 325.2(a)(2)). 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 the proposed activity may affect an endangered or threatened species or their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. 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 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 paragraph 325.1(d) of this Part.

(2) The comment period on the public notice should be for a reasonable period of time within which interested parties

may express their views concerning the permit. The comment period should not be more than 30 days nor less than 15 days from the date of the notice. Before designating comment periods less than 30 days, the district engineer will consider: (i) Whether the proposal is routine or noncontroversial, (ii) mail time and need for comments from remote areas, (iii) comments from similar proposals, and (iv) the need for a site visit. After considering the length of the original comment period, paragraphs (a)(2) (i) through (iv) of this section, and other pertinent factors, the district engineer may extend the comment period up to an additional 30 days if warranted.

(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 § 325.8 of this Part), (iii) the comment period is extended, (iv) a timely submittal of information or comments 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 CZM 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 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

DA 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 DA permit. In unusual cases 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 DA permit while deferring his final decision.

(5) The applicant will be given a reasonable time, not to exceed 30 days, to respond to requests of the district engineer. The district engineer may make such requests by certified letter and clearly inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate. If additional time is requested, the district engineer will either grant the time, make a final decision, or consider the application as withdrawn.

(6) The time requirements in these regulations are in terms of calendar days rather than in terms of working days.

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

(1) *Letters of permission.* Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice. The letter of permission will not be used to authorize the transportation of dredged material for the purpose of dumping it in ocean waters. Letters of permission may be used:

(i) In those cases subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

(ii) In those cases subject to section 404 of the Clean Water Act after:

(A) The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional

Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures.

(B) The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and

(C) A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.

(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 contrary to the public interest provided the procedures of § 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 (a)(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 notice 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 NEPA (see paragraph 7 of Appendix B to 33 CFR Part 230);

(10) A statement of the district engineer's current knowledge on historic properties;

(11) A statement of the district engineer's current knowledge on endangered species (see § 325.2(b)(5));

(12) A statement(s) on evaluation factors (see § 325.3(c));

(13) 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;

(14) The comment period based on § 325.2(d)(2);

(15) 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.

(16) For non-federal applications in states with an approved CZM Plan, a statement on compliance with the approved Plan; and

(17) 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 discharges 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) *Public notice for general permits.* District engineers will publish a public notice for all proposed regional general permits and for significant modifications to, or reissuance of, existing regional permits within their area of jurisdiction. Public notices for statewide regional permits may be issued jointly by the affected Corps districts. The notice will include all applicable information necessary to provide a clear understanding of the proposal. In addition, the notice will state the availability of information at the district office which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance of general permits. District engineers will publish a public notice for nationwide permits in accordance with 33 CFR 330.4.

(c) *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 (c)(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 proposal 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, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership 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 of the activity on the public interest will include application of the guidelines promulgated by the Administrator, EPA, (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 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."

(d) *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 representatives, 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-65, 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, DC 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, Installations, and Logistics (ASD(MI&L)), Washington, DC 20310, the Director, Defense Mapping Agency (Hydrographic Center) Washington, DC 20390, Attention, Code NS12, and the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, 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, DC 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, DC 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 addressees 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 constituent or himself, the district engineer will inform the member of Congress of the final decision.

(4) District engineers will update public notice mailing lists at least once every two years.

#### § 325.4. Conditioning of permits.

(a) District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirements. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

(1) Legal requirements which may be satisfied by means of Corps permit conditions include compliance with the 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state section 401 water quality certifications.

(2) Where appropriate, the district engineer may take into account the existence of controls imposed under other federal, state, or local programs which would achieve the objective of the desired condition, or the existence of an enforceable agreement between the applicant and another party concerned with the resource in question, in determining whether a proposal complies with the 404(b)(1) guidelines, ocean dumping criteria, and other applicable statutes, and is not contrary to the public interest. In such cases, the Department of the Army permit will be conditioned to state that material changes in, or a failure to implement and enforce such program or agreement, will be grounds for modifying, suspending or revoking the permit.

(3) Such conditions may be accomplished on-site, or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment.

(b) District engineers are authorized to add special conditions, exclusive of paragraph (a) of this section, at the applicant's request or to clarify the permit application.

(c) If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.

(d) *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) DA permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, DA 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 Section 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 paragraph 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 relevant general conditions from 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. 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 acknowledgment 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 DA 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.

(3) *Programmatic permits* Programmatic permits are a type of general permit founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program.

(d) *Section 9 permits* Permits for structures in interstate navigable waters of the United States under section 9 of the Rivers and Harbors Act of 1899 will be drafted at DA level.

#### § 325.6 Duration of permits.

(a) *General* DA 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 permit may also specify a date by which the work must be started, normally within one year from the date of issuance. The date 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 unless the district engineer determines that an extension would be contrary to 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.

(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, the 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 to 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 permits.**

(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 or need for 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 section.

(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 but 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. The district engineer shall consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest in the term, condition, or feature being modified prior to permit issuance.

(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 issuing official 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 dams or dikes in intrastate waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899; for construction or other work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899; for the discharge of dredged or fill material into 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 in interstate navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District engineer's authority.* District engineers are authorized to issue or deny permits in accordance with these regulations pursuant to sections 9 and 10 of the Rivers and Harbors 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 9 of the Rivers and Harbors Act of 1899, or territorial sea baseline changes).

(c) *Division engineer's 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 Rivers and Harbors 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 Authority to determine jurisdiction.

District engineers are authorized to determine the area defined by the terms "navigable waters of the United States" and "waters of the United States" except:

(a) When a determination of navigability is made pursuant to 33 CFR 329.14 (division engineers have this authority); or

(b) When EPA makes a section 404 jurisdiction determination under its authority.

#### § 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 and Special Conditions

##### A Permit Form

##### Department of the Army Permit

Permittee \_\_\_\_\_  
Permit No. \_\_\_\_\_  
Issuing Office \_\_\_\_\_

Note.—The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

**Project Description.** (Describe the permitted activity and its intended use with references to any attached plans or drawings that are considered to be a part of the project description. Include a description of the types and quantities of dredged or fill materials to be discharged in jurisdictional waters.)

**Project Location.** (Where appropriate, provide the names of and the locations on the waters where the permitted activity and any off-site disposal will take place. Also, using name, distance, and direction, locate the permitted activity in reference to a nearby landmark such as a town or city.)

#### Permit Conditions: General Conditions:

1. The time limit for completing the work authorized ends on \_\_\_\_\_. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

**Special Conditions:** (Add special conditions as required in this space with reference to a continuation sheet if necessary.)

##### Further Information:

1. Congressional Authorities. You have been authorized to undertake the activity described above pursuant to:

( ) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)

( ) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

##### 2. Limits of this authorization

a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, and dates that you accept and agree to comply with the terms and conditions of this permit.

(Permittee)

(Date)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

(District Engineer)

(Date)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(Transferee)

(Date)

B. Special Conditions. No special conditions will be preprinted on the permit form. The following and other special conditions should be added, as appropriate, in the space provided after the general conditions or on a referenced continuation sheet:

1. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.

2. You must have a copy of this permit available on the vessel used for the authorized transportation and disposal of dredged material.

3. You must advise this office in writing, at least two weeks before you start maintenance dredging activities under the authority of this permit.

4. You must install and maintain, at your expense, any safety lights and signals prescribed by the United States Coast Guard (USCG), through regulations or otherwise, on your authorized facilities. The USCG may be reached at the following address and telephone number:

5. The condition below will be used when a Corps permit authorizes an artificial reef, an aerial transmission line, a submerged cable or pipeline, or a structure on the outer continental shelf.

National Ocean Service (NOS) has been notified of this authorization. You must notify NOS and this office in writing, at least two weeks before you begin work and upon completion of the activity authorized by this permit. Your notification of completion must include a drawing which certifies the location and configuration of the completed activity (a certified permit drawing may be used). Notifications to NOS will be sent to the following address: The Director, National Ocean Service (N/CG 222), Rockville, Maryland 20852.

6. The following condition should be used for every permit where legal recordation of the permit would be reasonably practicable and recordation could put a subsequent purchaser or owner of property on notice of permit conditions.

You must take the actions required to record this permit with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to or interest in real property.

Appendix B—[Reserved] (For Future NEPA Regulation)

Appendix C—[Reserved] (For Historic Properties Regulation)

## PART 326—ENFORCEMENT

Sec.

326.1 Purpose.  
326.2 Policy.  
326.3 Unauthorized activities.  
326.4 Supervision of authorized activities.  
326.5 Legal action.

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

### § 326.1 Purpose.

This Part prescribes enforcement policies (§ 326.2) and procedures applicable to activities performed without required Department of the Army permits (§ 326.3) and to activities not in compliance with the terms and conditions of issued Department of the Army permits (§ 326.4). Procedures for initiating legal actions are prescribed in § 326.5. Nothing contained in this Part shall establish a non-discretionary duty on the part of district engineers nor shall deviation from these procedures give rise to a private right of action against a district engineer.

### § 326.2 Policy.

Enforcement, as part of the overall regulatory program of the Corps, is based on a policy of regulating the waters of the United States by discouraging activities that have not been properly authorized and by requiring corrective measures, where appropriate, to ensure those waters are not misused and to maintain the integrity of the program. There are several methods discussed in the remainder of this part which can be used either singly or in combination to implement this policy, while making the most effective use of the enforcement resources available. As EPA has independent enforcement authority under the Clean Water Act for unauthorized discharges, the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved.

### § 326.3 Unauthorized activities.

(a) *Surveillance.* To detect unauthorized activities requiring permits, district engineers should make the best use of all available resources.

Corps employees; members of the public; and representatives of state, local, and other Federal agencies should be encouraged to report suspected violations. Additionally, district engineers should consider developing joint surveillance procedures with Federal, state, or local agencies having similar regulatory responsibilities, special expertise, or interest.

(b) *Initial investigation.* District engineers should take steps to investigate suspected violations in a timely manner. The scheduling of investigations will reflect the nature and location of the suspected violations, the anticipated impacts, and the most effective use of inspection resources available to the district engineer. These investigations should confirm whether a violation exists, and if so, will identify the extent of the violation and the parties responsible.

(c) *Formal notifications to parties responsible for violations.* Once the district engineer has determined that a violation exists, he should take appropriate steps to notify the responsible parties.

(1) If the violation involves a project that is not complete, the district engineer's notification should be in the form of a cease and desist order prohibiting any further work pending resolution of the violation in accordance with the procedures contained in this part. See paragraph (c)(4) of this section for exception to this procedure.

(2) If the violation involves a completed project, a cease and desist order should not be necessary. However, the district engineer should still notify the responsible parties of the violation.

(3) All notifications, pursuant to paragraphs (c) (1) and (2) of this section, should identify the relevant statutory authorities, indicate potential enforcement consequences, and direct the responsible parties to submit any additional information that the district engineer may need at that time to determine what course of action he should pursue in resolving the violation; further information may be requested, as needed, in the future.

(4) In situations which would, if a violation were not involved, qualify for emergency procedures pursuant to 33 CFR Part 325.2(e)(4), the district engineer may decide it would not be appropriate to direct that the unauthorized work be stopped. Therefore, in such situations, the district engineer may, at his discretion, allow the work to continue, subject to appropriate limitations and conditions as he may prescribe, while the violation is being resolved in

accordance with the procedures contained in this part.

(5) When an unauthorized activity requiring a permit has been undertaken by American Indians (including Alaskan natives, Eskimos, and Aleuts, but not including Native Hawaiians) on reservation lands or in pursuit of specific treaty rights, the district engineer should use appropriate means to coordinate proposed directives and orders with the Assistant Chief Counsel for Indian Affairs (DAEN-CCI).

(6) When an unauthorized activity requiring a permit has been undertaken by an official acting on behalf of a foreign government, the district engineer should use appropriate means to coordinate proposed directives and orders with the Office, Chief of Engineers, ATTN: DAEN-CCK.

(d) *Initial corrective measures.* (1) The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the unauthorized, completed work, solicit the views of the Environmental Protection Agency; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service, and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. In determining what initial corrective measures are required, the district engineer should consider whether serious jeopardy to life, property, or important public resources (see 33 CFR Part 320.4) may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation. In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work. In unusual cases where initial corrective measures substantially eliminate all current and future detrimental impacts resulting from the unauthorized work, further enforcement actions should normally be unnecessary. For all other cases, the district engineer's order should normally specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

(2) An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-

fact permit application is prohibited or considered not appropriate pursuant to § 326.3(e)(1) (iii)-(iv) below. However, such orders will be issued only when the district engineer has reached an independent determination that such measures are necessary and appropriate.

(3) It will not be necessary to issue a Corps permit in connection with initial corrective measures undertaken at the direction of the district engineer.

(e) *After-the-fact permit applications.* (1) Following the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines that one of the exceptions listed in subparagraphs i-iv below is applicable. Applications for after-the-fact permits will be processed in accordance with the applicable procedures in 33 CFR Parts 320-325. Situations where no permit application will be processed or where the acceptance of a permit application must be deferred are as follows:

(i) No permit application will be processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer.

(ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (§ 326.5(a)) until such legal action has been completed.

(iii) No permit application will be accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied.

(iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

(2) Upon completion of his review in accordance with 33 CFR Parts 320-325, the district engineer will determine if a permit should be issued, with special conditions if appropriate, or denied. In reaching a decision to issue, he must determine that the work involved is not contrary to the public interest, and if section 404 is applicable, that the work also complies with the Environmental Protection Agency's section 404(b)(1) guidelines. If he determines that a denial is warranted, his notification of denial should prescribe any final corrective

actions required. His notification should also establish a reasonable period of time for the applicant to complete such actions unless he determines that further information is required before the corrective measures can be specified. If further information is required, the final corrective measures may be specified at a later date. If an applicant refuses to undertake prescribed corrective actions ordered subsequent to permit denial or refuses to accept a conditioned permit, the district engineer may initiate legal action in accordance with § 326.5.

(f) *Combining steps.* The procedural steps in this section are in the normal sequence. However, these regulations do not prohibit the streamlining of the enforcement process through the combining of steps.

(g) *Coordination with EPA.* In all cases where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures and after-the-fact permitting, as well as to appropriate legal enforcement actions.

#### § 326.4 Supervision of authorized activities.

(a) *Inspections.* District engineers will, at their discretion, take reasonable measures to inspect permitted activities, as required, to ensure that these activities comply with specified terms and conditions. To supplement inspections by their enforcement personnel, district engineers should encourage their other personnel, members of the public, and interested state, local, and other Federal agency representatives to report suspected violations of Corps permits. To facilitate inspections, district engineers will, in appropriate cases, require that copies of ENC Form 4336 be posted conspicuously at the sites of authorized activities and will make available to all interested persons information on the terms and conditions of issued permits. The U.S. Coast Guard will inspect permitted ocean dumping activities pursuant to section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(b) *Inspection limitations.* Section 326.4 does not establish a non-discretionary duty to inspect permitted activities for safety, sound engineering practices, or interference with other permitted or unpermitted structures or uses in the area. Further, the regulations implementing the Corps regulatory program do not establish a non-discretionary duty to inspect permitted activities for any other purpose.

(c) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activities will normally be paid by the Federal Government unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may condition permits to require permittees to pay inspection expenses pursuant to the authority contained in Section 9701 of Pub L. 97-258 (33 U.S.C. 9701). The collection and disposition of inspection expense funds obtained from applicants will be administered in accordance with the relevant Corps regulations governing such funds.

(d) *Non-compliance.* If a district engineer determines that a permittee has violated the terms or conditions of the permit and that the violation is sufficiently serious to require an enforcement action, then he should, unless at his discretion he deems it inappropriate: (1) First contact the permittee; (2) request corrected plans reflecting actual work, if needed; and (3) attempt to resolve the violation. Resolution of the violation may take the form of the permitted project being voluntarily brought into compliance or of a permit modification (33 CFR 325.7(b)). If a mutually agreeable solution cannot be reached, a written order requiring compliance should normally be issued and delivered by personal service. Issuance of an order is not, however, a prerequisite to legal action. If an order is issued, it will specify a time period of not more than 30 days for bringing the permitted project into compliance, and a copy will be sent to the appropriate state official pursuant to section 404(a)(2) of the Clean Water Act. If the permittee fails to comply with the order within the specified period of time, the district engineer may consider using the suspension/revocation procedures in 33 CFR 325.7(c) and/or he may recommend legal action in accordance with § 326.5.

#### § 326.5 Legal action.

(a) *General.* For cases the district engineer determines to be appropriate, he will recommend criminal or civil actions to obtain penalties for violations, compliance with the orders and directives he has issued pursuant to §§ 326.3 and 326.4, or other relief as appropriate. Appropriate cases for criminal or civil action include, but are not limited to, violations which, in the district engineer's opinion, are willful, repeated, flagrant, or of substantial impact.

(b) *Preparation of case.* If the district engineer determines that legal action is appropriate, he will prepare a litigation report or such other documentation that

he and the local U.S. Attorney have mutually agreed to, which contains an analysis of the information obtained during his investigation of the violation, or during the processing of a permit application and a recommendation of appropriate legal action. The litigation report or alternative documentation will also recommend what, if any, restoration or mitigative measures are required and will provide the rationale for any such recommendation.

(c) *Referral to the local U.S. Attorney.* Except as provided in paragraph (d) of this section, district engineers are authorized to refer cases directly to the U.S. Attorney. Because of the unique legal system in the Trust Territories, all cases over which the Department of Justice has no authority will be referred to the Attorney General for the Trust Territories. Information copies of all letters of referral shall be forwarded to the appropriate division counsel, the Office, Chief of Engineers, ATTN: DAEN-CCK, the Office of the Assistant Secretary of the Army (Civil Works), and the Chief of the Environmental Defense Section, Lands and Natural Resources Division, U.S. Department of Justice.

(d) *Referral to the Office, Chief of Engineers.* District engineers will forward litigation reports with recommendations through division offices to the Office, Chief of Engineers, ATTN: DAEN-CCK, for all cases that qualify under the following criteria:

- (1) Significant precedential or controversial questions of law or fact;
- (2) Requests for elevation to the Washington level by the Department of Justice;
- (3) Violations of section 9 of the Rivers and Harbors Act of 1899;
- (4) Violations of section 103 of the Marine Protection, Research and Sanctuaries Act of 1972;
- (5) All cases involving violations by American Indians (original of litigation report to DAEN-CCI with copy to DAEN-CCK) on reservation lands or in pursuit of specific treaty rights;

(6) All cases involving violations by officials acting on behalf of foreign governments, and

(7) Cases requiring action pursuant to paragraph (e) of this section.

(e) *Legal option not available.* In cases where the local U.S. Attorney declines to take legal action, it would be appropriate for the district engineer to close the enforcement case record unless he believes that the case warrants special attention. In that situation, he is encouraged to forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN-CCK.

direct coordination through the Office of the Assistant Secretary of the Army (Civil Works) with the Department of Justice. Further, the case record should not be closed if the district engineer anticipates that further administrative enforcement actions, taken in accordance with the procedures prescribed in this part, will identify remedial measures which, if not complied with by the parties responsible for the violation, will result in appropriate legal action at a later date.

## PART 327—PUBLIC HEARINGS

### Sec.

- 327.1 Purpose.
- 327.2 Applicability.
- 327.3 Definitions.
- 327.4 General policies.
- 327.5 Presiding officer.
- 327.6 Legal adviser.
- 327.7 Representation.
- 327.8 Conduct of hearings.
- 327.9 Filing of transcript of the public hearing.
- 327.10 Authority 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 DA permit action or Federal project as defined in § 327.3 of this Part 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 DA permit action, or Federal project, and which affords the public an 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 DA permit pursuant to sections 9 or 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, or section 103 of the MPRSA, as amended, or the modification, suspension or revocation of any DA 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.

### § 327.4 General policies.

(a) A public hearing will be held in connection with the consideration of a DA 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 DA permit application or on a Federal project, that a public hearing be held to consider the material matters at issue in the permit application or with respect to 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. 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.

(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 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 proceedings 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 presiding 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 the 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 making 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 provided to newspapers of general circulation for publication. 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.

(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—DEFINITION OF WATERS OF THE UNITED STATES

Sec.

328.1 Purpose.

328.2 General scope.

328.3 Definitions.

328.4 Limits of jurisdiction.

328.5 Changes in limits of waters of the United States.

Authority: 33 U.S.C. 1344.

#### § 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid

confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout CFR Parts 320-330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

#### § 328.2 General scope.

Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and non-tidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

#### § 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) 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 purpose by industries in interstate commerce;

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

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

(6) The territorial seas;

(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 "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.

(c) 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."

(d) The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, 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 line encompasses 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.

(e) The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as 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.

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

#### § 329.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. [See 33 CFR 329.12]

(b) *Tidal Waters of the United States.* The landward limits of jurisdiction in tidal waters:

- (1) Extends to the high tide line, or
- (2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-Tidal Waters of the United States.* The limits of jurisdiction in non-tidal waters:

- (1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or
- (2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.
- (3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

#### § 329.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

### PART 329—DEFINITION OF NAVIGABLE 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.

#### Sec.

- 329.11 Geographic and jurisdictional limits of rivers and lakes.  
329.12 Geographic and jurisdictional limits of oceanic and tidal waters.  
329.13 Geographic 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 "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 and 328.

#### § 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 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 Intra-state 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 area (see paragraph 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 transport 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 improvements, 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" improvement may potentially be made. The improvement 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 paragraph 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 cannot 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" of 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. Jurisdiction thus extends to the edge (as determined above) 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 ordinary high waters.

(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 baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

(1) *Baseline defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn 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 of 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 proposedly capable of use in interstate 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 Section 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.

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

#### § 330.1 General.

The purpose of this regulation is to describe the Department of the Army's (DA) nationwide permit program and to list all current nationwide permits which have been issued by publication herein. A nationwide permit is a form of general permit which may authorize activities throughout the nation. (Another type of general permit is a "regional permit" and is issued by division or district engineers on a regional basis in accordance with 33 CFR Part 325). Copies of regional conditions and

modifications, if any, to the nationwide permits can be obtained from the appropriate district engineer.

Nationwide permits are designed to allow certain activities to occur with little, if any, delay or paperwork. Nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Failure to comply with a condition does not necessarily mean the activity cannot be authorized but rather that the activity can only be authorized by an individual or regional permit. Several of the nationwide permits require notification to the district engineer prior to commencement of the authorized activity. The procedures for this notification are located at § 330.7 of this Part. Nationwide permits can be issued to satisfy the requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and/or section 103 of the Marine Protection, Research and Sanctuaries Act. The applicable authority is indicated at the end of each nationwide permit.

#### § 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321-329 are applicable to the terms used in this Part.

(b) 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. 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. For streams that are dry for long periods of the year, district engineers may establish the "headwaters" as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

(c) Discretionary authority means the authority delegated to division engineers in § 330.8 of this part to override provisions of nationwide permits, to add regional conditions, or to require individual permit application.

#### § 330.3 Activities occurring before certain dates.

The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:

(a) Discharges of dredged or fill material into 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.) (Section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation. (Section 10)

#### § 330.4 Public notices.

(a) *Chief of Engineers.* Upon proposed issuance of new nationwide permits, modification to, or reissuance of, existing nationwide permits, the Chief of Engineers will publish a notice in the Federal Register seeking public comments and including the opportunity for a public hearing. This notice will state the availability of information at the Office of the Chief of Engineers and at all district offices which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance under general permit authority. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(b) *District engineers.* Concurrent with publication in the Federal Register of proposed, new, or reissued nationwide permits by the Chief of Engineers, district engineers will so notify the known interested public by an appropriate notice. The notice will include regional conditions, if any, developed by the division engineer.

#### § 330.5 Nationwide permits.

(a) *Authorized activities.* The following activities are hereby permitted provided they meet the conditions listed in paragraph (b) of this section and, where required, comply with the notification procedures, of § 330.7.

(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). (Section 10)

(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 Part 322.5(g)). (Section 10)

(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 from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Section 10 and 404)

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, and clam and oyster digging. (Section 10)

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures. (Section 10)

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling of exploration-type bore holes for oil and gas exploration is not authorized by this nationwide permit; the plugging of such holes is authorized. (Sections 10 and 404)

(7) Outfall structures and associated intake structures 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 district or division engineer makes a determination that the individual and cumulative adverse environmental effects of the structure itself are minimal in accordance with § 330.7 (c)(2) and (d). Intake structures *per se* are not included—only those directly associated with an outfall structure are covered by this nationwide permit. This permit includes minor excavation, filling and other work associated with installation of the intake and outfall structures. (Sections 10 and 404)

(8) Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Mineral Management Service, 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 330.8 of this Part, and further subject to the provisions of the fairway regulations in 33 CFR 322.5(1) (Section 10).

(9) Structures placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)

(10) Non-commercial, single-boat, mooring buoys. (Section 10)

(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 discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

(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). (Section 404)

(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. (Sections 10 and 404)

(14) Minor road crossing fills including 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 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 may require a permit from the US Coast Guard if located in navigable waters of the United States. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). District engineers are authorized, where local circumstances indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (Sections 10 and 404)

(15) Discharges of dredged or fill material incident 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 discharge has been authorized by the US Coast Guard 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. (Section 404)

(16) Return water from an upland, contained dredged material disposal area (see 33 CFR 323.2(d)) provided the state has issued a site specific or generic certification under section 401 of the Clean Water Act (see also 33 CFR 325.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States. The return water or runoff from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) 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 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. (Section 404)

(17) Fills associated with small hydropower projects at existing reservoirs where the project which

includes the fill is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualified of the short-form licensing procedures of the FERC (see 18 CFR 4.61), and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal in accordance with § 330.7 (c)(2) and (d). (Section 404)

(18) Discharges of dredged or fill material into all waters of the United States other than wetlands that do not exceed ten cubic yards as part of a single and complete project provided the material is not placed for the purpose of stream diversion. (Sections 10 and 404)

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project. This permit does not authorize the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Section 10)

(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, (40 CFR Part 300), provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action. (Sections 10 and 404)

(21) Structures, work, discharges associated with surface coal mining activities provided they were 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 or division engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal in accordance with §§ 330.7 (c) (2) and (3) and (d). (Sections 10 and 404)

(22) Minor work, fills, or temporary structures required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This permit does not authorize maintenance dredging, shoal removal, or river bank snagging. (Sections 10 and 404)

(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's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit comments through publication in the Federal Register. (Sections 10 and 404)

(24) Any activity permitted by a state administering its own Section 404 permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)-(i) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this nationwide permit but many will be exempted by section 154 of Pub. L. 94-587. (See 33 CFR 322.3(a)(2)). (Section 10)

(25) Discharge of concrete into tightly sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction. (Section 404)

(26) Discharges of dredged or fill material into the waters listed in paragraphs (a)(26) (i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of such waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification to the district engineer is required in accordance with section 330.7 of this section. (Section 404)

(i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters, or

navigable waters of the United States (i.e., isolated waters).

(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 (ESA), or destroy or adversely modify the critical habitat of such species. In the case of federal agencies, it is the agencies' responsibility to comply with the requirements of the ESA. If the activity may adversely affect any listed species or critical habitat, the district engineer must initiate Section 7 consultation in accordance with the ESA. In such cases, the district engineer may:

(i) Initiate section 7 consultation and then, upon completion, authorize the activity under the nationwide permit by adding, if appropriate, activity specific conditions, or

(ii) Prior to or concurrent with section 7 consultation he may recommend discretionary authority (See section 330.8) or use modification, suspension, or revocation procedures (See 33 CFR 325.7).

(4) That the activity shall 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 shall consist of suitable material free from toxic pollutants (see section 307 of the Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized shall be properly maintained.

(7) That the activity will not occur in a component of the National Wild and Scenic River System; nor in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status;

(8) That the activity shall not cause an unacceptable interference with navigation;

(9) That, if the activity may adversely affect historic properties which the National Park Service has listed on, or determined eligible for listing on, the National Register of Historic Places, the permittee will notify the district

engineer. If the district engineer determines that such historic properties may be adversely affected, he will provide the Advisory Council on Historic Preservation an opportunity to comment on the effects on such historic properties or he will consider modification, suspension, or revocation in accordance with 33 CFR 325.7.

Furthermore, that, if the permittee before or during prosecution of the work authorized, encounters a historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, he shall immediately notify the district engineer;

(10) That the construction or operation of the activity will not impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights;

(11) That in certain states, an individual state water quality certification must be obtained or waived (See § 330.9);

(12) That in certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (See § 330.10);

(13) That the activity will comply with regional conditions which may have been added by the division engineer (See § 330.8(a)); and

(14) That the management practices listed in § 330.6 of this part shall be followed to the maximum extent practicable.

(c) *Further information.* (1) District engineers are authorized to determine if an activity complies with the terms and conditions of a nationwide permit unless that decision must be made by the division engineer in accordance with § 330.7.

(2) Nationwide permits do not obviate the need to obtain other Federal, state or local authorizations required by law.

(3) Nationwide permits do not grant any property rights or exclusive privileges.

(4) Nationwide permits do not authorize any injury to the property or rights of others.

(5) Nationwide permits do not authorize interference with any existing or proposed Federal project.

(d) *Modification, Suspension or Revocation of Nationwide Permits.* The Chief of Engineers may modify, suspend, or revoke nationwide permits in accordance with the relevant procedures of 33 CFR 325.7. Such authority includes, but is not limited to: adding individual, regional, or nationwide conditions; revoking authorization for a category of activities

or a category of waters by requiring individual or regional permits; or revoking an authorization on a case-by-case basis. This authority is not limited to concerns for the aquatic environment as is the discretionary authority in § 330.8.

#### § 330.6 Management practices.

(a) In addition to the conditions specified in § 330.5 of this Part, the following management practices shall be followed, to the maximum extent practicable, 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 § 330.8 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 Notification procedures.

(a) The general permittee shall not begin discharges requiring pre-discharge notification pursuant to the nationwide permit at § 330.5(a)(28):

(1) Until notified by the district engineer that the work may proceed under the nationwide permit with any special conditions imposed by the district or division engineer; or

(2) If notified by the district or division engineer that an individual permit may be required, or

(3) Unless 20 days have passed from receipt of the notification by the district engineer and no notice has been

received from the district or division engineer.

(b) Notification pursuant to the nationwide permit at § 330.5(a)(26) must be in writing and include the information listed below. Notification is not an admission that the proposed work would result in more than minimal impacts to waters of the United States; it simply allows the district or division engineer to evaluate specific activities for compliance with general permit criteria.

(1) Name, address, and phone number of the general permittee;

(2) Location of the planned work;

(3) Brief description of the proposed work, its purpose, and the approximate size of the waters, including wetlands, which would be lost or substantially adversely modified as a result of the work; and

(4) Any specific information required by the nationwide permit and any other information that the permittee believes is appropriate.

(c) *District engineer review of notification.* Upon receipt of notification, the district engineer will promptly review the general permittee's notification to determine which of the following procedures should be followed:

(1) If the nationwide permit at § 330.5(a)(26) is involved and the district engineer determines either: (i) the proposed activity falls within a class of discharges or will occur in a category of waters which has been previously identified by the Regional Administrator, Environmental Protection Agency; the Regional Director, Fish and Wildlife Service; the Regional Director, National Marine Fisheries Service; or the heads of the appropriate state natural resource agencies as being of particular interest to those agencies; or (ii) the particular discharge has not been previously identified but he believes it may be of importance to those agencies, he will promptly forward the notification to the division engineer and the head and appropriate staff officials of those agencies to afford those agencies an adequate opportunity before such discharge occurs to consider such notification and express their views, if any, to the district engineer concerning whether individual permits should be required.

(2) If the nationwide permits at § 330.5(a)(7), (17), or (21) are involved and the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service, or the appropriate state natural resource or water quality agencies forward concerns to the district engineer, he will forward those concerns to the division engineer

together with a statement of the factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and his views on the specific points raised by those agencies.

(3) If the nationwide permit at § 330.5(a)(21) is involved the district engineer will give notice to the Environmental Protection Agency and the appropriate state water quality agency. This notice will include as a minimum the information required by paragraph (b) of this section.

(d) *Division engineer review of notification.* The division engineer will review all notifications referred to him in accordance with paragraph (c)(1) or (c)(2) of this section. The division engineer will require an individual permit when he determines that an activity does not comply with the terms or conditions of a nationwide permit or does not meet the definition of a general permit (see 33 CFR 322.2(f) and 323.2(n)) including discharges under the nationwide permit at § 330.5(a)(26) which have more than minimal adverse environmental effects on the aquatic environment when viewed either cumulatively or separately. In reaching his decision, he will review factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and will give full consideration to the views, if any, of the federal and state natural resource agencies identified in paragraph (c) of this section. If the division engineer decides that an individual permit is not required, and a federal or appropriate state natural resource agency has indicated in writing that an activity may result in more than minimal adverse environmental impacts, he will prepare a written statement, available to the public on request, which sets forth his response to the specific points raised by the commenting agency. When the division engineer reaches his decision he will notify the district engineer, who will immediately notify the general permittee of the division engineer's decision.

#### § 330.8 Discretionary authority.

Except as provided in paragraphs (c)(2) and (d) of this section, 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, for a category of activities, or in specific geographic areas. Discretionary authority will be

based on concerns for the aquatic environment<sup>6</sup> expressed in the guidelines published by EPA pursuant to section 404(b)(1) (40 CFR Part 230)

(a) *Actively Specific conditions.* Division engineers are authorized to modify nationwide permits by adding individual conditions on a case-by-case basis applicable to certain activities within their division. Actively specific conditions may be added by the District Engineer in instances where there is mutual agreement between the district engineer and the permittee. Furthermore, district engineers will condition NWP's with conditions which have been imposed on a state section 401 water quality certification issued pursuant to § 330.9 of this Part.

(b) *Regional conditions.* Division engineers are authorized to modify nationwide permits by adding conditions on a generic basis 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 Parts 321, 322, 323, and 324. Division and district engineers will take appropriate measures to inform the public of the additional conditions.

(c) *Individual permits—(1) Case-by-Case.* In nationwide permit cases where additional individual or regional conditioning may not be sufficient to address concerns for the aquatic environment or where there is not sufficient time to develop such conditions under paragraphs (a) or (b) of this section, the division engineer may suspend use of the nationwide permit and require an individual permit application on a case-by-case basis. The district engineer will evaluate the application and will either issue or deny a permit. However, if at any time the reason for taking discretionary authority is satisfied, then the division engineer may remove the suspension, reactivating authority under the nationwide permit. 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 orally authorize the district engineer to implement that authority. Oral authorization should be followed by written confirmation.

(2) *Category.* Additionally, after notice and opportunity for public hearing, division engineers may decide that individual permit applications

should be required for categories of activities, or in specific geographic areas. However, only the Chief of Engineers may modify, suspend, or revoke nationwide permits on a statewide or nationwide basis. 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 an individual permit(s) pursuant to 33 CFR Part 325.

(d) For the nationwide permit found at § 330.51(a)(26), after the applicable provisions of § 330.7(a) (1) and (3) have been satisfied, the permittee's right to proceed under the general permit may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 325.7.

(e) A copy of all modifications or revocations of activities covered by nationwide permits will be forwarded to the Office of the Chief of Engineers. ATTN: DAEN-CWO-N.

#### § 330.9 State water quality certification.

(a) State water quality certification is required for nationwide permits which may result in any discharge into waters of the United States. If a state issues a water quality certification which includes special conditions, the district engineer will add these conditions as conditions of the nationwide permit in that state. However, if such conditions do not comply with the provisions of 33 CFR 325.4 or if a state denies a required 401 certification for a particular nationwide permit, authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. A district engineer will not process an individual permit application for an activity for which authorization has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications. In instances where a state has denied the 401 water quality certification for discharges under a particular nationwide permit, applicants must furnish the district engineer with an individual or generic 401 certification or a copy of the application to the state for the certification. If a state fails to act within a reasonable period of time (see § 325.2(b)(1)(ii)), a waiver will be

presumed. Upon receipt of an individual or generic certification or a waiver of certification, the proposed work is authorized under the nationwide permit. If a state issues a conditioned individual certification, the district engineer will include those conditions that comply with 33 CFR 325.4 as special conditions of the nationwide permit (see 33 CFR Part 330.8(a)) and notify the applicant that the work is authorized under the nationwide permit provided all conditions are met.

(b) Certification requirements for nationwide permits fall into the following general categories:

(1) *No certification required.* Nationwide permits numbered 1, 2, 4, 5, 8, 9, 10, 11, and 19 do not involve activities which may result in a discharge and therefore 401 certification is not applicable.

(2) *Certification sometimes required.* Nationwide permits numbered 3, 6, 7, 13, 20, 21, 22, and 23 each involve various activities, some of which may result in a discharge and require certification, and others of which do not. State denial of certification for any specific nationwide permit in this category affects only those activities involving discharges. Those not involving discharges remain in effect.

(3) *Certification required.* Nationwide permits numbered 12, 14, 15, 16, 17, 18, 24, 25, and 26 involve activities which would result in discharges and therefore 401 certification is required.

(c) District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, an individual 401 water quality certification is required.

#### § 330.10 Coastal zone management consistency determination.

In instances where a state has not concurred that a particular nationwide permit is consistent with an approved coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has concurred in it. If a state does not act on an applicant's consistency statement within six months after receipt by the state, consistency shall be presumed. District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, such individual

consistency determination is required. District engineers will not process any permit application for an activity which has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications.

#### § 330.11 Nationwide permit verification.

(a) General permittees may, and in some cases must, request from a district engineer confirmation that an activity complies with the terms and conditions of a nationwide permit. District engineers will respond promptly to such requests. The response will state that the verification is valid for a period of no more than two years or a lesser period of time if deemed appropriate. Section 330.12 takes precedence over this section, therefore, it is incumbent upon the permittee to remain informed of changes to nationwide permits.

(b) If the district engineer decides that an activity does not comply with the terms or conditions of a nationwide permit, he will so notify the person desiring to do the work and indicate that an individual permit is required (unless covered by a regional permit).

(c) If the district engineer decides that an activity does comply with the terms and conditions of a nationwide permit, he will so notify the general permittee. In such cases, as with any activity which qualifies under a nationwide permit, the general permittee's right to proceed with the activities under the nationwide permit may be modified, suspended, or revoked only in accordance with the procedures of 33 CFR 325.7.

#### § 330.12 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits on a continual basis, and will decide to either modify, reissue (extend) or revoke the permits at least every five years. 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. Authorization of activities which have commenced or are under contract to commence in reliance upon a nationwide permit will remain in effect provided the activity is completed within twelve months of the date a nationwide permit has expired or was revoked unless discretionary permit authority has been exercised in

accordance with § 330.8 of this Part or modification, suspension, or revocation procedures are initiated in accordance with the relevant provisions of 33 CFR 325.7. Activities completed under the authorization of a nationwide permit which was in effect at the time the activity was completed continue to be authorized by that nationwide permit.

[FR Doc. 86-25301 Filed 11-12-86; 8:45 am]

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**PART III - GUIDELINES AND REGULATIONS**

**Section 3**

**Clean Water Section 404  
Program Definition and Permit Exemptions;  
Section 404 State Program Regulations; Final Rule  
40 CFR Parts 232 and 233  
Environmental Protection Agency**

# REGISTERED

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Monday  
June 6, 1988

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## Part V

# Environmental Protection Agency

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40 CFR Parts 232 and 233  
Clean Water Section 404 Program  
Definition and Permit Exemptions;  
Section 404 State Program Regulations;  
Final Rule

## ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 232 and 233

(FRL-3214-1)

## Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** We are hereby issuing final rules containing 404 program definitions and 404(f)(1) exemptions and the procedures and criteria used in approving, reviewing and withdrawing approval of State 404 programs. Part 232 contains definitions and exemptions related to both the Federal and State-run 404 program and Part 233 deals with State programs only. The revisions in these rules will provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Clean Water Act (the Act).

**EFFECTIVE DATES:** This final rule is effective on July 6, 1988. In accordance with 40 CFR 23.2, this regulation shall be considered issued for purposes of judicial review at 1:00 p.m., Eastern time on June 20, 1988.

**FOR FURTHER INFORMATION CONTACT:** Lori Williams, Office of Wetlands Protection (A-104F), U.S. Environmental Protection Agency, Washington, DC 20460, (202) 382-5043.

**SUPPLEMENTARY INFORMATION:** This final rule contains the 404 program definitions and 404(f)(1) permit exemptions in addition to the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. Part 232 basically recodifies the existing 404 program definitions and 404(f)(1) permit exemptions in a new, separate part of eliminate any confusion about their applicability. Part 232 applies to both the Federal and State programs. Part 233 revises the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. These final rules provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Act.

This rule was proposed on October 2, 1984 at 49 FR 39012. The notice invited public comments for a 60-day period ending December 3, 1984. On December 10, 1984 (49 FR 48064), the comment period was extended to January 2, 1985.

Thirty-eight comments were received—15 State agencies, 10 environmental groups, 6 industry groups, 4 Federal agencies, and 3 others.

The comments covered the full range of views, ranging from those which indicated that more streamlining is required to those which indicated that the proposed regulations increased flexibility at the expense of environmental protection.

In addition to the more significant revisions described in the preamble, we have made minor editorial and content changes from the proposal. We have also renumbered the sections in Part 233 to close the large gaps in numbering in the proposal.

It is the agency's intent that 40 CFR Part 124 no longer applies to 404 State programs. We will be publishing technical, conforming regulations in the near future.

The following summarizes the major comments and EPA's response to them.

**Response to Comments and Explanation of Changes****Part 232—404 Program Definitions, Exempt Activities Not Requiring 404 Permits**

**Section 232.2(b):** In response to comment, we have revised the proposed definition of "application" for clarity.

**Section 232.2(e) and (f):** The definition of "discharge of dredged material" and "discharge of fill material" were modified for consistency with the Corps regulations (33 CFR 323.2(d) and (f)).

**Section 232.2(j):** We received comment that our definition of "general permit" is different from the Corps' definition (33 CFR 323.2(n)). The proposed definition was taken from the Act (404(e)(1)) and, therefore, has been retained in the final regulation.

**Section 232.2(i):** Under Section 404 of the Act, the Corps (and States approved by EPA) issue permits for discharges of dredged and fill material into waters of the U.S. Under Section 402, EPA (and States approved by EPA) issue permits for discharges of all other pollutants into waters of the U.S. In January 1988 the Corps and EPA entered into a Memorandum of Agreement (MOA) to resolve a longstanding difference over the appropriate Clean Water Act program to regulate certain discharges of solid wastes into waters of the U.S. The Corps issued its definition of "fill material" in 1977, which provided that only those solid wastes discharged with the primary purpose of replacing an aquatic area or of changing the bottom elevation of a waterbody are regulated under the Corps' 404 program. These

discharges include discharges of pollutants intended to fill a regulated wetland to create fast land for development. The Corps' definition excludes pollutants discharged with the primary purpose to dispose of wastes which, under the Corps' definition, would be regulated under Section 402. Under EPA's definition of "fill material," all such solid waste discharges would be regulated under Section 404, regardless of the primary purpose of the discharger. The difference complicated the regulatory program for some solid wastes discharged into waters of the U.S.

The MOA provides an interim arrangement between the agencies for controlling these discharges. In the longer term EPA and Army agree that consideration given to the control of discharges of solid waste both in waters of the U.S. and upland should take into account the results of studies being implemented under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act (RCRA). The main focus of the interim arrangement is to ensure an effective enforcement program under Section 309 of the Act of controlling discharges of solid and semi-solid wastes into waters of the U.S. for the purpose of disposal of waste. When warranted, EPA will normally initiate section 309 action to control such unauthorized discharges. If it becomes necessary to determine whether Section 402 or 404 applies to an ongoing or proposed discharge, the determination will be based upon criteria in the agreement, which provide, *inter alia*, for certain homogeneous wastes to be regulated under the Section 402 Program and certain heterogeneous wastes to be regulated under the Section 404 Program, subject to certain criteria. This agreement does not affect the regulatory requirements for materials discharged into waters of the U.S. for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a water body. Discharges listed in the Corps definition of "discharge of fill material" (33 CFR 323.2(1)) remain subject to Section 404 even if they occur in association with discharges of waste meeting the criteria in the agreement for Section 402 discharges.

Unless extended by mutual agreement, the MOA will expire at such time as EPA has accomplished specified steps in its implementation of RCRA. In the meantime, these regulations simply re promulgate EPA's existing definition of fill material.

**Section 232.2(q) and (r):** Several comments were directed toward the

definitions of "waters of the United States" and wetlands." The commenters suggested that these definitions exceed the original intent of Congress.

The legislative history of the Act, from both 1972 and 1977, emphasizes Congress' intent that the jurisdiction of the Act over waters of the United States reflect the maximum extent permissible under the Commerce Clause of the Constitution. The specific definition of wetlands used in these regulations was originally promulgated in 1977 (prior to the 1977 Amendments to the Act) and has been approved in numerous courts, most recently by the Supreme Court in *U.S. v. Riverside Bayview Homes Inc.* (106 S.Ct. 455 (Dec. 4, 1985)). The overall definition of waters of the United States has also been approved by the courts, both in its current articulation and in earlier versions. Therefore, we see no need to change these definitions to narrow their coverage.

Several questions have arisen about this application of this definition to isolated waters which are or could be used by migratory birds and endangered species. As the Agency explained in an opinion by the General Counsel dated September 12, 1985, if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In addition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of jurisdiction would have to be made, and would turn on the particular facts.

For clarity and consistency, we are adding the following language from the preamble to the Corps' regulations published on November 13, 1986 (51 FR 41217). This language clarifies some

cases that typically are or are not considered "waters of the United States."

"Waters of the United States" typically include the following waters:

- Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- Which are or would be used as habitat by other migratory birds which cross State lines; or
- Which are or would be used as habitat for endangered species; or
- Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "waters of the United States." However, EPA reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. Pursuant to agreements with EPA, the permitting authority also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

Non-tidal drainage and irrigation ditches excavated on dry land.

- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

Section 232.3: The 1977 Clean Water Act provided for specific exemptions (404(f)(1)) from permitting requirements. EPA's 1980 Consolidated Permit Regulations promulgated regulations spelling out the scope of the exempted activities. The October 2, 1984, publication proposed several substantive revisions to the 404(f)(1) exemptions, as well as organizational changes. This rulemaking finalizes the organizational changes, but finalizes only one of the proposed substantive revisions. That revision substitutes "one year from discovery" for the previous

"one year from formation" in § 232.2(d)(3)(i)(D), which exempts as minor drainage certain discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages. This rule also includes the revised irrigation ditch provision which was the subject of a separate rulemaking (40 CFR 233.35(a)(3), December 20, 1984). Additionally, we have made the note following § 232.3(b) more explicit to clarify that a conversion of wetlands to non-wetlands is (and has been) considered a "change in use." Apart from these changes, it appears, based on the comments received, that the regulated sector is familiar with the existing language and that no additional clarification or improvement is now needed.

One commenter suggested that the Best Management Practices (BMPs) for the exemption from permitting for construction or maintenance of farm roads, forest roads or temporary roads for moving mining equipment are complex and difficult to administer and should be left to negotiation between the State and EPA for inclusion in the Memorandum of Agreement (§ 233.13). These BMPs are the same BMPs that are required for exemption from Federal permitting requirements. These BMPs were promulgated in 1980 and have not been the subject of significant comment or complaint since then. A discharger under an approved State program should meet the same requirements as under the Federal program.

#### Part 233—State Section 404 Program Assumption Regulations

We received several comments expressing concern that the proposed regulations would weaken Federal responsibilities, such as those in the Fish and Wildlife Coordination Act, Endangered Species Act, and National Environmental Policy Act. When a State assumes the 404 permitting responsibility, these statutes usually no longer apply, since these statutes only apply to Federal actions. When a State assumes the program, the permit decision is a State action, not a Federal action. However, a Federal oversight role is clearly established by section 404(j) of the Act. Therefore, the altered Federal role after program approval is a function of the statutory scheme, not these regulations.

Section 233.1: Several comments were received on partial State programs, ranging from the view that partial programs should not be allowed to the

view that it is desirable to approve partial programs. The commentors identified partial programs in terms of geographic extent or scope of activities regulated. EPA interprets the Act as requiring State programs to have full geographic and activities jurisdiction (subject to the limitation in section 404(g)). While specific authorization for partial programs under section 402 was enacted in the Water Quality Act of 1987, no similar provision was added for section 404. Accordingly, partial 404 programs are not approvable. Because of the special status of Indians, a lack of State authority to regulate activities on Indian lands will not cause the State's program to be considered a partial program.

We encourage States to begin working with the Federal land-owning agencies (i.e., Forest Service, Bureau of Land Management, and National Park Service to name a few) early in the program development stage. This should eliminate or reduce any confusion that may develop, since subsequent to program approval, the State will assume 404 permitting responsibility in these lands.

In response to comments, we have clarified that States may have a program that is more stringent or extensive than what is required for an approvable program. Under State law, and not as part of its approved program, States may also regulate discharges into those waters over which the Corps retains jurisdiction. Those parts of the State's program that go beyond the scope of Federal requirements for an approvable program are not subject to Federal oversight or federally enforceable. Of course, while States may impose more stringent requirements they may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required.

**Section 233.3:** One commentor requested that we limit confidentiality only to that information that does not relate to adverse effects on the aquatic environment. As these regulations conform to EPA's general regulations on confidentiality of information (40 CFR Part 2), we did not make the requested change.

**Section 233.4:** In the preamble to the proposed rulemaking, we specifically sought comment on the conflict of interest section. Several comments were received on this topic, the vast majority of which supported the need for a conflict of interest provision. However, several commentors did suggest that some flexibility should be added into this section

The current language is derived from the requirements for an approvable NPDES program. However, State 404 programs should not be held to the same conflict of interest standards as State NPDES programs because of factual differences between the two programs. NPDES discharges are usually long term discharges, often from certain specific types of industrial or municipal dischargers. Discharges authorized by section 404 typically tend to be one time, of shorter duration, and by a wider range of dischargers than NPDES, ranging from private citizens to large corporations, from small fills for boat docks or erosion prevention to major development projects. Therefore, an absolute ban on anyone with a financial interest in a permit from serving on a board that approves permits is likely to be more difficult to comply with under the 404 program than under the NPDES program because under the NPDES criteria, so many people would be considered to be financially interested in 404 permits that the pool of potential 404 board members would be unreasonably small. In addition, because of the nature and size of the discharge, 404 dischargers will often have less at stake financially than 402 dischargers.

Therefore, we have simplified the conflict of interest section from what was proposed. The final rule does not prohibit a person with an interest in a 404 permit decision from generally participating on a board which makes decisions on permit issuance or denial. However, anyone with a direct personal or pecuniary interest in a particular permit decision *must* make such interest known and must *not* participate in that permit decision. This new language allows more latitude in who may serve on a board, but still provides that there not be a conflict of interest or appearance of conflict of interest in any particular permit decision. This language effectuates the basic intent of the NPDES criteria, by ensuring that board members are disinterested decisionmakers.

**Section 233.10:** In response to comment, we have clarified our original intent that copies of State statutes and regulations submitted as part of a State's submission include statutes and regulations concerning the State's applicable administrative procedures.

**Section 233.11:** Several comments addressed the need for additional information in the program description. These commentors were concerned that there may be insufficient information available to determine a program's adequacy. These regulations reflect EPA's view that a complete program

description is essential for determining the adequacy of a State's program. A State's program must be at least as stringent and extensive as the Federal program. In response to these comments, we have specified certain information that must be included in the scope and structure of the State's program. The description of the scope and structure of the State's program must include a detailed description of the extent of the State's jurisdiction, scope of the activities regulated as well as the scope of permit exemptions (if any), anticipated coordination, and the environmental permit review criteria.

Section 233.11(h) clarifies the requirements for a description of the State's jurisdiction. As part of the program description, the State must describe separately the waters it will assume after program approval and the waters retained by the Corps. This should make it easier for the public to understand the split jurisdiction between the State and the Corps.

We do not concur with the comment that, in addition to a description of funding and manpower available for program administration, the program description should include formal assurance from the Governor that the level of funding is sufficient to provide for an effective program. However, we have reinstated the existing requirement that the State provide an estimate of the anticipated workload. This should provide the information needed to determine if the State has sufficient manpower to adequately administer a good program. If there is insufficient funding or manpower for an adequate program, this will become evident either in review of the program submission or in the annual review of an approved program.

**Section 233.13:** In response to comment, we have specified that, if more than one State agency has responsibility for program administration, all the involved State agencies must be parties to the Memorandum of Agreement (MOA) between the State and EPA's Regional Administrator. This requirement is in the existing regulations, but had been eliminated in the proposal. Restoring this requirement ensures that all State agencies responsible for program implementation are fully aware of their responsibilities.

One commenter suggested we use the MOA to establish procedures to withdraw a permit from State processing prior to any State action on the application. We do not agree with this suggestion. Except for one situation provided for in Section 404(j), only the

State may issue a permit for discharges in State regulated waters.

We do not agree with the comment that the proposal fails to ensure adequate coordination of EPA and State enforcement activities, as it requires the MOA to address State and EPA roles and coordination on compliance monitoring and enforcement activities. The purpose of formalizing this aspect of the State's program in an MOA is to assure adequate coordination on compliance monitoring and enforcement activities. As part of the State's program submission, this MOA is subject to public comment. If there is any question on the adequacy of a particular program, it should become apparent during Federal agency and public review.

Many commentors expressed concern about the provision for waiver of Federal review. Many were concerned that the waiver provision would be abused and that environmental protection of the resources would suffer. Several commentors were concerned that inappropriate categories would be waived. We feel that use of this waiver provision will reduce workload and paperwork and focus Federal resources where they are most needed and appropriate. Specific waivers will be available for public review and comment prior to program approval.

This final regulation eliminates a separate section on sharing of information (former 40 CFR 233.29), since the MOA with the Regional Administrator is already required to address State submittal of information to EPA and EPA access to State records, reports and files relevant to the program. We feel this adequately serves the purpose of 40 CFR 233.29.

*Section 233.14:* In response to comments, we have, as in the previous section, now specified that all State agencies responsible for program administration must be parties to the Memorandum of Agreement between the State and the Secretary.

EPA has also added a note encouraging States to use this MOA to establish procedures for joint processing of Federal and State permits. Several comments requested that joint processing be made mandatory. While we agree that joint permit processing may be very beneficial to the regulated public, we cannot make this a condition to an approvable program. However, we will continue to strongly encourage States to look into the possibility of joint processing.

In response to comment, we have retained the existing requirement that, if States plan to assume existing Corps general permits, this MOA must include procedures for transferring the support

files for these general permits from the Corps to the State. This will facilitate State oversight of such general permits.

One commentor was concerned that the regulations eliminated a provision for procedures to ensure the State did not approve permits on the basis of incomplete applications transferred by the Corps. This provision was deleted as unnecessary. Once a State assumes the program, it is responsible for fulfilling all permitting requirements, including public notice. The regulation requires that sufficient information be available to meet the information requirements for public notice and for assessing the impacts of the discharge. Therefore, the State must either deny incomplete applications or take steps to get the complete information.

*Section 233.15:* The Act establishes a 120-day time clock for EPA decision on a State's request for program approval. The final regulation clarifies that this statutorily mandated time period starts on EPA's receipt of a complete program submission. If the State significantly changes its submission during the review period, the time clocks starts over upon EPA's receipt of the revised submission. The review period may be extended upon agreement of the State and EPA.

We cannot agree to the suggestion that the regulation lengthen the public comment period and notice of public hearing for decision on a State program. The Act is very specific on the timeframe for this decision. If a decision is not made within the 120 days timeframe, the State's program is automatically approved. EPA cannot make a decision within the mandated 120 days of receipt if these time frames are extended. Of course, as noted earlier, a State may agree to extend the time period for program approval; in that event, additional time could be provided for public participation within that State.

EPA will make its decision to approve or disapprove the State's program within the statutorily mandated timeframe. However, if approved, the State's program will not be effective until the notice of approval is published in the Federal Register.

Many comments were received on the delegation of authority to the Regional Administrator to approve/disapprove State programs. Most commentors were concerned about national consistency among the States' programs. The Delegation Manual, which formalizes this delegation of authority, requires that the Regional Administrator approving a State program must obtain the concurrence of two EPA headquarters offices—Office of Water

and Office of General Counsel. This should ensure the desired national consistency.

EPA has added language to make it explicit that programs shall be approved or disapproved based on whether the State's program fulfills the requirements of this regulation and the Act.

This rule also clarifies that EPA will use existing State, Corps, FWS and NMFS mailing lists as the basis for mailing notices about the State's request for program approval.

A summary of significant comments received and response to these comments will be prepared by the Regional Administrator prior to decision on a State's program. Since there are already specific requirements for public notice and public hearing, there is no need for (and we have deleted the requirement for) the responsiveness summary itself to describe the public participation activities or matters presented to the public.

*Section 233.16:* This rule clarifies that it is the State's obligation to keep the Regional Administrator informed of any proposed or actual changes to the State's approved program.

We rejected the suggestion that if a State must amend or enact new legislation to comply with any modification in Federal regulation, the change must be promulgated within one year of the modification. A two year time period was chosen because many State legislatures do not meet every year. A one-year deadline for these States would be impossible to meet.

We also do not agree with the suggestion that minor revisions to an approved State program should undergo as much review and/or coordination as substantial program revisions. As the name (minor revision) implies, these program changes will not have a significant impact on the program or the environment. Of course, if there is question in EPA's mind about whether a proposed revision is minor or substantial, the revision shall be considered substantial and undergo full review specified for an original application.

*Section 233.21:* Several commentors questioned the legality of State issued general permits. Sections 404 (g), (h) and (j) of the Act authorize this type of State permit.

Many commentors were received on general permits. States have the option of assuming administration of Corps' existing general permits. If they choose to exercise this option, the State is responsible for ensuring discharges comply with any existing permit conditions and any reporting, monitoring

or predischARGE requirements. The Corps shall provide the State copies of the support files for any general permits assumed by the State.

One commentor questioned the advisability of EPA approving transfer of some existing Corps general permits to a State. EPA cannot ignore Sections 404 (g)(1) and (h)(5) which provide for a State to assume existing general permits. If a State with an approved State program proposes renewal of any permits that have not worked well, EPA will comment/object to these proposed permits, as appropriate.

Several commentors expressed satisfaction with the Corps' existing general permits. These commentors expressed concern about the States not assuming such existing general permits and about their opportunity for participation in such a decision. It is the State's prerogative not to assume any of the existing general permits. However, if, at the time of initial program assumption, the State does not intend to assume existing Corps general permits, this will be noted within the program submission and will be subject to public comment and public hearing as part of the approval process. Failure to assume existing Corps general permits does not constitute a partial program, since the State will process individual permit applications for those discharges previously authorized by general permit. Any Corps general permit not assumed by the State will remain in effect, for purposes of the Clean Water Act, until its normal expiration date, unless revoked or modified sooner by the Corps under its procedures. If subsequent to program approval the State decides to revoke or modify a general permit it has assumed, the normal revocation procedures will apply.

Many comments were received on predischARGE notification requirements for general permits. Some commentors agreed that notification should be determined on a permit-by-permit basis; others felt that such notification should be required on all general permits. This rule adopts the proposal that notification requirements be established on a permit-by-permit basis. For instance, prenotification or reporting may be required in areas where there is a likelihood for individual or cumulative adverse effect on the environment because of discharges conducted under a general permit. All draft general permits will be reviewed by EPA and the other Federal review agencies as well as the general public. If during the review of a particular draft general permit, EPA determines that notification

provisions are appropriate to ensure compliance with the 404(b)(1) Guidelines, we will so state in the Federal comments to the State. This ensures that notification requirements will be included where in fact appropriate.

The Department of the Interior requested that we require a 30-day prenotification requirement on any discharge pursuant to a general permit that may impact units of the National Park System, National Wildlife Refuge System, National Fish Hatchery, Reclamation project lands, Indian Reservation and Trust lands, and public lands under the jurisdiction of the Bureau of Land Management. We do not feel at this time that there is a basis for automatically requiring such prenotification. If there is a need for prenotification for a particular permit, it may be specified through the Federal comment on the draft permits and will therefore be included in the issued general permit, in accordance with § 233.50.

Several commentors requested that we retain limits on any single operation conducted under a general permit. We agree that this is appropriate. Subsection 233.21(c) (1) and (2) require each general permit to have limits on the size and location and type of fill for any single operation, sufficient to ensure minimal adverse environmental effects when performed separately and minimal cumulative adverse effects, as required by Section 404(e).

One commentor was concerned that we had deleted all the standard permit conditions (§ 233.23) for general permits. Section 233.21(c) (1) and (2) recapture the main items of § 233.23(c)(1) such as specific description of activities authorized including limitations for any single operation and precise description of geographic area to which the general permit applies including any limitations where operations may be conducted. The only part of § 233.23 (Permit conditions) that does not apply for general permits is § 233.23(c)(1), which is not applicable because it refers to items that are pertinent only to individual permits (e.g. name and address of permittee).

Several commentors suggested that the Director should show cause for invoking discretionary authority to require an individual permit. This regulation specifies that discretionary authority may be based on concerns for the aquatic environment including compliance with these regulations and the 404(b)(1) Guidelines. Section 510 of the Act preserves the Director's right to impose more stringent requirements, i.e.,

to invoke discretionary authority for other reasons under State law. Once the Director notifies a discharger that he will exercise discretionary authority to require an individual permit, the activity is no longer authorized under the general permit. If the activity continues after notification, the discharger is subject to enforcement action.

**Section 233.22:** In response to comments requesting more specific permit conditions, we have clarified that emergency permits, to the extent possible, should incorporate all applicable permit conditions (§ 233.23), including restoration of the site. We have also retained the provision that emergency permits shall be limited to duration of time needed to complete the authorized emergency action.

We do not agree with the comment that the Regional Administrator must show cause to terminate an emergency permit. The Regional Administrator never terminates permits. The Director may terminate an emergency permit if he determines such an action is necessary to protect human health or the environment.

**Section 233.23:** Each permit shall have conditions which assure compliance with all applicable statutory and regulatory requirements. If any of these requirements change, the permit conditions must be modified as needed to assure compliance with the revised requirements.

In response to comments, we have added a requirement that the permit contain conditions which assure that the discharge will be conducted in a manner which minimizes adverse impacts on the physical, chemical and biological integrity of the waters of the United States. This is a reiteration of the requirements in the 404(b)(1) Guidelines (§ 230.10(a)). Restoration and mitigation may be considered as mechanisms for reducing adverse impacts in appropriate circumstances.

One commentor expressed concern about the proposed deletion of the permit condition referring to BMP's approved by a Statewide 208(b)(4) agency. If a State has an approved 208 program, these requirements would be covered by § 233.23(a), which requires the Director to establish conditions which assure compliance with all applicable statutory and regulatory requirements, so there is no need for a separate reference to the BMP's.

In response to comment, we have retained the requirement for a permit condition explaining that a permit violation is a violation of the Act as well as of State statutes or regulations, as this reminder may enhance compliance.

We also have expanded § 233.23(c)(6) to require the permittee to provide the Director information to determine whether cause exists for permit revocation or termination as well as modification.

We concur with the comment that the Director or his authorized representative should have proper identification before they can enter the premises or inspect any records. We believe this is reasonable and have added this to the final regulation.

One commentor requested that the regulation require more specific identification of the disposal site. We feel that between the existing requirements for permit application, public notice and permit conditions, the disposal site will be adequately identified. However, as a safeguard, we have added that the description of the project on the issued permit must include a description of the purpose of the discharge.

*Section 233.24 (Effect of a permit).* This section has been deleted as unnecessary. The statements in this section were simply facts which do not need to be included in regulations to be in effect.

*Section 233.30:* Many comments were received on the State application form. A number expressed concern that there would not be enough information available to evaluate the potential impacts of the discharge activity. We have accordingly revised this section to generally reflect the same application information requirements contained in the Corps' current regulations (33 CFR Part 325). Under this approach, State assumption of the program should not result in any change in either the kind of information available for review or the burden upon the applicant to supply the information. In addition, a requirement for certification that all information contained in the application is true and accurate has been added to § 233.30(b)(4).

Several commentors requested that we include the publicity and pre-application consultation requirements in the regulations. As noted in the preamble to the proposed rule, we agree that publicity and preapplication consultation are beneficial; however, they are not required for an approvable program. We will continue to encourage States to include them in their programs.

*Section 233.31:* In response to comment, this section has been simplified from proposed § 233.61; it now simply requires coordination with other States whose waters may be impacted by the discharge and coordination with Federal and Federal-State water related planning and review

processes, without attempting to list such processes. These planning and review processes may include, but are not limited to, coastal zone management plans, 208 areawide plans, Continuing Planning Process (§ 303(e)), and advanced identification (40 CFR 230.80). The coordination procedures will likely vary from State to State. The State's anticipated coordination shall be included in the program description. EPA will carefully scrutinize the anticipated coordination to assure it is adequate.

Comments were received suggesting that we require States to incorporate into their programs information developed by FWS' National Wetlands Inventory (NWI). While we agree that this information would be very useful in administering a State's program and encourage States to take advantage of it, it should not be mandatory for States to incorporate this information in their programs. The NWI was not developed for regulatory purposes. Additionally, the FWS did not use EPA's definition of wetlands in the NWI; therefore, the "NWI wetlands" and the "404 wetlands" may not always coincide.

Several commentors were concerned that the lack of specificity of coordination requirements would weaken State programs. While these regulations do not list specific entities (agencies) that must be coordinated with, we will carefully evaluate the coordination aspects of each State's program prior to decision on approval/disapproval. While we anticipate that the State's permitting agency will coordinate with State fish and game agencies, this is not required by the Fish and Wildlife Coordination Act (FWCA). Once a State assumes the 404 permitting responsibility, that Act no longer applies in the permitting process since permitting becomes a State (not Federal) action. The FWCA will still require coordination with FWS whenever a State-issued permit is issued to a Federal agency or facility. However, it must also be remembered that States must assure compliance with the 404(b)(1) Guidelines which provide for protection of fish and wildlife resources. EPA is responsible for soliciting comments from the Corps, FWS, and NMFS, and commenting to the States.

*Section 233.32:* Many comments were received on proposed § 233.62-(public notice), some in support of and others opposed to shortening the public comment period. The final rule provides for a public comment period at least comparable to that under the Federal program. The existing Corps' regulations (33 CFR Part 325.3) specify a public notice period of "A reasonable period of

time, normally thirty days but not less than fifteen days from date of mailing." Today's rules specify " . . . a reasonable period of time, normally 30 days," and allows approving a program that allows less than a 30 day public comment period if the Regional Administrator determines that "sufficient public notice is provided for." The Regional Administrator must carefully consider all aspects of a State's program in regard to public involvement, including how extensive the State's mailing list is, whether notice is published in area newspapers, what the actual length of the comment period is, whether the shorter time period is for all projects or just certain categories of discharge. We anticipate that comment periods would not be shorter than 20 days, and we will carefully scrutinize any that are less than 30 days.

Several comments on the content of the public notices were also received. These comments objected to the lack of specificity of the information required to be included in the public notice. In response to these comments, the information requirements for public notice have been changed. These regulations incorporate much of the language in the Corps' existing regulations (33 CFR 325.3.) Therefore, there should be no net change in the information available to evaluate a proposed discharge from the existing Federal program to an approved State program.

We have modified the requirement on who must automatically be mailed notice of a permit application. While the notification may vary depending on the type and location of the project, certain notifications, such as the local governmental agency, should be routine. Other notifications that may be useful include historic preservation and coastal zone management offices.

In response to comments, we have also clarified that anyone may request to be put on a mailing list to receive copies of public notices.

One commentor suggested that we make it clear that information obtained in response to the public notice will be taken into consideration as part of the environmental assessment to determine if an environmental impact statement (EIS) should be prepared. We have not included this language since, once a State assumes the permitting responsibility, the National Environmental Policy Act (NEPA) no longer applies. NEPA applies to Federal actions. When a State assumes the program, the permit decision is a State action, not a Federal action. While many States have a State law equivalent to



NEPA, it is not the function of these regulations to address EIS requirements under such State laws.

**Section 233.33:** This provision has been rewritten to clarify how the transcript of public hearings will be made available to the public.

**Section 233.34:** Several commentors expressed concern that requiring the State to prepare a written determination for each permit is excessive paperwork. We do not concur with this view; we feel that a written determination is needed for each permit decision to ensure proper evaluation and to facilitate subsequent review. Therefore, these regulations contain the requirement that the Director must prepare a written determination for each permit application outlining the decision and the rationale for the decision. Of course, in accordance with § 230.6 of the Guidelines, the level of detail may be tailored to the circumstances.

Any State environmental review criteria must be at least equivalent to the 404(b)(1) Guidelines for an approvable program. The 404(b)(1) Guidelines were the subject of an Advanced Notice of Proposed Rulemaking (ANPRM) (47 FR 36798) published August 23, 1982, to solicit comments and examples of alleged problems with these Guidelines. At this time, EPA has not found sufficient basis for revising the Guidelines. Therefore, States must assure compliance with the current Guidelines, as required in section 404(h)(1)(A)(i).

We do not concur with the suggestion that we establish specific deadlines for State decision on an application. The only deadlines in this regulation are those which relate to the statutorily mandated timeframes for Federal review of an application.

**Section 233.35:** The final regulation simply requires signature by both the applicant and the Director, and does not specify the sequence in which they sign. However, EPA anticipates that, if the project is controversial or if the permit conditions are restrictive, the Director may wish to require the applicant to sign the permit to indicate acceptance of its terms prior to the Director's signature.

**Section 233.36:** These regulations simplify the procedures for modification, suspension and revocation of permits. State procedures to handle these situations shall be approved if there is opportunity for public comment, coordination with the Federal review agencies, and opportunity for public hearing. Language has been added (§ 233.36(b)) specifying that permit modification must be in compliance with § 233.20 (Prohibitions).

The 402 State program regulations handle modifications differently than these 404 State Program Regulations. 40 CFR 122.62 provides an exclusive list of grounds which justify the modification of a 402 State permit. Section 233.36 does not. This difference between the two programs is appropriate for the following reasons. First, the 402 program has a long history of litigation concerning reopener and the five year maximum permit term; the 404 program does not. Second, the 402 program generally regulates continuous discharges; consequently, there is great concern with balancing the permittee's need for certainty and continuity against the program's need to impose more stringent standards. The 404 program, however, tends to regulate short-term discharges, and thus the permittee's need for continuity is much less than it is in the 402 program. Consequently, the 404 programs may facilitate permit modification by States where the 402 program can not.

One commenter expressed concern about use of abbreviated review procedures for modification of permits for minor modification of project plans that do not "significantly" change the character, scope and/or purpose of the project or result in significant change in environmental impact. The commenter was concerned that the use of the word "significant" was too vague and allowed a procedural loophole to avoid public and agency review. The key word in this sentence is "minor" modification. Things that will be evaluated in making the decision on whether the project modification is minor are whether there is any change in project purpose, or any change that increases the amount of dredged or fill material, or any change that enlarges the scope of the project. We anticipate that, if there is any question about the need for public and agency review of a project modification, the State will initiate full review procedures.

**Section 233.37:** In the preamble to the proposed regulation (49 FR 39015) we noted that the requirements concerning who must sign may not necessarily be appropriate for the 404 program. The language in the proposal was the result of a settlement agreement (*NRDC v. EPA*, and consolidated cases [No. 80-1607 (D.C. Circuit)]). All the comments received on this subject agreed that the proposed signature requirements are appropriate for NPDES discharges, but are too inflexible and are not really appropriate for 404 discharges, since most 404 discharges are a one time discharge and on a relatively small scale. We concur with these comments. Therefore, this final regulation

incorporates the signatory requirements contained in the Corps' current regulations (33 CFR 325.1). Thus, there will be no change from the existing Section 404 requirements when a State assumes the program.

The certification that all statements contained in the application or other documents are true and accurate and that there are penalties for submitting false information has been removed from this section to § 233.30 (Application for a permit). Section 233.41(e)(3)(iii) also addresses this certification in that it provides for authority to seek criminal fines against any person who knowingly makes false statements in any application, record, report, plan or other document filed or required to be maintained under the Act, these regulations or the approved State program.

**Section 233.38:** One commentor requested that if a State permit application has been submitted in a timely manner, an existing Federal permit should be continued beyond its expiration date until a State permit is issued. The provision in the Administrative Procedures Act for continuing Federal permits does not apply in this setting. Therefore, such continuation may be accomplished only through State law. These regulations allow but do not require the State to have such authority. We cannot mandate that this be a requirement for an approvable program.

**Section 233.40:** The compliance evaluation provision has been rewritten from the existing regulation to simplify it and to provide additional flexibility. We continue to believe that compliance evaluation is an important component of an effective Section 404 program. Therefore, the previous provisions (40 CFR 233.27 (1984)) should be considered as guidance in interpreting the new streamlined language.

We do not agree with the comment that State agency authority to "enter any site or premises subject to regulation" is excessive or may violate civil rights. This provision does not override applicable warrant requirements or other safeguards. Of course, if State requirements so constrain the State's right of entry that the State lacks meaningful authority to inspect, the program would not be approvable. (We are not presently aware of any States where there would be this problem, however.)

**Section 233.41:** Many comments were received on the proposed alternative requirements for authority to assess civil and criminal fines of a specific amount. The comments ranged from approval of

the alternative concept to concern about weakening State enforcement capability. This regulation promulgates the proposed subsection allowing approval of a State program without the specific monetary penalty authority if it has a demonstrably effective alternative enforcement mechanism.

We are interested in ensuring that State programs have strong enforcement capability, since it is not desirable for EPA to constantly overfile in State enforcement actions. Because the Act does not specify that a State must have penalties equal to the Federal penalties or at any other particular level for an approvable program, EPA has substantial discretion in deciding what is sufficient State enforcement authority. These regulations establish monetary penalties for which the State must have the authority to assess; they need not be assessed by the State for every violation. These amounts are approximately half those EPA is authorized to assess.

If a State cannot fulfill these monetary penalty requirements, it can still have an approved program if EPA is satisfied that it has "an alternate, demonstrably effective method of ensuring compliance." However, even under the alternative enforcement program provision, States must still have the authority to assess both civil and criminal penalties, although the amounts may not equal those required by § 233.41(a)(i)-(iii).

Before approving any alternate enforcement mechanism, the Regional Administrator (RA) will carefully evaluate the State's proposed alternative enforcement mechanism to ascertain the effectiveness of the proposed alternative. The State's program must have a clear history of demonstrated effective deterrence, while also having direct punitive value. Programs will have to be in effect for at least one year prior to formal application for program approval in order to have a sufficient track record for evaluating effectiveness.

An effective, strong restoration program is the type of enforcement program that would be given serious consideration as an alternative under this provision. Being of a solid nature, 404 discharges tend to stay where originally placed, making restoration of illegally filled areas more feasible for 404 discharges as compared to 402 discharges. Most 404 discharges are a one time discharge, of relatively short duration, and on a relatively small scale. This lends more credence to restoration working as an alternative enforcement mechanism which can serve to protect

the environment, deter future violations, and penalize the violator.

A key aspect that the RA must consider in determining effectiveness is whether the alternative program has an equivalent deterrence effect as would assessment of monetary penalties. The alternative approach must be strong enough to cause a violator to cease any and all illegal activities. It must also deter others from violating the State's permit program. How effective the alternative mechanism will be in preventing and restoring any environmental damage will also be considered by the RA in making a decision on approval/denial of a State's alternative enforcement program.

The enforcement authority which a State must have in order for a Section 404 program to be approved is essentially the same enforcement authority it must have to administer an NPDES program under the Act. If a State lacks authority to recover penalties of the levels required under § 233.41(a)(3)(i)-(iii), EPA will review a State's authority to assess penalties in light of the State's ability to provide other incentives to compliance and deterrence to noncompliance. EPA intends that penalties for violations of Section 404 programs will provide general and specific deterrence. Penalties assessed in State administered programs should persuade the violator to take precautions against falling into noncompliance again, deter violations by others, and restore economic equity to regulated parties who have complied with Section 404 requirements. Penalties assessed in a State program should, at a minimum, recapture the economic benefit that a violator has wrongfully obtained. In support of its application for program approval, a State may provide information regarding its authority to obtain money judgments from Section 404 violators under equitable theories such as restitution and unjust enrichment.

Any proposed alternative enforcement mechanism will be available for public comment as part of the State's program submission. We are concerned about national consistency in administration and effectiveness of State programs. Therefore, we must stress that approval of an alternate enforcement mechanism will not be undertaken lightly. States should continue to try to meet the existing monetary penalty requirements.

In these regulations we have added a reporting requirement for States using the alternative enforcement authority. Under final § 233.41(d) the State must keep the Regional Administrator informed of all enforcement actions

carried out under the alternative provision. The manner of reporting will be established as part of the State's submission in the Memorandum of Agreement with the Regional Administrator. This reporting requirement will enable EPA to closely monitor the effectiveness of the State's enforcement program and to determine any need for EPA overfiling in State enforcement cases and/or action under Section 309.

In response to comment, we have retained the requirement that the burden of proof for State enforcement cases shall be no greater than the burden of proof required of EPA.

One commentor suggested that any intervention in a State enforcement action must include some showing of justification. This regulation adopts the proposal which allows intervention " . . . by any citizen having an interest which is or may be adversely affected." We feel this adequately answers the suggestion.

One commentor requested that EPA prescribe procedures for any affected person to initiate legal action in State or Federal court against the Director, the permittee, or anyone operating in noncompliance with a State program. This would be comparable to the citizen suit provision in Section 505 of the Act. While such a provision might strengthen a State program, there is no such statutory requirement for an approvable program. However, we do anticipate that many States will have some form of citizen suit provisions.

#### Subpart F—Oversight Policy

Many Federal environmental programs were designed by Congress to be administered at the State level wherever possible. EPA's policy has been to transfer the administration of national programs to State governments to the fullest extent possible, consistent with statutory intent and good management practice. The clear intent of this design is to use the strengths of Federal and State governments in a partnership to protect public health and the nation's air, water, and land. State governments are expected to assume primary responsibility, while EPA is to provide consistent environmental leadership at the national level, develop general program frameworks, establish standards as required by the legislation, assist States in preparing to assume responsibility for program operation, provide technical support to States in maintaining high quality programs, and ensure national compliance with environmental quality standards.

The relationship between EPA and the States under assumption of the Section 404 Program is intended to be a partnership. Both EPA and the States have continuing roles and responsibilities under assumed State 404 programs. EPA remains responsible to the President, the Congress and the public for progress toward meeting national environmental goals and for ensuring that the Clean Water Act is adequately enforced. Thus, EPA's policy to transfer management responsibilities for environmental programs to State governments carries with it a corresponding EPA responsibility to assure the objectives of the Federal law are achieved.

Evaluation of approved State 404 programs will generally focus on overall program performance and identifying patterns of problems. However, there will be some cases where EPA (and other Federal agency) participation in an individual State permit decision will be appropriate. Section 404(j) specifically provides for Federal comment on individual permit applications.

However, based on our general policy and our specific experience with Michigan's Section 404 program, the provision for waiver of Federal review (§ 404(k)) will be exercised to focus permit-specific oversight primarily on proposed discharges with potentially serious adverse environmental impacts. Review of Michigan's assumed program clearly illustrates that Federal review was waived in the vast majority of cases. In 1985, approximately 1% of the permit applications received Federal review; in 1986, approximately 1.5%.

We expect to issue guidance on Federal oversight of approved State programs under these regulations. This will include guidance on identifying and describing categories of activities eligible and appropriate for waiver of Federal review, emphasizing reasonable waiver initially, followed by increasing waiver over time based on experience with the State 404 Program. Thus, as experience demonstrates that a State is effectively administering its approved program, so as to comply with all national requirements, it is expected that additional waivers will be developed, replacing more individual permit review with periodic programmatic review. This periodic review will usually be conducted on an annual basis, but may be more frequent, as necessary or appropriate. EPA intends that other Federal agencies with responsibility under Section 404 will have an opportunity to participate in State program review activities and in

the determination of what changes to such review would be appropriate.

**Section 233.50:** Several commentors expressed concern that too much time is allowed for Federal review of State permit applications. The final regulations retain the proposed time frames because they are based on Section 404(j) of the Act. However, the regulations do allow for the times to be shortened by mutual agreement of the Federal agencies and the State.

Several commentors questioned why EPA receives the public notice from the State and distributes the notice to the Federal agencies. The Act establishes EPA as the Federal focus of contact with the State. However, if the State, with the goal of streamlining, wants to provide copies of the public notice directly to all the Federal agencies, this can be accommodated within the Memorandum of Agreement with the Regional Administrator (§ 233.13). In either case, the comments from the Federal review agencies will be forwarded to EPA to consolidate the Federal comment to the State.

In addition to the public notice and draft general permit, the Regional Administrator shall forward to the Corps, FWS, and NMFS any other information pertinent to making an informed comment that the States makes available to him.

This regulation eliminates the requirement that States prepare draft individual permits. Draft general permits must be prepared (§ 404(j) refers to a copy of each proposed general permit) but there is no comparable statutory requirement for draft individual permits. Moreover, draft permits are not prepared as part of the current Federal program. Public review of individual permit applications is currently based on the public notice; public review subsequent to State assumption will also be based on public notice. Therefore, there will be no substantial change from existing procedures.

One commentor questioned why the public notice was circulated to EPA for Federal review instead of the permit application (§ 404(j)). The public notice usually contains all the pertinent information in the permit application (§ 233.32(d)). Under the Corps administered program, public and Federal review is normally based on the public notice; therefore, there will be no significant change from current practice. In addition, under either the Federal and State programs, EPA can request a copy of a particular application if it has a need for it.

In response to comment, we have reinstated the provision that if the

Regional Administrator notified the Director within 30 days of receipt of the public notice that there is no comment, he may reserve the right to object within 90 days of receipt of the notice based on new information brought out by the public during the comment period or at a hearing.

Contrary to several comments received, the regulation already provides that the State shall provide a copy of every issued permit to the Regional Administrator (§ 233.50(a)(4)). These issued permits will be reviewed for compliance with the requirements for an approvable program, as part of EPA's overall oversight.

One commentor suggested that our provision for the Regional Administrator to consolidate comments for the Federal agencies conflicted with Section 404(h)(1)(H). However, Section 404(j) specifically assigns this coordination/consolidation role to EPA's Regional Administrator. This section clearly establishes EPA's Regional Administrator as the Federal focus for approved State programs. After "full consideration" of the comments of the Federal review agencies, EPA will prepare and transmit the Federal comment on a permit application to the State. If appropriate and/or useful, EPA may transmit copies of the other Federal agencies' comment to the State as part of the official Federal comment. Those agencies are, of course, also free to furnish information copies of their comments to the State at the same time they submit them to EPA.

**Section 233.51:** This section received many comments, which range from the view that Federal review has been waived far too much to one that Federal review has not been waived for enough categories of discharge. Other than the few categories never eligible for waiver, waivers will be developed on a State-by-State basis. Each State has unique resources that must be considered in developing categories or discharge eligible for waiver. These categories will be developed in consultation with the Federal review agencies and will be open to public comment. We anticipate that use of this waiver mechanism will reduce unnecessary paperwork and direct the Federal presence to where it is most needed and appropriate.

The proposed rule specified that general permits are not eligible for waiver of Federal review. The proposal intended that *draft* general permits are not eligible for waiver of review. This has been clarified in the final rule.

In response to comment, we have reinstated the provision that discharges into National and historical monuments

are not eligible for waiver of Federal review, in light of the special Federal interest in them.

We anticipate that existing Corps nationwide permits will be used as a basis for developing categories to discharge eligible for waiver of Federal review. Previous Federal agencies' comments (or no comment) can also be used in determining activities eligible for waiver of Federal review. Where EPA has used the advanced identification procedure with the Corps or the State under 40 CFR 230.80, or on its own initiative under Section 404(c) (40 CFR Part 231), the results of that process will be used to determine those areas and categories of discharge that should be, and/or those that should not be, considered for waiver of Federal review.

Categories of activities eligible for waiver of Federal review in a particular State will be developed after consultation with the Corps, FWS, and NMFS. These categories will be described in the State's submission for program approval and therefore will be subject to public comment. Activities for which Federal review is waived are also subject to annual review. If, at any time, any of these categories of activities are deemed inappropriate for continued waiver, they can (and will) be withdrawn from the waiver provision and become subject to individual review.

**Section 233.52:** In response to comments, we have added a requirement that the State's draft annual report to be made available for public inspection.

The annual report is a mandatory, not a discretionary, requirement for an approved program. In response to comment, we have added to the information that shall be included in the annual report the number of suspected unauthorized activities reported to the State and the nature of the State's action on these reported activities; added that the State shall report the number of violations identified as well as the number and nature of enforcement actions taken; and the number of permit applications received but not yet processed.

Contrary to comment on the annual reporting requirements, the regulation does require the Director to respond, in the final report, to the Regional Administrator's comments and questions about the draft report.

**Section 233.53:** One commentator suggested that program withdrawal should be initiated only where a State's program, on the whole, has repeatedly failed to comply with the requirements for an approvable program. This commentator suggested that continued

problems with any one of the criteria specified in § 233.53(b) (2) and (3) is not sufficient grounds for program withdrawal. We cannot concur with this suggestion. While we do agree that program withdrawal will not be taken lightly and that program approval will not be withdrawn for minor reasons, continued non-performance of any of the criteria specified can be grounds for initiating program withdrawal. Each of the criteria listed is a vital part of an approved program and continued non-performance of any of these would result in a program that no longer fulfills the requirements for an approved program.

These regulations provide that the Administrator shall respond in writing to any petition to commence withdrawal proceedings. One commentator suggested that this exceeded the public involvement requirements. We believe that such written response is nonetheless good policy and publish the rule as proposed.

#### Executive Order 12291

Since these rules are revisions which provide regulatory relief by, for the most part, increasing flexibility in State program design and administration, we have determined that they are not a major rule requiring a Regulatory Impact Analysis under Executive Order 12291. This rule has been reviewed by the Office of Management and Budget in accordance with the requirements of Executive Order 12291.

#### Regulatory Flexibility Act

This final rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96-354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. Since this revision to 40 CFR Part 233 will reduce paperwork, reporting requirements and application information requirements, this final rule will be beneficial to small entities. Thus, no Regulatory Flexibility Analysis is needed.

#### Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this final rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control numbers:

2090-011.  
2090-012.  
2090-013.  
2090-015.

#### List of Subjects in 40 CFR Parts 232 and 233

Administrative practice and procedure, Reporting and recordkeeping requirements, Confidential business information, Water pollution control, Indian lands, Intergovernmental relations, Water supply, Waterways, Navigation, Penalties, Wetlands.

Dated: May 27, 1988.

Lee M. Thomas,  
Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, 40 CFR Part 232 is amended as set forth below.

1. Part 232 is added to read as follows:

#### PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

Sec.  
232.1 Purpose and scope of this part.  
232.2 Definitions.  
232.3 Activities not requiring permits.  
Authority: 33 U.S.C. 1344.

##### § 232.1 Purpose and scope of this part.

Part 232 contains definitions applicable to the Section 404 program for discharges of dredged or fill material. These definitions apply to both the Federally operated program and State administered programs after program approval. This part also describes those activities which are exempted from regulation. Regulations prescribing the substantive environmental criteria for issuance of Section 404 permits appear at 40 CFR Part 230. Regulations establishing procedures to be followed by the EPA in denying or restricting a disposal site appear at 40 CFR Part 231. Regulations containing the procedures and policies used by the Corps in administering the 404 program appear at 33 CFR Parts 320-330. Regulations specifying the procedures EPA will follow, and the criteria EPA will apply in approving, monitoring, and withdrawing approval of Section 404 State programs appear at 40 CFR Part 233.

##### § 232.2 Definitions.

(a) *Administrator* means the Administrator of the Environmental Protection Agency or an authorized representative.

(b) *Application* means a form for applying for a permit to discharge dredged or fill material into waters of the United States.

(c) *Approved program* means a State program which has been approved by the Regional Administrator under Part 233 of this chapter or which is deemed

approved under Section 404(h)(3), 33 U.S.C. 1344(h)(3).

(d) *Best management practices (BMPs)* 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 from discharges of dredged or fill material. BMPs include methods, measures, practices, or design and performance standards which facilitate compliance with the Section 404(b)(1) Guidelines (40 CFR Part 230), effluent limitations or prohibitions under Section 307(a), and applicable water quality standards.

(e) *Discharge of dredged material* means any addition of dredged material into 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 site. 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 Act even though the extraction and deposit of such material may require a permit from the Corps or the State Section 404 program. The term does not include *de minimus*, incidental soil movement occurring during normal dredging operations.

(f) *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; 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.

(g) *Dredged material* means material that is excavated or dredged from waters of the United States.

(h) *Effluent* means dredged material or fill material, including return flow from confined sites.

(i) *Fill material* 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.

(j) *General permit* means a permit authorizing a category of discharges of dredged or fill material under the Act. General permits are permits for categories of discharge which are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

(k) *Owner or operator* means the owner or operator of any activity subject to regulation under the 404 program.

(l) *Permit* means a written authorization issued by an approved State to implement the requirements of Part 233, or by the Corps under 33 CFR Parts 320-330. When used in these regulations, "permit" includes "general permit" as well as individual permit.

(m) *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

(n) *Regional Administrator* means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

(o) *Secretary* means the Secretary of the Army acting through the Chief of Engineers.

(p) *State regulated waters* means those waters of the United States in which the Corps suspends the issuance of Section 404 permits upon approval of a State's Section 404 permit program by the Administrator under Section 404(h). 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. All other waters of the United States in a State with an approved program shall be under jurisdiction of the State program, and shall be identified in the program description as required by Part 233.

(q) *Waters of the United States* means:

(1) 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.

(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 would or 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 (g)(1)-(4) of this section;

(6) The territorial sea; and

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (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.

(r) *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.

#### § 232.3 Activities not requiring permits.

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

(a) If any discharge of dredged or fill material resulting from the activities listed in paragraph (c) of this section contains any toxic pollutant listed under Section 307 of the Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(b) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraph (c) 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 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 conversion of Section 404 wetland to a non-wetland is a change in use of an area of waters of the U.S. 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.]

(c) The following activities are exempt from Section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(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 (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) 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 in 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 operation. 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 was part of an established farming, silviculture or ranching operation.

(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. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. 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 the Act which meets the requirements of Section 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. The BMPs which must be applied to satisfy this provision 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 United States 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 United States;

(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 to prevent erosion during and following construction;

(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 the 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 United States 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.

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) 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.

(2) 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.

(3)(i) Minor drainage means:

(A) 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;

(B) The discharge of dredged or fill material for the purpose of installing ditching or other 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;

(C) 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 the Act, and which are in established use for the production of rice, cranberries, or other wetland crop species.

[Note.—The provisions of paragraphs (d)(3)(i) (B) and (C) 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.]

(D) 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 after such blockages are discovered in order to be eligible for exemption.

(ii) Minor drainage in waters of the United States 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 adequate 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.

(4) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used 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. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. 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, as described above, will never involve a discharge of dredged or fill material.

(5) 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.

(e) Federal projects which qualify under the criteria contained in Section 404(r) of the Act are exempt from Section 404 permit requirements, but may be subject to other State or Federal requirements.

2. Authority citation for Part 233 continues to read as follows:

Authority: 33 U.S.C. 1344.

3. Part 233 is amended by revising Subparts A, B, C, E, and F and by redesignating Subpart D as G and the section number is changed from "233.42" to "233.60" and by adding a new Subpart D to read as follows:

## PART 233-404 STATE PROGRAM REGULATIONS

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### Subpart A—General

#### § 233.1 Purpose and scope.

(a) This Part specifies the procedures EPA will follow, and the criteria EPA

will apply, in approving, reviewing, and withdrawing approval of State programs under Section 404 of the Act.

(b) Except as provided in § 232.3, the State program must regulate all discharges of dredged or fill material into State regulated waters. Partial State programs are not approvable under Section 404. A State's decision not to assume existing Corps general permits does not constitute a partial program. The discharges previously authorized by general permit will be regulated by State individual permits. 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. The Secretary will administer the program on Indian lands if the State does not have authority to regulate activities on Indian lands.

(c) Nothing in this Part precludes a State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope, than required under this Part. Where an approved State program has a greater scope than required by Federal law, the additional coverage is not part of the Federally approved program and is not subject to Federal oversight or enforcement.

**Note.**—State assumption of the Section 404 program is limited to certain waters, as provided in section 404(g)(1). 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 material into those waters over which the Secretary retains Section 404 jurisdiction.

(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this Part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.

#### § 233.2 Definitions.

The definitions in Parts 230 and 232 as well as the following definitions apply to this Part.

(a) *Act* means the Clean Water Act (33 U.S.C. 1251 et seq.).

(b) *Corps* means the U.S. Army Corps of Engineers.

(c) *FWS* means the U.S. Fish and Wildlife Service.

(d) *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.

(e) *NMFS* means the National Marine Fisheries Service.

(f) *State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. For purposes of this regulation, the word State also includes any interstate agency requesting program approval or administering an approved program.

(g) *State Director (Director)* means the chief administrative officer of any State or interstate agency operating an approved program, or the delegated representative of the Director. If responsibility is divided among two or more State or interstate agencies, 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.

(h) *State 404 program or State program* means a State program which has been approved by EPA under Section 404 of the Act to regulate the discharge of dredged or fill material into certain waters as defined in § 232.2(p).

#### § 233.3 Confidentiality of Information.

(a) Any information submitted to EPA pursuant to these regulations may be claimed as confidential by the submitter at the time of submittal and a final determination as to that claim will be made in accordance with the procedures of 40 CFR Part 2 and paragraph (c) of this section.

(b) Any information submitted to the Director may be claimed as confidential in accordance with State law, subject to paragraphs (a) and (c) of this section.

(c) Claims of confidentiality for the following information will be denied:

- (1) The name and address of any permit applicant or permittee.
- (2) Effluent data.
- (3) Permit application, and
- (4) Issued permit.

#### § 233.4 Conflict of Interest.

Any public officer or employee who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision.

#### Subpart B—Program Approval

##### § 233.10 Elements of a program submission.

Any State that seeks to administer a 404 program under this Part shall submit to the Regional Administrator at least three copies of the following:

(a) A letter from the Governor of the State requesting program approval.

(b) A complete program description, as set forth in § 233.11.

(c) An Attorney General's statement, as set forth in § 233.12.

(d) A Memorandum of Agreement with the Regional Administrator, as set forth in § 233.13.

(e) A Memorandum of Agreement with the Secretary, as set forth in § 233.14.

(f) Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures.

##### § 233.11 Program description.

The program description as required under § 233.10 shall include:

(a) A description of the scope and structure of the State's program. The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria;

(b) A description of the State's permitting, administrative, judicial review, and other applicable procedures;

(c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program;

(d) A description of the funding and manpower which will be available for program administration;

(e) An estimate of the anticipated workload, e.g., number of discharges.

(f) Copies of permit application forms, permit forms, and reporting forms;

(g) A description of the State's compliance evaluation and enforcement programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA;

(h) A description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains



jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.

**Note.**—States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps retains authority under Section 404(g) of the Act.

(i) A description of the specific best management practices proposed to be used to satisfy the exemption provisions of Section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

#### § 233.12 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 independence legal counsel), that the laws and regulations of the State, or an interstate compact, provide adequate authority to carry out the program and meet the applicable requirements of this Part. This statement shall cite specific statutes and administrative regulations which are lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved, and, where appropriate, judicial decisions which demonstrate adequate authority. The attorney signing the statement required by this section must have authority to represent the State agency in court on all matters pertaining to the State program.

(b) If a State seeks approval of a program covering activities on Indian lands, the statement shall contain an analysis of the State's authority over such activities.

(c) The State Attorney General's statement shall contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful implementation of the State's program.

(d) In those States where more than one agency has responsibility for administering the State program, the statement must 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.

#### § 233.13 Memorandum of Agreement with Regional Administrator.

(a) Any State that seeks to administer a program under this Part shall submit a Memorandum of Agreement executed by the Director and the Regional

Administrator. The Memorandum of Agreement shall become effective upon approval of the State program. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible State agencies shall be parties to the Memorandum of Agreement.

(b) The Memorandum of Agreement shall set out the State and Federal responsibilities for program administration and enforcement. These shall include, but not be limited to:

(1) Provisions specifying classes and categories of permit applications for which EPA will waive Federal review (as specified in § 233.51).

(2) Provisions specifying the frequency and content of reports, documents and other information which the State may be required to submit to EPA in addition to the annual report, as well as a provision establishing the submission date for the annual report. The State shall also allow EPA routinely to review State records, reports and files relevant to the administration and enforcement of the approved program.

(3) Provisions addressing EPA and State roles and coordination with respect to compliance monitoring and enforcement activities.

(4) Provisions addressing modification of the Memorandum of Agreement.

#### § 233.14 Memorandum of Agreement with the Secretary.

(a) Before a State program is approved under this Part, the Director shall enter into a Memorandum of Agreement with the Secretary. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible agencies shall be parties of the Memorandum of Agreement.

(b) The Memorandum of Agreement shall include:

(1) A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.

(2) Procedures whereby the Secretary will, upon program approval, transfer to the State pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.

**Note.**—Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue Section 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.

(3) An identification of all general permits 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 general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director, including support files for permit issuance, compliance reports and records of enforcement actions.

#### § 233.15 Procedures for approving State programs.

(a) The 120 day statutory review period shall commence on the date of receipt of a complete State program submission as set out in § 233.10 of this Part. EPA shall determine whether the submission is complete within 30 days of receipt of the submission and shall notify the State of its determination. 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.

(b) If EPA determines the State significantly changes its submission during the review period, the statutory review period shall begin again upon the receipt of a revised submission.

(c) The State and EPA may extend the statutory review period by agreement.

(d) Within 10 days of receipt of a complete State Section 404 program submission, the Regional Administrator shall provide copies of the State's submission to the Corps, FWS, and NMFS (both Headquarters and appropriate Regional organizations.)

(e) After determining that a State program submission is complete, the Regional Administrator 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. The Regional Administrator shall also mail notice to persons known to be interested in such matters. Existing State, EPA, Corps, FWS, and NMFS mailing lists shall be used as a basis for this mailing. However, failure to mail all such notices shall not be grounds for invalidating approval (or disapproval) of an otherwise acceptable (or unacceptable) program. This notice shall:

(1) Provide for 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 not less than 30

days after notice of hearing is published in the Federal Register;

(3) Indicate where and when the State's submission may be reviewed by the public;

(4) Indicate whom an interested member of the public with questions should contact; and

(5) Briefly outline the fundamental aspects of the State's proposed program and the process for EPA review and decision.

(f) Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and NMFS shall submit to EPA any comments on the State's program.

(g) Within 120 days of receipt of a complete program submission (unless an extension is agreed to by the State), the Regional Administrator shall approve or disapprove the program based on whether the State's program fulfills the requirements of this Part and the Act, taking into consideration all comments received. The Regional Administrator shall prepare a responsiveness summary of significant comments received and his response to these comments. The Regional Administrator shall respond individually to comments received from the Corps, FWS, and NMFS.

(h) If the Regional Administrator approves the State's Section 404 program, he shall notify the State and the Secretary of the decision and publish notice in the Federal Register. Transfer of the program to the State shall not be considered effective until such notice appears in the Federal Register. The Secretary shall suspend the issuance by the Corps of Section 404 permits in State regulated waters on such effective date.

(i) If the Regional Administrator disapproves the State's program based on the State not meeting the requirements of the Act and this Part, the Regional Administrator shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State's program which are necessary to obtain approval. If the State resubmits a program submission remedying the identified problem areas, the approval procedure and statutory review period shall begin upon receipt of the revised submission.

#### § 233.16 Procedures for revision of State programs.

(a) The State shall keep the Regional Administrator fully informed of any proposed or actual changes to the State's statutory or regulatory authority or any other modifications which are significant to administration of the program.

(b) Any approved program which requires revision because of a modification to this Part or to any other applicable Federal statute or regulation shall be revised within one year of the date of promulgation of such regulation, except that if a State must amend or enact a statute in order to make the required revision, the revision shall take place within two years.

(c) States with approved programs shall notify the Regional Administrator whenever they propose to transfer all or part of any program from the approved State agency to any other State agency. The new agency is not authorized to administer the program until approved by the Regional Administrator under paragraph (d) of this section.

(d) Approval of revision of a State program shall be accomplished as follows:

(1) The Director shall submit a modified program description or other documents which the Regional Administrator determines to be necessary to evaluate whether the program complies with the requirements of the Act and this Part.

(2) Notice of approval of program changes which are not substantial revisions may be given by letter from the Regional Administrator to the Governor or his designee.

(3) Whenever the Regional Administrator determines that the proposed revision is substantial, he shall publish and circulate notice to those persons known to be interested in such matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS. The Regional Administrator shall approve or disapprove program revisions based on whether the program fulfills the requirements of the Act and this Part, and shall publish notice of his decision in the Federal Register. For purposes of this paragraph, substantial revisions include, but are not limited to, revisions that affect the area of jurisdiction, scope of activities regulated, criteria for review of permits, public participation, or enforcement capability.

(4) Substantial program changes shall become effective upon approval by the Regional Administrator and publication of notice in the Federal Register.

(e) Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to a State's 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 to evaluate the program's compliance with the requirements of the Act and this Part.

#### Subpart C—Permit Requirements

##### § 233.20 Prohibitions.

No permit shall be issued by the Director in the following circumstances:

(a) When permit does not comply with the requirements of the Act or regulations thereunder, including the Section 404(b)(1) Guidelines (Part 230 of this Chapter).

(b) When the Regional Administrator has objected to issuance of the permit under § 233.50 and the objection has not been resolved.

(c) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under Section 404(c) of the Act, or when the discharge would fail to comply with a restriction imposed thereunder.

(d) If the Secretary determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired.

##### § 233.21 General permits.

(a) Under Section 404(h)(5) of the Act, States may, after program approval, administer and enforce general permits previously issued by the Secretary in State regulated waters.

Note: If States intend to assume existing general permits, they must be able to ensure compliance with existing permit conditions on any reporting monitoring, or notification requirements.

(b) The Director may issue a general permit for categories of similar activities if he 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. Any general permit issued shall be in compliance with the Section 404(b)(1) Guidelines.

(c) In addition to the conditions specified in § 233.23, each general permit shall contain:

(1) A specific description of the type(s) of activities which are authorized, including limitations for any single operation. The description shall be detailed enough to ensure that the requirements of paragraph (b) of this section are met. (This paragraph supercedes § 233.23(c)(1) for general permits.)

(2) A precise description of the geographic area to which the general permit applies, including limitations on the type(s) of water where operations may be conducted sufficient to ensure that the requirements of paragraph (b) of this section are met.

(d) Predischarge notification or other reporting requirements may be required by the Director on a permit-by-permit basis as appropriate to ensure that the general permit will comply with the requirement (section 404(e) of the Act) 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.

(e) The Director may, without revoking the general permit, require any person authorized under a general permit to apply for an individual permit. This discretionary authority will be based on concerns for the aquatic environment including compliance with paragraph (b) of this section and the 404(b)(1) Guidelines (40 CFR Part 230.)

(1) This provision in no way affects the legality of activities undertaken pursuant to the general permit prior to notification by the Director of such requirement.

(2) Once the Director notifies the discharger of his decision to exercise discretionary authority to require an individual permit, the discharger's activity is no longer authorized by the general permit.

#### § 233.22 Emergency permits.

(a) Notwithstanding any other provision of this Part, the Director may issue a temporary emergency permit for a discharge of dredged or fill material if unacceptable harm to life or severe loss of physical property is likely to occur before a permit could be issued or modified under procedures normally required.

(b) Emergency permits shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of § 233.23.

(1) Any emergency permit shall be limited to the duration of time (typically no more than 90 days) required to complete the authorized emergency action.

(2) The emergency permit shall have a condition requiring appropriate restoration of the site.

(c) The emergency permit may be terminated at any time without process (§ 233.36) if the Director determines that termination is necessary to protect human health or the environment.

(d) The Director shall consult in an expeditious manner, such as by telephone, with the Regional Administrator, the Corps, FWS, and NMFS about issuance of an emergency permit.

(e) The emergency permit may be oral or written. If oral, it must be followed within 5 days by a written emergency

permit. A copy of the written permit shall be sent to the Regional Administrator.

(f) Notice of the emergency permit shall be published and public comments solicited in accordance with § 233.32 as soon as possible but no later than 10 days after the issuance date.

#### § 233.23 Permit conditions.

(a) For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines, applicable Section 303 water quality standards, and applicable Section 307 effluent standards and prohibitions.

(b) Section 404 permits shall be effective for a fixed term not to exceed 5 years.

(c) Each 404 permit shall include conditions meeting or implementing the following requirements:

(1) A specific identification and complete description of the authorized activity including name and address of permittee, location and purpose of discharge, type and quantity of material to be discharged. (This subsection is not applicable to general permits).

(2) Only the activities specifically described in the permit are authorized.

(3) The permittee shall comply with all conditions of the permit even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes a violation of the Act as well as of State statute and/or regulation.

(4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit.

(5) The permittee shall inform the Director of any expected or known actual noncompliance.

(6) The permittee shall provide such information to the Director, as the Director requests, to determine compliance status, or whether cause exists for permit modification, revocation or termination.

(7) Monitoring, reporting and recordkeeping requirements as needed to safeguard the aquatic environment. (Such requirements will be determined on a case-by-case basis, but at a minimum shall include monitoring and reporting of any expected leachates, reporting of noncompliance, planned changes or transfer of the permit.)

(8) Inspection and entry. The permittee shall allow the Director, or his authorized representative, upon presentation of proper identification, at reasonable times to:

(i) Enter upon the permittee's premises where a regulated activity is located or

where records must be kept under the conditions of the permit.

(ii) Have access to and copy any records that must be kept under the conditions of the permit.

(iii) Inspect operations regulated or required under the permit, and

(iv) Sample or monitor, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

(9) Conditions assuring 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.

#### Subpart D—Program Operation

##### § 233.30 Application for a permit.

(a) Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit a permit application to the Director. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.

(b) A complete application shall include:

(1) Name, address, telephone number of the applicant and name(s) and address(es) of adjoining property owners.

(2) A complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not generally expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; 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.

(3) The application must include a description of the type, composition, source and quantity of the material to be discharged, the method of discharge, and the site and plans for disposal of the dredged or fill material.

(4) A certification that all information contained in the application is true and accurate and acknowledging awareness of penalties for submitting false information.

(5) All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.

(c) In addition to the information indicated in § 233.30(b), the applicant will be required to furnish such additional information as the Director deems appropriate 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.

(d) The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation.

Note: EPA encourages States to provide permit applicants guidance regarding the level of detail of information and documentation required under this subsection. This guidance can be provided either through the application form or on an individual basis. EPA also encourages the State to maintain a program to inform 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.

#### § 233.31 Coordination requirements.

(a) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, he shall notify the affected State and the Regional Administrator prior to permit issuance in writing of his failure to accept these recommendations, together with his reasons for so doing. The Regional Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.

(b) State Section 404 permits shall be coordinated with Federal and Federal-State water related planning and review processes.

#### § 233.32 Public notice.

##### (a) Applicability.

(1) The Director shall give public notice of the following actions:

- (i) Receipt of a permit application.
- (ii) Preparation of a draft general permit.
- (iii) Consideration of a major modification to an issued permit.

(iv) Scheduling of a public hearing.  
(v) Issuance of an emergency permit.

(2) Public notices may describe more than one permit or action.

##### (b) Timing.

(1) The public notice shall provide a reasonable period of time, normally at least 30 days, within which interested parties may express their views concerning the permit application.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing.

(3) The Regional Administrator may approve a program with shorter public notice timing if the Regional Administrator determines that sufficient public notice is provided for.

(c) The Director shall give public notice by each of the following methods:

(1) By mailing a copy of the notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his rights to receive notice for any classes or categories of permits):

(i) The applicant.

(ii) Any agency with jurisdiction over the activity or the disposal site, whether or not the agency issues a permit.

(iii) Owners of property adjoining the property where the regulated activity will occur.

(iv) All persons who have specifically requested copies of public notices. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.)

(v) Any State whose waters may be affected by the proposed discharge.

(2) In addition, by providing notice in at least one other way (such as advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.

(d) All public notices shall contain at least the following information:

(1) The name and address of the applicant and, if different, the address or location of the activity(ies) regulated by the permit.

(2) The name, address, and telephone number of a person to contact for further information.

(3) A brief description of the comment procedures and procedures to request a public hearing, including deadlines.

(4) 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, and a description of the type,

composition and quantity of materials to be discharged.

(5) 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.

(6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based.

(7) Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity.

(e) Notice of public hearing shall also contain the following information:

(1) Time, date, and place of hearing.

(2) Reference to the date of any previous public notices relating to the permit.

(3) Brief description of the nature and purpose of the hearing.

#### § 233.33 Public hearing.

(a) Any interested person may request a public hearing during the public comment period as specified in § 233.32. Requests shall be in writing and shall state the nature of the issues proposed to be raised at the hearing.

(b) The Director shall hold a public hearing whenever he determines there is a significant degree of public interest in a permit application or a draft general permit. He may also hold a hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the permit application.

(c) At a hearing, any person may submit oral or written statements or data concerning the permit application or draft general permit. The public comment period shall automatically be extended to the close of any public hearing under this section. The presiding officer may also extend the comment period at the hearing.

(d) All public hearings shall be reported verbatim. Copies of the record of proceedings may be purchased by any person from the Director or the reporter of such hearing. A copy of the transcript (or if none is prepared, a tape of the proceedings) shall be made available for public inspection at an appropriate State office.

#### § 233.34 Making a decision on the permit application.

(a) The Director will review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations.

(b) The Director shall consider all comments received in response to the public notice, and public hearing if a hearing is held. All comments, as well as the record of any public hearing, shall be made part of the official record on the application.

(c) After the Director has completed his review of the application and consideration of comments, the Director will determine, in accordance with the record and all applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining his decision and rationale for his decision. The determination shall be dated, signed and included in the official record prior to final action on the application. The official record shall be open to the public.

**§ 233.35 Issuance and effective date of permit.**

(a) If the Regional Administrator comments on a permit application or draft general permit under § 233.50, the Director shall follow the procedures specified in that section in issuing the permit.

(b) If the Regional Administrator does not comment on a permit application or draft general permit, the Director shall make a final permit decision after the close of the public comment period and shall notify the applicant.

(1) If the decision is to issue a permit, the permit becomes effective when it is signed by the Director and the applicant.

(2) If the decision is to deny the permit, the Director will notify the applicant in writing of the reason(s) for denial.

**§ 233.36 Modification, suspension or revocation of permits.**

(a) *General.* The Director may reevaluate the circumstances and conditions of a permit either on his own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if he determines that sufficient cause exists. Among the factors to be considered are:

(1) Permittee's noncompliance with any of the terms or conditions of the permit;

(2) Permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at the time;

(3) Information that activities authorized by a general permit are

having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits.

(4) Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit;

(5) Any significant information relating to the activity authorized by the permit if such information was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance;

(6) Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards.

(b) *Limitations.* Permit modifications shall be in compliance with § 233.20.

(c) *Procedures.* (1) The Director shall develop procedures to modify, suspend or revoke permits if he determines cause exists for such action (§ 233.36(a)). Such procedures shall provide opportunity for public comment (§ 233.32), coordination with the Federal review agencies (§ 233.50), and opportunity for public hearing (§ 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened.

(2) Minor modification of permits. The Director may, upon the consent of the permittee, use abbreviated procedures to modify a permit to make the following corrections or allowance for changes in the permitted activity:

(i) Correct typographical errors;

(ii) Require more frequent monitoring or reporting by permittee;

(iii) Allow for a change in ownership or operational control of a project or activity where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director;

(iv) Provide for minor modification of project plans that do not significantly change the character, scope, and/or purpose of the project or result in significant change in environmental impact;

(v) Extend the term of a permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date and does not result in any increase in the amount of dredged or fill material allowed to be discharged.

**§ 233.37 Signatures on permit applications and reports.**

The application and any reports must be signed by the person who desires to undertake the proposed activity or by that person's 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 or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

**§ 233.38 Continuation of expiring permits.**

A Corps 404 permit does not continue in force beyond its expiration date under Federal law if, at that time, a State is the permitting authority. States authorized to administer the 404 Program may continue Corps or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.

**Subpart E—Compliance Evaluation and Enforcement**

**§ 233.40 Requirements for compliance evaluation programs.**

(a) In order to abate violations of the permit program, the State shall maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions.

(b) The Director and State officers engaged in compliance evaluation, upon presentation of proper identification, 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.

(c) The State program shall provide for inspections to be conducted, samples to be taken and other information to be gathered in a manner that will produce evidence admissible in an enforcement proceeding.

(d) The State shall maintain a program for receiving and ensuring proper consideration of information submitted by the public about violations.

**§ 233.41 Requirements for enforcement authority.**

(a) Any State agency administering a program shall have authority:

(1) To restrain immediately and effectively any person from engaging in any unauthorized activity;

(2) To sue to enjoin any threatened or continuing violation of any program requirement;

(3) To assess or sue to recover civil penalties and to seek criminal remedies, as follows:

(i) The agency shall have the authority to assess or recover civil penalties for discharges of dredged or fill material without a required permit or in violation of any Section 404 permit condition in an amount of at least \$5,000 per day of such violation.

(ii) The agency shall have the authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under Section 404 in the amount of at least \$10,000 per day of such violation.

(iii) The agency shall have the authority to seek criminal fines against any person who knowingly makes false statements, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act, these regulations or the approved State program, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit, in an amount of at least \$5,000 for each instance of violation.

(b)(1) The approved maximum civil penalty or criminal fine shall be assessable for each violation and, if the violation is continuous, shall be assessable in that 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 bear when it brings an action under the Act.

(c) The civil penalty assessed, sought, or agreed upon by the Director under paragraph (a)(3) of this section shall be appropriate to the violation.

**Note.**—To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA may, when authorized by Section 309 of the Act, commence separate action for penalties.

(d)(1) The Regional Administrator may approve a State program where the State lacks authority to recover penalties of the levels required under paragraphs (a)(3)(i)–(iii) of this section

only if the Regional Administrator determines, after evaluating a record of at least one year for an alternative enforcement program, that the State has an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects.

(2) States whose programs were approved via waiver of monetary penalties shall keep the Regional Administrator informed of all enforcement actions taken under any alternative method approved pursuant to paragraph (d)(1) of this section. The manner of reporting will be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13).

(e) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention of right in any civil or administrative action to obtain remedies specified in paragraph (a)(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 State procedures;

(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.

#### Subpart F—Federal Oversight

§ 233.50 Review of and objection to State permits.

(a) The Director shall promptly transmit to the Regional Administrator:

(1) A copy of the public notice for any complete permit applications received by the Director, except those for which permit review has been waived under § 233.51. The State shall supply the Regional Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA.

(2) A copy of a draft general permit whenever the State intends to issue a general permit.

(3) Notice of every significant action taken by the State agency related to the consideration of any permit application except those for which Federal review has been waived or draft general permit.

(4) A copy of every issued permit.

(5) A copy of the Director's response to another State's comments/recommendations, if the Director does

not accept these recommendations (§ 233.32(a)).

(b) Unless review has been waived under § 233.51, the Regional Administrator shall provide a copy of each public notice, each draft general permit, and other information needed for review of the application to the Corps, FWS, and NMFS, within 10 days of receipt. These agencies shall notify the Regional Administrator within 45 days of their receipt if they wish to comment on the public notice or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of such receipt. The final decision to comment, object or to require permit conditions shall be made by the Regional Administrator. (These times may be shortened by mutual agreement of the affected Federal agencies and the State.)

(c) If the information provided is inadequate to determine whether the permit application or draft general permit meets the requirements of the Act, these regulations, and the 404(b)(1) Guidelines, the Regional Administrator may, within 30 days of receipt, request the 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 supplemental application, that the Regional Administrator determines necessary for review.

(d) If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Director's failure to accept the recommendations of an affected State submitted pursuant to § 233.31(a), he shall notify the Director of his intent within 30 days of receipt. If the Director has been so notified, the permit shall not be issued until after the receipt of such comments or 90 days of the Regional Administrator's receipt of the public notice, draft general permit or Director's response (§ 233.31(a)), whichever comes first. The Regional Administrator may notify the Director within 30 days of receipt that there is no comment but that he reserves 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.

(e) If the Regional Administrator has given notice to the Director under paragraph (d) of this section, he shall submit to the Director, within 90 days of receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), a written statement of his

comments, objections, or recommendations; the reasons for the comments, objections, or recommendations; and the actions that must be taken by the Director in order to eliminate any objections. Any such objection shall be based on the Regional Administrator's determination that the proposed permit is (1) the subject of an interstate dispute under § 233.31(a) and/or (2) outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines. The Regional Administrator shall make available upon request a copy of any comment, objection, or recommendation on a permit application or draft general permit to the permit applicant or to the public.

(f) When the Director has received an EPA objection or requirement for a permit condition to a permit application or draft general permit under this section, he shall not issue the permit unless he has taken the steps required by the Regional Administrator to eliminate the objection.

(g) Within 90 days of receipt by the Director of an objection or requirement for a permit condition by the Regional Administrator, the State or any interested person may request that the Regional Administrator hold a public hearing on the objection or requirement.

The Regional Administrator shall conduct a public hearing whenever requested by the State proposing to issue the permit, or if warranted by significant public interest based on requests received.

(h) If a public hearing is held under paragraph (g) of this section, the Regional Administrator shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition, and notify the Director of this decision.

(1) If the Regional Administrator withdraws his objection or requirement for a permit condition, the Director may issue the permit.

(2) If the Regional Administrator does not withdraw the objection or requirement for a permit condition, the Director must issue a permit revised to satisfy the Regional Administrator's objection or requirement for a permit condition or notify EPA of its intent to deny the permit within 30 days of receipt of the Regional Administrator's notification.

(i) If no public hearing is held under paragraph (g) of this section, the Director within 90 days of receipt of the objection or requirement for a permit condition shall either issue the permit revised to satisfy EPA's objections or notify EPA of its intent to deny the permit.

(j) In the event that the Director neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary shall process the permit application.

#### § 233.51 Waiver of review.

(a) The MOA with the Regional Administrator shall specify the categories of discharge for which EPA will waive Federal review of State permit applications. After program approval, the MOA may be modified to reflect any additions or deletions of categories of discharge for which EPA will waive review. The Regional Administrator shall consult with the Corps, FWS, and NMFS prior to specifying or modifying such categories.

(b) With the following exceptions, any category of discharge is eligible for consideration for waiver:

- (1) Draft general permits;
- (2) Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS;
- (3) Discharges with reasonable potential for adverse impacts on waters of another State;
- (4) Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the Act) or hazardous substances in reportable quantities (Section 311 of the Act);
- (5) Discharges located in proximity of a public water supply intake;
- (6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.

(c) The Regional Administrator retains the right to terminate a waiver as to future permit actions at any time by sending the Director written notice of termination.

(c) The Regional Administrator retains the right to terminate a waiver as to future permit actions at any time by sending the Director written notice of termination.

#### § 233.52 Program reporting

(a) The starting date for the annual period to be covered by reports shall be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13.)

(b) The Director shall submit to the Regional Administrator within 90 days after completion of the annual period, a draft annual report evaluating the State's administration of its program identifying problems the State has encountered in the administration of its program and recommendations for resolving these problems. Items that

shall be addressed in the annual report include an assessment of the cumulative impacts of the State's permit program; the integrity of the State regulated waters; identification of areas of particular concern and/or interest within the State; the number and nature of individual and general permits issued, modified, and denied; number of violations identified and number and nature of enforcement actions taken; number of suspected unauthorized activities reported and nature of action taken; an estimate of extent of activities regulated by general permits; and the number of permit applications received but not yet processed.

(c) The State shall make the draft annual report available for public inspection.

(d) Within 60 days of receipt of the draft annual report, the Regional Administrator will complete review of the draft report and transmit comments, questions, and/or requests for additional evaluation and/or information to the Director.

(e) Within 30 days of receipt of the Regional Administrator's comments, the Director will finalize the annual report, incorporating and/or responding to the Regional Administrator's comments, and transmit the final report to the Regional Administrator.

(f) Upon acceptance of the annual report, the Regional Administrator will publish notice of availability of the annual report.

#### § 233.53 Withdrawal of program approval.

(a) A State with a program approved under this Part may voluntarily transfer program responsibilities required by Federal law to the Secretary 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 180 days notice of the proposed transfer. The State shall also submit a plan for the orderly transfer of all relevant program information not in the possession of the Secretary (such as permits, permit files, reports permit applications) which are necessary for the Secretary to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator and the Secretary shall evaluate the State's transfer plan and shall identify for the State any additional information needed by the Federal government for program administration.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of transfer to the Federal

Register and in a sufficient number 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, Corps and State mailing lists.

(b) 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) 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 to implement alternative enforcement methods approved by the Administrator; 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 § 233.13.

(c) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program:

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on the Administrator's 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 subsection (b) of this section. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal review 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, shall specify the allegations against the State which are to be considered at the hearing, and shall be published in the Federal Register. Within 30 days after publication of the Administrator's order in the Federal Register, 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 definition of "Administrative Law Judge," "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 proceedings.

(iii) "Petitioner" means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.*

(i) The following provisions of 40 CFR Part 22 [Consolidated Rules of Practice] are applicable to proceedings under this paragraph:

(A) Section 22.02—(use of number/gender);

(B) Section 22.04—(authorities of Presiding Officer);

(C) Section 22.06—(filing/service of rulings and orders);

(D) Section 22.09—(examination of filed documents);

(E) Section 22.19 (a), (b) and (c)—(prehearing conference);

(F) Section 22.22—(evidence);

(G) Section 22.23—(objections/offers of proof);

(H) Section 22.25—(filing the transcript; and

(I) Section 22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) Computation and extension of time.

(1) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time

expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(2) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (i) upon timely motion of a party to the proceeding, for good cause shown and after consideration of prejudice to other parties, or (ii) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(3) 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.

(B) *Ex parte discussion of proceeding.* At no time after the issuance of the order commencing proceedings shall the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any other person who is likely to advise these officials in the decisions on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) *Intervention.*

(1) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the



foregoing sentence and paragraph (b)(3)(ii)(C)(3) of this section, within ten (10) days after service of the motion for leave to intervene.

(2) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is published in the Federal Register.

(3) *Disposition. Leave to intervene* may be granted only if the movant demonstrates that (i) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (ii) the movant will be adversely affected by a final order; and (iii) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(4) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(D) *Motions.* (1) *General.* All motions, except those made orally on the record during a hearing, shall (i) be in writing; (ii) state the grounds therefore with particularity; (iii) set forth the relief or order sought; and (iv) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(2) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(3) *Decision.* The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(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 SW., Washington, DC 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 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, in 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.* (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and prehearing proceedings;

(B) 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 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 the State has administered the program in conformity with the Act and this Part 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 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. 704.

(d) Withdrawal of authorization under this section and the Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions taken by the State prior to withdrawal.

[FR Doc. 88-12832 Filed 6-3-88; 8:45 am]

CALLING CODE 5540-60-M

**PART III - GUIDELINES AND REGULATIONS**

**Section 4**

**Clean Water Act Regulatory Programs; Final Rule  
33 CFR Parts 323 and 328, and 40 CFR Parts 110 et  
al. (8-25-93)**

**Department of Defense  
Environmental Protection Agency**

Wednesday  
August 25, 1993

# Federal Register

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## Part V

### Department of Defense

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Department of the Army  
Corps of Engineers

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33 CFR Parts 323 and 328

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### Environmental Protection Agency

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40 CFR Part 110, et al.  
Clean Water Act Regulatory Programs;  
Final Rule

**DEPARTMENT OF DEFENSE**

Department of the Army

Corps of Engineers

35 CFR Parts 323 and 328

**ENVIRONMENTAL PROTECTION AGENCY**

40 CFR Parts 110, 112, 116, 117, 122, 230, 232 and 401

**Clean Water Act Regulatory Programs**

**AGENCIES:** U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are issuing today final regulations that implement the following actions with regard to the Clean Water Act (CWA) Section 404 regulatory program: (1) Modification of the definition of "discharge of dredged material;" (2) clarification of when the placement of pilings is a discharge of fill material; and (3) codification of the current policy that prior converted croplands are not waters of the United States. EPA is also issuing conforming changes to the definition of "waters of the United States" and "navigable waters" in other CWA program regulations. The first two changes implement the settlement agreement in *North Carolina Wildlife Federation v. Tulloch*, Civil No. C90-715-CIV-5-BO (E.D.N.C. 1992).

**EFFECTIVE DATE:** This rule becomes effective on [insert 30 days from the publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Davis, Office of the Assistant Secretary of the Army for Civil Works at (703) 695-1376 or Mr. Sam Johnson (Corps) at (202) 272-0199 or Mr. Gregory Peck (EPA) or Ms. Hazel Gorman (EPA) at (202) 260-7799.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On February 26, 1992, the Federal government agreed to settle a lawsuit brought by the North Carolina Wildlife Federation and the National Wildlife Federation (*North Carolina Wildlife Federation, et al. v. Tulloch*, Civil No. C90-715-CIV-5-BO (E.D.N.C. 1992)) regarding CWA Section 404 as it applies to certain activities in waters of the United States. In accordance with the settlement agreement, the Corps and EPA proposed changes to their

regulations on June 16, 1992 to clarify that mechanized landclearing, ditching, channelization, and other excavation activities involve discharges of dredged material when performed in waters of the United States, and that these activities would be regulated under Section 404 of the CWA when they have or would have the effect of destroying or degrading waters of the United States, including wetlands. 57 FR 26894. In addition, the Corps and EPA agreed to propose to incorporate into the Section 404 regulations the substantive provisions of Corps Regulatory Guidance Letter (RGL) 90-8 to clarify the circumstances under which the placement of pilings have the effect of "fill material" and is subject to regulation under Section 404. The agencies stated that the proposal would not affect, in any manner, the existing statutory exemptions for normal farming, ranching, and silviculture activities in Section 404(f)(1).

In addition to the changes proposed in accordance with the settlement agreement, the Corps and EPA proposed to incorporate into the Section 404 regulations the substantive provisions of Corps RGL 90-7 to clarify that prior converted croplands are not waters of the United States for purposes of the CWA. EPA also proposed conforming changes to the definitions of "waters of the United States" and "navigable waters" for all other CWA program regulations contained in 40 CFR parts 110, 112, 116, 117, 122, and 401 to provide consistent definitions in all CWA program regulations.

Overall, these changes were proposed in order to promote national consistency, more clearly notify the public of regulatory requirements, ensure that the Section 404 regulatory program is more equitable to the regulated public, enhance the protection of waters of the United States, and clarify which areas in agricultural crop production would not be regulated as waters of the United States.

The proposed changes were published in the Federal Register on June 16, 1992, for public comment. The comment period closed on August 17, 1992. We received over 6,300 comments. The significant issues raised by public comments and the changes that have been made from the proposed rule are discussed below.

**II. General Comments on the Proposed Rule**

Several commentors raised general issues with regard to the proposed rule. These comments are addressed first below. Comments relating to the specific components of the rule are

addressed in the following sections of this preamble.

Several commentors expressed concern that the agencies had agreed to propose these revisions as part of a settlement agreement with plaintiffs in the *Tulloch* lawsuit. These commentors felt that this procedural posture for the rulemaking impaired the agencies' ability to conduct the rulemaking impartially and based upon a good faith consideration of all public comments, as required by the Administrative Procedure Act. The commitments the agencies entered in the settlement of the *Tulloch* case have not, in any way, bound the agencies to reach a predetermined outcome in this rulemaking. The agencies agreed in the settlement agreement to propose certain revisions to their regulations in exchange for the plaintiffs' agreement to stay that litigation. The settlement agreement in no way binds the agencies to an outcome in the final rule, but provides that the plaintiffs in the lawsuit will dismiss their action if the final rule is "substantially similar" in language and effect as the proposal. The agencies do not view the settlement agreement as narrowing our discretion in any manner to adopt a final rule that best reflects relevant legal and policy considerations under Section 404. Because this rulemaking is of great national significance to the Section 404 program, EPA and the Corps have pursued this rulemaking based upon careful consideration of all the policy issues raised in the proposal and addressed by public comments. The agencies would not adopt policies in this final rule that we do not believe are appropriate merely to avoid reinitiation of litigation in the *Tulloch* lawsuit. As reflected by the discussion in this preamble, the agencies have fully considered all the public comments received on the proposal, and we have therefore fully complied with the procedural requirements of the Administrative Procedure Act.

Several commentors recommended that no decision on the final rule be made until a wetland definition was agreed upon by Congress. Two commentors stated that the wetlands definition was too broad and that it was not applicable across the country. Similarly, two commentors stated that because the rulemaking regarding the wetlands delineation manual was not yet complete, it was inappropriate to propose changes that would expand activities in wetlands covered under the program, thereby increasing uncertainty about the Federal government's regulation of wetlands. Several commentors were concerned about how

the functions and values of wetlands would be addressed or requested that a wetland classification system be developed. Some commentors requested that no decision be made until such a system was developed.

We do not agree that these concerns should delay promulgation of this rule. With the exception of the prior converted (PC) cropland aspect of this rulemaking, this rule addresses the scope of activities regulated under Section 404. The question of what activities result in a discharge of dredged or fill material is distinct and separate from the issue of what areas constitute wetlands, or how wetlands functions and values are considered in the permitting process. Today's rule will enable the Corps and EPA to make appropriate determinations as to whether an activity occurring in waters of the U.S. is subject to regulation under Section 404, however wetlands are defined. Therefore, there is no reason to delay this rulemaking pending completion of the delineation manual rulemaking. With regard to the PC cropland portion of this rule, the agencies do not believe that completion of this rulemaking should await conclusion of the manual rulemaking. The proposed revisions to the delineation manual did not alter the policy finding in Corps RGL 90-7 that PC cropland is not wetlands under the Act. Since the applicability of Section 404 to PC cropland is not an issue in the delineation manual rulemaking, delaying completion of this rule is not warranted. In any case, EPA and the Corps are both currently making wetlands delineations using the 1987 Corps Manual, Corps of Engineers Wetland Delineation Manual (Technical Report 4-87-1, Department of the Army, Corps of Engineers, Waterways Experiment Station, Vicksburg, MS). We believe that the guidance in that Manual is entirely consistent with our statutory and regulatory authorities under the CWA.

Several commentors requested that the comment period be extended. We believe that a 60-day comment period was sufficient time to provide an opportunity for the public comment, as reflected by the fact that we have received over 6,300 comments on the proposal. At least one commentor requested that the agencies hold a public hearing on the proposal. The agencies have declined to do so. The comments on the proposal addressed many legal and factual issues that were presented in great detail in written submissions, and the agencies have fully considered the submitted documents in developing the final rule.

EPA and the Corps do not believe that the opportunity for meaningful public input or the agencies' understanding of public comments would have been materially advanced by the holding of a public hearing.

Several commentors requested that the Corps districts work with local regulatory agencies to avoid duplication of effort. We agree and encourage districts to develop regional general permits to avoid duplication of effort for those activities with minimal impacts.

### III. Revisions to Definition of "Discharge of Dredged Material 33 CFR 323.2(d) and 40 CFR 232.2(e)

We have organized the numerous comments on the definition of discharge of dredged material into several issues. Our discussion of the comments is provided below.

#### A. Summary of Major Issues and Changes From the Proposal

The aspect of the rule which engendered the most public comment was the proposed revisions to the definition of "discharge of dredged material." Many commentors supported the proposed revisions on the grounds that they would better achieve the goals of the Section 404 program, and help ensure more equal treatment of different types of activities that adversely impact wetlands.

Opponents of the changes challenged the appropriateness of the proposed rule on both legal and factual grounds. In their legal arguments, many commentors contended that the proposal constituted a change in the Corps' longstanding approach to regulating landclearing and excavation activities, and that the agencies had failed to explain adequately the reasons for changing the existing approach, as required by the Administrative Procedure Act. Commentors also contended that EPA and the Corps lacked the authority under the CWA to regulate incidental discharges associated with mechanized landclearing, ditching, channelization and other excavation on the grounds that such incidental discharges do not constitute an "addition" of "dredged material" to waters of the U.S. within the meaning of the Act. These commentors also contended that the proposed rule would impermissibly regulate "activities" rather than "discharges," something they argued was beyond the agencies' jurisdiction under the statute. Other commentors argued that the proposed rule's establishment of a presumption that mechanized landclearing, ditching, channelization and other excavation

destroy or degrade wetlands was contrary to the requirements of the CWA.

Factual contentions raised by commentors centered on objections to the finding in the proposed rule that mechanized landclearing, ditching, channelization and other excavation always result in a discharge of dredged material. Some commentors contended that the agencies had failed to compile an adequate factual record to support this finding, and a few commentors discussed activities which they believed did not result in a discharge. Some commentors also objected to the rebuttable presumption in the proposed rule that mechanized landclearing, ditching, channelization and other excavation destroy or degrade wetlands or other waters of the United States. Commentors suggested specific activities that they believed should be excluded from the regulation on the grounds that they did not cause such effects. Concerns were also raised in public comments that the term "degrade" was not adequately defined by the agencies.

Based upon public comments, the agencies have made certain changes to the language in the regulation defining "discharge of dredged material." However, the basic thrust of the proposal had not changed. Under the final rule, any addition or redeposition of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, that destroys or degrades waters of the United States requires a Section 404 permit.

The agencies have modified some of the language and structure of the final rule to improve clarity, since some public comments found the proposed rule language hard to follow. In response to public comments, we have decided to include definitions of the terms "destroy" and "degrade" in the final rule. These changes are discussed in section D.1, below.

In response to public comments, the agencies have deleted the irrebuttable presumption in the proposed rule that all mechanized landclearing, ditching, channelization and other excavation result in a discharge of dredged material. This change is discussed further in section C, below.

The agencies have modified the structure of the final rule to provide that any addition, including redeposit, of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, constitutes a discharge of dredged material. The final rule states, however, that a Section 404

permit is not required for an activity that would not destroy or degrade waters of the U.S. because it would have only a *de minimis* effect on such waters. Under the final rule, mechanized landclearing, ditching, channelization and other excavation activities resulting in a redeposition of dredged material associated with a discharge of dredged material require a Section 404 permit unless the discharger demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to the discharge, that the activity will not have such an effect. Under the final rule, the discharger bears the burden of demonstrating that its mechanized landclearing, ditching, channelization and other excavation activity will not destroy or degrade waters of the United States.

#### *B. Comments on Agencies' Legal Authority To Promulgate This Regulation*

Several commentors argued that EPA and the Corps lack legal authority under the Clean Water Act to issue the proposed regulation. Each of the bases for commentors' assertion is addressed below.

##### 1. Definition of "Dredged Material"

Several commentors argued that the term "dredged material" has a narrow and specific meaning as used by Congress in the Clean Water Act, and that Congress never intended incidental discharges associated with landclearing, ditching, channelization and other excavation to be regulated as dredged material under Section 404.

These commentors cited a dictionary definition of the verb "to dredge" as meaning "to gather and bring up with a dredge, as oysters; to clear out or deepen with a dredge, as a channel," and the definition of the noun "dredge" as "a contrivance for gathering objects or material from the bed of a river, lake or harbor, by dragging along the bottom . . . ." *New Webster's Dictionary of the English Language* 301 (1984). According to these commentors, therefore, the term "dredged material" in Section 404 is limited to material taken from the bottom of a harbor, river or channel and cannot be construed as extending to material redeposited in the course of activities taking place in other waters of the United States, such as wetlands. While these commentors argued that the meaning of the statutory language was so clear that recourse to the legislative history was not necessary, they contended that the legislative history of the 1972 Amendments of the Clean Water Act also supports their view.

EPA and the Corps believe that these comments are unfounded, for several reasons. First, these comments are in fact not relevant to this rulemaking, for they do not address the revisions the agencies are making to the definition of the term "discharge of dredged material." Rather, these comments challenge, in effect, the agencies' definition of the term "dredged material" which includes "any material dredged or excavated from waters of the U.S." (see 40 CFR 232.2(g) and 33 CFR 323.2(c)). Presumably the commentors believe that this definition should have been revised so that it would be limited to material excavated from waterbodies such as harbors, rivers and channels. However, EPA and the Corps have not proposed to revise this longstanding definition in any respect in this rulemaking, and this comment is therefore not relevant to the proposal on which we solicited public comment.

Even if these comments were relevant to this rulemaking, however, EPA and the Corps disagree with the commentors that the statutory term "dredged material" was expressly limited by Congress to mean material dredged from the bottom of waterways such as lakes, rivers or channels. While the "narrow" and "specific" definition of this term favored by these commentors appears in the Webster's dictionary, it is not contained in any provision of the Clean Water Act. Congress therefore left to the agencies administering Section 404 the discretion to define this term. Since regulations were first promulgated implementing Section 404, the Corps has interpreted the term "dredged material" to mean any material excavated from waters subject to the full jurisdictional reach of the CWA (see 39 FR 12110, April 3, 1974), and the current language in the agencies' definition has been in existence since 1977 (see 42 FR 37145, July 19, 1977). This longstanding definition of the term "dredged material" is a straightforward and reasonable reading of the statutory language used by Congress.

The commentors' approach to defining dredged material, in contrast, would draw arbitrary distinctions in how the CWA regulates identical types of material based upon whether the waterbody from which it was excavated met some vague standard of wetness and water depth (i.e., material excavated from the bottom of a "lake" would qualify as dredged material but material excavated from a "drier" water such as a saturated wetland would not). Such distinctions are without any support in the language or structure of the CWA.

Because the commentors' approach does not reasonably reflect the structure

of the Act, their suggested reading of the term "dredged material" would lead to anomalous results that we believe could not have been intended by Congress. For example, under their scenario, material excavated from a saturated wetland presumably would not qualify as "dredged material" under Section 404. However, the disposal of that material into waters of the U.S. would nonetheless require a permit under the Act, since the material, even if not meeting the definition of "dredged material," would in any case constitute a "pollutant" within the meaning of the Act (see section 502(6) of the Act, defining pollutant to include "sand" and "rock"). The disposal of such material, therefore, would require a permit under Section 402 of the Act, a regulatory provision ill-suited for authorizing such discharges. In our view, it is clearly more consistent with Congressional intent that all material dredged from and redeposited in waters of the U.S. be regulated under a single regulatory scheme—Section 404 of the CWA. Rather than draw the arbitrary distinctions suggested by these commentors, the agencies' definition of the term is a straightforward and logical interpretation of the statutory language in Section 404 that is consistent with the jurisdictional reach of Section 404 to all waters of the United States.

While the legislative history of the 1972 Amendments to the Clean Water Act reflects Congressional concern regarding disposal of material dredged from waterways to maintain navigation, EPA and the Corps do not read that legislative history as demonstrating Congressional intent to limit narrowly the agencies' discretion to define dredged material so that it includes any material excavated from waters of the U.S. The agencies' longstanding definition of this term is reasonable and fully consistent with the language and purposes of the Clean Water Act.

##### 2. "Addition" of Pollutants to Waters of the U.S.

Some commentors argued that the activities that would be subject to this regulation are beyond the scope of Section 404 because they do not result in the "addition" of pollutants to U.S. waters, as required by the definition of "discharge" contained in section 502(6) of the Clean Water Act. According to these commentors, no such "addition" occurs when the material to be excavated falls back into the very same water being dredged. An "addition" only takes place, these commentors believe, where material is excavated from one water of the U.S. and falls into "another" water, "outside" the area

being excavated. These commentators cited as support the decisions in *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982); and *U.S. v. Lambert*, 18 Env't Rep Cas (BNA) 1294 (M.D.Fla. 1981), *aff'd* 695 F.2d 536 (11th Cir. 1983).

In *Consumers Power* and *Gorsuch*, environmental groups challenged EPA's longstanding interpretation of the CWA that impacts on water quality and fish caused by the operation of dams were not covered by the CWA because the dams did not cause an "addition" of pollutants. EPA's longheld view was that impacts resulting from the passage of water through the dam did not constitute an "addition" because pollutants did not enter the water "from the outside world." See *Gorsuch*, 693 F.2d at 165. The *Consumers Power* and *Gorsuch* courts deferred to EPA's administrative interpretation of the CWA and upheld it as reasonable. Commentors argued that these holdings prevent EPA and the Corps from finding that redeposition of soil incidental to mechanized landclearing, ditching, channelization and other excavation constitutes an "addition" of pollutants.

We do not believe that the analysis of the *Gorsuch* and *Consumers Power* decisions is controlling here. These cases did not address what constitutes an addition of dredged material to waters of the United States. In our view, it would not be reasonable to require that dredged material enter waters of the U.S. "from the outside world" since dredged material, by definition, is contained in the waters themselves. This was the conclusion of the Fifth Circuit in *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983), which addressed the applicability of the *Gorsuch* case to mechanized landclearing activities. While the court did not rule on the question whether those activities resulted in a discharge of dredged material (finding that a discharge of fill material had occurred), the court rejected the notion that dredged material is only regulated if it enters waters from the "outside world." Since dredged material comes from the water itself, the court concluded that such an interpretation "would effectively remove the dredge-and-fill provision from the statute." 715 F.2d at 294, n.43. See also *U.S. v. Sinclair Oil Co.*, 767 F.Supp. 200 (D.Mont. 1990) (distinguishing *Gorsuch* and *Consumers Power* cases partially on the grounds that they were decided under the "separate regulatory framework" of Section 402, and holding that redistribution of riverbed materials

constituted a "discharge" of fill material). *United States v. MCC of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) (holding that redeposition of seabed materials by tug-boat propellers on adjacent sea grass beds was an "addition" of dredged spoil).

Some commentors suggested that the appropriate test in this context should be whether dredged material is moved from "one place to another" or "from one water to another." If the material is not moved in this manner, these commentors argued, it does not trigger Section 404. The agencies do not believe that such a vague test would be a meaningful or appropriate one to adopt in this rule. If dredged material must be "moved" from one "location" to another in order to trigger Section 404, the question arises as to how far the material must be moved. The agencies see a strong potential for drawing arbitrary distinctions among activities that may be identical in terms of the amount of soil redeposited and their effects on the aquatic ecosystem, but differ only in terms of the distance the soil is moved. EPA and the Corps certainly do not view such a distinction as legally compelled by the Clean Water Act.

Commentors also cited as support for their position the decision of the district court in *U.S. v. Lambert*, Env't Rep. Cases (BNA) 1294 (M.D.Fla. 1981), *aff'd*, 695 F.2d 536 (11th Cir. 1983), which held that "back-spill" of dredged material into the area from which it was excavated could not be considered to be an "addition" of a pollutant. Notably, however, the *Lambert* case was decided before the Supreme Court decision in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), which now establishes a deferential standard of review of agency actions where Congress has not specifically addressed an issue. EPA and the Corps do not believe that Congress has specifically mandated in any provision of the CWA that redeposition of dredged material is only regulated if it is "moved" from one "place" to "another." Rather than focus simply on the spatial relationship between where the excavation and redeposition occur as the deciding factor determining regulatory jurisdiction under Section 404, this rule will regulate an activity (involving a discharge to any part of waters of the U.S.) taking into account the effect of the activity on the aquatic environment. The agencies believe that this approach is entirely consistent with the language of the CWA, and better effectuates the environmental protection goals of the statute than the approach suggested by commentors. See CWA section 101(a).

### 3. Regulation of "Activities," Not "Discharges"

Many commentors argued that the proposed rule was outside the agencies' authority under the CWA because the effects-based test for determining whether an activity requires a Section 404 permit impermissibly regulates "activities," whereas the statute only authorizes regulation of "discharges." These commentors also argued that if the agencies were to adopt the proposed rule, EPA and the Corps would be limited by Section 404 of the CWA to considering the environmental effects associated with the discharge itself, not the activity with which the discharge is associated. Commentors cited the decision of the district court in *Reid v. Marsh*, 20 Env't Rep. Cas. (BNA) 1337 (N.D. Ohio 1984) as supporting this argument.

EPA and the Corps agree with the point made by these commentors that the presence of a "discharge" into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section 404. Based on the clear language in section 301(a) of the CWA, this has been the agencies' longstanding position, and we are not altering that view in this rulemaking. For the reasons explained in this preamble, the agencies believe that addition or redeposition of dredged material in the course of activities such as mechanized landclearing, ditching, channelization and other excavation meets the discharge requirement of section 301(a). Because this rule will only regulate activities where the jurisdictional prerequisite of a "discharge" is present, EPA and the Corps disagree with commentors who argued that this rule is outside the scope of the agencies' authority under Section 404.

Commentors are therefore flatly incorrect that this rule would trigger Section 404 jurisdiction over a discharge based upon the environmental effect of the associated activity. Under today's rule, the presence of certain environmental effects is not a prerequisite for Section 404 jurisdiction; rather, this rule looks to the environmental effects for purposes of creating an exception to the Section 404 permitting requirement that would otherwise apply to the discharge. Consideration of such effects is appropriate in order to ensure that the creation of a *de minimis* exception is consistent with the goals and objectives of Section 404. See discussion in section D, below. Since the agencies clearly have the authority under Section 404 to regulate *all* discharges of dredged



material into waters of the United States, without regard to effects on the aquatic environment, we fail to see how our decision in this rulemaking to regulate a subset of these activities could conceivably be overstepping our regulatory authority under Section 404. Because the only significant condition for regulation under Section 404 is the presence of a "discharge," commentors' arguments about the scope of environmental effects that can be considered under Section 404 are irrelevant to the findings that EPA and the Corps are making to support today's rule.

To the extent commentors argued that EPA and the Corps can only consider the environmental effects of the discharge itself in administering Section 404 (i.e., in the Corps' permitting process, or EPA's Section 404(c) process), such comments are not relevant to this rulemaking, which addresses the circumstances when a discharge or dredged material will require a Section 404 permit, not how the discharge will be addressed in the permitting or 404(c) process. In any case, however, EPA and the Corps wish to clarify that consideration of the environmental effects of activities associated with discharges covered by this rule is well within the agencies' authority in carrying out their authorities under Section 404. Because the scope of the agencies' authority to consider environmental effects is not relevant to our authority to issue this rule, the following discussion is not provided as a legal justification of today's rule, but rather as an attempt to help the public understand how we administer the Section 404 program generally.

Commentors' extremely narrow reading of the agencies' authority is first reflected by the language of Section 404(f) of the Act, which was discussed in the preamble to the proposed rule. Section 404(f)(1) exempts certain activities from the requirement to obtain a Section 404 permit. Section 404(f)(2), however, requires that a permit nonetheless be obtained for "any discharge of dredged or fill material into the navigable waters incidental to any activity" which has the purpose of changing the water's use and the effect of impairing the water's flow or circulation, or reducing its reach. Commentors criticized the citation of Section 404(f)(2) in the preamble to the proposed rule. They argued that this provision merely captures activities that are exempted under Section 404(f)(1), but that it does not expand the underlying scope of activities covered by the permit requirement of Section 404(a). These

commentors have misinterpreted the reason why the agencies cited Section 404(f)(2) in the preamble to the proposal. We agree with the commentors' point that Section 404(f)(2) does not expand the scope of activities subject to Section 404. However, the agencies do not rely on Section 404(f)(2) for such a proposition. Rather, we believe that Section 404(f)(2) contradicts the argument that Congress intended to preclude EPA and the Corps from considering under Section 404 the effects of activities associated with discharges of dredged or fill material, such as mechanized landclearing, ditching, channelization and other excavation. In Section 404(f)(2), Congress expressly required EPA and the Corps to implement the statutory exemptions based upon consideration of not only the effects of the discharge itself, but also the effects of the activity "incidental" to the discharge. Because Congress expressly required the agencies to consider such effects under Section 404(f), we do not believe it would be reasonable to conclude that Congress nonetheless intended to prohibit EPA and the Corps from otherwise considering such effects under Section 404.

Moreover, EPA's longstanding interpretation of Section 404, as reflected in the Section 404(b)(1) Guidelines, demonstrates that EPA and the Corps are not limited to considering solely the environmental effects of the discharge itself. The Guidelines expressly require consideration of "secondary effects" which are defined as

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.

40 CFR 230.11(h). Where an activity such as mechanized landclearing, ditching, channelization and other excavation activities are performed in waters of the U.S. and result in a discharge of dredged material to those waters, we believe that such activities are clearly "associated with" the discharge, within the meaning of Section 230.11(h), and therefore considering the effects of those activities is properly within the scope of Section 404.

Commentors nonetheless cite the decision in *Reid v. Marsh*, which addressed the Corps' authority to regulate dredging activities under Section 404. This case held that the Corps was limited under Section 404 to evaluating the effect of the discharge itself, and that the Corps could not look at the effects of the overall dredging

activity. For the reasons noted above, however, *Reid* is simply not relevant to this rulemaking, since the sole trigger under this rule for asserting Section 404 jurisdiction is the presence of a "discharge of dredged material," and the agencies therefore have clear authority to regulate the activities covered by today's rule. *Reid* did not address in any manner the scope of the agencies' authority to establish a *de minimis* exception under Section 404.

In any case, we do not view the *Reid* decision as precluding EPA and the Corps from considering the effects of activities associated with a discharge of dredged material in the Section 404 permitting or veto process. Notably, *Reid* was decided before the Supreme Court decision in *Chevron U.S.A. v. NRDC* which, as discussed previously, now mandates that courts defer to any reasonable agency interpretation of a statute it administers unless Congress has specifically spoken to the question at issue. The *Reid* opinion failed to cite any provision of the Clean Water Act as precluding the Corps from looking beyond the effects of the discharge itself; nor did *Reid* discuss at all the well-established administrative interpretation in the Guidelines that secondary effects must be considered in issuing permits under Section 404. Since the CWA does not reflect specific Congressional intent that EPA and the Corps be precluded from considering secondary effects under Section 404, the agencies retain broad discretion in deciding whether such an approach is appropriate. EPA and the Corps believe that considering the primary and secondary effects of a discharge is clearly consistent with the language and intent of Section 404 to ensure protection of the aquatic system from effects associated with the discharge of dredged and fill material.

In addition, the *Reid* decision is at odds with the decision of the Tenth Circuit in *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985). In this case, the Corps denied nationwide permit coverage for the construction of a dam, the operation of which would have resulted in depleted stream flows that would adversely affect habitat of an endangered species. Even though the discharge of fill material itself to construct the dam would not have had an adverse impact, the court held that the CWA authorized the Corps to consider the total environmental impact of the discharge, including indirect effects such as the impact of the operation of the dam on flows downstream and associated wildlife impacts.

Several commentors cited cases under section 10 of the Rivers and Harbors Act, the National Environmental Policy Act (NEPA), and Section 402 of the CWA as supporting their argument that EPA and the Corps are narrowly constrained to evaluating the effects of the discharge itself. For the reasons discussed previously, these cases are simply not on point because this rule properly triggers Section 404 jurisdiction based upon the presence of a "discharge of dredged material," and arguments about the proper scope of environmental review under Section 404 are therefore not relevant to this rulemaking. In any case, for the reasons explained above, we disagree with commentors that EPA and the Corps are limited to considering only the direct effects of discharges themselves in implementing Section 404.

#### 4. Authority Limited to Regulating Impacts on Water Quality

A few commentors contended that EPA and the Corps could only consider "degradation" of waters of the U.S. in terms of the impacts of an activity on chemical water quality. Some commentors cited for support for this argument the decision of the Seventh Circuit Court of Appeals in *Hoffman Homes v. EPA*, 961 F.2d 1310 (7th Cir. 1991), reh. granted and opinion vacated, 35 ENV'T Rep. Cases (BNA) 1328 (7th Cir. Sept. 4, 1992).

EPA and the Corps believe that this comment is erroneous. First, the decision in *Hoffman Homes* relied upon by some commentors has since been vacated by the Seventh Circuit. A new opinion issued by the Court in this case contains no support for the commentor's argument that the CWA is only intended to address impacts of an activity on chemical water quality (*Hoffman Homes v. EPA*, No. 90-8810 (July 19, 1993)). We believe, moreover, that there is no support in the CWA as a whole or in Section 404 for the proposition that impacts to the aquatic ecosystem under Section 404 are limited to impacts on chemical water quality, as opposed to impacts on other functions such as flood storage and wildlife habitat.

First, the language in Section 404 itself repudiates the notion that EPA and the Corps may only evaluate impacts of a discharge on chemical water quality. For example, Section 404(c) authorizes EPA to deny or restrict specification of a disposal site for dredged or fill material if the disposal would have an unacceptable adverse effect on a range of aquatic system values, including "shellfish bed and fishery areas (including spawning and breeding areas)," "wildlife," or

"recreational areas." There is no language in Section 404 indicating that the adverse impacts to these other aquatic functions are only remediable under Section 404 if the impacts result directly from impacts to chemical water quality.

Similarly, Congress directed that the Section 404(b)(1) Guidelines be based upon criteria comparable to the ocean discharge criteria contained in Section 403(c) of the Act. Section 403(c) states that guidelines for ocean discharges shall include consideration of impacts of a discharge on "marine ecosystem diversity, productivity, and stability; and species and community population changes." Again, there is no language in Section 403(c) limiting the consideration of such impacts solely to those deriving directly from changes to chemical water quality itself. Therefore, the line that some commentors seek to draw around EPA's and the Corps' ability to protect the aquatic environment is simply not one that has been drawn by Congress.

The agencies' interpretation of Section 404, as reflected in the Section 404(b)(1) Guidelines, reaffirms their responsibility to consider impacts of discharges on the broader aquatic ecosystem, and not just water quality itself. For example, 40 CFR 230.10(c) prohibits any discharge of dredged or fill material that would cause significantly adverse effects on ecosystem diversity, productivity and stability such as loss of fish and wildlife habitat. See also 40 CFR 230.32 (describing wildlife values that must be considered in the permitting process); 40 CFR 230.41 (describing how discharges of dredged or fill material may damage or destroy habitat and adversely affect the biological productivity of wetlands).

#### 5. Reversal of Agency Position

Commentors argued that the proposed rule was arbitrary because it represented an abandonment and reversal of an allegedly longstanding agency interpretation of the CWA, and because the agencies allegedly had failed to provide an adequate explanation of the change in policy.

In certain respects this final rule represents a change in Corps regulations and policy, but some commentors seemed to overstate and exaggerate both the extent and the "abruptness" of that change. The Corps and EPA expect that the net effect of this rule will be that most projects involving mechanized landclearing, ditching, channelization, mining, or other excavation activity in waters of the U.S. will require authorization under CWA Section 404.

Although this new rule will regulate a number of projects that previously might have escaped Section 404 regulation, it is important to realize that the Corps has been regulating many projects involving mechanized landclearing, ditching, channelization, mining, or other excavation in waters of the U.S. for years because those projects frequently involved substantial discharges of dredged or fill material into waters of the U.S. For example, many drainage ditches in wetlands traditionally have been dug by sidecasting the excavated material into the wetlands; those activities have always been regulated under Section 404. Similarly, many channelization, mining, and other excavation activities in U.S. waters have been regulated under Section 404 over the years, because they involved substantial discharges through disposal or stockpiling of the excavated material in waters of the U.S., or "sloppy" excavation practices, or other substantial discharges. As we shall explain below, the Corps has gradually changed its policy and practice to increase our regulation of mechanized landclearing activities over a period of years. Thus, this final rule is not an abrupt change in policy, interpretation, or practice, that would suddenly begin to regulate all landclearing, ditching, channelization, and other excavation activities in U.S. waters for the first time.

Nevertheless, this final rule does represent both a clarification of agency guidance and a change of agency practice regarding a sub-class of excavation-type activities in waters of the U.S.: i.e., those that would take place with relatively small-volume, "incidental" discharges of dredged material that unavoidably accompany such excavation operations. Until the Corps and EPA undertook this present rulemaking, neither agency had ever promulgated written guidance explicitly and specifically addressing the question whether CWA Section 404 could or should regulate ditching, channelization, mining, or comparable excavation activities in waters of the U.S. based solely on their incidental discharges of dredged material. However, most Corps districts normally followed the practice of not regulating such activities so long as their discharges of dredged material were limited to small-volume, "incidental" discharges.

This practice by most Corps districts was generally consistent with the informal policy of the Department of the Army during much of the 1980s, which narrowly construed the scope of Section

404 jurisdiction over these activities. The practice of not regulating small, incidental discharges was also viewed by many Corps districts as consistent with the thrust of guidance dating from the late 1970s regarding *de minimis* discharges associated with normal dredging activities. This practice led to the adoption by the Corps in 1986 of the current language in the definition of "discharge of dredged material," which excludes from regulation "*de minimis*, incidental soil movement occurring during normal dredging operations." 33 CFR 323.2 (1986) (emphasis added). This language was explained in several paragraphs in the preamble to the Corps' 1986 rule, which some commenters who oppose today's rule quoted to support their position. It states:

Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to Section 404 which we do not believe was the intent of Congress.

51 FR 41210 (Nov. 13, 1986) (emphasis added).

While some in the Corps (along with some commenters opposed to this rule) have interpreted this language as indicating that the Corps did not intend to regulate fallback associated with any activity, the Corps has never in fact adopted written guidance clarifying the scope of this exclusion, or defining the term, "normal dredging activities." Moreover, there is no explicit indication that the language of the rule, or the explanation statement in the preamble, applies generally to mechanized landclearing, ditching, channelization, or other excavation activities in the waters of the U.S. As discussed further below, an informal survey of Corps districts shows that, in fact, the districts have varied in their approach to regulating activities involving only incidental discharges, indicating that the language of the 1986 rule and preamble was not as definitive as some commenters have suggested.

Today's rule therefore represents the first time that the Corps and EPA have clarified the meaning of the term "normal dredging operations," which we have defined as:

*Dredging for navigation in navigable waters of the United States, as that term is defined in Part 329 of this chapter, with proper authorization from Congress and/or the Corps pursuant to Part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at Section 328.3 of this Chapter. (Emphasis added).*

By providing this definition, the Corps and EPA hope to substantially reduce the inconsistency among Corps District offices as to scope of the *de minimis* exclusion for discharges of dredged material.

Much of the inconsistency among the Corps district offices on this issue resulted from the decentralized nature of the Corps. Recognizing that conditions and situations differ tremendously across the country, the Corps confers a large amount of discretion upon each of its district engineers to operate the regulatory program in a reasonable manner. Each district engineer must therefore consider local and regional factors in applying national standards. This approach enables the program to remain flexible enough to interpret one standard set of regulations so that it applies to widely varying regional needs and circumstances. In carrying out their responsibilities, districts have therefore had to interpret terms used (but not defined) in the 1986 regulation, such as "*de minimis*," "incidental," and "normal dredging operations" in response to specific projects, situations, and regional needs and these interpretations have differed somewhat across the country.

Corps headquarters did not intercede to halt the adoption of these varying interpretations so long as they did not conflict with the plain words of the regulations. The Corps has always provided its districts with the flexibility to interpret the Corps' regulations so that they may be reasonably applied to varying circumstances. So long as the districts abided by the regulatory language in Section 323.1(d), that indicates that the term "discharge of dredged material" \* \* \* does not include *de minimis*, incidental soil movement occurring during normal dredging operations," districts were not prohibited from developing their own operating interpretations of "*de minimis*," "incidental," and "normal dredging operations."

Today's rule aims to rectify the ambiguity inherent in the 1986 rule's statements on "*de minimis* soil movement" and "normal dredging operations," first, by making it clear that the exclusion from Section 404 of "incidental movement" of dredged material only applies to such movement occurring in the course of "normal dredging operations"; all other incidental discharges of dredged material under this rule can be considered a discharge of dredged material regulated under Section 404. Second, today's rule for the first time

defines "normal dredging operations," as quoted above.

As noted above, over the years Corps district offices have developed somewhat differing approaches to how they regulate the various activities that produce incidental discharges of dredged material. To sample this diversity, the Corps conducted an informal survey of eleven Corps district offices. The Corps selected the districts surveyed in order to obtain a cross-section of likely practices among district offices. The Corps did not intend, however, for this to be a "scientific" survey statistically representative of practices across the country; the Corps simply wanted to obtain anecdotal information regarding the range of interpretations and practices among the districts. In the survey the Corps found that many districts currently regulate some of the activities covered by this rule. Although the Corps is not aware of any district that regulates all the activities subject to the rulemaking in the same manner that today's rule dictates, there are several districts that regulate one or more of these activities in the same manner as provided for under this rule.

Since the issuance of the 1990 RGL on landclearing (RGL 90-5), the districts have been much more consistent in how they regulate landclearing. In the absence of comparable guidance on ditching, channelization, and mining, the Corps districts have shown a greater diversity in their regulation of these activities. By examining the informal survey results on an activity-by-activity basis, this diversity becomes readily apparent.

Virtually all of the districts surveyed regulate ditching activities that involve sidecasting. At least one of the districts surveyed regulates ditching activities that produce only incidental discharges. These incidental discharges were typically in the form of drippings or fallback from ditching machinery. Another district regulates ditching based on these same incidental discharges, but only if the water of the U.S. being ditched is covered by some type of vegetation that the district could use to classify the activity as landclearing, and thus, apply the guidance in RGL 90-5.

Several Corps districts surveyed regulate channelization activities based on incidental discharges. These districts tend to focus on those channelization operations that employ drag lines. At least one of these districts will only regulate these channelization activities if the activity is conducted in water.

At least three of the eleven districts surveyed regulate mining activities in

the waters of the U.S. Two of these districts are currently regulating these activities in virtually the same manner as they will be regulated under today's rule. Other districts only regulate mining activities if the material removed is in water. Yet another district regulates the discing of peat bogs, which is required in the mining of peat.

As explained above, mechanized landclearing is being regulated in a fairly consistent manner by all Corps districts due in large part to the series of regulatory guidance letters that have been issued by the Corps over the past decade. There is, however, some inconsistency in how the most recent RGL (RGL 90-5) is currently being applied by some districts. At least one district, as explained above, uses the RGL 90-5 to regulate discharges incidental to ditching, as long as the area has some type of vegetation on it.

Some degree of inconsistency among the Corps districts' in regulating ditching, channelization, mining, and even landclearing is therefore evident in the results of our survey. The Corps will readily concede that practically every district will have to change some number of their regulatory practices to conform to today's rule. However, the allegation that today's rule represents a sudden and radical departure from a longstanding, official interpretation of our Section 404 regulatory jurisdiction substantially overstates the case.

Commentors specifically cited several RGLs on landclearing, the only written, national guidance the Corps has issued concerning any of these activities, as evidence that the Corps, by promulgating this rule, allegedly is drastically departing from past agency positions. The commentors focused mainly on the RGLs that were issued by the Corps in 1982 and 1985 that more narrowly construed the extent to which mechanized landclearing activities would be subject to Section 404. RGL 82-5 stated that Section 404 did not cover "[m]inimal ('de minimis') movement of dirt, in and of itself, incidental to removal of planting of vegetation." Under this RGL, such activity would be covered if "accompanied by a land leveling operation which alters the topographic features of a 'water of the U.S.' through significant movement of soil." After the decision was issued by the 5th Circuit in *Avoyelles*, the Corps issued RGL 85-4, which provided that mechanized landclearing activities required a Section 404 permit if "the activity would involve burying logs or burying burn residue, or totally or partially filling in sloughs or low areas, or leveling the land." This RGL also stated

that piling of trees, brush and stumps with *de minimis* amounts of soil attached or gathered in the piling operation did not necessarily constitute a Section 404 discharge unless it would totally or partially fill in sloughs or level the land. The RGL also stated that the filling of stump holes is normally a *de minimis* discharge because of the *de minimis* nature of the incidental soil movement.

EPA and the Corps acknowledge that the interpretation of the applicability of Section 404 to mechanized landclearing activities contained in these two earlier RGLs was more narrow than that reflected in today's regulation. Rather than view today's rule as a sharp departure of our past position, however, we believe that there has been an evolution in the agencies' treatment of mechanized landclearing under Section 404, which has gradually brought more and more mechanized landclearing activities under regulation by the Section 404 program. The 1982 RGL most narrowly construed the applicability of Section 404 to these activities, while the 1985 RGL recognized additional circumstances when mechanized landclearing would trigger Section 404 jurisdiction. Finally, almost three years ago, the Corps issued RGL 90-5, which took the position that mechanized landclearing activities generally are regulated under Section 404 because they result in the redeposition of dredged material. Today's rule is therefore entirely consistent with the guidance issued by the Corps in 1990.

Thus, while our position has changed over the course of the last decade regarding the applicability of Section 404 to mechanized landclearing activities, we do not agree with the commentors who argued that today's rule is an "abrupt" reversal of our longstanding position. The interpretation of Section 404 contained in the landclearing portion of today's rule is the position that has been taken by the Corps since 1990. This position reflects, moreover, the gradual increase in our appreciation of the severe adverse environmental effects associated with mechanized landclearing that has led us to conclude that regulation of these activities under Section 404 is warranted.

Even if one were to consider today's rule an "abrupt reversal" of a longstanding agency position, however, the Corps and EPA believe that such a change is warranted in light of our increased understanding of the severe environmental effects often associated with the activities covered by the rule, and the increasing sophistication of

developers who seek to convert waters of the U.S. to uplands without being subject to the Section 404 regulatory program as previously administered by the agencies. As the Supreme Court recently provided in *Rust v. Sullivan*, an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 111 S. Ct. 1759, 1769 (1991), quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64, 104 S. Ct. 2792. The Court further explained that agencies must be provided the flexibility to "adapt [their] rules and policies to the demands of changing circumstances." *Id.*

Such changes, whether dramatic or slight, must be consistent with the authorizing statute and be based on a "reasoned analysis." *Id.* quoting *Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983). The Corps and EPA both strongly believe that the regulatory mandates expressed in today's rule are within the authorities provided to our agencies pursuant to Section 404 of the Clean Water Act. Furthermore, we feel that, to whatever extent today's rule constitutes a change of previous practice, such a change is warranted, for the reasons we have explained in the preamble.

The Corps regulatory program over the years has proved to be remarkably adaptable to changes that has occurred in our appreciation of wetland functions and values and in our increased understanding of the effects of certain activities on wetlands. Ever since the Corps was first given authority to regulate discharges of dredged or fill material into waters of the U.S., the Corps and EPA have been shaping and defining the regulatory program with the broad discretion granted to the agencies by the CWA. Today's rule embodies many changes that we have gradually adopted through less formal guidance over the past two decades, and incorporates some refinements and clarifications to our policy that are long overdue.

In certain respects, and for every Corps district, today's rule will bring about changes in our previous practice; however, we believe that such changes are warranted in order to ensure that the Section 404 program can effectively protect our aquatic resources from the degradation that can result from unregulated mechanized landclearing, ditching, channelization, and other excavation activities. As discussed further below, we have learned increasingly over the last decade how

these activities can severely impact our nation's aquatic resources, and we therefore view today's rule as an important means of achieving the objectives of the CWA to "restore and maintain the chemical, physical and biological integrity" of those resources.

The specific facts of the case that led to the initiation of litigation in the *Tulloch* lawsuit provides a graphic example of how mechanized landclearing and ditching activities adversely affect the aquatic environment, and of the inequities that have resulted under the previous policies for regulating these activities. The facts in *Tulloch* help demonstrate the necessity of this rule by revealing how one developer with the technical expertise and financial resources was able, under past agency policies, to avoid the requirement to obtain a Section 404 permit for environmentally destructive activities in waters of the United States.

The *Tulloch* case involved an 1800 acre development project in New Hanover County, North Carolina, called the Pembroke Jones Park. In 1987, the Corps determined that about 700 acres of the site were wetlands. The developer performed numerous activities in the wetlands that "destroyed or degraded" them, yet the Wilmington District repeatedly determined, based on their understanding of the policies of the Corps, that the developer's activities should not be regulated under Section 404.

The developer originally applied for a permit for discharges associated with its development, but withdrew the application, in light of concerns among the Corps and resource agencies about the significant adverse effects likely to be caused by the development. The developer subsequently met repeatedly with the Wilmington District of the Corps, presenting a strategy for constructing the same project without the need to obtain a Section 404 permit. First, the developer land cleared much of the wetland acreage. This was accomplished by pushing the vegetation from the cleared area. Wilmington District determined that since the clearing removed all the vegetation and did not remove the land, this activity did not require a Section 404 permit.

If these same activities were allowed after the promulgation of today's rule, these activities would trigger Section 404 regulation. Under the rule, for example, the dirt falling from the roots of the trees as they were removed from the ground, in and of itself, would constitute a discharge of dredged material that would subject the

mechanized landclearing operation to regulation. Pursuant to today's rule, these landclearing activities pursued by the developer would certainly destroy or degrade the wetlands and therefore require Section 404 authorization.

Second, the developer performed two types of excavation activities in the wetlands. He excavated some areas to create new ponds and excavated drainage ditches. The excavation was performed using draglines (in the ponds) and backhoes, which had sealed buckets. The soil excavated was either placed directly on uplands or placed in sealed containers resting on the beds of 4-wheel drive and 6-wheel drive trucks or pans. The excavation, for the most part, was performed in such a manner that only drippings from the buckets of the excavation machinery were allowed to fall back into the wetland.

Using computer modeling, the developer's consultant determined that by excavating ditches four feet deep every two hundred feet, the wetlands in the first conversion area could be drained, eliminating the presence of wetland hydrology and wetland vegetation, and thereby removing the area from Section 404 jurisdiction. After these ditches were completed and the water table had dropped sufficiently, the Wilmington District released the tract from jurisdiction. The developer used this technique in several other tracts which were also later released from jurisdiction.

The developer also excavated many acres of the wetlands in order to create approximately eighty-five acres of open water ponds. He also inundated portions of the wetlands acreage to create additional open water ponds. The work was accomplished by constructing wooden piers that the Wilmington District did not find to be an activity that was regulated under Section 404.

During the course of the excavation operations, the Wilmington District determined that these activities were not subject to regulation. By using sealed buckets and container trucks, the developer was able to substantially reduce the amount of dredged material being redeposited in the wetland. Although the Wilmington District later adopted a more strict position regarding excavation activities in wetlands, the District initially determined that it would not require the developer to secure a permit based on the "drippings" alone.

As a result of this operation, hundreds of acres of environmentally valuable pocosin wetlands have been converted into a residential development and a golf course without being regulated, eliminating opportunities to avoid and

mitigate adverse environmental effects. Pocosins are an unusual and relatively rare type of wetland found only in the Southeast. Owing their existence to poor drainage and abundant rainfall, pocosins typically serve important water quality and groundwater recharge functions, and often provide habitat for rare plants and animals. Because of the sophisticated methods employed, this developer was able to evade regulation under the Section 404 program while destroying these ecologically valuable wetlands.

It is clear that the methods used by the developer were expressly chosen because they would avoid triggering the need to obtain a Section 404 permit. The developer's representatives met repeatedly with the staff at the Wilmington District to determine what the District believed was the exact extent of its regulatory jurisdiction over wetland excavation. It was only after the developer was confident that it could successfully evade Corps regulation that it would proceed with the next destructive portion of its operation.

It is precisely because of operations like this development that the Corps and EPA have decided to promulgate this rule. At one time it appeared to be sufficient to base the regulation of ditching on sidecast material. This, as well as other similar projects, have demonstrated that this is no longer the case. It the Corps and EPA are to perform their assigned mission under the CWA, "to protect and restore the chemical, biological, and physical integrity of the waters of the U.S.," we believe that modification of earlier practices and policies is necessary and appropriate.

### *C. Presumption That Mechanized Landclearing, Ditching, Channelization and Other Excavation Result in Discharges*

The proposed rule contained language that would have established an irrebuttable presumption that mechanized landclearing, ditching, channelization or other excavation activities in waters of the United States result in the discharge of dredged material (proposed 33 CFR 323.2(d)(2) and 40 CFR 232.2(e)(2)).

#### 1. Public Comments and Changes to Proposed Rule

Commentors expressed several concerns with this approach. First, commentors argued that the terms "mechanized landclearing," "ditching," "channelization" and "excavation" are vague, and therefore do not provide clear guidance to the regulated public as to whether their activities would require

a permit under the rule. Commentors argued, moreover, that the agencies had not presented factual information in justify the conclusion that these activities invariably result in discharges. They contended that it is possible in some cases to conduct some of these activities without causing any fallback or redeposition of dredged material.

In response to these comments, and in order to ensure that the final rule is clear and understandable, the Corps and EPA have made certain changes in the final rule. The agencies have deleted the proposed rule language that would have established the irrebuttable presumption that the listed activities will result in discharges of dredged material. As explained in the preamble to the proposed rule and explained further below, we believe that it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process. However, the agencies cannot rule out the possibility that, in a highly unusual case, or with novel technology, one or more of these activities might be accomplished without such a discharge. Moreover, since the agencies' jurisdiction over a particular activity can only be triggered by the presence of a discharge in the specific case, the agencies declined to make a categorical finding in this regulation that the listed activities always result in discharges. That determination, by its nature, depends on the facts of a particular case. However, the agencies strongly admonish any party considering conducting any one of these activities without obtaining a permit that they may be proceeding at the risk of violating Section 404 since, under today's rule, a permit is required in any case where any incidental redeposition of dredged material (however small or temporary) is cause in connection with an activity that would destroy or degrade waters of the United States, unless otherwise exempted under Section 404(f).

Because this rule does not make a finding that mechanized landclearing, ditching, channelization and other excavation will always result in discharges, commentor's concerns about the factual support for such a finding are no longer relevant. Section C, below, however, provides a detailed description of how mechanized landclearing, ditching, channelization and other excavation activities can result in the redeposition of dredged materials.

Several commentors stated that the term "mechanized landclearing" should not be defined to include operations such as the moving or cutting of vegetation where the activity occurs at or above the soil/sediment line. Some commentors wanted the Corps and EPA to clarify which landclearing activities will be regulated under this rule. We agree that not all mechanized operations involving the removal of vegetation in wetlands and other waters of the United States should be regulated because not all these operations result in a discharge of dredged or fill material.

In response to these comments, the definition of discharge of dredged material in the final rule expressly excludes "activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, or chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material." Under this language, a discharge only occurs when mechanized landclearing activities occurring in waters of the U.S. cause soils and other excavated dredged materials to be added or redeposited in such waters. So long as all work occurs above ground level, and root systems are not substantially disturbed, the cutting of vegetation, whether using hand-held equipment or equipment mounted on heavy machinery, would not cause either the addition or the redeposition of dredged material. For example, maintenance clearing of existing powerlines and chipping cut vegetation in place or shearing vegetation above the soil line where the vegetation is not subsequently windrowed or otherwise pushed would not usually cause a discharge regulated under Section 404.

Several commentors, however, appeared to argue that maintenance of utility line corridors would never result in a discharge of dredged or fill material. These commentors cited the decision of the Fifth Circuit in *Save Our Wetlands, supra*, which held that cutting of trees with a chainsaw and windrowing of the vegetation did not result in a discharge subject to Section 404. As noted above, today's rule expressly excludes from the definition of "discharge of dredged material" the cutting of vegetation above the ground. Under today's rule, if vegetation is cut above the surface and then lifted into windrows without causing redeposition of excavated material, then no Section 404 permit is required. If, however, windrowing is accomplished in a manner that would redeposit dredged material (for example, by pushing the

fallen vegetation with a bulldozer or similar equipment), then a permit would be required.

Unlike certain commentors, however, we do not read *Save Our Wetlands* as holding that EPA and the Corps are precluded under the CWA from regulating landclearing unless it would result in a conversion of waters of the U.S. to uplands. That decision did not construe the scope of the agencies' statutory authority under Section 404, but rather turned on EPA's and the Corps' regulatory definition of discharge of dredged material. The court held that the activities in that case did not constitute a discharge of dredged material under the agencies' regulatory definition because the activity would not convert wetlands to uplands. An activity involving a discharge of dredged material subject to today's rule, however, would require a permit if it would destroy or degrade a water of the United States. We do not read *Save Our Wetlands* as addressing, in any respect, the agencies' statutory authority to adopt the regulatory approach we are taking here. Indeed, the court expressly noted in its opinion that Congress left to EPA and the Corps how to define the term "dredged or fill material." *Id.* at 647.

## 2. Description of Mechanized Landclearing, Ditching, Channelization and Other Excavation Activities

The agencies provide below a detailed description of the actual processes involved in mechanized landclearing, ditching, channelization and other excavation. This discussion is intended to be illustrative of the major types of landclearing and excavation techniques currently used, and is not intended to be exhaustive or limit in any manner the scope or applicability of the final rule. We are providing this description in order to illustrate the manner in which these types of activities cause incidental soil movement, which results in additions or redepositions of dredged material.

a. *Mechanized landclearing.* In the mechanized landclearing process, the addition or redeposit of dredged material can occur several ways. For example, implements used in the mechanized landclearing process are scraped along the surface of the ground or pushed into the ground and then moved through the soil, usually by bulldozers or loaders. Brushrakes, rootrakes, chunkrakes, disc harrows, root plows, rippers, bulldozer plows, and many types of shearing blades are characteristic of the type of equipment which operate in this way. Brushrakes, for example, have tines which scrape

below the ground level to gather and stockpile slash and loose rock; chunkrakes have bowl shaped blades frequently up to two feet or more in diameter, which cut into the ground and fluff the soil; disc harrows knock down, chop and partially bury weeds, brush, and small saplings by using concave disc, two feet or more in diameter, with sharp scalloped edges; root rakes remove roots and stumps by use of a fork-like blade pushed through the soil; shearing blades are tractor-mounted shears which can weigh up to several thousand pounds and can move large amounts of debris, soil and roots if they are moved along the surface of the ground. Rippers and deep plows are pushed along below the soil surface to break up hard pans or other stiff subsoil. The arm which attaches them to the bulldozer or loader drags through the soil surface, moving soil aside and thereby causing a discharge.

When the implements used in mechanized landclearing move along the ground or through the soil, they scrape, pick up, move or otherwise displace debris and soil (including leaf litter and humus) and usually have a leveling effect on the ground by moving debris from high areas to low areas. When soils are picked up, moved, or otherwise displaced, they are added or redeposited to waters of the United States at various distances from the excavation point as the implements used in the mechanized landclearing process move through waters of the United States. During the discing, tining, or raking process, for example, soil will ride in front of the disc, tine, or rake if the disc, tine, or rake scrapes or penetrates the ground, resulting in a displacement and redepositing of soils and sediments.

The addition or redeposit of dredged material also occurs when equipment is used to knock down trees and rip up root systems even if the equipment used does not, in itself, scrape across or penetrate the ground. When stumps are ripped out of the waters of the United States, soils and sediments are added or redeposited back into the waters of the United States. Also, holes and depressions are created in the ground which are typically filled by using the vehicle which removed the trees and their roots, or subsequently by other vehicles or equipment. This filling or redeposition would constitute a discharge in addition to that which occurs by the removal of the stumps themselves. Tree pushers and tree splitters are examples of equipment which normally operate in this way. A tree pusher uses a bar mounted to the front of a bulldozer or loader while a

tree splitter uses a V-shaped blade, which is usually about 18 to 20 feet in length. As the tree pusher or tree splitter knocks the tree down, the roots are usually ripped up out of the ground. Any roots remaining are then typically removed from the ground by the bulldozer's blade. Not all equipment used to remove trees disturbs root systems, or pushes, drags, or otherwise engages in an activity which results in a discharge of dredged material. Some tree shears or tree pinchers, for example, may be operated in such a manner so that they do not cause a discharge of dredged material, provided the vegetation is cut above the ground while leaving the soils and roots intact.

*b. Ditching, channelization and other excavation.* During excavation, material in either a solid or semi-solid form is removed from the waters of the United States. As material is excavated from the waters of the United States, the addition or redeposit of dredged material occurs through soil or sediment spills, drippings, and moving or displacing of soils and sediments as the dredging equipment moves through the soil or sediments.

Ditching and channelization are two types of excavation activities which often occur in wetlands and in other waters of the United States. As we use the terms here, ditching is the act of creating ditches (i.e., trenches or troughs) by excavating the earth. Channelization is the modification made to, within, or adjacent to an existing stream channel, as well as the rerouting of a stream channel. Both ditching and channelization are used to convey water, often for irrigation or drainage purposes and can be accomplished by using the same equipment.

Most ditching and channelization activities are accomplished using excavation equipment of some type, which is usually characterized by the use of some form of bucket or scoop to excavate soil and sediment.

Mechanical dredging equipment typically consists of a backhoe, a bulldozer, a dipper, or a bucket. A backhoe is a hoe-type or pull-type shovel usually attached to the back of a front loader. A backhoe, which shovels and then lifts soil or sediments from waters of the United States, is often used during the construction of ditches or for stream channelization projects. A dipper and bucket operate at the end of a boom, which is attached to a crane or other vehicle. Buckets are suspended from a cable and dippers are fixed directly to the boom. Typically, a crane drops the bucket into the soil or through the water column to the bottom. The

bucket is filled with soil or sediments and lifted from the water or off the ground and dropped or sidecast on adjacent grounds or into vehicles where it is moved to another disposal site. Bucket dredging for ditching and channelization projects is commonly done with a dragline. Draglines, or other equipment of this kind, operate by dropping the bucket into the soil or sediment and then dragging it through the soil or sediment until it is filled. With a dipper, as with a backhoe, a bulldozer or loader pushes the scoop or hoe through the soil or sediment in order to fill up the dipper. The dipper is then moved off the bottom and the collected sediments disposed of as they are with buckets.

Many stream channelization projects are accomplished by using a bulldozer to push sediments, including cobble, gravel and sand, from a particular point in the stream to another location. To complete such work, the bulldozer blade is lowered into the bottom of the stream and then moved in a forward direction which results in the pushing of sediments to another location in the stream or to an upland area.

Because of the physical processes of soil movement inherent in the act of dredging, the use of bulldozers, draglines, dippers, and backhoes, or other equipment of this kind will, except in limited situations, result in some addition or redeposition of dredged material. The addition or redeposit of dredged material occurs as soils and sediments are picked up and moved during the excavation process.

For example, when a dragline or backhoe is dragged through soils or sediments, such soils and sediments are displaced and redeposited to various distances from the initial excavation point as the implement used in the excavation process gathers the dredged material. This same type of displacement and redeposition occurs as a bulldozer pushes sediments during a stream channelization project. Also, when the dragline or backhoe stops moving along the bottom and the bucket is raised, additional additions or redeposits of soils or sediments occur as such material falls from the bucket.

The cutterhead dredge is the most commonly used hydraulic dredger. It operates by using a rotating cutter to cut into the sediments. The rotating cutter is attached to a suction line which sucks in the material as it is being cut. Typically, a cutterhead is used to break up the sediment and mix it into a slurry and then pump it through a pipe to a disposal area. As the cutterhead moves through the bottom, it pushes the sediment around. The addition or

redeposit or dredged material occurs as the whirling of the cutter slings some of the dredged material away from the suction of the pump either as discrete clumps or in suspension and adds or redeposits it at various points from where the cutterhead moved through the bottom.

#### *D. Effects of Mechanized Landclearing, Ditching, Channelization and Other Excavation*

The agencies received substantial public comment regarding whether the activities that would be covered by this rule in fact destroy or degrade waters of the U.S. Many commentors cited activities that they believed did not cause such an effect. There was also confusion regarding the meaning of "degrade" in the proposed rule. Some commentors also objected to the presumption in the proposed rule that these activities destroy or degrade wetlands, and questioned the factual basis for such a presumption. These comments are addressed below.

##### 1. Definition of "Destroy" and "Degrade"

The proposed rule did not contain definitions of the terms, "destroy" and "degrade." In the preamble to the proposal, however, the agencies solicited public comment on defining destruction as altering an area "in such a way that it would no longer be a water of the U.S." and defining degradation as occurring when a discharge "results in an identifiable decrease in the functional values of the water of the U.S." 57 Fed. Reg., 26896.

Several commentors supported the definition of "destroy," stating it was clear and concrete. A few commentors recommended that the definition of "destroy" be modified to clarify that it is only necessary to determine whether there is destruction in areas currently being delineated as waters of the United States. Two commentors felt the destruction threshold was inadequate and that destruction would also occur when a wetland or other special aquatic site is converted to open waterbody, such as conversion of a wetland to a retention pond. Another commentor disagreed and argued that this type of activity did not destroy, and possible did not even degrade, waters of the United States. We believe that the term "destroy" is sufficiently clear that no change in the proposed approach is appropriate.

We agree with commentors that the jurisdictional status of an area before and after an activity takes place should be based on current agency guidance for making such determinations. While we

agree that conversion of a wetland or other water of the U.S. to another type of water of the U.S. (e.g., conversion of a wetland to open water such as a lake) does not necessarily "destroy" a water of the U.S., such a change could in fact "degrade" an area by adversely affecting at least one of the aquatic functions of the site. As discussed further below, while there may be some environmental benefits associated with such a project, any adverse effect on any aquatic function would mean that an activity required a Section 404 permit. While such an activity may well receive a permit based on consideration of the Corps' public interest review and the Section 404(b)(1) Guidelines, we do not believe that it would be appropriate to exclude such activities from the coverage of Section 404 entirely. For clarity, we have added the definition of destroy to the final rule (see 33 CFR 323.2(d)(4); 40 CFR 232.2(e)(4)).

By far, most commentors addressing these terms were concerned with the definition of "degrade" contained in the preamble to the proposal as "an identifiable decrease in the functional values of waters of the United States." The commentors stated that "identifiable decrease" and "functional values" were vague terms, which were not susceptible to measurement, and that adoption of these terms would only contribute to increased confusion over the Section 404 regulatory process, as a result of subjective determinations made by Corps or EPA personnel. Two commentors felt that the term "functional values" was inappropriate and should be replaced with "functions and values," to be judged separately since functions are measurable and values are subjective. A few commentors recommended that regulated waters be generally classified, according to potential functions and values, for their respective geographic areas, while two others felt functions should be directly related to the science of water quality. Several commentors stated that there is no established methodology to evaluate functional values for impact assessment. Therefore, they recommended that the Corps and EPA develop a methodology and/or identify a preferred method to provide a clear and precise standard to measure degradation. Further, two of these commentors also felt that the selected methodology should be implemented only after promulgation through notice-and-comment rulemaking.

Several commentors disagreed with the example presented in the proposed rule, i.e., that if the hydrologic regime of a wetland is altered enough to change the vegetative composition of the area,

it will be degraded. These commentors did not believe a mere change in vegetative composition automatically results in degradation. As a means of better clarifying the term "degradation," several commentors suggested that the definition refer to an "identifiable adverse effect that the proposed activity is likely to have on waters of the United States." Two commentors suggested replacing the word "identifiable" with "significant" and one commentor recommended changing "identifiable decrease" with "appreciable decrease."

Because there was confusion among the public about the term "degrade" we have chosen to include a definition of degradation in the final rule that incorporates suggestions made by some commentors. Under the final rule, an activity results in degradation when it would have more than a *de minimis* effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function. As discussed further below, this standard is a threshold for determining whether an activity requires a Section 404 permit at all, so we believe that any adverse effect to any aquatic function of the site would constitute "degradation" under the final rule. Evaluation of the project and its overall impacts under the Section 404(b)(1) Guidelines and the Corps' public interest review would occur during the permit process.

This definition changes how the term "*de minimis*" is used in the rule from the way it has been used previously in the definition of "discharge of dredged material." In the previous rule, the term "*de minimis*" referred to the amount of soil moved during normal dredging activities, and the proposed rule similarly used this term to refer to the amount of soil moved in the process of mechanized landclearing, ditching, channelization and other excavation. The definition of degradation in the final rule uses the term "*de minimis*" to refer to the degree of environmental effects associated with these activities. This change makes sense for several reasons. First, using the term "*de minimis*" to refer to environmental effects is consistent with the intent of this rulemaking, which is to ensure that incidental discharges associated with mechanized landclearing, ditching, channelization and other excavation trigger Section 404 where those activities would have certain effects on waters of the U.S. Establishing a *de minimis* effects test also comports with the structure and goals of Section 404, which focus on providing protection of waters of the United States from adverse effects associated with discharges of dredged or fill material.



EPA and the Corps believe that the *de minimis* exception contained in today's regulation is within the agencies' authority under Section 404. The underlying focus of Section 404 is on evaluating and, where possible, reducing and avoiding adverse effects to the aquatic environment due to discharges of dredged or fill material. Section 404's focus on environmental effects is evident in numerous aspects of this statutory provision. For example, Section 404(c) authorizes EPA to prohibit, deny or restrict the specification of any site for the discharge of dredged or fill material if it would have "unacceptable adverse effects" on municipal water supplies, shellfish beds and fishery areas, wildlife or recreational areas. A similar focus on environmental effects is evident in Section 404(f)(2), which "recaptures" activities otherwise exempt under Section 404(f)(1) where the activities have the purpose of changing the use of an area of waters of the United States, and have the effect of impairing the flow or circulation, or reducing the reach, of waters of the United States.

Thus, the very purpose of Section 404 is to conduct an environmental review of discharges of dredged or fill material in order to determine the gravity of the environmental harm associated with the discharge, and evaluate ways in which that harm can be reduced or avoided. The focus of Section 404 on effects of discharges is reflected throughout the Section 404(b)(1) Guidelines which, for example, prohibit discharges where a practicable alternative would have less "adverse impact" on the aquatic ecosystem, where a discharge would cause or contribute to significant degradation of the aquatic environment or where appropriate and practicable steps have not been taken to minimize "adverse effects of the discharge on the aquatic ecosystem." See 40 CFR 230.10 (a), (c), and (d). See also 40 CFR 230.11 (listing types of effects that must be considered in the permitting process).

Therefore, subjecting *de minimis* activities to review under section 404 would be a needless paper exercise that would divert limited agency resources from focusing on discharges associated with environmental effects of concern under Section 404. Given the clear focus of Section 404 on regulating activities based on their environmental effects, we view an exception for discharges of dredged material having *de minimis* effects as a tool for advancing the goals and objectives of Section 404. See *Alabama Power Co. v. Costle*, 636 F.2d 323 (DC Cir. 1979).

We note that the exception addressed by this rulemaking was already present

in the agencies' regulatory definition of "discharge of dredged material." This rule is clarifying, and narrowing the effect of, this pre-existing exception. Moreover, as discussed further below, EPA and the Corps have included provisions in the rule to help ensure that only truly *de minimis* activities are exempted from the Section 404 program by requiring that dischargers engaging in mechanized landclearing, ditching, channelization and other excavation obtain a finding by the Corps, or EPA as appropriate, prior to their discharge, that their activities do not require a permit.

We wish to emphasize that the threshold of adverse effects for the *de minimis* exception is a very low one. Under the final rule, an identifiable adverse individual or cumulative effect on any aquatic function is sufficient to subject an activity to Section 404 jurisdiction. Some activities may cause certain adverse effects on the aquatic ecosystem while having other beneficial effects. For example, an activity altering the hydrology of a wetland may result in restoring pre-existing hydrology, or may improve habitat value or water quality in the long-term. If the activity would result in some loss or identifiable reduction of any aquatic function to achieve this result, however, the activity would "degrade" waters of the U.S. and a permit would be required under today's rule. For example, if a discharge activity would have any adverse impact on the suitability of the area as habitat for any species utilizing the area, a permit would be required. It is not our intent, therefore, that the positive and negative effects of the activity be balanced and to require a permit only in those cases where the net effect is adverse. Rather, an adverse effect on any one aquatic function, even if it is temporary, would be sufficient under the final rule to trigger the Section 404 permit requirement.

In the case of endangered or threatened species, any effect of an activity on such species would trigger an inquiry by the Corps as to the nature of that effect, and whether the activity would destroy or degrade waters of the U.S. within the meaning of today's rule. If there is an effect on endangered or threatened species from an activity, the Corps in consultation with the Fish and Wildlife Service or the National Marine Fisheries Service (depending on the agency having jurisdiction over the species) under Section 7 of the Endangered Species Act, will determine whether the activity is likely to adversely affect the species. If the Corps finds that the activity is not likely to adversely affect the species, and the

Service concurs in writing in this finding, then the activity would not "degrade" the water within the meaning of today's rule, and no permit would be required. If, however, either the Corps or the Service believes that the effect is likely to be adverse, then a Section 404 permit will be required for the activity.

Other examples of adverse effects on any aquatic function would be an adverse alteration of the area's hydrologic regime, or of the type, distribution or diversity of vegetation, fish and wildlife that depend on such waters. Again the threshold of effect under the final rule is a low one. It would not be necessary for a discharge activity to remove or significantly impair wetland hydrology to trigger the permit requirement. An activity that would, for example, likely reduce the duration of inundation or saturation of a portion of wetland would "degrade" the wetland within the meaning of this rule. Indeed, in some cases, increasing the duration of inundation or saturation may have an adverse effect on an aquatic function. Similarly, alteration of the vegetative composition of a water of the U.S. does not require that all vegetation be removed, or that the vegetative composition be so significantly altered that the area would no longer meet the hydrophytic vegetation criteria for delineating wetlands. A lesser change to the vegetation of an area can, for example, have an impact on the function of a wetland as a food source or as habitat for a species utilizing the area.

Activities such as walking, bicycling or driving a vehicle through a wetland would have *de minimis* effects except in extraordinary situations, and the agencies do not intend to devote scarce resources to regulating such typically innocuous activities.

In response to commentors who thought that the agencies should establish a higher effects threshold in this rule (e.g., activities would be regulated only when they have a "significant" effect on the environment), we wish to emphasize that the *de minimis* exception is necessarily a narrow one, limited to "trifling" or "inconsequential" effects (see *Alabama Power Co. v. Costle*, 636 F.2d at 360 (DC 1979)). Moreover, the evaluation of effects under this rule is for the purpose of determining whether an activity is subject to regulation under the CWA at all. When an activity poses more than *de minimis* effects on the aquatic environment, the severity of those effects will be evaluated to determine whether, for example, a class of activities would have minimal effects and therefore could be authorized by a

general permit. See CWA Section 404(e). The severity of effects is also evaluated during the individual permitting process to determine whether a permit should be issued and, if so, with what conditions. Where the question, however, is whether an activity requires authorization at all, we believe that the threshold should be a low one, consistent with the nature of the legal *de minimis* exception.

The term "significant impacts" by contrast, generally suggests a severe adverse environmental effect. As used in the National Environmental Policy Act (NEPA), an action "significantly" affecting the environment triggers the most rigorous of environmental reviews, an environmental impact statement. Similarly, under the Section 404(b)(1) Guidelines, any discharge that would "significantly" degrade waters of the U.S. is prohibited. Such a high threshold is not appropriate where, as here, the question is whether an activity should be subject to regulatory scrutiny under Section 404 at all.

Because commentors expressed confusion regarding the application of the phrase "decrease in functional values" that was included in the proposed rule, this phrase is not included in the final rule. Nevertheless, an evaluation of the functions of a water of the U.S. is obviously relevant to determining whether an activity may cause an adverse effect on waters of the U.S. For example, an area whose functions include vegetation serving as a food source or habitat for migratory waterfowl would suffer a decrease in that function by the alteration or removal of vegetation. However, it is not our intent to place on the Corps or EPA a heavy burden of conducting a detailed evaluation of the water's functions and values and documenting how they would be impacted by an activity. Such an inquiry is more relevant to the evaluation conducted by the Corps under the Section 404(b)(1) Guidelines and Corps regulations in the permitting process itself. Again, we emphasize that this is merely the threshold inquiry of whether an activity should be subject to regulation under Section 404 at all. We believe it is sufficient for this purpose that the Corps or EPA, as appropriate, evaluate the available information to make a reasonable judgment of whether an activity will adversely affect waters of the U.S.

For similar reasons, we also disagree with commentors who suggested that the agencies should establish a scheme for classifying the values of wetland areas for purposes of this rule. The "value" of a water of the U.S. is again something that should be considered in

the permitting process when the Corps determines whether a discharge complies with the Section 404(b)(1) Guidelines, and what type and level of mitigation is necessary to compensate for the impacts of a project. We do not view a detailed consideration of values of an area to be necessary for the Corps or EPA to determine whether an activity would simply have an "adverse effect" on a water of the U.S.

One commenter argued that the rule should list the specific activities that require a Section 404 permit based on the type, location, and known impact of the activities and also should identify "de minimis" activities that will not require a Section 404 permit. While such a list might be ideal from the regulated community's standpoint, the types of activities that involve a discharge and would destroy or degrade waters of the United States are too numerous and varied to list definitively. They generally must be evaluated on a case-by-case basis. However, today's rule does provide examples of several activities that require a permit unless the discharger demonstrates they would not destroy or degrade waters of the U.S. (i.e., mechanized landclearing, ditching, channelization and other excavation in waters of the United States).

Several commentors argued that the agencies had failed to give the public adequate notice of the meaning of the terms "destroy" and "degrade" as required by the Administrative Procedure Act. We disagree. Definitions of the terms "destroy" and "degrade" were discussed in the preamble of the proposed rule, along with a request for public comment. The definitions of "destroy" and "degrade" in the final rule reflect the proposal and the public comments received. We believe that the agencies have fully complied with the Administrative Procedure Act's rulemaking requirements.

One commentator felt that the definitions of "destroy" and "degrade" contradicted Section 101(g) of the CWA. It is entirely unclear to us how this rule conceivably would be inconsistent with Section 101(g), which provides that State water rights will not be superseded, abrogated, or impaired by the CWA. This aspect of the rule simply addresses what activities result in discharges of dredged material requiring a permit under Section 404 of the Act. Merely subjecting activities to the Section 404 permitting requirement cannot, in and of itself, result in any impact on allocation of water rights. The substantive criteria for processing Section 404 permits are not altered in any way by this rule.

Two commentors believed that the determination of degradation should be the responsibility of the State agency to ensure compliance with State water quality standards. We disagree, since the Corps and EPA are charged with administering the regulatory responsibilities of CWA Section 404. Moreover, degradation of waters of the U.S. will not necessarily be limited to consideration of State water quality standards.

## 2. Presumption That Activities Destroy or Degrade

The proposed rule also would have established a rebuttable presumption that mechanized landclearing, ditching, channelization and other excavation would result in the destruction or degradation of waters of the United States. See 33 CFR 323.2(c)(2); 40 CFR 232.2(e)(2). Some commentors supported the proposed rebuttable presumption because they felt these activities virtually always cause adverse impacts to the aquatic ecosystem.

Other commentors opposed the presumption in the proposal on the grounds that the government should bear the burden for demonstrating that it has jurisdiction over an activity. These commentors cited the discussion in the preamble to the proposed revisions to the wetlands delineation manual, in which the government stated that it bore the burden of demonstrating that it has geographic jurisdiction over a specific area under the statute. These commentors argued that such a burden should also fall on the government here. Some commentors contended that the presumption would impose unreasonable costs on project proponents seeking to rebut the presumption. Commentors also argued that the presumption was based upon a factual finding that these activities virtually always destroy or degrade wetlands, yet the agencies have not provided record support for such a conclusion beyond the reference to the "experience" of the agencies in administering the Section 404 program.

We believe that these commentors have misconstrued the nature and basis of the approach in this rulemaking. In the proposed rule, the agencies stated that, in our experience, mechanized landclearing, ditching, channelization and other excavation virtually always destroy or degrade waters of the United States. While this statement accurately describes our experience, we are not relying on such a factual finding to support the approach in the final rule. Rather, we view the final rule as legally appropriate in light of the language and structure of

Section 404, which prohibits the discharge of dredged or fill material except in compliance with a permit under Section 404. In our view, the addition or redeposit of any dredged material into waters of the U.S. associated with mechanized landclearing, ditching, channelization and other excavation constitutes a "discharge," and is therefore prohibited if no permit is obtained under Section 404, unless otherwise exempted under Section 404(f).

The approach taken by the agencies in this rule is to carve out a narrow exception to the Section 404 permitting requirement for certain discharges that are associated with activities that have only *de minimis* environmental effects. We do not view this exception as compelled by the Act. There is no express *de minimis* exception in Section 404, and it would therefore be perfectly consistent with the statutory scheme to require that any person discharging dredged material in the course of mechanized landclearing, ditching, channelization, other excavation or any other activity to obtain a Section 404 permit, without regard to the effects of the associated activity on waters of the U.S. Nonetheless, the agencies believe that the better approach in this case is to maintain a narrow exception for those activities that have only a *de minimis* effect on waters of the U.S. This exception, as explained above, is consistent with Section 404 and will help improve the efficiency and effectiveness of the program by focusing limited agency resources on activities having more than inconsequential environmental effects.

The language and structure of the final rule have been modified to reflect the basis for the agencies' approach. First, the rule states that any addition or redeposit of dredged materials into waters of the U.S. incidental to any activity, including mechanized landclearing, ditching, channelization and other excavation constitutes a "discharge of dredged material." 33 CFR 323.2(d)(1)(iii); 40 CFR 232.2(e)(1)(iii). The rule therefore provides that a Section 404 permit is required for the incidental discharge unless the discharger demonstrates to the Corps, or EPA as appropriate, prior to the discharge, that the activity associated with the discharge does not have or would not have the effect of destroying or degrading any area of waters of the United States. Under the final rule, a discharger bears the burden of demonstrating that such activities will not destroy or degrade the waters of the U.S., including wetlands. 33 CFR 323.2(d)(3)(i); 40 CFR 232.2(e)(3)(i).

Given the language and structure of the Act, we believe that the approach adopted in the final rule is appropriate. Under the CWA, a party wishing to discharge dredged material into waters of the U.S. can only do so if it obtains a Section 404 permit, unless otherwise exempted. Therefore, if such a discharger conducting mechanized landclearing, ditching, channelization or other excavation desires to proceed without Section 404 authorization, we believe that it behooves the discharger to obtain an affirmative finding from the Corps, or EPA as appropriate, prior to the discharge, that the discharge is subject to the *de minimis* exception. Requiring dischargers to bear the burden of demonstrating that its activities do not require a Section 404 permit does not, as some commentors have asserted, place an unreasonable burden on the discharger. Rather, since the discharger would otherwise be required to obtain a permit for its activities, we believe that it behooves the discharger to demonstrate affirmatively that mechanized landclearing, ditching, channelization or other excavation activities should be exempted from the permitting requirement. Moreover, EPA and the Corps would not feel comfortable establishing a *de minimis* exception for mechanized landclearing, ditching, channelization or other excavation activities without the procedural protection of requiring an affirmative finding prior to the discharge by EPA or the Corps that the exception is appropriate in a particular case. This will ensure consistency in the application of the exception and guarantee that the exception is interpreted in a manner consistent with the purposes of the CWA. Under the final rule, dischargers conducting activities other than mechanized landclearing, ditching, channelization or other excavation which would not destroy or degrade waters of the United States (e.g., walking and vehicular traffic) do not require a prior finding by the relevant agency that the activity can proceed without obtaining a Section 404 permit. The agencies do not believe that it would be practical, or an efficient use of limited agency resources, to require a prior determination in such cases. However, should any activity—including activities other than mechanized landclearing, ditching, channelization or other excavation—undertaken by a discharger in fact have more than a *de minimis* effect on waters of the United States, that discharger is subject to enforcement action or citizen suit for discharging without a Section 404 permit.

Some commentors objected to the proposal of regulating only activities that are associated with incidental discharges where those activities produce certain environmental effects. These commentors felt that the agencies should regulate any addition or redeposit associated with mechanized landclearing, ditching, channelization and other excavation, regardless of its impact on the aquatic environment. We do not believe, however, that it would be an effective use of limited agency resources to eliminate completely the *de minimis* language in the current definition of "discharge of dredged material" so that all incidental discharges would be regulated, without regard to their environmental effect. The underlying purpose of Section 404 is to avoid, where possible, the degradation of our nation's aquatic resources due to discharges of dredged or fill material, and it is in keeping with that goal to focus limited agency resources on activities that have more than a *de minimis* effect on those waters. See *Alabama Power Co. v. Costle*, 636 F.2d 323, 357-360 (DC Cir. 1979).

We also do not agree with one commentor that there should be an opportunity for an appeal to an independent panel of a decision to require a Section 404 permit. The CWA grants the Corps or EPA, as appropriate, the authority to determine that a certain activity is subject to the Section 404 permitting requirement. Allowing an "appeal" at such a preliminary stage in the permitting process would not be in accordance with the agencies' roles under the statute, and would be wasteful of limited agency resources.

Many commentors recommended that the Corps specify the mechanism by which project proponents may demonstrate that their activity does not require a Section 404 permit. The Corps district engineer and EPA Region, as appropriate, will require the minimum information necessary to conduct an adequate evaluation of an activity's impacts. The submittal to the Corps district engineer will include, as necessary, the following information: A written description of the project; the specific landclearing, ditching, channelization, or excavation techniques to be used; the equipment to be used; the acreage and type of wetland or other waters of the U.S. to be affected; the extent and type of impacts projected; the change or loss of wetland functions and values that could be anticipated from the activity; a project location-vicinity map; the name, address and phone number of the applicant; and other site-specific information requested by the district

engineer. Based on this information, the Corps district engineer or EPA Region, as appropriate, will determine, within a reasonable length of time, whether a Section 404 permit is required.

One commentator recommended that the language of the proposed rebuttable presumption be modified to have the nature and extent of the impact assessed during the individual permit review process. We agree with the intent of this suggestion; however, no change is necessary. If an individual Section 404 permit application is submitted, the Corps will evaluate the nature and extent of the impacts of the activity and, if appropriate, return the application if no permit is required.

Finally, we do not believe that a determination by the Corps or EPA that a discharger must obtain a permit under today's rule would be subject to judicial review, since pre-enforcement review is not available under the CWA. See e.g., *Avella v. Corps*, 20 ELR 20920 (S.D. Fla. 1990), *aff'd* 916 F.2d 721 (11th Cir. 1990) (holding that Corps finding that a discharger could not proceed under a general permit and had to obtain an individual permit was not subject to judicial review).

### 3. Whether Specific Activities Will Destroy or Degrade Waters of the U.S.

In the preamble to the proposal, we solicited public comment on whether there were certain categories of activities which, as a general rule, did not destroy or degrade waters of the U.S. and which therefore would not come within the scope of this regulation. We address below comments that were submitted on this issue.

Many commentators felt that the modification of the definition of "discharge of dredged material" was too expansive and would result in the regulation of such activities as walking, grazing, vehicular traffic, and boating in waters of the United States. Several other commentators indicated that they believe vehicular traffic should be regulated. As indicated above, under today's rule, we are not regulating every discharge associated with activities in waters of the U.S., but only those associated with activities which have or would have the effect of destroying or degrading any area of a water of the United States. We believe that activities such as walking, grazing, vehicular traffic and boating (excluding prop-dredging) in waters of the United States would not generally be regulated under this rule because, even if they do result in discharges, they generally do not destroy or degrade waters of the United States. As discussed previously, activities such as these do not require a

finding prior to the discharge that the activity would not destroy or degrade waters of the United States. If the effect of the activity is *de minimis*, then a Section 404 permit is not required.

One commentator stated that the following activities should be categorically excluded from regulation under Section 404: landclearing activities for the creation and maintenance of utility line corridors; mechanized landclearing in wetlands that are seasonally dry or frozen, provided that cutting of brush and timber occurs above the soil surface; and use of corduroy roads in constructing utility lines. Another commentator said that activities associated with the construction and maintenance of powerlines and distribution corridors should be exempted from regulation under Section 404 because they do not destroy or degrade wetlands. One commentator suggested that routine maintenance of pipeline rights-of-way should not require an individual permit since there is no long-term impact on vegetation. Another commentator stated that pipeline construction on Alaska's North Slope should be specifically identified as an activity that should be excluded from regulation under Section 404 because the pipelines are elevated and supported by pilings that result in only temporary *de minimis* discharges.

If a landclearing operation does not disturb the soil, no discharge occurs; thus, such activities would not be regulated (see 33 CFR 323.2(d)(1); 40 CFR 232.2(e)(2)(ii)). We do not believe that it would be appropriate, as this commentator has suggested, to categorically exclude from regulation mechanized landclearing to create utility line or transmission line corridors. As we have explained above, where a discharge occurs, we believe that it is appropriate for the discharger to bear the burden of demonstrating that a particular activity will not destroy or degrade waters of the United States. Pipelines that are normally built on pilings and where no landclearing or fill pad construction is required are generally not regulated under Section 404. Similarly, we do not believe it is appropriate to categorically exclude from regulation mechanized landclearing in frozen or seasonally dry wetlands. While we agree with the commentator that cutting of brush and timber in wetlands above the soil's surface does not normally result in a redeposition of soil (see 33 CFR 323.2(d)(1)(ii); 40 CFR 232.2(e)(2)(ii)), as described in today's preamble at section III(c), mechanized landclearing usually results in a discharge of dredged

material, and the commentator has provided no basis for concluding that mechanized landclearing in seasonally dry or frozen wetlands will never result in such a discharge. We therefore do not believe there is a basis to exclude categorically such areas from the scope of this rule. Where a regulated discharge occurs (as subject to this rule, regardless of the type of water of the U.S. in which it occurs.

In response to the commentator's request that corduroy roads, (i.e., roads which are created by placing cut timber and brush along the centerline of a utility line corridor through a wetland without the addition of dirt or rock fill), should be excluded from Section 404 regulation, we agree that this activity generally does not constitute a discharge of dredged material. However, this activity may constitute a discharge of fill material and require Section 404 authorization. The agencies cannot, as suggested by this commentator, unilaterally expand the statutory exemptions for farm, forestry and mining roads to include corduroy roads used for utility line construction related to farming, forestry, or mining operations.

Other activities that commentators suggested should be excluded from regulation are: Maintenance of flood control structures according to design specifications; public health and safety projects; activities associated with the maintenance of natural or mitigated wetlands; construction or repair of water diversion structures to divert water under state water rights, where there is only a minor amount of excavation with temporary, minimal impacts; maintenance dredging of cooling water intakes channels; dredging operations in wetlands; the creation of storm water retention/detention basins for residential construction which involve only *de minimis* soil movement that should not destroy or degrade wetlands; certain wetland wildlife management activities, including wetland wildlife enhancement work and gravel placement in river channels to serve as salmon spawning habitat; and excavation in a dry streambed or similar areas which will not cause destruction or degradation of a water of the United States.

We do not agree with these commentators that these activities would, as a general rule, not result in discharges of dredged material that would destroy or degrade waters of the U.S. For example, a category of activities such as "public health and safety projects" relates to the purpose of the activity, not to whether it causes additions or redepositions of dredged

material or whether it will destroy or degrade waters of the U.S. Activities associated with the maintenance of natural or mitigated wetlands might have an overall purpose of benefiting the environment, but may nonetheless cause certain adverse effects warranting review under Section 404. Such activities may be addressed through general permits if they would have minimal environmental impacts. Similarly, we do not believe that there is a basis for concluding that the other activities listed by this commentor will not destroy or degrade waters of the United States. However, some of these activities are authorized by existing nationwide and regional general permits. In addition, to the extent construction or repair of water diversion structures involve the construction or maintenance of irrigation ditches or the maintenance of drainage ditches, such activities may be exempt under Section 404(f) of the Act. Furthermore, we do not believe that today's rule will greatly burden the regulated public because, to the extent they involve minimal environmental impacts, the Corps will consider issuing general permits to regulate those activities.

Two commentors requested that the nationwide permits not be subject to the presumption and demonstration requirements of Section 323.2(d)(2). They recommended adding to § 323.2(d)(2), as follows: "[2] For the purposes of paragraph (d)(1), mechanized landclearing, ditching, channelization, or other excavation activities in waters of the United States result in a discharge of dredged material. Further, where such activities occur in waters of the United States and are not authorized under the Nationwide Permit Program at part 330, the activity is presumed to result in destruction . . . . We do not agree with the thrust of this comment. The tests in this rule go to the question whether an activity results in a discharge of dredged material requiring a permit under Section 404. By definition, activities already covered by a Section 404 permit (including nationwide permits) are subject to regulation. The scope, applicability and potential use of nationwide permits is not affected by today's rule. Those excavation activities that destroy or degrade waters of the U.S. but only have minimal adverse environmental effects may qualify for coverage under a nationwide permit. Corps districts are encouraged to develop general permits for those classes of mechanized landclearing, ditching, channelization, and other excavation that are

determined to have only minimal individual and cumulative adverse effects.

Several commentors addressed discussion in the preamble to the proposed rule regarding "snagging," which we stated included "the removal of trees, parts of trees, or the like, from a water body to prevent their interfering with navigation." We concluded that such activities generally would not result in a discharge and therefore would not be subject to Section 404, unless in a particular case, the snagging operation would result in a discharge through redeposition of soil and would destroy or degrade a water of the United States. Some commentors agreed that snagging operations, such as the removal of trees and tree parts from streams, should be regulated. Two commentors stated that all snagging operations should be regulated. Another commentor asserted that snagging, especially in waters only subject to Section 404 jurisdiction and where Section 10 permits are not required, should be regulated because it involves a discharge and will result in significant adverse impacts to wetlands and water quality. One commentor suggested that the exclusion for snagging should be more narrowly defined to allow removal of tree and tree parts only where there is interference with navigation or where they are likely to obstruct normal stream flow. Several commentors expressed concern that the new proposed rules would negatively affect flood control activities, such as snagging and dredging, by requiring Section 404 permits. Two commentors stated that an exemption to Section 404 is needed for the maintenance of flood control projects that involve the removal of vegetation.

We have carefully considered these comments and believe that qualifying the term "snagging" in the proposal to include only the removal of trees and tree parts where that removal is to prevent their interfering with navigation is not appropriate. Therefore, for purposes of today's preamble, we are eliminating that qualification (i.e., prevention of interference with navigation). The determination of whether an activity involves a discharge of dredged material is not based on the intent of the activity; instead, that determination turns on whether there is any addition or redeposit of dredged material into waters of the United States. Where only vegetation is removed during a snagging operation and no discharge of dredged or fill material occurs, a permit is obviously not required. Consequently, snagging operations will only be regulated when

they would result in incidental discharges through redeposition of soil and the activity would destroy or degrade waters of the United States. For this reason, we do not agree with the commentor who suggested inclusion of an additional qualifier (i.e., snagging only includes removal of trees or tree parts where they are likely to obstruct normal stream flow).

While today's rule may affect those flood control projects that involve snagging operations that result in discharges of dredged material by requiring authorization under Section 404, some such activities may already be exempted under sections 404(f)(1) (B) and (C), and others may be covered by current general permits. Also, in some cases, general permits may be developed where the adverse environmental effects of certain snagging operations that involve a discharge of dredged material into waters of the United States are determined to be minimal.

Several commentors expressed concerns that the regulation of excavation would affect normal drainage practices around small isolated wetlands that allegedly have little or no value. It is unclear what this commentor means by normal drainage practices. Section 404(f) provides an exemption for maintenance of existing drainage ditches, and such practices would therefore not be affected by today's rule. To the extent they are not exempt, such activities in small isolated wetlands may also be authorized by nationwide permit number 26 or other general permits. In general, however, we believe that the approach suggested by the commentor is overboard. Small isolated wetlands can be of great cumulative importance to the aquatic ecosystem. Categorically exempting drainage activities in these areas from Section 404 of the Act would therefore not be warranted or appropriate.

Two commentors stated that it was unclear how commercial sand and gravel dredging operations would be regulated and wanted exemptions for such operations. Several commentors wanted mining exemptions for the removal of overburden and sand and gravel mining operations in intermittent streams. While we appreciate these concerns, we believe that an exemption would be inappropriate for this type of activity since sand and gravel operations do involve excavation activities in waters of the U.S. and there is no basis to conclude categorically that these activities will not destroy or degrade waters of the U.S. Indeed, most mining activities result in significant alteration of the aquatic environment since their very purpose is to remove

overburden and substrate materials, and such activities generally would therefore have an identifiable adverse impact on the aquatic environment. We have, however, decided to include a grandfather provision for mining activities that have not been regulated prior to the adoption of this rule to allow time for operators to obtain the necessary permits and for the Corps to consider development and issuance of general permits for mining activities that have minimal individual and cumulative impacts.

One commentator expressed concern that the rule would regulate "normal reservoir operations." Such activities below the ordinary high water mark of a reservoir will often require Section 404 authorization; however, districts may develop regional general permits to authorize certain activities with minimal impacts, as appropriate.

One commentator expressed concern that the new regulations would discourage developers from creating stormwater management ponds through the excavation of existing wetlands. The agencies note that today's rule is not meant to "discourage" activities that comply with the Section 404(b)(1) Guidelines, including the construction of appropriate stormwater management ponds. Under today's rule, the creation of stormwater management ponds will be regulated under Section 404 to the extent that such creation involves a discharge of dredged material incidental to excavation activities which destroy or degrade wetlands or other waters of the United States. However, this does not mean these activities are prohibited, only that they require Section 404 authorization. As part of the permit evaluation process, the agencies will evaluate whether the proposal to excavate an existing wetland to create a stormwater management pond is the least environmentally damaging practicable alternative, and whether all appropriate actions have been taken to minimize impacts to the aquatic ecosystem, and whether other Section 404 permitting criteria are met. Moreover, to the extent creation of stormwater management ponds require the construction of dikes or berms, such activities would be regulated as a discharge of fill material, regardless of today's rule.

Several commentators indicated we should regulate the pumping of water because pumping water from a wetland has the same effect as draining, and, according to this commentator, "the impact of draining would be considered an identifiable decrease" in functions and values of waters of the U.S. We believe that pumping water from a

wetland or other waters of the United States would not, in and of itself, necessarily result in a discharge of dredged material. See *Save Our Community v. EPA*, 971 F.2d 1155 (5th Cir. 1992). However, if excavation would be necessary to accomplish the pumping and the activity would destroy or degrade a water of the United States, then the discharge activity would be regulated under Section 404. Further, if the pumping resulted in a discharge of other pollutants to a water of the United States, such a discharge would be regulated under Section 402 of the CWA. Section 404 covers only discharges of dredged or fill material. We do not believe that simply placing a pipe into a water of the United States, per se, would necessarily involve a regulated discharge.

One commentator indicated that the deepening and widening of existing ditches should be regulated. Maintenance of existing drainage ditches are exempted from the permit requirement under Section 404(f)(1)(C), provided the original dimensions of the drainage ditches are not increased. Those excavation activities in drainage ditches that deepen or widen an existing drainage ditch beyond the original dimension do not qualify for an exemption and, if they would expand the carrying capacity of the ditch, would likely alter the hydrological regime of adjacent areas, and therefore result in degradation.

Some commentators indicated that they believe that many excavation activities are beneficial to the environment and result in increased aquatic functions and values, including excavation for purposes of stormwater management and maintenance of ditches, and were concerned that many such activities will be regulated under Section 404. However, even though these activities may have some beneficial effects, they can still have adverse effects by, for example, altering the hydrology of an area of the water of the U.S. Therefore, they may be covered under this rule. However, the Corps will consider the use of general permits where such environmentally beneficial activities otherwise result in minimal impacts. In addition, particular cases where the applicant can demonstrate that the activity would not destroy or degrade a water of the United States would not be regulated under Section 404.

One commentator indicated that the preamble should clarify that the excavation of wetlands to place drainage tiles should be regulated under Section 404 since this involves a discharge and destroys wetlands. The excavation of wetlands to place drainage tiles is

currently regulated under Section 404 unless such activities qualify for a Section 404(f) exemption. Activities that involve replacing existing field drainage tiles where the replacement does not increase the extent of drainage beyond that provided by the original tiling would generally qualify for such an exemption.

#### E. Normal Dredging Operations

Many commentators suggested that all discharges of dredged material should be regulated, stating that it does not seem reasonable or consistent to exclude discharges incidental to "normal dredging operations" for navigation, while regulating excavation for non-navigation purposes. One commentator stated that the proposal was extremely confusing because, while the preamble discussed eliminating the *de minimis* exemption, the proposed rule mentioned exemptions for certain *de minimis* activities. The commentator stated that the proposed rule has created a disparity with respect to excavation in waters of the United States versus normal dredging operations in navigable waters of the United States. Several commentators stated that, contrary to the explanation that normal dredging operations "generally do not alter the reach or flow or circulation of the waters, nor do they convert waters of the United States into dry land or degrade wetlands," these operations do in fact have negative impacts. These commentators further cited specific examples, including increased sedimentation, changes in salinity, loss of habitat, alteration of flows, changes in circulation and lowered dissolved oxygen concentrations. Two commentators stated that the exemption for normal dredging operations to maintain navigation is acceptable so long as the term "navigation channel" is clearly defined as that type of channel capable of carrying commercial traffic. However, those commentators stated that the extension or deepening of navigation channels should be regulated under Section 404.

Today's rule clarifies that "normal dredging operations" will continue to be excluded from the definition of "discharge of dredged material." "Normal dredging operations" are defined as "dredging for navigation in navigable waters of the United States, as that term is defined in part 329 of this Chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at § 328.3 of this Chapter" (33 CFR 323.2(d)(3)(ii)).

There are several reasons for continuing to exclude incidental soil movement occurring during "normal dredging operations" from the regulatory definition of "discharge of dredged material." The overriding goal is to ensure that discharges of dredged or fill material into the waters of the United States are regulated in a satisfactory manner. In light of this goal, the Corps, as well as all other Federal or private dredging entities, fully comply with the regulatory requirements of the Section 404 process for any and all disposal of the dredged material removed from the navigation channel during dredging and discharged in the waters of the United States, whether that dredged material has been generated by Corps or other dredging operations. Furthermore, the Corps applies for state Section 401 water quality certifications and any required state permits for these disposal activities.

The Corps has established a two-part regulatory framework for the actual dredging portion of its own normal dredging operations. Prior to conducting any normal dredging operations for Corps dredging projects, the Corps must comply fully with its Operations and Maintenance dredging regulations. (33 CFR 209.335, 336, 337, and 338.) These regulations were developed by the Corps in 1986 specifically to address environmental and other aspects of normal dredging operations on the waters of the United States. Pursuant to these regulations the Corps must fully comply with NEPA, the Clean Water Act, including Section 401, the Coastal Zone Management Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the Marine Protection Research and Sanctuaries Act, and all other applicable environmental laws. Furthermore, each time a federally authorized navigation channel is designated or modified, Congress, in effect, conducts a public interest review through the authorization process. This provides another safeguard that the subsequent normal dredging operations to maintain these channels are in the best interests of the Nation.

The procedure is different for those normal dredging operations conducted by other Federal agencies or non-Federal entities. The Corps requires that these dredgers apply for a Section 10 Rivers and Harbors Act permit. The Section 10 permit process includes an extensive public interest review pursuant to which any adverse impacts of the proposed dredging are fully discussed and analyzed. The Corps must ensure that NEPA, CWA Section 401, the Coastal Zone Management Act,

the Endangered Species Act, the Fish and Wildlife Coordination Act, the Marine Protection Research and Sanctuaries Act, and all other applicable Federal environmental laws are complied with prior to granting a Section 10 permit.

Considering these various types and levels of review, the Corps and EPA have concluded that it would not be in the public interest to require that the Corps, other Federal agencies, and private entities also be required to secure a Section 404 permit for each normal dredging operation. This process would be resource intensive and duplicative, and would only serve to divert limited Corps and EPA resources away from permit applications that deserve our careful scrutiny.

Additionally, the Corps and EPA believe that this is an appropriate approach because, as a general rule, normal dredging operations which have been subjected to the above regulatory process and associated environmental safeguards do not have a substantially adverse effect on the aquatic environment. It may be true, as some commentators have stated, that normal dredging operations can, in some cases, cause changes in sedimentation, salinity, habitat, flows and circulation patterns, and dissolved oxygen concentration. However, the Corps and EPA believe that these impacts are adequately addressed as part of the regulatory and congressional review processes described above and do not warrant the additional scrutiny of the Section 404 regulatory process.

As stated above, two commentators agreed that normal dredging operations conducted in Federal (Corps of Engineers) navigation channels should not be regulated under Section 404; however, these commentators argued that any deepening or extension of these channels should be regulated under Section 404. We disagree, and see no reason to distinguish between normal dredging operations, on the one hand, and channel deepening or extensions, on the other hand. For one thing, Congress must authorize any major extensions of, and any deepening of, any Corps Federal navigation channel. Through this authorization process, Congress is responsible for determining whether it is in the public interest to conduct these activities. Moreover, Federal agencies and non-Federal entities must apply for a Section 10 permit for any project to extend or deepen a Federal navigation channel.

The Corps' and EPA's position that incidental soil movement associated with normal dredging operations does not constitute a discharge under Section

404 is specifically addressed in the Corps' regulations at 33 CFR 323.2. Since 1977, the Corps has consistently held that Section 404 does not apply to incidental soil movement during normal dredging operations. We continue to believe that "normal dredging operations" to maintain or deepen navigation channels in the navigable waters of the United States, with proper authorization from the Congress and/or the Corps under Section 10, will not result in significant environmental impacts affecting the reach or flow or circulation of the waters, nor do they convert waters of the United States into dry land. The definition of "normal dredging operations" excludes dredging that takes place in wetlands. We made this exclusion to reflect the fundamental purpose of the normal dredging operations exception, which is to allow for the maintenance of navigation channels. We believe it would be a rare and exceptional circumstance for a party to propose dredging wetlands for purposes of navigation. If such an exceptional case were to arise, however, we believe that the activity should be evaluated under Section 404 in light of the special functions and values of wetlands that Section 404 is specifically designed to address.

As we stated in the proposed rule, it is our desire to avoid duplicative regulation of dredging itself in waters within the jurisdictional scope of the Rivers and Harbors Act. Normal dredging operations in the navigable waters will continue to be regulated and evaluated under Section 10 of the Rivers and Harbors Act of 1899.

#### F. Section 404(f)(1)(A) Exemptions

Several commentators expressed concern that the language of the proposed rule might be construed as weakening the exemptions provided for normal farming, silviculture, and ranching activities under Section 404(f)(1)(A). A few commentators urged the continued exemption for normal farming and forestry practices as provided in Section 404(f). Many commentators requested clarification that the 404(f)(1) exemptions would not be affected by the new regulations and some requested that the following language be added to the rule: "The term 'discharge or dredged material' does not include activities defined in 33 CFR 323.4(a)." One commentator requested assurance by suggesting changing § 323.2(d)(2) to state that the existing exemptions of Section 404(f) are not presumed to have the effect of destroying or degrading waters of the United States. A few commentators stated that § 323.2(d)(1) be amended to read

"the term does not include the activities defined in § 323.4(a)(1)-(6)." We disagree that any further clarification is necessary. As indicated in the Preamble of the proposed rule, this rule does not change, in any way, the manner in which the Corps and EPA determine whether an activity is exempt under Section 404(f) of the CWA. Therefore, this regulation will not, in any way, effect the exemptions for normal agriculture, silviculture or ranching activities now provided by Section 404(f)(1)(A) of the CWA, or any of the other exemptions found in Section 404(f)(1).

As part of today's rule, the agencies have also made an additional minor revision to the Corps' definition of "discharge or dredged material" which would make EPA's and Corps' definition consistent with each other and conform the definitions to the language and intent of Section 404(f). The EPA' pre-existing definition expressly excludes "plowing, cultivating, seeding and harvesting for the protection of food, fiber and forest products." 33 CFR 323.2(d). EPA's current definition, by contrast, does not contain this exclusion, see 40 CFR 232.2(e), although the proposal would have added the Corps' language in EPA's definition. The final rule deletes this exclusion entirely from the definition of "discharge of dredged material" because it has created confusion with regard to the effect of today's rule on the Section 404(f) exemptions.

This exclusion in the Corps' regulation predates the adoption of Section 404(f) in the 1977 Amendments to the CWA. Clean Water Act of 1977, Public Law No. 95-217, 91 Stat. 1566 (amending 33 U.S.C. 1251-1376). Section 404(f)(1)(A) expressly lists these activities as examples of normal farming, silviculture, and ranching activities exempt from Section 404, unless the activities would be recaptured under Section 404(f)(2). The exclusion of these activities from the definition of "discharge of dredged material" is broader than the exemption in Section 404(f) because, under the Corps' regulatory definition, these activities would never require a Section 404 permit, even if they would have effects "recapturing" the activities under Section 404(f)(2). Since Congress expressly stated in Section 404(f) that discharges associated with these activities require a permit if they would be recaptured under Section 404(f)(2), we believe that the exclusion in the current rule should be deleted in order to be consistent with Congressional intent in this area. The Corps and EPA

reiterate that today's rule, including deletion of this sentence, has no effect with regard to the scope and applicability of the Section 404(f) exemptions. This is further emphasized in the rule at §§ 323.3(d)(3)(iv) and 232.2(e)(3)(iv). Under Section 404(f)(1), discharges of dredged or fill material associated with certain activities, including normal farming, ranching, and silviculture activities, are exempt from the Act's permit requirement, provided that they are not "recaptured" under Section 404(f)(2).

#### G. Grandfather Provision

Numerous commentors requested that the Corps and EPA include a grandfather provision as part of the revised definition of "discharge of dredged material." In light of these comments and consistent with past Corps practice, the Corps and EPA have included such a provision in this part of the final rule.

By including a grandfather provision here, the Corps and EPA are intending to avoid application of the revised definition of "discharge of dredged material" in a manner that would frustrate the reasonable expectations of persons who, as explained below, justifiably relied on the previous definition of that phrase as interpreted by the regulatory agencies. At the same time, however, we are also mindful of the goals of today's rule and the overall goals of the Clean Water Act.

Therefore, we have developed procedures to "grandfather" certain "discharges of dredged material" that, in some Corps districts, were not considered to be subject to regulation under the previous definition of that term. Under these procedures, Section 404 authorization will not be required for discharges of dredged material associated with ditching, channelization and other excavation activities in waters of the United States where such discharges were not previously regulated and where such activities had commenced or were under contract prior to the date of publication of this final rule in the Federal Register, and where such activities are completed within one year from the date of publication of the final rule. This provision does not apply to discharges associated with mechanized landclearing because the Corps current policy (reflected in RGL 90-5) has generally subjected this activity to Section 404 regulation. To further ensure that implementation of the revised definition proceeds in a fair and equitable manner, the Corps will be able to extend the one-year grandfather provision on a case-by-case basis subject

to the following three conditions: (1) The excavation activity is of a type that occurs on an ongoing basis, either continuously or periodically (e.g., seasonally); (2) the discharger submits a completed individual permit application to the Corps within one year from the date of publication of this final rule; and (3) the total time period within which the excavation activity proceeds subject to this grandfather provision does not exceed three years from the date of publication of today's rule. The agencies recognize that the revised definition of "discharge of dredged material" is likely to apply to some persons who have been engaging in ongoing excavation activities, such as some mining or sand and gravel operations, which given their ongoing nature on either a continual or periodic basis, will not be able to be completed within one year from the date of publication of today's rule. Therefore, in situations where persons engaged in excavation activities occurring on an ongoing basis have acted in good faith by submitting a complete individual permit application seeking Section 404 authorization for such activities no later than one year from the date of publication of this rule, the agencies believe it is appropriate to retain sufficient flexibility to ensure that such persons are not prevented from proceeding with these excavation activities pending the evaluation of a Section 404 permit application for the discharges associated with the activity. The agencies have further determined that a grandfather period not to extend beyond three years from publication of today's rule is sufficiently long to ensure fair and equitable treatment of the regulated community in a manner consistent with the environmental goals of this rulemaking and the Clean Water Act. Moreover, discharges associated with activities that were regulated by a particular Corps district prior to the promulgation of this rule will not be subject to the grandfather provision in the regulation. If a discharger is uncertain whether its activity was regulated by the Corps district in which the discharge would take place, the discharger should contact the Corps district. Finally, the grandfather provision does not apply to landclearing activities, since the Corps has interpreted current regulatory provisions as covering mechanized landclearing under the Section 404 program since 1990. See RGL 90-5.

#### H. General Permit Comments

We invited public comment to identify mechanized landclearing, ditching, channelization, or other



excavation activities that would generally have minimal environmental impacts and therefore be potential candidates for authorization under general permits. Several commentors suggested activities that are either exempt from regulation or already covered under the nationwide general permit program. Several commentors suggested that activities having minimal environmental impacts should be authorized by general permits, but they did not give specific candidate activities. Another commentor indicated that all activities should be regulated on a case-by-case basis. Several activities were suggested for authorization by general permits. These include all mechanized landclearing; mechanized landclearing in seasonally dry or frozen wetlands where brush and timber cutting occurs above the soil surface; landclearing for creation and maintenance of utility line or overhead transmission line corridors; water diversion structures constructed to exercise water rights; activities when states already have effective regulatory controls; discharges incidental to dredging or excavation to improve fish and/or wildlife habitat or to restore previously filled wetlands; excavation in dry streambeds; use of a hydroax to clear vegetation; creation of stormwater retention/detention basins for residential construction; and sand and gravel mining activities having minor impacts.

The general permit program is an extremely important regulatory tool used by the Corps to regulate effectively activities with minimal impacts on the aquatic environment. The Corps does not have the resources to regulate all activities on a case-by-case individual permit basis. Therefore we must focus our resources on those activities with more than minimal impacts. Moreover, general permits are very effective in protecting the aquatic environment, because they are issued with stringent conditions that limit authorized activities to those with minimal adverse effects. This regulation may increase the number of discharges regulated by the Corps nationwide. In order to administer responsibly the regulatory program and protect effectively the environment the Corps will identify those activities with minimal impacts and pursue development of general permits. We appreciate the suggestions made and will consider them for possible issuance as nationwide or regional general permits in the near future. Any proposed nationwide permits will be published in the Federal Register and any proposed regional

general permits will be proposed by public notice to obtain public comment before a decision is made whether to issue such nationwide or regional general permits.

#### IV. Revision to Definition of "Discharge of Fill Material;" 33 CFR 323.3(c) and 40 CFR 232.2(r)

We have organized the numerous comments on the regulation of pilings as fill material into several issues. Our discussion of the comments is provided below.

##### A. Summary of Major Issues and Changes From the Proposal

Many commentors supported the proposed revisions on the grounds that the regulation of the placement of pilings as a discharge of fill material was necessary under Section 404 to ensure that adverse impacts to wetlands and other aquatic resources are minimized. Many of these commentors, as explained in more detail below, also argued that the placement of pilings should be regulated as a discharge of fill material in all circumstances, and that the proposed revisions contained unnecessary and unjustified limitations and exceptions. Other commentors contended that EPA and the Corps lacked the authority under the CWA to regulate the placement of pilings as fill material. Concerns were also raised by commentors that the terms used in the proposed revisions were not adequately defined by the agencies.

Based upon public comments, the agencies have made certain changes to the language in the regulations to clarify when the placement of pilings constitutes a discharge of fill material subject to regulation under Section 404. Under the final rule, the placement of pilings in waters of the United States shall require a Section 404 permit when such placement has or would have the physical effect of a discharge of fill material.

The agencies have made two major changes to the rule in response to public comments. First, we have deleted the "functional use and effect" test in the proposed rule. In addition, the final rule does not contain an exception for structures "traditionally constructed" on pilings. For the reasons explained further below, we agree with commentors who argued that the physical effect of the placement of pilings (as opposed to its functional use, or whether the structure was traditionally placed on pilings) should be the focus for determining when placement of pilings constitutes a discharge of fill material. We recognize, however, that some projects generally

use pilings in a manner that does not result in the same physical effect as the placement of fill material. Consequently, the final rule notes that placement of pilings for these projects (i.e., linear projects, piers, wharves, and individual houses on stilts) generally do not have the effect of a discharge of fill material and therefore a Section 404 permit will generally not be required for these projects. The Corps and EPA, nevertheless, reserve the right on a case-by-case basis to determine that the proposed placement of pilings to support a particular linear project or a particular pier, wharf, or individual home on stilts does have or would have the effect of fill material and therefore requires Section 404 authorization.

##### B. Need for Regulating Pilings Having the Effect of Fill

The Corps adopted RGL 90-8 in order to address projects placed on pilings in waters of the U.S. that would have the kinds of adverse environmental consequences generally associated with discharges of fill material, but which were not subject to any environmental review under Section 404 to avoid or mitigate those adverse effects. For example, in one case, a developer proposed a large, multi-use high rise waterfront complex which would have covered over 16 acres of the East River in New York. The developer proposed an unconventional construction method, using pilings instead of solid fill to support the 16 acres of structures. The developer apparently pursued this course of action in order to try to avoid the necessity of obtaining a Section 404 permit. To provide the necessary structural support, the pilings would have been so large and so closely spaced that they would have physically displaced over 20% of the bottom surface area and the water column. In addition to the physical displacement of aquatic habitat due to the extraordinarily dense spacing, the project would have substantially altered current and sedimentation patterns such that at least some of the covered area would have silted in and eventually lost its character as a water of the U.S.

In another case, a 13-acre hotel/office development project was proposed to be constructed in palustrine forested wetland in New Jersey. This wetland was identified as habitat for more than 80 species of birds, including numerous migratory birds that had witnessed decreasing population numbers due to fragmentation and loss of habitat. The developer originally proposed that the project be built on fill material, which would have required a Section 404 permit, but subsequently proposed to

build virtually the identical project on 12-16 inch diameter pilings. While the pilings did not need to be spaced densely to support the structure, as in the East River situation, the platform supporting the 13 acre development would have rested from 3 inches to approximately one foot above the wetland. The project would therefore have prevented sunlight from reaching almost all of the 13 acres of wetlands underneath the structures, thereby making wetland vegetation growth impossible and causing the area to lose virtually all of its wildlife habitat value. The project also would have contributed to soil erosion by killing vegetation that provide soil stability, resulting in interference with the site's natural flood protection function, and impairment to downstream water quality. Ultimately, the developer decided not to pursue this project.

In both of these cases, the environmental effects of the projects would have been severe, comparable in many respects to the effects that would have resulted had the projects been built on fill material. Adoption of RGL 90-8 reflected the Corps' belief that allowing such projects to proceed without any environmental review under Section 404 would not be consistent with the goals and objectives of the CWA or Section 404. Regulating pilings when the project would have the effect of fill will therefore help insure that potentially damaging activities constructed on pilings in waters of the United States are reviewed under Section 404.

#### *C. Comments on Agencies' Legal Authority To Promulgate This Aspect of the Regulation*

Several commentors argued that EPA and the Corps lack legal authority under the Clean Water Act to issue the proposed regulation. These commentors, however, did not cite any provision of the statute or discussion in the legislative history to support this contention; they simply asserted that placement of pilings having the effect of fill was not the same thing as a discharge of fill material itself. We believe, however, that today's rule is a reasonable exercise of our authority under the statute.

The CWA does not define the term, "fill material." Nor does the CWA specifically address, in any manner whatsoever, whether the placement of pilings in waters of the U.S. is a discharge of fill material subject to Section 404 of the Act. Therefore, it is up to EPA and the Corps to determine a reasonable regulatory approach to this activity, consistent with the language

and purposes of the CWA. We have made what we believe to be a very straightforward determination here that placement of pilings is a discharge of fill material when it would have the effect of fill material on waters of the U.S. The agencies believe that this approach is entirely consistent with the language of the Act, and helps effectuate the underlying goal of the statute of protecting our nation's aquatic resources.

Several commentors requested that we not pursue this rulemaking but instead wait to see how Congress addresses pilings in the upcoming reauthorization of the CWA. Because this rule is entirely consistent with existing statute, we see no reason to delay promulgating this rule.

One commentor argued that there is no justification for regulating certain pilings under Section 10 of the Rivers and Harbors Act, but not regulating them as "fill" under the Clean Water Act, when the pilings are placed in waters subject to jurisdiction of both Acts. This commentor also suggested that Section 10 jurisdiction does not substitute for Section 404 jurisdiction. Today's decision to define fill material under Section 404 to include the placement of certain pilings is not in any manner related to the regulation of pilings under Section 10. Section 10 establishes an independent regulatory program that regulates any work, among other things, in navigable waters that affects the navigable capacity of those waters. Regulatory jurisdiction under Section 10 does not depend to any degree on whether the work involves a "discharge of fill material." Therefore, we do not believe, as this commentor does, that the scope of activities regulated under Section 10 of the Rivers and Harbors Act and Section 404 of CWA must be the same.

#### *D. Establishment of "Effects" Tests and Exceptions to the Regulation of the Placement of Pilings as Fill Material*

The proposed rule contained language that would have regulated the placement of pilings where the pilings were essentially equivalent to a discharge of fill material in physical effect or in functional use and effect. In addition, the rule would have provided exceptions to the regulation of the placement of pilings as fill material in circumstances involving linear projects or projects which have traditionally been constructed on pilings.

Commentors expressed several concerns with this approach. First, several commentors contended that all pilings, without exception, should be regulated. One commentor also argued

that pilings are by definition "fill material" and therefore must be regulated in all cases. Numerous commentors were concerned that the proposed rule was arbitrary since it would regulate the placement of pilings based on what type of structure is built on the pilings. Asserting that the functional use of the pilings is irrelevant, several commentors suggested that the agencies rely solely on the physical effect test to determine when the placement of pilings would constitute fill material. Other commentors disagreed, supporting the inclusion of a functional use and effect test.

We agree with commentors who argued that it is not appropriate to determine whether Section 404 applies to the placement of pilings solely on the basis of the functional use of the pilings or whether the structures on the pilings have traditionally been built in this fashion. As discussed earlier, the agencies have deleted the "functional use and effect" test set forth in the proposed rule. We agree with certain commentors that this test was vague, and that focusing on the use of the pilings structure is not appropriate where our paramount concern is the effect of the placement of pilings on the aquatic environment. Our primary motivation in adopting the pilings RGL in December 1990 and in proposing this rule, has been to address the growing practice among some project proponents of building large development projects on pilings, even though they would normally have been placed on top of fill material. In these cases, the projects had a clear adverse impact on the aquatic environment, yet no permit was being required for the activity. While the type of structures built on top of pilings can be indicative of how the pilings will affect the aquatic environment, ultimately it is the effect of the pilings that is of concern to us. Focusing solely on those effects will therefore simplify implementation of this regulation.

For the same reasons, the final rule provides that the placement of pilings will not be excluded from regulation under Section 404 based on whether the structures they support are traditionally constructed on pilings. The final rule will require a Section 404 permit when the placement of pilings has or would have the effect of a discharge of fill material; this test will be applied in all circumstances. The final rule also provides examples of activities that generally have the effect of a discharge of fill material, including the following: projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the

pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

We disagree, however, with the commentator who argued that the placement of a piling is by definition a discharge of fill material in all cases and that all pilings must therefore be regulated under Section 404. As discussed above, the CWA does not define fill material. We believe that it is reasonable to define the placement of pilings as a discharge of fill material when such placement would have the effect of fill material. This commentator apparently believes that EPA and the Corps are compelled to regulate the placement of a piling in waters of the United States as a discharge of fill material, even where the placement would not have effects associated with discharges of fill material. We see no provision of the Clean Water Act that would compel the adoption of such an approach. We have taken what we believe to be a straightforward and common-sense approach to defining when the placement of pilings is a discharge of fill material, an approach that we believe is entirely consistent with the Clean Water Act.

Several commentators raised concern over the exception for the placement of pilings in linear projects. Some commentators suggested deleting the exception based on their concerns that adverse impacts to the aquatic ecosystem would occur as a result of the construction of linear projects. One commentator suggested that linear projects not be exempted if the project would "significantly alter the flow of water or increase sedimentation so that the quantity and quality of habitat is reduced." One commentator also suggested that the exception for projects that have traditionally been constructed on pilings be eliminated, while another commentator was concerned that determining what constitutes a pier or marina is subject to "elastic interpretations" and therefore should not be exempted. Other commentators supported the exception for linear projects, and one commentator requested that "hot-oil" pipelines constructed in Alaska's North Slope be included in the list of linear projects where the placement of pilings would not require a Section 404 permit. Some commentators argued that the proposed exceptions were too narrow, and suggested

additional examples of activities involving the placement of pilings that should not be considered a discharge of fill material. In particular, several commentators suggested that the examples of structures that would not require a Section 404 permit due to their having been traditionally constructed on pilings should be expanded to include "commercial and industrial structures interrelated to wharves, piers, and marinas." Finally, one commentator suggested that all non-water dependent activities in waters of the United States be regulated under Section 404.

We believe that linear project construction on pilings will generally not have the physical effect of fill material. We recognize, however, the possibility that such projects could, in certain cases, have the effect of fill material and therefore should be subject to Section 404. Therefore, the regulation does not establish a definitive rule that linear projects will never have the effect of fill material.

Nonetheless, we believe that it will be a rare case when pilings used for linear projects have the effect of fill material and require authorization under Section 404. The most significant factors in determining whether placement of pilings has the effect of fill material are how densely the piles are placed, the size of the pilings, and the ground clearance of the structures built on pilings, and the overall areal coverage of the structures built on pilings.

Closely spaced pilings of any size, for example, can have the effect of substantially replacing an aquatic area. Very large pilings, regardless of their spacing, may also substantially replace an aquatic area. Large or closely spaced pilings can also affect current patterns and sedimentation rates. The above-ground clearance, and the overall areal coverage of the structures built on pilings, affect the suitability of the area underneath for vegetation and wildlife. The losses of aquatic and wetland functions and values under these circumstances can be the same as would occur from the discharge of fill material itself.

Most linear projects (piers, wharves, bridges, elevated roads and pipelines, etc.) do not require either closely spaced pilings or overly large pilings since they generally do not support massive structures requiring great support. Also, although some linear projects (e.g., bridges and elevated roads and pipelines) may be quite long, they generally are not very wide, and therefore would generally not result in the overall areal coverage that can result in substantial adverse effects on

vegetation and suitability of the area as wildlife habitat.

Although an individual home on pilings is generally not "linear" in design, it generally shares many of the same attributes as linear projects so that we believe that it generally will not have the effect of fill material. Most pile supported individual houses require neither closely spaced nor large pilings. An individual home also generally does not cover large areas. Some commentators objected to the term "single-family" houses contained in the proposed rule. We agree that this term was somewhat vague and confusing. We have substituted the word "individual" for "single-family" in the final rule in order to more effectively exclude larger structures (e.g., a development of multiple single-family houses) that may indeed have the effect of a discharge of fill material, as outlined above.

We do not take the position that pile supported linear projects and an individual house on pilings can never have any adverse effects on the aquatic ecosystem. Obviously, aquatic life located where a single piling is placed will be crushed by the placement of the piling. Similarly, even less-than-massive structures on widely spaced pilings have some effects on the aquatic environment. We, however, are concerned with the cases where the pilings and structures they support cause impacts on the aquatic environment comparable to those which occur with the discharge of fill material (i.e., by displacing many or all of the aquatic functions of an area). Today's rule will ensure that such effects do not occur without undergoing environmental review under Section 404 of the CWA.

We do not agree with commentators who argued that we should expand the proposed exceptions to include "commercial and industrial structures interrelated to wharves, piers and marinas." Such a broad category of structures could certainly include those with large area coverage or those built on large or closely spaced pilings; therefore we cannot find as a general matter that these types of structures generally would not have the effect of fill material.

Several commentators expressed concern over the manner in which the effects tests were defined. Some of these commentators suggested that the rule should be consistent with the test proposed for determining whether a discharge of dredged material occurs, i.e., the rule should clarify that the placement of pilings should be regulated as a discharge of fill material only when the activity would destroy or

degrade any area of waters of the United States. One commentator suggested that the proposal to regulate the placement of pilings as fill material when a project "significantly alters or eliminates aquatic functions and values" was too vague. Another commentator was concerned that the proposed test of whether the "pilings are so closely spaced that sedimentation rates are increased" would be difficult to implement given technical difficulties in predicting sedimentation rates. Commentors also requested that we develop specific thresholds, such as flow/temperature, or volume change, to determine if pilings have the same physical or functional effect as fill material. For example, one commentator recommended setting a standard volume of piles to be used in one project below which a project would not be regulated because there would be "minimal environmental impact." One commentator suggested that use of the phrase "essentially the same effects as fill" was vague, and left open questions of how similar the effect would have to be in order to be "essentially the same."

The agencies disagree with the comments that suggested the inclusion of the same "destroy or degrade" test proposed for the definition of "discharge of dredged material." We note that the definition of "discharge of dredged material," unlike that of the "discharge of fill material," historically has contained an exclusion for *de minimis* discharges associated with "normal dredging operations." As part of today's rule, the agencies are narrowing that exclusion in a manner that we believe carries out the purposes and objectives of the CWA. There is no comparable language in the agencies' definition of "discharge of fill material" and we see no justification for adding such language.

In response to the comment that "significantly alters or eliminates aquatic functions and values" was too vague, we have deleted the term "significantly." We agree that this qualifier would add confusion to the determination of whether the placement of pilings should be regulated as fill material, and is unnecessary. We agree with the comment that precise predictions would be difficult. We believe, however, that Corps and EPA staff are able to make general predictions regarding sedimentation rates that may result from the placement of pilings. Moreover, we believe that such generalized findings would be sufficient to determine whether a placement of pilings would have the effect of a discharge of fill material. Consequently, we have retained this

part of the proposed rule without modification.

We agree with the concern expressed over the use of the term "large" when referring to structures, and have deleted it from the final rule. We have not set specific standards or thresholds to measure the physical effect of pilings as suggested by comments, as we believe the circumstances related to each situation are so diverse that setting specific standards would be inappropriate. Instead, we believe the determination of the effect of the placement of pilings should be determined on a case-by-case basis considering the facts of each individual case. We agree with the commentator that "essentially" the same is unclear, and we have deleted use of the term "essentially" in the final rule.

#### E. Additional Comments

A few commentators expressed the need to note specifically that existing nationwide permits are not affected by this rule and that activities determined not to be subject to Section 404 regulation may still need a Section 10 permit when undertaken in traditionally navigable waters of the United States. With regard to the first point, today's rule does not modify, in any manner, current authorizations provided by existing nationwide permits. However, the Corps will examine the need for additional general permits under Section 404 for those projects involving the placement of pilings that have less than minimal adverse effects on the environment. In addition, as specifically provided for in today's rule, the placement of pilings in traditionally navigable waters of the United States remains subject to authorization under Section 10 of the Rivers and Harbors Act.

Another commentator expressed concern that the regulation will prohibit construction of any structures in wetlands (either on fill material or on pilings). This is clearly not our intent. The Corps authorizes thousands of projects involving fill material every year, and the Corps expects to authorize activities on pilings where appropriate. One commentator proposed that a set of quantifiable standards be developed for how and where structures such as decks may be built. We believe that national standards for pile supported structures are inappropriate; instead, these determinations are more properly addressed on a case-by-case basis in the permitting process. One commentator suggested that pilings should be defined to include pile caps, columns, piers and abutments which are part of linear

projects, such as bridges. We agree with this comment.

#### V. Revision to the Definition of Waters of the United States to Exclude Prior Converted Cropland

##### A. Background and Rationale for the Final Rule.

The agencies proposed to add language in the definition of waters of the U.S. providing that the term does not include prior converted ("PC") cropland, as defined by the National Food Security Act Manual (NFSAM) published by the Soil Conservation Service (SCS). PC cropland is defined by SCS as areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible. PC cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothold or playa wetlands. EPA and the Corps stated in the preamble to the proposal that we were proposing to codify existing policy, as reflected in RGL 90-7, that PC cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands.

Some commentators supported the proposed change. They felt that it was important for EPA, the Corps and the Department of Agriculture to follow consistent procedures and policies, because to do otherwise undermines the credibility and effectiveness of federal wetlands protection programs. Other commentators opposed the change in its entirety or took issue with specific aspects of the PC cropland definition that they believed were inappropriate. We have decided to retain the approach contained in the proposed rule. The reasons for this approach and responses to comments opposing the proposal are discussed below.

As stated in the preamble to the proposal, we are excluding PC cropland from the definition of waters of the U.S. in order to achieve consistency in the manner that various federal programs address wetlands. One commentator argued that such consistency is not a "goal of the CWA," and that it was therefore not appropriate to base wetlands policy on this consideration. We believe, however, that effective implementation of the wetlands provisions of the Act without unduly confusing the public and regulated community is vital to achieving the environmental protection goals of the Clean Water Act. The CWA is not administered in a vacuum. Statutes other than the CWA and agencies other

than EPA and the Corps have become an integral part of the federal wetlands protection effort. We believe that this effort will be most effective if the agencies involved have, to the extent possible, consistent and compatible approaches to insuring wetlands protection. We believe that this rule achieves this policy goal in a manner consistent with the language and objectives of the CWA.

Moreover, we believe that excluding PC cropland from the definition of waters of the U.S. is consistent with EPA's and the Corps' paramount objective of protecting the nation's aquatic resources. By definition, PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA.

The altered nature of PC cropland was discussed in RGL 90-7, in which the Corps concluded that cropped conditions constitute the "normal circumstances" of such areas. The Corps contrasted PC cropland with "farmed wetlands," defined by SCS as potholes and playas with 7 or more consecutive days of inundation or 14 days of saturation during the growing season, and other areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season. Because the hydrology of farmed wetlands has been less drastically altered than it has for PC cropland, the Corps stated in RGL 90-7 that farmed wetlands continued to retain their basic soil and hydrological characteristics, and that such areas should therefore be considered to be wetlands.

#### *B. Technical Validity of Excluding PC Cropland From Regulation Under Section 404*

Several commentors argued that it was not technically valid to treat all PC cropland as non-wetlands. These commentors pointed out that the SCS definition of PC cropland excludes areas that are inundated for more than 14 consecutive days a year, and they argued that this requirement was inconsistent with EPA's and the Corps' regulatory definition of wetlands, which includes areas that have wetland

hydrology due to inundated or saturated soil conditions.

We believe that these commentors have oversimplified the relationship between the SCS definition of PC cropland and the wetlands definition under Section 404. In fact, except for a brief period of time after the adoption of the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual), the Section 404 program has generally not considered such farmed areas as meeting the regulatory definition of wetlands under the CWA. In 1986, the Corps issued RGL 86-9, which interpreted the phrase "normal circumstances" in our regulatory definition of wetlands as referring to an area's characteristics and use in the present and recent past. Under this interpretation, cropped areas did not constitute wetlands where hydrophytic vegetation has been removed by the agricultural activity. In the 1989 Manual, EPA and the Corps modified this approach and evaluated whether a cropped area retained wetland hydrology to the extent that wetland vegetation would return if the cropping ceased. Under the 1989 Manual, therefore, the phrase "normal circumstances," as applied to agricultural areas, meant the circumstances that would be present absent agricultural activity. The Corps ceased using the 1989 Manual in August, 1991 at the direction of Congress (Energy and Water Development Appropriations Act of 1992, Publ L. 102-560) and began using its earlier 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for wetlands delineations. EPA is currently also using the Corps' 1987 Manual in implementing Section 404 (See 58 FR 4995, January 19, 1993). While the 1987 Manual does not address application of the "normal circumstances" phrase as it relates to areas in agricultural production, both agencies continue to follow the guidance provided by RGL 90-7, which interprets our regulatory definition of wetlands to exclude PC cropland.

The evolution over the last several years in the EPA and Corps policy for delineating wetlands in agricultural areas attests to the difficult technical, legal and policy considerations that bear on this issue. We therefore disagree with commentors who seemed to believe that ascertaining the jurisdictional status of PC cropland is a cut-and-dried technical question readily resolved by reference to generally accepted delineation methodologies. In utilizing the SCS definition of PC cropland for purposes of Section 404 of the CWA, we are attempting, in an area where there is not

a clear technical answer, to make the difficult distinction between those agricultural areas that retain their wetland character sufficiently that they should be regulated under Section 404, and those areas that have been so modified that they should fall outside the scope of the CWA. As is inevitable where the government engages in such line-drawing, we recognize that the particular line we have chosen to draw is not perfect. Two areas that are inundated for 14 days and 15 days a season respectively may not, in fact, differ materially in terms of their function and values. This criticism, however, could be made no matter where we chose to draw the line between wetlands and non-wetlands. We believe that the distinctions under the Food Security Act between PC cropland and farmed wetlands provides a reasonable basis for distinguishing between wetlands and non-wetlands under the CWA. In addition to the fact that we believe this distinction is an appropriate one based on the ecological goals and objectives of the CWA, adopting the SCS approach in this area will also help achieve the very important policy goal of achieving consistency among federal programs affecting wetlands.

#### *C. Role of SCS PC Cropland Determinations*

In the preamble to the proposal, we stated that jurisdictional determinations under the CWA can only be made by EPA and the Corps. While we stated we would accept and concur in SCS determinations to the extent possible, this rule does not alter the final authority of EPA regarding CWA jurisdiction.

This discussion in the preamble was criticized by commentors from several angles. Some commentors were concerned that the proposed rule effectively "delegated" EPA's and the Corps' authority regarding CWA jurisdiction to SCS. Some of these commentors urged that SCS be required to obtain Corps (or EPA) concurrence for the purposes of making PC cropland determinations. From the other side, commentors argued that EPA and the Corps should not be allowed to make an independent judgment at a site, and should be required to defer absolutely to SCS determinations.

In response to these comments, we note that today's rule does not "delegate" EPA's ultimate authority for determining the scope of geographic jurisdiction under the CWA. At the same time, we believe it is critical that duplication between the SCS's wetlands program and the CWA Section 404

the use of prior converted croplands for non-agricultural uses. One commentator objected to the fact that there is no mechanism providing for "recapture" into Section 404 jurisdiction of those prior converted croplands that revert back to wetlands. One commentator objected to the requirement that a prior converted cropland is considered abandoned unless it is used for the production of an agricultural commodity at a regular interval, stating that it should include use for any agricultural production, including hay and pastureland.

The Corps and EPA will use the SCS provisions on "abandonment," thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to Section 404 regulation. While we agree that SCS's abandonment provisions may be complex, SCS has been applying these provisions for several years in implementing the Swampbuster program, and farmers have become familiar with the standards used to determine whether a property has been "abandoned." If EPA and the Corps were to use different abandonment provisions in implementing today's rule, we believe the resulting inconsistency between the two regulatory programs would serve only to create confusion as to which standards are applicable to the same parcel of property. In response to commentators who opposed the use of PC croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas. The agencies also note that today's rule will provide a mechanism for "recapturing" into Section 404 jurisdiction those PC croplands that revert back to wetlands where the PC cropland has been abandoned. Finally, in response to the request that a PC cropland not be considered abandoned if the area is used for any agricultural production, regardless of whether the crop is an agricultural commodity, we note that SCS's abandonment provisions do recognize that an area may be used for other agricultural activities and not be considered abandoned. In particular, PC cropland which now meets wetland criteria is considered to be abandoned unless for once in every five years the area has been used for the production of an agricultural commodity, or the area

has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

#### H. Grandfather Clause

One commentator said that RGL 90-7 results in the retroactive grandfathering of illegal drainage activities between 1977 and 1985. It has been and continues to be the position of the Corps and EPA that unauthorized discharge activity cannot eliminate Section 404 jurisdiction. Therefore, wetlands that were converted to prior converted cropland between 1972 and 1985 as a result of unauthorized discharges of dredged or fill material do not constitute "prior converted cropland" within the meaning of today's rule and remain "waters of the United States" subject to Section 404 regulation.

#### VI. Environmental Documentation

Some commentators wanted the Corps to prepare an Environmental Impact Statement (EIS), arguing that this rulemaking constitutes a major federal action significantly affecting the quality of the human environment. Some commentators felt that since these rules protect wetlands, an EIS would be needed to determine such environmental effects as mosquito infestation, odors, and gases. Others wanted an EIS prepared because they felt that these rules would result in a loss of wetlands. One commentator requested that the Corps prepare an EIS for farming, forestry and ranching disturbances and other questionable wetland impacts before proceeding with further rulemaking.

Section 511(c) of the CWA provides that, except for certain actions not relevant here, no action by EPA constitutes a major federal action significantly affecting the quality of the human environment with the meaning of NEPA. In this joint rulemaking by EPA and the Corps, these two agencies are making substantively identical revisions to their regulations in order to better carry out the purposes of Section 404 of the CWA. EPA is exempt from NEPA under Section 511(c), and we believe that, under the circumstances of this joint rulemaking, the Corps is exempt as well.

Nonetheless, the Corps has prepared an environmental assessment and determined that there will not be a significant impact on the quality of the human environment. This assessment is contained in the record for this rulemaking. Consequently, an EIS has not been prepared by the Corps. Furthermore, appropriate environmental

documentation, including an EIS when required, is prepared by the Corps for all permit decisions.

#### VII. Executive Order 12291 and the Regulatory Flexibility Act

Numerous commentators indicated that a regulatory impact analysis under Executive Order 12291 should be done because the rule would allegedly cause an increase in the Corps' workload and in costs to permit applicants and because the rule will allegedly result in additional encumbrances or burdens on the public in the form of tax increases, project delays, project scrutiny and increased project costs. One commentator felt that agency resources would be diverted from larger, more significant projects by this rule. EPA and the Corps do not believe that this regulation meets the definition of a major rule under Executive Order 12291, and we therefore have not prepared a regulatory impact analysis for the rule.

Some commentators also argued that the agencies were required to perform a Regulatory Flexibility Analysis for this regulation under the Regulatory Flexibility Act, 5 U.S.C. 601-612. EPA and the Department of the Army certify, pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, that this regulation will not have a significant impact on a substantial number of entities. Therefore we have not prepared a regulatory flexibility analysis for this rule.

EPA and the Corps do not believe that this regulation will have a significant impact on a substantial number of small entities first because most of the components of this rule merely codify current agency policies and these aspects of the rule will therefore not result in any increased regulatory burden on the public, including small businesses. Since 1990, the Corps has followed the policy under RGL 90-5 of regulating mechanized landclearing activities under Section 404. Similarly, RGL 90-8 established, in December 1990, the Corps policy of regulating the placement of pilings when the activity would have the effect of discharge of fill material. The amendment of the definition of waters of the United States in today's rule also codifies the agencies' current policy of not regulating prior converted cropland under Section 404, as reflected by Corps RGL 90-7. RGL 90-7, moreover, eased the regulatory burden of the Section 404 program by excluding prior converted cropland from coverage under this provision.

EPA and the Corps believe, moreover, that coverage of discharges associated with ditching, channelization and other

program be reduced. In that regard, we believe that farmers should generally be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the Section 404 program. In order to make this reliance possible, we are working with SCS to develop appropriate procedures, including monitoring, for coordinating wetland determinations by the agencies. We are also working with SCS to develop field guidance for implementing the 1997 Corps Manual to clarify procedures for identifying wetlands in areas managed for agriculture, and are expediting current efforts to revise the SCS's NFSAM to provide greater consistency between our wetlands delineation procedures. Moreover, we are also developing an interagency training program with SCS and other agencies to ensure that agency field staff are properly trained, and that standard, agreed-upon methods are utilized in making wetland determinations. However, in order to clarify the relationship between determinations made by SCS and the Corps or EPA, we have added language to the rule itself stating that the final authority regarding CWA jurisdiction remains with EPA.

We also disagree with commenters who stated that SCS should be required to obtain EPA or Corps concurrence in their PC cropland determinations. First, since SCS is the administering agency under the Food Security Act, we do not believe it would be appropriate to require that SCS obtain the concurrence of other federal agencies before making determinations under that statute. Moreover, requiring EPA/Corps concurrence on every PC designation made by the SCS would be an inefficient use of our limited resources, since a site being evaluated by SCS may not be one where a regulated activity will occur (i.e., a discharge of dredged or fill material not exempt under Section 404(f)). In those cases, a Section 404 delineation will not be necessary at all, and expending our resources on delineations in such cases would be a waste of taxpayer money. In light of EPA's ultimate statutory responsibility for determining the scope of CWA jurisdiction, we cannot satisfy commenters who argued that we should be required to defer absolutely to SCS determinations. However, recognizing SCS's expertise in making these PC cropland determinations, we will continue to rely generally on determinations made by SCS.

Many commenters expressed concerns about the alleged lack of consistency and reliability in SCS prior converted cropland determinations.

These commenters stated that most SCS PC cropland determinations are made based on aerial photos, and they argued that site visits were necessary to accurately delineate wetlands under Section 404. As discussed earlier, the SCS, in consultation with the Corps and EPA, is working to improve the consistency of its prior converted cropland determinations.

#### *D. Expand Exclusion to All Agricultural Areas*

Some commenters argued that the exclusion of agricultural areas should not be limited to land that meets the SCS definition of PC cropland but that the exclusion should apply to any agricultural area that is not inundated for more than 14 consecutive days during the growing season. While these commenters believed there would be advantages to treating all agricultural areas similarly in this manner, we believe that such considerations are outweighed by the importance of achieving the goal of consistency with the PC definition under the Food Security Act.

#### *E. Incorporation of NFSAM Into EPA/Corps Regulations*

Several commenters made the procedural argument that adoption of the NFSAM by reference into EPA's and the Corps' regulations violated the Administrative Procedure Act. These commenters pointed out that the NFSAM had not yet gone through rulemaking when it was adopted by SCS and they argued that reference to the NFSAM in the proposed rule was not legally adequate. Other commenters questioned the appropriateness of incorporating the NFSAM into EPA's and the Corps' regulatory provisions when the agency that developed the manual (SCS) uses it as a guidance document. Some commenters also felt that EPA and the Corps should retain the flexibility to follow future revisions to the NFSAM made by SCS.

As explained above, one of the primary reasons that EPA and the Corps are amending the definition of waters of the United States to exclude prior converted croplands is to ensure consistency in the way various federal agencies are regulating wetlands. We believe that consistency with SCS policy will best be achieved by our utilizing the NFSAM in the same manner as SCS, i.e., as a guidance document used in conjunction with other appropriate technical guidance and field testing techniques to determine whether an area is prior converted cropland. We also agree with the commenters' arguments about the

need to be able to maintain consistency with SCS in the future when revisor are made to the NFSAM; incorporating one version of the manual into EPA's and the Corps' regulations would impair our ability to follow future revisions to the NFSAM in administering Section 404. The final rule, therefore, continues to exclude prior converted cropland from the definition of waters of the United States, but does not specifically incorporate by reference the provisions of the NFSAM. EPA and the Corps will, however, implement this exclusion in a manner following the guidance contained in the NFSAM and appropriate field delineation techniques, and will continue to rely, to the extent appropriate, on determinations made by SCS. The Corps and EPA will continue to work with SCS on procedures for implementing the prior converted cropland portion of the NFSAM. We will also issue policy guidance directing our field staff to utilize the guidance in the NFSAM when determining the presence of wetlands on agricultural lands.

By codifying our existing policy that prior converted croplands are not waters of the U.S., the final rule strengthens the regulatory basis for not regulating these areas under Section 404. The fact that we have not incorporated by reference the actual provisions of the NFSAM in our rules does not undercut our ability to maintain this consistency. Rather, as explained above, we believe that utilizing the NFSAM as a guidance manual, as it is used by SCS, will enhance consistency in the administration of the Food Security and Clean Water Act programs.

#### *F. Section 404(f) Exemptions*

Some commenters expressed concern that codifying Regulatory Guidance Letter 90-7 would eliminate all exemptions for agricultural activities under Section 404(f)(1)(A) of the Act. Other commenters felt that the rule was not needed and that prior converted croplands should be considered exempt under the Section 404(f) normal farming activities exemption.

As previously stated in this preamble, today's rule will not eliminate or in any way effect the exemptions for normal farming, ranching, or silviculture activities in Section 404(f)(1). Moreover, the exemptions apply only to discharges and not to the issue of whether an area is within the geographic scope of Section 404.

#### *G. Criteria for Abandonment*

Some commenters expressed concerns that the abandonment rule was not clear. A few commenters opposed

excavation activities that would destroy or degrade waters of the United States should not result in a significant impact on a substantial number of small entities. Prior to today's rule, the Corps has uniformly regulated these activities where they were accomplished by excavating dredged material and sidcasting the material in adjacent waters of the United States. Conducting these activities without sidcasting dredged material is technically difficult and costly, and operators unable or unwilling to pay the costs to perform their activities in this manner have therefore already been subject to the Section 404 program. In addition, the practices of Corps districts have varied in this area, with some districts already regulating ditching, channelization and other excavation activities where dredged material was not sidcast. Therefore, we do not believe that the incremental regulatory burden associated with this aspect of the regulation should be significant.

Moreover, EPA and the Corps have included a provision in this regulation that would minimize any increased regulatory burden that may result from subjecting some activities to Section 404 jurisdiction for the first time. The rule does not regulate discharges of dredged material associated with activities that would not destroy or degrade waters of the United States. Establishing this threshold for requiring a Section 404 permit should be relevant for small entities in most instances, since they may be more likely than large operations to engage in minor activities having only a *de minimis* impact on the aquatic ecosystem. Some commentators believed that there would be regulatory impacts on the public due to regulating activities such as mowing, certain snagging activities, pumping, and vehicular traffic. While such activities may occur in waters of the United States, they generally do not involve a discharge of dredged material or would not have the effect of destroying or degrading a water of the United States and therefore would not trigger the requirement of a Section 404 permit.

In addition, as discussed elsewhere in this preamble, the Corps intends to issue general permits (regional or nationwide) for newly regulated activities that would have a minimal individual or cumulative impact on the aquatic environment. Issuance of general permits should further reduce any regulatory burden associated with complying with today's rule.

Finally, one primary purpose of the Regulatory Flexibility Act is to encourage agencies to explore regulatory alternatives that would minimize

impacts of the regulatory scheme on small entities. See 5 U.S.C. 604(a)(2) (requiring that final regulatory flexibility analysis include "a description of each of the significant alternatives to the rule . . . designed to minimize any significant economic impact of the rule on small entities"). The only issue addressed in this rulemaking, however, is whether a discharge of dredged or fill material will require a Section 404 permit. Under Section 404, there are therefore only two regulatory "alternatives" available to the agencies: either a Section 404 permit is required or it is not. Section 404 does not authorize any other "intermediate" regulatory control mechanisms for regulated discharges that the agencies could consider establishing for small entities. Because, under Section 404, the requirement to obtain a permit is the sole tool for regulating activities covered by this provision, we do not believe that there are less burdensome alternatives available to achieve the objectives of this rulemaking. Rather, we believe that the appropriate forum for exploring means of reducing impacts on small businesses is through the permitting process itself (e.g., through issuance of general permits where appropriate, and by tailoring permit requirements to the severity of the environmental harm, which in turn may correlate with the size of the entity undertaking the project). As explained previously, the agencies have considered in this rulemaking alternatives that may, indirectly, have resulted in less of a regulatory burden on small entities (e.g., by excluding from regulation activities associated with a discharge of dredged material that would not have a "significant" effect on the environment). For the reasons explained in this preamble, however, we rejected these alternatives as not being consistent with the language, goals and/or objectives of Section 404. Therefore, we believe that the final rule reflects a regulatory approach that appropriately meets the requirements of Section 404.

*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.

#### List of Subjects

##### 33 CFR Part 323

Navigation, Water pollution control, Waterways.

##### 33 CFR Part 328

Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, and 401

Wetlands, Water pollution control.

Dated: August 19, 1993.

Carol M. Browner,  
Administrator, Environmental Protection Agency.

G. Edward Dickey,  
Acting Assistant Secretary of the Army (Civil Works), Department of the Army.

Accordingly, 33 CFR parts 323 and 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232 and 401 are amended as follows:

33 CFR Chapter II—Corps of Engineers,  
Department of the Army

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

1. The authority citation for part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Section 323.2(d) is revised to read as set forth below.

3. Section 323.2(e) is amended by adding a sentence at the end that reads as set forth below.

4. Section 323.2(f) is amended by adding a sentence at the end that reads as set forth below.

#### § 323.2 Definitions.

(d)(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

(i) the addition of dredged material to a specified discharge site located in waters of the United States;

(ii) the runoff or overflow from a contained land or water disposal area; and

(iii) any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) 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). These discharges 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 or applicable state Section 404 program.

(ii) activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(3) Section 404 authorization is not required for the following:

(i) any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined in section 328.3 of this Chapter.

(iii) those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, provided that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later than August 25, 1994. This provision does not apply

to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), e.g., mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision provided that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking Section 404 authorization for such excavation activity. In no event can the grandfather period under this paragraph extend beyond August 25, 1993.

(iv) certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 33 CFR 323.4 for discharges that do not require permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

[Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.]

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

(e) \* \* \* See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(f) \* \* \* See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

5. Section 323.3(c) is added to read as follows:

§ 323.3 Discharges requiring permits.

(c) *Pilings.* (1) Placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody;

projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

(2) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in part 329 of this chapter, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see part 322 of this chapter).

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

6. The authority citation for part 328 continues to read as follows:

Authority: 33 U.S.C. 1344.

7. Section 328.3(a) is amended by adding a new paragraph (a)(8) that reads as follows:

§ 328.3 Definitions.

(a) \* \* \*

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

40 CFR Chapter I—Environmental Protection Agency

PART 110—DISCHARGE OF OIL

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 1321 (b)(3) and (b)(4) and 1361(a); 33 U.S.C. 1517(m)(3).

2. Section 110.1, definition of *navigable waters*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 110.1 Definitions.

\* \* \* \* \*

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**PART 112—OIL POLLUTION PREVENTION**

1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 112.2(k), definition of *navigable waters*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

**§ 112.2 Definitions.**

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES**

1. The authority citation for part 116 continues to read as follows:

Authority: 33 U.S.C. 1521 *et seq.*

2. In § 116.3, the definition of *navigable waters* is amended by adding three new sentences of concluding text at the end of the definition, as set forth below, and the definitions are placed in alphabetical order.

**§ 116.3 Definitions.**

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES**

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. The definition of *navigable waters*, § 117.1(i), is amended by adding three

new sentences of concluding text at the end of the definition to read as follows:

**§ 117.1 Definitions.**

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

1. The authority citation for part 122 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 122.2, definition of *waters of the United States*, is amended by adding three new sentences at the end of the concluding text of the definition to read as follows:

**§ 122.2 Definitions.**

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL**

1. The authority citation for part 230 continues to read as follows:

Authority: 33 U.S.C. 1344(b) and 1361(a).

2. Section 230.3(s), definition of *waters of the United States*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

**§ 230.3 Definitions.**

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS**

1. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. In § 232.2, the definition of *discharge of dredged material* is revised to read as set forth below.

3. In § 232.2, the definition of *discharge of fill material* is revised to read as set forth below.

4. In § 232.2, the definition of *waters of the United States* is amended by adding two new sentences of concluding text at the end of the definition to read as set forth below.

**§ 232.2 Definitions.**

*Discharge of dredged material.* (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and

(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) 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). These discharges 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 or applicable state.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(3) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material

associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the U.S. as defined in paragraphs (4) and (5) of this definition; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (4) and (5) of this definition. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in 33 CFR part 329, with proper authorization from the Congress or the Corps pursuant to 33 CFR part 322; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at § 232.2(r) of this Chapter.

(iii) Those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, *provided* that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later than August 25, 1994. This provision does not apply to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), e.g., mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision *provided* that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking Section 404 authorization for such excavation activity. In no event can the grandfather

period under this paragraph extend beyond August 25, 1996.

(iv) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 40 CFR 232.3 for discharges that do not require permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

*Note:* Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

*Discharge of fill material.* (1) 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 for 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, 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.

(2) In addition, placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce

the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

(i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in 33 CFR part 329, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

(ii) [Reserved]

*Waters of the United States.* \* \* \*

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**PART 401—EFFLUENT GUIDELINES AND STANDARDS**

1. The authority citation for part 401 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 401.11(i), definition of *navigable waters*, is amended by adding two new sentences at the end of the definition to read as follows:

**§ 401.11 General definitions.**

(i) \* \* \* Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

[FR Doc. 93-20530 Filed 8-24-93; 8:45 am] BELLING CODE 6560-60-01

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**PART VI - MEMORANDA OF AGREEMENT**

**Section 1**

**Memorandum of Agreement Between the Assistant Administrators  
for External Affairs and Water U.S. Environmental Protection  
Agency and the Assistant Secretary of the Army for Civil Works  
Concerning Regulation of Discharges of Solid Waste Under the  
Clean Water Act**

January 17, 1986

**MEMORANDUM OF AGREEMENT BETWEEN THE  
ASSISTANT ADMINISTRATORS FOR EXTERNAL AFFAIRS AND WATER  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
AND THE ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS  
CONCERNING REGULATION OF DISCHARGES OF  
SOLID WASTE UNDER THE CLEAN WATER ACT**

**A. Basis of Agreement**

1. Whereas the Clean Water Act has as its principal objective the requirement "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters; and,

2. Whereas Section 301 of the Clean Water Act prohibits the discharge of any pollutant into waters of the United States except in compliance with Sections 301, 302, 306, 307, 318, 402, and 404 of the Act; and

3. Whereas EPA, and States approved by EPA, have been vested with authority to permit discharges of pollutants, other than dredged or fill material, into waters of the United States pursuant to Section 402 of the Clean Water Act that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 40 CFR 122-125; and

4. Whereas the Army, and States approved by EPA, have been vested with authority to permit discharges of dredged or fill material into waters of the United States that satisfy the requirements of the Act and regulations developed to administer this program promulgated in 33 CFR 320 et seq. and 40 CFR 230 et seq.; and

5. Whereas the definitions of the term "fill material" contained in the aforementioned regulations have created uncertainty as to whether Section 402 of the Act or Section 404 is intended to regulate discharges of solid waste materials into waters of the United States for the purpose of disposal of waste; and

6. Whereas the Resource Conservation and Recovery Act Amendments of 1984 (RCRA) require that certain steps be taken to improve the control of solid waste; and

7. Whereas interim control of such discharges is necessary to ensure sound management of the Nation's waters and to avoid complications in enforcement actions taken against persons discharging pollutants into waters of the United States without a permit;

8. The undersigned agencies do hereby agree to use their respective abilities cooperatively in an interim program to control the discharges of solid waste material into waters of the United States.

#### B. Procedures

1. When either agency is aware of a proposed or an unpermitted discharge of solid waste into waters of the United States, the agency will notify the discharger of the prohibition against such discharges as provided in Section 301 of the Clean Water Act. Such notice is not a prerequisite for an enforcement action by either agency.

2. Normally, if an activity in B.1 above warrants action, EPA will issue an administrative order or file a complaint under Section 309 to control the discharge.

3. In issuing a notice of violation or administrative order or in filing a complaint, it is not necessary in order to demonstrate a violation of Section 301(a) of the Clean Water Act to identify which permit a permitless discharge should have had. However, after an enforcement action has commenced, a question may be raised by the court, discharger, or other party as to whether a particular discharge having the effect of replacing an aquatic area with dry land or of changing the bottom elevation of a water body meets the primary purpose test for "fill material" in the Corps definition (33 CFR 323.2(k)). For example, such question may be raised in connection with a defense, or it may be relevant to the relief to be granted or the terms of a settlement.



4. To avoid any impediment to prompt resolution of the enforcement action, if such a question arises, a discharge will normally be considered to meet the definition of "fill material" in 33 CFR 323.2(k) for each specific case by consideration of the following factors:

a. The discharge has as its primary purpose or has as one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation.

b. The discharge results from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities.

c. A principal effect of the discharge is physical loss or physical modification of waters of the United States, including smothering of aquatic life or habitat.

d. The discharge is heterogeneous in nature and of the type normally associated with sanitary landfill discharges.

5. On the other hand, in the situation in paragraph B.3., a pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to Section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials.

6. While this document addresses enforcement cases, prospective dischargers who apply for a permit will be encouraged to use the above criteria for purposes of project planning. If a prospective discharger applies for a Section 404 permit based on the considerations in paragraph B.4., or for a Section 402 permit based on the considerations in paragraph

B.5., the application will normally be accepted for processing. If a prospective discharger applies for a 404 permit for discharge of materials that might be hazardous, he shall be advised that discharges of wastes to waters of the United States that are hazardous under RCRA are unlikely to comply with the Section 404(b)(1) Guidelines. To facilitate processing of applications for permits under Sections 402 or 404 for discharges covered by this agreement, an application for such discharge shall not be accepted for processing until the applicant has provided a determination signed by the State or appropriate interstate agency that the proposed discharge will comply with applicable provisions of State law including applicable water quality standards, or evidence of waiver by the State or interstate agency. As mandated under the Clean Water Act, neither a 402 nor a 404 permit will be issued for a discharge of toxic pollutants in toxic amounts. Prospective applicants for Section 402 permits shall be advised that the proposed discharge will be evaluated for compliance with the Act, in particular with Sections 101(a), 301, 303, 304, 307, 402, and 405 of the Act.

C. Determination of Permit

1. In enforcement cases, where a question arises under paragraph B.3 as to which permit would be required for a permitless discharge, the enforcing agency will determine whether the criteria in paragraph B.4 or B.5, if either, have been satisfied, with concurrence from the other agency. If the enforcing agency concludes that neither set of the criteria has been met and additional analysis is required to determine which Section applies, or if the necessary concurrence is not forthcoming promptly, the Division Engineer and the Regional Administrator (or designees) will consult and determine which permit program is applicable.

2. In non-enforcement situations, the agency receiving an application shall determine whether it meets the criteria in paragraphs 4 or 5, as the case may be. If the agency determines that the criteria applicable to its permit program have not been met, it will ask the other agency to determine whether the criteria for the latter's permit program have been met.

If neither agency determines that the criteria for its permit program have been met, the Division Engineer and the RA (or their designees) shall consult and determine which agency shall process the application in question.

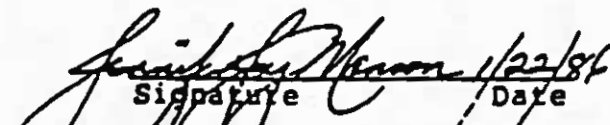
**D. Publication in the Federal Register**

Since this Memorandum of Agreement clarifies the definition of fill material with respect to discharges of solid waste into waters of the United States, the parties in this agreement shall jointly publish it in the Federal Register within 45 days after it has been signed.

**E. Effective Dates**

1. This agreement shall take effect 90 days after the date of the last signature below and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice.

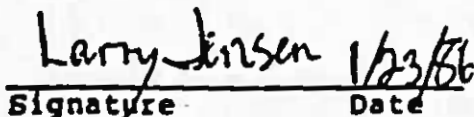
2. This agreement automatically expires at such time as EPA has submitted its Report to Congress on the Results of Study of the Adequacy of the Existing Subtitle D Criteria and has published a Notice of Proposed Revisions to the Subtitle D Criteria in the Federal Register, unless the agencies mutually agree that extension of this agreement is needed.

 1/22/86  
Signature Date

Assistant Administrator  
for External Affairs,  
U.S. Environmental Protection  
Agency

 1/17/86  
Signature Date

Assistant Secretary of  
the Army (Civil Works)

 1/23/86  
Signature Date

Assistant Administrator  
for Water  
U. S. Environmental Protection  
Agency

PART IV - MEMORANDA OF AGREEMENT

**Section 2**

**Memorandum of Agreement Between the Department of the Army  
and the Environmental Protection Agency Concerning the  
Determination of the Geographic Jurisdiction of the Section 404  
Program and the Application of the Exemptions Under Section 404(f)  
of the Clean Water Act**



**MEMORANDUM OF AGREEMENT  
BETWEEN THE DEPARTMENT OF THE ARMY  
AND THE ENVIRONMENTAL PROTECTION AGENCY  
CONCERNING THE DETERMINATION OF THE  
GEOGRAPHIC JURISDICTION OF THE SECTION 404 PROGRAM  
AND THE APPLICATION OF THE EXEMPTIONS  
UNDER SECTION 404(f) OF THE CLEAN WATER ACT**

**I. PURPOSE AND SCOPE.**

The United States Department of the Army (Army) and the United States Environmental Protection Agency (EPA) hereby establish the policy and procedures pursuant to which they will determine the geographic jurisdictional scope of waters of the United States for purposes of section 404 and the application of the exemptions under section 404(f) of the Clean Water Act (CWA).

The Attorney General of the United States issued an opinion on September 5, 1979, that the Administrator of EPA (Administrator) has the ultimate authority under the CWA to determine the geographic jurisdictional scope of section 404 waters of the United States and the application of the section 404(f) exemptions. Pursuant to this authority and for purposes and effective administration of the 404 program, this Memorandum of Agreement (MOA) sets forth an appropriate allocation of responsibilities between the EPA and the U.S. Army Corps of Engineers (Corps) to determine geographic jurisdiction of the section 404 program and the applicability of the exemptions under section 404(f) of the CWA.

**II. POLICY.**

It shall be the policy of the Army and EPA for the Corps to continue to perform the majority of the geographic jurisdictional determinations and determinations of the applicability of the exemptions under section 404(f) as part of the Corps role in administering the section 404 regulatory program. It shall also be the policy of the Army and EPA that the Corps shall fully implement EPA guidance on determining the geographic extent of section 404 jurisdiction and applicability of the 404(f) exemptions.

Case-specific determinations made pursuant to the terms of this MOA will be binding on the Government and represent the Government's position in any subsequent Federal action or litigation regarding the case. In making its determinations, the

Corps will implement and adhere to the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," EPA guidance on isolated waters, and other guidance, interpretations, and regulations issued by EPA to clarify EPA positions on geographic jurisdiction and exemptions. All future programmatic guidance, interpretations, and regulations on geographic jurisdiction, and exemptions shall be developed by EPA with input from the Corps; however, EPA will be considered the lead agency and will make the final decision if the agencies disagree.

### III. DEFINITIONS.

A. Special Case. A special case is a circumstance where EPA makes the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404.

Special cases may be designated in generic or project-specific situations where significant issues or technical difficulties are anticipated or exist, concerning the determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404 and where clarifying guidance is or is likely to be needed. Generic special cases will be designated by easily identifiable political or geographic subdivisions such as township, county, parish, state, EPA region, or Corps division or district. EPA will ensure that generic special cases are marked on maps or some other clear format and provided to the appropriate District Engineer (DE).

B. Special 404(f) Matters. A special 404(f) matter is a circumstance where EPA makes the final determination of the applicability of exemptions under section 404(f) of the CWA.

A special 404(f) matter may be designated in generic or project-specific situations where significant issues or technical difficulties are anticipated or exist, concerning the applicability of exemptions under section 404(f), and where clarifying guidance is, or is likely, to be needed. Generic special 404(f) matters will be designated by easily identifiable political or geographic subdivisions such as township, county, parish, state, EPA region, or Corps division or district and by specific 404(f) exemption (e.g., 404(f)(1)(A)).

### IV. PROCEDURES.

A. Regional Lists. Each regional administrator (RA) shall maintain a regional list of current designated special cases and special 404(f) matters within each region, including documentation, if appropriate, that there are no current designated special cases or special 404(f) matters in the region.

The RA shall create an initial regional list and transmit it to the appropriate DE within 30 days of the date of the last signature on this MOA. In order to be eligible for a regional list, the designated special cases and special 404(f) matter must be approved by the Administrator. (NOTE: Those geographic areas designated as current special cases pursuant to the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program, may be incorporated into the initial regional lists without additional approval by the Administrator based on township, county, parish, state or other appropriate designation, as described in paragraph III. A. of this MOA but will no longer be designated by forest cover type.)

B. Changes to the Regional Lists. Changes to the regional lists shall be proposed by the RA and approved by the Administrator and may include additions to, amendments to, or deletions from the regional lists. When the RA proposes an addition, amendment, or deletion to the regional list, the RA shall forward the proposal to EPA Headquarters for review and approval. When the RA proposes an addition or amendment in writing or by phone to the appropriate Corps DE, the Corps will not make a final geographic jurisdictional determination within the proposed special case area for a period of ten working days from the date of the RA's notification. The Corps may proceed to make determinations in the proposed special case area after the ten day period if it has not been provided final notification of EPA Headquarters approval of the RA's proposed changes. Deletions to the regional list do not become effective until a revised regional list, approved by EPA Headquarters, is provided to the appropriate DE.

C. Project Reviews. The DE shall review section 404 preapplication inquiries, permit applications, and other matters brought to his attention, which involve the discharge of dredged or fill material into waters of the United States to determine if a current designated special case or special 404(f) matter is involved.

(1). Special Cases/Special 404(f) Matters.

For those projects involving a current designated special case or special 404(f) matter, the DE shall request that the RA make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404 or applicability of the exemptions under section 404(f). The RA shall make the final determination, subject to discretionary review by EPA Headquarters, and transmit it to the DE, and to the applicant/inquirer.

(2) Non-Special Cases/Non-Special 404(f) Matters.

For those projects not involving a current designated special case or special 404(f) matter, the DE shall make final determinations and communicate those determinations without a requirement for prior consultation with EPA.

D. Determination of Special Cases or Special 404(f) Matters. When the special case or special 404(f) matter has been designated on a project-specific basis, issuance of the final determination by the RA will serve as guidance relevant to the specific facts of each particular situation, and will terminate the special case or special 404(f) matter designation. When the special case or special 404(f) matter has been designated on a generic basis, EPA Headquarters will develop, in consultation with Army, relevant programmatic guidance for determining the geographic jurisdictional scope of waters of the United States for the purpose of section 404 or the applicability of exemptions under section 404(f). Special cases and special 404(f) matters designated on a generic basis remain in effect until (1) a deletion from the regional list is proposed and processed according to paragraph IV-B of this MOA, or (2) EPA Headquarters issues programmatic guidance that addresses the relevant issues and specifically deletes the special case or special 404(f) matter from the regional list(s), whichever occurs first.

E. Uncertainties Regarding Special Cases/Special 404(f) Matters. Should any uncertainties arise in determining whether a particular action involves a current designated special case or special 404(f) matter, the DE shall consult with the RA. Upon completion of the consultation, the RA will make the final determination as to whether the action involves a current designated special case or special 404(f) matter.

F. Compliance Tracking. In order to track the DE's compliance with EPA guidance, the DE shall make his files available for inspection by the RA at the district office, including field notes and data sheets utilized in making final determinations as well as any photographs of the site that may be available. Copies of final geographic jurisdictional determinations will be provided to the RA upon request at no cost to EPA unless the sample size exceeds 10 percent of the number of determinations for the sample period. Copies in excess of a 10 percent sample will be provided at EPA expense. To ensure that EPA is aware of determinations being made for which notification is not forwarded through the public notice process, the Corps will provide copies to EPA of all final determinations of no geographic jurisdiction and all final determinations that an exemption under Section 404(f) is applicable. Should EPA become aware of any problem trends with the DE's implementation of guidance, EPA shall initiate interagency discussions to address the issue.



## V. RELATED ACTIONS.

A. Enforcement Situations. For those investigations made pursuant to the 1989 Enforcement MOA between Army and EPA concerning Federal enforcement of section 404 of the CWA, which involve areas that are current designated special cases, the RA shall make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404. The RA's determination is subject to discretionary review by EPA Headquarters, and will be binding regardless of which agency is subsequently designated lead enforcement agency pursuant to the 1989 Enforcement MOA. For those investigations not involving special cases, the agencies will proceed in accordance with the provisions of the 1989 Enforcement MOA.

For those investigations made pursuant to the 1989 Enforcement MOA between Army and EPA concerning Federal enforcement of section 404 of the CWA, which involve current designated special 404(f) matters, the RA shall make the final determination of the applicability of the exemptions under section 404(f). The RA determination is subject to discretionary review by EPA Headquarters, and is binding regardless of which agency is subsequently designated lead enforcement agency pursuant to the 1989 Enforcement MOA. For those investigations not involving special 404(f) matters, the agencies will proceed in accordance with the provisions of the 1989 Enforcement MOA.

B. Advanced Identification. EPA may elect to make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404, as part of the advanced identification of disposal sites under 40 CFR 230.80, subject to discretionary review by EPA Headquarters, and regardless of whether the areas involved are current designated special cases, unless the DE has already made a final geographic jurisdictional determination. Any determinations under this section shall be completed in accordance with paragraph IV of this MOA.

C. 404(c) Actions. EPA may elect to make the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404(c) of the CWA.

## VI. GENERAL PROVISIONS.

A. All final determinations must be in writing and signed by either the DE or RA. Final determination of the DE or RA made pursuant to this MOA or the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program, will be binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination.

B. The procedures and responsibilities of each agency specified in this MOA may be delegated to appropriate subordinates consistent with established agency procedure. Headquarters procedures and responsibilities specified in the MOA may only be delegated within headquarters.

C. Nothing in this document is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of either agency.

D. This agreement shall take effect and supercede the April 23, 1980, Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program on the 60th day after the date of the last signature below and will continue in effect for five years, unless extended, modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice, prior to that time.

*for* Robert W. Page  
Assistant Secretary of the  
Army (Civil Works)

Rebecca W. Hammer  
Rebecca W. Hammer  
Acting Assistant Administrator  
for Water  
U. S. Environmental Protection  
Agency

January 19, 1989  
Date

January 19, 1989  
Date

**PART IV - MEMORANDA OF AGREEMENT**

**Subsection 2a**

**Effects of the Amendment to the Army/EPA Geographic Jurisdiction  
Memorandum of Agreement on Wetlands Delineations and Pending  
Enforcement Actions (1-14-93)**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JAN 14 1993

OFFICE OF  
WATER

**MEMORANDUM**

**SUBJECT:** Effects of the Amendment to the Army/EPA Geographic Jurisdiction Memorandum of Agreement on Wetland Delineations and Pending Enforcement Actions

**FROM:** Robert H. Wayland, III, Director *Robert H. Wayland, III*  
Office of Wetlands, Oceans and Watersheds

Frederick F. Stiehl *Frederick F. Stiehl*  
Enforcement Counsel for Water Enforcement  
Office of Enforcement

**TO:** Water Management Division Directors  
Regions I, II, IV, V, VIII, IX, X  
Environmental Services Division Directors  
Regions III, VI  
Assistant Regional Administrator for Policy and  
Management, Region VII

On January 4, 1993, the Assistant Administrator for Water and the Assistant Secretary of the Army for Civil Works signed the "Amendment to the January 19, 1989, Department of the Army/Environmental Protection Agency Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act" (copy attached). Accordingly, you are hereby directed to begin using the 1987 Corps of Engineers Wetlands Delineation Manual in making wetland determinations under the Clean Water Act, thereby achieving consistency with the Corps of Engineers.

In addition, EPA is hereby adopting, on an interim basis, the Corps' October 7, 1991, and March 6, 1992, guidance on applying the 1987 Manual (copies attached). We invite your specific written comments on the Corps' guidance in order to determine what revisions, if any, will be necessary. Please provide your comments to Greg Peck, Chief of the Wetlands Division's Wetlands and Aquatic Resources Regulatory Branch before January 27, 1993.

We anticipate that there will be questions regarding the effect of this amendment on pending EPA enforcement actions. In that regard, in any EPA enforcement action (judicial or administrative) that was pending on January 4, 1993, and where the 1989 Manual was used for the delineation, the following steps should be taken:

- 1) For judicial cases that have been referred for civil or criminal litigation, the Wetlands Division, Office of Enforcement, and the Department of Justice should be notified immediately for consultation and a case-by-case determination.
- 2) For administrative cases, the Region shall evaluate the jurisdictional status of the property under the 1987 Manual and clearly document this evaluation in the administrative record.

We look forward to working with you to minimize any potential disruptions that may be associated with this change. Please feel free to call John Meagher, Director of the Wetlands Division, if you have any questions.

#### **Attachments**

cc: Office of General Counsel  
Regional Wetlands Coordinators  
Office of Regional Counsel (Section 404 Attorneys)

**PART IV - MEMORANDA OF AGREEMENT**

**Section 3**

**Memorandum of Agreement Between the Department of the Army  
and the Environmental Protection Agency Concerning Federal  
Enforcement for the Section 404 Program of the Clean Water Act**



MEMORANDUM OF AGREEMENT  
BETWEEN THE DEPARTMENT OF THE ARMY AND  
THE ENVIRONMENTAL PROTECTION AGENCY CONCERNING  
FEDERAL ENFORCEMENT FOR THE SECTION 404 PROGRAM  
OF THE CLEAN WATER ACT

## I. PURPOSE AND SCOPE

The United States Department of the Army (Army) and the United States Environmental Protection Agency (EPA) hereby establish policy and procedures pursuant to which they will undertake federal enforcement of the dredged and fill material permit requirements ("Section 404 program") of the Clean Water Act (CWA). The U.S Army Corps of Engineers (Corps) and EPA have enforcement authorities for the Section 404 program, as specified in Sections 301(a), 308, 309, 404(n), and 404(s) of the CWA. In addition, the 1987 Amendments to the CWA (the Water Quality Act of 1987) provide new administrative penalty authority under Section 309(g) for violations of the Section 404 program. For purposes of effective administration of these statutory authorities, this Memorandum of Agreement (MOA) sets forth an appropriate allocation of enforcement responsibilities between EPA and the Corps. The prime goal of the MOA is to strengthen the Section 404 enforcement program by using the expertise, resources and initiative of both agencies in a manner which is effective and efficient in achieving the goals of the CWA.

## II. POLICY

A. *General.* It shall be the policy of the Army and EPA to maintain the integrity of the program through federal enforcement of Section 404 requirements. The basic premise of this effort is to establish a framework for effective Section 404 enforcement with very little overlap. EPA will conduct initial on-site investigations when it is efficient with respect to available time, resources and/or expenditures, and use its authorities as provided in this agreement. In the majority of enforcement cases the Corps, because it has more field resources, will conduct initial investigations and use its authorities as provided in this agreement. This will allow each agency to play a role in enforcement which concentrates its resources in those areas for which its authorities and expertise are best suited. The Corps and EPA are encouraged to consult with each other on cases involving novel or important legal issues and/or technical situations. Assistance from the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS) and other federal, state, tribal and local agencies will be sought and accepted when appropriate.

B. *Geographic Jurisdictional Determinations.* Geographic jurisdictional determinations for a specific case will be made by the investigating agency. If asked for an oral decision, the investigator will caution that oral statements regarding jurisdiction are not an official agency determination. Each agency will advise the other of any problem trends that they become aware of through case by case determinations and initiate interagency discussions or other action to address the issue. (Note: Geographic jurisdictional determinations for "special case" situations and interpretation of Section 404(f) exemptions for "special Section 404(f) matters" will be handled in accordance with the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act.)

C. *Violation Determinations.* The investigating agency shall be responsible for violation determinations, for example, the need for a permit. Each agency will advise the other of any problem trends that they become aware of through case by case determinations and initiate interagency discussions or other action to address the issue.

D. *Lead Enforcement Agency.* The Corps will act as the lead enforcement agency for all violations of Corps-issued permits. The Corps will also act as the lead enforcement agency for unpermitted discharge violations which do not meet the criteria for forwarding to EPA, as listed in Section III.D. of this MOA. EPA will act as the lead enforcement agency on all unpermitted discharge violations which meet those criteria. The lead enforcement agency will complete the enforcement action once an investigation has established that a violation exists. A lead enforcement agency decision with regard to any issue in a particular case, including a decision that no enforcement action be taken, is final for that case. This provision does not preclude the lead enforcement agency from referring the matter to the other agency under Sections III.D.2 and III.D.4 of this MOA.

E. *Environmental Protection Measures.* It is the policy of both agencies to avoid permanent environmental harm caused by the violator's activities by requiring remedial actions or ordering removal and restoration. In those cases where a complete remedy/removal is not appropriate, the violator may be required, in addition to other legal remedies which are appropriate (e.g., payment of administrative penalties) to provide compensatory mitigation to compensate for the harm caused by such illegal actions. Such compensatory mitigation activities shall be placed as an enforceable requirement upon a violator as authorized by law.

### III. PROCEDURES

A. *Flow chart.* The attached flow chart provides an outline of the procedures



EPA and the Corps will follow in enforcement cases involving unpermitted discharges. The procedures in (B.), (C.), (D.), (E.) and (F.) below are in a sequence in which they could occur. However, these procedures may be combined in an effort to expedite the enforcement process.

**B. Investigation.** EPA, if it so requests and upon prior notification to the Corps, will be the investigating agency for unpermitted activities occurring in specially defined geographic areas (e.g., a particular wetland type, areas declared a "special case" within the meaning of the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act). Timing of investigations will be commensurate with agency resources and potential environmental damage. To reduce the potential for duplicative federal effort, each agency should verify prior to initiating an investigation that the other agency does not intend or has not already begun an investigation of the same reported violation. If a violation exists, a field investigation report will be prepared which at a minimum provides a detailed description of the illegal activity, the existing environmental setting, initial view on potential impacts and a recommendation on the need for initial corrective measures. Both agencies agree that investigations must be conducted in a professional, legal manner that will not prejudice future enforcement action on the case. Investigation reports will be provided to the agency selected as the lead on the case.

**C. Immediate Enforcement Action.** The investigating or lead enforcement agency should inform the responsible parties of the violation and inform them that all illegal activity should cease pending further federal action. A notification letter or administrative order to that effect will be sent in the most expeditious manner. If time allows, an order for initial corrective measures may be included with the notification letter or administrative order. Also, if time allows, input from other federal, state, tribal and local agencies will be considered when determining the need for such initial corrective measures. In all cases the Corps will provide EPA a copy of its violation letters and EPA will provide the Corps copies of its §308 letters and/or §309 administrative orders. These communications will include language requesting the other agency's views and recommendations on the case. The violator will also be notified that the other agency has been contacted.

**D. Lead Enforcement Agency Selection.** Using the following criteria, the investigating agency will determine which agency will complete action on the enforcement case:

- i. EPA will act as the lead enforcement agency when an unpermitted activity involves the following:

- a. Repeat Violator(s);
  - b. Flagrant Violation(s);
  - c. Where EPA requests a class of cases or a particular case; or
  - d. The Corps recommends that an EPA administrative penalty action may be warranted.
2. The Corps will act as the lead enforcement agency in all other unpermitted cases not identified in Part III D-1. above. Where EPA notifies the Corps that, because of limited staff resources or other reasons, it will not take action on a specific case, the Corps may take action commensurate with resource availability.
  3. The Corps will act as the lead enforcement agency for Corps-issued permit condition violations.
  4. Where EPA requests the Corps to take action on a permit condition violation, this MOA establishes a "right of first refusal" for the Corps. Where the Corps notifies EPA that, because of limited staff resources or other reasons, it will not take an action on a permit condition violation case, the EPA may take action commensurate with resource availability. However, a determination by the Corps that the activity is in compliance with the permit will represent a final enforcement decision for that case.

*E. Enforcement Response.* The lead enforcement agency shall determine, based on its authority, the appropriate enforcement response taking into consideration any views provided by the other agency. An appropriate enforcement response may include an administrative order, administrative penalty complaint, a civil or criminal judicial referral or other appropriate formal enforcement response.

*F. Resolution.* The lead enforcement agency shall make a final determination that a violation is resolved and notify interested parties so that concurrent enforcement files within another agency can be closed. In addition, the lead enforcement agency shall make arrangements for proper monitoring when required for any remedy/removal, compensatory mitigation or other corrective measures.

*G. After-the-Fact Permits.* No after-the-fact (ATF) permit application shall be accepted until resolution has been reached through an appropriate enforcement response as determined by the lead enforcement agency (e.g., until all administrative, legal and/or corrective action has been completed, or a decision has been made that no enforcement action is to be taken).

#### IV. RELATED MATTERS

A. *Interagency Agreements* The Army and EPA are encouraged to enter into interagency agreements with other federal, state, tribal and local agencies which will provide assistance to the Corps and EPA in pursuit of Section 404 enforcement activities. For example, the preliminary enforcement site investigations or post-case monitoring activities required to ensure compliance with any enforcement order can be delegated to third parties (e.g., FWS) who agree to assist Corps/EPA in compliance efforts. However, only the Corps or EPA may make a violation determination and/or pursue an appropriate enforcement response based upon information received from a third party.

B. *Corps/EPA Field Agreements*. Corps Division or District offices and their respective EPA Regional offices are encouraged to enter into field level agreements to more specifically implement the provisions of this MOA.

C. *Data Information Exchange*. Data which would enhance either agency's enforcement efforts should be exchanged between the Corps and EPA where available. At a minimum, each agency shall begin to develop a computerized data list of persons receiving ATF permits or that have been subject to a Section 404 enforcement action subsequent to February 4, 1987 (enactment date of the 1987 Clean Water Act Amendments) in order to provide historical compliance data on persons found to have illegally discharged. Such information will help in an administrative penalty action to evaluate the statutory factor concerning history of a violator and will help to determine whether pursuit of a criminal action is appropriate.

#### V. GENERAL

A. The procedures and responsibilities of each agency specified in this MOA may be delegated to subordinates consistent with established agency procedures.

B. The policy and procedures contained within this MOA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the U.S. Deviation or variance from these MOA procedures will not constitute a defense for violators or others concerned with any Section 404 enforcement action.

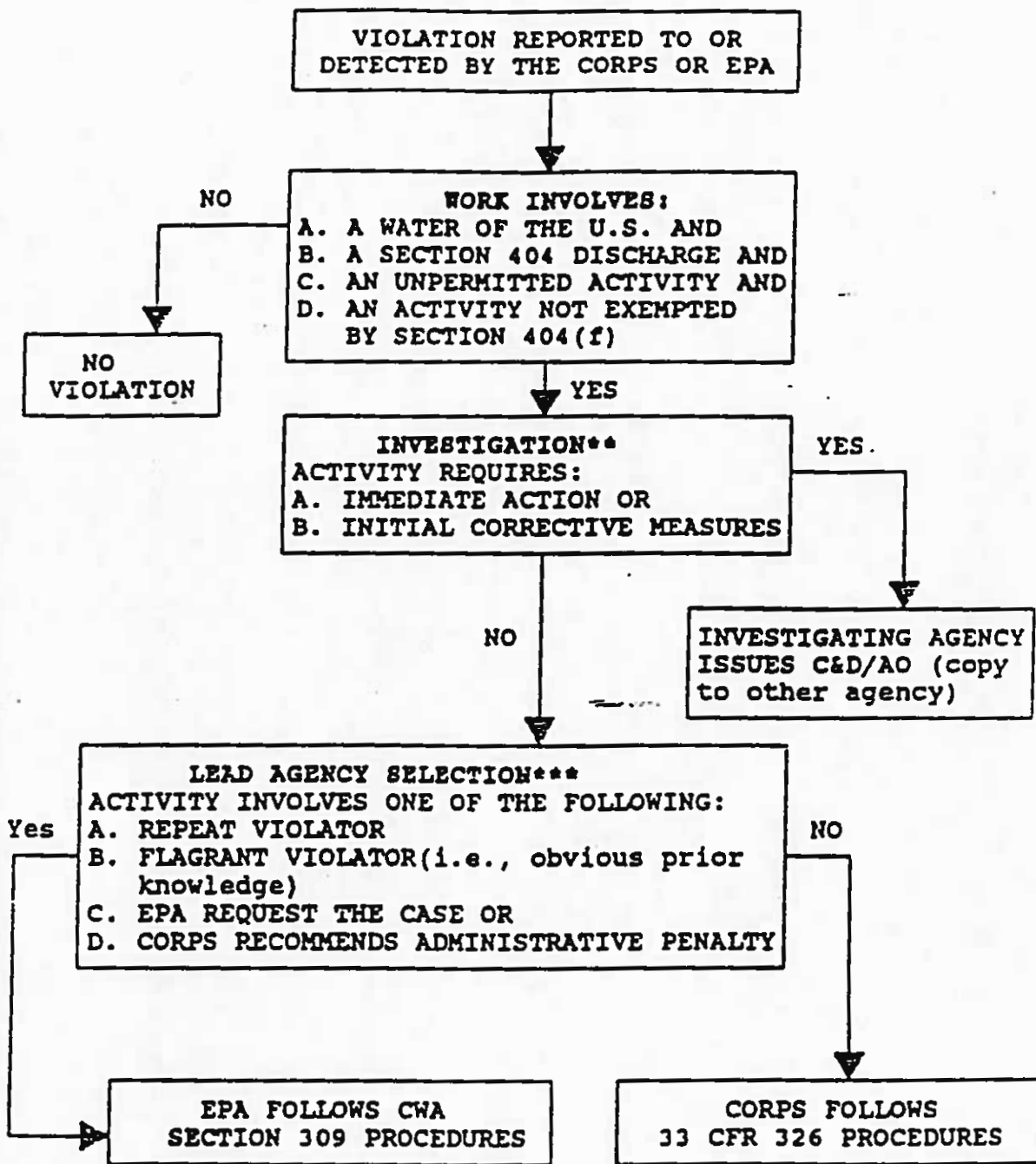
C. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of either agency. All formal guidance interpreting this MOA shall be issued jointly.

D. This agreement shall take effect 60 days after the date of the last signature below and will continue in effect for five years unless extended, modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice, prior to that time.

John S. Page ARMY Jan. 15, 1989  
Robert W. Page (Date)  
Assistant Secretary of  
the Army (Civil Works)

Rebecca W. Hammer Jan. 17  
Rebecca W. Hammer (Date)  
Acting Assistant Administrator  
for Water  
U.S. Environmental Protection Agency

**CORPS/EPA ENFORCEMENT PROCEDURES  
FOR SECTION 404 UNPERMITTED VIOLATIONS\***



\* Enforcement procedures for permit condition violation cases are set forth at Part III.D.3. and III.D.4.

\*\* Procedures for investigating unpermitted activity cases are set forth at Part III.B.

\*\*\* Examples of situations in which "C" & "D" might arise include cases which are important due to deterrent value, due to the violation occurring in a critical priority resource or in an advanced identification area, involving an uncooperative individual, etc.

**PART IV - MEMORANDA OF AGREEMENT**

**Section 3a**

**Clean Water Act Section 404  
Administrative Penalty Settlement Guidance**

**DRAFT**

3-8-88

**CLEAN WATER ACT SECTION 404 ADMINISTRATIVE PENALTY SETTLEMENT GUIDANCE**

**Prepared for EPA Regional Offices**

**by the Office of Water's**

**Office of Wetlands Protection**

**[ PROGRAM GUIDANCE MEMO No. IM - 88-1 ]**

CLEAN WATER ACT ADMINISTRATIVE PENALTIES:  
GUIDANCE FOR USE BY THE SECTION 404 PROGRAM

INTRODUCTION

Section 309(g) of the Clean Water Act (as amended by the Water Quality Act of 1987) authorizes the Environmental Protection Agency (EPA) to assess administrative penalties for, among other things, discharges resulting from dredge and fill activity not authorized by a Section 404 permit, or violations of a State-issued Section 404 permit. This document provides internal guidance for EPA staff on settling agency administrative civil penalty claims under this new authority in the context of Section 404 violations. This document does not establish a rigid system governing the use of this authority, but instead provides guidance whereby EPA staff may exercise discretion in arriving at specific administrative penalty settlement amounts for particular enforcement cases while establishing consistency on a national basis among Regions on use of this new enforcement tool.<sup>1/</sup>

It is important to recognize that enforcing the requirements of Section 404 is somewhat complex due to the unique informational needs required, such as establishing that proper federal jurisdiction exists on a particular site. In addition, quantitative criteria and standards have not been established by regulation upon which to evaluate the appropriateness or amounts of monetary penalties for violations of Section 404. Therefore, in addition to this guidance, Regional staff must use best professional judgment when seeking administrative penalties.

As the Regions' experience with administrative penalties grows, this guidance will help to ensure that the Agency's use of the authority develops in a standardized and consistent manner. Consequently, a certain level of routineness should develop over time. In response to the evolution of standard approaches and consistency, the Agency may revise this guidance as experience dictates.

RELATIONSHIP OF ADMINISTRATIVE PENALTIES TO OTHER SECTION 404 ACTIONS

The following describes the relationship of administrative penalty actions to other Section 404 actions.

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<sup>1/</sup>EPA and the Corps of Engineers are developing a Section 404 Enforcement Memorandum of Agreement (MOA). This MOA may outline procedures regarding EPA and Corps response to detected violations regarding 309(g) jurisdiction.



## Judicial Actions

Under Section 309(g)(6), payment of an administrative penalty forecloses any possibility of judicial action in the future for civil penalties for that specific violation. This fact is of particular importance if the Region is attempting to build a case for eventual referral by documenting a history of violations. Therefore, an administrative penalty should not be pursued by a Region if a subsequent judicial action for civil penalties is desired. For example, when a violator has received economic benefits from the violation which exceed \$125,000 (maximum administrative penalty allowable), it would be preferable to pursue a judicial action incorporating civil penalties recovering more than the illegal economic benefit; both types of actions cannot be pursued.

## §308 Information Letters

A §308 letter is a tool whereby the Region can require information from an alleged violator to determine the existence and/or extent of violation. Section 309(g) of the CWA specifically allows for assessment of an administrative penalty for violations of §308 of the CWA. Therefore, if a person violates §308 (e.g., fails to respond to a §308 request for information regarding an alleged §404 discharge), the Agency may assess an administrative penalty for such violation. The §308 letter should notify the recipient of this potential for a §309(g) penalty assessment.

## Administrative Orders (AOs)

In most §404 violation instances, the immediate goal should be to correct environmental harm resulting from the illegal discharge. This normally can be achieved by issuing a §309(a) administrative compliance order (AO) requiring, for example, removal and restoration or cessation of discharge. An AO for removal and restoration has been a common enforcement tool used by the 404 Program and should continue as such because it affords immediate environmental protection to a resource impacted by illegal activity. An administrative penalty should be sought separately in addition to actions required under a compliance AO when the Region determines that an administrative penalty is the preferred course of action (i.e., rather than a judicial referral) for violations of the Clean Water Act. (Also see "ADMINISTRATIVE PENALTIES IN CONJUNCTION WITH ADDITIONAL ACTIONS" below.)

## Mitigation

Mitigation plans required as part of an administrative order or placed as a condition in an after-the-fact permit should be pursued regardless of whether an administrative penalty is imposed. The costs incurred by a violator under a mitigation plan will not necessarily reduce the amount of the appropriate administrative penalty for that violation. An administrative penalty should not affect a Region's decision to require mitigation action (i.e., on-site restoration or off-site compensatory mitigation) of the violator.

## After-the-Fact Permits

Issuance of an ATF permit legalizes a discharge of fill from the date of issuance onward. It does not cure the period of violation prior to issuance of the permit. Consequently, an administrative penalty may be assessed for each day that the illegal discharge exists prior to issuance of the ATF permit. Regions may wish in some instances to apprise ATF applicants of the possibility that an administrative penalty may be imposed regardless of the outcome of the ATF permit process.<sup>2/</sup>

## Special Area Actions

If the Region has identified a particular area or resource as valuable and vulnerable, for example, under a \$230.80 Advanced Identification effort or in the regional priority wetlands list, the Region should ensure that there is an adequate enforcement presence in that area. The administrative penalty authority is another enforcement tool to be used in conjunction with other tools available to help ensure that the area is protected.

## SPMS

The Strategic Planning and Management System (SPMS) identifies certain categories of violators/violations as Significant Violators (SVs). The administrative penalty authority is another tool to be used in addressing SV actions.

## ADMINISTRATIVE PENALTIES IN CONJUNCTION WITH ADDITIONAL ACTIONS

When imposing penalties in addition to taking other enforcement action, care should be taken to separate the penalty action from other administrative actions. These actions should remain separate and distinct but may be issued at the same time. Regions should refer to a separate guidance document entitled "Relationship of §309(a) Compliance Orders To §309(g) Administrative Penalty Proceedings."

Generally, administrative orders requiring removal and/or restoration should (and in a practical sense, would) be issued well in advance of an administrative complaint for penalties under §309(g). Moreover (and again in a practical sense), as the goal of removal and/or restoration requirements is to ameliorate environmental harm as quickly as possible, we would not wish to subject these requirements to the inherent delays involved with penalty assessment (e.g., request for hearings).

Also, the Region should refer to "Guidance on 'Claim-Splitting' in Enforcement Actions Under The Clean Water Act" with regard to questions on parallel proceedings or simultaneous administrative penalty proceedings.

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<sup>2/</sup> See footnote 1. The MOA may substantially change the ATF permit process and its relationship to a federal 404 enforcement action. The reader should refer to this MOA when finalized for information on joint procedures for handling violations where there is a potential for ATF permit issuance.

## WHEN ARE ADMINISTRATIVE PENALTIES BY EPA APPROPRIATE

A basic discussion on when to use administrative penalties in Clean Water Act (CWA) enforcement is provided in a separate guidance document entitled "Guidance On Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies." In addition, for violations which occurred prior to February 4, 1987 (Water Quality Act of 1987 enactment date), Regions should refer to the separate guidance document entitled "Guidance on Retroactive Application Of New Penalty Authorities Under The Clean Water Act." The following discussion makes some specific points in the context of CWA enforcement relating to dredge and fill activity.<sup>3/</sup>

As with any enforcement action under Section 404, the Agency first must establish that it has jurisdiction (i.e., a water of the U.S.) and that a violation has occurred (e.g., a discharge of dredged or fill material in the absence of a required Section 404 permit). That done, a decision must be made about what action(s) to pursue against the violator. The specific circumstances of each violation will determine what action is warranted.

Regional staff should bear in mind the general goals of using this authority:

- ° Deterrence;
- ° Swift resolution of environmental problems;
- ° Fair and equitable treatment of the regulated community.

When deciding whether to impose an administrative penalty, the following questions should be considered:

- ° Administrative Penalty Goals. Will an assessment of an administrative penalty serve the general goals described above?
- ° Economic Benefit. Is the economic benefit to the violator less than \$125,000?

If the answer is yes to these two questions, it is likely that an administrative penalty is appropriate for the violation. To ascertain whether a Region's limited enforcement resources should be utilized for a particular case, the Region should apply the following questions to the specific case:

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<sup>3/</sup> EPA administrative penalty action against violations in States which have assumed the 404 Program (i.e., Michigan) may be dependent on the approved State program. These situations will therefore be handled on a case-by-case basis.

- History of the Violator. Is there evidence that the violator had previous experience with the section 404 process? Is the violator attempting to circumvent the regulatory program? Has the violator refused or exhibited reluctance to take independent action to correct the adverse effect of the violation?
- Significance of the Affected Resources. Are state or federally listed endangered or threatened species impacted? Is the site or geographic area of the violation designated as critical habitat of special concern under state or federal law? Is the site included in the Region's listing of priority wetlands? Is the site contained in an area for which the Region has conducted an advanced identification? Has the area been subjected to other violations or discharges such that cumulative impacts are a concern?
- Significance of the Discharge. Does the discharge exhibit a trend which may be developing in a particular industry? Does the dredged or fill material discharged contain toxic substances? Does the discharge evidence a need for establishing a 404 enforcement precedent/ deterrence?

If the answer is yes to any of the questions above, the violation most likely would be considered an SV under the EPA Operating Guidance SPMS enforcement definitions and thus, an enforcement action would be consistent with national enforcement priorities. Therefore, a Region should consider an administrative penalty action against the violator as long as a judicial action is not warranted for other reasons. Again, Regions should refer to the separate guidance document entitled "Guidance On Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies."

The threshold for the decision to pursue a 309(g) penalty should be relatively low. For example, penalties are appropriate for punitive/deterrent purposes even when the fill is removed. The §309(g) administrative penalty serves as the monetary penalty for the violation of the Clean Water Act, regardless of any other actions which are required of the violator under the Act (e.g., removal and restoration under §309(a)). To provide other examples, it is likely that an administrative penalty would be utilized most commonly in the following situations:

- Section 308 violations
- Illegal discharges which likely would receive a §404 after-the-fact permit
- Illegal discharges where an AO for removal and restoration is not sought
- Illegal discharges where an AO is issued but other factors warrant a penalty being levied on the violator

The first situation occurs where a Region utilizes its §308 authorities to obtain information and the recipient of the §308 letter fails to respond as required by the Act. The second situation deals with violations arising from activity which likely would have received some authorization under a permit had one been applied for. By issuing an administrative penalty in such cases, the Region will help to dispel any belief that it is "easier to get forgiveness than permission" (i.e., discharge illegally now and have the discharge legalized later by obtaining an after-the-fact permit

rather than pursuing the required §404 permit application review process). The third situation refers to those violations where an AO for removal and restoration is not appropriate because removal of the illegal fill would result in greater environmental harm than allowing the material to remain at the site. In a sense, the appropriateness of an administrative penalty would increase if a removal action would have been required if it were environmentally feasible, cannot be performed. The fourth situation amounts to those situations where a region determines that particular factors warrant an administrative penalty 1) in addition to actions required under an AO or 2) as a penalty for previous and continuing violations even after EPA issues an AO. .... that §309(g) administrative penalties may be sought for the unknowing violation of the Act which leads to the issuance of the AO; however, such penalties are not authorized for non-compliance with the AO per se.

Again, in considering the above factors and in particular the goals of using administrative penalty authority, the threshold for deciding to pursue an administrative penalty should be relatively clear. If Regional staff determine that the violation requires an action with a minor deterrent effect, then reconsideration should be given to referring the case for judicial enforcement action.

### STATE CONSULTATION

Prior to assessing an administrative penalty, the Act requires that the Region consult with an appropriate State agency regarding such assessment. For the Section 404 program, the appropriate State contact will be the agency administering the State 404 program or, where the State has not assumed the 404 program, the State §401 certification agency, unless another State agency is agreed to by the Region and the respective State, through an existing State/EPA Enforcement Agreement (which addresses §404) or some other formal agreement with the State. The procedure for such consultation should be discussed and decided upon by the Region with their respective State contact, consistent with "Guidance on Class I Clean Water Act Administrative Penalty Procedures" for Class I penalties and "Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties Under the Clean Water Act" for Class II penalties.

### BASIS FOR DETERMINING APPROPRIATE PENALTY SETTLEMENT AMOUNTS

In determining an appropriate administrative penalty settlement amount, Regions should initially review the separate guidance entitled "Guidance on Effect of Clean Water Act Amendment Penalty Assessment Language" to help determine the maximum administrative penalty amount authorized by statute. Class I penalties carry an overall maximum of \$25,000 while Class II penalties carry a maximum of \$125,000.

As general guidance, Class I penalties are likely the most appropriate where the violation is of the nature where a penalty probably would have been issued authorizing substantially the same kind of discharge had an application been submitted and economic benefit to the violator is less than \$25,000.

As specific guidance, Section 309(g)(3) of the Act addresses some factors to consider when determining an appropriate penalty settlement. These factors include, with respect to the violation, the nature of circumstances, extent and gravity of the violation(s) and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and other matters as justice may require. Thus, in determining appropriate penalty settlement amounts, Regional staff should specifically bear in mind these factors as follows:

- Nature, circumstances, extent and gravity of the violation: These factors depend largely on scientific assessment of impacts, the significance of the resource(s), general national environmental goals, program priorities, and professional experience. Again, Regions should refer to EPA Operation Guidance and SPAS S enforcement definitions for consistency on a national basis.
- Economic benefit to the violator: The Region will need to make an assessment of monetary gain which the violators derived from the illegal discharge. In many cases, economic benefit may not be readily or initially verifiable (e.g., violator fails to provide information to EPA regarding potential monetary gain received as a result of discharge). In such cases, the Region should use best professional judgement in determining the economic benefit, which accrued to the violator. When determining the economic benefit, the Region should assess the full economic gain obtained by the violator for any discharge ultimately remaining in place (e.g., increased land value of filled area, profits realized from any improvements located on the illegal fill), as well as the increased economic value gained with respect to the surrounding property as a result of the fill. Keep in mind that the amount of economic benefit to the violator may be directly related to whether EPA demands and obtains complete removal and restoration. For example, if a violator discharges fill into a wetland but then entirely removes the fill voluntarily or under the terms of an AO, the violator may receive no further illegally obtained economic benefit resulting from use of the site once the fill is removed. Economic benefit to the violator may still be present but lower than originally anticipated. There will be some cases, however, where removal of an illegal discharge does not reduce the economic benefit. For example, an illegal discharge for the purpose of stream rechannelization may be removed by the violator in order to comply with an AO for removal; however, the removal activity by the violator does not restore the stream to its original flow pattern (i.e., the illegal activity permanently changes the course of the waterway even though the illegal discharge is removed). In such cases, an economic benefit to the violator may still be present even though removal of the illegal discharge has taken place. In all cases where the Region seeks removal, a

recalculation (if any) of economic benefit for administrative penalty purposes should not be made by the Region until after the violator actually removes the illegal discharge material.

[Note: The Region should re-evaluate its enforcement strategy in any §309(g) administrative penalty action where (1) the Region considers it essential for the violator to remove the fill, and (2) a §309(a) AO and the potential penalties of the §309(g) action fail to induce the violator to carry out such removal. In this event the Region would have to decide whether to continue the administrative penalty action, or to dismiss it and file a §309(b) civil action for injunctive relief (also including any claim for civil penalties under §309(d)).]

- Ability of the violator to pay: This factor is self-explanatory. The Region should request whatever documentation is needed to ascertain the violator's financial condition where this factor is an issue. Any statements of financial condition should be appropriately certified. Case law supports the proposition that the factor is worthy of consideration only to the extent that paying a penalty is likely to put a discharger out of business.
- Prior history: This factor deals with the violator's previous knowledge/experience with §404 requirements along with previous compliance history. Prior history information should be obtained not only from EPA experience with the violator, but from appropriate Corps Districts and other federal agencies' knowledge and records. [If the violator has a history of Clean Water Act violations, the Region should consider federal contractor listing procedures as well. See 40 CFR Part 15.]
- Degree of culpability: This factor includes the extent to which the violator's illegal conduct is reprehensible or blameworthy (including moral blame) and whether the impacts could have been anticipated and avoided. If criminal conduct is alleged, the Region should consider a criminal judicial action.
- Other factors: An example of other factors as justice may require is where the state has imposed a penalty and/or a removal and restoration order on the violator. These costs may be considered when determining the appropriate penalty. In litigation, this factor may weigh heavily in a "fairness" argument. However, be aware that the burden is upon the violator to show an inability to pay.

It is suggested that, as a general rule, the Region may wish to quote the statutory language with respect to the maximum penalty allowable under a particular Class of administrative penalty (e.g., "up to \$10,000 per violation") when designing the complaint, rather than claim a specific, lesser amount. The need to design a complaint in this manner may occur more often than not for Section 404 violations as information regarding the extent of environmental damage and other pertinent factors may not be fully available to the Region at the time that the complaint is prepared.

For example, it may not be possible to verify the exact number of days on which the violator discharged or how long the illegal discharge has been in place, or a scientific assessment regarding the individual/cumulative impacts of the illegal discharge may not be completed (the lack of specific criteria and standards for wetlands discharges lengthens the time and effort required to determine such levels of impacts), or the existence of contaminated materials may not be known until a laboratory analysis of a site sample is performed.

In these types of circumstances, it may be wise to claim up to the maximum penalty in the complaint so as to allow for a situation where the Region will need to propose the statutory maximum should the case go to a hearing where the information received by that time indicates that the maximum is appropriate. Considering that multiple violations may occur on each day with each violation triggering a potential \$10,000 administrative penalty (Regions should refer to the separate guidance document entitled "Guidance On Effect Of Clean Water Act Amendment Civil Penalty Assessment Language") and that each day that the illegal fill remains in place may constitute another \$10,000 penalty, it is likely that most §404 cases will reach the statutory maximum for each Class of administrative penalty rather quickly. In any event, Regions at least should claim a penalty amount in the administrative complaint that allows for some room for negotiation as facts develop during negotiations.

#### PENALTY SETTLEMENT MATRIX

The following penalty calculation matrix contains the recommended penalty ranges for EPA to accept in settlement of administrative penalty enforcement actions pursuant to consideration of the factors above. EPA will in virtually all cases seek higher penalty amounts if a violator fails to settle and the Agency has to litigate its claims administratively. Absent exceptional circumstances largely relating to litigation considerations or a violator's ability to pay, a settlement amount calculated from this matrix should always be greater than the calculated economic benefit to the violator. Although mitigation actions required by an AO should not be used to offset economic benefit (e.g., cost of providing off-site compensatory mitigation), compliance with an AO requiring complete removal of the illegal fill may decrease or eliminate the actual economic benefit accruing to the violator (e.g., a profitable enterprise planned for development on illegal fill will not be constructed on that site if the fill is removed, therefore illegal profits expected from the development enterprise will not be realized by the violator). The amounts are based upon 1) the significance of factors relating to the violation and 2) the significance of factors relating to the violator.

The criteria described below are used as a general basis for defining the range of penalty which the Region may wish to pursue in settlement. The "Environmental Significance" criteria relate to the violation factors under the Act and the "Compliance Significance" criteria relate to the violator factors under the Act.



### "Environmental Significance" Criteria

- Significance of impact under the 404(b)(1) Guidelines requirements
- Significance of area affected (prior to violation)
- Severity of individual, secondary and cumulative environmental impacts
- Duration and/or permanence of environmental impacts
- Location within a special area (e.g., §230.80, priority wetland)
- Size of area affected (subsequent to violation)
- Existence of contaminated discharge materials
- Relationship to program goals in Agency Operating Guidance and SPMS SV definition

Defining particular discharges as "minor, moderate or major" has been attempted in the past within the context of various 404 management tasks. These attempts have met with difficulty as a particular type of discharge may have variable effects on different types of ecosystems or, conversely, a particular ecosystem may react differently to various types of discharges. Overall effects of a discharge may depend on such factors as the amount of discharge or the content of the discharge material. In addition, the size of the ecosystem impacted is not appropriate for determining the range of environmental significance. A specific wetland of three acres or less may be of higher environmental concern to a Region than a particular wetland of 50 acres or more. This may be true, for example, when the smaller wetland has unique environmental characteristics or is a scarce ecosystem within the particular Region's geographic area. For these and other various reasons inherent in such attempts to define discharges as minor, moderate or major, clear examples cannot be given in this guidance. However, as a rule of thumb, those illegal discharges which would have been unlikely to receive a §404 permit (had the discharge been proposed in a permit application) would be considered as one of 'major' environmental compliance significance; those discharges which likely would be permitted with little or no changes to the actual discharge which took place illegally would be considered 'minor'. <sup>4/</sup>

### "Compliance Significance" Criteria

- History, knowledge and intent of violator
- Deterrence value regarding future violations by violator
- Deterrence value regarding future violations by others
- Relationship to program goals in Agency Operating Guidance and SPMS SV definition

The penalty matrix exhibits a range of compliance significance of minor, moderate and major. Examples of these terms could include the following scenarios. A person who has had no previous experience with Section 404

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<sup>4/</sup> Please note, however, that even though a violation may be considered 'minor' due to its likelihood of being permitted, the range of penalty may be 'major' within the context of its compliance significance, for example, when the violator knew of §404 requirements and decided to risk an enforcement action rather than proceed legally with the §404 permit review process.

requirements who is unlikely to perform such illegal activities in the future probably would be considered a violator of minor compliance significance. However, if the illegal activity is commonplace in the community and a strong signal is needed in order to deter other potential violators, the violator may be considered of moderate significance. If the violator actually had known of §404 requirements prior to discharging illegally but discharged to avoid a permit process which could have resulted in denial or modifications to the original discharge plans, this violator would be in the major compliance significance range. (Of course, the Region may decide that a civil or criminal judicial referral is the more appropriate enforcement course to follow in the "major" violator case, dependent on the particular facts of the case.)

The above criteria are not necessarily exclusive of other justifiable considerations which the Region deems appropriate under the Act. Also, these criteria are not in any order of priority nor are the examples intended to be all inclusive or mutually exclusive regarding the range of penalty to be pursued. Undoubtedly, Regional staff will encounter violations with circumstances which do not allow a direct application of these criteria. For those situations, the Regions have the discretion to pursue higher penalty amounts. Moreover, minor, moderate and major are relative terms to be used within the context of violation's addressable through administrative penalty actions. EPA will be utilizing these classifications only within the context of an enforcement action it deems appropriate to handle through an administrative penalty action.

**SECTION 404 PENALTY SETTLEMENT MATRIX**

Environmental Significance

	Minor	Moderate	Major
<u>Compliance</u>	\$500 - 5000	\$5,000 - 15,000	\$15,000 - 40,000
<u>Significance</u>	\$5,000 - 15,000	\$15,000 - 40,000	\$25,000 - 75,000
	\$15,000 - 40,000	\$25,000 - 75,000	\$75,000 - 125,000

The specific amount which EPA would accept in settlement also may be adjusted in consideration of the following factors:

- Good faith efforts to resolve the violation
- Promptness and completeness of restoration actions by violator (if applicable)
- Efforts to educate others on importance of protecting the Nation's waters through compliance with §404 requirements
- Consideration of Corps, other agencies and public comments (if applicable)
- ~~Litigation considerations~~
- Other unique factors.

These factors will be considered during the settlement or negotiation stage. Whatever penalty figure a Region proposes in a complaint, a Region has the discretion to settle at a lower amount than that proposed in the complaint, provided such penalty settlements are still consistent with this guidance.

Staff negotiating administrative penalty claims for Section 404 related violations should be aware that there have been substantial judicially assessed penalties for such violations. See, e.g.: U.S. v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166 (D. Mass. 1986), aff'd, farmland by filling without permit; \$540,000 civil penalty, of which \$390,000 is to be remitted if the defendant satisfactorily restores the wetland as ordered by the court); U.S. v. Ciampitti, 669 F. Supp. 684 (D.N.J. 1987) (developer held to be in contempt of judicial order prohibiting further filling of wetlands; \$235,000 penalty); U.S. v. Phelps Dodge Corp., Civil Action No. 85-507-GLO-WDB (D. Ariz. 1986) (consent decree entered requiring payment of \$1,000,000 civil penalty to United States, and \$50,000 civil penalty to Arizona, for unpermitted discharges of mine overburden and acidic mine drainage from open pit mine; see, 51 Fed. Reg. 31849 (Sept. 5, 1986)); U.S. v. Conrad, 19 E.R.C. 1736, aff'd, 745 F.2d 70 (11th Cir. 1984) (\$100,000 for unlawful discharges of fill material). See also: U.S. v. Tull, 615 F. Supp. 610, bench trial, ordered discharger of fill material to pay \$75,000 "penalty or civil fine" and restore wetlands at three properties, and ordered discharger to either restore a canal which had been filled or pay an additional "fine" of \$250,000), rev'd and remanded (on grounds that liability, but not amount of penalty, should have been determined by a jury), 481 U.S. -- (1987); U.S. v. Marathon Development Corp., No. 87-129-MC (D. Mass.) (development company and corporate officer indicated for illegally filling wetlands; see, 17 [Current Developments] Env't Rep. (BNA) 2129 (Apr. 17, 1987)); U.S. v. Barker, No. CR86-127R (W.D. Wash.) (company and corporate officer indicated for illegally discharging dredged spoils, see, 17 [Current Developments] Env't Rep. (BNA) 71 (May 16, 1986)).

#### DEFERRED PENALTY PAYMENTS

One final point on settlement of administrative penalties relates to the second factor listed above, "Promptness and completeness of restoration actions by violator". There may be cases where the Region will wish to include deferred penalty payments in a settlement to reflect a violator's willingness to correct the environmental harm resulting from the illegal activity. The deferred penalty payment tool would be used for an administrative penalty settlement based on a violator's commitment to conform to a compliance order (i.e., §309 AO). Although the terms of an AO must be fulfilled by a violator, the Section 404 violation is unique in that there is a greater chance of recovering the impacted resource if removal of illegally discharged material is achieved in an expeditious manner. The overall mandate given to this Agency to achieve environmental protection of the Nation's resources may be well served by use of deferred penalty payments.

The commitment of a violator to conform quickly to the AO could be embodied in a consent order settling the administrative penalty proceeding: a fixed penalty could be assessed, and then a certain additional portion could be assessed for past violations. The deferred portion would be immediately

**PART IV - MEMORANDA OF AGREEMENT**

**Section 4**

**Memorandum of Agreement Between the Environmental Protection  
Agency and the Department of the Army Concerning the  
Determination of Mitigation Under the Clean Water  
Act Section 404(b)(1) Guidelines (2-6-90)**



MEMORANDUM OF AGREEMENT  
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY  
AND THE DEPARTMENT OF THE ARMY CONCERNING  
THE DETERMINATION OF MITIGATION UNDER THE  
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES



*I. Purpose*

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide guidance for agency field personnel on the type and level of mitigation which demonstrates compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented. The MOA does not change the substantive requirements of the Guidelines. It is intended to provide guidance regarding the exercise of discretion under the Guidelines.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))<sup>1</sup>. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA provides guidance to Corps and EPA personnel for implementing the Guidelines and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its positions on compliance with the Guidelines for

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<sup>1</sup>Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

proposed discharges and will reflect this MOA when commenting on standard permit applications.

## II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508-20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.<sup>2</sup> The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. "Practicable" is defined at Section 230.3(q) of the Guidelines.<sup>3</sup> However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with others through the Administration's interagency task force and other avenues to help achieve this national goal.

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<sup>2</sup>(except where Section 404(b)(2) applies).

<sup>3</sup>Section 230.3(q) of the Guidelines reads as follows: "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.*" (Emphasis supplied)

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. The Corps, except as indicated below, first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans). It may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain or insignificant environmental losses.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. Avoidance.<sup>4</sup> Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.<sup>5</sup> The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites<sup>6</sup> are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment.

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<sup>4</sup>Avoidance as used in the Section 404(b)(1) Guidelines and this MOA does not include compensatory mitigation.

<sup>5</sup>It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

<sup>6</sup>Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

Compensatory mitigation may not be used as a method to reduce environmental impact in the evaluation of the least environmentally damaging practicable alternatives for purposes of requirements under Section 230.10(a).

**2. Minimization.** Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

**3. Compensatory Mitigation.** Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects is considered as meeting the objectives of Section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.



### III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements. Compliance with other statutes, requirements and reviews, such as NEPA and the Corps public interest review, may not in and of themselves satisfy the requirements prescribed in the Guidelines.

B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable, and thus may not be relevant in all cases, as discussed in Section II.B of this MOA.<sup>7</sup> In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the

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<sup>7</sup>For example, there are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands. EPA and Army, at present, are discussing with representatives of the oil industry, the potential for a program of accelerated rehabilitation of abandoned oil facilities on the North Slope to serve as a vehicle for satisfying necessary compensation requirements.

area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

C. The Guidelines are the environmental standard for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals.

D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

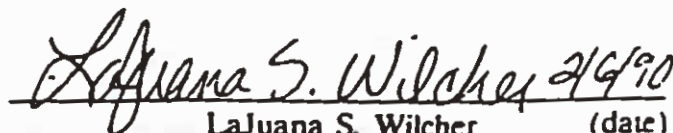
E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect on February 7, 1990, and will apply to those completed standard permit applications which are received on or after that date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

 2/6/90

Robert W. Page (date)  
Assistant Secretary of the Army  
(Civil Works)

 2/6/90

LaJuana S. Wilcher (date)  
Assistant Administrator for Water  
U.S. Environmental Protection Agency

PART IV - MEMORANDA OF AGREEMENT

Section 5

**Guidance Regarding Memoranda of Agreement between U.S. Army Corps of Engineers and the Environmental Protection Agency, and Departments of Commerce and Interior Establishing Policies and Procedures to Implement Section 404(q) of the Clean Water Act**



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

CECW-OR

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS, DISTRICT COMMANDS

SUBJECT: Section 404(q) Memorandum of Agreement (MOA)

1. The White House established priorities for the initiatives... included in the President's Wetland Plan issued 9 August 1991. One of the top priorities was to streamline the Regulatory process by revising the Section 404(q) MOA's with the Environmental Protection Agency (EPA), the Department of Commerce (National Marine Fisheries Service) and the Department of Interior (Fish and Wildlife Service).
2. The Assistant Secretary of the Army for Civil Works (ASA(CW)) has signed Section 404(q) MOA's with EPA and Commerce (copy enclosed). We expect to complete and forward to the field the Interior MOA very soon. Each MOA is effective as of the date of the last signature. However, because of unavoidable delays in implementation, the ASA(CW) has determined that the grandfather provision contained in the last sentence of Part I, paragraph 9 will be based on September 8, 1992, rather than the last signature date of each MOA (i.e., the 15 day period ends on September 23, 1992).
3. The intent of the MOA's is to provide for the Corps, as the decision-maker, to reach timely permit decisions in an efficient manner while giving full consideration to resource agency views. Local coordination procedures that are developed must focus on these principles. The MOA's also provide a mechanism for resolving policy issue disagreements and in certain cases allow the resource agencies to request elevation of an Army Corps of Engineers decision for review by higher authority in the Corps or ASA(CW). The 1985 MOA's resulted in lengthy and unreasonable delays for applicants where a resource agency had initiated the 404(q) elevation process. The revised MOA's are intended to minimize such delays by providing that the 404(q) elevation process will only be initiated (i.e., letter signed by the Regional Administrator/Director in Paragraph IV.3(b)) in cases where there are substantial and unacceptable impacts to aquatic resources of national importance.

4. The 1992 MOA's have several advantages over the 1985 MOA's in that:

a. For clarity, the MOA's are divided into four distinct parts: Part I - Background, Part II - Coordination Procedures, Part III - Elevation of Policy Issues and Part IV - Elevation of Individual Permit Decisions.

b. The elevation process for policy issues and permit cases are separate and distinct. The policy issue process can be initiated by agency staff, while the elevation of specific cases can only be initiated by a letter signed by the resource agency Regional Administrator/Director.

c. The Corps, in addition to the resource agencies, can elevate generic issues (Part III, Paragraph 2) using the procedures in Part III. This includes abuse of the Part IV elevation process.

d. Part IV contains procedures for case specific elevation which must involve substantial and unacceptable impacts to aquatic resources of national importance. Aquatic resources of national importance are a subset of special aquatic sites and other waters of the United States. We intend that this term will be more completely defined through administration of the Regulatory Program under the MOA's. Although case specific elevation is included, the process is very efficient.

e. Final action on a permit will proceed while any policy or procedural issue is elevated for resolution pursuant to Part III. However, for a case specific elevation, the district engineer's final action is held in abeyance pending headquarter's level review pursuant to Part IV.

5. We believe that the enclosed MOA's will substantially reduce unnecessary delays in the Corps Regulatory Program and further clarify that the Corps is the decisionmaker, while maintaining positive and professional relationships with the Federal resource agencies. You should ensure that the intent to minimize delays

CECW-OR

SUBJECT: Section 404(q) Memorandum of Agreement (MOA)

and reduce the number of cases subject to initiation of the elevation process is realized. If you believe this is not occurring, you should elevate that as an issue (see paragraph 4(c) above).

FOR THE COMMANDER:

Encl  
as

*Stanley G. Genega*  
STANLEY G. GENEGA  
Brigadier General (P), USA  
Director of Civil Works

**PART IV - MEMORANDA OF AGREEMENT**

**Subsection 5a**

**Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Establishing Policies and Procedures to Implement Section 404(q) of the Clean Water Act (8-11-92)**



## MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY

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1. **Authority:** Section 404(q) of the Clean Water Act, 33 U.S.C. 1344(q).
2. **Purpose:** Establish policies and procedures to implement Section 404(q) of the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits."
3. **Applicability:** This agreement shall apply to Regulatory authorities under: a) Section 10 of the Rivers and Harbors Act of 1899; b) Section 404 of the Clean Water Act; and c) Section 103 of the Marine Protection, Research and Sanctuaries Act.
4. **General Rules:** Policy and procedures for the Department of the Army Regulatory Program are established in 33 CFR Parts 320 through 330, and 40 CFR Part 230.
5. **Organization:** This Memorandum of Agreement (MOA) is subdivided into four distinct parts. The procedures for each part are specific to that part and do not necessarily relate to other parts. For example, different signature levels are established for Parts II, III, and IV.

### PART I - BACKGROUND

1. The Army Corps of Engineers is solely responsible for making final permit decisions pursuant to Section 10, Section 404(a), and Section 103, including final determinations of compliance with the Corps permit regulations, the Section 404(b)(1) Guidelines, and Section 7(a)(2) of the Endangered Species Act. As such, the Corps will act as the project manager for the evaluation of all permit applications. As the project manager, the Corps is responsible for requesting and evaluating information concerning all permit applications. The Corps will obtain and utilize this information in a manner that moves, as rapidly as practical, the regulatory process towards a final permit decision. The Corps



will not evaluate applications as a project opponent or advocate -- but instead will maintain an objective evaluation, fully considering all relevant factors. The Corps will fully consider EPA's comments when determining compliance with the National Environmental Policy Act, the 404(b)(1) Guidelines, and other relevant statutes, regulations, and policies. The Corps will also fully consider the EPA's views when determining whether to issue the permit, to issue the permit with conditions and/or mitigation, or to deny the permit.

2. It is recognized that the EPA has an important role in the Department of the Army Regulatory Program under the Clean Water Act, National Environmental Policy Act, and other relevant statutes. When providing comments, only substantive, project-related information (within EPA's area of expertise and authority) on the impacts of activities being evaluated by the Corps and appropriate and practicable measures to mitigate adverse impacts will be submitted. Pursuant to its authority under Section 404(b)(1) of the Clean Water Act, the EPA may provide comments to the Corps identifying its views regarding compliance with the Section 404(b)(1) Guidelines. The comments will be submitted within the time frames established in this agreement and applicable regulations.

3. National or regional issues relating to resources, policy, procedures, and regulation interpretation, can be elevated by either agency to their respective Washington Headquarters for resolution as prescribed in Part III - ELEVATION OF POLICY ISSUES. Individual permit decisions will not be delayed during the policy issue elevation process. Elevation of issues related to specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. Procedures for elevation of such specific cases are provided in PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS.

4. For projects of other Federal agencies and Federally assisted projects for which a Federal agency takes responsibility for environmental analysis and documentation, Army will accept, where appropriate and legally permissible, the environmental documentation and decisions of those agencies.

5. This agreement does not diminish either Army's authority to decide whether a particular individual permit should be granted, including determining whether the project is in compliance with the Section 404(b)(1) Guidelines, or the Administrator's authority under Section 404(c) of the Clean Water Act.

6. The officials identified in this MOA cannot delegate their responsibilities unless specifically provided for in this MOA.
7. Days referred to in this MOA are calendar days. If the end of the specified time period falls on a weekend or holiday, the last calendar day will be the first business day following the weekend or holiday. The end of the specified time period shall mean the close of the business day on the last day of the specified time period.
8. This agreement is effective immediately upon the date of the last signature and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice.
9. The Memorandum of Agreement between the Administrator of the Environmental Protection Agency and the Secretary of the Army on Section 404(q) of the Clean Water Act dated November 12, 1985, is terminated. Those permit applications which have been elevated to the Assistant Secretary of the Army for Civil Works (ASA(CW)) under the November 12, 1985, MOA shall be processed according to its terms. Those permit applications for which Notices of Intent to Issue have been sent by the District Engineer in accordance with paragraph 7.b. of the November 12, 1985, MOA shall be governed by that MOA. All other permit applications shall be governed by this agreement. For permit applications where the basic or extended comment period has closed before the signature date of this MOA the Regional Administrator has 15 calendar days from the date of the last signature below to indicate which individual permit cases will be governed under Part IV by sending the District Engineer the letter required in Part IV, paragraph 3(b).

## **PART II - COORDINATION PROCEDURES**

1. Purpose: The purpose of Part II is to provide and encourage communication and full consideration of each agencies' views concerning proposed projects within the resource limits of each agency and the time constraints of the regulatory process.
2. District Engineers and the Regional Administrators are encouraged to develop, within six months of the date of this MOA, written procedures to ensure effective interagency coordination and to discuss issues, expedite comments, foster strong professional partnerships and cooperative working relationships. These professional partnerships will be based on EPA providing substantive, project specific comments and the Corps giving

full consideration to EPA's recommendations as the Corps makes its determination of compliance with the Section 404(b)(1) Guidelines and the decision on the permit application. The procedures will encourage, to the extent appropriate:

- a. interagency pre-application consultation with prospective applicants;
- b. interagency site visits;
- c. interagency meeting(s) with applicants;
- d. cooperation in acquiring and conveying site specific information needed by either agency to fulfill its responsibilities;
- e. consistent with the time frames set forth in this MOA, an informal process for the timely resolution of issues at the field level to ensure that the permit evaluation proceeds as rapidly as practical.

3. The Regional Administrator will inform the District Engineer, in writing, of the EPA officials who are authorized to provide official EPA comments, including, where appropriate, by category of activity or geographic area. All official EPA comments will be signed by either the Regional Administrator or the designated official or an individual acting for the Regional Administrator or acting for the designated EPA official. Two officials will be designated in EPA Region X to provide for special circumstances in Alaska. Comments signed by any of the above mentioned officials will be considered EPA's response in accordance with Part II of this MOA. Notwithstanding the above, certain actions described in Part IV require the actual signature of the Regional Administrator or Acting Regional Administrator.

4. The Corps will ensure the timely receipt (within 2-3 days from the date of issuance) of public notices by EPA. EPA comments will be submitted in writing during the basic comment period specified in the public notice. To the maximum extent practical, EPA will immediately provide the Corps project manager with a faxed copy of its signed comments. Where the basic comment period is less than 30 calendar days and the situation is not an emergency, the District Engineer (or designee) shall, upon written or electronically transmitted request of an official authorized to provide official EPA comments, extend the comment period to 30 calendar days. An extension beyond 30 calendar days from the date of the public notice, must be requested in writing by the Regional Administrator or designee. The written request must be received three calendar days prior to the end of the basic comment period and must demonstrate the reason for the extension (e.g., a joint coordination meeting occurs near the end of the comment period and EPA needs additional time to prepare substantive comments). The District Engineer or his designee will respond, in writing, within three calendar days of receipt

of the request letter. If the District Engineer or his designee denies the request for extension within three calendar days prior to the end of the basic comment period, the EPA will have five calendar days from the receipt of the denial letter to submit final EPA comments. The maximum comment period, including extension, will not exceed 60 calendar days, unless sought by the applicant.

5. Consistent with the procedures in Part IV, at the conclusion of the comment period, the Corps will proceed to final action on the permit application. The Corps will consider all comments submitted by EPA pursuant to Part IV, paragraphs 3(a) and 3(b).

6. The Corps may, in certain cases, request additional comments from or discuss issues relevant to the project with EPA after the close of the comment period to either clarify matters or obtain information relevant to the permit decision.

7. Consistent with Part IV, if the District Engineer's decision is to issue the permit over the objections of the EPA Regional Administrator or to issue the permit without conditions recommended by the EPA Regional Administrator, the District Engineer will send a copy of the decision document to the EPA commenting official.

### **PART III - ELEVATION OF POLICY ISSUES**

1. **Purpose:** The purpose of Part III is to provide procedures for policy issue coordination and resolution.

2. If either agency considers that the nature of an action or series of actions raises concerns regarding the application of existing policy or procedure, or procedural failures in agency coordination, the District or Division Engineer, or Regional Administrator (or designee) may initiate policy implementation review between the District and/or Division Engineer (or designee) and the EPA Regional Administrator (or designee) through written notification. The written notification will describe the issue in sufficient detail and provide recommendations for resolving the issue. The District Engineer or Division Engineer (or designee), depending on the level of the issue, or the Regional Administrator (or designee) will resolve the issue within 60 calendar days of receipt of written notification to initiate policy implementation review.

3. In the context of Part III of this MOA, "resolve" means to review the issue, obtain the views of the requesting party, discuss those views as appropriate, fully consider those

views, and then make the final determination, in writing, regarding the particular resource, policy, procedure, or regulation interpretation.

4. If during consultation, the Regional Administrator (or designee) or the Corps (District Engineer or Division Engineer, or designee) determine the issue cannot or should not be resolved at the field level, or that an issue has broader implications beyond the Division, the RA and Division Engineer will so notify the Assistant Administrator, Office of Water (AAOW) and the ASA(CW), through the Director of Civil Works, respectively, in writing. Such notification will describe the nature of the issue and the reasons why the issue cannot, or should not, be resolved at the District or Division level or Regional level. (e.g., national policy issue)

5. Either the AAOW or the ASA(CW) may initiate informal or formal consultation concerning unresolved regional issues or national issues by meeting within 30 calendar days of receipt of notification under paragraph 4. above, or within 30 calendar days of receipt of notification of a policy or procedural issue or issues raised directly at Headquarters level. Within 60 calendar days of that meeting, the agencies will agree to provide direction, guidance, or joint guidance (e.g., general guidance on the Section 404(b)(1) Guidelines), where appropriate in response to the issues raised in 4., above.

6. At no time should individual permit decisions be delayed pending resolution of policy issues pursuant to PART III of this MOA. Similarly, changes in policy (i.e., new policies) that occur as a result of PART III should not affect applicants who have submitted a complete permit application prior to implementation of such policy change.

7. Upon resolving a particular policy or procedure, the Corps will determine if the policy is of sufficient importance to warrant public comment. All decisions will be implemented pursuant to the requirements of the Administrative Procedures Act, including public notice and comment rulemaking as necessary.

## **PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS**

1. Purpose: The purpose of PART IV is to provide the exclusive procedures for the elevation of specific individual permit cases. The elevation of specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. For example, cases that do not meet this resource value threshold cannot be elevated under this Part over a dispute concerning practicable alternatives. More specifically, the

elevation of individual permit cases should be limited to those cases where the net loss (i.e., after considering mitigation) from the project (i.e., within the scope of impacts being evaluated by the Corps), will result in unacceptable adverse effects to aquatic resources of national importance. As a basis for comparison, these cases will cause resource damages similar in magnitude to cases evaluated under Section 404(c) of the Clean Water Act. The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest solely with the ASA(CW).

2. Because delays associated with the process described within this Part IV can be costly to the regulated public, every effort will be taken to ensure that the process under paragraph 3(b) of this Part will be initiated only when absolutely necessary. Generic issues concerning the use of this Part IV may be elevated by either party using the procedures in Part III.

3. The following procedures will be utilized for the elevation of specific individual permit cases:

#### **FIELD LEVEL PROCEDURES**

(a) Within the basic or extended comment period the Regional Administrator (or designee) must notify the District Engineer by letter that in the opinion of EPA the project may result in substantial and unacceptable impacts to aquatic resources of national importance as defined in paragraph 1 of this Part.

(b) For those individual permit cases identified in paragraph 3(a), within 25 calendar days after the end of the basic or extended comment period the Regional Administrator must notify the District Engineer by letter (signed by the Regional Administrator) that in EPA's opinion the discharge will have a substantial and unacceptable impact on aquatic resources of national importance. The opinion will clearly state in detail: (1) why there will be substantial and unacceptable impacts to aquatic resource of national importance as defined in paragraph 1 of this Part and; (2) why the specific permit must be modified, conditioned, or denied to protect the aquatic resource of national importance. The opinion, which should explain how the agency determination was made, should be based on site specific information and relate directly to matters within EPA's authority and expertise. A signed copy of the EPA letter should be immediately faxed to the Corps regulatory project manager.

**(c) Notice of Intent to Proceed.**

**(1) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer's proposed permit decision is contrary to the stated EPA written recommendation in paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the**

**draft permit and decision document by overnight mail to the Wetlands Division Director.**

**(2) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer believes that his proposed decision resolves the written concerns raised by EPA pursuant to paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the draft permit and decision document by overnight mail to the Wetlands Division Director.**

**(3) Alternatively, if the District Engineer, prior to reaching a decision on the permit (e.g., the final decision is pending resolution of issues not related to the concerns raised by EPA), determines that the project has been modified or conditioned sufficiently so there are no longer substantial adverse impacts on aquatic resources of national importance, the District Engineer will notify the Wetlands Division Director, by letter including such project modifications and/or conditions that resolve EPA's concerns raised in paragraph 3(b).**

**(d) Within 15 calendar days from receipt of the draft permit under paragraphs 3(c)(1) or 3(c)(2) or notification under paragraph 3(c)(3), the Regional Administrator will notify the District Engineer by faxed letter (signed by the Regional Administrator or the Acting Regional Administrator) that:**

**(1) the Regional Administrator will not request higher level review; or**

**(2) the Regional Administrator has forwarded the issue to the AAOW with a recommendation to request review by the ASA(CW).**

**(e) When the Regional Administrator requests elevation pursuant to paragraph 3(d)(2) of this Part the District Engineer will hold in abeyance the issuance of a permit**

pending completion of the Headquarters level review outlined below. Further, the District Engineer will provide CECW-OR and ASA(CW) a copy of the Regional Administrator's letter notifying the District Engineer of the intent to request higher level review.

#### **AGENCY HEADQUARTERS REVIEW (AS NECESSARY)**

(f) Within 20 calendar days from the Regional Administrator's letter notifying the District Engineer of the intent to request higher level review (paragraph 3(d)(2)), the AAOW will either:

(1) notify the ASA(CW) that the AAOW will not request further review (the ASA(CW) will immediately notify CECW-OR of the AAOW's decision, CECW-OR will immediately notify the district regulatory chief); or

(2) request the ASA(CW) to review the permit decision document.

(g) Within 30 calendar days from the AAOW's request for review, the ASA(CW), through the Director of Civil Works, will review the permit decision document and either:

(1) inform the District Engineer to proceed with final action on the permit decision; or

(2) inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or

(3) make the final permit decision in accordance with 33 CFR 325.8.

(h) The ASA(CW) will immediately notify the AAOW in writing of its decision in paragraph 3(g) above. The EPA reserves the right to proceed with Section 404(c). To assist the EPA in reaching a decision on whether to exercise its Section 404(c) authority, the District Engineer will provide EPA a copy of the Statement of Findings/Record of Decision prepared in support of a permit decision after the ASA(CW) review. The permit shall not be issued during a period of 10 calendar days after such notice unless it contains a condition that no activity may take place pursuant to the permit



until such 10th day, or if the EPA has initiated a Section 404(c) proceeding during such 10 day period, until the Section 404(c) proceeding is concluded and subject to the final determination in such proceeding.

Merrill S. Prothro  
Acting Assistant Administrator for Water  
Environmental Protection Agency

11 August 1992  
Date

Nancy P. Don  
Assistant Secretary of the Army  
for Civil Works  
Department of the Army

11 August 1992  
Date

**PART IV - MEMORANDA OF AGREEMENT**

**Subsection 5b**

**Memorandum of Agreement between the Department of Commerce  
and the Department of the Army Establishing Policies and  
Procedures to Implement Section 404 (q) of the Clean Water Act (8-  
11-92)**



**MEMORANDUM OF AGREEMENT BETWEEN THE  
DEPARTMENT OF COMMERCE AND  
THE DEPARTMENT OF THE ARMY**

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- 1. Authority:** Section 404(q) of the Clean Water Act, 33 U.S.C. 1344(q).
- 2. Purpose:** Establish policies and procedures to implement Section 404(q) of the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits."
- 3. Applicability:** This agreement shall apply to Regulatory authorities under: a) Section 10 of the Rivers and Harbors Act of 1899; b) Section 404 of the Clean Water Act; and c) Section 103 of the Marine Protection, Research and Sanctuaries Act.
- 4. General Rules:** Policy and procedures for the Department of the Army Regulatory Program are established in 33 CFR Parts 320 through 330, and 40 CFR Part 230.
- 5. Organization:** This Memorandum of Agreement (MOA) is subdivided into four distinct parts. The procedures for each part are specific to that part and do not necessarily relate to other parts. For example, different signature levels are established for Parts II, III, and IV.

## **PART I - BACKGROUND**

1. The Army Corps of Engineers is solely responsible for making final permit decisions pursuant to Section 10, Section 404(a), and Section 103, including final determinations of compliance with the Corps permit regulations, the Section 404(b)(1) Guidelines, and Section 7(a)(2) of the Endangered Species Act. As such, the Corps will act as the project manager for the evaluation of all permit applications. As the project manager, the Corps is responsible for requesting and evaluating information concerning all permit applications. The Corps will obtain and utilize this information in a manner that moves, as rapidly as practical, the regulatory process towards a final permit decision. The Corps

will not evaluate applications as a project opponent or advocate — but instead will maintain an objective evaluation, fully considering all relevant factors. The Corps will fully consider the Department of Commerce (DOC) comments when determining compliance with the National Environmental Policy Act, the 404(b)(1) Guidelines, and other relevant statutes, regulations, and policies. The Corps will also fully consider the DOC's views when determining whether to issue the permit, to issue the permit with conditions and/or mitigation, or to deny the permit.

2. The National Marine Fisheries Service (NMFS) within the National Oceanic and Atmospheric Administration (NOAA) will be the point of contact for DOC and NOAA for field discussions and permit coordination.

3. It is recognized that the NMFS has an important role in the Department of the Army Regulatory Program under the Fish and Wildlife Coordination Act, the Clean Water Act, National Environmental Policy Act, Endangered Species Act, Magnuson Fisheries Conservation and Management Act, Marine Mammal Protection Act, Marine Protection, Research and Sanctuaries Act, and other relevant statutes. . When providing comments, only substantive, project-related information (within NOAA's area of expertise and authority) on the impacts of activities being evaluated by the Corps and appropriate and practicable measures to mitigate adverse impacts will be submitted. The comments will be submitted within the time frames established in this agreement and applicable regulations.

4. National or regional issues relating to resources, policy, procedures, and regulation interpretation, can be elevated by either agency to their respective Washington Headquarters for resolution as prescribed in Part III - ELEVATION OF POLICY ISSUES. Individual permit decisions will not be delayed during the policy issue elevation process. Elevation of issues related to specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. Procedures for elevation of such specific cases are provided in PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS.

5. For projects of other Federal agencies and Federally assisted projects for which a Federal agency takes responsibility for environmental analysis and documentation, Army will accept, where appropriate and legally permissible, the environmental documentation and decisions of those agencies.

6. This agreement does not diminish Army's authority to decide whether a particular individual permit should be granted, including determining whether the project is in compliance with the Section 404(b)(1) Guidelines.
7. The officials identified in this MOA cannot delegate their responsibilities unless specifically provided for in this MOA. The Under Secretary of Commerce for Oceans and Atmosphere may delegate signature authority, wherever applicable in this MOA, to either the Assistant Secretary for Oceans and Atmosphere or an individual acting for the Under Secretary.
8. Days referred to in this MOA are calendar days. If the end of the specified time period falls on a weekend or holiday, the last calendar day will be the first business day following the weekend or holiday. The end of the specified time period shall mean the close of the business day on the last day of the specified time period.
9. This agreement is effective immediately upon the date of the last signature and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon six months written notice.
10. The Memorandum of Agreement between the Secretary of Commerce and the Secretary of the Army on Section 404(q) of the Clean Water Act dated March 26, 1986, is terminated. Those permit applications which have been elevated to the Assistant Secretary of the Army for Civil Works (ASA(CW)) under the March 26, 1986, MOA shall be processed according to its terms. Those permit applications for which Notices of Intent to Issue have been sent by the District Engineer in accordance with paragraph 7.b. of the March 26, 1986, MOA shall be governed by that MOA. All other permit applications shall be governed by this agreement. For permit applications where the basic or extended comment period has closed before the signature date of this MOA the NMFS Regional Director has 15 calendar days from the date of the last signature below to indicate which individual permit cases will be governed under Part IV by sending the District Engineer the letter required in Part IV, paragraph 3(b).

## **PART II - COORDINATION PROCEDURES**

1. Purpose: The purpose of Part II is to provide and encourage communication and full consideration of each agencies' views concerning proposed projects within the resource limits of each agency and the time constraints of the regulatory process.

2. District Engineers and the NMFS Regional Directors (or their designees) are encouraged to develop, within six months of the date of this MOA, written procedures to ensure effective interagency coordination and to discuss issues, expedite comments, and foster strong professional partnerships and cooperative working relationships. These professional partnerships will be based on NMFS providing substantive, project specific comments and the Corps giving full consideration to NMFS recommendations as the Corps makes its determination of compliance with the Section 404(b)(1) Guidelines and the decision on the permit application. The procedures will encourage, to the extent appropriate:

- a. interagency pre-application consultation with prospective applicants;
- b. interagency site visits;
- c. interagency meeting(s) with applicants;
- d. cooperation in acquiring and conveying site specific information needed by either agency to fulfill its responsibilities;
- e. consistent with the time frames set forth in this MOA, an informal process for the timely resolution of issues at the field level to ensure that the permit evaluation proceeds as rapidly as practical.

3. The NMFS Regional Director will inform the District Engineer, in writing, of the NMFS officials who are authorized to provide official NMFS comments, including, where appropriate, by category of activity or geographic area. All official DOC comments will be signed by either the NMFS Regional Director or the designated official or an individual acting for the Regional Director or acting for the designated DOC official. Comments signed by any of the above mentioned officials will be considered DOC's response in accordance with Part II of this MOA. Notwithstanding the above, certain actions described in Part IV require the actual signature of the NMFS Regional Director or Acting Regional Director.

4. The Corps will ensure the timely receipt (within 2-3 days from the date of issuance) of public notices by NMFS. DOC comments will be submitted in writing during the basic comment period specified in the public notice. To the maximum extent practical, NMFS will immediately provide the Corps project manager with a faxed copy of its signed comments. Where the basic comment period is less than 30 calendar days and the situation is not an emergency, the District Engineer (or designee) shall, upon written or electronically transmitted request of an official authorized to provide official DOC comments, extend the comment period to 30 calendar days. An extension beyond 30 calendar days from the date of the public notice, must be requested in writing by the

NMFS Regional Director or designee. The written request must be received three calendar days prior to the end of the basic comment period and must demonstrate the reason for the extension (e.g., a joint coordination meeting occurs near the end of the comment period and NMFS needs additional time to prepare substantive comments). The District Engineer or his designee will respond, in writing, within three calendar days of receipt of the request letter. If the District Engineer or his designee denies the request for extension within three calendar days prior to the end of the basic comment period, the NMFS will have five calendar days from the receipt of the denial letter to submit final NMFS comments. The maximum comment period, including extension, will not exceed 60 calendar days, unless sought by the applicant.

5. Consistent with the procedures in Part IV, at the conclusion of the comment period, the Corps will proceed to final action on the permit application. The Corps will consider any additional comments submitted by NMFS pursuant to Part IV, paragraph 3(a).

6. The Corps may, in certain cases, request additional comments from or discuss issues relevant to the project with NMFS after the close of the comment period to either clarify matters or obtain information relevant to the permit decision.

7. Consistent with Part IV, if the District Engineer's decision is to issue the permit over the objections of the NMFS Regional Director or to issue the permit without conditions recommended by the NMFS Regional Director, the District Engineer will send a copy of the decision document to the NMFS commenting official.

### **PART III - ELEVATION OF POLICY ISSUES**

1. Purpose: The purpose of Part III is to provide procedures for policy issue coordination and resolution.

2. If either agency considers that the nature of an action or series of actions raises concerns regarding the application of existing policy or procedure, or procedural failures in agency coordination; the District or Division Engineer, or NMFS Regional Director (or designee) may initiate policy implementation review between the District and/or Division Engineer (or designee) and the NMFS Regional Director (or designee) through written notification. The written notification will describe the issue in sufficient detail and provide recommendations for resolving the issue. The District Engineer or Division Engineer (or designee), depending on the level of the issue, or the NMFS Regional

Director (or designee) will resolve the issue within 60 calendar days of receipt of written notification to initiate policy implementation review.

3. In the context of Part III of this MOA, "resolve" means to review the issue, obtain the views of the requesting party, discuss those views as appropriate, fully consider those views, and then make the final determination, in writing, regarding the particular resource, policy, procedure, or regulation interpretation.
4. If during consultation, the NMFS Regional Director (or designee) or the Corps (District Engineer or Division Engineer, or designee) determine the issue cannot or should not be resolved at the field level, or that an issue has broader implications beyond the Division, the NMFS Regional Director and Division Engineer will so notify the Under Secretary for Oceans and Atmosphere (USOA) and the ASA(CW), through the Assistant Administrator for Fisheries and the Director of Civil Works, respectively, in writing. Such notification will describe the nature of the issue and the reasons why the issue cannot, or should not, be resolved at the District or Division level or Regional level (e.g., national policy issue).
5. Either the USOA or the ASA(CW) may initiate informal or formal consultation concerning unresolved regional issues or national issues by meeting within 30 calendar days of receipt of notification under paragraph 4. above, or within 30 calendar days of receipt of notification of a policy or procedural issue or issues raised directly at Headquarters level. Within 60 calendar days of that meeting, the agencies will agree to provide direction, guidance, or joint guidance (e.g., general guidance on the Section 404(b)(1) Guidelines), where appropriate in response to the issues raised in 4., above. At the discretion of the USOA or the ASA(CW), resolution of issues raised pursuant to paragraph 4 may be delegated to the Assistant Administrator for Fisheries or the Director of Civil Works, respectively.
6. At no time should individual permit decisions be delayed pending resolution of policy issues pursuant to PART III of this MOA. Similarly, changes in policy (i.e., new policies) that occur as a result of PART III should not affect applicants who have submitted a complete permit application prior to implementation of such policy change.
7. Upon resolving a particular policy or procedure, the Corps will determine if the policy is of sufficient importance to warrant public comment. All decisions will be implemented pursuant to the requirements of the Administrative Procedures Act, including public notice and comment rulemaking as necessary.



## PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS

1. Purpose: The purpose of PART IV is to provide the exclusive procedures for the elevation of specific individual permit cases. The elevation of specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. For example, cases that do not meet this resource value threshold cannot be elevated under this Part over a dispute concerning practicable alternatives. More specifically, the elevation of individual permit cases should be limited to those cases where the net loss (i.e., after considering mitigation) from the project (i.e., within the scope of impacts being evaluated by the Corps), will result in unacceptable adverse effects to aquatic resources of national importance. As a basis for comparison, these cases will cause resource damages similar in magnitude to cases evaluated under Section 404(c) of the Clean Water Act. The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest solely with the ASA(CW).

2. Because delays associated with the process described within this Part IV can be costly to the regulated public, every effort will be taken to ensure that the process under paragraph 3(b) of this Part will be initiated only when absolutely necessary. Generic issues concerning the use of this Part IV may be elevated by either party using the procedures in Part III.

3. The following procedures will be utilized for the elevation of specific individual permit cases:

### FIELD LEVEL PROCEDURES

(a) Within the basic or extended comment period the NMFS Regional Director (or designee) must notify the District Engineer by letter that in the opinion of NMFS the project may result in substantial and unacceptable impacts to aquatic resources of national importance as defined in paragraph 1 of this Part.

(b) For those individual permit cases identified in paragraph 3(a), within 25 calendar days after the end of the basic or extended comment period the NMFS Regional Director must notify the District Engineer by letter (signed by the Regional Director or Acting Regional Director) that in the NMFS's opinion the discharge will have a substantial and unacceptable impact on aquatic resources of national importance. The opinion will clearly state in detail: (1) why there will be substantial and unacceptable

impacts to aquatic resource of national importance as defined in paragraph 1 of this Part and; (2) why the specific permit must be modified, conditioned, or denied to protect the aquatic resource of national importance. The opinion, which should explain how the agency determination was made, should be based on site specific information and relate directly to matters within NOAA's authority and expertise. A signed copy of the NMFS Regional Director's letter should be immediately faxed to the Corps regulatory project manager.

**(c) Notice of Intent to Proceed:**

(1) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer's proposed permit decision is contrary to the stated NMFS written recommendation in paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the draft permit and decision document by overnight mail to the NMFS Regional Director.

(2) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer believes that his proposed decision resolves the written concerns raised by NMFS pursuant to paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of

the draft permit and decision document by overnight mail to the NMFS Regional Director.

(3) Alternatively, if the District Engineer, prior to reaching a decision on the permit (e.g., the final decision is pending resolution of issues not related to the concerns raised by NMFS), determines that the project has been modified or conditioned sufficiently so there are no longer substantial adverse impacts on aquatic resources of national importance, the District Engineer will notify the NMFS Regional Director, by letter including such project modifications and/or conditions that resolve NMFS's concerns raised in paragraph 3(b).

(d) Within 15 calendar days from receipt of the draft permit under paragraphs 3(c)(1) or 3(c)(2) or notification under paragraph 3(c)(3), the NMFS Regional Director will notify the District Engineer by faxed letter (signed by the Regional Director or the Acting Regional Director) that:

(1) the Regional Director will not request higher level review; or

(2) the Regional Director has forwarded the issue to the USOA with a recommendation to request review by the ASA(CW).

(e) When the NMFS Regional Director requests elevation pursuant to paragraph 3(d)(2) of this Part the District Engineer will hold in abeyance the issuance of a permit pending completion of the Headquarters level review outlined below. Further, the District Engineer will provide CECW-OR and ASA(CW) a copy of the NMFS Regional Director's letter notifying the District Engineer of the intent to request higher level review.

#### AGENCY HEADQUARTERS REVIEW (AS NECESSARY)

(f) Within 20 calendar days from the NMFS Regional Director's letter notifying the District Engineer of the intent to request higher level review (paragraph 3(d)(2)), the USOA will either:

(1) notify the ASA(CW) that the USOA will not request further review (the ASA(CW) will immediately notify CECW-OR of the USOA's decision, CECW-OR will immediately notify the district regulatory chief); or

(2) request the ASA(CW) to review the permit decision document.

(g) Within 30 calendar days from the USOA's request for review, the ASA(CW), through the Director of Civil Works, will review the permit decision document and either:

(1) inform the District Engineer to proceed with final action on the permit decision; or

(2) inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or

(3) make the final permit decision in accordance with 33 CFR 325.8.

(h) The ASA(CW) will immediately notify the USOA in writing of its decision in paragraph 3(g) above

John A. Krauss  
Under Secretary for Oceans  
and Atmosphere  
Department of Commerce

AUG 11 1992  
Date

Norman P. L...  
Assistant Secretary of the Army  
for Civil Works  
Department of the Army

11 August 1992  
Date

**PART IV- MEMORANDA OF AGREEMENT**

**Subsection 5c**

**Memorandum of Agreement between the Department of the Interior  
and the Department of the Army Establishing Policies and  
Procedures to Implement Section 404(q) of the Clean Water Act (12-  
21-92)**



**MEMORANDUM OF AGREEMENT BETWEEN THE  
DEPARTMENT OF THE INTERIOR AND  
THE DEPARTMENT OF THE ARMY**

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- 1. Authority:** Section 404(q) of the Clean Water Act, 33 U.S.C. 1344(q).
- 2. Purpose:** Establish policies and procedures to implement Section 404(q) of the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits."
- 3. Applicability:** This agreement shall apply to Regulatory authorities under: a) Section 10 of the Rivers and Harbors Act of 1899; b) Section 404 of the Clean Water Act; and c) Section 103 of the Marine Protection, Research and Sanctuaries Act.
- 4. General Rules:** Policy and procedures for the Department of the Army Regulatory Program are established in 33 CFR Parts 320 through 330, and 40 CFR Part 230.
- 5. Organization:** This Memorandum of Agreement (MOA) is subdivided into four distinct parts. The procedures for each part are specific to that part and do not necessarily relate to other parts. For example, different signature levels are established for Parts II, III, and IV.

**PART I - BACKGROUND**

1. The Army Corps of Engineers is solely responsible for making final permit decisions pursuant to Section 10, Section 404(a), and Section 103, including final determinations of compliance with the Corps permit regulations, the Section 404(b)(1) Guidelines, and Section 7(a)(2) of the Endangered Species Act. As such, the Corps will act as the project manager for the evaluation of all permit applications. As the project manager, the Corps is responsible for requesting and evaluating information concerning all permit applications. The Corps will obtain and utilize this information in a manner that moves, as rapidly as practical, the regulatory process towards a final permit decision. The Corps

will not evaluate applications as a project opponent or advocate -- but instead will maintain an objective evaluation, fully considering all relevant factors. The Corps will fully consider the Department of Interior (DOI) comments when determining compliance with the National Environmental Policy Act, the 404(b)(1) Guidelines, and other relevant statutes, regulations, and policies. The Corps will also fully consider the DOI's views when determining whether to issue the permit, to issue the permit with conditions and/or mitigation, or to deny the permit.

2. It is recognized that the DOI has an important role in the Department of the Army Regulatory Program under the Fish and Wildlife Coordination Act, the Clean Water Act, National Environmental Policy Act, Endangered Species Act, and other relevant statutes. When providing comments, only substantive, project-related information (within DOI's area of expertise and authority) on the impacts of activities being evaluated by the Corps and appropriate and practicable measures to mitigate adverse impacts will be submitted. The comments will be submitted within the time frames established in this agreement and applicable regulations.

3. National or regional issues relating to resources, policy, procedures, and regulation interpretation, can be elevated by either agency to their respective Washington Headquarters for resolution as prescribed in Part III - ELEVATION OF POLICY ISSUES. Individual permit decisions will not be delayed during the policy issue elevation process. Elevation of issues related to specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. Procedures for elevation of such specific cases are provided in PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS.

4. For projects of other Federal agencies and Federally assisted projects for which a Federal agency takes responsibility for environmental analysis and documentation, Army will accept, where appropriate and legally permissible, the environmental documentation and decisions of those agencies.

5. This agreement does not diminish Army's authority to decide whether a particular individual permit should be granted, including determining whether the project is in compliance with the Section 404(b)(1) Guidelines.

6. The officials identified in this MOA cannot delegate their responsibilities unless specifically provided for in this MOA.

7. Days referred to in this MOA are calendar days. If the end of the specified time period falls on a weekend or holiday, the last calendar day will be the first business day following the weekend or holiday. The end of the specified time period shall mean the close of the business day on the last day of the specified time period.

8. This agreement is effective immediately upon the date of the last signature and will continue in effect until modified or revoked by agreement of both parties, or revoked by either party alone upon 30 calendar days written notice.

9. The Memorandum of Agreement between the Secretary of the Interior and the Secretary of the Army on Section 404(g) of the Clean Water Act dated November 8, 1985, is terminated. Those permit applications which have been elevated to the Assistant Secretary of the Army for Civil Works (ASA(CW)) under the November 8, 1985, MOA shall be processed according to its terms. Those permit applications for which Notices of Intent to Issue have been sent by the District Engineer in accordance with paragraph 7.b. of the November 8, 1985, MOA shall be governed by that MOA. All other permit applications shall be governed by this agreement. For permit applications where the basic or extended comment period has closed before the signature date of this MOA the Fish and Wildlife Service (FWS) Regional Director has 15 calendar days from the date of the last signature below to indicate which individual permit cases will be governed under Part IV by sending the District Engineer the letter required in Part IV, paragraph 3(b).

## **PART II - COORDINATION PROCEDURES**

1. Purpose: The purpose of Part II is to provide and encourage communication and full consideration of each agencies' views concerning proposed projects within the resource limits of each agency and the time constraints of the regulatory process.

2. The Assistant Secretary for Fish and Wildlife and Parks, at the direction of the Secretary of the Interior, will be the point of contact for coordination with DOI and will provide comments, through the Director of the Fish and Wildlife Services, on behalf of DOI on permit applications evaluated through the Army Regulatory Program.

3. District Engineers and the FWS Regional Directors as representatives of DOI will direct the development, and approve, within six months of the date of this MOA, written procedures to ensure effective interagency coordination and to discuss issues, expedite comments, and foster strong professional partnerships and cooperative working



relationships. These professional partnerships will be based on DOI providing substantive, project specific comments and the Corps giving full consideration to FWS recommendations as the Corps makes its determination of compliance with the Section 404(b)(1) Guidelines and the decision on the permit application. The procedures will encourage, to the extent appropriate:

- a. interagency pre-application consultation with prospective applicants;
- b. interagency site visits;
- c. interagency meeting(s) with applicants;
- d. cooperation in acquiring and conveying site specific information needed by either agency to fulfill its responsibilities;
- e. consistent with the time frames set forth in this MOA, an informal process for the timely resolution of issues at the field level to ensure that the permit evaluation proceeds as rapidly as practical.

4. The FWS Regional Director will inform the District Engineer, in writing, of the FWS officials who are authorized to provide official DOI comments, including, where appropriate, by category of activity or geographic area. All official DOI comments will be signed by either the FWS Regional Director or the designated official. Comments signed by any of the above mentioned officials will be considered DOI's response in accordance with Part II of this MOA. Notwithstanding the above, certain actions described in Part IV require the actual signature of the FWS Regional Director.

5. The Corps will ensure the timely receipt (within 2-3 days from the date of issuance) of public notices by FWS. DOI comments will be submitted in writing during the basic comment period specified in the public notice. To the maximum extent practical, DOI will immediately provide the Corps project manager with a faxed copy of DOI signed comments. Where the basic comment period is less than 30 calendar days and the situation is not an emergency, the District Engineer (or designee) shall, upon written or electronically transmitted request of an official authorized to provide official DOI comments, extend the comment period to 30 calendar days. An extension beyond 30 calendar days from the date of the public notice, must be requested in writing by the FWS Regional Director, Deputy Regional Director, or Assistant Regional Director/Enhancement. The written request must be received three calendar days prior to the end of the basic comment period and must demonstrate the reason for the extension (e.g., a joint coordination meeting occurs near the end of the comment period and DOI needs additional time to prepare substantive comments). The District Engineer or his designee will respond, in writing, within three calendar days of receipt of the request

letter. If the District Engineer or his designee denies the request for extension within three calendar days prior to the end of the basic comment period, the FWS will have five calendar days from the receipt of the denial letter to submit final DOI comments. The maximum comment period, including extension, will not exceed 60 calendar days, unless sought by the applicant.

6. Consistent with the procedures in Part IV, at the conclusion of the comment period, the Corps will proceed to final action on the permit application. The Corps will consider all comments submitted by DOI pursuant to Part IV, paragraphs 3(a) and 3(b).
7. The Corps may, in certain cases, request additional comments from or discuss issues relevant to the project with DOI after the close of the comment period to either clarify matters or obtain information relevant to the permit decision.
8. Consistent with Part IV, if the District Engineer's decision is to issue the permit over the objections of DOI or to issue the permit without conditions recommended by the DOI, the District Engineer will send a copy of the decision document to the DOI commenting official.
9. Notwithstanding any other provision of this agreement, nothing in this agreement shall be construed to affect the responsibility of the Corps of Engineers to comply with the provisions of Section 7(a)(2) of the Endangered Species Act, including the procedural provisions for interagency consultation established in 50 CFR 402.

### **PART III - ELEVATION OF POLICY ISSUES**

1. Purpose: The purpose of Part III is to provide procedures for policy issue coordination and resolution.
2. If either agency considers that the nature of an action or series of actions raises concerns regarding the application of existing policy or procedure, or procedural failures in agency coordination, the District or Division Engineer, or FWS Regional Director acting on behalf of DOI, may initiate policy implementation review between the District and/or Division Engineer (or designee) and the FWS Regional Director, Deputy Regional Director, or Assistant Regional Director/Enhancement, through written notification. The written notification will describe the issue in sufficient detail and provide recommendations for resolving the issue. The District Engineer or Division Engineer (or

designee), depending on the level of the issue, or the Regional Director, Deputy Regional Director, or Assistant Regional Director/Enhancement, will resolve the issue within 60 calendar days of receipt of written notification to initiate policy implementation review.

3. In the context of Part III of this MOA, "resolve" means to review the issue, obtain the views of the requesting party, discuss those views as appropriate, fully consider those views, and then make the final determination, in writing, regarding the particular resource, policy, procedure, or regulation interpretation.

4. If during consultation, the FWS Regional Director, Deputy Regional Director, or Assistant Regional Director/Enhancement, or the Corps (District Engineer or Division Engineer, or designee) determine the issue cannot or should not be resolved at the field level, or that an issue has broader implications beyond the Division, the FWS Regional Director and Division Engineer will so notify the Assistant Secretary for Fish and Wildlife and Parks (A/S-FWP) and the ASA(CW), through the Director of Fish and Wildlife Service and the Director of Civil Works, respectively, in writing. Such notification will describe the nature of the issue and the reasons why the issue cannot, or should not, be resolved at the District or Division level or Regional level (e.g., national policy issue).

5. Either the A/S-FWP or the ASA(CW) may initiate informal or formal consultation concerning unresolved regional issues or national issues by meeting within 30 calendar days of receipt of notification under paragraph 4. above, or within 30 calendar days of receipt of notification of a policy or procedural issue or issues raised directly at Headquarters level. Within 60 calendar days of that meeting, the agencies will agree to provide direction, guidance, or joint guidance (e.g., general guidance on the Section 404(b)(1) Guidelines), where appropriate in response to the issues raised in 4., above.

6. At no time should individual permit decisions be delayed pending resolution of policy issues pursuant to PART III of this MOA. Similarly, changes in policy (i.e., new policies) that occur as a result of PART III should not affect applicants who have submitted a complete permit application prior to implementation of such policy change.

7. Upon resolving a particular policy or procedure, the Corps will determine if the policy is of sufficient importance to warrant public comment. All decisions will be implemented pursuant to the requirements of the Administrative Procedures Act, including public notice and comment rulemaking as necessary.

## **PART IV - ELEVATION OF INDIVIDUAL PERMIT DECISIONS**

1. Purpose: The purpose of PART IV is to provide the exclusive procedures for the elevation of specific individual permit cases. The elevation of specific individual permit cases will be limited to those cases that involve aquatic resources of national importance. For example, cases that do not meet this resource value threshold cannot be elevated under this Part over a dispute concerning practicable alternatives. More specifically, the elevation of individual permit cases should be limited to those cases where the net loss (i.e., after considering mitigation) from the project (i.e., within the scope of impacts being evaluated by the Corps), will result in unacceptable adverse effects to aquatic resources of national importance. The final decision on the need to elevate a specific individual permit case and any subsequent case specific policy guidance rest solely with the ASA(CW).

2. Because delays associated with the process described within this Part IV can be costly to the regulated public, every effort will be taken to ensure that the process under paragraph 3(b) of this Part will be initiated only when absolutely necessary. Generic issues concerning the use of this Part IV may be elevated by either party using the procedures in Part III.

3. The following procedures will be utilized for the elevation of specific individual permit cases:

### **FIELD LEVEL PROCEDURES**

(a) Within the basic or extended comment period the FWS Regional Director (or designee) must notify the District Engineer by letter that in the opinion of DOI the project may result in substantial and unacceptable impacts to aquatic resources of national importance as defined in paragraph 1 of this Part.

(b) For those individual permit cases identified in paragraph 3(a), within 25 calendar days after the end of the basic or extended comment period the FWS Regional Director must notify the District Engineer by letter (signed by the FWS Regional Director) that in the DOI's opinion the discharge will have a substantial and unacceptable impact on aquatic resources of national importance. The opinion will clearly state in detail: (1) why there will be substantial and unacceptable impacts to aquatic resource of national importance as defined in paragraph 1 of this Part and; (2) why the specific permit must be modified, conditioned, or denied to protect the aquatic resource of

national importance. The opinion, which should explain how the agency determination was made, should be based on site specific information and relate directly to matters within DOI's authority and expertise. A signed copy of the FWS Regional Director's letter should be immediately faxed to the Corps regulatory project manager.

**(c) Notice of Intent to Proceed:**

(1) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer's proposed permit decision is contrary to the stated DOI written recommendation in paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the draft permit and decision document by overnight mail to the FWS Regional Director.

(2) If, following the receipt of the notification in Part IV paragraph 3(b), the District Engineer believes that his proposed decision resolves the written concerns raised by DOI pursuant to paragraph 3(b), the District Engineer will, within five calendar days of his proposed decision, forward a copy of the draft permit and decision document by overnight mail to the FWS Regional Director.

(3) Alternatively, if the District Engineer, prior to reaching a decision on the permit (e.g., the final decision is pending resolution of issues not related to the concerns raised by DOI), determines that the project has been modified or conditioned sufficiently so there are no longer substantial adverse impacts on aquatic resources of national importance, the District Engineer will notify the FWS Regional Director, by letter including such project modifications and/or conditions that resolve DOI's concerns raised in paragraph 3(b).

(d) Within 15 calendar days from receipt of the draft permit under paragraphs 3(c)(1) or 3(c)(2) or notification under paragraph 3(c)(3), the FWS Regional Director will notify the District Engineer by faxed letter (signed by the FWS Regional Director) that:

(1) the FWS Regional Director will not request higher level review; or

(2) the FWS Regional Director has forwarded the issue to the A/S-FWP,

through the Director of the Fish and Wildlife Service with a recommendation to request review by the ASA(CW).

(e) When the FWS Regional Director requests elevation pursuant to paragraph 3(d)(2) of this Part the District Engineer will hold in abeyance the issuance of a permit pending completion of the Headquarters level review outlined below. Further, the District Engineer will provide CECW-OR and ASA(CW) a copy of the FWS Regional Director's letter notifying the District Engineer of the intent to request higher level review.

#### **AGENCY HEADQUARTERS REVIEW (AS NECESSARY)**

(f) Within 20 calendar days from the FWS Regional Director's letter notifying the District Engineer of the intent to request higher level review (paragraph 3(d)(2)), the A/S-FWP will either:

(1) notify the ASA(CW) that the A/S-FWP will not request further review (the ASA(CW) will immediately notify CECW-OR of the A/S-FWP's decision, CECW-OR will immediately notify the district regulatory chief); or

(2) request the ASA(CW) to review the permit decision document.

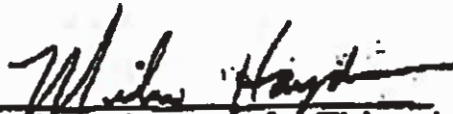
(g) Within 30 calendar days from the A/S-FWP's request for review, the ASA(CW), through the Director of Civil Works, will review the permit decision document and either:

(1) inform the District Engineer to proceed with final action on the permit decision; or

(2) inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or

(3) make the final permit decision in accordance with 33 CFR 325.8.

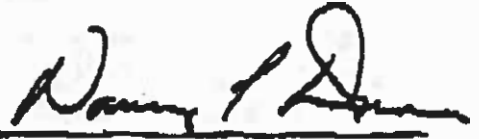
(h) The ASA(CW) will immediately notify the A/S-FWP in writing of its decision in paragraph 3(g) above.



Assistant Secretary for Fish and  
Wildlife and Parks  
Department of Interior

21 Dec 92

Date



Assistant Secretary of the Army  
for Civil Works  
Department of the Army

18 Dec 92

Date

PART IV - MEMORANDA OF AGREEMENT

Section 6

**Memorandum of Agreement Among the Department of Agriculture, the Environmental Protection Agency, the Department of Interior and the Department of the Army Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act (1-6-94)**





Read

## MEMORANDUM OF AGREEMENT

AMONG THE DEPARTMENT OF AGRICULTURE, THE ENVIRONMENTAL PROTECTION AGENCY, THE DEPARTMENT OF THE INTERIOR, AND THE DEPARTMENT OF THE ARMY

CONCERNING THE DELINEATION OF WETLANDS FOR PURPOSES OF SECTION 404 OF THE CLEAN WATER ACT AND SUBTITLE B OF THE FOOD SECURITY ACT

### I. BACKGROUND

The Departments of the Army, Agriculture, and the Interior, and the Environmental Protection Agency (EPA) recognize fully that the protection of the Nation's remaining wetlands is an important objective that will be supported through the implementation of the Wetland Conservation (Swampbuster) provision of the Food Security Act (FSA) and Section 404 of the Clean Water Act (CWA). The agencies further recognize and value the important contribution of agricultural producers to our society, our economy, and our environment. We are committed to ensuring that Federal wetlands programs are administered in a manner that minimizes the impacts on affected landowners to the fullest possible extent consistent with the important goal of protecting wetlands. We are also committed to minimizing duplication and inconsistencies between Swampbuster and the CWA Section 404 program. On August 24, 1993, the Administration announced a comprehensive package of reforms that will improve both the protection of wetlands and make wetlands programs more fair and flexible for landowners, including the Nation's agriculture producers. This Memorandum of Agreement (MOA) implements one of over 40 components of the Administration's Wetlands Plan.

### II. PURPOSE AND APPLICABILITY

#### A. PURPOSE

The purpose of this MOA is to specify the manner in which wetland delineations and certain other determinations of waters of the United States made by the U.S. Department of Agriculture (USDA) under the FSA will be relied upon for purposes of CWA Section 404. While this MOA will promote consistency between CWA and FSA wetlands programs, it is not intended in any way to diminish the protection of these important aquatic resources. In this regard, all signatory agencies to this MOA will ensure that wetlands programs are administered in a manner consistent with the objectives and requirements of applicable laws, implementing regulations, and guidance.

## B. APPLICABILITY

1. The Administrator of EPA has the ultimate authority to determine the geographic scope of waters of the United States subject to jurisdiction under the CWA, including the Section 404 regulatory program. Consistent with a current MOA between EPA and the Department of the Army, the Army Corps of Engineers (Corps) conducts jurisdictional delineations associated with the day-to-day administration of the Section 404 program.
2. The Secretary of the USDA, acting through the Chief of the Soil Conservation Service (SCS), has the ultimate authority to determine the geographic scope of wetlands for FSA purposes and to make delineations relative to the FSA, in consultation with the Department of the Interior, Fish and Wildlife Service (FWS).

## III. DEFINITION OF AGRICULTURAL LANDS

For the purposes of this MOA, the term "agricultural lands" means those lands intensively used and managed for the production of food or fiber to the extent that the natural vegetation has been removed and cannot be used to determine whether the area meets applicable hydrophytic vegetation criteria in making a wetland delineation.

- A. **Areas that meet the above definition may include intensively used and managed cropland, hayland, pasture land, orchards, vineyards, and areas which support wetland crops (e.g., cranberries, taro, watercress, rice). For example, lands intensively used and managed for pasture or hayland where the natural vegetation has been removed and replaced with planted grasses or legumes such as ryegrass, bluegrass, or alfalfa, are considered agricultural lands for the purposes of this MOA.**
- B. **"Agricultural lands" do not include range lands, forest lands, wood lots, or tree farms. Further, lands where the natural vegetation has not been removed, even though that vegetation may be regularly grazed or mowed and collected as forage or fodder (e.g., uncultivated meadows and prairies, salt hay), are not considered agricultural lands for the purposes of this MOA.**

Other definitions for the purposes of this MOA are listed below in Section VI.

## IV. ALLOCATION OF RESPONSIBILITY

- A. **In accordance with the terms and procedures of this MOA, wetland delineations made by SCS on agricultural lands, in consultation with FWS, will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction. In addition, EPA and the Corps will accept SCS wetland delineations**

on non-agricultural lands that are either narrow bands immediately adjacent to, or small pockets interspersed among, agricultural lands. SCS is responsible for making wetland delineations for agricultural lands whether or not the person who owns, manages, or operates the land is a participant in USDA programs.

- B. Lands owned or operated by a USDA program participant that are not agricultural lands and for which a USDA program participant requests a wetland delineation, will be delineated by SCS in coordination with the Corps, or EPA as appropriate, and in consultation with FWS. Final wetland delineations conducted by SCS pursuant to the requirements of this paragraph shall not be revised by SCS except where an opportunity for coordination and consultation is provided to the other signatory agencies.
- C. SCS may conduct delineations of other waters for the purposes of Section 404 of the CWA, such as lakes, ponds, and streams, in coordination with the Corps, or EPA as appropriate, on lands on which SCS is otherwise engaged in wetland delineations pursuant to paragraphs IV.A or IV.B of this MOA. Delineations of "other waters" will not be made until the interagency oversight team convened pursuant to Section V.B.2 has agreed on appropriate local procedures and guidance for making such delineations.
- D. For agricultural lands, the signatory agencies will use the procedures for delineating wetlands as described in the National Food Security Act Manual, Third Edition (NFSAM). For areas that are not agricultural lands, SCS will use the 1987 Corps Wetland Delineation Manual, with current national Corps guidance, to make wetland delineations applicable to Section 404.
- E. Delineations on "agricultural lands" must be performed by personnel who are trained in the use of the NFSAM. Delineations on other lands and waters must be performed by personnel who are trained in the use of the 1987 Corps Wetland Delineation Manual. This MOA includes provisions for the appropriate interagency delineation training below in Section V.E.
- F. In the spirit of the agencies' commitment to develop agreed upon methods for use in making wetland delineations, subsequent revisions or amendments to the Corps 1987 manual or portions of the NFSAM affecting the wetland delineation procedures upon which this agreement is based will require the concurrence of the four signatory agencies.
- G. A final written wetland delineation made by SCS pursuant to the terms of this MOA will be adhered to by all the signatory agencies and will be effective for a period of five years from the date the delineation is made final, unless new information warrants revision of the delineation before the expiration date. Such new information may include, for example, data on landscape changes caused by a

major flood, or a landowner's notification of intent to abandon agricultural use and the return of wetland conditions on a prior converted cropland. In accordance with Section 1222 of the FSA, SCS will update wetland delineations on this five-year cycle. Circumstances under which SCS wetland delineations made prior to the effective date of this agreement will be considered as final for Section 404 purposes are addressed in Paragraph V.C.

- H. Within the course of administering their Swampbuster responsibilities, SCS and FWS will provide landowners/operators general written information (i.e., EPA/Corps fact sheets) regarding the CWA Section 404 program permit requirements, general permits, and exemptions. The SCS and FWS will not, however, provide opinions regarding the applicability of CWA Section 404 permit requirements or exemptions.
- I. USDA will maintain documentation of all final written SCS wetland delineations and record the appropriate label and boundary information on an official wetland delineation map. USDA will make this information available to the signatory agencies upon request.
- J. In pursuing enforcement activities, the signatory agencies will rely upon delineations made by the lead agency, as clarified below, providing a single Federal delineation for potential violations of Section 404 or Swampbuster. Nothing in this MOA will diminish, modify, or otherwise affect existing EPA and Corps enforcement authorities under the CWA and clarified in the 1989 "EPA/Army MOA Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act." EPA, the Corps, and SCS may gather information based on site visits or other means to provide additional evidentiary support for a wetland delineation which is the subject of a potential or ongoing CWA Section 404 or Swampbuster enforcement action.
- K. For those lands where SCS has not made a final written wetland delineation, and where the Corps or EPA is pursuing a potential CWA violation, the lead agency for the CWA enforcement action will conduct a jurisdictional delineation for the purposes of Section 404 and such delineations will be used by SCS for determining Swampbuster jurisdiction and potential Swampbuster violations. For those lands where the Corps has not made a final written wetland delineation, and where SCS is pursuing a potential Swampbuster violation, SCS will make a final written wetland delineation consistent with Sections IV.A, IV.B, and IV.C of this MOA and provide copies to the Corps and EPA. Such delineations will be used by the Corps and EPA for the purpose of determining potential violations of the CWA. In circumstances in which either the Corps or EPA is pursuing a potential CWA violation on land that is subject to an ongoing SCS appeal, a wetland delineation will be conducted by the Corps or EPA in consultation with SCS and FWS.

- L. In making wetland delineations, the agencies recognize that discharges of dredged or fill material that are not authorized under Section 404 cannot eliminate Section 404 jurisdiction, and that wetlands that were converted as a result of unauthorized discharges remain subject to Section 404 regulation.

## V. PROCEDURES

Accurate and consistent wetland delineations are critical to the success of this MOA. For this reason, the signatory agencies will work cooperatively at the field level to:

- 1) achieve interagency concurrence on mapping conventions used by SCS for wetland delineations on agricultural lands, 2) provide EPA and Corps programmatic review of SCS delineations, and 3) certify wetland delineations in accordance with Section 1222(a)(2) of the FSA, as amended. The following sections describe the procedures that will be followed to accomplish these objectives.

### A. MAPPING CONVENTIONS

1. Each SCS State Conservationist will take the lead in convening representatives of the Corps, EPA, FWS, and SCS to obtain the written concurrence of each of the signatory agencies, within 120 calendar days of the effective date of this MOA, on a set of mapping conventions for use in making wetland delineations. Only mapping conventions concurred upon by all signatory agencies will be used by SCS for wetland delineations.
2. If interagency consensus on mapping conventions is not reached within 120 days of the date of this MOA, the State Conservationist will refer documentation of the unresolved issues to the Chief of SCS. The Chief of SCS will immediately forward copies of the State Conservationist's documentation of unresolved issues to the Corps Director of Civil Works; the EPA Director of the Office of Wetlands, Oceans, and Watersheds; and the FWS Director. Immediately thereafter, the Chief of SCS or an appropriate designee will lead necessary discussions to achieve interagency concurrence on resolution of outstanding issues, and will forward documentation of the resolution to the State Conservationist and the appropriate Headquarters offices of the signatory agencies.
3. Once interagency concurrence on mapping conventions is obtained, such mapping conventions will be used immediately in place of the earlier mapping conventions.
4. Agreed-upon mapping conventions developed at the state level will be documented and submitted, for each state, through the Chief of SCS to the Headquarters of each of the signatory agencies. State-level agreements will be reviewed by the Headquarters of the signatory agencies for the purpose of ensuring national consistency.

## B. DELINEATION PROCESS REVIEW AND OVERSIGHT

1. **This MOA emphasizes the need to ensure consistency in the manner in which wetlands are identified for CWA and FSA purposes, and provides a number of mechanisms to increase meaningful interagency coordination and consultation in order for the agencies to work toward meeting this goal. In this regard, the agencies believe it is critical that efforts for achieving consistency be carefully monitored and evaluated. Consequently, this MOA establishes a monitoring and review process that will be used to provide for continuous improvement in the wetland delineation process specified in this MOA.**
  
2. **EPA will lead the signatory agencies in establishing interagency oversight teams at the state level to conduct periodic review of wetland delineations conducted under the provisions of this MOA. These reviews will include delineations done by SCS pursuant to Sections IV.A, IV.B, and IV.C of this MOA and delineations done by EPA or the Corps pursuant to Section IV.K of this MOA. These reviews also will include changes to wetland delineations resulting from the SCS appeals process, as well as disagreements regarding allocation of responsibility. These reviews will occur, at a minimum, on a quarterly basis for the first year, on a semi-annual basis for the second year, and annually thereafter. In addition, a review will be initiated whenever one or more of the signatory agencies believes a significant issue needs to be addressed. The purpose of each review will be to evaluate the accuracy of an appropriate sample of wetland delineations. When feasible, this will include actual field verifications of wetland delineations. Should the interagency oversight team identify issues regarding implementation of this MOA or wetland delineations conducted under the provisions of this MOA, the team will work to resolve those issues and reach agreement on any necessary corrective actions. Each review, and any necessary corrective action, will be documented in a report to be distributed to the signatory agencies' appropriate field and Headquarters offices.**
  
3. **In situations in which the interagency oversight team identifies and reports unresolved issues concerning wetland delineations conducted under the provisions of this MOA, including changes to wetland delineations resulting from the SCS appeals process, the Headquarters offices of the signatory agencies will informally review the issue and work to reach agreement on any necessary corrective actions. This informal process notwithstanding, the EPA Regional Administrator or the Corps District Engineer may, at any time, propose to designate a geographic area as a "special case".**

4. **Similar to the terms of the current Memorandum of Agreement between the Department of the Army and the EPA Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA, the EPA Regional Administrator or the Corps District Engineer may propose to designate a geographic area, or a particular wetland type within a designated geographic area, as a special case. A special case may be designated only after the interagency oversight team (EPA, Corps, SCS, and FWS) has reviewed the relevant issues and been unable to reach a consensus on an appropriate resolution. Special cases will be designated by an easily identifiable political or geographic subdivision, such as a township, county, parish, state, EPA Region, or Corps division or district, and will be marked on maps or using some other clear format and provided to the appropriate EPA, Corps, FWS, and SCS field offices. Proposed designations of special cases will not be effective until approved by EPA or Corps Headquarters, as appropriate.**
5. **Upon proposing a special case, the EPA Regional Administrator or Corps District Engineer, as appropriate, will notify the appropriate SCS State Conservationist in writing. Following notification of the proposed designation, SCS will not make wetland delineations for the purposes of CWA jurisdiction within the proposed special case for a period of 20 working days from the date of the notification. SCS may proceed to make wetland delineations for CWA purposes in the proposed special case after the 20-day period if the SCS State Conservationist has not been notified by the EPA Regional Administrator or Corps District Engineer of approval of the proposed special case designation by EPA Headquarters or the Corps Director of Civil Works, as appropriate.**
6. **Following approval of the proposed special case, the Corps, or EPA as appropriate, will make final CWA wetland delineations in the special case area, rather than SCS. In addition, the referring field office (i.e., either the EPA Regional Administrator or Corps District Engineer) will develop draft guidance relevant to the specific issues raised by the special case and forward the draft guidance to its Headquarters office. The Headquarters office of the agency which designated the special case will develop final guidance after consulting with the signatory agencies' Headquarters offices. EPA concurrence will be required for final guidance for any special case designated by the Corps. Special cases remain in effect until final guidance is issued by the Headquarters office of the agency which designated the special case or the designation is withdrawn by the EPA Regional Administrator or Corps District Engineer, as appropriate.**

**C. RELIANCE ON PREVIOUS SCS WETLAND DELINEATIONS FOR CWA PURPOSES**

1. Section 1222 of the FSA, as amended by the Food Agriculture Conservation and Trade Act, provides that SCS will certify SCS wetland delineations made prior to November 28, 1990. The intent of this process is to ensure the accuracy of wetland delineations conducted prior to November 28, 1990, for the purposes of the FSA. This certification process also will provide a useful basis for establishing reliance on wetland delineations for CWA purposes. All certifications done after the effective date of this MOA that are done using mapping conventions will use the agreed-upon mapping conventions pursuant to Section V.A of this MOA.
2. Written SCS wetland delineations for lands identified in Section IV.A of this MOA conducted prior to the effective date of this MOA will be used for purposes of establishing CWA jurisdiction, subject to the provisions of Section V.C.3 below. If such SCS wetland delineations are subsequently modified or revised through updated certification, these modifications or revisions will supersede the previous delineations for purposes of establishing CWA jurisdiction. Written SCS wetland delineations for lands identified in Sections IV.B and IV.C of this MOA conducted prior to the effective date of this MOA will require coordination with the Corps, or EPA as appropriate, before being used for purposes of determining CWA jurisdiction.
3. As part of the certification effort, SCS will establish priorities to certify SCS wetland delineations. In addition to responding to requests from individual landowners who feel their original wetland determinations were made in error, SCS will give priority to certifying those wetland delineations where at least two of the four signatory agencies represented on the interagency oversight team convened pursuant to Section V.B.2 of this MOA agree that SCS wetland delineations in a particular area, or a generic class of SCS wetland delineations in a particular area, raise issues regarding their accuracy based on current guidance. These priority areas will be identified only after mapping conventions are agreed upon pursuant to Section V.A of this MOA. Identification of these high priority certification needs shall be made at the level of the SCS State Conservationist, FWS Regional Director, EPA Regional Administrator, and the Corps District Engineer. Following identification of these high priority certification needs, the SCS State Conservationist will immediately notify the affected landowner(s), by letter, that the relevant SCS wetland delineations have been identified as a high priority for being certified under Section 1222 of the FSA. In addition, the notification will inform the landowner that while previous wetland delineations remain valid for



purposes of the FSA until certification or certification update is completed, the landowner will need to contact the Corps before proceeding with discharges of dredged or fill material. This communication by the landowner will enable the Corps to review the wetland delineation to establish whether it can be used for purposes of CWA jurisdiction. The SCS State Conservationist will initiate, within 30 calendar days of landowner notification, corrective measures to resolve the wetland delineation accuracy problem.

#### **D. APPEALS**

Landowners for whom SCS makes wetland delineations for either Swampbuster or Section 404 will be afforded the opportunity to appeal such wetland delineations through the SCS appeals process. In circumstances where an appeal is made and the State Conservationist is considering a change in the original delineation, the State Conservationist will notify the Corps District Engineer and the EPA Regional Administrator to provide the opportunity for their participation and input on the appeal. FWS also will be consulted consistent with the requirements of current regulations. The Corps and EPA reserve the right, on a case-by-case basis, to determine that a revised delineation resulting from an appeal is not valid for purposes of Section 404 jurisdiction.

#### **E. TRAINING**

- 1. SCS, in addition to FWS and EPA, will continue to participate in the interagency wetland delineation training sponsored by the Corps, which is based on the most current manual used to delineate wetlands for purposes of Section 404. Completion of this training will be a prerequisite for field staff of all signatory agencies who delineate wetlands on non-agricultural lands using the 1987 Corps Wetland Delineation Manual.**
- 2. The interagency wetland delineation training will address agency wetland delineation responsibilities as defined by this MOA, including SCS NFSAM wetland delineation procedures.**
- 3. Field offices of the signatory agencies are encouraged to provide supplemental interagency wetland delineation training (i.e., in addition to that required in paragraph IV.E), as necessary, to prepare SCS field staff for making Section 404 wetland delineations. For training on the use of the 1987 Corps Wetland Delineation Manual, such supplemental training will rely on the training materials used for the Corps delineation training program and will provide an equivalent level of instruction.**

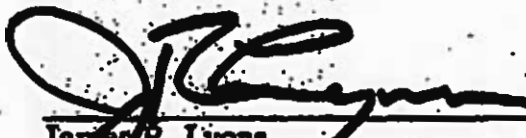
## **VI. DEFINITIONS**

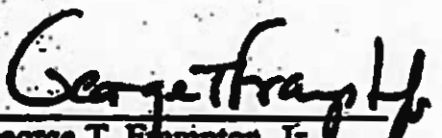
- A. **"Coordination"** means that SCS will contact the Corps, or EPA as appropriate, and provide an opportunity for review, comment, and approval of the findings of SCS prior to making a final delineation. The Corps, or EPA as appropriate, will review the proposed delineation and respond to SCS regarding its acceptability for CWA Section 404 purposes within 45 days of receipt of all necessary information. SCS will not issue a final delineation until agreement is reached between SCS and the Corps or EPA, as appropriate.
- B. **"Consultation"** means that SCS, consistent with current provisions of the FSA, will provide FWS opportunity for full participation in the action being taken and for timely review and comment on the findings of SCS prior to a final wetland delineation pursuant to the requirements of the FSA.
- C. A **"wetland delineation"** is any determination of the presence of wetlands and their boundaries.
- D. A **"special case"** for the purposes of this MOA refers to those geographic areas or wetland types where the Corps or EPA will make final CWA wetland delineations.
- E. **"Signatory agencies"** means the EPA and the Departments of Army (acting through the Corps), Agriculture (acting through SCS), and Interior (acting through FWS).
- F. **"USDA program participant"** means individual landowners/operators eligible to receive USDA program benefits covered under Title XII of the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation and Trade Act of 1990.


## **VII. GENERAL**

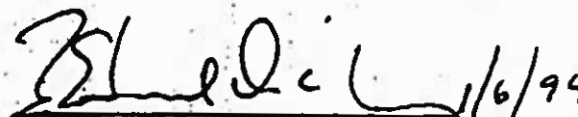
- A. The policy and procedures contained within this MOA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by the United States. Deviation or variance from the administrative procedures included in this MOA will not constitute a defense for violators or others concerned with any Section 404 enforcement action.
- B. Nothing in this MOA is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies. All formal guidance interpreting this MOA and background materials upon which this MOA is based will be issued jointly by the agencies.

- C. Nothing in this MOA will be construed as indicating a financial commitment by SCS, the Corps, EPA, or FWS for the expenditure of funds except as authorized in specific appropriations.
- D. This MOA will take effect on the date of the last signature below and will continue in effect until modified or revoked by agreement of all signatory agencies, or revoked by any of the signatory agencies alone upon 90 days written notice. Modifications to this MOA may be made by mutual agreement and Headquarters level approval by all the signatory agencies. Such modifications will take effect upon signature of the modified document by all the signatory agencies.
- E. The signatory agencies will refer delineation requests to the appropriate agency pursuant to this MOA.

 1/6/94  
 James R. Lyons  
 Assistant Secretary for Natural  
 Resources and Environment  
 U.S. Department of Agriculture

 1/5/94  
 George T. Frampton, Jr.  
 Assistant Secretary for Fish and  
 Wildlife and Parks  
 U.S. Department of the Interior

 1-4-94  
 Robert Perciasepe  
 Assistant Administrator for Water  
 U.S. Environmental Protection Agency

 1/6/94  
 G. Edward Dickey  
 Acting Assistant Secretary of the  
 Army for Civil Works  
 U.S. Department of the Army

**PART IV - MEMORANDA OF AGREEMENT**

**Subsection 6a**

**Implementation of Wetlands Delineation  
Memorandum of Agreement in San Francisco Bay (1-  
6-94)**



MEMORANDUM

January 6, 1994

**SUBJECT:** Implementation of Wetlands Delineation Memorandum of Agreement in San Francisco Bay

**FROM:** Robert H. Wayland, III  
Director  
Office of Wetlands, Oceans, and Watershed  
Environmental Protection Agency

Michael L. Davis  
Assistant for Regulatory Affairs  
Office of the Assistant Secretary  
of the Army (Civil Works)  
Department of the Army

Paul Johnson, Chief  
Soil Conservation Service  
Department of Agriculture

for Michael J. Spear  
Assistant Director for Ecological Services  
Fish and Wildlife Service

**TO:** Harry Seraydarian  
Director  
Water Management Division  
Environmental Protection Agency, Region IX

Calvin Fong, Chief  
Regulatory Branch  
U.S. Army Corps of Engineers, San Francisco District

Henry Wyman  
Acting State Conservationist, California  
Soil Conservation Service

Marvin L. Plenert  
Regional Director, Region I  
Fish and Wildlife Service

Recognizing the need to minimize duplication and inconsistencies between Food Security Act (FSA) and Clean Water Act (CWA) wetlands programs, our agencies have entered into a Memorandum of Agreement (MOA) on January 6, 1994, that makes the Soil Conservation Service the lead federal agency for delineating wetlands on agricultural lands. We are committed to the

underlying principles of this new MOA, and look forward to working with our new partners to make our wetlands programs more fair, flexible, and effective.

However, as you are aware, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) have historically encountered significant difficulty in making jurisdictional determinations in the San Francisco Bay area for the purposes of CWA Section 404 and Section 10 of the Rivers and Harbors Act of 1899. These difficulties have involved contentious debate and litigation concerning questions of historical navigation, effects of constructed dikes on jurisdiction, and the relationship between Section 404 and Section 10 jurisdiction.

Recognizing these difficulties, we have agreed that it would be inconsistent with the objectives of the MOA for SCS to take the lead in making CWA wetlands delineations on agricultural lands in the San Francisco Bay area until EPA and the Corps can resolve these outstanding legal, technical and policy issues. Therefore, the San Francisco Bay area will be the sole area where the Corps and EPA will retain responsibility for CWA wetland jurisdictional delineations on all lands, including agricultural lands, until such time that the MOA's signatory agencies have resolved the San Francisco Bay area's jurisdictional issues and it would be appropriate to make SCS the lead agency for making wetland delineations on lands identified in paragraphs IV.A., B., and C. of the MOA. That is, for this interim period, paragraphs IV. A., B., and C. of the MOA will not apply to the San Francisco Bay area. This interim action does not affect SCS's ability to continue to make wetland delineations for the purposes of the FSA in the San Francisco Bay area. Moreover, consistent with the MOA, the agencies will fully coordinate all wetland delineations for the purposes of the CWA or the FSA in the San Francisco Bay area prior to making those delineations final in order to ensure consistency to the fullest practical extent. The agencies will develop local procedures to provide for coordination in making wetland delineations during this interim period. The agencies will also coordinate in the San Francisco Bay area consistent with the other provisions of the MOA, such as developing mapping conventions, certifying delineations, training and so forth, to ensure the goals of the MOA are achieved.

It is important to note that the need to maintain the Corps and EPA as the lead agencies for making wetlands delineations in the San Francisco Bay area at this time is based, in large part, on the unique history of the Bay. For example, it is estimated that over 2,200 square kilometers of tidal marshes once existed in the San Francisco, San Pablo, and Suisun Bays, and that approximately 95% of these wetlands have since been destroyed by various activities, leaving today only 125 square kilometers of tidal marsh. During the late 1800's and early 1900's, extensive

areas within the San Francisco Bay system were diked to facilitate agricultural activities and salt production. Moreover, much of the area originally diked for grazing, pasture and cropland has been subsequently converted to solar evaporation ponds for salt production.

In addition, many of these diked areas are still below the mean high tide line today and retain wetland characteristics. Factors affecting the wetland character of these diked areas include current land use, condition of the dikes, elevation, exposure to tidal exchange, freshwater input from ponding of rainwater, and sediment salinities. These factors directly affect hydrology, soils and vegetation characteristics which, in turn, directly influence the technical considerations required to determine the presence of wetlands under the CWA.

These factors, in combination with numerous policy considerations that are relevant to the determination of CWA jurisdiction, have also presented difficulties in determining jurisdiction in the San Francisco Bay area. For example, EPA and Corps CWA implementing regulations define "waters of the United States" to include all waters that are currently used, or were used in the past, or may be susceptible to future use, in interstate or foreign commerce, including areas subject to tidal influence. CWA jurisdiction over "waters of the United States" also explicitly includes wetlands adjacent to waters that were, are, or are susceptible for use in interstate or foreign commerce. Coincidentally, the Corps regulations defining the scope of waters under the jurisdiction of Section 10 of the Rivers and Harbors Act uses almost identical language, leaving the Corps almost always in the position of determining concurrently the scope of federal jurisdiction in the San Francisco Bay area under both programs. Further, historical tidal influence over broad areas in the San Francisco Bay area, past and current land use patterns involving agriculture and salt production involving interstate commerce questions, extensive diking and other hydrological modification that affects tidal reach and influences adjacency determinations, are a few of the practical policy considerations that complicate virtually every jurisdictional determination under both the CWA and the Rivers and Harbors Act in the San Francisco Bay area.

The difficulties associated with making jurisdictional determinations in the San Francisco Bay area have made this issue one that has also been subject to numerous legal challenges. One recent case finally decided in the Ninth Circuit Court of Appeals explicitly considered federal jurisdiction over wetlands and isolated ponds in San Francisco Bay area (*Leslie Salt Co. v. United States*, 896 F.2d 354, cert. denied, 111 S. Ct. 1089 (1991)). This case provides a clear example of the extensive and complicated technical, policy and legal factors involved in San Francisco Bay area jurisdictional determinations. In reaching

its decision, the court considered issues involving the demonstration of federal interest under the Constitution's commerce clause, technical questions involving the presence of vegetation "under normal circumstances," and policy considerations affecting jurisdiction over created and man-made waters.

The agencies will need to continue to coordinate in an effort to clarify the criteria for determining jurisdiction over waters in the San Francisco Bay area. A number of technical and policy issues will need to be further clarified in the context of existing regulations and case law and as we expand our scientific understanding of the unique physical, chemical and biological characteristics of San Francisco Bay area wetlands. Once these issues are resolved, the MOA will be fully implemented and the SCS will assume the lead for making wetlands delineations for lands identified in paragraphs IV.A., B., and C. of the MOA in the San Francisco Bay area .

Representatives from the four Headquarters offices will immediately initiate conversations with you to define the exact geographic scope of those areas of the San Francisco Bay where, on an interim basis, the Corps and EPA will retain responsibility for CWA wetland jurisdictional delineations. The scope will be defined by easily identifiable boundaries to ensure full public understanding. We look forward to working with you to minimize problems associated with this issue and to resolve the outstanding jurisdictional questions as expeditiously as possible so the MOA can be fully implemented in the San Francisco Bay area.



# **Part V - Protecting America's Wetlands: A Fair, Flexible Approach**

## *Section 1*

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**PART V - PROTECTING AMERICA'S WETLANDS**

**Section 1**

**Protecting America's Wetlands: A Fair, Flexible  
Approach (8-24-93)**

***PROTECTING AMERICA'S WETLANDS:  
A FAIR, FLEXIBLE,  
AND EFFECTIVE APPROACH***

**WHITE HOUSE OFFICE  
ON ENVIRONMENTAL POLICY**

**August 24th, 1993**

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## I. INTRODUCTION

The Clinton Administration is proposing a comprehensive package of improvements to the Federal wetlands program that reflects a new broad-based consensus among Federal agencies. For years, many have argued that the Federal government badly needed to improve its wetlands program to make it fairer and more effective. But for too long, contradictory policies from feuding Federal agencies have blocked progress, creating uncertainty and confusion. This wetlands package reflects a sharp break through the past gridlock caused by warring Federal agencies and contains a balanced, common sense, workable set of improvements that will make the program simpler, fairer, better coordinated with state and local efforts and more effective at protecting wetlands.

The Nation's wetlands perform many functions that are important to society, such as improving water quality, recharging groundwater, providing natural flood control, and supporting a wide variety of fish, wildlife and plants. The economic importance of wetlands to commercial fisheries and recreational uses is also enormous. The Nation has lost nearly half of the wetland acreage that existed in the lower 48 States prior to European settlement. The Nation's wetlands continue to be lost at a rate of hundreds of thousands of acres per year due to both human activity and natural processes. This continued loss occurs at great cost to society.

Notwithstanding the importance of wetland resources, efforts to protect wetlands have caused considerable controversy. It is estimated that 75 percent of the Nation's wetlands in the lower 48 States are located on private property. It is, therefore, imperative to recognize and consider fully the impacts of wetlands protection policies on individuals who own wetland property. Statutory, regulatory, and policy objectives should be accomplished in a manner that avoids unnecessary impacts upon such landowners.

Given the environmental and economic significance of wetlands, the alarming rate of wetlands loss, and concerns for private landowners, the Interagency Working Group on Federal Wetlands Policy began developing a comprehensive package of initiatives in June. The policy positions contained in this paper strongly support the effective protection and restoration of the Nation's wetlands, while advocating much-needed reforms to increase the fairness and flexibility of Federal regulatory programs.

## II. A DIVISIVE DEBATE

Federal programs to protect the Nation's wetlands have been the focus of considerable controversy in recent years. Much of the attention focused upon the 1989 Interagency Wetlands Delineation Manual (1989 Manual). The 1989 Manual was prepared jointly by the U.S. Army Corps of Engineers (the Corps), the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS) of the Department of the Interior, and the Department of Agriculture's Soil Conservation Service (SCS). It was developed in response to criticism that Federal agencies

were not using a single set of common procedures to "delineate" — or identify — wetlands under the jurisdiction of programs administered by these agencies.

But rather than alleviating concerns about inconsistency, the 1989 Manual only further fueled the controversy. Critics claimed that the 1989 Manual represented a major expansion of regulatory jurisdiction without opportunity for public participation. In response, the Bush Administration embarked upon a closed-door effort to revise the 1989 Manual. This process resulted in the technically flawed 1991 Manual that would have dramatically and indefensibly reduced the amount of wetlands subject to protection. The proposed 1991 Manual generated even further controversy and resulted in even greater polarization of the debate on Federal wetlands policy.

In addition to assailing the 1989 Manual, critics of Federal wetlands regulatory programs effectively characterized those programs as unfair, inflexible, inconsistent, and confusing. Supporters of wetlands protection responded — with equal effectiveness — by emphasizing the environmental and economic benefits associated with protecting the Nation's wetlands.

As both sides voiced their strongly held opinions, the debate over Federal wetlands policy became increasingly divisive. The opposition that developed to both the 1989 and 1991 Manuals demonstrated the policy deadlock that had developed. Wetlands policy has become one of the most controversial environmental issues facing the Federal government, just as Congress embarks upon the reauthorization of the Clean Water Act.

### **III. THE INTERAGENCY WORKING GROUP ON FEDERAL WETLANDS POLICY**

The Administration convened the Interagency Working Group on Federal Wetlands Policy in early June with the goal of developing a package of Clinton Administration initiatives to break the deadlock over Federal wetlands policy. The group has been chaired by the White House Office on Environmental Policy and has included the participation of the EPA, the Army (the Corps of Engineers), the Office of Management and Budget, and the Departments of Agriculture, Commerce, Energy, Interior, Justice, and Transportation.

The working group sought the views of a broad range of stakeholders representing all perspectives in the wetlands debate. For example, the working group has received presentations that have included: a bipartisan group of eight members of the U.S. Congress; representatives of State and local government; environmentalists; the development community; agricultural interests; scientists and others.

After listening to this broad range of interests, the working group began its policy deliberations by establishing the following five principles that serve as the framework for the Administration's comprehensive package of wetlands reform initiatives.

#### IV. FIVE PRINCIPLES FOR FEDERAL WETLANDS POLICY

- 1) The Clinton Administration supports the interim goal of no overall net loss of the Nation's remaining wetlands, and the long-term goal of increasing the quality and quantity of the Nation's wetlands resource base;
- 2) Regulatory programs must be efficient, fair, flexible, and predictable, and must be administered in a manner that avoids unnecessary impacts upon private property and the regulated public, and minimizes those effects that cannot be avoided, while providing effective protection for wetlands. Duplication among regulatory agencies must be avoided and the public must have a clear understanding of regulatory requirements and various agency roles;
- 3) Non-regulatory programs, such as advance planning; wetlands restoration, inventory, and research; and public/private cooperative efforts must be encouraged to reduce the Federal government's reliance upon regulatory programs as the primary means to protect wetlands resources and to accomplish long-term wetlands gains;
- 4) The Federal government should expand partnerships with State, Tribal, and local governments, the private sector and individual citizens and approach wetlands protection and restoration in an ecosystem/watershed context; and
- 5) Federal wetlands policy should be based upon the best scientific information available.

#### V. A COMPREHENSIVE PACKAGE OF REFORMS

Building upon these principles, the working group has developed a comprehensive package of initiatives that will significantly reform Federal wetlands policy, while maintaining protection of this vital natural resource. This package includes regulatory reforms and innovative, non-regulatory policy approaches; it includes administrative actions that will take effect immediately, and legislative recommendations for Congress to consider during the reauthorization of the Clean Water Act. The Clinton Administration looks forward to working closely with the Congress to implement this new approach to Federal wetlands policy. In addition, the Administration will establish an ongoing interagency working group, to be chaired by the Office on Environmental Policy, to monitor the implementation of the initiatives contained in the reform package.

The reform package includes the following initiatives:

- To affirm its commitment to conserving wetlands resources, the Administration will issue an Executive Order embracing the interim goal of no overall net loss of the Nation's remaining wetlands resource base, and a long-term goal of increasing the quality and quantity of the Nation's wetlands;

- **To increase fairness in the wetlands permitting process, the Corps will establish an administrative appeals process so that landowners can seek recourse short of going to court;**
- **To increase fairness and efficiency in the wetlands permitting process, the Corps will establish deadlines for wetlands permitting decisions under the Clean Water Act;**
- **To reduce uncertainty for American farmers, yesterday the Corps and EPA issued a final regulation ensuring that approximately 53 million acres of prior converted cropland -- areas which no longer exhibit wetlands characteristics -- will not be subject to wetlands regulations;**
- **To reduce duplication and inconsistency for American farmers, the Soil Conservation Service will be the lead Federal agency responsible for identifying wetlands on agricultural lands under both the Clean Water Act and the Food Security Act;**
- **To close a loophole that has led to the degradation and destruction of wetlands, yesterday the Corps and EPA issued a final regulation to clarify the scope of activities regulated under the Clean Water Act;**
- **To emphasize that all wetlands are not of equal value, yesterday EPA and the Corps issued guidance to field staff highlighting the flexibility that exists to apply less vigorous permit review to small projects with minor environmental impacts;**
- **To ensure consistency and fairness, the Army Corps of Engineers, the Environmental Protection Agency, the Soil Conservation Service, and the Fish and Wildlife Service will all use the same procedures to identify wetland areas;**
- **To increase the predictability and environmental effectiveness of the Clean Water Act regulatory program and to help attain the no overall net loss goal, the Administration endorses the use of mitigation banks;**
- **To reduce the conflict that can result between wetlands protection and development when decisions are made on a permit-by-permit basis, the Administration strongly supports incentives for States and localities to engage in watershed planning;**
- **To provide effective incentives for farmers to restore wetlands on their property, the Administration will continue to support increased funding for the USDA's Wetland Reserve Program; and**



- To attain the long-term goal of increasing the quantity and quality of the Nation's wetlands, the Administration will promote the restoration of damaged wetland areas through voluntary, non-regulatory programs.

The complete package of reform initiatives follows. (Some initiatives are listed under more than one heading for the sake of clarity.) By proposing an approach based upon effective protection and restoration of the Nation's wetlands, while adopting much-needed reforms to increase the fairness and flexibility of regulatory programs, the Administration's reform package offers a tremendous opportunity to move beyond the divisiveness that has characterized the wetlands policy debate in recent years.

## A. ADDRESSING LANDOWNER CONCERNS

**Issue Definition:** The program that regulates wetlands under Section 404 of the Clean Water Act has been criticized as being slow, unpredictable and unfair. For example, it has been claimed that permits take too long to obtain; that wetlands delineations are sometimes slow, inaccurate, and inconsistent; and that it is unfair that the Corps does not provide a process by which landowners can appeal a jurisdictional determination or the denial of a wetlands permit short of suffering the expense of going to court.

**Administration Position:** The Clinton Administration believes that the Federal government has a responsibility to the public to conduct such regulatory programs in a manner that is efficient, responsive and fair. Therefore, the Administration supports the following reforms that will reduce the impact of regulation on the public, while meeting our objectives to protect wetlands:

● **Deadlines for Permit Action** Within one year the Corps will modify its regulations, through a public rulemaking process, to establish regulatory deadlines for reaching decisions regarding permit applications. The regulations will generally require the Corps to reach permit decisions within 90 days from the date of issuance of the public notice, unless precluded by other laws, such as the National Environmental Policy Act. The Administration will strongly support the additional personnel and funding necessary to meet these deadlines for permit action.

● **The Adoption of an Appeals Process** Within one year, the Corps will develop an administrative appeals process under the Section 404 regulatory program. The process, which will be implemented after a public rulemaking, will be designed to allow for administrative appeals of the Corps' determination that it has regulatory jurisdiction over a particular parcel of property, permit denials, and administrative penalties. The process will allow third parties to participate in applicant appeals of permit denials and will require that applicants exercise their right to appeal before initiating judicial action. The Administration will strongly support the additional personnel and funding necessary to implement successfully the appeals process.

The USDA already has an appeals process in place and landowners will be able to appeal SCS wetlands delineations through that administrative process.

● ***Delineation Training and Certification*** All employees of Federal agencies who conduct wetlands delineations will be required to complete the interagency wetlands delineation training program to improve accuracy and consistency in delineation in Federal wetlands programs or have comparable training and experience. As appropriate, State and Tribal agencies will also be encouraged to participate in the Federal training program. In addition, by the end of 1993, the Corps will propose regulations for implementing a certification program for private sector delineators.

By requiring training of Federal delineators, jurisdictional determinations can be done more accurately and consistently across the country. By encouraging the growth of a pool of certified private sector wetlands consultants, jurisdictional determinations can be performed far more quickly than if the job is solely the responsibility of Federal agency personnel. In addition, the Corps will streamline the process by which it considers and accepts delineations performed by certified wetlands consultants.

● ***Promote Voluntary, Cooperative Programs.*** With 75 percent of the Nation's remaining wetlands in the lower 48 States located on privately owned property, it is clear that cooperation with the private sector in implementation of wetlands protection and restoration activities is critical. Advance planning (see next issue) offers an excellent opportunity to involve the public in general, and property owners in particular, in developing and implementing wetlands protection and restoration plans. The Administration will support planning activities that include cooperative activities with property owners, and will increase support for programs that assist landowners in the implementation of such plans through restoration, technical assistance and information programs.

## B. ADVANCE PLANNING AND WATERSHED MANAGEMENT

**Issue Definition:** Typically, decisions affecting wetlands are made on a project-by-project, permit-by-permit basis. This often precludes the effective consideration of the cumulative effects of piecemeal wetlands loss and degradation. It also hampers the ability of State, Tribal, regional, and local governments to integrate wetlands conservation objectives into the planning, management, and regulatory tools they use to make decisions regarding development and other natural resource issues. This can often result in inconsistent and inefficient efforts among agencies at all levels of government, and frustration and confusion among the public.

In contrast, advance planning, particularly comprehensive planning conducted on a watershed basis, offers the opportunity to have strong participation by State, Tribal, and local governments and private citizens in designing and implementing specific solutions to the most pressing environmental problems of that watershed. Advance planning generally involves at least the

identification, mapping, and preliminary assessment of relative wetland functions within the planning area. More comprehensive advance planning may identify wetlands that merit a high level of protection and others that may be considered for development, and may also incorporate wetlands conservation into overall land use planning at the local level. Advance planning can provide greater predictability and certainty to property owners, developers, project planners, and local governments.

**Administration Position:** To encourage greater use of comprehensive advance planning, particularly with State, Tribal, regional, and local involvement, and to identify wetlands protection and restoration needs, opportunities, and concerns, the Administration supports the following actions:

● **Provide Incentives for States/Locals to Integrate Watershed and Wetlands Planning.** The Clean Water Act should authorize the development of State watershed protection programs, which should include local and regional involvement and Federal approval of the State programs. Wetlands should be incorporated into the overall watershed approach, with minimum standards for wetlands protection and restoration planning. Approved watershed plans would receive a high priority for technical and financial support for activities such as mitigation banking, advance identification, and watershed-based categorization under the Section 404 regulatory program. There would also be a high priority given to developing Programmatic General Permits that defer to local regulatory programs implementing approved watershed plans.

● **Endorse State/Tribal Wetlands Conservation Plans.** Congress should endorse the development of State/Tribal comprehensive wetland plans, with the goal of supporting State and Tribal efforts to protect and manage their wetlands resources. EPA is currently funding the development of 22 State Wetlands Conservation Plans; Congress should provide EPA the authority to use its Wetlands Grants program to fund both their development and implementation.

● **Provide for Greater Integration of Advance Planning Into the Section 404 Regulatory Program.** The Administration will support efforts to better integrate advance planning into the Section 404 regulatory program, including appropriate local or watershed-based categorization frameworks and regionalized improvements to implementation of the existing Nationwide Permit 26 in headwaters and isolated waters. Such opportunities are expected to grow as States, Tribes, and regional and local governments progress on watershed plans, State Wetlands Conservation Plans, and other wetlands-related planning processes. Where State, Tribal, regional, or local governments have approved watershed plans that address wetlands, EPA and the Corps will give high priority to assisting with the development of categorization of wetland resources for the purpose of Section 404. Categorization approaches should be local or regional in nature, and reflect the full range of impacts and functions that affect wetlands within the watershed or planning area.

- ***Programmatic General Permits (PGPs) Under Section 404.*** The Corps will issue guidance which specifies the circumstances under which State, Tribal, regional, and local governments with existing regulatory programs may assume a more active role in wetlands protection while reducing duplication with Federal programs. PGPs are extremely useful in reducing unnecessary duplication between Federal and non-Federal regulatory programs and in generally enhancing the role of State and local governments and of advance planning, in decisions regarding wetlands and other aquatic resources. The Administration recommends that Congress amend Section 404(e) of the Clean Water Act to provide explicitly for issuance of PGPs, with appropriate environmental safeguards, for approved State, Tribal, regional, and local regulatory programs.
- ***Improve Nationwide Permit 26 Through Regionalization.*** In order to improve the implementation of existing Nationwide Permit 26 (NWP 26) in isolated waters and in headwater areas, the Corps, in coordination with appropriate Federal, State, and Tribal agencies, and with the opportunity for public notice and comment, will undertake a field level review of NWP 26 to develop regional descriptions of the types of waters, and the nature of activities in those waters that will not be subject to authorization under NWP 26. Advance planning efforts that have assessed the functions and values of local isolated wetlands and headwaters, and have considered factors such as cumulative losses and scarcity of particular classes of waters, will be used to facilitate this effort.
- ***Mitigation Banking.*** Wetland mitigation banking refers to the restoration, creation, enhancement, and, in certain defined circumstances, preservation of wetlands expressly for the purpose of providing compensatory mitigation in advance of discharges into wetlands authorized under the Section 404 regulatory program. Advance planning can be used to identify appropriate locations for, and uses of, mitigation banks. EPA and the Corps have issued guidance to their field staff that clarifies the manner in which wetlands mitigation banking fits in the Section 404 regulatory program. Congress should endorse the appropriate use of banking, with environmental safeguards, as a compensatory mitigation option under the Section 404 regulatory program, and explicitly allow use of the State Revolving Fund to capitalize mitigation banks.
- ***Promote Voluntary, Cooperative Programs.*** With approximately 75 percent of the Nation's remaining wetlands in the lower 48 States located on privately owned property, it is clear that cooperation with the private sector in implementation of wetlands protection and restoration activities is critical. Advance planning offers an excellent opportunity to involve the public in general, and property owners in particular, in developing and implementing wetlands protection and restoration plans. The Administration will support planning activities that include cooperative activities with property owners, and will increase support for programs that assist landowners in the implementation of such plans through restoration, technical assistance, and education and information programs.

• **Revise the Executive Order on Wetlands.** The existing Executive Order on wetlands (E.O.11990) will be revised to direct the Federal agencies to take a watershed/ecosystem approach to wetlands protection and restoration. In addition, it will require Federal agencies that conduct or assist with multi-objective natural resource planning to incorporate wetlands protection into their programs to the extent practicable.

• **Provide Better and Coordinated Information and Technical Assistance on Wetland Issues.** The Federal agencies will coordinate efforts to provide States, Tribes, regional and local governments, and the public with timely, consistent information concerning wetlands programs. The agencies will develop a strategic plan for delivering information on regulatory programs, and encourage the development of innovative education and outreach materials and initiatives to assist the public in understanding wetlands issues.

The Administration will also direct the Wetlands Subcommittee of the Federal Geographic Data Committee to complete reconciliation and integration of all Federal agency wetland inventory activities. In addition, the Administration will coordinate wetlands restoration, research, inventory, monitoring, cooperative programs, and information and education activities.

### C. AGRICULTURE

**Issue Definition:** Two Federal statutes regulate certain activities in wetlands on agricultural lands. The Food Security Act Wetlands Conservation provision, which is known as the Swampbuster program, is administered by the Soil Conservation Service (SCS) of the U.S. Department of Agriculture, in consultation with the Fish and Wildlife Service of the Department of the Interior. The Clean Water Act Section 404 program is administered jointly by the Department of the Army and the Environmental Protection Agency. American farmers have at times been subjected to needless duplication and frustrating inconsistency in the implementation of these two statutes.

**Administration Position:** The Administration recognizes the valuable contribution of agricultural producers to the Nation's economy and more generally to the American way of life. We also appreciate the challenges faced by farmers as they try to comply with wetlands regulations, as well as other environmental requirements affecting farm operations. As a result, the Administration is committed to ensuring that Federal wetlands programs do not place unnecessary restrictions or burdens on farmers and other landowners, while providing necessary environmental safeguards.

The Administration has identified a number of actions that can be taken to reduce the impact of these two wetlands protection programs on American agriculture. At the heart of this effort is a commitment on the part of all Federal agencies involved to work closely and cooperatively to coordinate their work under these two statutes so as to increase efficiency, minimize duplication, and reduce inconsistencies between the programs.

The following initiatives demonstrate our commitment to protect and restore the Nation's wetlands and eliminate unnecessary impacts on the farm community:

• ***Prior Converted Cropland Rulemaking.*** EPA and the Corps have just completed a rulemaking which assures American farmers that an estimated 53 million acres of prior converted cropland will not be subject to regulation under Section 404 of the Clean Water Act. These lands were converted from wetlands to croplands prior to the passage of the Food Security Act of 1985, which established the Swampbuster program, and no longer exhibit wetlands characteristics. The Administration is also recommending that Congress include in the Clean Water Act a definition of "waters of the United States" that explicitly excludes from Clean Water Act jurisdiction areas determined to be prior converted cropland.

• ***A Package to Eliminate Duplication and Inconsistency***

The SCS, EPA, the Corps, and FWS signed an interagency agreement on August 23, 1993 that will reduce existing overlap and inconsistencies in the implementation of Federal wetlands programs affecting agricultural lands by undertaking, within 120 days, the following initiatives:

• ***Make the SCS the Lead Agency on Agricultural Lands.*** The SCS, the Corps, EPA, and FWS will develop procedures to provide that SCS wetland delineations will represent the final government position on the extent of Swampbuster and Clean Water Act jurisdiction on agricultural lands. Interagency training programs will be developed to ensure that agency field staff are properly trained, that standard, agreed-upon methods are utilized in making delineation and mitigation determinations, and that EPA and the Corps, consistent with their statutory authorities, have the ability to monitor SCS determinations on a programmatic basis. SCS, EPA and the Corps will also coordinate enforcement responsibilities on agricultural lands to ensure that the Federal government's activities are equitable, and consistent.

• ***Guarantee Consistency in Delineations on Agricultural Lands.*** In order to ensure consistency in identifying wetlands on agricultural lands, the Corps, EPA, SCS, and FWS will all use the same procedures to delineate wetlands. The agencies will develop field guidance for implementing the 1987 Wetlands Delineation Manual to establish procedures for identifying wetlands in areas managed for agriculture. The agencies will also expedite current efforts to revise the SCS Food Security Act Manual to eliminate inconsistencies between wetlands delineation procedures in the FSA Manual and the 1987 Manual.

• ***Greatly Increase Farmers' Certainty in Agency Decisions.*** The Corps, in coordination with EPA, SCS, and FWS, will propose a Nationwide General Permit for discharges associated with "minimal effects" and "frequently cropped with mitigation" conversions determined by SCS and FWS to qualify for exemption

from Swampbuster provisions. This will provide greater certainty to the Nation's farmers that they can rely on SCS/FWS mitigation determinations. While the Nationwide permit will include appropriate conditions to protect valuable wetlands, an individual review by the Corps and EPA will generally not be required.

• **Clarify that Certain Man-Made Wetlands Are Not Jurisdictional.** The Corps and EPA will incorporate examples of certain man-made wetlands, such as non-tidal drainage and irrigation ditches excavated on upland, and irrigated lands that would revert to upland if irrigation ceased, into their regulations to clarify the types of waters that are generally not subject to Clean Water Act jurisdiction because they are created out of upland.

• **Wetlands Reserve Program.** The Wetlands Reserve Program (WRP) offers a significant opportunity to assist farmers who are interested in restoring wetlands on their property. Response by farmers to the nine State pilot program was overwhelming, with proposals for 250,000 acres of restoration by over 2300 farmers. The 1994 Appropriations conference report provides for 75,000 new acres to be enrolled in the WRP. When passed this will more than double -- to 20 -- the number of states where producers can participate in the program. The recent Midwest flood has created a particularly pressing need to assist farmers in the voluntary restoration of wetlands that have historically provided valuable flood protection. Congress should fully fund the Administration's budget requests for the WRP in 1995, and should expand the program in the 1995 Farm Bill.

#### D. CATEGORIZATION

**Issue Definition:** A persistent criticism of the Section 404 regulatory program is that the permit process is inflexible to the extent that "all wetlands are treated the same" from a regulatory perspective. Such criticisms have led to calls for a nationwide categorization system to rank wetlands based upon their relative function and importance to society.

One proposed approach would require that all of the Nation's wetlands be mapped and categorized "up front" as either "high-", "medium-", or "low-value." The ranking based upon this *a priori* categorization would, in turn, govern the regulatory response at the time of a specific permit application.

**Administration Position:** While conceptually *a priori* categorization and ranking may seem attractive, its technical, fiscal and environmental implications make it unworkable. For example, simply mapping the lower 48 States at a scale suitable for detailed regulatory use would involve a mammoth undertaking yielding nearly 14 million maps and costing in excess of \$500 million. Assessing the functions of every wetland in the country would be a far larger and more complicated task and would require staffing and funding many times that necessary to complete mapping alone.

There is currently no scientific basis for a nationwide ranking of functionally distinct and diverse wetland types; any such scheme would be extremely difficult and require many years to develop. The suggestion contained in one legislative proposal that the Federal government buy all "high-value" wetlands would be infeasible from a budgetary standpoint. The Congressional Budget Office estimates the acquisition costs alone for the lower 48 States to range between \$10 billion and \$45 billion.

Finally, an *a priori* categorization and ranking approach would not provide for consideration of the individual impacts associated with specific projects. This makes little sense from the standpoint of either development or wetlands protection. For example, small projects with minor impacts would be arbitrarily prevented from proceeding in a "high-value" wetland area. At the same time, large and environmentally damaging projects would be automatically approved if they were located in "low-value" wetland areas. A nationwide *a priori* categorization scheme would further complicate the Section 404 program and would conflict with the Administration's goals of administering a scientifically sound regulatory program that is efficient, predictable and understandable.

In contrast to nationwide *a priori* categorization, opportunities exist to provide greater predictability and certainty in the regulatory process while increasing participation at the State and local levels. Local or regionally developed advance planning at the watershed level can provide a scientifically sound and workable framework for early consideration of variations in wetland functions within the Section 404 program. Appropriate functional assessment techniques can be applied to all wetlands within the boundaries of a particular watershed or planning area, and reasonably foreseeable development needs can be superimposed upon this inventory and assessment to identify appropriate regulatory responses in advance of specific permit applications. Highly functional and ecologically significant wetlands can be identified as deserving a very high standard of protection; conversely, wetlands with limited function and ecological significance, or activities that would cause minimal environmental harm, can be identified as appropriate for general permits or other regulatory streamlining methods.

In the context of individual permit reviews, the Section 404(b)(1) Guidelines currently provide the Corps and EPA with the flexibility to appropriately scale the regulatory response to reflect the relative function of the affected wetland, the character of the proposed discharge, and the probable environmental impact.

The Administration recognizes that "all wetlands are not the same" and that permit applicants deserve a timely and predictable regulatory response that is appropriate for the project being proposed. To this end, the Administration proposes the following actions:

- *Issue Section 404(b)(1) Guidelines Flexibility Guidance.* EPA and the Corps have issued guidance to their field staff to clarify and standardize implementation of the flexibility afforded by the 404(b)(1) Guidelines to make regulatory decisions regarding the analysis of project alternatives based on the relative severity of the environmental



impact of proposed discharges. This guidance clarifies that small projects with minor impacts are subject to less rigorous permit review than larger projects with more substantial environmental impacts.

● ***Develop Improved Analytical Tools for Wetlands Functional Assessment.*** The agencies will expedite development of a new approach for wetland functional assessment known as the Hydrogeomorphic Classification System (HGM). The HGM methodology is being developed by the agencies and the academic community as an improved analytical tool to make timely and accurate assessments of wetland functions. This tool will assist the agencies in assessing the relative severity of environmental impact of proposed discharges to determine an appropriate regulatory response consistent with the 404(b)(1) Guidelines flexibility guidance referenced above.

● ***Encourage Advance Planning Efforts.*** The agencies will provide technical assistance for advance planning efforts addressing wetlands conservation, and will counsel planning participants on methods to link local or regional planning with Section 404 regulatory decision making. Wetland categorization will be supported within the context of an approved advance plan to provide landowners with early identification and characterization of wetlands on their property, streamlined permit review, and more flexible mitigation sequencing where appropriate.

● ***Regionalize General Permits for Activities in Defined Categories of Waters.*** The Section 404 program already embodies a form of wetlands categorization through use of Nationwide Permit 26 (NWP 26), a "category of waters" general permit that authorizes discharges into isolated waters and headwaters. The Corps will undertake, in close coordination with relevant State and Federal agencies, a field level review and evaluation of NWP 26 for the purpose of regionalizing and improving its use. Congress should amend Section 404(e) to recognize the concept of regionalized "category of waters" general permits.

## E. GEOGRAPHIC JURISDICTION

The term "geographic jurisdiction" encompasses a set of wetlands issues that concern the determination of which waters fall within the jurisdiction of the Section 404 program of the Clean Water Act. These issues include the delineation manual that specifies the methodology by which wetlands are identified; the definitions of "wetlands" and "waters of the United States;" "artificial" wetlands; and isolated waters. (For "Delineation Training and Certification" see ADDRESSING LANDOWNER CONCERNS.)

### **Issue Definition: Delineation Manual**

As previously indicated, there has been a great deal of controversy surrounding the manuals that Federal agencies use in the field to delineate wetlands. The 1989 Manual was strongly criticized by some who claimed that it was an attempt by the bureaucracy to greatly *expand* the geographic

jurisdiction of wetlands regulation without opportunity for public involvement. The proposed 1991 Manual that followed was roundly criticized by those who claimed that it would greatly *reduce* the scope of geographic jurisdiction applied to wetlands. In an attempt to resolve this controversy, in the fall of 1992 the Congress directed EPA to fund a National Academy of Science (NAS) study of wetlands delineation. That study is expected to be completed in the Fall of 1994. Since January 1993, both the Corps and EPA have adopted the 1987 Manual, which was in use in some parts of the country prior to the issuance of the 1989 Manual.

**Administration Position:** The Clinton Administration supports the use of the 1987 Wetlands Delineation Manual by the Corps, EPA, SCS, and FWS pending the evaluation of the NAS study. (See "Guarantee Consistency in Delineations on Agricultural Lands" under AGRICULTURE.) The use of the 1987 Manual by the Corps and EPA has increased confidence and consistency in identifying wetlands and has diminished the controversy associated with the 1989 and 1991 manuals. If the Federal agencies jointly conclude that the 1987 Manual should be revised to respond to recommendations of the NAS, any proposed changes will be the subject of a process that will provide full opportunity for public comment. In addition, any proposed changes will be field tested by the agencies prior to final adoption to determine their impact in the real world.

To increase public confidence in the Section 404 regulatory program, the Administration recommends that the Congress endorse the continued use of the 1987 Manual in the reauthorization of the Clean Water Act, pending recommendations that may result from the NAS study.

**Issue Definition: Defining "Waters of the U.S." and "Wetlands"**

The Clean Water Act regulates discharges to "navigable waters," which are defined in the statute as "waters of the United States." However, the Act does not contain a definition of "waters of the United States." Similarly, while the Act refers to "wetlands," the statute does not define the term. Explicit definitions of these terms in the statute, consistent with longstanding regulatory definitions, would clarify Congressional intent with regard to the scope of geographic jurisdiction under the Act.

**Administration Position:** The Administration recommends that Congress incorporate the definition of "waters of the United States" contained in existing EPA and Corps implementing regulations. To provide additional consistency among Clean Water Act and Food Security Act programs, Congress should also incorporate the definition of "wetlands" contained in the Clean Water Act regulatory definitions, which is essentially identical to the wetlands definition in the 1990 Farm Bill. (The Clean Water Act regulatory definition of wetlands is preferable because some States have used the definition in State wetlands statutes. To adopt a different definition at Federal and State levels of government would only create further confusion in the regulatory program.)

The EPA/Corps definition of "waters of the United States" explicitly includes recently promulgated language clarifying that "prior converted croplands" are not waters of the

United States for purposes of the Clean Water Act. Congress should include this clarifying language in statute as well.

The Administration also recommends that Congress add examples of "isolated waters" (e.g., prairie potholes, vernal pools, and playa lakes) to the statutory definition of wetlands. From a scientific standpoint, isolated wetlands perform many of the same vital functions performed by other aquatic areas widely accepted as wetlands, such as flood control and groundwater recharge, as well as providing critical habitat for migratory waterfowl and other wildlife, and contribute to achieving the objectives of the Clean Water Act both individually and as a class.

**Issue Definition: "Artificial" Wetlands**

Neither the Clean Water Act nor its implementing regulations distinguishes between natural and created wetlands. However, certain "artificial" wetlands do not normally exhibit the values and functions typically attributed to natural wetlands. These artificial wetlands are created inadvertently from upland by human activity and would revert to upland if such activity ceased. The fact that these areas are not specifically excluded from the jurisdiction of the Clean Water Act in either statute or regulation has caused confusion.

**Administration Position:** The EPA and the Corps will incorporate examples of artificial wetlands, such as non-tidal drainage and irrigation ditches excavated on upland, into their regulations to clarify the types of waters that are generally not subject to Clean Water Act jurisdiction because they are created out of upland.

## F. MITIGATION AND MITIGATION BANKING

**Issue Definition:** Mitigating the harmful effects of necessary development actions on the Nation's waters is a central premise of Federal wetland regulatory programs. The Section 404 regulatory program relies upon a sequential approach to mitigating these harmful effects by first avoiding unnecessary impacts, then minimizing environmental harm, and, finally, compensating for remaining unavoidable damage to wetlands and other waters through, for example, the restoration or creation of wetlands.

Mitigation banking refers to a wetland restoration, creation, or enhancement effort undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when compensatory mitigation is not appropriate, practicable, or as environmentally beneficial at the development site. Units of restored or created wetland are expressed as "credits", and accumulated credits are subsequently withdrawn to offset "debits" incurred at the development site.

**Administration Position:** The sequential approach to mitigation provides a logical, predictable, and reasonable framework for mitigating impacts associated with proposed

development actions. The Administration supports the use of mitigation banking in appropriate circumstances as a means of compensating for authorized wetland impacts.

The Administration is proposing the following actions to ensure that mitigation of environmental impacts within the Section 404 program is effective, predictable, and consistent with a watershed management perspective:

• ***Issue Mitigation Planning Guidance.*** The Corps, in coordination with EPA, FWS, SCS, and the National Marine Fisheries Service (NMFS), will issue guidance to their field staff to clarify the requirements for developing compensatory mitigation conditions in Section 404 permits. This guidance is intended to increase the success of mitigation projects in offsetting impacts to wetlands and other waters resulting from permitted activities. This guidance will assist permit applicants by providing greater consistency and certainty with regard to how Section 404 mitigation requirements are applied.

• ***Endorse the Use of Mitigation Banking Under the Section 404 Regulatory Program.*** While a number of technical and procedural questions regarding the establishment and long term management of mitigation banks remain, conceptually mitigation banking, with appropriate environment safeguards, offers numerous advantages. Banking provides for greater certainty of successful compensatory mitigation in the permit process by requiring mitigation to be established before permits are issued. Banks are often ecologically advantageous because they consolidate fragmented wetland mitigation projects into one large contiguous parcel that can more effectively replace the lost wetland functions within the watershed. Mitigation banks also provide a framework for financial resources, planning and technical expertise to be brought together in a fashion often not possible with smaller mitigation projects.

Recognizing the advantages offered by mitigation banking to compensate for wetlands losses, Congress should endorse the appropriate use of banking as a compensatory mitigation option under the Section 404 regulatory program, within environmentally sound limits. Congress should also explicitly allow use of the State Revolving Fund by States to capitalize mitigation banks.

• ***Issue Mitigation Banking Guidance.*** EPA and the Corps, in coordination with FWS, NMFS, and SCS have issued guidance to their field staff to clarify the manner in which wetlands mitigation banking is appropriately used within the Section 404 regulatory program. This guidance provides interim direction pending the results of additional studies, but will encourage, within environmentally sound limits, the use of mitigation banks for compensatory mitigation under Section 404.

• ***Develop Improved Analytical Tools.*** The agencies will expedite current efforts being coordinated by the Corps Waterways Experiment Station to develop an improved wetland functional assessment tool, the Hydrogeomorphic Classification System, to assist in conducting impact analysis and determining appropriate and effective mitigation measures.

## G. RESTORATION

**Issue Definition:** This Nation has lost nearly half of the wetland acreage that existed in the lower 48 States prior to European settlement. Much of this loss was due to Federal policies from an earlier era that encouraged the drainage of wetlands. The effect of this wetland loss is reflected in declining populations of fish, waterfowl, and other living things dependent upon the aquatic environment; in degraded water quality; and, most recently, in the extent of flooding in the Midwest.

The Section 404 regulatory program under the Clean Water Act and the Swampbuster provisions under the Food Security Act are attempts to stem this loss of wetlands. At best, the regulatory approach can ensure no further overall net loss. But to achieve a positive increase in the Nation's wetlands will require the restoration of some damaged wetlands.

Our ability to restore wetlands, particularly inland wetlands in agricultural areas, has been well-established over the last decade. A number of private and governmental entities have successfully restored degraded or lost wetlands to productive status. For example, the Fish and Wildlife Service, in cooperation with private landowners across the Nation, has implemented 9,500 restoration projects affecting 200,000 acres. Last year, a 50,000 acre pilot of the USDA Wetlands Reserve Program received proposals from 2,300 farmers to restore 500,000 acres.

**Administration Position:** Restoring some former wetlands that have been drained previously or otherwise destroyed to functioning wetlands is key to achieving the Administration's interim goal of no overall net loss of the Nation's remaining wetlands, and its long term goal to increase the quality and quantity of the Nation's wetlands base.

In support of a broad-based effort to restore a portion of the Nation's historic wetlands base that has been destroyed or degraded in the past, the Administration proposes to take the following actions:

- **Wetlands Reserve Program.** The fiscal year 1994 Agriculture Appropriations conference report provides for 75,000 new acres to be enrolled in the Wetlands Reserve Program. When passed this will also more than double - to 20 - the number of States eligible for participation in the program. The Administration will also use this program in the Midwest to restore wetlands in the course of providing financial assistance to farmers and improved flood protection for all those affected by the recent flooding. The Administration will also pursue full funding of the President's budget request for the Wetlands Reserve Program in FY 1995, and will seek to have this program expanded in the 1995 Farm Bill.

- **Promote Wetlands Restoration through Voluntary, Cooperative Programs and Outreach Activities.** Wetlands conservation efforts have historically focused largely on wetlands regulation and acquisition. These programs continue to be essential to a

comprehensive strategy for achieving the Administration's wetlands goals. However, stemming the net loss of the Nation's wetlands base and achieving a long-term increase in wetlands acreage is dependent upon restoring wetlands that have been drained, diked, or otherwise destroyed in the past.

The universe of restorable former wetlands is predominantly on private lands, and the Administration presently has in place a number of Federal programs that focus on or incorporate voluntary, cooperative efforts to restore wetlands on private lands (e.g., FWS's Partners for Wildlife program, Bay and Estuary program, and North American Waterfowl Management Plan Joint Ventures; USDA's Wetlands Reserve, Water Bank, Water Quality Incentives, Forestry Incentives, and Stewardship Incentives programs.) The Administration will review existing Federal programs that seek to restore wetlands through cooperative, voluntary agreements and outreach efforts with private and other non-Federal landowners, and will examine opportunities to expand such programs, including education and outreach activities.

● *Revise the Executive Order on Wetlands.* The existing executive order on wetlands will be revised to incorporate the Administration's interim and long term wetland goals and to establish wetlands restoration as an essential vehicle for Federal and quasi-Federal agencies to achieve those goals through a voluntary approach.

## H. ROLES OF FEDERAL AGENCIES

**Issue Definition:** Public support for Federal wetlands protection programs, such as the Clean Water Act Section 404 regulatory program and the Food Security Act Swampbuster program, has suffered during recent years from a perception that multiple agency roles in the Administration of these programs has contributed to confusion, delays, overlap, and a general sense that no single agency is "in charge".

**Administration Position:** The Administration is initiating steps to streamline the implementation of Federal wetlands protection programs by reducing duplication, overlap, and delay. For example, a memorandum of agreement has recently been signed to give the Soil Conservation Service, in consultation with the Fish and Wildlife Service, the lead agency for making wetlands delineations and mitigation decisions on agricultural land (see AGRICULTURE).

The Administration is committed to providing for effective and timely participation by the agencies with roles in Federal programs affecting wetlands while emphasizing the ultimate role of a single Federal agency decisionmaker. This increased coordination among the relevant agencies will be accomplished through the following mechanism:

● *Continue Implementation of the 1992 Interagency Section 404(q) MOAs.* EPA, the Corps, FWS, and NMFS have issued guidance to their field staff to improve interagency

coordination procedures established in the 1992 Memoranda of Agreement under Section 404. These MOAs define a process for expedited review and resolution of agency concerns regarding individual permit decisions. The MOAs also establish procedures for resolving concerns involving the implementation of Section 404 program policy that can be accomplished without delaying individual permit decisions.

The agencies will continue to use the 1992 MOAs and, based on this experience, determine whether additional guidance or revisions to the MOAs are necessary. It is critical to the ultimate effectiveness of the Section 404 program to preserve the responsibilities of Federal resource agencies such as the EPA, FWS and NMFS to reflect their relative expertise and authorities while reducing duplication, overlap, and delay. It is equally critical to recognize and understand the Corps' leadership and final decision-making role as "project manager" for the evaluation of permit applications under the Section 404 regulatory program.

## I. ROLE OF STATE, TRIBAL, AND LOCAL GOVERNMENT

**Issue Definition:** Decisions on where and how to protect or restore wetlands can be often most appropriately made at State, Tribal, or local levels. However, the current Section 404 regulatory program is run at the Federal level, except for certain waters in one State (Michigan). Many States, Tribes, and local governments have their own wetlands programs, which often overlap, are inconsistent with, or are simply distinct from Federal programs. This has resulted in inefficiency, frustration by the regulated public, and significant confusion.

**Administration Position:** The Administration is committed to increasing State, Tribal, and local government roles in Federal wetlands protection and restoration efforts. To increase consistency and clarity and reduce the confusion generated by the current relationship between the Federal government and State, Tribal, and local governments in wetlands protection and restoration, and to bring decision making to more appropriate levels, the Administration is taking the following actions:

- *Assist States, Tribes, and Local Governments in Taking a Stronger Role in Wetlands Protection.* The Administration will provide technical and financial assistance and guidance to States, Tribes, and local governments to assist them in taking more of a leadership role in wetlands protection, e.g., through State/Tribal assumption of Section 404, development of comprehensive State/Tribal Wetland Conservation Plans, application of State/Tribal Section 401 Certification authority to wetlands, development of Programmatic General Permits under Section 404, and better coordination between State, Tribal, and local permit programs and the Section 404 program.

- *Provide Incentives for States, Tribes, and Regional and Local Governments to Integrate Watershed and Wetlands Planning.* The Clean Water Act should authorize the development of State/Tribal watershed protection programs, requiring local and regional

involvement and Federal approval of the State/Tribal programs. Wetlands should be incorporated into the overall watershed approach, with minimum requirements for wetlands protection and restoration planning. Approved watershed plans would receive a high priority for technical and financial support for activities such as mitigation banking, advance identification, and categorization under the Section 404 regulatory program. There would also be a high priority given to developing Programmatic General Permits that defer to local regulatory programs implementing approved watershed plans.

● ***Increase Deference to State, Tribal, Regional, and Local Wetlands Decisionmaking.*** The Corps will issue guidance which specifies the circumstances under which State, Tribal, regional, and local programs can effectively regulate Section 404 activities, through issuance of Programmatic General Permits (PGPs). The guidance will also clarify the safeguards required to ensure that these programs adequately protect wetlands and other waters.

The use of PGPs is designed to increase the roles of State, Tribal, regional, and local governments in wetlands protection, provide an incentive for watershed planning efforts, and reduce redundancy and overlap between these programs and the Federal Section 404 program. The Administration recommends that Congress amend Section 404(e) of the Clean Water Act to provide explicitly for issuance of PGPs with appropriate environmental safeguards for approved State, Tribal, regional, and local regulatory programs.

● ***Endorse State/Tribal Wetlands Conservation Plans.*** Congress should endorse the development of State/Tribal comprehensive wetland plans, with the goal of supporting State and Tribal efforts to protect and manage their wetlands resources. EPA is currently funding the development of 22 State Wetlands Conservation Plans; Congress should provide EPA the authority to use its Wetlands Grants program to fund both their development and implementation.

● ***Encourage State/Tribal Assumption of Section 404.*** Congress should provide EPA the authority to use its Wetlands Grants program to fund both development and implementation of State assumption of the Section 404 program. In addition, Congress should authorize partial assumption of the Section 404 program by States and Tribes as an interim step toward full assumption. By authorizing partial assumption of discrete areas within State or Tribal jurisdiction, the State/Tribe can get experience with the program as it develops full statutory equivalency, and the Federal government can defer to the State/Tribe as early as possible.

● ***Provide States/Tribes with Access to Wetlands Delineation Training.*** State and Tribal agencies will be encouraged to participate in the Federal interagency wetlands delineation training and certification programs to strengthen their abilities to conduct wetlands delineations, and to improve consistency in wetlands identification among State and Federal wetlands programs.



## J. SCOPE OF REGULATED ACTIVITIES

**Issue Definition:** The Clean Water Act Section 404 program regulates "discharges" of dredged and fill material to wetlands and other waters of the United States. In the past, these terms have been interpreted in a way that created regulatory "loopholes" under which certain projects could be designed, using expensive and sophisticated methods, so that they did not require Section 404 authorization.

The environmental effects of these projects on wetlands are no different than less sophisticated projects involving discharges of dredged or fill material, which have been regulated under Section 404. Also, these loopholes have led to inconsistencies in how the Section 404 program has been implemented around the country.

**Administration Position:** The Administration has issued a final regulation, and is asking Congress to take corresponding legislative action, to close these regulatory loopholes by clarifying the types of activities that involve discharges of dredged or fill material subject to Section 404 review.

The following actions will result in better protection of wetlands, and improve the fairness, predictability, and consistency of the Section 404 program

● **Clarify Definition of "Discharge of Dredged Material."** Under the final rule, this term is defined to ensure that discharges into wetlands and other waters of the United States will be consistently regulated when they are associated with excavation activities, such as ditching, channelization, or mechanized landclearing, that have environmental effects of concern. The rule explicitly excludes from Section 404 regulation discharges associated with activities that have only *de minimis*, or inconsequential, environmental effects. In an effort to reduce the impact of these changes on the regulation of minor activities with only minimal adverse environmental effects, the Corps will coordinate with EPA to develop additional general permits authorizing such minor activities. The revised definition does *not* affect the existing exemptions in Section 404(f) for ongoing farming, ranching, and silvicultural activities

● **Clarify Definition of "Discharge of Fill Material."** The agencies also are clarifying the definition of "discharge of fill material" to ensure that activities in waters of the United States that involve the non-traditional use of pilings (e.g., shopping malls, parking garages) will require Clean Water Act authorization. In an effort to reduce the impact of these changes on the regulation of minor activities with only minimal adverse environmental effects, the Corps will coordinate with EPA to develop additional general permits that authorize such activities

- *Legislative Clarification of Scope of Activities Regulated Under Section 404.* Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking.

## K. STATE OF ALASKA

**Issue Definition:** The extent and nature of Alaska wetlands reflect, in part, climatological and physiographic conditions found in no other State. More than 99 percent of Alaska's wetlands remain, and much of the State's developable lands are wetlands. This abundance of wetlands in combination with Alaska's short building season, leads some to claim that the Section 404 program places a heavier burden on Alaskans than on the rest of the country.

The previous Administration attempted to address some of these concerns by proposing the "Alaska 1% rule" which would have exempted wetlands in Alaska from mitigation requirements until one percent of Alaska's wetland resources had been developed. The "Alaska 1% rule" was published for public comment in November 1992, and 83 percent of the over 6,500 comments received objected to the rule, raising concerns about its potential impact on the environment.

Objections to the proposed rule focused on several key considerations:

- An additional 1.5 million acres of Alaska's wetlands would be destroyed before the one percent threshold would be met, including potentially all of Alaska's 345,000 acres of extremely valuable coastal wetlands. Wetlands losses in Alaska have historically been greatest in coastal areas where the State's population is concentrated. For example, losses of high value coastal wetlands near the cities of Anchorage and Juneau are estimated to exceed 50 percent of their historic base.
- The proposed rule would hinder management efforts for several Federally listed or proposed threatened and endangered species that utilize Alaska's coastal wetlands, as well as hastening the listing of additional candidate species.
- Although full in-kind compensation is often not possible or practicable, opportunities do exist for restoration or rehabilitation of disturbed areas in proximity to a proposed development that have the potential to benefit affected fish and wildlife populations.
- There is enough flexibility in the existing Section 404 regulatory program to respond to Alaska's unique concerns administratively. During the last 20 years, of the approximately 4,000 permit applications received by the Corps' Alaska District, only 108 (2.7 percent) were denied; the remaining applications were either issued as individual or general permits, or withdrawn. Of the more than 3,000 individual permits issued, only 15 (0.5 percent) required compensatory mitigation.

**Administration Position:** Because of the significant adverse environmental consequences that it would allow, the "Alaska 1% rule" will be withdrawn. The best way to address Alaska-specific concerns regarding the Section 404 program is through targeting the specific areas where questions about program policies or implementation have been raised. Finalizing the proposed "Alaska 1% rule" would have far broader and avoidable adverse environmental consequences.

The EPA and the Corps will, within the next 90 days, initiate meetings with the Federal resource agencies, State and local government agencies, representatives of native villages, industry groups including oil and fishing interests, and environmental groups, to consider other environmentally appropriate means to assure regulatory flexibility and the feasibility of alternative permitting procedures in Alaska.

In addition, the Administration is proposing a number of actions to improve implementation of the Section 404 regulatory program nationwide (e.g., issuing guidance on flexibility in the Section 404(b)(1) Guidelines, mitigation banking, mitigation planning, advance planning, programmatic general permits; establishing an administrative appeals process; providing for more explicit consideration of wetland functions; and regionalizing Nationwide Permit number 26. See earlier discussion for details). These actions, in combination with any Alaska-specific proposals developed as a result of the process outlined above, should contribute significantly to addressing Alaska's concerns with implementation of the Section 404 regulatory program.

## L TAKINGS

**Issue Definition:** Some critics of the Section 404 regulatory program have asserted that Federal efforts to protect wetlands constitute a "taking" of private property and require compensation under the Fifth Amendment of the Constitution. Critics of the program have proposed legislation that would characterize permit denial decisions, and other Section 404 regulatory actions, as "takings" requiring compensation.

**Administration Position:** The Administration strongly supports private property rights. The equitable administration of any Federal regulatory program involves more than strict technical considerations and must include sensitivity to the rights and expectations of citizens. Implementation of the Section 404 program often requires a balancing of environmental protection, public interests, and individual interests.

Many activities undertaken on wetlands either are not regulated at all, are explicitly exempted from regulation, or are authorized by general permits. In situations where individual permits are required, the Federal agencies can work with permit applicants to design projects that meet the requirements of the law and protect the environment and public safety, while protecting the property rights of the applicant. However, in rare instances the public interest in conserving wetlands may substantially interfere with the rights of landowners. In such instances, Federal action will be based

on the proposition that restrictions on the actions of the property owners in question are called for in order to protect the property rights, safety, environmental or economic interests of other individuals or the community at large.

In those situations where the necessary restrictions on use amount to a taking of the property, the owner will, of course, be entitled to compensation. Moreover, where a property owner believes that government action amounts to a taking, the courts are available to review such claims and to determine whether compensation is due. Due to the unique nature of each situation, these issues must be considered on a case-by-case basis. Therefore, the Administration does not support a legislative approach to this issue.

The Administration is strongly committed to reducing the impact of the 404 program on landowners. Many of the Administration positions that have been described in this paper are designed to make the program as efficient, predictable, consistent, and equitable as possible (see ADDRESSING LANDOWNER CONCERNS, AGRICULTURE and CATEGORIZATION).

## **VI. CONCLUSION**

This comprehensive reform package represents a tremendous opportunity to move beyond the unnecessary polarization that has characterized the wetlands policy debate in recent years. While divisive, that debate has not been without value.

The critics of the wetlands regulatory program have performed a service to the country by highlighting the need for meaningful reform in the administration of wetland regulatory programs. Many of the much-needed reforms contained in this package — such as permit deadlines, an appeals process, the use of mitigation banks, and increasing the role of State and local government in wetlands regulation — have been proposed by critics of the current regulatory program.

The supporters of wetlands protection have also performed a service by helping to inform the Nation of the environmental and economic importance of wetlands, a vital natural resource that was once routinely destroyed. Their strong commitment to protecting and restoring this vital resource is also reflected in this package.

There will, no doubt, be individuals on each side of this divisive debate who will not be entirely pleased with every element of this reform package. But our approach provides effective protection of an important natural resource in a manner that is both fair and flexible, thus recognizing both the value of wetland resources and the need to minimize regulatory burdens.

## VII. POSTSCRIPT: LESSONS FROM THE FLOOD

The entire Nation shares the pain of those Americans experiencing the physical destruction and economic loss caused by the disastrous floods that have devastated the Nation's heartland. Many lives have been lost, and billions of dollars in damage have been caused to property and crops. In the short term, we must use the tools available to us to assist those struggling to deal with severe economic hardship due to the floods. We must concentrate our attention on helping people rebuild their lives by protecting our riverfront communities and providing assistance to businesses and the agricultural community adversely affected by the floods.

We must also look to the future, and learn from these floods how to more effectively protect human health and safety, property, and the environment. Many scientists have concluded that past manipulation of the rivers in the Midwest has contributed to the current level of devastation by separating the river channels from their natural floodplains, eliminating millions of acres of additional flood storage capacity. Wetlands within the floodplain and higher in the watershed reduce floods by absorbing rain, snow melt, and floodwaters and releasing it slowly, thereby reducing the severity of downstream flooding.

We must be cautious not to repeat policies and practices which may have added to the destruction caused by these floods. One way to assist landowners while alleviating some flood risks is through funding wetlands restoration and acquisition programs targeted to help those in flood-ravaged areas. Programs such as the USDA Wetlands Reserve Program provide farmers with much needed support and increase the quantity of flood-absorbing wetlands in this region.

Of course, we recognize that wetlands and river system restoration and protection alone will not suffice. It will be critically important that we quickly rebuild many of the flood control structures. However, we have learned the importance of also looking at alternative non-structural measures that may provide as much or better flood damage reduction at the same or lower cost. Such measures would include using more natural river corridor systems and wetlands. In the longer term, it is important that *all* potential flood control measures, both structural and non-structural, be considered and evaluated from a pragmatic and cost-benefit standpoint.

It is not a question of whether to protect cities and farms; it is a question of how best to protect them. In the case of riverfront communities, protective levees may be the only reasonable answer, but in other circumstances, non-structural measures may make more sense. We can identify ways to protect and restore our river and wetlands systems so that they work *for us*, integrated with structural flood control measures. Of course, wetlands that provide flood control generally will also provide other important functions, such as fish and wildlife habitat, water quality improvement, and recreational opportunities. In our response to this flood-borne tragedy, the Administration will pursue measures that are the most effective means to prevent this catastrophe from happening again. Doubtless this will involve a combination of repair and construction of flood control structures together with restoration of natural flood attenuating river and wetlands systems.

**PART V - PROTECTING AMERICA'S WETLANDS**

**Section 2**

**"Protecting America's Wetlands," The Clinton Administration's August 24, 1993, Wetlands Announcement, Questions and Answers**

***PROTECTING AMERICA'S WETLANDS***

***A FAIR, FLEXIBLE,  
AND EFFECTIVE APPROACH***

**Questions and Answers**

**August 24, 1993**

**"PROTECTING AMERICA'S WETLANDS"  
THE CLINTON ADMINISTRATION'S AUGUST 24, 1993  
WETLANDS ANNOUNCEMENT**

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**"PROTECTING AMERICA'S WETLANDS"  
THE CLINTON ADMINISTRATION'S AUGUST 24, 1993  
WETLANDS ANNOUNCEMENT**

**Questions and Answers**

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**GENERAL**

**Q1** What is the fundamental basis of the Clinton Administration's wetlands plan as articulated in the paper "Protecting America's Wetlands: A Fair, Flexible, and Effective Approach?"

**A.** The Clinton Administration's wetlands plan is based on the following five principles:

- (1)** The Administration supports the National Wetlands Policy Forum's interim goal of no overall net loss of the Nation's remaining wetlands and its long-term goal of increasing the quality and quantity of the Nation's wetlands base;
- (2)** Regulatory programs must be efficient, equitable, flexible, and predictable and administered in a manner that avoids unnecessary impacts upon private property;
- (3)** Non-regulatory programs, such as advanced planning and wetlands restoration, are a vital element of meeting wetlands goals;
- (4)** The Federal government should expand partnerships with state, tribal, and local governments and the private sector and approach wetlands protection and restoration in an ecosystem/watershed context; and
- (5)** Federal wetlands policy should be based on the best scientific information available.

**Q2** What process was used to develop the wetlands plan?

**A.** The wetlands plan was developed by an interagency workgroup chaired by the White House Office on Environmental Policy. The workgroup included representatives from EPA, Army, USDA, DOI, DOC, DOJ, DOE, DOT and

OMB. In developing the final wetlands plan the workgroup received the views of a diverse group of stakeholders (e.g., members of Congress, the development, agriculture, and environmental communities as well as state and local governments).

**Q3 How does the plan advance the "No Net Loss goal?"**

**A. As highlighted in the interagency paper, the Clinton Administration supports the interim goal of no overall net loss of the Nation's remaining wetlands, and a long-term goal of increasing the quality and quantity of the Nation's wetlands resource base. In that regard, this plan attempts to address existing gaps in Federal wetlands policy which prevent the nation from achieving the goal. While the Administration recognizes that the loss of some individual wetlands will be unavoidable, specific provisions within the plan, such as guidance to improve mitigation under the Clean Water Act Section 404 regulatory program and support for wetland restoration under the Department of Agriculture's Wetlands Reserve Program, have been proposed to ensure that unavoidable wetland losses are appropriately offset and that the wetlands base increase over time.**

**Q4 What is the current estimate of the Nation's remaining wetland acreage?**

**A. According to the Fish and Wildlife Service's Wetlands Status and Trends study, in the mid-1980's there were 103.3 million acres in the lower 48 States. At an average annual loss rate of 290,000 acres/year, the 1993 estimate would be 100.7 million acres. The current estimates for Alaska and Hawaii are an additional 170 million and 51,800 acres, respectively.**

**Q5 What is the current estimate of annual wetlands losses and the primary causes of these losses?**

**A. The FWS status and trends study indicates wetland losses of 290,000 acres/year between the mid-1970's and the mid-1980's. Approximately 54% of these losses resulted from agricultural conversion, 41% have been due to "other" causes (including silviculture, related forestry activities, and rural development), and 5% were lost to urban development. The USDA National Resource Inventory showed average wetland losses of 120,000 acres per year on nonfederal rural land during the period 1983 to 1987. The same inventory indicates that there has been a declining rate of conversion to agriculture, with an average loss rate on nonfederal rural land of 41,000 acres per year between 1982 to 1991.**

**Q6 What is the current estimate of wetlands gains?**

**A. While a total estimate is difficult to obtain at this time, approximately 900,000 acres were restored or enhanced during the period from 1983 to 1992. The Fish and Wildlife Service estimates that since 1987, 200,000 acres have been restored under its Partners for Wildlife program. These range from complete to partial restorations.**

**Q7 When will the Clinton Wetlands Plan be implemented?**

**A. Several key components of the plan were signed on August 23, the day before the plan was announced. These include the "excavation rule," mitigation banking guidance, mitigation sequencing flexibility guidance and an interagency memorandum on agriculture. Depending on the action, other administrative components of the plan will be completed in the next two to twelve months, depending on the need for notice and comment rulemaking. The legislative recommendations will be discussed during upcoming debates over Clean Water Act reauthorization.**

**Q8 Has the Administration considered the financial resource requirements associated with implementation of the Clinton Plan?**

**A. Yes. We recognize that many components of the plan come with a price tag (e.g., administrative appeals). The Administration will take a comprehensive look at its wetlands budget and make necessary adjustments in light of the plan.**

**Q9 What role does wetlands restoration play in achieving the no net loss goal?**

**A. Even under the most optimistic assumptions of wetlands protection and mitigation success, continued losses will occur through either natural or man-induced causes. By including a wetlands restoration component in the overall plan for wetlands conservation, these losses can be offset, and wetlands increases will be possible.**

**Q10 What wetlands restoration programs are available to help private landowners who have an interest in restoring wetlands?**

**A. The USDA wetlands reserve program will provide for the acquisition of permanent easements and the associated implementation of wetlands restoration features. Authorized in the 1990 Farm Bill, the program's original goal was the restoration of 1,000,000 acres by 1995. The FWS, through the Partners for Wildlife**

Program, works with private landowners to restore wetlands and other habitats of importance. This is a voluntary program, and there is no purchase of land rights. Since inception of the program in 1988, over 200,000 acres have been restored in cooperation with approximately 10,900 landowners. Under the North American Wetlands Conservation Act, a variety of wetlands acquisition, protection, enhancement and restoration activities are also undertaken on public or private lands.

**Q11 Will natural wetlands losses be factored into the no net loss plan?**

**A. Natural wetland losses (or conversions) are tracked in the Fish and Wildlife Service's Wetland Status and Trends study. Losses due to landslides, beaver activity or natural succession, etc., would be included in the study.**

**Q12 Is anything being done to stem the natural loss of wetlands, such as in coastal Louisiana?**

**A. Yes. An example includes the initiatives being undertaken through the Coastal Wetlands Planning, Protection and Restoration Act.**

**Q13 How does the Clinton Administration envision measuring its success in meeting the no net loss of wetlands goal?**

**A. The FWS Wetlands Status Trends study is a yardstick to measure overall progress. This information is prepared using a stratified sampling technique for the entire country, and is updated every 10 years as mandated by Congress. Interim reports on trends in selected regions or national estimates will also be possible beginning in 1995. Non-regulatory wetlands restoration gains will also be tracked separately by USDA for the Wetlands Reserve Program, and by FWS for its restoration efforts. In the context of the Section 404 regulatory program we will more closely track wetlands losses and gains by using a Corps of Engineers regulatory database.**

**Q14 Will the Administration revise the executive order on wetlands (E.O. 11990) and if so, when?**

**A. Yes, the E.O. will be revised to reflect the Clinton plan. We hope to have a draft E.O. completed within the next 120 days.**

**Q15 Will the revised E.O. apply to the Section 404 CWA regulatory program?**

**A. Yes.**

**Q16 What is in the current E.O. and what key components should be included in a revised order?**

**A. On May 24, 1977, the White House issued Executive Order 11990 "Protection of Wetlands." The purpose of this E.O. was to reduce Federally subsidized destruction of wetlands by encouraging Federal agencies to consider wetlands in their decision-making. The E.O. does not, however, establish a clear national goal for wetlands protection. It does not recognize the importance of wetlands restoration or set forth mechanisms to measure actual implementation of the E.O. Key elements that should be considered as the E.O. is revised include:**

- 1) Establishing a short-term national goal of no overall net loss of the Nation's remaining wetlands and a long-term goal to restore and create wetlands, where feasible, to increase the quality and quantity of the Nation's wetlands;**
- 2) Establishing a wetlands mitigation policy for Federal agency programs, including regulatory programs;**
- 3) Directing Federal agencies to protect, manage, and where possible, restore degraded wetlands on Federally owned land, and include wetlands in their planning, construction, operation and maintenance programs; and**
- 4) Directing Federal agencies to conduct wetlands projects or activities on a watershed basis.**

**Q17 How does the Clinton Wetlands Plan differ from the Bush Plan?**

**A. The Clinton plan offers a truly balanced package of administrative initiatives and legislative recommendations that will improve the protection of wetlands, reduce unnecessary regulatory burdens on the public, promote more state and local government involvement and facilitate a comprehensive watershed planning approach to the protection and restoration of wetlands. The Bush plan focused almost exclusively on reforming the Section 404 regulatory program in a manner that would have substantially reduced wetlands protection.**

## **ADDRESSING LANDOWNER CONCERNS**

**Q18 How and when will the Corps establish regulatory deadlines for reaching decisions regarding standard permit applications?**

**A. The permit deadlines will be established after a public rulemaking process. We expect to complete the regulation within one year.**

**Q19 What will the deadlines be?**

**A. While the actual deadlines cannot be set until after the public rulemaking process, we will propose a deadline of 90 days for reaching permit decisions. The final deadline will have appropriate extension clauses based on the requirements of other laws such as the National Environmental Policy Act.**

**Q20 What permit decisions are subject to these deadlines?**

**A. Standard individual permits.**

**Q21 How and when will the Corps establish an administrative appeals process?**

**A. The administrative appeals process will be established after a public rulemaking process. We expect to complete the regulation within one year and implement the appeals process as soon as necessary personnel are hired and trained.**

**Q22 What Corps actions can be appealed?**

**A. We will propose regulations that allow for the appeal of wetlands jurisdiction determinations, permit denials, and administrative penalty enforcement actions.**

**Q23 What will be the administrative appeals process?**

**A. The process will be developed through the public rulemaking process. The final process will require, however, that appeals be decided at a level higher than the permit decision maker.**

**Q24 Who can appeal Corps actions?**

**A. We will propose that individuals receiving determinations that their property contains wetlands, permit applicants receiving a permit denial, and individuals**

assessed an administrative penalty will be allowed to appeal these decisions. We also anticipate that third parties that participated in the public review process for a permit or enforcement action may also participate in the appeal of that particular permit determination, or enforcement action.

**Q25 Why is the Administration proposing the appeals process?**

**A. Currently, expensive and lengthy judicial action is the only recourse available to landowners who wish to challenge permit denials. An administrative appeals process will provide landowners with a mechanism for a timely hearing when they receive certain regulatory decisions.**

**Q26 What is the Wetlands Delineation Certification Program (WDPC)?**

**A. The WDCP is being developed by the Corps, in accordance with Section 307(e) of the Water Resources Development Act of 1990. Section 307(e) authorizes the Secretary of the Army to establish a program for the training and certification of individuals as wetland delineators, and to carry out demonstration projects in Corps districts prior to establishing the WDCP nationwide. The intent of the WDCP is: 1) to improve the quality and consistency of wetland delineations and 2) to streamline the regulatory process by developing procedures for expediting consideration and acceptance of delineations performed by certified delineators.**

**Q27 Does the government currently have a wetlands delineation training program? Is it mandatory?**

**A. There is currently an interagency wetland delineation training program involving both students and instructors from the Corps, EPA, SCS, and FWS. The class is managed by the Corps and offered through its training division at Huntsville, Alabama. Sessions are held around the country and cover an array of wetland types and difficult delineation scenarios. The week-long class covers the Corps 1987 Manual and includes both classroom and field lectures and exercises. Attendance at all sessions is necessary for successful completion. The class is currently not mandatory for agency staff.**

**Q28 Will Federal agency personnel be required to be certified?**

**A. At this time, it is uncertain whether Federal personnel involved in wetland delineation will be required to be certified; however, all employees of Federal agencies who conduct wetland delineations will be required to participate in the**

interagency wetland delineation training program. This will improve accuracy and consistency in Federal wetland programs by ensuring that agency staff have comparable training and experience in wetlands delineation.

**Q29** Are the wetlands delineation certification and interagency wetlands delineation training procedures similar? Equally rigorous?

**A.** The procedures for both are very similar. During development of the proposed rule for implementing the certification program we will consider developing equivalent certification procedures for private individuals and Federal agency staff. Options will be presented in the proposed rule soliciting public input on the WDCP prior to nationwide implementation.

**Q30** When will the WDCP program go into effect?

**A.** The WDCP is scheduled to be issued as a proposed rule in the *Federal Register* during the Fall, 1993. Public comments will be accepted and considered in the development of the final rule, which is anticipated to become effective in March, 1994.

### **ADVANCED PLANNING AND WATERSHED MANAGEMENT**

**Q31** What is watershed planning?

**A.** Watershed planning is integrating resource management planning on a watershed basis. This means integrating wetlands regulation, protection and restoration activities with water quality, water supply, floodplain management, habitat protection and other activities on a geographic, watershed basis.

**Q32** What are the benefits of watershed planning?

**A.** Watershed planning allows Federal, state, local or regional governments to work together in a comprehensive and cooperative manner to identify common wetlands conservation objectives and strategies through advance planning.



**Q33** What incentives will be provided to encourage state and local participation in watershed planning?

- A.** The Administration will provide financial and technical assistance to encourage watershed planning. For example, the Clinton Plan will provide state and local governments with the opportunity for greater involvement in the Federal regulatory program through mechanisms such as programmatic general permits.

## **AGRICULTURE**

**Q34** Which delineation manual will SCS use to delineate wetlands under Swampbuster?

- A.** SCS will use the Corps of Engineers 1987 Manual supplemented by criteria and procedures contained in its Food Security Act Manual for identifying wetlands intensively managed for agriculture.

**Q35** Will the Corps, EPA, FWS and SCS use the same procedures to delineate wetlands for FSA and CWA purposes?

- A.** Yes, the agencies will use the same procedures to delineate wetlands. Interagency training programs will be developed to ensure that agency field staff are properly trained and that standard agreed-upon methods are utilized in making delineation and mitigation determinations.

**Q36** Will SCS wetland delineations be accepted for Section 404 purposes?

- A.** Yes, an interagency agreement will be developed to allow EPA and the Corps to rely on SCS wetland delineations on agricultural lands for both Swampbuster and the Clean Water Act. In making such determinations SCS will work closely with FWS pursuant to the requirements of the 1990 Farm Bill.

**Q37** Does all of this mean that farmers and ranchers will receive a wetland delineation from SCS that will satisfy both Swampbuster and the CWA?

- A.** Yes, SCS's wetland, farmed wetland, and prior converted cropland delineations will be used for both programs.

- Q38 Will landowners have an opportunity to appeal SCS wetland delineations under the Clean Water Act?**
- A. Yes, SCS will use the same appeals process for Section 404 delineations that it uses for Swampbuster.**
- Q39 What is the role of the FWS related to Swampbuster and how does it change under this approach?**
- A. The FWS provides technical biological wetlands expertise to the Swampbuster program. Consultation between SCS and FWS, pursuant to the 1990 Farm Bill, occurs in such actions as wetland identification, minimal effect determinations, and minimal effect mitigation actions. The close cooperation between SCS and FWS will continue to be an integral and required part of the program.**
- Q40 What is a prior converted cropland?**
- A. Prior converted croplands were wetlands that were drained, dredged, filled, leveled or otherwise manipulated before December 23, 1985, for the purpose and having the effect of making the production of an agriculture commodity possible. This applies to areas where commodities were produced prior to 1985 and the area has not been abandoned.**
- Q41 Will frequently cropped farmed wetlands be subject to Federal jurisdiction under Swampbuster and the Clean Water Act?**
- A. Yes, wetlands with a cropping history are nonetheless still wetlands and many have high functions and values. Cropping history alone is not an adequate determinant of functions or jurisdictions. Landowners will be allowed to maintain but not increase the scope of any drainage systems in place prior to December 23, 1985, on farmed wetlands. Farmers will be able to rely on SCS's farmed wetland determinations for both Swampbuster and the Clean Water Act.**
- Q42 Are prior converted croplands excluded from Clean Water Act jurisdiction?**
- A. Yes, the same areas excluded under Swampbuster will continue to be excluded under the Clean Water Act.**

**Q43 Will normal on-going farming, ranching, and silvicultural activities continue to be exempted under Section 404(f)?**

**A. Yes, the existing exemptions in Section 404(f) are not changed.**

**Q44 Will SCS's "minimal effects" and "frequently cropped with mitigation" determinations be accepted under Section 404?**

**A. Yes. A Nationwide General Permit will be proposed to authorize the discharge of dredged or fill associated with these actions.**

**Q45 Will the Wetland Reserve Program continue to be supported?**

**A. Yes, the 1994 Agriculture Appropriations Bill will provide up to 75,000 additional acres and will more than double the number of states participating. Congress will be asked to expand the program in the 1995 Farm Bill.**

**Q46 Will farms impacted by the 1993 Midwest flood be given an opportunity to participate in wetland restoration?**

**A. Yes, our restoration efforts will help ensure that wetlands existing prior to the flood will be protected. Landowners will be given opportunities to restore wetlands converted to agricultural uses if interest exist and funds are available.**

## **CATEGORIZATION**

**Q47 How does the plan ensure that the relative differences in the functions and values of wetlands are taken into account in the Section 404 permit review process?**

**A. The Clinton Administration recognizes that wetland functions and project impacts vary from case to case and permit applicants deserve a timely and predictable regulatory response that is appropriate for the project being proposed. In response, EPA and the Corps have issued guidance to emphasize further flexibility which allows agency field staff to tailor regulatory reviews accordingly. Specifically the guidance clarifies that the level of regulatory review should be commensurate with the severity of the proposed environmental impact and should consider both the functions of the affected wetland and the character of the proposed discharge. The plan also encourages the regionalization of general permits to authorize activities that would have only minimal adverse impact.**

**Q48 Does the administration support the *a priori* categorization approach in H.R. 1330?**

**A. No. We believe that the fiscal and environmental implications make such an approach unworkable. There is no scientific basis for a nationwide ranking scheme, and the approach proposed does not provide for the consideration of the impacts associated with specific projects.**

**Q49 Under what circumstances is categorization appropriate?**

**A. In the context of comprehensive watershed/wetlands planning efforts, categorization of wetlands may be appropriate.**

**Q50 What are the benefits of this type of categorization?**

**A. At the scale of a local or regional watershed plan, categorization can provide a scientifically sound and workable framework for early consideration of wetland functions. This could be translated into specific regulatory responses depending on the functions of the resource. For example, for wetlands with limited functions and minimal ecological significance, general permits may be issued to streamline the regulatory process.**

**Q51 How are wetlands functions and values assessed?**

**A. Many functional assessments are currently based on the professional judgment of field staff. In some situations a more formal analytical approach is used (e.g., the Corps Wetlands Evaluation Technique or the FWS Habitat Evaluation Procedures). Because both have proved to be problematic, Federal agencies are developing a new functional assessment technique which is based on the "Hydrogeomorphic Classification System."**

**Q52 What is the Hydrogeomorphic Classification System and when will it be completed?**

**A. The Hydrogeomorphic Classification (HGM) system is an approach to wetlands classification that uses the principles of geomorphology, hydrology, and hydrodynamics to identify functionally similar wetland classes. It is hierarchical so it can be easily modified for use in different geographic regions, and at different scales. The HGM provides a means for identifying functionally similar classes of wetlands that exhibit a relatively narrow range of variation with respect to the characteristics that fundamentally influence how they function.**

A technical report describing the Hydrogeomorphic Classification will be available for distribution in October 1993. To request a copy call 601-634-2349, and ask for "A Hydrogeomorphic Classification of Wetlands," Wetlands Research Program Technical Report WRP-DE-4. Regional assessment methods based on the Hydrogeomorphic Classification are currently underway. The efforts are being coordinated under the Evaluation Work Unit of the Wetlands Research Program at the Corps of Engineers Waterways Experiment Station. A procedural document and specific functional assessment methods will be available during the latter part of FY94.

**Q53 Will the Corps revoke NWP 26?**

**A. No. NWP 26 will be re-evaluated and revised, however, to control more effectively the environmental impacts associated with discharges into isolated waters and headwaters. The primary emphasis of the revision process will be on developing regional conditions to protect valuable aquatic resources.**

**Q54 How will NWP 26 be revised?**

**A. Corps districts will undertake, in coordination with relevant State and Federal agencies, a field level review and evaluation of NWP 26 for the purpose of developing regional conditions on the types of waters, and the character, size and/or location of activities in those waters, subject to NWP 26 authorization. Based on this field level review, the Corps will revise NWP 26 through the public notice-and-comment process required for the issuance of general permits.**

## ***GEOGRAPHIC JURISDICTION***

**Q55 What manual is the Administration using to delineate wetlands for determining CWA jurisdiction?**

**A. The 1987 Corps of Engineers Wetlands Delineation Manual. For wetlands manager for agriculture, the SCS's Food Security Act Manual procedures will be used. As part of the Clinton Plan the affected Federal agencies are developing common procedures to ensure consistency between the 1987 Corps Manual and the SCS Food Security Act Manual.**

**Q56 How is the 1987 Manual working?**

**A. The 1987 Manual has worked very well and has almost completely diminished the controversy over wetlands delineation and identification.**

**Q57 If the 1987 Manual is working so well, why is an NAS study necessary?**

**A. The NAS study will provide an opportunity for a new, independent look at the controversial issue of wetlands delineation. While this review may affirm that the 1987 Manual is an accurate and efficient method for determining wetlands jurisdiction, the review may result in recommendations for improvements. The NAS will be specifically evaluating certain areas where additional guidance is needed, such as areas disturbed by agriculture activities.**

**Q58 When is the NAS study scheduled for completion?**

**A. The Academy intends to complete its work by September 30, 1994.**

**Q59 Will the public be given the opportunity to review and comment on the final wetlands delineation manual before it is adopted?**

**A. Yes. Once the NAS has completed its evaluation, a Federal delineation manual will be adopted after the public has an opportunity to review and comment on the final proposal.**

**Q60 Why do we need to define legislatively "wetlands" and "waters of the United States" in the CWA?**

**A. Ratification of the current regulatory definitions of "wetlands" and "waters of the United States" would affirm Congress's intent with regard to the scope of geographic jurisdiction under the CWA. This would promote consistency and potentially reduce litigation.**

**Q61 What is the current CWA regulatory definition of wetlands?**

**A. The term "wetlands" means those areas that are inundated 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.**

**Q62** What are artificial or man-made wetlands?

**A.** Generally artificial wetlands are those wetlands that have been created from uplands by human activity that would revert to upland if such activity ceased.

**Q63** Are these areas regulated under the CWA?

**A.** Generally no, as explained in the preamble to the Corps regulations.

**Q64** What are "isolated wetlands" and why should they be protected?

**A.** Isolated wetlands are those wetlands which are not part of a surface water tributary system, and include prairie potholes, playa lakes and vernal pools. Isolated wetlands perform many of the same vital functions performed by other wetlands adjacent to waterbodies, including flood and erosion control, groundwater recharge, and critical habitat for migratory waterfowl and other wildlife. For example, the prairie pothole region is widely recognized as the most important duck breeding habitat in the coterminous United States. The CWA Section 404 regulatory program affords protection to those isolated wetlands that have an effect or could have an effect on interstate commerce. The agencies' regulations and guidance provide examples of what constitutes the requisite nexus to interstate commerce (e.g., an area that is used or could be used by migratory birds, endangered species, or interstate or foreign travelers for recreational or other purposes).

## **MITIGATION AND MITIGATION BANKING**

**Q65** What is mitigation sequencing?

**A.** Mitigation sequencing involves three basic steps: avoidance of impacts; minimization of impacts; and finally compensation for remaining unavoidable impacts. When evaluating a proposed activity, the Corps must first determine whether the impacts to aquatic resources can be avoided – whether there exists a less environmentally damaging practicable alternative. The regulatory concept of practicability takes into account cost, existing technology, and logistics in light of the overall purpose of a project. If such an alternative does not exist, the Corps must next consider whether the impacts may be minimized or reduced (e.g., by reconfiguring the project or adjusting the construction schedule). Finally, to the extent appropriate and practicable, compensation for all remaining impacts must

be undertaken (e.g., restoring, enhancing, or creating additional wetlands). The Clinton Administration endorses the concept of sequencing.

**Q66 Is there flexibility in how the sequence is applied?**

**A. EPA and Army issued, on August 23, joint guidance that emphasizes the flexibility found in the current regulations and guidance. Specifically, the guidance clarifies that the level of regulatory review should be commensurate with the severity of the proposed environmental impact, considering both the functions of the affected wetland and the character of the proposed discharge. For example, a landowner proposing a small project in low-value wetlands, where environmental impacts would be minor, should not be required to undertake a rigorous analysis of alternatives.**

**Q67 What will the Clinton Administration do to improve our scientific capabilities to mitigate wetlands losses?**

**A. We need to improve our capabilities to restore, create and enhance wetlands to compensate for unavoidable wetlands losses. The Administration supports efforts to increase our scientific and technical knowledge to enhance our mitigation capabilities. We will also take steps to assure that mitigation, required of permittees, to compensate for unavoidable losses is successfully accomplished.**

**Q68 What is mitigation banking?**

**A. Mitigation banking is generally defined as wetland restoration or creation undertaken expressly for the purpose of compensating for future unavoidable wetland losses. Mitigation banking may involve the consolidation of compensation requirements for multiple project impacts on a single site, where units of restored or created wetland are expressed as "credits," and where accumulated credits are subsequently withdrawn to offset "debits" incurred at the project site.**

**Q69 What are the benefits of banking?**

**A. Mitigation banking provides for the restoration or creation of wetland functions in advance of development impacts reducing thereby the uncertainty of mitigation success. As such, mitigation banking may expedite the permit review process for projects that qualify. By consolidating compensation requirements, there may be ecological advantages accrued, as well as economies of scale relating to planning, monitoring, and management.**



**Q70 Does mitigation banking encourage unnecessary wetlands destruction?**

- A. No. Within the policy framework articulated in the Army/EPA guidance, applicants will be required to avoid and minimize impacts before using credits from a mitigation bank. Because of the advantages mitigation banking has over case-by-case compensatory mitigation associated with individual projects, it can actually result in positive environmental gains.**

**Q71 How does one go about establishing a mitigation bank?**

- A. Any individual, corporation, or public or private entity desiring to establish a mitigation bank should first contact the local Corps of Engineers District Regulatory Office. Conceptual plans indicating the location and current condition of the proposed mitigation area and the proposed plan for creating, restoring, and/or enhancement of the mitigation site should be available for discussion with the Corps and appropriate agencies. Generally, a memorandum of agreement will be signed by the mitigation bank proponent, the Corps, EPA, Federal and State resource agencies. This agreement should specify the plan for establishment, management, maintenance, and monitoring of the mitigation area. Procedures for establishment of credits and debits will also be included in the agreement. A Department of the Army permit may also be required if the mitigation bank is located in an area that is presently a water of the United States.**

## **ROLES OF AGENCIES**

**Q72 Will the Administration retain the 1992 Section 404(q) MOAs?**

- A. Yes. These MOAs define a process for expeditious review and resolution of agency concerns regarding individual permit decisions and policy issues. The agencies will continue to monitor its use to determine whether additional guidance or revisions are necessary.**

**Q73 Is the Administration proposing major changes in the respective roles of various Federal agencies involved in wetlands protection?**

- A. No. However, the Administration will take steps to emphasize a single decisionmaker to streamline the various Federal wetlands programs and reduce duplication, overlap and delay.**

## **STATE ROLES**

**Q74 How will the Administration increase the roles of state, tribal, and local governments in wetlands protection?**

**A. The Administration is committed to increasing state, tribal, and local government roles in Federal wetlands protection and restoration. The Administration will provide technical and financial assistance and guidance to states, tribes, and local governments in several areas, including: assumption of the Section 404 program; development of comprehensive wetland conservation programs; increasing Section 401 Certification authority; development of Programmatic General Permits; and better coordination between state, tribal, and local permit programs and the Section 404 program.**

**Q75 What has the experience been to date with State assumption of the Section 404 program?**

**A: Michigan assumed the Section 404 program in 1984. To date, Michigan is the only State that has assumed the Federal permit program. Until the spring of 1992, the relationship between the State and Federal agencies was very positive and there was general agreement that the State's Section 404 program was effective and efficient. While EPA Headquarters and the Regional office participate in State program oversight, there has been significant disagreements in only two cases since 1984.**

**New Jersey formally submitted its request to assume the program in June, 1993. The State has requested an extension to the 120-day application review period in order to better consider issues raised by the FWS, Environmental Defense Fund, Homebuilders Association and others. EPA is currently conducting Section 7 (Endangered Species Act) consultation with FWS on New Jersey's application.**

**Many States have expressed a number of reasons why they have not more actively pursued assumption. These include:**

- lack of available funding to run the program;**
- limit on State/Tribal assumption to "non-navigable" waters;**
- concerns regarding Federal requirements and oversight;**

- the availability of alternative mechanisms for State/Tribal wetlands protection; and
- the controversial nature of regulation of wetlands and other aquatic resources.

**Q76 How would partial state assumption of the Section 404 program work?**

**A. The Administration is requesting that Congress amend the CWA to allow States to assume part of the Section 404 programs as an interim step toward full assumption. Partial assumption could be geographic or programmatic.**

**Q77 What are programmatic general permits?**

**A. Programmatic general permits (PGPs) are general permits that authorize, with appropriate Section 404 safeguards, activities that qualify for approval under a Federal, state, tribal, regional, or local permit program. These program must protect wetlands and other waters of the United States at a level equal to or greater than Section 404.**

**Q78 Do PGPs delegate Federal regulatory authority to state/tribal/local governments?**

**A. No. The Federal regulatory authority remains with the Corps. Programmatic general permits, with appropriate safeguards, provide the Section 404 permit authorization when a Federal, State, Tribal, regional, or local permit is issued under an approved permit program. The Corps retains the authority to modify, suspend, or revoke authorization of any activity qualifying for a programmatic general permit when necessary to protect the environment.**

### ***SCOPE OF ACTIVITIES REGULATED***

**Q79 - One criticism of the Regulatory Program has been that many activities that destroy or degrade wetlands have not been regulated by the Federal government. Does the Clinton Administration propose to close this loophole?**

**A. Yes. The Corps and EPA are issuing revisions to their regulations which clarify the types of activities that involve discharges of dredged or fill material subject to Section 404 regulation. This clarification will result in the consistent regulation of many excavation activities that previously were not regulated. In addition, the regulation promotes consistency between Swampbuster and the CWA.**

**Q80 What is included in the final rule?**

**A. The final regulation contains three clarifications of the existing regulations: 1) the discharge of dredged material subject to Section 404 regulation includes discharges incidental to mechanized landclearing, ditching, channelization, or other excavation activities that destroy or degrade waters of the United States, 2) the discharge of fill material subject to Section 404 regulation includes activities that involve non-traditional use of pilings; and 3) prior converted croplands are not waters of the United States.**

**Q81 When will the final rule take effect?**

**A. The final regulation takes effect 30 days from the date of its publication in the *Federal Register*.**

**Q82 What excavation activities will now be regulated?**

**A. Incidental discharges of dredged or fill material associated with mechanized landclearing, ditching, channelization, and other excavation activities that destroy or degrade waters of the United States.**

**Q83 Will some of these activities be authorized by general permits?**

**A. Yes. The Corps intends to propose general permits for discharges associated with excavation activities that have minimal impacts on the aquatic environment.**

**Q84 Is a permit required if an applicant can excavate in waters of the United States by removing material without any incidental discharge of dredged material?**

**A. No. However, the Corps and EPA believe that it is virtually impossible to conduct mechanized land clearing, ditching, channelization, or excavation in waters of the U.S. without causing incidental redepositions of dredged material (however small or temporary) in the process.**

**Q85 Are there provisions for grandfathering previous and ongoing activities affected by the final rule?**

**A. Yes.**

**Q86 For activities involving a discharge of dredged material, who is responsible for proving whether this activity would have the effect of destroying or degrading waters of the United States?**

**A. It is the responsibility of any person preparing to undertake an excavation activity to demonstrate to the satisfaction of the Corps, or EPA as appropriate, that the activity would not have the effect of destroying or degrading any water of the United States.**

**Q87 How is the final rule different from the previous definition of "discharge of dredged material"?**

**A. The previous Corps definition of discharge of dredged material excluded *de minimis*, incidental soil movement occurring during normal dredging operations. This test was based on a quantity approach which was not clearly defined. The revised exclusion is based on an effects test (i.e. whether the activity will destroy or degrade a water of the United States).**

**Q88 Was the placement of pilings previously regulated under the Section 404 program?**

**A. Yes. The Corps has regulated the placement of pilings in certain circumstances under Section 404 for a number of years. The Corps issued Regulatory Guidance Letters in 1988 and 1990 to clarify this issue.**

**Q89 What piling activities would be regulated under Section 404?**

**A. The placement of pilings in waters of the United States will require a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities include, but are not limited to, the following: where the pilings are so closely spaced that sedimentation rates are increased; where the pilings themselves effectively replace the bottom of a waterbody; where the placement of pilings would reduce the reach or impair the flow or circulation of the waterbody; and where the placement of pilings would result in the adverse alteration or elimination of aquatic functions.**

**Q90 What piling activities are excluded from regulation under Section 404?**

**A. Generally two types of activities are not regulated under Section 404: 1) the placement of pilings for linear projects, such as bridges, elevated walkways, or powerline structures; and 2) the placement of pilings for piers, wharves, or an**

individual house on stilts. Such activities, however, will require authorization under Section 10 of the Rivers and Harbors Act if located in navigable waters of the United States.

**Q91** What does the phrase "degrade a water of the United States" mean?

**A.** An activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area, causing an identifiable individual or cumulative adverse effect on any aquatic function. It is the responsibility of any person preparing to undertake an excavation activity in a water of the United States to demonstrate clearly that degradation will not occur.

**Q92** Why is the Corps excluding normal dredging of navigable waters from the final rule?

**A.** The final rule clarifies that normal dredging operations are defined as dredging for navigation purposes in navigable waters of the United States with authorization from Congress and/or the Corps under Section 10 of the Rivers and Harbors Act of 1899. Considering these existing reviews and approvals, the agencies concluded that it would not be in the public interest to also require a Section 404 permit for "normal dredging" operations.

**Q93** How does the Corps define "identifiable adverse impacts" to wetlands?

**A.** There is no specific definition of this term. It will be determined by the Corps, or EPA as appropriate, on a case-by-case basis. The standard of identifiable adverse impacts is intended to be very low (i.e., very minor adverse impacts will trigger regulation). It is based on the loss or identifiable reduction of any single aquatic function and is not balanced with other beneficial effects (i.e., not the net effect). Some examples would include, but not be limited to, an adverse alteration of an area's hydrologic regime or alteration of the type, distribution, or diversity of aquatic vegetation.

**Q94** Was the excavation rule subject to rulemaking?

**Yes.** A proposed rule was published on June 16, 1992 in the *Federal Register*. We received over 6,300 comments. Most of these commenters wrote in support of the proposal to regulate incidental discharges associated with mechanized land clearing, ditching, channelization and other excavation.

## **ALASKA**

**Q95** The previous Administration proposed to exempt of Alaska's wetlands from the mitigation sequencing requirements (Alaska 1% rule). What was the proposed 1% rule?

**A.** The proposed "1% rule" would have allowed any state with historic wetland losses of 1% or less to circumvent the avoidance and compensatory mitigation requirements of the sequencing policy. Only the State of Alaska has experienced losses of less than 1%.

**Q96** Does the Clinton Administration intend to finalize the 1% rule?

**A.** No. The proposed rule will be withdrawn.

**Q97** What aspects of the Alaska 1% rule does the Clinton Administration consider inconsistent with its wetlands policies?

**A.** Relaxed permitting requirements under the "1% rule" would allow 1.5 million acres of wetlands to be filled before the 1% threshold would be met, which could include all of Alaska's extremely valuable coastal wetlands. This would occur even in situations where more environmentally appropriate alternatives and/or compensatory mitigation was clearly practicable. Additionally, the proposal could hinder management efforts for several Federally listed or proposed threatened and endangered species.

**Q98** Does the Administration have a proposal to address the Alaska issues?

**A.** Yes. The Corps and EPA will, within 90 days from August 24, 1993, initiate meetings with the Federal resource agencies, State and local government agencies, representatives of native villages, industry groups (including oil and fishing interests) and environmental groups, to consider other environmentally appropriate means to ensure regulatory flexibility and the feasibility of alternative permitting procedures in Alaska. Such Alaska-specific proposals, combined with nationwide changes to the regulatory program, should significantly address many of Alaska's concerns about implementation of the Section 404 regulatory program.

## **TAKINGS**

**Q99** How do the recommendations address the takings/private property rights issue?

- A.** The Administration strongly supports private property rights, and is committed to reducing the impact of the Section 404 regulatory program on landowners. Although we believe that "takings" claims are best addressed on a case-by-case basis through the court, the Clinton Administration's package of reforms includes a number of measures that will protect the landowner's property interests. These measures include establishing deadlines for permit actions, creating an appeals process for jurisdiction and permitting actions, and mandating delineation training and certification programs for Federal employees responsible for making permit decisions.

## **THE FLOOD**

**Q100** How did the flood affect the Interagency Workgroup Report? What does the Report mean for flood recovery?

- A.** Impacts of the extensive flooding in the Midwest this summer heightened public awareness of the value of wetlands and the potential consequences that may result from their loss. Many of the provisions included in the Administration's plan will help facilitate federal assistance to farmers, business owners, families and others adversely affected by the flooding, both in the form of immediate relief and in the long-term as we work together to repair the damage and identify opportunities to minimize the potential for a reoccurrence. Particularly for farmers who may not be able to farm their silt-covered lands for many years, funding for programs such as the Department of Agriculture's Wetlands Reserve Program may provide essential financial support in this time of need, while having the added benefit of increasing the number of flood-absorbing wetlands in this part of the country. As the country moves to provide flood control in the Midwest and elsewhere for the future, we must identify ways to protect and restore our river and wetlands systems so that they can work for us, integrated with structural flood control measures, where appropriate and cost-effective.



# **Part VI - Federal Manual for Identifying and Delineating Wetlands**

## *Section 1*

**Special Notice - U.S. Army Corps of Engineers,  
Use of the 1987 Delineation Manual . . . . . 405**

## *Section 2*

**Memorandum, U.S. Army Corps of Engineers,  
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## *Section 3*

**Except from "Protecting America's Wetlands,"  
Current Policy on the Use of the 1987 Wetlands  
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**PART VI - FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING  
WETLANDS**

**Section 1**

**Special Notice, U.S. Army Corps of Engineers, Use of  
the 1987 Wetlands Delineation Manual**



DEPARTMENT OF THE ARMY  
SEATTLE DISTRICT, CORPS OF ENGINEERS  
P.O BOX 3755  
SEATTLE, WASHINGTON 98124-2255

REPLY TO  
ATTENTION OF

September 16, 1991

Until revisions to the January 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual) are finalized, the U.S. Army Corps of Engineers (Corps) will apply the 1987 Corp of Engineers Wetland Delineation Manual (1987 Manual) to identify and delineate wetlands regulated under section 404 of the Clean Water Act. A copy of this manual is enclosed for your use.

The transition from the 1989 Manual to the 1987 Manual was directed by the 1992 Energy and Water Development Appropriation Act, signed by President Bush on August 17, 1991.

Individuals who have pending permit applications with the Corps will be notified in writing of their options of redelineation under the 1987 Corps' Manual. After consultation with appropriate parties, the Corps will make the final decision on the appropriate wetland boundary, which will be binding for the particular application.

In addition, all first time delineations, from August 17, 1991 until revisions to the 1989 Manual are finalized, will be made with the 1987 Corps Manual. In these cases, use of the 1987 Manual is mandatory.

Other wetland delineation methods, particularly the 1989 Manual, may continue to be used by state and local government jurisdictions.

Please see the attached Public Notice for more guidance regarding implementation of the 1987 Manual.

Sincerely,

THOMAS F. MUELLER  
Chief, Regulatory Branch



US Army Corps  
of Engineers  
Seattle District

Regulatory Branch  
Post Office Box 3755  
Seattle, Washington 98124-2255  
Telephone (206) 764-3495

# Special Public Notice

August 30, 1991

Subject: Use of the 1987 Wetlands Delineation Manual

Until revisions to the January 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual) are finalized, the U.S. Army Corps of Engineers (Corps) will apply the 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual) to identify and delineate wetlands potentially subject to regulation under section 404 of the Clean Water Act.

The transition from the 1989 Manual to the 1987 Manual is directed in part by the 1992 Energy and Water Development Appropriation Act, which provides Corps funding for civil works projects and its regulatory program. The act was signed by President Bush on August 17, 1991.

Permit applicants and individuals with enforcement cases who have pending actions with the Corps as of August 17, 1991, will be notified in writing of their options of redelineation under the 1987 Corps Manual. After consultation with appropriate parties, the Corps will make the final decision as to whether a substantial difference exists between delineations under the 1987 and 1989 manuals. Also, all first-time delineations from August 17, 1991, until the revisions to the 1989 Manual are finalized through rulemaking, will be made with the 1987 Corps Manual. Copies of the 1987 Corps Manual may be obtained by contacting the National Technical Information Service at (703) 487-4650. Guidance concerning the implementation of the 1987 Manual is available from your local Corps office.

Use of the 1987 Manual is mandatory, however, the Appendices are modified as discussed below:

a. Appendix A: The definition of "under normal circumstances" provided in this glossary is modified pursuant to Regulatory Guidance Letter (RGL) #90-7;

b. Appendix B: Use of the data sheets provided is recommended, but is not mandatory;

c. Appendix C: Sections 1 and 2 - These sections are replaced with the May 1988 National List of Plant Species That Occur in Wetlands and associated regional lists (U.S. Fish and Wildlife Service, Summary 88(24) and Biological Reports 88(26.1-26.13)). The referenced lists will be used to determine the wetland indicator status of plant species and any subsequent updates will be adopted;

d. Appendix D: Section 2 - The most recent Hydric Soils of the United States list developed by the U.S. Department of Agriculture, Soil Conservation Service (SCS), will be used to determine if a particular soil has been designated as hydric by the National Technical Committee for Hydric Soils. The current hydric soils list was published by SCS in ~~June 1991~~ and any subsequent updates will be adopted. 1990

All other current policy considerations concerning wetlands in general (e.g., RGL's) remain in effect during interim use of the 1987 Corps Manual.

The proposed revisions to the 1989 Manual were published in the August 14 Federal Register, beginning a 60-day public comment period, which closes October 15, 1991. Copies of the proposed revisions may be obtained from your local Corps office or by calling the EPA Wetlands Hotline at (800) 832-7828.

In addition to restriction on the use of the 1989 Manual, the appropriation act also disallows use of funds for the implementation of the proposed regulatory fee structure, as published in the October 11, 1990 Federal Register. The Army will take no further action, at this time, on the proposal to amend regulatory fees.

**PART VI - FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING  
WETLANDS**

**Section 2**

**Memorandum, U.S. Army Corps of Engineers,  
Clarification and Interpretation of the 1987 Manual**



DEPARTMENT OF THE ARMY  
U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

MAR 1992

CECW-OR

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Clarification and Interpretation of the 1987 Manual

1. The purpose of this memorandum is to provide additional clarification and guidance concerning the application of the Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report (1987 Manual). As discussed in my 20 February 1992 memorandum, procedures for the identification and delineation of wetlands must be fully consistent with both the 1987 Manual and the Questions and Answers issued 7 October 1991. The technical and procedural guidance contained in paragraphs 2 thru 6 below has been prepared by the Waterways Experiment Station (WES) and is provided as further guidance. The following guidance is considered to be consistent with the 1987 Manual and the 7 October Questions and Answers. Further, this guidance will be presented in the upcoming Regulatory IV wetlands delineation training sessions in FY 92. The alternative technical methods of data gathering discussed below are acceptable as long as the basic decision rules (i.e., criteria and indicators) established in the 1987 Manual are applied. Also enclosed is a revised data form which may be used in lieu of the routine data sheet provided with the 1987 Manual, if desired. As discussed in my 20 February 1992 memorandum to the field, regional approaches and/or alternative data sheets must be reviewed and approved by HQUSACE (CECW-OR) prior to regional implementation. Notwithstanding this requirement, we encourage interagency coordination and cooperation on implementation of the 1987 Manual. Such cooperation can facilitate the continued success of our use of the 1987 Manual.

2. Vegetation:

a. Basic rule: More than 50 percent of dominant species from all strata are OBL, FACW, or FAC (excluding FAC-) on the appropriate Fish and Wildlife Service regional list of plant species that occur in wetlands.

b. The 1987 Manual provides that the 3 most dominant species be selected from each stratum (select 5 from each stratum if only 1-2 strata are present). However, alternative ecologically based methods for selecting dominant species from each stratum are also acceptable. The dominance method described in the 1989 interagency manual is an appropriate alternative

method. (1989 Manual, p. 9, para. 3.3)

c. The 4 vegetation strata (tree, sapling/shrub, herb, and woody vine) described in the 1987 Manual are appropriate. However, a 5-stratum approach (tree, sapling, shrub, herb, and woody vine) is an acceptable alternative.

d. The 1987 Manual states on page 79 that hydrophytic vegetation is present if 2 or more dominant species exhibit morphological adaptations or have known physiological adaptations for wetlands. This rule should be used only after the basic rule is applied; use caution with adaptations (e.g., shallow roots) that can develop for reasons other than wetness. Furthermore, the morphological adaptations must be observed on most individuals of the dominant species.

e. In areas where the available evidence of wetlands hydrology or hydric soil is weak (e.g., no primary indicators of hydrology), the Facultative Neutral (FAC neutral) option may be used to help clarify a wetland delineation. Use of the FAC neutral option is explained in paragraph 35(a), page 23, of the 1987 Manual. Use of the FAC neutral option is at the discretion of the District. Further, the FAC neutral option cannot be used to exclude areas that meet the "basic vegetation rule" and the hydrology and hydric soil requirements.

### 3. Hydrology:

a. Areas which are seasonally inundated and/or saturated to the surface for a consecutive number of days for more than 12.5 percent of the growing season are wetlands, provided the soil and vegetation parameters are met. Areas wet between 5 percent and 12.5 percent of the growing season in most years (see Table 5, page 36 of the 1987 Manual) may or may not be wetlands. Areas saturated to the surface for less than 5 percent of the growing season are non-wetlands. Wetland hydrology exists if field indicators are present as described herein and in the enclosed data sheet.

b. To evaluate hydrologic data (e.g., from stream gages or groundwater wells) growing season dates are required. Soil temperature regime (i.e., period of the year when soil temperature at 20 inches below the surface is above 5 C) is the primary definition of growing season, but data are rarely available for individual sites. Broad regions based on soil temperature regime (e.g., mesic, thermic) are not sufficiently site-specific. For wetland determinations, growing season can be estimated from climatological data given in most SCS county soil



CECW-OR

SUBJECT: Clarification and Interpretation of the 1987 Manual

surveys (usually in Table 2 or 3 of modern soil surveys). Growing season starting and ending dates will generally be determined based on the "28 degrees F or lower" temperature threshold at a frequency of "5 years in 10." In the south, at the discretion of the district, it may be more appropriate to use the 32 degree F threshold.

c. In groundwater-driven systems, which lack surface indicators of wetland hydrology, it is acceptable to use local Soil Conservation Service (SCS) soil survey information to evaluate the hydrology parameter (p. 37 in the Manual) in conjunction with other information, such as the FAC neutral test. Use caution in areas that may have been recently drained.

d. Oxidized rhizospheres surrounding living roots are acceptable hydrology indicators on a case-by-case basis and may be useful in groundwater systems. Use caution that rhizospheres are not relicts of past hydrology. Rhizospheres should also be reasonably abundant and within the upper 12 inches of the soil profile. Oxidized rhizospheres must be supported by other indicators of hydrology such as the FAC neutral option if hydrology evidence is weak.

#### 4. Soil:

a. The most recent version of National Technical Committee for Hydric Soils hydric soil criteria will be used. At this writing, criteria published in the June 1991 Hydric Soils of the United States are current. These criteria specify at least 15 consecutive days of saturation or 7 days of inundation during the growing season in most years.

b. Local Lists of Hydric Soil Mapping Units recently developed by SCS and available from county or State SCS offices give local information about presence of hydric soils on a site. When available, these local lists take precedence over the national list for hydric soil determinations.

c. SCS is currently developing regional indicators of significant soil saturation. Until finalized and adopted, these indicators may not be used for hydrology or hydric soil determinations.

d. The statement (p. 31 of the 1987 Manual) that gleyed and low-ochroma colors must be observed "immediately below the A-horizon or 10 inches (whichever is shallower)" is intended as general guidance. Certain problem soils may differ.

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SUBJECT: Clarification and Interpretation of the 1987 Manual

5. Methods:

a. As stated in the 1987 Manual (footnote, p. 76), alternative plot sizes and dominance measures are acceptable.

b. For comprehensive determinations involving a patchy or diverse herb layer, a single, centrally located 3.28 x 3.28-foot quadrat may not give a representative sample. As an alternative, the multiple-quadrat procedure presented in the 1989 Manual (p. 42) is recommended.

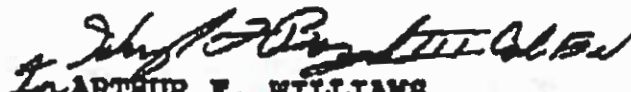
6. Problem Areas

a. Page 93, paragraph 78 of the 1987 Manual states that similar problem situations may occur in other wetland types; therefore, problem areas are not limited to this list.

b. Problem soil situations mentioned elsewhere in the Manual include soils derived from red parent materials, some Entisols, Mollisols, and Spodosols.

7. Questions concerning this information should be directed to Ms. Karen A. Kochenbach, HQUSACE (CECW-OR), at (202) 272-1784, or Mr. James S. Wakeley, WES, at (601) 634-3702.

Encl

  
ARTHUR E. WILLIAMS  
Major General, USA  
Directorate of Civil Works

DISTRIBUTION:  
(SEE PAGE 2 & 3)

**DATA FORM  
ROUTINE WETLAND DETERMINATION  
(1987 COE Wetlands Delineation Manual)**

Project/Site: _____ Applicant/Owner: _____ Investigator: _____		Date: _____ County: _____ State: _____	
Do Normal Circumstances exist on the site?      Yes    No Is the site significantly disturbed (Atypical Situation)?      Yes    No Is the area a potential Problem Area? (If needed, explain on reverse.)      Yes    No		Community ID: _____ Transect ID: _____ Plot ID: _____	

**VEGETATION**

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. _____	_____	_____	9. _____	_____	_____
2. _____	_____	_____	10. _____	_____	_____
3. _____	_____	_____	11. _____	_____	_____
4. _____	_____	_____	12. _____	_____	_____
5. _____	_____	_____	13. _____	_____	_____
6. _____	_____	_____	14. _____	_____	_____
7. _____	_____	_____	15. _____	_____	_____
8. _____	_____	_____	16. _____	_____	_____

Percent of Dominant Species that are OBL, FACW or FAC (excluding FAC-): \_\_\_\_\_

Remarks: \_\_\_\_\_

**HYDROLOGY**

<input type="checkbox"/> Recorded Data (Describe in Remarks): <input type="checkbox"/> Stream, Lake, or Tide Gauge <input type="checkbox"/> Aerial Photographs <input type="checkbox"/> Other <input type="checkbox"/> No Recorded Data Available	<b>Wetland Hydrology Indicators:</b> <b>Primary Indicators:</b> <input type="checkbox"/> Inundated <input type="checkbox"/> Saturated in Upper 12 Inches <input type="checkbox"/> Water Marks <input type="checkbox"/> Drift Lines <input type="checkbox"/> Sediment Deposits <input type="checkbox"/> Drainage Patterns in Wetlands <b>Secondary Indicators (2 or more required):</b> <input type="checkbox"/> Oxidized Root Channels in Upper 12 Inches <input type="checkbox"/> Water-Stained Leaves <input type="checkbox"/> Local Soil Survey Data <input type="checkbox"/> FAC-Neutral Test <input type="checkbox"/> Other (Explain in Remarks)
<b>Field Observations:</b> Depth of Surface Water: _____ (in.) Depth to Free Water in Pit: _____ (in.) Depth to Saturated Soil: _____ (in.)	
Remarks: _____	

**SOILS**

<b>Map Unit Name</b> (Series and Phase): _____			<b>Drainage Class:</b> _____		
<b>Taxonomy (Subgroup):</b> _____			<b>Field Observations</b> Confirm Mapped Type?    Yes   No		
<b>Profile Description:</b>					
Depth (inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance/Contrast	Texture Concretions, Structure, etc.

**Hydric Soil Indicators.**

<input type="checkbox"/> Histosol <input type="checkbox"/> Histic Epipedon <input type="checkbox"/> Sulfidic Odor <input type="checkbox"/> Aquic Moisture Regime <input type="checkbox"/> Reducing Conditions <input type="checkbox"/> Gleyed or Low-Chroma Colors	<input type="checkbox"/> Concretions <input type="checkbox"/> High Organic Content in Surface Layer in Sandy Soils <input type="checkbox"/> Organic Streaking in Sandy Soils <input type="checkbox"/> Listed on Local Hydric Soils List <input type="checkbox"/> Listed on National Hydric Soils List <input type="checkbox"/> Other (Explain in Remarks)
---	--

**Remarks.**

**WETLAND DETERMINATION**

Hydrophytic Vegetation Present?    Yes   No   (Circle)	Wetland Hydrology Present?    Yes   No	(Circle)  Is this Sampling Point Within a Wetland?    Yes   No
Hydric Soils Present?    Yes   No		
<b>Remarks:</b>		

Approved by HQUFACE 3/92

# 1987 Corps of Engineers Wetlands Delineation Manual

## DATA FORM 3 ATYPICAL SITUATIONS

Applicant Name: \_\_\_\_\_ Application Number: \_\_\_\_\_ Project Name: \_\_\_\_\_  
Location: \_\_\_\_\_ Plot Number: \_\_\_\_\_ Date: \_\_\_\_\_

### A. VEGETATION:

1. Type of Alteration: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
2. Effect on Vegetation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
3. Previous Vegetation: \_\_\_\_\_  
(Attach documentation) \_\_\_\_\_  
\_\_\_\_\_
4. Hydrophytic Vegetation? Yes \_\_\_\_\_ No \_\_\_\_\_

### B. SOILS:

1. Type of Alteration: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
2. Effect on Soils: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
3. Previous Soils: \_\_\_\_\_  
(Attach documentation) \_\_\_\_\_  
\_\_\_\_\_
4. Hydric Soils? Yes \_\_\_\_\_ No \_\_\_\_\_

### C. HYDROLOGY:

1. Type of Alteration: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
2. Effect on Hydrology: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
3. Previous Hydrology: \_\_\_\_\_  
(Attach documentation) \_\_\_\_\_  
\_\_\_\_\_
4. Wetland Hydrology? Yes \_\_\_\_\_ No \_\_\_\_\_

Characterized By: \_\_\_\_\_

**DATA FORM  
ROUTINE ONSITE DETERMINATION METHOD<sup>1</sup>**

Field Investigator(s): \_\_\_\_\_ Date: \_\_\_\_\_  
 Project/Site: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_  
 Applicant/Owner: \_\_\_\_\_ Plant Community #/Name: \_\_\_\_\_

Note: If a more detailed site description is necessary, use the back of data form or a field notebook.

Do normal environmental conditions exist at the plant community?  
 Yes \_\_\_\_\_ No \_\_\_\_\_ (If no, explain on back)  
 Has the vegetation, soils, and/or hydrology been significantly disturbed?  
 Yes \_\_\_\_\_ No \_\_\_\_\_ (If yes, explain on back)

**VEGETATION**

Dominant Plant Species	Indicator		Dominant Plant Species	Indicator	
	Status	Stratum		Status	Stratum
1. _____	_____	_____	11. _____	_____	_____
2. _____	_____	_____	12. _____	_____	_____
3. _____	_____	_____	13. _____	_____	_____
4. _____	_____	_____	14. _____	_____	_____
5. _____	_____	_____	15. _____	_____	_____
6. _____	_____	_____	16. _____	_____	_____
7. _____	_____	_____	17. _____	_____	_____
8. _____	_____	_____	18. _____	_____	_____
9. _____	_____	_____	19. _____	_____	_____
10. _____	_____	_____	20. _____	_____	_____

Percent of dominant species that are OBL, FACW, and/or FAC \_\_\_\_\_  
 Is the hydrophytic vegetation criterion met? Yes \_\_\_\_\_ No \_\_\_\_\_  
 Rationale: \_\_\_\_\_

**SOILS**

Series/phase: \_\_\_\_\_ Subgroup:<sup>2</sup> \_\_\_\_\_  
 Is the soil on the hydric soils list? Yes \_\_\_\_\_ No \_\_\_\_\_ Undetermined \_\_\_\_\_  
 Is the soil a Histosol? Yes \_\_\_\_\_ No \_\_\_\_\_ Histic epipedon present? Yes \_\_\_\_\_ No \_\_\_\_\_  
 Is the soil: Mottled? Yes \_\_\_\_\_ No \_\_\_\_\_ Gleyed? Yes \_\_\_\_\_ No \_\_\_\_\_  
 Matrix Color: \_\_\_\_\_ Mottle Colors: \_\_\_\_\_  
 Other hydric soil indicators: \_\_\_\_\_  
 Is the hydric soil criterion met? Yes \_\_\_\_\_ No \_\_\_\_\_  
 Rationale: \_\_\_\_\_

**HYDROLOGY**

Is the ground surface inundated? Yes \_\_\_\_\_ No \_\_\_\_\_ Surface water depth: \_\_\_\_\_  
 Is the soil saturated? Yes \_\_\_\_\_ No \_\_\_\_\_  
 Depth to free-standing water in pit/soil probe hole: \_\_\_\_\_  
 List other field evidence of surface inundation or soil saturation.  
 \_\_\_\_\_  
 Is the wetland hydrology criterion met? Yes \_\_\_\_\_ No \_\_\_\_\_  
 Rationale: \_\_\_\_\_

**JURISDICTIONAL DETERMINATION AND RATIONALE**

Is the site a wetland? Yes \_\_\_\_\_ No \_\_\_\_\_  
 Rationale for jurisdictional decision: \_\_\_\_\_

<sup>1</sup> This data form can be used for the Hydric Soil Assessment Procedure and the Plant Community Assessment Procedure.  
<sup>2</sup> Classification according to "Soil Taxonomy."

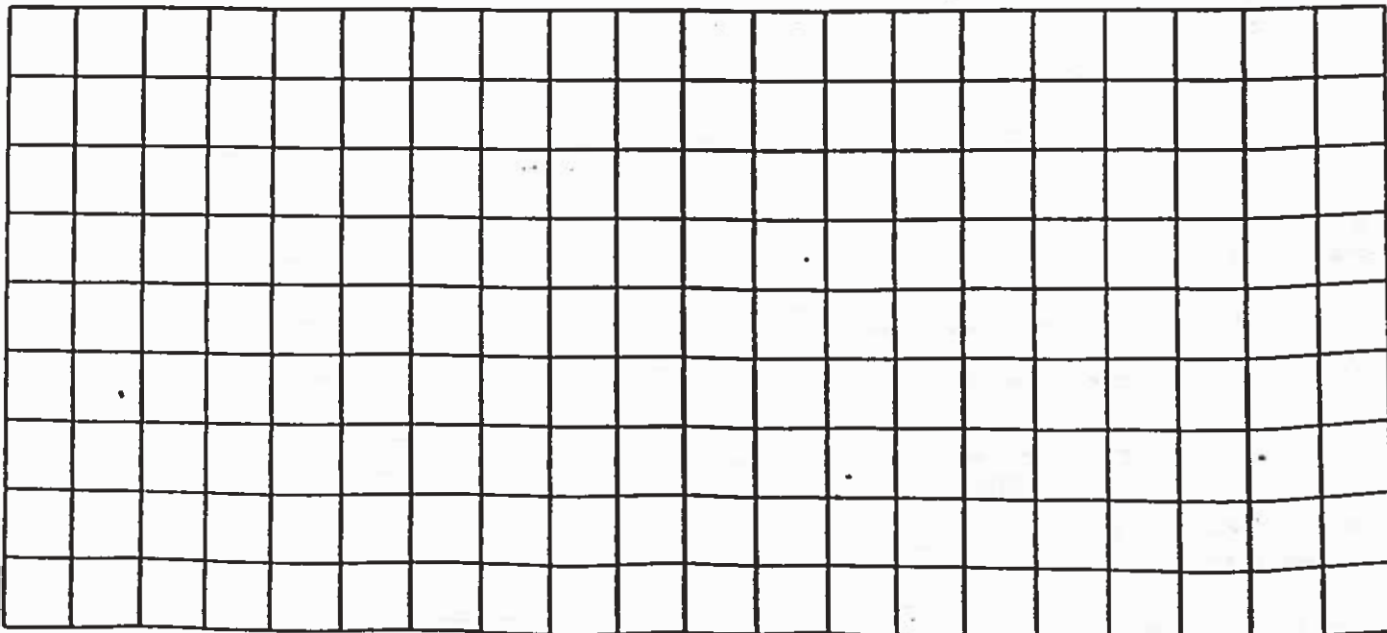
ADDITIONAL SOIL PIT DATA

1. PIT LOCATION/PLOT #: \_\_\_\_\_
2. A. SOIL TYPE NAME/ORDER/SUBORDER: \_\_\_\_\_  
B. SOIL SURVEY NAME & DATE: \_\_\_\_\_
3. IS THE SOIL TYPE ON THE HYDRIC SOILS LIST FOR THE:  
A. STATE (Y OR N)?                      B. COUNTY (Y OR N)?    C. OTHER (Y OR N)
4. REGARDLESS OF WHETHER IT'S ON A STATE OR COUNTY LIST, IS THE SOIL A "HYDRIC" SOIL?  
(Y OR N) WHY? \_\_\_\_\_

5. CHARACTERIZATION OF SOIL PIT:

DEPTH IN PIT (IN)	HORIZON NAME	MUNSELL SOIL COLOR	GLEYES?	MOTTLED? MOTTLE COLOR	ROOT DIST.	HYDROLOGY/ TEXTURE/EH/ COMMENTS
/	/	/	/	/	/	/
/	/	/	/	/	/	/
/	/	/	/	/	/	/
/	/	/	/	/	/	/
/	/	/	/	/	/	/
/	/	/	/	/	/	/
/	/	/	/	/	/	/

6. COMMENTS/SKETCH: \_\_\_\_\_



**DATA FORM <sup>1</sup>**  
**INTERMEDIATE-LEVEL ONSITE DETERMINATION METHOD OR**  
**COMPREHENSIVE ONSITE DETERMINATION METHOD**  
**(Summary Sheet)**

Field Investigator(s): \_\_\_\_\_ Date: \_\_\_\_\_  
 Project/Site: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_  
 Applicant/Owner: \_\_\_\_\_  
 Intermediate-level Onsite Determination Method \_\_\_\_\_  
 Comprehensive Onsite Determination Method \_\_\_\_\_  
 Transect # \_\_\_\_\_ Plot # \_\_\_\_\_ Vegetation Unit #/Name: \_\_\_\_\_  
 Note: If a more detailed site description is necessary, use the back of data form or a field notebook.

Do normal environmental conditions exist at the plant community?  
 Yes \_\_\_\_\_ No \_\_\_\_\_ (If no, explain on back)  
 Has the vegetation, soils, and/or hydrology been significantly disturbed?  
 Yes \_\_\_\_\_ No \_\_\_\_\_ (If yes, explain on back)

Dominant Plant Species	Indicator Status	Stratum	Dominant Plant Species	Indicator Status	Stratum
1. _____	_____	_____	14. _____	_____	_____
2. _____	_____	_____	15. _____	_____	_____
3. _____	_____	_____	16. _____	_____	_____
4. _____	_____	_____	17. _____	_____	_____
5. _____	_____	_____	18. _____	_____	_____
6. _____	_____	_____	19. _____	_____	_____
7. _____	_____	_____	20. _____	_____	_____
8. _____	_____	_____	21. _____	_____	_____
9. _____	_____	_____	22. _____	_____	_____
10. _____	_____	_____	23. _____	_____	_____
11. _____	_____	_____	24. _____	_____	_____
12. _____	_____	_____	25. _____	_____	_____
13. _____	_____	_____	26. _____	_____	_____

Percent of dominant species that are OBL, FACW and/or FAC \_\_\_\_\_

Is the hydrophytic vegetation criterion met? Yes \_\_\_\_\_ No \_\_\_\_\_

Is the hydric soil criterion met? Yes \_\_\_\_\_ No \_\_\_\_\_

Is the wetland hydrology criterion met? Yes \_\_\_\_\_ No \_\_\_\_\_

Is the vegetation unit or plot wetland? Yes \_\_\_\_\_ No \_\_\_\_\_

Rationale for jurisdictional decision: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

<sup>1</sup> This data form can be used for either the Intermediate-level Onsite Determination Method or the Comprehensive Onsite Determination Method. Indicate which method is used.



**DATA FORM <sup>1</sup>**  
**INTERMEDIATE-LEVEL ONSITE DETERMINATION METHOD OR**  
**COMPREHENSIVE ONSITE DETERMINATION METHOD**  
**(Soils and Hydrology)**

Field Investigator(s): \_\_\_\_\_ Date: \_\_\_\_\_  
Project/Site: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_  
Applicant/Owner: \_\_\_\_\_  
Intermediate-level Onsite Determination Method \_\_\_\_\_  
Comprehensive Onsite Determination Method \_\_\_\_\_  
Transect # \_\_\_\_\_ Plot # \_\_\_\_\_  
Vegetation Unit #/Name: \_\_\_\_\_ Sample # Within Veg. Unit: \_\_\_\_\_  
*Note: If a more detailed site description is necessary, use the back of data form or a field notebook.*

-----

**SOILS**

Series/phase: \_\_\_\_\_ Subgroup:<sup>2</sup> \_\_\_\_\_  
Is the soil on the hydric soils list? Yes \_\_\_\_\_ No \_\_\_\_\_ Undetermined \_\_\_\_\_  
Is the soil a Histosol? Yes \_\_\_\_\_ No \_\_\_\_\_ Histic epipedon present? Yes \_\_\_\_\_ No \_\_\_\_\_  
Is the soil: Mottled? Yes \_\_\_\_\_ No \_\_\_\_\_ Gleyed? Yes \_\_\_\_\_ No \_\_\_\_\_  
Matrix Color: \_\_\_\_\_ Mottle Colors: \_\_\_\_\_  
Other hydric soil indicators: \_\_\_\_\_  
Comments: \_\_\_\_\_

-----

**HYDROLOGY**

Is the ground surface inundated? Yes \_\_\_\_\_ No \_\_\_\_\_ Surface water depth: \_\_\_\_\_  
Is the soil saturated? Yes \_\_\_\_\_ No \_\_\_\_\_  
Depth to free-standing water in pit/soil probe hole: \_\_\_\_\_  
Mark other field indicators of surface inundation or soil saturation below:

<input type="checkbox"/> Oxidized root zones	<input type="checkbox"/> Water-stained leaves
<input type="checkbox"/> Water marks	<input type="checkbox"/> Surface scoured areas
<input type="checkbox"/> Drift lines	<input type="checkbox"/> Wetland drainage patterns
<input type="checkbox"/> Water-borne sediment deposits	<input type="checkbox"/> Morphological plant adaptations

Additional hydrologic indicators: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Comments: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

<sup>1</sup> This data form can be used for both the Vegetation Unit Sampling Procedure and the Quadrat Transect Sampling Procedure of the Intermediate-Level Onsite Determination Method, or the Quadrat Sampling Procedure of the Comprehensive Onsite Determination Method. Indicate which method is used.

<sup>2</sup> Classification according to "Soil Taxonomy."

**DATA FORM**  
**INTERMEDIATE-LEVEL ONSITE DETERMINATION METHOD**  
**QUADRAT TRANSECT SAMPLING PROCEDURE**  
**(Vegetation Data)**

Field Investigator(s): \_\_\_\_\_

Project/Site: \_\_\_\_\_ Date: \_\_\_\_\_

Applicant/Owner: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_

Transect # \_\_\_\_\_ Plot # \_\_\_\_\_

Note: If a more detailed site description is necessary, use the back of data form or a field notebook.

**DOMINANT PLANT SPECIES**

<u>Herbs (Bryophytes)</u>	<u>Indicator Status</u>	<u>Saplings</u>	<u>Indicator Status</u>
1. _____	_____	1. _____	_____
2. _____	_____	2. _____	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____
5. _____	_____	5. _____	_____
6. _____	_____	6. _____	_____
7. _____	_____	7. _____	_____
8. _____	_____	8. _____	_____
9. _____	_____	9. _____	_____
10. _____	_____	10. _____	_____
11. _____	_____	11. _____	_____
12. _____	_____	12. _____	_____
13. _____	_____	13. _____	_____

<u>Shrubs</u>	<u>Indicator Status</u>	<u>Trees</u>	<u>Indicator Status</u>
1. _____	_____	1. _____	_____
2. _____	_____	2. _____	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____
5. _____	_____	5. _____	_____
6. _____	_____	6. _____	_____
7. _____	_____	7. _____	_____
8. _____	_____	8. _____	_____
9. _____	_____	9. _____	_____
10. _____	_____	10. _____	_____
11. _____	_____	11. _____	_____
12. _____	_____	12. _____	_____
13. _____	_____	13. _____	_____

Woody Vines

1. _____	_____
2. _____	_____
3. _____	_____
4. _____	_____
5. _____	_____
6. _____	_____
7. _____	_____
8. _____	_____
9. _____	_____
10. _____	_____
11. _____	_____
12. _____	_____
13. _____	_____

Percent of dominant species that are OBL, FACW, and/or FAC \_\_\_\_\_

**DATA FORM**  
**INTERMEDIATE-LEVEL ONSITE DETERMINATION METHOD**  
**VEGETATION UNIT SAMPLING PROCEDURE**  
**(Herbs and Bryophytes)**

Field Investigator(s): \_\_\_\_\_ Date: \_\_\_\_\_  
 Project/Site: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_  
 Applicant/Owner: \_\_\_\_\_ Vegetation Unit #/Name: \_\_\_\_\_  
 Note: If a more detailed site description is necessary, use the back of data form or a field notebook.

Species	Indicator Status	Percent Areal Cover	Cover <sup>1</sup> Class	Midpoint <sup>1</sup> of Cover Class	Rank <sup>2</sup>
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____	_____
6. _____	_____	_____	_____	_____	_____
7. _____	_____	_____	_____	_____	_____
8. _____	_____	_____	_____	_____	_____
9. _____	_____	_____	_____	_____	_____
10. _____	_____	_____	_____	_____	_____
11. _____	_____	_____	_____	_____	_____
12. _____	_____	_____	_____	_____	_____
13. _____	_____	_____	_____	_____	_____
14. _____	_____	_____	_____	_____	_____
15. _____	_____	_____	_____	_____	_____
16. _____	_____	_____	_____	_____	_____
17. _____	_____	_____	_____	_____	_____
18. _____	_____	_____	_____	_____	_____
19. _____	_____	_____	_____	_____	_____
20. _____	_____	_____	_____	_____	_____
21. _____	_____	_____	_____	_____	_____
22. _____	_____	_____	_____	_____	_____
23. _____	_____	_____	_____	_____	_____
24. _____	_____	_____	_____	_____	_____
25. _____	_____	_____	_____	_____	_____
26. _____	_____	_____	_____	_____	_____
27. _____	_____	_____	_____	_____	_____
28. _____	_____	_____	_____	_____	_____
29. _____	_____	_____	_____	_____	_____
30. _____	_____	_____	_____	_____	_____
31. _____	_____	_____	_____	_____	_____
32. _____	_____	_____	_____	_____	_____
33. _____	_____	_____	_____	_____	_____
34. _____	_____	_____	_____	_____	_____
35. _____	_____	_____	_____	_____	_____
36. _____	_____	_____	_____	_____	_____
Sum of Midpoints				_____	_____
Dominance Threshold Number Equals 50% x Sum of Midpoints				_____	_____

<sup>1</sup> Cover classes (midpoints): T<1% (none); 1 = 1-5% (3.0); 2 = 6-15% (10.5); 3 = 16-25% (20.5); 4 = 26-50% (38.0); 5 = 51-75% (63.0); 6 = 76-95% (85.5); 7 = 96-100% (98.0).

<sup>2</sup> To determine the dominants, first rank the species by their midpoints. Then cumulatively sum the midpoints of the ranked species until 50% of the total for all species midpoints is immediately exceeded. All species contributing to that cumulative total (the dominance threshold number) plus any additional species having 20% of the total midpoint value should be considered dominants and marked with an asterisk.

**DATA FORM**  
**INTERMEDIATE-LEVEL ONSITE DETERMINATION METHOD**  
**VEGETATION UNIT SAMPLING PROCEDURE**  
**(Shrubs, Woody Vines and Saplings)**

Field Investigator(s): \_\_\_\_\_ Date: \_\_\_\_\_  
 Project/Site: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_  
 Applicant/Owner: \_\_\_\_\_ Vegetation Unit #/Name: \_\_\_\_\_  
 Note: If a more detailed site description is necessary, use the back of data form or a field notebook.

<u>Shrub Species</u>	<u>Indicator Status</u>	<u>Percent Areal Cover</u>	<u>Cover<sup>1</sup> Class</u>	<u>Midpoint<sup>1</sup> of Cover Class</u>	<u>Rank<sup>2</sup></u>
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____	_____
6. _____	_____	_____	_____	_____	_____
7. _____	_____	_____	_____	_____	_____
8. _____	_____	_____	_____	_____	_____
9. _____	_____	_____	_____	_____	_____
10. _____	_____	_____	_____	_____	_____
Sum of Midpoints				_____	_____
Dominance Threshold Number Equals 50% x Sum of Midpoints					

<u>Woody Vine Species</u>	<u>Indicator Status</u>	<u>Percent Areal Cover</u>	<u>Cover<sup>1</sup> Class</u>	<u>Midpoint<sup>1</sup> of Cover Class</u>	<u>Rank<sup>2</sup></u>
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____	_____
Sum of Midpoints				_____	_____
Dominance Threshold Number Equals 50% x Sum of Midpoints					

<u>Sapling Species</u>	<u>Indicator Status</u>	<u>Percent Areal Cover</u>	<u>Cover<sup>1</sup> Class</u>	<u>Midpoint<sup>1</sup> of Cover Class</u>	<u>Rank<sup>2</sup></u>
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____	_____
6. _____	_____	_____	_____	_____	_____
7. _____	_____	_____	_____	_____	_____
8. _____	_____	_____	_____	_____	_____
9. _____	_____	_____	_____	_____	_____
Sum of Midpoints				_____	_____
Dominance Threshold Number Equals 50% x Sum of Midpoints					

<sup>1</sup> Cover classes (midpoints): T < 1% (none); 1 = 1-5% (3.0); 2 = 6-15% (10.5); 3 = 16-25% (20.5); 4 = 26-50% (38.0); 5 = 51-75% (63.0); 6 = 76-95% (85.5); 7 = 96-100% (98.0).  
<sup>2</sup> To determine the dominants, first rank the species by their midpoints. Then cumulatively sum the midpoints of the ranked species until 50% of the total for all species midpoints is immediately exceeded. All species contributing to that cumulative total (the dominance threshold number) plus any additional species having 20% of the total midpoint value should be considered dominants and marked with an asterisk.

**DATA FORM**  
**INTERMEDIATE-LEVEL ONSITE DETERMINATION METHOD**  
**VEGETATION UNIT SAMPLING PROCEDURE**  
**(Trees)**

Field Investigator(s): \_\_\_\_\_ Date: \_\_\_\_\_  
 Project/Site: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_  
 Applicant/Owner: \_\_\_\_\_ Vegetation Unit #/Name: \_\_\_\_\_  
 Note: If a more detailed site description is necessary, use the back of data form or a field notebook.

Tree Species (Percent Cover Option)	Indicator Status	Percent Areal Cover	Cover <sup>1</sup> Class	Midpoint <sup>1</sup> of Cover Class	Rank <sup>2</sup>
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____	_____
6. _____	_____	_____	_____	_____	_____
7. _____	_____	_____	_____	_____	_____
Sum of Midpoints				_____	
Dominance Threshold Number Equals 50% x Sum of Midpoints				_____	

Tree Species (Basal Area Option)	Indicator Status	Tally								Total Trees	Basal <sup>3</sup> Area	Rank <sup>2</sup>
		1	2	3	4	5	6	7	8			
1. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
6. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
7. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
8. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
9. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
10. _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Basal Area Factor (e.g., Prism Used)											_____	
Total Basal Area of All Species Combined											_____	
Dominance Threshold Number Equals 50% of Total Basal Area											_____	

- <sup>1</sup> Cover classes (midpoints): T < 1% (none); 1 = 1-5% (3.0); 2 = 6-15% (10.5); 3 = 16-25% (20.5); 4 = 26-50% (38.0); 5 = 51-75% (63.0); 6 = 76-95% (85.5); 7 = 96-100% (98.0).
- <sup>2</sup> To determine the dominants, first rank the species by their midpoints (or basal area). Then cumulatively sum the midpoints (basal area) of the ranked species until 50% of the total for all species midpoints (or basal area) is immediately exceeded. All species contributing to that cumulative total (the dominance threshold number) plus any additional species having 20% of the total midpoint, or basal area, value should be considered dominants and marked with an asterisk.
- <sup>3</sup> The basal area for a species (on a per acre basis) is determined by dividing the total number of individual trees tallied for all tally areas by the number of tallies and multiplying by the basal area factor.

**PART VI - FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING  
WETLANDS**

**Section 3**

**Excerpt from "Protecting America's Wetlands,"  
Current Policy on Use of 1987 Wetlands Delineation  
Manual**

## Excerpt from "Protecting America's Wetlands," Current Policy on Use of 1987 Wetlands Delineation Manual

### E. GEOGRAPHIC JURISDICTION

The term "geographic jurisdiction" encompasses a set of wetlands issues that concern the determination of which waters fall within the jurisdiction of the Section 404 program of the Clean Water Act. These issues include the delineation manual that specifies the methodology by which wetlands are identified; the definitions of "wetlands" and "waters of the United States;" "artificial" wetlands; and isolated waters. (For "Delineation Training and Certification" see ADDRESSING LANDOWNER CONCERNS.)

#### **Issue Definition: Delineation Manual**

As previously indicated, there has been a great deal of controversy surrounding the manuals that Federal agencies use in the field to delineate wetlands. The 1989 Manual was strongly criticized by some who claimed that it was an attempt by the bureaucracy to greatly *expand* the geographic

jurisdiction of wetlands regulation without opportunity for public involvement. The proposed 1991 Manual that followed was roundly criticized by those who claimed that it would greatly *reduce* the scope of geographic jurisdiction applied to wetlands. In an attempt to resolve this controversy, in the fall of 1992 the Congress directed EPA to fund a National Academy of Science (NAS) study of wetlands delineation. That study is expected to be completed in the Fall of 1994. Since January 1993, both the Corps and EPA have adopted the 1987 Manual, which was in use in some parts of the country prior to the issuance of the 1989 Manual.

**Administration Position:** The Clinton Administration supports the use of the 1987 Wetlands Delineation Manual by the Corps, EPA, SCS, and FWS pending the evaluation of the NAS study. (See "Guarantee Consistency in Delineations on Agricultural Lands" under AGRICULTURE.) The use of the 1987 Manual by the Corps and EPA has increased confidence and consistency in identifying wetlands and has diminished the controversy associated with the 1989 and 1991 manuals. If the Federal agencies jointly conclude that the 1987 Manual should be revised to respond to recommendations of the NAS, any proposed changes will be the subject of a process that will provide full opportunity for public comment. In addition, any proposed changes will be field tested by the agencies prior to final adoption to determine their impact in the real world.

To increase public confidence in the Section 404 regulatory program, the Administration recommends that the Congress endorse the continued use of the 1987 Manual in the reauthorization of the Clean Water Act, pending recommendations that may result from the NAS study.

## **GEOGRAPHIC JURISDICTION**

**Q55** What manual is the Administration using to delineate wetlands for determining CWA jurisdiction?

**A.** The 1987 Corps of Engineers Wetlands Delineation Manual. For wetlands manager for agriculture, the SCS's Food Security Act Manual procedures will be used. As part of the Clinton Plan the affected Federal agencies are developing common procedures to ensure consistency between the 1987 Corps Manual and the SCS Food Security Act Manual.

**Q56** How is the 1987 Manual working?

**A.** The 1987 Manual has worked very well and has almost completely diminished the controversy over wetlands delineation and identification.

**Q57** If the 1987 Manual is working so well, why is an NAS study necessary?

**A.** The NAS study will provide an opportunity for a new, independent look at the controversial issue of wetlands delineation. While this review may affirm that the 1987 Manual is an accurate and efficient method for determining wetlands jurisdiction, the review may result in recommendations for improvements. The NAS will be specifically evaluating certain areas where additional guidance is needed, such as areas disturbed by agriculture activities.

**Q58** When is the NAS study scheduled for completion?

**A.** The Academy intends to complete its work by September 30, 1994.

**Q59** Will the public be given the opportunity to review and comment on the final wetlands delineation manual before it is adopted?

**A.** Yes. Once the NAS has completed its evaluation, a Federal delineation manual will be adopted after the public has an opportunity to review and comment on the final proposal.

**Q60** Why do we need to define legislatively "wetlands" and "waters of the United States" in the CWA?

**A.** Ratification of the current regulatory definitions of "wetlands" and "waters of the United States" would affirm Congress's intent with regard to the scope of geographic jurisdiction under the CWA. This would promote consistency and potentially reduce litigation.



**Q62 What are artificial or man-made wetlands?**

**A. Generally artificial wetlands are those wetlands that have been created from uplands by human activity that would revert to upland if such activity ceased.**

**Q63 Are these areas regulated under the CWA?**

**A. Generally no, as explained in the preamble to the Corps regulations.**

**Q64 What are "isolated wetlands" and why should they be protected?**

**A. Isolated wetlands are those wetlands which are not part of a surface water tributary system, and include prairie potholes, playa lakes and vernal pools. Isolated wetlands perform many of the same vital functions performed by other wetlands adjacent to waterbodies, including flood and erosion control, groundwater recharge, and critical habitat for migratory waterfowl and other wildlife. For example, the prairie pothole region is widely recognized as the most important duck breeding habitat in the coterminous United States. The CWA Section 404 regulatory program affords protection to those isolated wetlands that have an effect or could have an effect on interstate commerce. The agencies' regulations and guidance provide examples of what constitutes the requisite nexus to interstate commerce (e.g., an area that is used or could be used by migratory birds, endangered species, or interstate or foreign travelers for recreational or other purposes).**

Part VII - NATIONWIDE PERMITS

**Section 1**

**Regulatory Guidance Letter No. 88-6  
Nationwide Permit Program  
US Army Corps of Engineers**



US Army Corps  
of Engineers  
Office, Chief of Engineers

# Regulatory Guidance Letter

No. 88-6

Date 27 June 88 Expires 31 Dec 88

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SUBJECT: Nationwide Permit Program

1. The purpose of the Corps of Engineers Nationwide Permit Program is to authorize activities that cause only minimal individual and cumulative environmental effects with little, if any, delay or paperwork. The NWP's were subject to public comment through the rulemaking process and appropriate documentation was developed prior to their issuance. Therefore, FOAs should make every effort to minimize overall effort on each action. Too much effort expended on any one action defeats the goal of the program.

2. Several questions have surfaced regarding specific provisions of the Nationwide Permit Program as promulgated on 13 November 1986. The following guidance is provided to address those questions.

3. NATIONWIDE PERMITS (33 CFR 330.5).

a. NWP 7 (33 CFR 330.5(a)(7)). Provides authorization for outfall structures and associated intake structures where the outfall has an NPDES permit. Section 405 of the Water Quality Act of 1987 exempts stormwater outfalls from the requirement to obtain an NPDES permit until October 1988. This exemption provision of the Water Quality Act of 1987 is considered adequate to satisfy the NPDES permit requirement of this Nationwide Permit for stormwater outfalls. Therefore, outfall structures which qualify for this exemption and meet the other terms and conditions of NWP 7 are authorized by this NWP. After October, only those stormwater outfalls with discharges receiving an NPDES permit can be authorized under this NWP.

b. NWP 12 (33 CFR 330.5(a)(12)). Authorizes the discharge of backfill or bedding for utility lines. This NWP is not restricted to "crossing" situations as is NWP 14. That is, a utility line can be placed through a wetland parallel to upland areas, and is not restricted to situations where streams or other waterways with an ordinary high water mark (OHWM) must be crossed. The control over adverse impacts to the aquatic environment is through the requirement to restore the site to its actual preconstruction bottom contours. This authorization does include the temporary side-casting of material that occurs with normal construction practice provided the best management practices at 330.6 are complied with to the maximum extent practicable. In particular, the disturbance from sidecasting must be minimized to the extent practicable and all sidecast material must be entirely removed or returned to the original trench. The sidecast material may be used to construct temporary cofferdams, access roads, etc., but no additional fill,

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temporary or permanent, is authorized under this NWP. Also, this NWP does not authorize tile drains or other drainage works where the wetland through which the pipeline is being constructed is being drained. The NWP does authorize pipelines conveying drainage collected from other areas.

c. NWP 14 (33 CFR 330.5(a)(14)). Authorizes minor road fills that are single and complete projects for crossing nontidal waterbodies. In order for this NWP to apply, the road must cross a surface waterbody with an OHWM; that is, a lake, pond, river, stream or other open water area. The fill material discharged into wetlands adjacent to the waterbody is limited to a maximum of 100 linear feet in wetlands on either side of the OHWM on each side of the waterbody. In cases where wetlands exist waterward of the OHWM, the total encroachment into wetlands, both above and below the OHWM, on either side of the open water channels, is limited to 100 linear feet. Measurements should be made along the centerline of the roadway crossing the water of the U.S. The discharge is further limited by 33 CFR 330.6, best management practices, which require the minimization, to the extent practicable, of disturbance of a water of the U.S., including wetlands, as compatible with sound road construction practices.

d. NWP 26 (33 CFR 330.5(a)(26)). Authorizes minor fills in the headwaters of streams and in isolated waters, sometimes involving the predischarge notification procedures at 330.7. Judgment must be used in determining "loss or substantial adverse modification" of waters of the U.S. A substantial adverse modification occurs when a discharge eliminates or greatly reduces the principle valuable function(s) of a water of the U.S., including wetlands. The impacts factored into this determination must be the direct (i.e., area covered by the fill) or closely related indirect (i.e., change in vegetation such as might occur after flooding a portion of forested swamp by constructing a dam and thereby killing all of the trees), and must be substantial. Any indirect impact factored into the determination must similarly eliminate or greatly impair the principle valuable functions (e.g., water quality enhancement, fishery nursery area, wildlife habitat, flood storage, etc.) of the water of the U.S. In the example above, a judgment must be made on what are the principle valuable functions provided by the forested swamp in its present state. As an example, assume that the principal function of forested swamp is wildlife habitat. Backflooding may or may not be a "substantial adverse modification" depending on the extent to which it impacts the overall wetland. While it may be an adverse impact to certain types of wildlife currently inhabiting the impact area, it could increase diversity of habitat and improve the value of wetland overall for wildlife. As another example, a fill could indirectly eliminate the principle valuable function(s) by blocking backflooding of a wetland that previously provided flood storage or water quality renovation, thereby reducing or eliminating the wetland's value for these functions.

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Areas excavated and areas affected by the excavation should not be factored into the acreage as lost or substantially modified, unless the permittee cannot practicably conduct the excavation without the discharge that is subject to the NWP. Furthermore, impacts resulting from increased use by humans of a wetland area as a result of a small fill should not be included. However, such indirect impacts may contribute to the basis for asserting discretionary authority if they involve concerns for the aquatic environment as outlined in 40 CFR Part 230. Indirect impacts such as backflooding and Jewatering are more strongly related to the discharge and should be considered if they are likely to result in substantial, long-term damage.

(e) Single and complete project: Linear projects by their nature will likely have minimal impacts on several different waterbodies (i.e., tributaries, ponds and isolated waters). Districts should be careful when determining what constitutes a separate waterbody. Individual channels in a braided stream or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies. For linear projects, the single and complete project requirement for individual NWPs will be applied to a waterbody crossing at a single location. That is, each waterbody impacted by a roadway will be considered a single and complete crossing at that location. Where a roadway intersects a single waterbody, such as a meandering river at separate but distant locations, each crossing is considered a single and complete crossing. The purpose of the "single and complete project" language is to preclude situations where one project will repeatedly crisscross one waterbody when such multiple crossings can be practicably avoided. It was also meant to preclude constructing a crossing and adding lanes later. This approach may result in multiple application of the NWP on a lengthy project that crosses several rivers or tributaries to a river, or a single, large river at several distant locations.

f. Quantities: Several NWPs authorize certain cubic yardages of material to be discharged or excavated (i.e., 13, 14, 18 and 19). In all such cases, the volume is to be determined by the material that is discharged or excavated below the plane of the OHWM in non-tidal waters, or the high tide line in tidal waters. For example, if an average of 2 cubic yards of material is placed for bank stabilization per running foot, but of that total only 0.8 cubic yards per running foot are below the plane of the high tide line, the project would be authorized by NWP 13 (provided all other conditions are met). Furthermore, the material placed landward of the OHWM, even though it is below the plane of OHWM, is not included in the volume measurement, nor is backfill material placed in areas excavated channelward of the OHWM. For example, the area adjacent to the waterway (above the OHWM) may be excavated for placement of base material for a minor road crossing. Such excavations may become flooded and are temporarily below the plane of the OHWM extended. Material placed in such excavations does not count in the volume measurements. In addition, for NWP 13 and 14 the material is limited to the purpose stated (i.e., for the road crossing or bank stabilization).

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g. OHWM: The OHWM is the physical evidence (shelving, debris lines, etc.) established by normal fluctuations of water level. For rivers and streams, the OHWM is meant to mark the within-channel high flows, not the average annual flood elevation that generally extends beyond the channel. Wetlands often extend beyond the OHWM. However, for the sake of defining the applicability to NWP's 13, 14, 18 and 19, volume measurements are measured below the OHWM and do not include the volume of material placed in wetlands unless these wetlands are located channelward of the OHWM. The NWP's have other limitations that govern the amount of fill placed in wetlands (e.g., NWP 14 is limited to no more than 100 linear feet of fill in wetlands on either side of the open water channel, and NWP 13 does not allow any placement of fill in wetlands).

h. Multiple use of NWP's.

(1) Use of Multiple Nationwide Permits in a Single Project: It is entirely appropriate to combine two or more nationwide permits to authorize an activity. For example, a project that includes both a minor road crossing and downstream bank stabilization work could be authorized under NWP's 13 and 14 provided that the conditions of those permits are met. Likewise, a project that involves a fill resulting in up to one acre of impacts above the headwaters as well as a minor-road crossing fill, is authorized under a combination of NWP's 26 and 14 without the requirement for a pre-discharge notification (PDN). In other words, the acreage limitations of NWP 26 do not include the acreage that may be impacted by other nationwide permit authorizations which may be part of the same project. However, NWP 26 cannot be "stacked" on itself; that is, NWP 26 may not be used more than once on a single project. Acreage limitations should be figured on a per project basis. For example, where fill for an industrial park would substantially impact a cumulative total of more than 1 acre of wetland, even where spread between two or more wetlands, the PDN should be triggered. This does not, however, apply to linear projects.

(2) Combining Nationwide Permits with Individual Permits: It may be appropriate, in some cases, to allow independent parts of a larger project to proceed under the authority of the nationwide permits while evaluating an individual permit application for other portions of the same project. However, portions qualifying for a NWP should be able to function or meet their purpose without the portion requiring an individual permit.

(3) Whether or not the activities qualifying for nationwide permits are authorized to proceed separately or are included in an individual permit application, the decision documentation relating to the individual permit will include a discussion of the rationale for the course of action taken. Also, a discussion on the total impacts of the entire project (i.e., both the portions authorized by individual and nationwide permit) will be included in the individual permit documentation.

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4. Predischarge notification procedures (33 CFR 330.7):

a. Signature authority: Signature authority can be delegated from the district or division engineer to any appropriate level within the district or division, respectively.

b. District engineer and resource agency comments: When the district forwards a PDN to the division under either of the two provisions of 330.7 (c)(1), it will provide a recommendation on which the division can base its decision under 330.7(d). This recommendation can be either before or after receipt of resource agency comments by the district. However, the district should be aware of the concerns the agencies are likely to express to the division engineer and respond to those concerns in its recommendation, especially where the district thinks the activity should be authorized over agency recommendations to the contrary. In any event, the resource agency comments must be forwarded to the division so that they can be considered and addressed by the division engineer. This entire evaluation process must be completed within the 20-day limit. In coordination with the resource agencies the district engineer should establish a reasonable date by which the resource agencies must submit their comments in order to be considered within the 20 days. If the date is missed by the resource agencies the division engineer need not address those comments pursuant to 330.7(d).

c. NWP 26:

(1) "May be required": 330.7(a)(2) states that an applicant shall not proceed if the district engineer notifies him that an individual permit "may be required." This was not intended to be used by a district to notify the applicant that more than 20 days would be needed for review and may not be used in that fashion.

(2) Information needed: Upon receipt of an application, regulatory staff will, when reviewing the application, determine whether or not the activity may be covered by a general permit, including nationwide permits. If an application has adequate information to be considered as a PDN it will be so considered. When a district engineer determines that information in an application or PDN is insufficient for the PDN process, he may request that information prior to starting the 20-day clock. Such request must be made immediately and only for additional information needed to meet the minimum requirements of 330.7(b). Information provided by the permittee, relating to the extent of waters of the United States to be impacted by the proposal, will be reviewed by the district and may, in some instances, require confirmation through a field inspection. This review must take place within the overall 20-day timeframe for PDN review. When verifying that an activity is authorized under a NWP, the district should notify the permittee that if the information he submits and on which the Corps bases its NWP and jurisdictional determinations is later found to be in error, the authorization may be subject to modification, suspension or revocation.

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When a landowner proceeds with a discharge without going through the process (where required), the DE should, in coordination with the appropriate agencies, determine the best way to proceed. Options include: whether to authorize the project under NWP, seek discretionary authority and require an after-the-fact permit application, or initiate an enforcement action.

5. Discretionary authority (33 CFR 330.8). Discretionary authority can only be exerted as a result of concerns for the aquatic environment as expressed in the 404(b) (1) Guidelines. The district engineer is authorized to add conditions to the NWPs on a case-by-case basis when the applicant agrees to the conditions. If no mutual agreement with the applicant can be reached, the division engineer may require conditions on a case-by-case basis. If a categorical or regional restriction to the NWP is needed, it should be accomplished by the division engineer asserting discretionary authority and adding the appropriate conditions through evaluation procedures in 33 CFR 325. Divisions should not restrict a NWP through discretionary authority then develop a regional general permit for the activities formerly covered by the NWP since any protection or allowances afforded by a regional permit can be placed on the NWP through regional conditioning.

6. State Water Quality Certification (33 CFR 330.9). If a district receives a PDN for NWP 26 in a state which has denied 401 certification for NWP 26, it normally should defer the PDN process pending the state's completion of its 401 action unless the division engineer determines that, even with a 401 certification, the discharge will likely have more than minimal adverse impacts on the environment. In this case, he should complete the PDN and notify the applicant that an individual permit is required even before he receives the 401 certification.

7. Enforcing compliance with NWPs. With the exception of the division or district engineer's discretionary authority at 33 CFR 330.8, only the Chief of Engineers can modify, suspend, or revoke a NWP. However, the district engineer can use the appropriate procedures of 33 CFR 326 and 33 CFR 325.7 on a case-by-case basis to ensure compliance with the terms and conditions of a specific authorization issued under a NWP, including those conditions that he or the division engineer may have added. The district engineer should require only those corrective actions needed to bring the discharge into compliance with the terms and conditions.

8. Cumulative Impacts. This office prepared an environmental assessment for each NWP prior to their reissuance in 1986. As part of that assessment, we considered the potential cumulative impacts of each NWP. It is, therefore, not necessary for the districts to assess the potential cumulative impacts of each and every action authorized under each NWP. However, in situations where the district engineer believes that application of several nationwide permits to one project or application of one nationwide permit repetitively by several




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permittees in a defined area would result in more than minimal cumulative impacts on the aquatic environment, as determined under the 404(b)(1) Guidelines, it is appropriate to exert discretionary authority. Moreover, we have asked districts to, from time to time, conduct monitoring studies of the impacts of NWP's in their areas. The districts should periodically review a sample of actions occurring under NWP, perhaps through a comparison of their files to state, regional, or municipal files (i.e., wetland regulatory program, planning and zoning, municipal building permits, etc.) or through aerial photo interpretation.

9. This guidance expires 31 December 1990 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:



JOHN P. ELMORE  
Chief, Operations and Readiness Division  
Directorate of Civil Works

# Part VII - Nationwide Permits

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**PART VII - NATIONWIDE PERMITS**

**Section 2**

**Quick Reference List of Nationwide Permits**

## Section 2

### QUICK REFERENCE LIST OF NATIONWIDE PERMITS

Throughout the United States, as many as 26 Nationwide Permits (NWP's) may exist in a state, depending on the state's issuance of water quality certification and/or certification of coastal zone consistency

1. Aids to Navigation
2. Structures in Artificial Canals
3. Repair and Replacement Activities
4. Fish and Wildlife Harvesting Devices
5. Scientific Testing Devices
6. Surveying Activities
7. Outfalls with NPDES Permits and Approved Intakes
8. Oil and Gas Exploration Structures
9. Structures in USCG Approved Anchorages
10. Individual Mooring Buoys
11. Temporary Buoys
12. Utility Line Crossing
13. Bank Stabilization
14. Minor Road Crossing
15. Fill Associated with USCG Approved Bridges
16. Return Water From Hydraulic Dredging
17. Fills for Small Hydro Power Projects
18. Discharges Less Than 10 YD<sup>3</sup>
19. Dredging Less Than 10 YD<sup>3</sup>
20. Discharges to Clean Up Oil Spills
21. Surface Coal Mining Activities
22. Removal of Obstructions to Navigation

- 23. Council on Environmental Quality Adopted Categorical Exclusions for Federal Agency Activities**
- 24. State Administered 404 Programs (404 g)**
- 25. Structural Discharge Into Sealed Form or Cells**
- 26. Discharges into Headwaters, Isolated or Intermittent Waters**
- 27. Wetland Restoration Activities**
- 28. Modifications of Existing Marinas**
- 29. Reserved**
- 30. Reserved**
- 31. Reserved**
- 32. Completed Enforcement Actions**
- 33. Temporary Construction and Access**
- 34. Cranberry Production Activities**
- 35. Maintenance Dredging of Existing Basins**
- 36. Boat Ramps**
- 37. Emergency Watershed Protection**
- 38. Cleanup of Hazardous and Toxic Waste**
- 39. Reserved**
- 40. Farm Buildings**

**PART VII - NATIONWIDE PERMITS**

**Section 3**

**Highlights of Proposed Nationwide Permit  
Regulations**

## Highlights of Nationwide Permit Regulations

1. The number of NWP is increased from 26 to 40. Significant new NWPs include (i) dewatering of construction sites, (ii) small docks, piers and boat ramps, (iii) temporary construction access, (iv) maintenance dredging of existing basins, (v) cleanup of hazardous and toxic waste, and (vi) certain agriculture-related discharges.
2. A pre-discharge notification (PDN) is required for certain NWPs that did not require such notification, including minor road crossings, Coast Guard approved bridges, hydropower projects, minor discharges and activities categorically excluded from environmental documentation by another federal agency. PDNs are also required for new NWPs involving hazardous and toxic waste and agricultural discharges.
3. The authority to determine whether an individual permit should be required is delegated to the District Engineers (DE). This authority was vested in the Divisional Engineer. It is mandatory that DEs require an individual permit whenever they determine that the proposed action would have more than minimal individual or cumulative adverse impact on the aquatic environment.
4. In making a determination of whether an individual permit will be required, the DE is allowed to consider matters of "public interest" in addition to EPA's 404(b)(1) Guidelines.
5. In deciding whether a project requiring a PDN qualifies for an NWP, the Corps will consider the effect of mitigation on a project's impact. Acceptable forms of mitigation include mitigation banking and contributions to a mitigation trust fund.
6. Under the previous PDN process, the Corps was to coordinate its decision on whether the activity qualified for an NWP with federal and state resource agencies and respond to the application within 20 days. The new regulations allow 30 days and relieve District Engineers from the need to coordinate with the federal and state resource agencies.
7. Revised NWP 3 (Maintenance) allows replacement of recently destroyed structures in addition to currently serviceable structures. It also explicitly allows upgrading to meet current safety standards.
8. Revised NWP 7 (Outfall Structures) clarifies the fact that the permit covers outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, specifically exempted, or is otherwise in compliance with NPDES regulations.
9. Revised NWP 12 (Utility Line Backfill) includes a provision allowing material from trench excavation to be temporarily sidecast into waters of the United States, provided

there is little or no flow to disperse the excavated material. The new language also states that the top 6 to 12 inches of the trench should generally be backfilled with topsoil from the trench.

10. Revised NWP 13 (Bank Stabilization) includes a new provision allowing stabilization activities involving more than 500 linear feet or greater than one cubic yard of fill per running foot if 30 days notice is given and the DE determines that the activity complies with the terms and conditions of the NWP.

11. Revised NWP 14 (Minor Road Crossing) allows minor road crossings in wetlands. The previous NWP 14, and associated Regulatory Guidance Letters, make it clear that it is only valid for crossing open water bodies (i.e., lakes, ponds, rivers and streams).

12. Revised NWP 15 (U.S. Coast Guard Approved Bridges) is expanded to include approach fills that are reviewed and approved by the Coast Guard.

13. Revised NWP 17 (Hydropower Projects) removes the small hydropower project limitation and applies the permit all Federal Energy Regulatory Commission (FERC) licensed hydropower projects (although a 30-day notice to the DE is required unless FERC has exempted the project under Section 408 of the Energy Security Act of 1980).

14. Revised NWP 18 (Minor Discharges) increases the maximum allowable fill from 10 to 25 cubic yards and allows placement of such fill in wetlands in addition to other waters of the United States.

15. Revised NWP 19 (Dredging in Navigable Waters) increases the maximum allowable removal from dredging activities in navigable waters from 10 to 20 cubic yards.

16. Revised NWP 26 (Headwaters and Isolated Waters) replaces the previous 20-day PDN with a 30-day PDN. The "loss or substantial modification" criterion is measured in terms of the area filled and/or flooded or drained.

17. New NWP 30 (Dewatering Construction Sites) allows dewatering of construction sites with temporary cofferdams, provided certain conditions are met.

18. New NWP 31 (Small Docks and Piers) authorizes small private docks and piers in navigable waters.

19. New NWP 32 (Completed Enforcement Actions) authorizes activities in waters of the United States which are required by civil or criminal judicial actions brought by the Corps or EPA.

20. New NWP 33 (Temporary Construction and Access) allows temporary construction access fills with 30 days notice to the DE and a restoration plan.



21. New NWP 34 (Cranberry Production Activities).
22. New NWP 35 (Maintenance Dredging of Existing Basin) authorizes maintenance dredging of existing basins, canals, boat slips, etc.
23. New NWP 36 (Boat Ramps) allows small boat ramps in non-wetlands.
24. New NWP 37 (Emergency Watershed Protection) permits certain discharges associated with emergency water protection projects done by or funded by the Soil Conservation Service under its 7 CFR Part 6224 regulations.
25. New NWP 38 (Cleanup of Hazardous and Toxic Waste) authorizes specific work needed to contain, stabilize or remove hazardous and toxic wastes, provided such work is done, ordered or sponsored by a government agency with appropriate authority.
26. New NWP 39 (Agricultural Discharges) allows discharges necessary for agricultural, silvicultural or aquacultural activities in "farmed wetlands" (i.e., those that were both manipulated and cropped for agricultural commodities before December 23, 1985).
27. New NWP 40 (Farm Buildings) authorizes discharges for foundations or building pads for farm buildings or other agriculturally related structures necessary for farming activities in wetlands that are currently in agricultural production.

# Part VI - Regulatory Guidance Letters

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**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 1**

**Index to Regulatory Guidance Letters Issued by the Corp  
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## Index to Regulatory Guidance Letters Issued by the Corps of Engineers

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83-4	Distribution of Public Notices for Activities Involving Agricultural Conversions	3/4/83	12/31/85
83-5	Nationwide Permit at 33 CFR 330.5(a)(23): Categorical Exclusions	4/12/83	12/31/85
83-6	Endangered Species Act - Regulatory Program	5/17/83	12/31/85
83-7	General Permits for Reducing Duplication (State Program General Permits)	5/20/83	12/31/85
83-8	Nationwide Permit Program: Monitoring Activities	6/8/83	12/31/83
83-9	Marking of Aerial Power Transmission Lines, Cables and Structures	7/13/83	12/31/85
83-10	Recision of RGL 82-1, Navigability Studies	8/26/83	12/31/85

84-1	Regulatory Jurisdiction over Vegetative Operations	1/10/84	12/31/86
84-2	Criteria for Individual Permit Review of Discharge Activities Subject to Certain Nationwide General Permits	2/24/84	12/31/86
84-4	Application of Section 404 to Dredging Projects	3/23/84	12/31/86
84-5	Fifth Circuit Decision in <i>Avoyelles vs. Marsh</i>	3/26/84	12/31/86
84-6	EPA's Role in Determining Compliance with Section 404(b)(1) Guidelines	3/26/84	12/31/86
84-9	Permit Decision Documentation	7/26/84	12/31/86
84-10	Considerations of Fairness and Equity in Implementing the Discretionary Authority Under 33 CFR 330.7	8/8/84	12/31/86
84-11	Nationwide Rivers Inventory	8/16/84	12/31/86
84-12	Public Notice Requirements: Nationwide Permits	9/11/84	12/31/86
84-13	Permitting Activities Associated with Corps Planning and O&M Projects	9/17/84	12/31/86
84-14	33 CFR 330.8 Discretionary Authority	9/18/84	12/31/86
84-15	Nationwide Permit #26 - Procedures for Designation of Classes of Discharges & Categories of Waters of Concern to Resource Agencies	9/18/84	12/31/86
84-16	Conditioning of DA Permits to Comply with Section 401	9/18/84	12/31/86
84-17	Permits for Activities Which May Modify or Encroach on Constructed Congressionally Authorized Federal Projects	10/26/84	12/31/86
85-1	State Transfer Authority	1/18/85	12/31/87
85-2	Permit for Bridges over and Causeways in the Navigable Waters of the U.S.	1/18/85	12/31/87
85-3	Contractor Reports	12/28/85	12/31/87

85-4	Avoyelles	3/29/85	12/31/87
85-5	Referral Provisions of 33 CFR 325.8	4/22/85	12/31/87
85-7	Superfund Projects	7/5/85	12/31/91
86-1	Plowing	2/11/86	12/31/88
86-2	Nationwide Permit at 33 CFR 33.05(a)(23): Categorical Exclusions	1/17/86	12/31/88
86-4	Projects Involving Both Individual and General Permits	5/23/86	12/31/88
86-5	Implementation of the Section 404(q) MOAs with the Dept. of Interior (DOI), the EPA and Dept. of Commerce (DOC)	5/23/86	12/31/88
86-7	Projects Involving Both Individual and General Permits	7/25/86	12/31/86
86-8	Summary of Decision in <i>River Road Alliance v. Corps of Engineers</i>	8/21/86	12/31/88
86-9	Clarification of "Normal Circumstances" in the Wetland Definition (33 CFR 323.2(c))	8/27/86	12/31/88
86-10	Special Area Management Plans (SAMPs)	10/02/86	12/31/88
86-11	Acknowledging Public Notice Comments	11/18/86	12/31/88
87-1	Streamlining the National Environmental Act (NEPA) Process	3/02/87	12/31/89
87-2	Use of the Word "Significant" in Permit Documentation	3/30/87	12/31/89
87-3	Section 401 Water Quality Certification	4/14/87	12/31/89
87-4	Use of Alternative Dispute Resolution in Regulatory Actions	4/14/87	12/31/89
87-7	Section 404(f)(1)(C) Statutory Exemption for Drainage Ditch Maintenance	8/17/87	12/31/89

87-8	Testing Requirements for Dredged Material Evaluations	8/19/87	12/31/89
87-9	Section 404 (f)(1)(C) Exemption for Construction of Maintenance of Farm or Stock Ponds	8/27/87	12/31/89
88-3	Wetland Jurisdictional Determinations	4/4/88	12/31/90
88-4	Enforcement	4/7/88	12/31/90
88-5	Applicant Responsibility for Providing Information	5/16/88	12/31/90
88-6	Nationwide Permit Program	6/27/88	12/31/90
88-7	Certification of Compliance with Permit Terms and Conditions by Permittees	7/5/88	12/31/90
88-8	Regulation of Artificial Islands, Installations, and Structures on the U.S. Outer Continental Shelf	7/20/88	12/31/90
88-9	Corps Civil Works Projects	7/21/88	12/31/90
88-10	Regulation of Waste Disposal from In-Stream Placer Mining	7/28/88	12/31/90
89-1	General Permit Notifications	2/1/89	12/31/91
89-2	Extension of Regulatory Guidance Letter 85-7	6/10/89	12/31/91
89-3	Activities within Superfund Sites	8/29/89	12/31/92
89-4	Consideration of Public Comments: Mandatory Public Notice Language	10/16/89	12/31/92
90-1	Nationwide Permit Verification	1/14/90	1/13/92
90-2	Permits for Structures and Fills which Affect the Territorial Seas	1/24/90	12/31/92
90-3	Extension of Regulatory Guidance Letter 87-8 subject: "Testing Requirements of Dredged Material Evaluation"	1/24/90	12/31/92
90-4	Water Quality Considerations	3/13/90	12/31/92

90-5	Landclearing Activities Subject to Section 404 Jurisdiction	7/18/90	12/31/92
90-6	Expiration Dates for Wetlands Jurisdictional Delineations	8/14/90	12/31/93
90-7	Clarification of the Phrase "Normal Circumstances"	9/26/90	12/31/93
90-8	Applicability of Section 404 to Pilings	12/14/90	12/31/93
90-9	Wetlands Enforcement Initiative	12/17/90	12/31/93
91-1	Extensions of Time for Individual Permit Authorizations	12/31/91	12/31/96
92-1	Federal Agencies Roles and Responsibilities	5/13/92	12/31/97
92-2	Water Dependency and Cranberry Production	6/26/92	12/31/95
92-3	Extension of Regulatory Guidance Letter 86-10 subject "Special Area Management Plans"	8/19/92	12/31/97
92-4	Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits	9/14/92	1/21/97
92-5	Alternatives Analysis under Section 404(b)(1) Guidelines for Projects Subject to Modification Under the Clean <u>Air</u> Act	10/29/92	12/31/97
93-1	Provisional Permits	4/20/93	12/31/98
93-2	Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking	8/23/93	12/31/98
93-3	Recision of Regulatory Guidance Letters 90-5, 90-7 and 90-8	9/13/93	



**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 2**

**Regulatory Guidance Letter No. 82-2  
Clarification of "Normal Circumstances" in the Wetland  
Definition**



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers  
WASHINGTON, D C 20314

REPLY TO  
ATTENTION OF

11 FEB

DAEN-CCE/DAEN-CWO-N

SUBJECT: Regulatory Guidance Letter 82-2, Clarification of  
"Normal Circumstances" in the Wetland Definition

SEE DISTRIBUTION

1. This letter will serve as guidance regarding Corps policy on land-use conversion as it concerns regulatory jurisdiction. Specifically, the guidance addresses situations involving changes in the physical characteristics of a wetland which cause the area no longer to be a part of "waters of the United States" for purposes of the Section 404 regulatory program.

2. The current definition of "waters of the United States" delineates "wetlands" as follows, at 33 CFR 323.2:

- 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.

The regulations now in force cover the actual discharge of dredged or fill material into "wetlands," as they are a part of the "waters of the United States." However, these regulations do not discuss what effect the conversion of a wetland to other uses (i.e. agricultural) has upon regulatory jurisdiction; once the land-use conversion has been accomplished.

3. Nonetheless, the preamble to the current (1977) regulations does indicate some basic parameters of the intended scope of regulatory

SUBJECT: Regulatory Guidance Letter 82-2, Clarification of  
"Normal Circumstances" in the Wetland Definition

jurisdiction. In discussing the newly revised definition of wetlands, the preamble contains the following statements, at p. 37128 of the Federal Register vol. 42, no. 138:

Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation.

Furthermore, the following remarks are made in reference to the substitution of "under normal circumstances" for "normally" in the new definition:

We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes.

The discussion on the definition of wetlands concludes with these observations, at p. 37129:

Finally, to respond to those who expressed concern that our definition of "wetlands" may be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation, we have listed swamps, bogs, and marshes at the end of this definition to further clarify our intent to include only truly aquatic areas. (emphasis added).

4. It is important to note the following qualification found at p. 37128 of the Federal Register vol. 42, no. 138:

The use of the word "normally" in the old definition generated a great deal of confusion. The term was included in the definitions to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and

SUBJECT: Regulatory Guidance Letter 82-2, Clarification of  
"Normal Circumstances" in the Wetland Definition,

to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several such instances of destruction of aquatic vegetation in order to eliminate Section 404 jurisdiction actually have occurred. However, even if this destruction occurs, the area still remains as part of the overall aquatic system intended to be protected by the Section 404 program. Conversely, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program. (emphasis added).

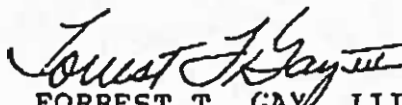
This policy remains in effect, regardless of the substitution of "under normal circumstances" for "normally."

5. Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such "natural circumstances" are not what is meant by "normal circumstances" in the definition quoted above. "Normal circumstances" is determined on the basis of actual, present use of an area. Thus, it is the Corps' policy that once a wetland area has been ~~converted~~ to another use which alters its wetland characteristics to where it is no longer a "water of the United States," that area will no longer come under the Corps' regulatory jurisdiction. However, if the area is abandoned and over time in fact reverts to "wetlands" meeting our definition at 33 CFR 323.2(c), then the Corps' regulatory jurisdiction has been restored.

6. This policy is applicable to Section 404 authority only, not to Section 10.

7. This guidance expires 31 December 1984 unless sooner revised or rescinded.

FOR THE COMMANDER:



FORREST T. GAY, III  
Brigadier General, USA  
Deputy Director of Civil Works

DISTRIBUTION:  
(See page 4)

**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 3**

**Regulatory Guidance Letter No. 86-9  
Clarification of "Normal Circumstances"  
in the Wetland Definition (33 CFR 323.2(c))**



US Army Corps  
of Engineers  
Office, Chief of Engineers

# Regulatory Guidance Letter

No. 86-9

Date 27 Aug 86

Expires 31 Dec 88

DAEN-CWO-N

SUBJECT: Clarification of "Normal Circumstances" in the Wetland Definition  
(33 CFR 323.2(c))

1. This letter will serve to continue the guidance originally issued as RGL 82-2, regarding Corps policy on land-use conversion as it concerns regulatory jurisdiction. Specifically, the guidance addresses situations involving changes in the physical characteristics of a wetland which cause the area to lose or gain characteristics which would alter its status of "waters of the United States" for purposes of the Section 404 regulatory program.

2. The current definition of "waters of the United States" delineates "wetlands" as follows, at 33 CFR 323.2(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.

The regulations now in force cover the actual discharge of dredged or fill material into "wetlands," as they are a part of the "waters of the United States." However, these regulations do not discuss what effect the conversion of a wetland to other uses (e.g., agricultural) has upon regulatory jurisdiction, once the land-use conversion has been accomplished.

3. As was stated in RGL 82-2, it is our intent under Section 404 to regulate discharges of dredged or fill material into the aquatic system ~~as it exists~~ and not as it may have existed over a record period of time. The wetland definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. We do not intend to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes. Neither do we intend the definition of "wetlands" to be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation. Thus, we have listed swamps, bogs, and marshes at the end of the definition at 323.2(c) to further clarify our intent to include only truly aquatic areas.

27 Aug 86

SUBJECT: Clarification of "Normal Circumstances" in the Wetland Definition  
(33 CFR 323.2(c))

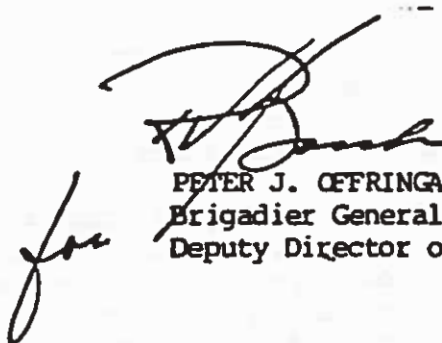
4. The use of the phrase "under normal circumstances" is meant to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several instances of destruction of aquatic vegetation to eliminate Section 404 jurisdiction have actually occurred. Because those areas would still support aquatic vegetation "under normal circumstances," they remain a part of the overall aquatic system intended to be protected by the Section 404 program; therefore, 404 jurisdiction still exists. On the other hand, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program.

5. Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such natural circumstances are not what is meant by "normal circumstances" in the definition quoted above. "Normal circumstances" are determined on the basis of an area's characteristics and use, at present and in the recent past. Thus, if a former wetland has been converted to another use (other than by recent unpermitted action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a "water of the United States," that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404. However, if the area is abandoned and over time regains wetland characteristics such that it meets the definition of "wetlands," then the Corps 404 jurisdiction has been restored.

6. This policy is applicable to Section 404 authority only, not to Section 10.

7. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:



PETER J. OEFRINGA  
Brigadier General, USA  
Deputy Director of Civil Works

**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 4**

**Regulatory Guidance Letter No. 87-7  
Section 404(f) (1) (C) Statutory Exemption for Drainage Ditch  
Maintenance**





US Army Corps  
of Engineers  
Office, Chief of Engineers

# Regulatory Guidance Letter

No. 87-7

Date 17 Aug 87

Expires 31 Dec 89

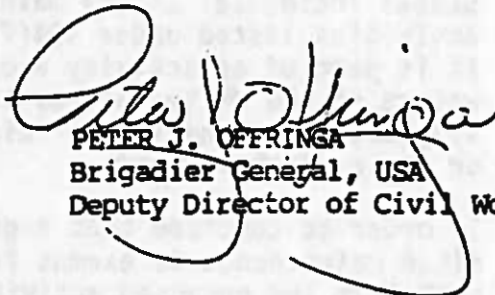
CECW-OR

**SUBJECT: Section 404(f) (1) (C) Statutory Exemption for Drainage Ditch  
Maintenance**

1. Enclosed for implementation is a guidance statement on the 404(f) (1) (C) exemption for drainage ditches. This guidance was developed by EPA in cooperation with the Corps.
2. This guidance expires 31 December 1989 unless sooner revised or rescinded.

**FOR THE CHIEF OF ENGINEERS:**

Encls

  
PETER J. OEFFRINGA  
Brigadier General, USA  
Deputy Director of Civil Works



17 AUG 1987

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460



**SUBJECT: Section 404(f)(1)(C) Statutory  
Exemption for Drainage Ditch Maintenance**

1. The discharge of dredged or fill material in waters of the United States associated with specific agricultural and silvicultural activities identified in Sections 404(f)(1)(A)-(F) is not prohibited by or otherwise subject to regulation under Section 404, 301, or 402 of the Clean Water Act (CWA) except; (1) as provided under Section 404(f)(2), or (2) if a discharge resulting from a 404(f)(1) activity contains a toxic pollutant listed under Section 307 of the CWA.
2. Section 404(f)(1)(C) specifically provides that dredge or fill discharges for the purpose of maintenance (but not construction) of drainage ditches are exempt under Section 404.
3. Section 404(f)(2), referred to as the "recapture provision," provides that any discharge of dredged or fill material in waters of the United States incidental to the maintenance of drainage ditches (or other activities listed under 404(f)(1)) must be authorized by permit if it is part of an activity whose purpose is to convert an area of the waters of the United States to a use to which it was not previously subject, where the flow or circulation of such waters may be impaired or their reach reduced.
4. In order to conclude that a given discharge activity associated with ditch maintenance is exempt from regulation, it must be determined both that the proposed activity falls within Section 404(f)(1)(C) and that it is not recaptured under Section 404(f)(2).
5. For purposes of determining whether or not a proposed activity falls under the provision for ditch maintenance at 404(f)(1)(C), the following interpretations will apply:
  - a) maintenance of a drainage ditch means the physical preservation of the original, as built configuration of the ditch. (The District may wish to consider issuance of a General Permit to allow for alteration of ditch side slopes in order to provide Best Management Practices to protect water quality. Such General Permit would allow this construction in association with exempted maintenance so long as the bottom depths and widths of the ditches are not otherwise altered.)
  - b) maintenance includes the removal of accumulated sediment and debris.
  - c) Unlike Section 404(f)(1)(A), there is no "ongoing" requirement associated with Section 404(f)(1)(C). However, facts relating to the current use of an area could be relevant under Section 404(f)(2), and therefore pertinent to whether or not an exemption applies.

- d) Because the statute clearly does not exempt "construction" of drainage ditches from regulation under the CWA, ditches being built for the dual function of irrigation and drainage are considered drainage ditches and their construction is not exempt.
6. For the 404(f)(2) recapture provision to apply, both the "change in use" requirement and the "reduction in reach/impairment of flow or circulation" requirement must be met.
7. For purposes of determining whether or not the 404(f)(2) recapture provision is triggered, the following interpretations will apply:
- a) the discharge of dredged or fill material itself does not need to be the sole cause of the destruction of the waters of the United States (e.g., wetlands) or other change in use or the sole cause of the reduction in or impairment of, reach, flow or circulation of such waters. The discharge need only be "incidental to" or "part of" an activity that is intended to or will foreseeably bring about that result.
  - b) A discharge of dredged or fill material which converts a Section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States (33 CFR §323.4(c)). For purposes of determining whether a discharge associated with the maintenance of a drainage ditch is recaptured under 404(f)(2), it is necessary to determine whether such maintenance activities would convert wetlands to a use to which the area was not previously subject. Determining the previous use requires a case-by-case assessment which applies a rule of reason to the facts. For example, if an area has been farmed following ditch construction and an effort has been made to farm the land within the originally constructed ditch drainage area on a regular but not necessarily continuous basis, the fact that wetland vegetation has temporarily reestablished does not mean that a continuation of farming after ditch maintenance will result in bringing the area under a new use. That is, the temporary establishment of wetland vegetation within an area benefitted by original ditch construction does not automatically mean that the use to which the area was previously subject should be considered "wetland." On the other hand, a discharge which results in the farming of wetlands for which there is no reasonable evidence that they were ever farmed or where farming was abandoned following original ditch construction, will be considered a new use even where such land was within the original drainage area. For the purposes of this paragraph, an area will not be considered abandoned where farming has occurred on a regular but not necessarily continuous basis.
  - c) 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.

8. In situations where the potential applicability of a proposed discharge to the exemption under Section 404(f)(1)(C) has been raised to the District, and where the District cannot make a determination due to a lack of pertinent factual information, it is incumbent on those seeking exemption to provide the documentation necessary to establish the facts on a case-by-case basis.



Peter J. O'Rourke  
Brigadier General, U. S. Army  
Deputy Director of Civil Works



David G. Davis  
Director  
Office of Wetlands Protection

**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 5**

**Regulatory Guidance Letter No. 90-5  
Landclearing Activities Subject to Section 404 Jurisdiction**



US Army Corps  
of Engineers  
Office, Chief of Engineers

# Regulatory Guidance Letter

No. 90-5

Date 18 Jul 90

Expires 31 Dec 92

CECW-OR

**SUBJECT:** Landclearing Activities Subject to Section 404  
Jurisdiction.

1. The purpose of this guidance is to interpret the statutory and regulatory definitions of "discharge of a pollutant" (CWA section 502(12) and 33 CFR 327.2(f)) to the effect that land-clearing activities using mechanized equipment such as backhoes or bulldozers with sheer blades, rakes, or discs constitute point source discharges and are subject to section 404 jurisdiction when they take place in wetlands which are waters of the United States.

2. In Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 - 24 (5th Cir.1983) the court stated that the term "discharge" may reasonably be understood to include "redeposit" and concluded that the term "discharge" covers the redepositing of soil taken from wetlands such as occurs during mechanized landclearing activities. Although the court in Avoyelles did not decide whether all landclearing activities constitute a discharge, it is our position that mechanized landclearing activities in jurisdictional wetlands result in a redeposition of soil that is subject to regulation under section 404. Some limited exceptions may occur, such as cutting trees above the soil's surface with a chain saw, but as a general rule, mechanized landclearing is a regulated activity.

3. As with any discharge subject to section 404, each case must be reviewed to determine if the discharge qualifies for a regional or nationwide permit, or for an exemption under section 404(f). This guidance is not intended to alter the exemptions for normal farming or silviculture activities under section 404(f).

4. This interpretation alters in some respects the guidance provided by previous Regulatory Guidance Letters (RGLs) on Landclearing (in particular RGL 85-4) and FOAs should exercise appropriate enforcement discretion with regard to properties whose owners have previously been informed that no permit is required for such landclearing based on the prior RGLs. The guidance in this RGL should apply to property which has not been cleared, unless the owner can demonstrate that he has committed substantial resources towards the clearing, in reliance on earlier Corps guidance, to the extent that it would be inequitable to apply this guidance.

CECW-OR

SUBJECT: Landclearing Activities Subject to Section 404  
Jurisdiction

5. This guidance expires on 31 December 1992 unless sooner modified or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:



JOHN P. ELMORE  
Chief, Operations, Construction and  
Readiness Division  
Directorate of Civil Works

**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 6**

**Regulatory Guidance Letter No. 90-6  
Expiration Dates for Wetlands Jurisdictional Delineations**





US Army Corps  
of Engineers  
Office, Chief of Engineers

# Regulatory Guidance Letter

No. 90-6

Date 14 AUG 90

Expires 31 DEC 93

CECW-OR

**SUBJECT: *Expiration Dates for Wetlands Jurisdictional Delineations***

1. Recently, questions have been raised regarding the length of time that wetlands jurisdictional delineations remain valid. In light of the need for national consistency in this area, the guidance in paragraph 4(a) - (d) below is provided. This guidance is subject to the provisions in paragraphs 5., 6., and 7.

2. Since wetlands are affected over time by both natural and man-made activities, we can expect local changes in wetland boundaries. As such, wetlands jurisdictional delineations will not remain valid for an indefinite period of time.

3. The purpose of this guidance is to provide a consistent national approach to reevaluating wetlands delineations. This provides greater certainty to the regulated public and ensures their ability to rely upon wetlands jurisdictional delineations for a definite period of time.

4.

- (a) Written wetlands jurisdictional delineations made before the effective date of this guidance, without a specific time limit imposed in the Corps written delineation, will remain valid for a period of two years from the effective date of this Regulatory Guidance Letter (RGL).
- (b) Written wetlands jurisdictional delineations made before the effective date of this guidance, with a specified time imposed in the Corps written delineation, will be valid until the date specified.
- (c) Oral delineations (i.e., not verified in writing by the Corps) are no longer valid as of the effective date of this RGL.
- (d) As specified in the 20 March 1989, Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water

Act (MOA), all wetlands jurisdictional delineations (including those prepared by the project proponent or consultant and verified by the Corps) shall be put in writing. Generally this should be in the form of a letter to the project proponent. The Corps letter shall include a statement that the wetlands jurisdictional delineation is valid for a period of three years from the date of the letter unless new information warrants revision of the delineation before the expiration date. Longer periods, not to exceed five years, may be provided where the nature and duration of a proposed project so warrant. The delineation should be supported by proper documentation. Generally the project proponent should be given the opportunity to complete the delineation and provide the supporting documentation subject to the Corps verification. However, the Corps will complete the delineation and documentation at the project proponent's request, consistent with other work priorities.

5. The guidance in paragraph 4(a) - (b) above does not apply to completed permit applications [33 CFR 325.1(d)(9)] received before the effective date of this RGL, or where the applicant can fully demonstrate that substantial resources have been expended or committed based on a previous Corps jurisdictional delineation (e.g., final engineering design work, contractual commitments for construction, or purchase or long term leasing of property will, in most cases, be considered a substantial commitment of resources). However, district engineers cannot rely upon the expenditure or commitment of substantial resources to validate an otherwise expired delineation for more than five years from the expiration dates noted in paragraph 4(a) - (b). At the end of the five year period a new delineation would be required. In certain rare cases, it may be appropriate to honor a previous oral wetlands delineation when the applicant can fully demonstrate a substantial expenditure or commitment of resources. However, the presumption is that oral delineations are not valid and acceptance of such must be based on clear evidence and equities of the particular case. This determination is left to the discretion of the district engineer.

6. When making wetlands jurisdictional delineations it is very important to have complete and accurate documentation which substantiates the Corps decision (e.g., data sheets, etc). Documentation must allow a reasonably accurate replication of the delineation at a future date. In this regard, documentation will normally include information such as data sheets, maps, sketches, and in some cases surveys.

CECW-OR

SUBJECT: Expiration Dates for Wetlands Jurisdictional  
Delineations

7. This guidance does not alter or supercede any provisions of law, regulations, or any interagency agreement between Army and EPA. Further, this guidance does not impair the Corps discretion to revise wetlands jurisdictional delineations where new information so warrants.

8. Each district shall issue a public notice on this guidance no later than 1 September 1990. The public notice shall contain the full text of this RGL.

9. This guidance expires on 31 December 1993 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:



JOHN P. ELMORE  
Chief, Operations, Construction  
and Readiness Division  
Directorate of Civil Works

**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 7**

**Regulatory Guidance Letter 92-5  
Alternatives Analysis Under Section 404 (b)(1)  
Guidelines for Projects Subject to Modification Under the  
Clean Air Act**



US Army Corps  
of Engineers  
Office, Chief of Engineers

# Regulatory Guidance Letter

No. 92-5

Date 29 Oct 1992 Expires 31 Dec 1997


C2CW-OR

**SUBJECT: Alternatives Analysis Under the Section 404(b)(1) Guidelines for Projects Subject to Modification Under the Clean Water Act**

1. Enclosed for implementation is a joint Army Corps of Engineers/Environmental Protection Agency Memorandum to the Field on alternatives analysis for existing power plants that must be modified to meet requirements of the 1990 Clean Air Act. This guidance was developed jointly by the Corps and EPA.
2. This guidance expires 31 December 1997 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl



JOHN P. ELMORE, P.E.  
Chief, Operations, Construction and  
Readiness Division  
Directorate of Civil Works



United States Department of the Army  
U.S. Army Corps of Engineers  
Washington, D.C. 20314  
29 October 1992

EPA/CORPS JOINT MEMORANDUM FOR THE FIELD

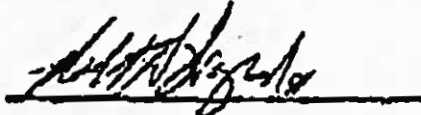
**SUBJECT: Alternatives Analysis under the Section 404(b)(1) Guidelines for Projects Subject to Modification Under the Clean Air Act.**

1. The 1990 Clean Air Act (CAA) amendments require most electric generating plants to reduce emissions of sulfur dioxide in phases beginning in 1995 and requiring full compliance by 2010. The Congressional endorsement of the industry's ability to select the most effective compliance method (e.g., sulfur dioxide scrubbers, low sulfur coal, or other methods) recognizes the expertise of the industry in these cases and is a fundamental element in the CAA market-based pollution control program. Given the need for cooling water, a substantial number of electric power generating plants are located adjacent, or in close proximity, to waters of the United States, including wetlands. Depending on the method chosen by the plants to reduce emissions, we expect that these facilities will be applying for Clean Water Act Section 404 permits for certain proposed activities.
  
2. The analysis and regulation under Section 404 of the Clean Water Act of activities in waters of the United States conducted by specific power plants to comply with the 1990 Clean Air Act amendments must ensure protection of the aquatic environment consistent with the requirements of the Clean Water Act. The review of applications for such projects will fully consider, consistent with requirements under the Section 404(b)(1) Guidelines, all practicable alternatives including non-aquatic alternatives, for proposed discharges associated with the method selected by the utility to comply with the 1990 Clean Air Act amendments. For the purposes of the Section 404(b)(1) Guidelines analysis, the project purpose will be that pollutant reduction method selected by the permit applicant.
  
3. For example, a utility may have decided to install sulfur dioxide scrubbers on an existing power plant in order to meet the new 1990 Clean Air Act standards. The proposed construction of the scrubbers, treatment ponds and a barge unloading facility could impact wetlands. In this case, the Section 404 review would evaluate practicable alternative locations and configurations for the scrubbers, ponds and of the docking facilities. The analysis will also consider practicable alternatives which satisfy the project purpose (i.e., installing scrubbers) but which have a less adverse impact on the aquatic environment or do not involve discharges into waters of the United States. However, in order to best effectuate Congressional intent reflected in the CAA that electric utilities retain flexibility to reduce sulfur dioxide emissions in the most cost effective manner, the Section 404 review should not evaluate alternative methods of complying with the Clean Air Act standards not selected by the applicant (e.g., in this example use of low sulfur coal).

Enclosure

4. In evaluating the scope of practicable alternatives which satisfy the project purpose (e.g., constructing additional scrubber capacity), the alternatives analysis should not be influenced by the possibility that, based on a conclusion that practicable upland alternatives are available to the applicant, the project proponent may decide to pursue other options for meeting Clean Air Act requirements. Continuing the above example, a Corps determination that practicable upland alternatives are available for scrubber waste disposal should not be affected by the possibility that an applicant may subsequently decide to select a different method for meeting the Clean Air Act standards (e.g., use of low sulfur coal that reduces waste generated by scrubbers).

5. The Corps and EPA will also recognize the tight time-frames under which the industry must meet these new air quality standards.



Robert H. Wayland, Director  
Office of Wetlands, Oceans and Watersheds



Julia Elmore, Chief  
Construction, Operations and  
Readiness Division

**PART VIII - REGULATORY GUIDANCE LETTERS**

**Section 8**

**Regulatory Guidance Letter 93-2**  
**Guidance on Flexibility of the 404(b)(1) Guidelines and**  
**Mitigation Banking**



## Regulatory Guidance Letter 93-2

### Regulatory Guidance Letters Issued by the Corps of Engineers

AGENCY: U.S. Army Corps of Engineers,  
DoD.

ACTION: Notice.

**SUMMARY:** The purpose of this notice is to provide a copy of the Regulatory Guidance Letter (RGL 93-2) to all known interested parties. RGL's are used by the Corps of Engineers as a means to transmit guidance on the permit program (33 CFR parts 320-330) to its division and district engineers. The Corps of Engineers publishes RGL's in the Federal Register upon issuance as a means of informing the public of Corps guidance.

**FOR FURTHER INFORMATION CONTACT:**  
Mr. Sam Collinson, Regulatory Branch,  
Office of the Chief of Engineers at (202)  
272-1782.

**SUPPLEMENTARY INFORMATION:** RGL 93-2,  
Subject: Guidance on Flexibility of the  
404(b)(1) Guidelines and Mitigation  
Banking is hereby published as follows:

Dated: September 2, 1993.

Approved:

John P. Elmore,

Chief, Operations, Construction and  
Readiness Division, Directorate of Civil  
Works.

Regulatory Guidance Letter, RGL 93-2.

Date: 23 August 1993, Expires: 31

December 1996.

Subject: Guidance on Flexibility of the  
404(b)(1) Guidelines and Mitigation Banking.

1. Enclosed are two guidance documents signed by the Office of the Assistant Secretary of the Army (Civil Works) and the Environmental Protection Agency. The first document provides guidance on the flexibility that the U.S. Army Corps of Engineers should be utilizing when making determinations of compliance with the section 404(b)(1) Guidelines, particularly with regard to the alternatives analysis. The second document provides guidance on the use of mitigation banks as a means of providing compensatory mitigation for Corps regulatory decisions.

2. Both enclosed guidance documents should be implemented immediately. These guidance documents constitute an important aspect of the President's plan for protecting the Nation's wetlands, "Protecting America's Wetlands: A Fair, Flexible and Effective Approach" (published on 24 August 1993).

3. This guidance expires 31 December 1998  
unless sooner revised or rescinded.

For The Director of Civil Works:

2 Encls

John P. Elmore,

Chief, Operations, Construction and  
Readiness Division, Directorate of Civil  
Works.

### Memorandum to the Field

Subject: Appropriate level of analysis  
required for evaluating compliance with the  
section 404(b)(1) guidelines alternative  
requirements.

1. Purpose: The purpose of this memorandum is to clarify the appropriate level of analysis required for evaluating compliance with the Clean Water Act section 404(b)(1) Guidelines' (Guidelines) requirements for consideration of alternatives. 40 CFR 230.10(a). Specifically, this memorandum describes the flexibility afforded by the Guidelines to make regulatory decisions based on the relative severity of the environmental impact of proposed discharges of dredged or fill material into waters of the United States.

2. Background: The Guidelines are the substantive environmental standards by which all section 404 permit applications are evaluated. The Guidelines, which are binding regulations, were published by the Environmental Protection Agency at 40 CFR part 230 on December 24, 1980. The fundamental precept of the Guidelines is that discharges of dredged or fill material into waters of the United States, including wetlands, should not occur unless it can be demonstrated that such discharges, either individually or cumulatively, will not result in unacceptable adverse effects on the aquatic ecosystem. The Guidelines specifically require that "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." 40 CFR 230.10(a). Based on this provision, the applicant is required in every case (irrespective of whether the discharge site is a special aquatic site or whether the activity associated with the discharge is water dependent) to evaluate opportunities for use of non-aquatic areas and other aquatic sites that would result in less adverse impact on the aquatic ecosystem. A permit cannot be issued, therefore, in circumstances where a less environmentally damaging practicable alternative for the

proposed discharge exists (except as provided for under section 404(b)(1)).

Discussion: The Guidelines are, as noted above, binding regulations. It is important to recognize, however, that this regulatory status does not limit the inherent flexibility provided in the Guidelines for implementing these provisions. The preamble of the Guidelines is very clear on this regard.

Of course, as the regulations make 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.

Guidelines preamble, "Regulation versus Guidelines", 45 FR 85336 (December 24, 1980).

Notwithstanding this flexibility, the record must contain sufficient information to demonstrate that the proposed discharge complies with the requirements of Section 230.10(a) of the Guidelines. The amount of information needed to make such a determination and the level of scrutiny required by the Guidelines is commensurate with the severity of the environmental impact (as determined by the functions of the aquatic resource and the nature of the proposed activity) and the scope/cost of the project.

a. Analysis Associated with Minor Impacts: The Guidelines do not contemplate that the same intensity of analysis will be required for all types of projects but instead envision a correlation between the scope of the evaluation and the potential extent of adverse impacts on the aquatic environment. The Introduction to Section 230.10(a) recognizes that the level of analysis required may vary with the nature and complexity of each individual case:

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.

#### 40 CFR 230.10

Similarly, Section 230.6 ("Adaptability") makes clear that the 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.

#### 40 CFR 230.6(9) (emphasis added)

Section 230.6 also emphasizes that when making determinations of compliance with the Guidelines, users:

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.

#### 40 CFR 230.6(b) (emphasis added)

Consequently, the Guidelines clearly afford flexibility to adjust the stringency of the alternatives review for projects that would have only minor impacts. Minor impacts are associated with activities that generally would have little potential to degrade the aquatic environment and include one, and frequently more, of the following characteristics: Are located in aquatic resources of limited natural function; are small in size and cause little direct impact; have little potential for secondary or cumulative impacts; or cause only temporary impacts. It is important to recognize, however, that in some circumstances even small or temporary fills result in substantial impacts, and that in such cases a more detailed evaluation is necessary. The Corps Districts and EPA Regions will, through the standard permit evaluation process, coordinate with the U.S. Fish and Wildlife Service, National Marine Fisheries Service and other appropriate state and Federal agencies in evaluating the likelihood that adverse impacts would result from a particular proposal. It is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will cause only minor impacts for purposes of the alternatives analysis required by Section 230.10(a).

In reviewing projects that have the potential for only minor impacts on the aquatic environment, Corps and EPA field offices are directed to consider, in coordination with state and Federal resource agencies, the following factors:

(i) Such projects by their nature should not cause or contribute to significant degradation individually or cumulatively. Therefore, it generally should not be necessary to conduct or require detailed analyses to determine compliance with Section 230.10(c).

(ii) Although sufficient information must be developed to determine whether the proposed activity is in fact the least damaging practicable alternative, the Guidelines do not require an elaborate search for practicable alternatives if it is reasonably anticipated that there are only minor differences between the environmental impacts of the proposed activity and potentially practicable alternatives. This decision will be made after consideration of resource agency comments on the proposed project. It often makes sense to examine first whether potential alternatives would result in no identifiable or discernible difference in impact on the aquatic ecosystem. Those alternatives that do not may be eliminated from the analysis since Section 230.10(a) of the Guidelines only prohibits discharges when a practicable alternative exists which would have less adverse impact on the aquatic ecosystem. Because evaluating practicability is generally the more difficult aspect of the alternatives analysis, this approach should save time and effort for both

the applicant and the regulatory agencies.<sup>1</sup> By initially focusing the alternatives analysis on the question of impacts on the aquatic ecosystem, it may be possible to limit (or in some instances eliminate altogether) the number of alternatives that have to be evaluated for practicability.

(iii) When it is determined that there is no identifiable or discernible difference in adverse impact on the environment between the applicant's proposed alternative and all other practicable alternatives, then the applicant's alternative is considered as satisfying the requirements of Section 230.10(a).

(iv) Even where a practicable alternative exists that would have less adverse impact on the aquatic ecosystem, the Guidelines allow it to be rejected if it would have "other significant adverse environmental consequences." 40 CFR 230.10(a). As explained in the preamble, this allows for consideration of "evidence of damages to other ecosystems in deciding whether there is a 'better' alternative." Hence, in applying the alternatives analysis required by the Guidelines, it is not appropriate to select an alternative where minor impacts on the aquatic environment are avoided at the cost of substantial impacts to other natural environmental values.

(v) In cases of negligible or trivial impacts (e.g., small discharges to construct individual driveways), it may be possible to conclude that no alternative location could result in less adverse impact on the aquatic environment within the meaning of the Guidelines. In such cases, it may not be necessary to conduct an offsite alternatives analysis but instead require only any practicable onsite minimization.

This guidance concerns application of the Section 404(b)(1) Guidelines to projects with minor impacts. Projects which may cause more than minor impacts on the aquatic environment, either individually or cumulatively, should be subjected to a proportionately more detailed level of analysis to determine compliance or noncompliance with the Guidelines. Projects which cause substantial impacts, in particular, must be thoroughly evaluated through the standard permit evaluation process to determine compliance with all provisions of the Guidelines.

b. Relationship between the Scope of Analysis and the Scope/Cost of the Proposed Project: The Guidelines provide the Corps and EPA with discretion for determining the necessary level of analysis to support a conclusion as to whether or not an alternative is practicable. Practicable alternatives are those alternatives that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 CFR 230.10(a)(2). The preamble to the Guidelines provides clarification on how cost is to be considered in the determination of practicability:

<sup>1</sup> In certain instances, however, it may be easier to examine practicability first. Some projects may be so site-specific (e.g., erosion control, bridge replacement) that no offsite alternative could be practicable. In such cases the alternatives analysis may appropriately be limited to onsite options only.

*Our intent is to consider those alternatives which are reasonable in terms of the overall scope/cost of the proposed project. The term economic [for which the term "cost" was substituted in the final rule] 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*

(Guidelines Preamble, "Alternatives", 45 FR 85339 (December 24, 1980) (emphasis added).

Therefore, the level of analysis required for determining which alternatives are practicable will vary depending on the type of project proposed. The determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with the particular type of project. Generally, as the scope/cost of the project increases, the level of analysis should also increase. To the extent the Corps obtains information on the costs associated with the project, such information may be considered when making a determination of what constitutes an unreasonable expense.

The preamble to the Guidelines also states that "(i)if an alleged alternative is unreasonably expensive to the applicant, the alternative is not 'practicable.'" Guidelines Preamble, "Economic Factors", 45 FR 85343 (December 24, 1980). Therefore, to the extent that individual homeowners and small businesses may typically be associated with small projects with minor impacts, the nature of the applicant may also be a relevant consideration in determining what constitutes a practicable alternative. It is important to emphasize, however, that it is not a particular applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations.

4. The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued. 40 CFR 230.12(a)(3)(iv).

5. A reasonable, common sense approach in applying the requirements of the Guidelines' alternatives analysis is fully consistent with sound environmental protection. The Guidelines clearly contemplate that reasonable discretion should be applied based on the nature of the aquatic resource and potential impacts of a proposed activity in determining compliance with the alternatives test. Such an approach encourages effective decisionmaking and fosters a better understanding and enhanced confidence in the Section 404 program.

6. This guidance is consistent with the February 6, 1990 "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines."

Signed 8-23-93

Robert H. Wayland, III,  
Director, Office of Wetlands, Oceans, and  
Watersheds, U.S. Environmental Protection  
Agency

Signed: 8-23-93

Michael L. Davis,  
Office of the Assistant Secretary of the Army  
(Civil Works), Department of the Army

Memorandum to the Field

Subject: Establishment and use of wetland mitigation banks in the Clean Water Act section 404 regulatory program.

1. This memorandum provides general guidelines for the establishment and use of wetland mitigation banks in the Clean Water Act Section 404 regulatory program. This memorandum serves as interim guidance pending completion of Phase I of by the Corps of Engineers' Institute for Water Resources study on wetland mitigation banking<sup>1</sup>, at which time this guidance will be reviewed and any appropriate revisions will be incorporated into final guidelines.

2. For purposes of this guidance, wetland mitigation banking refers to the restoration, creation, enhancement, and, in exceptional circumstances, preservation of wetlands or other aquatic habitats expressly for the purpose of providing compensatory mitigation in advance of discharges into wetlands permitted under the Section 404 regulatory program. Wetland mitigation banks can have several advantages over individual mitigation projects, some of which are listed below:

(a) Compensatory mitigation can be implemented and functioning in advance of project impacts, thereby reducing temporal losses of wetland functions and uncertainty over whether the mitigation will be successful in offsetting wetland losses.

(b) It may be more ecologically advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation for impacts to many smaller, isolated or fragmented habitats into a single large parcel or contiguous parcels.

(c) Development of a wetland mitigation bank can bring together financial resources and planning and scientific expertise not practicable to many individual mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation.

(d) Wetland mitigation banking proposals may reduce regulatory uncertainty and provide more cost-effective compensatory mitigation opportunities.

3. The Section 404(b)(1) Guidelines (Guidelines), as clarified by the "Memorandum of Agreement Concerning the Determination of Mitigation under the Section 404(b)(1) Guidelines" (Mitigation

<sup>1</sup> The Corps of Engineers Institute for Water Resources, under the authority of section 307(d) of the Water Resources Development Act of 1986, is undertaking a comprehensive two-year review and evaluation of wetland mitigation banking to assist in the development of a national policy on this issue. The interim summary report documenting the results of the first phase of the study is scheduled for completion in the fall of 1993.

MOA) signed February 6, 1990, by the Environmental Protection Agency and the Department of the Army, establish a mitigation sequence that is used in the evaluation of individual permit applications. Under this sequence, all appropriate and practicable steps must be undertaken by the applicant to first avoid and then minimize adverse impacts to the aquatic ecosystem. Remaining unavoidable impacts must then be offset through compensatory mitigation to the extent appropriate and practicable.

Requirements for compensatory mitigation may be satisfied through the use of wetland mitigation banks, so long as their use is consistent with standard practices for evaluating compensatory mitigation proposals outlined in the Mitigation MOA. It is important to emphasize that, given mitigation sequence requirements described above, permit applicants should not anticipate that the establishment of, or participation in, a wetland mitigation bank will ultimately lead to a determination of compliance with the Section 404(b)(1) Guidelines without adequate demonstration that impacts associated with the proposed discharge have been avoided and minimized to the extent practicable.

4. The agencies' preference for on-site, in-kind compensatory mitigation does not preclude the use of wetland mitigation banks where it has been determined by the Corps, or other appropriate permitting agency, in coordination with the Federal resource agencies through the standard permit evaluation process, that the use of a particular mitigation bank as compensation for proposed wetland impacts would be appropriate for offsetting impacts to the aquatic ecosystem. In making such a determination, careful consideration must be given to wetland functions, landscape position, and affected species populations at both the impact and mitigation bank sites. In addition, compensation for wetland impacts should occur, where appropriate and practicable, within the same watershed as the impact site. Where a mitigation bank is being developed in conjunction with a wetland resource planning initiative (e.g., Special Area Management Plan, State Wetland Conservation Plan) to satisfy particular wetland restoration objectives, the permitting agency will determine, in coordination with the Federal resource agencies, whether use of the bank should be considered an appropriate form of compensatory mitigation for impacts occurring within the same watershed.

5. Wetland mitigation banks should generally be placed and functional before credits may be used to offset permitted wetland losses. However, it may be appropriate to allow incremental distribution of credits corresponding to the appropriate stage of successful establishment of wetland functions. Moreover, variable mitigation ratios (credit acreage to impacted wetland acreage) may be used in such circumstances to reflect the wetland functions attained at a bank site at a particular point in time. For example, higher ratios would be required when a bank is not yet fully functional at the time credits are to be withdrawn.

6. Establishment of each mitigation bank should be accompanied by the development

of a formal written agreement (e.g., memorandum of agreement) among the Corps, EPA, other relevant resource agencies, and those parties who will own, develop, operate or otherwise participate in the bank. The purpose of the agreement is to establish clear guidelines for establishment and use of the mitigation bank. A wetlands mitigation bank may also be established through issuance of a Section 404 permit where establishing the proposed bank involves a discharge of dredged or fill material into waters of the United States. The banking agreement or, where applicable, special conditions of the permit establishing the bank should address the following considerations, where appropriate:

- (a) Location of the mitigation bank
- (b) Goals and objectives for the mitigation bank projects;
- (c) Identification of bank sponsors and participants;
- (d) Development and maintenance plan;
- (e) Evaluation methodology acceptable to all signatories to establish bank credits and assess bank success in meeting the project goals and objectives;
- (f) Specific accounting procedures for tracking crediting and debiting;
- (g) Geographic area of applicability;
- (h) Monitoring requirements and responsibilities;
- (i) Remedial action responsibilities including funding; and
- (j) Provisions for protecting the mitigation bank in perpetuity.

Agency participation in a wetlands mitigation banking agreement may not, in any way, restrict or limit the authorities and responsibilities of the agencies.

7. An appropriate methodology, acceptable to all signatories, should be identified and used to evaluate the success of wetland restoration and creation efforts within the mitigation bank and to identify the appropriate stage of development for issuing mitigation credits. A full range of wetland functions should be assessed. Functional evaluations of the mitigation bank should generally be conducted by a multi-disciplinary team representing involved resource and regulatory agencies and other appropriate parties. The same methodology should be used to determine the functions and values of both credits and debits. As an alternative, credits and debits can be based on acres of various types of wetlands (e.g., National Wetland Inventory classes). Final determinations regarding debits and credits will be made by the Corps, or other appropriate permitting agency, in consultation with Federal resource agencies.

8. Permit applicants may draw upon the available credits of a third party mitigation bank (i.e., a bank developed and operated by an entity other than the permit applicant). The Section 404 permit, however, must state explicitly that the permittee remains responsible for ensuring that the mitigation requirements are satisfied.

9. To ensure legal enforceability of the mitigation conditions, use of mitigation bank credits must be conditioned in the Section 404 permit by referencing the banking agreement or Section 404 permit establishing the bank; however, such a provision should

not limit the responsibility of the Section 404 permittee for satisfying all legal requirements of the permit.

Signed 8-23-93

Robert H. Wayland, III.

Director, Office of Wetland, Oceans, and Watersheds, U.S. Environmental Protection Agency.

Signed 8-23-93:

Michael L. Davis.

Office of the Assistant Secretary of the Army (Civil Works), Department of the Army.

(FR Doc. 93-22172 Filed 9-9-93; 8 45 am)

BILLING CODE 3710-02-M

# Part IX - Clarification for 'Cropped Wetlands'

<i>Section 1</i>	<b>Criteria for Identifying Prior Converted Croplands (PC) Converted Prior to December 23, 1985</b> .....	546
<i>Section 2</i>	<b>Regulatory Guidance Letter No. 90-7 Clarification of the Phrase "Normal Circumstances" as it Pertains to Cropped Wetlands</b> .....	557
<i>Section 3</i>	<b>Policy of the Clinton Administration with Respect to Cropped Wetlands</b> .....	562

**PART IX - CLARIFICATION FOR 'CROPPED WETLANDS**

**Section 1**

**Criteria for Identifying Prior Converted Croplands  
(PC) Converted Prior to December 23, 1985**

(512.15 Criteria for identifying prior converted croplands (PC) converted prior to December 23, 1985.

(a) Definition. Prior converted croplands were wetlands that were drained, dredged, filled, leveled, or otherwise manipulated before December 23, 1985, for the purpose, or to have the effect of, making the production of an agricultural commodity possible. This applies if (i) such production was not possible before the action, (ii) an agricultural commodity has been produced (planted) at least once before December 23, 1985, and (iii) the area has not been abandoned. This includes the following:

(1) Potholes or playas that have been drained to make possible the production of an agricultural commodity and no longer meet the hydrology criteria or hydrophytic vegetation criteria. Potholes and playas that were drained before December 23, 1985, by ditches or tiles are prior converted cropland if the ditch or tile was installed at an elevation or grade below the bottom of the wetland sufficient to remove water so that it no longer meets wetland hydrology criteria. These prior converted croplands are subject to abandonment criteria.

(2) Areas other than potholes or playas that were manipulated prior to December 23, 1985, to make possible the production of an agricultural commodity.

(3) Flooded and ponded areas that are less than seasonally flooded that have been drained, diked, or otherwise altered so that they do not flood or pond for extended periods during the growing season.

(4) Hydric soils that met only the water table (saturation) criteria, if prior to December 23, 1985, they were either drained or otherwise manipulated or had the woody vegetation removed, and:

(i) have been used to produce an agricultural commodity, and

(ii) have not been abandoned, and

(iii) do not currently flood or pond seasonally.

Subpart B - Wetland Criteria

512.15(a)(5)

(5) Areas of hydric soils that were manipulated prior to December 23, 1985, to the extent that they did not and do not currently meet hydrology criteria, but were never cropped, are considered non-wetland (NW). The abandonment provision applies to such lands, even if they have not been cropped, and they are considered wetland if wetland criteria are met after the appropriate period of abandonment. However, areas that meet the wetland criteria and where crop history cannot be documented are considered wetlands (W) and not prior converted cropland (PC). These areas can be farmed under natural conditions if it is not necessary to manipulate or remove additional woody vegetation (including stumps or brush) after December 23, 1985.

(6) Pocosins and other similar areas are prior converted cropland only if prior to December 23, 1985:

- (i) the woody vegetation was removed,
- (ii) a drainage system was installed that altered the hydrology to the extent the wetland criteria is no longer met,
- (iii) an agricultural commodity has been produced, and
- (iv) they have not been abandoned.

(b) Areas not considered to be prior converted croplands.

(1) Potholes and playas that were manipulated prior to December 23, 1985, but otherwise continue to meet wetland criteria shall not be determined to be prior converted croplands. Where potholes and playas were drained prior to December 23, 1985, to make possible the production of an agricultural commodity by ditches or tiles, they will be determined to be prior converted cropland if the ditch or tile was installed at an elevation or grade below the bottom of the wetland and has removed the wetland hydrology. These prior converted croplands are subject to abandonment criteria.

(2) Other wetland areas that are seasonally flooded or ponded and were manipulated before December 23, 1985, to make agricultural production possible, but otherwise continue to meet wetland criteria, are not prior converted croplands. (With maintenance considered and documented as outlined in 512.35(c)(6)).

512-19

(180-V-NFSAM, Second Ed., Amend. 6, May 1991)



(i) Surface water must be present for extended periods in the growing season to qualify as seasonally flooded or ponded. "Extended periods" is defined as the continued presence of surface water for at least 15 consecutive days or 10 percent of the growing season, whichever is less under average conditions (50 percent chance of occurrence using all existing precipitation records). Growing season is defined in Hydric Soils of the United States.

(ii) States, with NTC concurrence and in consultation with FWS, are authorized to determine locations where extended periods will be longer than the definition above. Such determinations will be based on the degree of ponding or flooding required to protect seasonal wetland wildlife values. The purpose of defining seasonally flooded or ponded areas as wetlands despite previous manipulations (e.g., clearing woody vegetation, planting an agricultural commodity) is to maintain remaining seasonal wetland wildlife values.

(512.16 Criteria for identifying Converted Wetlands (CW+year) after November 28, 1990.

(a) Converted wetlands after November 28, 1990, will be determined using the criteria for converted wetlands in 512.14.

(b) Persons who convert a wetland after November 28, 1990, for the purpose, or to have the effect, of making possible the production of an agricultural commodity will be ineligible for USDA program benefits.

(c) The conversion of a wetland for any purpose other than vineyards, shrubs, fish production, trees, cranberries, roads, and buildings is considered as converted for crop production.

(1) Wetland converted for pasture or hayland is considered a converted wetland because it is assumed a conversion to allow the planting of grass or legumes also would make the production of an agricultural commodity possible.

Subpart B - Wetland Criteria

512.16(c)(2)

(2) If trees and stems are removed only in part, but grasses and/or legumes are planted, the area is considered a converted wetland unless the planting is approved in advance by SCS.

(3) The removal of brush and stems from wet areas that have not been maintained in the past 5 years, making it possible to plant grasses or legumes, causes the area to be a converted wetland if the actions are not minimal effect.

(4) Clear cutting when stems and stumps are removed prior to replanting trees requires prior approval as outlined in 512.17.

(5) Construction of outlets through wetlands in order to maintain prior converted cropland, farmed wetlands, and farmed wetlands pasture causes the wetland to become a converted wetland if effects are not minimal.

(6) Construction of dugouts or other ponds in wetlands resulting in fill being placed in a wetland, cause the area to be a converted wetland if effects are not minimal.

(7) The following apply to wetlands converted after November 28, 1990, by mining and other major land disturbing activities:

(i) Wetlands converted as a result of a mining permit require a wetland reclamation plan that provides for the restoration or replacement of all wetlands converted as a result of the mining activity.

(ii) The operator holding the surface rights will be permitted to resume agricultural production without loss of benefits when the wetland reclamation plan is fully applied.

(iii) The restoration or replacement of wetlands on mined areas does not have to be located on prior converted cropland.

(iv) The use of mitigation banks is permitted under the guidelines in 512.22(a)(5)(iv).

512-21

(180-V-NFSAM, Second Ed., Amend. 6, May 1991)

Part 512 - Wetland Conservation

512.17(a)(1)

(d) The person will remain ineligible for all programs and all lands which the person has an interest, for that year forward, if the land is not restored. Any other person will become ineligible in any year in which the person plants an agricultural commodity or forage crop on the land.

(e) All converted wetlands that were not PC on December 23, 1985, and that are found after November 28, 1990, on farms enrolled in USDA programs for which an AD-1026 is signed, will be presumed to have been converted after November 28, 1990, and therefore must be restored in order for the person to regain eligibility for USDA program benefits. The person will be issued a determination of CW+year, which the person may appeal. Request ASCS to provide an ASCS-569 form, SCS Report of Conservation Compliance for Spotcheck Purposes. SCS will consider changing the CW+year determination if the person can document that the wetland was converted prior to November 28, 1990. If the area has been planted to an agricultural commodity, or the person provided incorrect information, inform ASCS.

(f) Wetlands converted after November 28, 1990, will be labeled CW plus the year in which the conversion took place or was found.

(g) Manipulation of a wet area that makes production of an agricultural commodity possible will cause the area to become a converted wetland.

512.17 Criteria for converted wetlands for non-agricultural purposes (CWNA).

(a) Persons who plan to convert a wetland for purposes other than production of an agricultural commodity or forage crops must have such plans approved before the conversion takes place. The plan must be approved by the SCS in consultation with FWS. Any person who converts a wetland is considered to have converted the wetland for agricultural production unless the person got prior approval for conversion. Persons must indicate on the AD-1026 that a wetland will be converted for non-agricultural use. The wetland will be labeled "CWNA" exempted converted wetlands, non-agricultural use.

(1) Persons who plan to do maintenance on hayland, pasture, or other wetlands that will not lead to a land use change must also get prior approval under this section by indicating intent on an AD-1026.

Subpart B - Wetland Criteria

512.17(a)(2)

(2) For purposes of this section, agricultural production includes the planting of any crop, hay, or pasture. Fruit trees, trees, vineyards, shrubs, fish production, and cranberries are not considered agricultural production if the conversion follows an approved plan.

(3) Before approving a plan, SCS will advise the person that 404 or other wetland-related permits may be required.

(4) SCS will conduct an annual review of all wetlands that are converted for non-agricultural use, until the planned use is installed. At any time that the plans are not being followed, or a hay, pasture or agricultural commodity is planted on the area, the area will be changed to a converted wetland and will be in violation of the wetland provisions.

(b) Persons who plan to convert wetlands for non-agricultural uses must check yes to appropriate question on form AD-1026 and must submit a plan to SCS for approval before converting the wetland.

(1) The plan must include present condition, planned alterations to the wetland, planned land use, date of conversion, date the plan will be fully implemented, and the planned cover for subject area.

(2) The DC will review the plan and note any additional conditions for the conversion.

(3) Have the person sign the plan and inform them that not following the plan will cause the area to become a converted wetland and be in violation of the FSA provision.

(4) The DC will sign the plan.

512.18 Criteria for Converted Wetland Technical Error (CWTE)

Incorrect wetland determinations made by SCS officials will be corrected any time such incorrect determinations become known. The new determinations become effective when made; however, no person shall be adversely affected by actions based on a prior determination. Promptly notify the land owner of the corrected determination.

512-23

(180-V-NFSAM, Second Ed., Amend. 6, May 1991)

Part 512 - Wetland Conservation

512.18(g)

(a) If the person has taken no actions to convert the wetland, label the area wetland and all USDA policies apply.

(b) Obvious wetlands will not be exempt.

(c) If wetlands have been converted as the result of good faith reliance upon misinformation from SCS or if conversion has commenced before the person receives the corrected determination, the person shall be granted relief for the actions taken based on the incorrect determination. Any further conversion activities would result in a loss of benefits unless the action were determined to have minimal effect.

(d) The state conservationist must approve relief granted for actions taken because of incorrect determinations by SCS in consultation with FWS. The documentation provided by the field office and reviewed by the area office must include a reviewable record, consisting of:

- Data supporting incorrect information provided to person.
- Date conversion was started.
- Date conversion was completed.
- Total cost of conversion.
- Total amount spent on conversion as of date correct determination was provided to a person.
- Explanation of the events and circumstances leading to the error.
- Statement of actions taken to correct the error and prevent reoccurrences.
- Documentation of FWS consultation.

(e) If a small investment was made to convert the area, the person shall not be considered in violation for past actions, but will not be permitted to plant agricultural commodities on the area in the future unless the wetland is restored.

(f) If a substantial investment was made to convert the wetland, label the area "CWTE" (converted wetland technical error), and permit the person to plant agricultural commodities and maintain existing drainage in the future. Any additional conversion of the area would result in a loss of benefits unless the action were determined to be minimal.

(g) If an agricultural commodity is planted or the action related to the conversion of a wetland takes place after SCS informs the person of the error, or if the person knew or should have known that the determination was in error, no exemption is allowed.

## Subpart B - Wetland Criteria

### 512.18(h)

(h) FWS must be consulted on all misinformation determinations.

(i) Inform the producer that Section 404 permits and other federal, state, and local permits may still be required.

(j) Within 15 days after the state conservationist decides that misinformation was provided, forward the entire reviewable record to the Director, Conservation Planning Division.

(k) Each state conservationist must report quarterly to the Director, Conservation Planning Division, the cumulative number of CWTE exemptions granted as of that quarter and the number of acres converted due to technical error. Reports are due April 15, July 15, October 15, and January 15; negative reports are required.

### 512.19 Criteria for abandonment.

(a) Abandonment is the cessation of cropping, management, or maintenance operations on prior converted cropland (PC), farmed wetland (FW), or farmed wetland pasture or hayland (FWP). If cropping, management, or maintenance operations have ceased for 5 successive years, prior converted cropland, farmed wetland, or pasture or hayland wetlands are considered abandoned if wetland criteria are present, unless it is shown that there was no intent to abandon; however, if there is no crop production for 5 successive years, the land is abandoned if it meets wetland criteria.

(1) Cropping means the use of the area for the production of an agricultural commodity, but also includes the use of the area for aquaculture, grasses, or legumes, or pasture production in a commonly used rotation related to the production of an agricultural commodity. Management or maintenance means carrying out those operations that support the production of the agricultural commodity, hay, or pasture.

(2) A person may provide a written declaration of a decision to cease cropping, management, or maintenance operations and allow the land to revert from cropland, farmed wetland, or farmed pasture or hayland wetland to natural wetland. Indicating

Part 512 - Wetland Conservation

512.19(c)(1)

an intent to sell or develop land for non-agricultural uses does not constitute an intent to abandon, without a written declaration.

(b) A prior converted cropland (PC) or farmed wetland (FW) is considered abandoned if wetland criteria are met, and

(1) the prior converted cropland or farmed wetland has not been planted to an agricultural commodity for 5 successive years; and

(2) it was not enrolled in a USDA set-aside or similar program of conserving use or wetland restoration approved by FWS or a state wildlife agency. However, if it is clear that the area was not farmable for the preceding 5-year period and was not farmable at the time it designated as set-aside, the area is considered wetland (W). The DC will request ASCS to determine whether the land was eligible for set-aside when it was designated, and ASCS will document its determination. The DC should inform ASCS, the farmer, and the state conservationist, through appropriate channels, that the area is now determined to be wetland due to abandonment of crop production, or

(3) the person indicates an intent to abandon. However, after 5 successive years of no crop production or participation in USDA set-aside or similar programs, the area is automatically considered abandoned regardless of intent. The farmer may request a reconsideration or appeal of the wetland determination based on the inability of the farmer to maintain production on the area due to circumstances beyond the farmer's control, such as where production on the area has been abandoned and not used as set-aside due to lack of maintenance of a related drainage facility by the drainage district or county. Using the information provided by the farmer, with the concurrence of the Fish and Wildlife Service (FWS), the DC may determine that the presumption of abandonment has been rebutted by this showing of an intention not to abandon.

(c) Farmed wetland pasture or hayland (FWP) is considered abandoned if wetland criteria are met, and

(1) the farmed pasture or hayland wetland has not been used, managed, or maintained, and has not been harvested (hayed, cropped or grazed) at least once in the preceding 5-year period; and

Subpart B - Wetland Criteria

512.19(c)(2)

(2) the requirements of 512.19 (b) (2) or (3) are also met.

(d) Prior converted croplands, farmed wetlands and pasture and hayland wetlands that SCS determines are abandoned and reverted to wetlands are classified as wetland and all wetland provisions apply. For lands that have been abandoned and meet wetland criteria the district conservationist will change designations to wetlands (W) upon becoming aware that such conditions exist. Persons may produce agricultural commodities on abandoned wetland only if water regimes are not altered or woody vegetation removed.

512-27

(180-V-NFSAM, Second Ed., Amend. 6, May 1991)



**PART IX - CLARIFICATION FOR 'CROPPED WETLANDS'**

**Section 2**

**Regulatory Guidance Letter No. 90-7  
Clarification of the Phrase  
"Normal Circumstances" as it Pertains to Cropped  
Wetlands**



US Army Corps  
of Engineers  
Office, Chief of Engineers

# Regulatory Guidance Letter

No. 90-7

Date 26 SEP 90

Expires 31 DEC 93

CECW-OR

**SUBJECT:** Clarification of the Phrase "Normal Circumstances" as it pertains to Cropped Wetlands.

1. The purpose of this regulatory guidance letter (RGL) is to clarify the concept of "normal circumstances" as currently used in the Army Corps of Engineers definition of wetlands (33 CFR 328.3(b)), with respect to cropped wetlands.
2. Since 1977, the Corps and the Environmental Protection Agency (EPA) have defined wetlands as:

"areas that are inundated or saturated by surface or groundwater 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..." (33 CFR 328.3(b)) (emphasis added).

While "normal circumstances" has not been defined by regulation, the Corps previously provided guidance on this subject in two expired "normal circumstances" RGLs (RGLs 82-2 and 86-9). These RGLs did not specifically deal with the issue of wetland conversion for purpose of crop production.

3. When the Corps adopted the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (Manual) on 10 January 1989, the Corps chose to define "normal circumstances" in a manner consistent with the definition used by the Soil Conservation Service (SCS) in its administration of the Swampbuster provisions of the Food Security Act of 1985 (FSA). Both the SCS and the Manual interpret "normal circumstances" as the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed [7 CFR 12.31(b)(2)(i)] [Manual page 71].

SUBJECT: Clarification of the Phrase "Normal Circumstances" as it pertains to Cropped Wetlands

4. The primary consideration in determining whether a disturbed area qualifies as a section 404 wetland under "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation. In addition, consideration is given to the purpose and cause of the physical alterations to hydrology and vegetation. For example, we have always maintained that areas where individuals have destroyed hydrophytic vegetation in an attempt to eliminate the regulatory requirements of section 404 remain part of the overall aquatic system, and are subject to regulation under section 404. In such a case, where the Corps can determine or reasonably infer that the purpose of the physical disturbance to hydrophytic vegetation was to avoid regulation, the Corps will continue to assert section 404 jurisdiction.

5. The following guidance is provided regarding how the concept of "normal circumstances" applies to areas that are in agricultural crop production:

- a. "Prior converted cropland" is defined by the SCS (Section 512.15 of the National Food Security Act Manual, August 1988) as wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values. Specifically, prior converted cropland is inundated for no more than 14 consecutive days during the growing season. Prior converted cropland generally does not include pothole or playa wetlands. In addition, wetlands that are seasonally flooded or ponded for 15 or more consecutive days during the growing season are not considered prior converted cropland.
- b. "Farmed wetlands" are wetlands which were both manipulated and cropped before 23 December 1985, but which continue to exhibit important wetland values. Specifically, farmed wetlands include cropped potholes, playas, and areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season.

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SUBJECT: Clarification of the Phrase "Normal Circumstances" as it pertains to Cropped Wetlands

- c. The definition of "normal circumstances" found at page 71 of the Manual is based upon the premise that for certain altered wetlands, even though the vegetation has been removed by cropping, the basic soil and hydrological characteristics remain to the extent that hydrophytic vegetation would return if the cropping ceased. This assumption is valid for "farmed wetlands" and as such these areas are subject to regulation under section 404.
- d. In contrast to "farmed wetlands", "prior converted croplands" generally have been subject to such extensive and relatively permanent physical hydrological modifications and alteration of hydrophytic vegetation that the resultant cropland constitutes the "normal circumstances" for purposes of section 404 jurisdiction. Consequently, the "normal circumstances" of prior converted croplands generally do not support a "prevalence of hydrophytic vegetation" and as such are not subject to regulation under section 404. In addition, our experience and professional judgment lead us to conclude that because of the magnitude of hydrological alterations that have most often occurred on prior converted cropland, such cropland meets, minimally if at all, the Manual's hydrology criteria.
- e. If prior converted cropland is abandoned (512.17 National Food Security Act Manual as amended, June 1990) and wetland conditions return, then the area will be subject to regulation under section 404. An area will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production. In this case, positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed.
- f. For the purposes of section 404, the final determination of whether an area is a wetland under normal circumstances will be made pursuant to the 19 January 1989 Army/EPA Memorandum of Agreement on geographic jurisdiction. For those

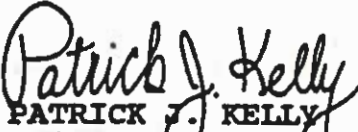
CECW-OR

SUBJECT: Clarification of the Phrase "Normal Circumstances" as it pertains to Cropped Wetlands

cropped areas that have previously been designated as "prior converted cropland" or "farmed wetland" by the SCS, the Corps will rely upon such a designation to the extent possible. For those cropped areas that have not been designated "prior converted cropland" or "farmed wetland" by the SCS, the Corps will consult with SCS staff and make appropriate use of SCS data in making a determination of "normal circumstances" for section 404 purposes. Although every effort should be made at the field level to resolve Corps/SCS differences in opinion on the proper designation of cropped wetlands, the Corps will make the final determination of section 404 jurisdiction. However, in order to monitor implementation of this RGL, cases where the Corps and SCS fail to agree on designation of prior converted cropland or farmed wetlands should be documented and a copy of the documentation forwarded to CECW-OR.

6. This policy is applicable to section 404 of the Clean Water Act only.
7. This guidance expires 31 December 1993 unless sooner revised or rescinded.

FOR THE COMMANDER:

  
PATRICK J. KELLY  
Major General, USA  
Director of Civil Works

**PART IX - CLARIFICATION FOR 'CROPPED WETLANDS'**

**Section 3**

**Policy of the Clinton Administration with respect to  
Cropped Wetlands**

# Policy of the Clinton Administration with Respect to Cropped Wetlands

Excerpt from "Protecting America's Wetlands"

## C. AGRICULTURE

**Issue Definition:** Two Federal statutes regulate certain activities in wetlands on agricultural lands. The Food Security Act Wetlands Conservation provision, which is known as the Swampbuster program, is administered by the Soil Conservation Service (SCS) of the U.S. Department of Agriculture, in consultation with the Fish and Wildlife Service of the Department of the Interior. The Clean Water Act Section 404 program is administered jointly by the Department of the Army and the Environmental Protection Agency. American farmers have at times been subjected to needless duplication and frustrating inconsistency in the implementation of these two statutes.

**Administration Position:** The Administration recognizes the valuable contribution of agricultural producers to the Nation's economy and more generally to the American way of life. We also appreciate the challenges faced by farmers as they try to comply with wetlands regulations, as well as other environmental requirements affecting farm operations. As a result, the Administration is committed to ensuring that Federal wetlands programs do not place unnecessary restrictions or burdens on farmers and other landowners, while providing necessary environmental safeguards.

The Administration has identified a number of actions that can be taken to reduce the impact of these two wetlands protection programs on American agriculture. At the heart of this effort is a commitment on the part of all Federal agencies involved to work closely and cooperatively to coordinate their work under these two statutes so as to increase efficiency, minimize duplication. The following initiatives demonstrate our commitment to protect and restore the Nation's wetlands and eliminate unnecessary impacts on the farm community:

• **Prior Converted Cropland Rulemaking.** EPA and the Corps have just completed a rulemaking which assures American farmers that an estimated 53 million acres of prior converted cropland will not be subject to regulation under Section 404 of the Clean Water Act. These lands were converted from wetlands to croplands prior to the passage of the Food Security Act of 1985, which established the Swampbuster program, and no longer exhibit wetlands characteristics. The Administration is also recommending that Congress include in the Clean Water Act a definition of "waters of the United States" that explicitly excludes from Clean Water Act jurisdiction areas determined to be prior converted cropland.

**Q40 What is a prior converted cropland?**

**A. Prior converted croplands were wetlands that were drained, dredged, filled, leveled or otherwise manipulated before December 23, 1985, for the purpose and having the effect of making the production of an agriculture commodity possible. This applies to areas where commodities were produced prior to 1985 and the area has not been abandoned.**

**Q41 Will frequently cropped farmed wetlands be subject to Federal jurisdiction under Swampbuster and the Clean Water Act?**

**A. Yes, wetlands with a cropping history are nonetheless still wetlands and many have high functions and values. Cropping history alone is not an adequate determinant of functions or jurisdictions. Landowners will be allowed to maintain but not increase the scope of any drainage systems in place prior to December 23, 1985, on farmed wetlands. Farmers will be able to rely on SCS's farmed wetland determinations for both Swampbuster and the Clean Water Act.**

**Q42 Are prior converted croplands excluded from Clean Water Act jurisdiction?**

**A. Yes, the same areas excluded under Swampbuster will continue to be excluded under the Clean Water Act.**

**Q43 Will normal on-going farming, ranching, and silvicultural activities continue to be exempted under Section 404(f)?**

**A. Yes, the existing exemptions in Section 404(f) are not changed.**

**Q44 Will SCS's "minimal effects" and "frequently cropped with mitigation" determinations be accepted under Section 404?**

**A. Yes. A Nationwide General Permit will be proposed to authorize the discharge of dredged or fill associated with these actions.**

**Q45 Will the Wetland Reserve Program continue to be supported?**

**A. Yes, the 1994 Agriculture Appropriations Bill will provide up to 75,000 additional acres and will more than double the number of states participating. Congress will be asked to expand the program in the 1995 Farm Bill.**

**Q46 Will farms impacted by the 1993 Midwest flood be given an opportunity to participate in wetland restoration?**

**A. Yes, our restoration efforts will help ensure that wetlands existing prior to the flood will be protected. Landowners will be given opportunities to restore wetlands converted to agricultural uses if interest exist and funds are available**



# Part X - Section 404(f) Exemptions to Agricultural Activities

<i>Section 1</i>	<b>Excerpts From Section 404(f)(1) &amp; (2) Exemptions 40 CFR 232.3 - "Activities Not Requiring Permits" .....</b>	<b>566</b>
<i>Section 2</i>	<b>Draft EPA Region IV Guidance on Agriculture and Silviculture Exemptions .....</b>	<b>570</b>
<i>Section 3</i>	<b>Letter of Clarification on the Application of the Section 404(f) Exemptions to Agricultural Activities .....</b>	<b>577</b>
<i>Subsection 3a</i>	<b>Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities .....</b>	<b>579</b>

**PART X - SECTION 404(f) EXEMPTIONS TO AGRICULTURAL  
ACTIVITIES**

**Section 1**

**Excerpts From Section 404(f)(1) & (2) Exemptions 40  
CFR 232.3 "Activities Not Requiring Permits"**

## **EXCERPTS FROM SECTION 404 (f) (1) & (2) EXEMPTIONS**

### **40 CFR 232.3 - "ACTIVITIES NOT REQUIRING PERMITS"**

**(a)** Discharge of dredged or fill material which contains a toxic pollutant listed under Section 307 is subject to toxic effluent standards and shall require a Section 404 permit.

**(b)** Any discharge of dredged or fill material into waters of the United States incidental to any of the activities listed in (C) of this section must have a permit if it is part of an activity whose purpose is to convert an area of waters of the U.S. into a use to which it was not previously subject, where the flow and circulation of waters of the U.S. may be impaired or the reach of such waters reduced.

Where the proposed discharge will result in significant discernable alterations of 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 silviculture to agriculture use when there is a discharge of fill material into waters of the U.S. In conjunction with construction of dikes, drainage ditches, or other works or structures used to effect such conversion. A conversion of Section 404 wetland to a non wetland is a change in use on an area of waters of the U.S. A discharge which elevates the bottom of waters of the U.S. without converting it to dry land does not thereby reduce the reach of, but may alter the flow and circulation of waters of the U.S.]

**(c)** The following activities are exempt from Section 404 permitting requirements except as specified in paragraphs (a) and (b) of this section:

**(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 (d) of this section.

**(ii)(A)** To fall under this exemption, the activities must be part of an established (i.e. on-going) farming, silviculture, or ranching operation.

**(B)** 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 in 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 operation. 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 was part of an established farming, silviculture or ranching operation.

**(2)** Maintenance...of currently serviceable structures such as dikes, dams, levees...

**(3)** Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches...

**(4)** Construction of temporary sedimentation basins on a construction site which does not include placement of fill materials into waters of the United States...

**(5)** Any activity with respect to which a State has an approved program under Section 208(b)(4) of the Act...

**(6)** Construction or maintenance of farm roads, forest roads, or temporary roads...when constructed in accordance with BMP's and flow, chemical, and biological characteristics of waters are not impaired and reach of waters not reduced...

**(d)** For the purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing and seeding are defined as follows:

**(1)** 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.

**(2)** Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural or 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.

**(3)** Minor Drainage in waters of the United States 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, ... or conversion from one wetland use to another (for example silviculture to farming).

In addition, minor drainage does not include the construction of canal, ditch, or other waterway 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 waters of the United States incidental to the construction of any such structure or waterway requires a permit.

**(4) Plowing** means all forms of primary tillage...used 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. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of waters of the United States to dryland. For example...

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

**(e)** Federal projects which qualify under the criteria contained in Section 404(r) of the Act are exempt from Section 404 permit requirements, but may be subject to other State or Federal requirements.

**PART X - SECTION 404(f) EXEMPTIONS TO AGRICULTURAL  
ACTIVITIES**

**Section 2**

**Draft EPA Region IV Guidance on  
Agriculture and Silviculture Exemptions**

## DRAFT EPA REGION IV GUIDANCE ON

### AGRICULTURE AND SILVICULTURE EXEMPTIONS

#### **1. WHAT ACTIVITIES ARE REGULATED UNDER SECTION 404 OF THE CLEAN WATER ACT?**

A Section 404 permit is required for the discharge of dredged or fill material into waters of the United States. Certain discharges are permitted under Nationwide Permits (44 CFR 330); other discharges may be authorized on a regional basis. If a discharge is not exempt or permitted under a nationwide permit, an individual or regional Section 404 permit will be required.

#### **2. WHAT DISCHARGES ARE EXEMPTED OR OTHERWISE NOT SUBJECT TO REGULATION UNDER SECTION 404?**

A filling activity is exempt if the discharge meets the following conditions:

- a. Is a normal farming, silviculture, or ranching activity such as seeding, cultivating, minor drainage, or harvesting; and
- b. Is part of an established (ie. on-going) farming, silviculture, or ranching operation; and
- c. Does not contain any toxic pollutant listed under Section 307 of the Clean Water Act; and
- d. Is not part of an activity whose purpose is to convert an area of 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 waters reduced.

#### **3. WHAT IS AN ON-GOING FARMING, SILVICULTURE, OR RANCHING OPERATION?**

On-going activities are events which are included in a management plan for a property and are currently being performed on that property. They are activities which are part of a conventional rotational cycle for that property.

On-going activities on a wetland site might change the biological composition of that site; such activities are exempt provided that the activities meet conditions 2 (a) through (d) given above. Any activity which results in the conversion of a wetland site to an upland site is not exempt since it does not meet condition 2(d) given above.

#### **4. WHEN DOES AN OPERATION CEASE TO BE ON-GOING?**

An operation ceases to be on-going when the area on which it was conducted has been converted to another use or has lain idle for so long that hydrological modifications are necessary to resume operations.

#### **5. HOW DOES A CHANGE IN OWNERSHIP AFFECT ON-GOING ACTIVITIES?**

When a property changes ownership and the new owner continues the management plan of the former owner and the activities of that plan were exempt, the activities of the new owner are part of the on-going operation and are also exempt. If the new owner changes the management plan for that property and the new activity results in a conversion of waters into a use to which it was not previously subject, the activity does not meet condition 2(d) (given above) and is not exempt.

#### **6. CAN THE CONVERSION OF A FORESTED WETLAND TO A PLANTED PINE PLANTATION BE PART OF AN ON-GOING SILVICULTURE ACTIVITY?**

Yes, provided certain conditions are met. A biological conversion can be part of an on-going silvicultural activity. The conversion of a diverse forested wetland to a monotypic stand of pines is a conversion of community types. However, this conversion is a normal silvicultural activity and could be part of the management plan for a particular piece of property. The property is in silvicultural usage before and after the clearing and planting and thus, no change in use will have occurred.

#### **7. IS THE CONVERSION OF A FORESTED WETLAND TO A PLANTED PINE PLANTATION ALWAYS EXEMPT IF THE CONVERSION IS PART OF AN ON-GOING SILVICULTURAL ACTIVITY?**

No. A conversion is not exempt if it brings an area of waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters may be impaired or the reach of waters reduced. Although the biological conversion is not a change in use since the land is still used for silviculture, the conversion is not exempt if activities which are used to clear, prepare or plant the site result in an impairment of flow or circulation or reduction of reach of waters.

Thus, although an activity may be on-going (see condition 2a above) it is exempt only if it meets conditions 2 (b-d), given above. If biological conversion is accompanied by a hydrological change at the site which results in the site no longer being able to be classified a wetland, then an area of waters of the United States will have been converted into a use to which it was not previously subject since a conversion of a wetland to an upland will have taken place. Conversion of wetlands to uplands are never exempt, even for on-going activities using normal practices.



**8. WHAT IS THE TEST USED TO DETERMINE WHETHER FLOW OR CIRCULATION OF WATERS HAVE BEEN IMPAIRED OR REACH OF WATERS HAVE BEEN REDUCED?**

If filling activities, including normal silviculture, agriculture, or ranching activities, on any wetland site, including sites which have on-going activities, would result in a change in hydrology, soil characteristics, and/or plant community structure so that the area can no longer be classified as a wetland, the filling activities are not exempt. Activities which result in a conversion of wetlands to uplands are not exempt.

**9. MUST A DISCHARGE RESULT IN THE IMPAIRMENT OF FLOW OR CIRCULATION AND REDUCE THE REACH OF WATERS IN ORDER TO BE REGULATED?**

No. Any discharge is exempt if it does not result in the change in classification of a site from a wetland to a non wetland area. A discharge which elevates the bottom of waters of the United States, without converting it to dry land, does not reduce the reach of waters, but may alter flow or circulation of waters and therefore may be subject to permitting requirements.

**10. WHAT IS BEDDING?**

Bedding is part of site preparation in silvicultural operations. Beds are mounds which are constructed from surrounding soil resulting in adjacent and alternating mounds and furrows. Pine trees planted on prepared beds generally exhibit better survival and growth than seedlings planted on wet sites which have not been bedded.

**11. IS BEDDING A NORMAL SILVICULTURAL ACTIVITY WHICH IS EXEMPT FROM PERMITTING REQUIREMENTS?**

Bedding is a normal silvicultural activity and is exempt from permitting requirements if:

- a. It is performed on a property that is part of an on-going silvicultural activity; and
- b. The bedding does not impair the flow or circulation or reduce the extent of each of waters of the United States.

**12. WOULD ANY CHANGE IN ELEVATION OF A WETLAND SITE RESULT IN THE IMPAIRMENT OF FLOW OR CIRCULATION OR REDUCTION IN REACH OF WATERS OF THE UNITED STATES?**

Many normal silvicultural activities result in rutting or piling of dirt. These activities are not exempt if the change in elevation is permanent and results in a permanent alteration of soils or vegetation or hydrology which is significant enough to result in the conversion of a wetland site to an upland. If the activities are

temporary and/or minor so that the site can still be classified a wetland, then no impairment or reduction of hydrology has occurred.

### **13. IS DITCHING AN EXEMPT ACTIVITY?**

Ditching is a normal silvicultural activity and is exempt if it is minor and is part of an on-going operation. Minor ditching does not include drainage associated with the immediate or gradual conversion of a wetland to a non wetland. It does not include construction of any structure or waterway which drains or significantly modifies a stream, lake, swamp, bog, or any other wetland or aquatic area constituting waters of the United States.

### **14. IS THE CONSTRUCTION OF A FARM OR FOREST ROAD AN EXEMPT ACTIVITY?**

Road construction is exempt only if construction and maintenance is in accordance with best management practices which assure that flow, circulation, chemical and biological characteristics of waters of the United States are not impaired, that the reach of waters is not reduced, and that any adverse effect on the aquatic environment will otherwise be minimized.

### **15. IN SUMMARY, WHAT MUST A PROPERTY OWNER DEMONSTRATE IN ORDER TO QUALIFY FOR THE AGRICULTURE, SILVICULTURE, RANCHING EXEMPTIONS?**

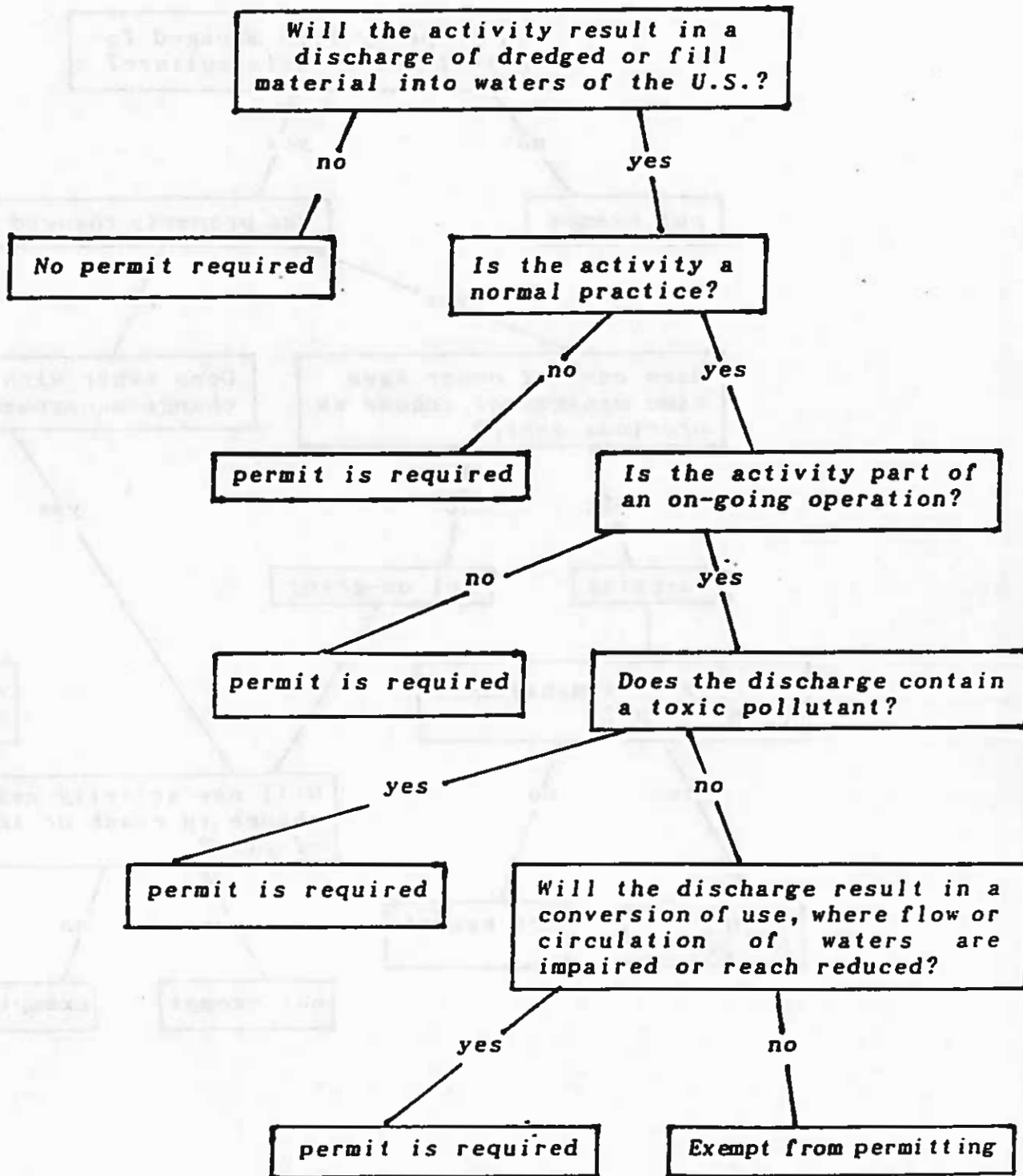
A property owner must demonstrate that activities on his land will not:

a. Result in the conversion of an existing wetland to an upland by bringing a wetland area into a use which it did not previously serve, where the flow or circulation of waters of the United States is impaired or the reach reduced; and,

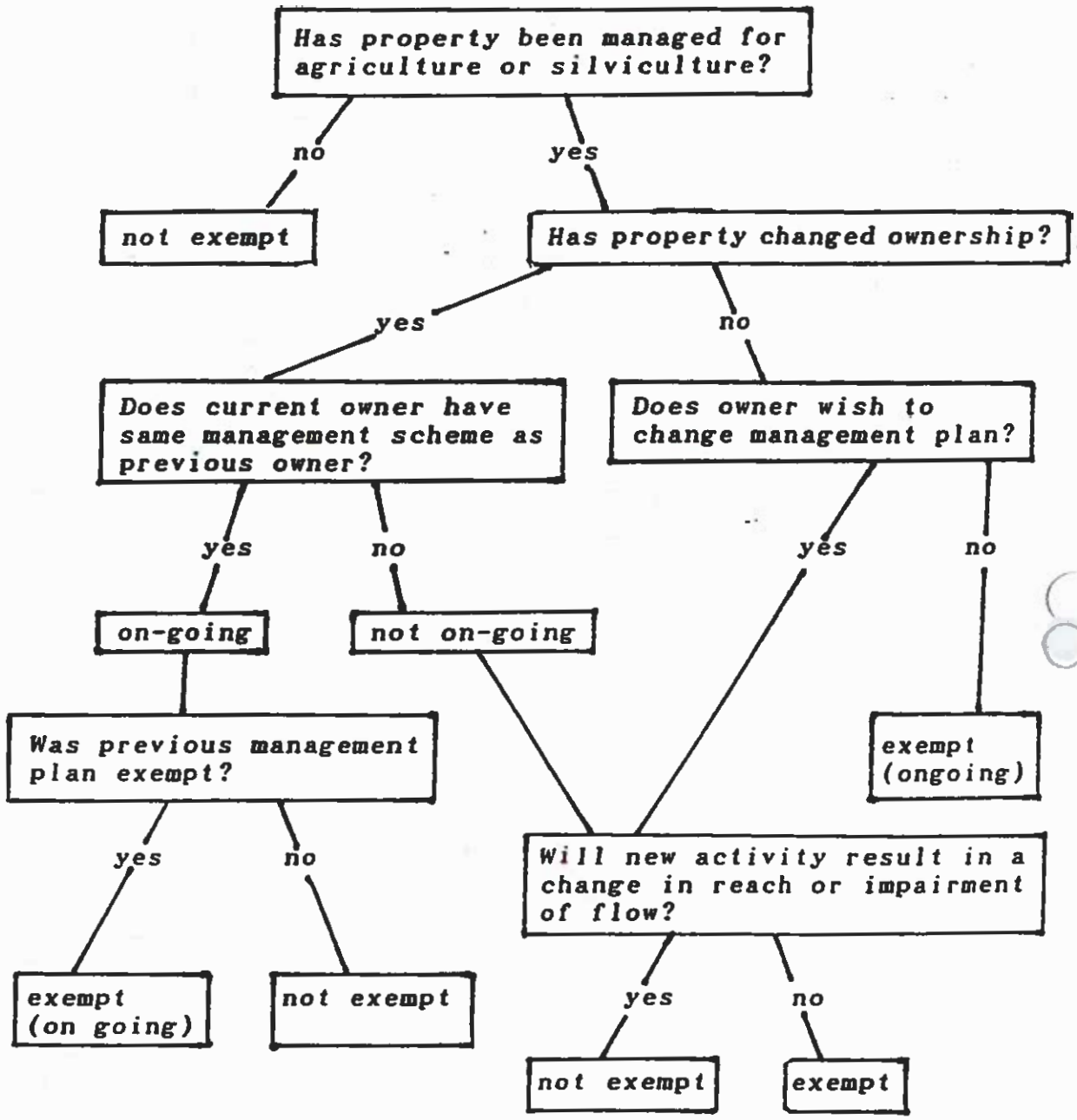
b. The proposed activity is part of a management plan which was prepared for the property and the activity is consistent with the normal rotation cycle of that plan.

The attached Flow Diagrams are provided to help understand the decision process in evaluation agriculture and silviculture activities.

**DECISION PROCESS TO EVALUATE ACTIVITIES  
FOR EXEMPTIONS UNDER SECTION 404(C)**



**DECISION PROCESS TO EVALUATE EXEMPTIONS  
WHEN OWNER CHANGES MANAGEMENT PLAN FOR PROPERTY  
OR PROPERTY CHANGES OWNERSHIP**



**PART X - SECTION 404(f) EXEMPTIONS TO AGRICULTURAL  
ACTIVITIES**

**Section 3**

**Letter of Clarification on the Application of the  
Section 404(f) Exemptions to Agricultural Activities**



DEPARTMENT OF THE ARMY  
U.S. Army Corps of Engineers  
WASHINGTON, DC 20314 1000

1.1 - 1

4 MAY 1990

REPLY TO  
ATTENTION OF

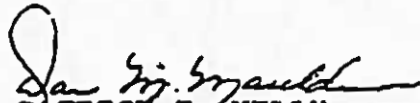
CECW-OR

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Clarification on the application of the Section 404(f) exemptions to agricultural activities

1. Enclosed is a Memorandum for the Field that was jointly prepared by the Environmental Protection Agency (EPA) in conjunction with the Army Corps of Engineers and the Assistant Secretary of the Army (Civil Works). This memorandum provides clarification on the Corps and EPA administration of the Section 404 program for areas subject to active agriculture and clarifies the Section 404 requirements for conversion of existing unfarmed wetlands to agriculture (i.e., wetlands that are not now subject to active agricultural production).
2. This memorandum was prepared in response to misunderstanding and concern expressed by Congressional interests and the public regarding application of the Section 404 program to agriculture. We believe that the clarification in this memorandum confirms the manner in which the districts have generally treated agricultural activities in the past.
3. In addition to providing clarification to the field offices of the Corps and EPA, this memorandum can provide valuable information for the agricultural community. Such information is desperately needed to reassure the agricultural community that it is our intent to continue to administer the Section 404 program in accordance with the exemptions at Section 404(f) and in a manner that is sensitive to the needs of the agricultural community. In this regard, I request that you publish a special public notice that includes the enclosed Memorandum for the Field as an enclosure. The special public notice must be issued not later than 11 May 1990. We have also enclosed language that we suggest for the special public notice.
4. Points of contact on this issue in my Regulatory Branch, are Mr. Zell Steever (202)272-1780, Mr. Michael Davis (202)272-0201, and Mr. John Studt (202)272-1785.

Encls

  
PATRICK J. KELLY  
Major General, USA  
Director of Civil Works

DISTRIBUTION  
(SEE PG. 2 & 3)

**PART X - SECTION 404(f) EXEMPTIONS TO AGRICULTURAL  
ACTIVITIES**

**Subsection 3a**

**Memorandum: Clean Water Act Section 404  
Regulatory Program and Agricultural Activities**



United States Environmental Protection Agency

Office of Water  
Washington, D.C. 20460



United States Department of the Army

Office of the Assistant Secretary  
Washington, D.C. 20310-0103

18 MAY 1970

**MEMORANDUM FOR THE FIELD**

**SUBJECT: Clean Water Act Section 404 Regulatory Program and Agricultural Activities**

A number of questions have recently been raised about the applicability of the Clean Water Act Section 404 Regulatory Program to agriculture. This memorandum is intended to assist Section 404 field personnel in responding to those questions and to assure that the program is implemented in a consistent manner. At the outset, we should emphasize that we respect and support the underlying purposes of the Clean Water Act regarding the exemption from Section 404 permitting requirements for "normal farming" activities. The exemptions (at Section 404(f) of the Act) recognize that American agriculture fulfills the vitally important public need for supplying abundant and affordable food and fiber and it is our intent to assure that the exemptions are appropriately implemented.

What are normal farming activities? Who makes that determination? Can agricultural producers plant crops in wetlands areas that have been farmed for many years? These are questions that have generated significant confusion and concern in the agricultural community. This memorandum will explain the extent of the Section 404 program and clarify some misunderstandings that may exist in the field. Therefore we encourage you to widely distribute this memorandum.

**What is Section 404?**

The Federal Water Pollution Control Act Amendments of 1972 established the Section 404 Regulatory Program. Under this Act, it is unlawful to discharge dredged or fill material into waters of the United States without first receiving authorization (usually a permit) from the Corps, unless the discharge is covered under an exemption. The term "waters of the United States" defines the extent of geographic jurisdiction of the Section 404 program. The term includes such waters as rivers, lakes, streams, tidal waters, and most wetlands. A discharge of dredged or fill material, placement of soil, sand, gravel, dredged material or other such m



of the United States. Section 404(f) exemptions, which were added in 1977, provide that discharges that are part of normal farming, ranching, and forestry activities associated with an active and continuous ("ongoing") farming or forestry operation generally do not require a Section 404 permit.

With this background in mind, we can now turn to the issues that are the focus of concern. As previously noted, Section 404(f) exempts discharges of dredged or fill material into waters of the United States associated with certain normal agricultural activities. Of course, activities that do not involve a discharge of dredged or fill material into waters of the United States never require a Section 404 permit. Further, as provided in the Interagency Federal Manual for Identifying and Delineating Jurisdictional Wetlands, while a site is effectively and legally drained to the extent that it no longer meets the regulatory wetlands hydrology criteria (as interpreted by the Interagency Manual), it is not a wetland subject to jurisdiction under Section 404 of the Clean Water Act.

**What is the "normal farming" activities exemption?**

The Clean Water Act exempts from the Section 404 program discharges associated with normal farming, ranching and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices (Section 404(f)(1)(A)). To be exempt, these activities must be part of an established, ongoing operation. For example, if a farmer has been plowing, planting and harvesting in wetlands, he can continue to do so without the need for a Section 404 permit, so long as he does not convert the wetlands to dry land. Activities which convert a wetland which has not been used for farming or forestry into such uses are not considered part of an established operation, and are not exempt. For example, the conversion of a bottomland hardwood wetland to crop production is not exempt.

In determining whether an activity is part of an established operation, several points need to be considered. First, the specific farming activity need not itself have been ongoing as long as it is introduced as part of an ongoing farming operation. For example, if crops have been grown and harvested on a regular basis, the mere addition or change of a cultivation technique (e.g., discing between crop rows to control weeds rather than using herbicides) is considered to be part of the established farming operation. Second, the planting of different agricultural crops as part of an established rotation (e.g., soybeans to rice) is exempt. Similarly, the rotation of rice and crawfish production is also exempt (construction of fish ponds is not an exempt activity and is addressed on page 5 of this memorandum). Third, the resumption of agricultural production in areas laying fallow as part of a normal rotational cycle are considered to be part of an established operation and would be exempted under Section 404(f).

However, if a wetland area has not been used for farming for so long that it would require hydrological modifications (modifications to the surface or groundwater flow) that would result in a discharge of dredged or fill material, the farming operation would no longer be established or ongoing.

As explained earlier, normal farming operations include cultivating, harvesting, minor drainage, plowing, and seeding. While these terms all have common, everyday definitions, it is important to recognize that these terms have specific, regulatory meanings in relation to the Section 404(f) exemptions. For example, plowing that is exempt under Section 404(f) means all mechanical means of manipulating soil, including land levelling, to prepare it for the planting of crops. However, grading activities that would change any area of waters of the United States, including wetlands, into dry land are not exempt. Minor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. In addition, minor drainage also refers to the emergency removal of blockages that close or constrict existing drainageways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States. Seeding that is exempt under Section 404(f) includes not only the placement of seeds themselves, but also the placement of soil beds for seeds or seedlings on established farm or forest lands. Cultivating under Section 404(f) includes physical methods of soil treatment to aid and improve the growth, quality, or yield of established crops. Except as provided under Section 404(f)(2) as explained below, construction or maintenance of irrigation ditches or maintenance of drainage ditches is also exempt.

Recognizing area and regional differences in normal farming practices, EPA and the Corps agree to develop additional definitions of normal farming practices in consultation with the designated Land Grant Colleges and the Cooperative Extension Services. We also further encourage our field staffs to utilize the expertise in these colleges and agricultural services in the ongoing implementation of the Section 404 program.

**When the normal farming activity exemptions do not apply**

Section 404(f)(2) provides that discharges related to activities that change the use of the waters of the United States, including wetlands, and reduce the reach, or impair the flow or circulation of waters of the United States are not exempted. This "recapture" provision involves a two-part test that results in an activity being considered not exempt when both parts are met: 1) does the activity represent a "new use" of the wetland and, 2) would the activity result in a "reduction in reach/impairment of flow or

circulation<sup>h</sup> of waters of the United States? Consequently, any discharge of dredged or fill material that results in the destruction of the wetlands character of an area (e.g., its conversion to uplands due to new or expanded drainage) is considered a change in use of the waters of the United States, and by definition, a reduction of their reach, and is not exempt under Section 404(f). In addition, Section 404(f)(1) of the Act provides that discharges that contain toxic pollutants listed under Section 307 are not exempted and must be permitted.

However, discharges that are not exempt are not necessarily prohibited. Non-exempted discharges must first be authorized either through a general or individual Section 404 permit before they are initiated.

### What are General Permits?

Even if a farming activity is one that does not fall under an exemption and a permit is required, some farming activities are eligible for General Permits. Section 404(e) of the Act authorizes the Corps, after notice and opportunity for public hearing, to issue General Permits on a State, regional or nationwide basis for certain categories of activities involving a discharge of dredged or fill material in waters of the United States. Such activities must be similar in nature and cause only minimal adverse environmental effects. Discharges authorized under a General Permit may proceed without applying to the Corps for an individual permit. However, in some circumstances, conditions associated with a General Permit may require that persons wishing to discharge under that permit must notify the Corps or other designated State or local agency before the discharge takes place. A list of current General Permits is available from each Corps District Office, as well as information regarding notification requirements or other relevant conditions.

### Rice farming

Questions have arisen regarding the relationship of the Section 404 program to rice farming. We understand these concerns, and recently have initiated actions that will allow farmers to understand better the regulatory program and provide more efficient and equitable mechanisms for implementing provisions of the Section 404 program.

In an April 19, 1990 letter responding to a request from Senator Patrick J. Leahy, Chairman, and 11 members of the Senate Committee on Agriculture, Nutrition, and Forestry, we stated our position that discharges of dredged material associated with the construction of rice levees for rice farming in wetlands which are in established agricultural crop production are "normal farming activities" within the meaning of

Section 404(f)(1)(A) and are therefore exempt from Section 404 regulation under the following conditions:

- 1) the purpose of these levees is limited to the maintenance and manipulation of shallow water levels for the production of rice crops; and
- 2) consistent with current agricultural practices associated with rice cultivation,
  - the height of the rice levees should generally not exceed 24 inches above their base; and
  - the material to be discharged for levee construction should generally be derived exclusively from the distribution of soil immediately adjacent to the constructed levee.

Land levelling for rice farming in wetlands which are in established crop production also is a "normal farming activity" within the meaning of Section 404(f)(1)(A) and is therefore exempt from Section 404 regulation.

#### **Fish ponds**

We are developing a General Permit authorizing discharges of dredged or fill material associated with the construction of levees and ditches for the construction of fish ponds in wetlands that were in agricultural crop production prior to December 23, 1985. A draft General Permit has been developed by the Vicksburg District, Army Corps of Engineers and should be issued by June 1, 1990. This General Permit should serve as a model permit for other areas of the country and this activity will be considered for a nationwide General Permit.

It should be made clear, however, that the Section 404(f) exemption for "normal farming activities" and the General Permit being developed for fish ponds apply only to the use of wetlands which are already in use for agricultural crop production. These provisions do not apply to 1) wetlands that were once in use for agricultural crop production but have lain idle so long that modifications to the hydrologic regime are necessary to resume crop production or, 2) the conversion of naturally vegetated wetlands to agriculture, such as the conversion of bottomland hardwood wetlands to agriculture.

#### **Limitations of the Section 404(f) Exemptions**

It should be emphasized that the use of Section 404(f) exemptions does not affect Section 404 jurisdiction. For example, the fact that an activity in wetlands is

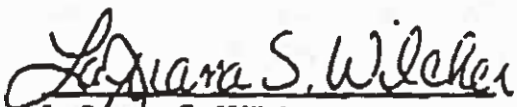
exempted as normal farming practices does not authorize the filling of the wetland for the construction of buildings without a Section 404 permit. Similarly, a Section 404 permit would be required for the discharge of dredged or fill material associated with draining a wetland area and converting it to dry land.

### Enforcement

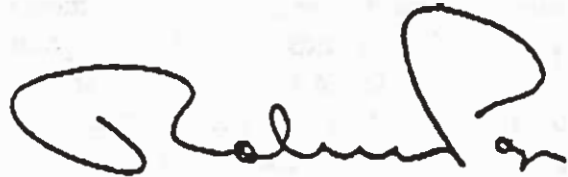
Given that the normal farming practices as described above are exempt from regulation under Section 404, neither EPA nor the Corps will initiate enforcement actions against farmers or other persons for engaging in such normal farming activities. Further, there will be no enforcement against actions that meet the description of activities covered by, and any conditions contained in, general permits issued by the Corps.

### Conclusion

Proper implementation of the Section 404 program is an issue of extreme importance to the nation. We encourage you to distribute this memorandum not only to your staffs but to the public at large so that there will be a better general understanding of the program and how it operates. If you have any questions regarding this memorandum, please contact us or have your staff contact Suzanne Schwartz in EPA's Office of Wetlands Protection at 202-475-7799, or John Studt in the Headquarters' Office of the U.S. Army Corps of Engineers at 202-272-1785 (temporary number 202-272-1294).



Lajana S. Wilcher  
Assistant Administrator for Water  
U.S. Environmental Protection Agency



Robert W. Page  
Assistant Secretary of the Army  
(Civil Works)

# **Part XI - EPA Guidance on Preparation of 404(b)(1) Alternatives Analyses Pursuant to 40 CFR 230.10(a)**

<i>Section 1</i>	<b>Memorandum: EPA Guidance on Preparation of 404(b)(1) Alternatives Analyses Pursuant to 40 CFR 230.10(a) . . . . .</b>	<b>587</b>
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**PART IX - EPA GUIDANCE ON PREPARATION OF 404(b)(1)  
ALTERNATIVES ANALYSIS**

**Section 1**

**Memorandum: EPA Guidance on Preparation of  
404(b)(1) Alternatives Analyses Pursuant to 40 CFR  
230.10(a)**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

215 Fremont Street

San Francisco, Ca. 94105

April 11, 1989

MEMORANDUM

SUBJECT: EPA Guidance on Preparation of 404(b)(1) Alternatives Analyses Pursuant to 40 CFR 230.10(a).

FROM: Thomas G. Yocom, Regional 404 Coordinator *HY*

TO: Harry Seraydarian, Director  
Water Management Division

THRU: Loretta Barsamian, Chief  
Wetlands, Oceans and Estuaries Branch

THRU: Philip Oshida, Chief *P.O.*  
Wetlands Section

The goals of the Clean Water Act are to restore and maintain the physical, chemical, and biological integrity of the nation's waters through the elimination of discharges of pollutants. Among those discharges considered pollutants under the Act are dredged or fill materials. Inasmuch as the Act also identifies a goal of eliminating all discharges of pollutants after 1985, there is little question that Congress intends the federal government to strongly discourage discharges of dredged or fill materials.

Under the 404(b)(1) Guidelines (40 CFR 230), the primary screening mechanism to determine the necessity of permitting a discharge of dredged or fill material is the analysis of practicable alternatives [see 40 CFR 230.10(a)]. The Guidelines prohibit all discharges of dredge or fill material into regulated "waters of the United States" (including wetlands) unless a discharge, as proposed, constitutes the least environmentally-damaging practicable alternative to achieve the basic project purpose; however, even if a proposed discharge constitutes the least-damaging alternative, it may be prohibited by other portions of the regulations.

The Guidelines recognize that water-dependent projects, by their very nature, are more likely to actually require dredging and filling of the nation's waters than non-water-dependent projects.



Again, the general rationale is that discharges of pollutants should be eliminated and that only those discharges which are absolutely necessary should be considered for permitting.

In distinguishing between water-dependent and non-water-dependent project purposes, the Guidelines recognize that certain areas regulated by the Clean Water Act ("special aquatic sites") are deserving of special protection because of their ecological significance. Thus, under the Guidelines, there is a regulatory presumption that if a project is 1) not water-dependent and 2) the project proposes to discharge dredged or fill material into a "special aquatic site" there is a less environmentally-damaging practicable alternative unless the applicant clearly demonstrates otherwise.

It is this demonstration by the permit applicant which has been a significant source of frustration to applicants and regulators alike. It is an area where formal agency guidance has not been provided, despite the agency's strong reliance upon the alternatives analysis to screen the permissibility of proposed discharges. In the absence of such formal Guidance, this memorandum is an attempt to summarize the general guidance which EPA Region IX has provided to the regulated public over the past 4 years.

## INTRODUCTION

EPA's 404(b)(1) Guidelines are the federal regulations that govern the issuance of permits to discharge dredged or fill material into "waters of the United States" under Section 404 of the Clean Water Act. Under these regulations, no permit may be issued unless the discharge, as proposed, is the least environmentally-damaging practicable alternative to achieve the basic project purpose. An alternative is practicable if it is available and capable of being done, taking into account cost, logistics, and overall project purposes.

### 1. What does "least environmentally-damaging" mean?

Projects which avoid discharges of dredged or fill material into "waters of the United States", including wetlands, are generally assumed to be less damaging environmentally than projects which require fill in such "waters". Similarly, projects which propose to fill fewer acres and/or which avoid ecologically significant areas are generally assumed to be less damaging than those projects or project alternatives which do not. These assumptions may be rebuttable in individual cases.

All discharges, whether or not a project is water-dependent or proposes discharges of dredged or fill material into a "special aquatic site", must constitute the least-damaging alternative to be considered for permitting under the regulations. Applicants should realize that the impact of the "water-dependency" determination has more to do with the burden of proof than it does

with any inherent permissibility of water-dependent versus non-water-dependent projects. The applicant proposing a non-water-dependent project in a wetland, for example, will have the burden of clearly demonstrating that there are no less damaging practicable alternatives.

Whether or not a project is water-dependent, it must fully comply with the remainder of the regulations; if a project does not fully comply with the regulations, it may not be permitted, regardless of this water-dependency issue and regardless of whether the project is the least-damaging practicable alternative.

- a. If the project, with proposed mitigation measures, does not result in a net loss of aquatic resources, is it necessary to look at other alternatives?

Applicants often contend that their project, with proposed mitigation measures included, has no net adverse impacts and that, therefore, there are no less environmentally-damaging alternatives. These applicants argue that no on-site or off-site alternatives which might reduce or avoid discharges of dredged or fill material will have less impact than their proposal, which has none. EPA strongly disagrees, and rejects alternatives analyses which are based upon these assumptions.

EPA's 404(b)(1) Guidelines are written sequentially to assure that maximum efforts are made to achieve the intent of the Clean Water Act and the goal of Congress to eliminate all discharges of pollutants into the nation's waters. Discharges of pollutants which can be avoided reasonably should be avoided [see preamble to EPA's 404(b)(1) Guidelines -- Alternatives -- 40 CFR 230]. The basic premise is that no compensatory mitigation proposal can turn an unnecessary fill into a necessary fill. To allow such mitigation proposals to determine the acceptability of a proposed discharge thwarts the intents and goals of the Act. Accordingly, EPA, generally will not discuss the appropriateness of compensatory mitigation measures until the least environmentally-damaging practicable alternative has been identified; this is the practicable alternative that results in the least environmental damage and the damage results from unavoidable impacts.

Another important reason that EPA rejects the concept that mitigation take precedence over avoidance is that mitigation proposals frequently fail to offset the impacts they are designed to mitigate. It has been our experience nationally that compensatory mitigation (efforts to replace habitat values through habitat creation or enhancement) is unsuccessful for many habitat types.

In this regard, permit applicants should realize that because of this fairly dismal record, mitigation proposals that are included in Department of Army permits are becoming much more complex and expensive. Often an applicant may not only have to buy mitigation property and deed it to a third party, but may have to fund extensive grading, planting, and hydrological modifications, as well as monitoring studies to assure that certain performance standards are met. In addition, the applicant may have to post bonds to provide for remedial actions if the mitigation proposal is not successful, and to pay for long-term operations and maintenance costs of the mitigation in perpetuity or over the life of the project.

In an increasing number of cases, permits are requiring that successful mitigation measures are being required to be implemented before project construction proceeds. Thus, projects which may require extensive and complex mitigation measures may prove very costly in terms of costs and delays. Clearly, a proposal which avoids discharging fill into "waters of the United States" avoids all costs and delays associated with the Clean Water Act permitting process.

## 2. What does practicable mean?

The regulations define "practicable" as available and capable of being done, taking into account cost, logistics, and overall project purposes. For example, an alternative for a commercial project that is so costly as to be unprofitable would not be practicable under the regulations. Similarly, an alternative site that is seismically unsound may, logistically, not be a practicable alternative, even though the site could be obtained reasonably. However, a project alternative which achieves a smaller return on investment than the applicant's preferred alternative may be considered practicable for the purposes of Clean Water Act permitting, even though that alternative may not be financially acceptable to a particular applicant.

### a. What does available mean?

"Available" means that an alternative can be obtained reasonably. Available sites may include property already owned by a permit applicant as well as properties which could be obtained. In evaluating the availability of alternatives, a "look back in time" may be considered appropriate under the Clean Water Act regulations, particularly when a project has a long planning history; in certain cases, it may be determined that an alternative which was available in the planning phases of a project, but which is no longer available at the time of permit application, may be, nonetheless, practicable.

In general, this "look back in time" is limited to that period during which the Corps has required full compliance with EPA's 404(b)(1) Guidelines.

In evaluating the availability of off-site alternatives, it may be appropriate to review city and county records to determine whether upland sites upon which the proposed project could be built have been bought or sold within the planning period of the proposed project. In many cases, applicants cite zoning restrictions as rationales for eliminating alternatives sites as impracticable. In certain cases, zoning may, in fact, be a legitimate measure of practicability. However, in areas where zoning variances or zoning changes are common, the fact that a parcel is zoned for a different use than proposed by the applicant may carry little weight in determining the practicability of using that site under the Clean Water Act regulations.

In addition, sites with existing development could be considered practicable if the existing development could be converted (or removed) to accommodate the basic project purpose and still make a profit. When considering the costs of 1) filling a regulated site, 2) developing the site, and 3) mitigating unavoidable impacts, use of a previously developed site may be less environmentally-damaging and practicable financially.

b. What does capable of being done mean?

"Capable of being done" means that the site for the project can be obtained and that the project can be built there. Construction of a dam in a site which is seismically unsound would not be considered practicable, for example. Building a housing development on pilings may be less environmentally damaging, but not engineeringly feasible and not, therefore, practicable.

c. What are overall project purposes? Do they include all proposed project features?

It is the legal opinion of EPA Region IX that the term "overall project purposes" means the basic project purpose plus consideration of costs and technical and logistical feasibility. The term "overall project purposes" does not, for example, include 1) project amenities, 2) a particular return on investment (unless a certain minimum return can be shown to render a project impracticable -- i.e. a negative benefit/cost ratio), 3) "highest and best use of land", or 4) certain desired size requirements. "Overall project purposes" may also not include a market-area which is so narrow as to only include an applicant's specific desires, such as "upscale" housing.

Thus, in simple terms, the least environmentally-damaging practicable alternative is that project proposal whose discharge of dredged or fill material into "waters of the United States" a) has the minimal adverse environmental impact, b) achieves the basic project purpose, and c) has a positive benefit/cost ratio (ie. is profitable).

### 3. What is the basic project purpose?

Although defining the basic project purpose would seem obvious, this determination has been among the most controversial portions of the analysis of alternatives. EPA consistently treats the basic project purpose as the generic function of the activity. For example, the regulatory basic purpose of a residential development is to house people, whether an applicant has proposed 1) "water-oriented housing" with finger piers, 2) upscale, single-family housing, or 3) resort housing with a golf course. Similarly, the regulatory basic purpose of a restaurant is to feed people even though the applicant may be proposing a waterfront restaurant [see preamble to EPA's 404(b)(1) Guidelines -- Water Dependency -- 40 CFR 230].

In adopting a generic viewpoint, EPA is not questioning the validity of an applicant's business decision, nor is EPA suggesting that an applicant adopt a different project purpose. Rather, EPA is seeking to evaluate whether or not an activity has available options, preferably not in "waters of the United States", in order to comply with the goal of the Clean Water Act to eliminate all discharges into the nation's waters.

EPA is not, therefore, questioning that a waterfront restaurant, for example, would likely to be a better business opportunity than the same restaurant on a site not on or near the water. Instead, EPA must provide a means to screen projects to assure that only projects which absolutely need to be sited in "waters" and/or "special aquatic sites" receive what amounts to a "waiver" from Congress' desire to prohibit all discharges after 1985.

#### a. How are multiple-purpose projects analyzed?

Multiple-purpose projects are somewhat more complicated. In some cases, the basic project purpose is that activity which is driving the project financially. A planned community development, for example, may be essentially viewed as housing, even though it seeks to include recreational and commercial facilities. Similarly, a "world-class destination resort" may, for regulatory purposes, be viewed as a hotel.

Again, EPA is not suggesting that a destination resort or planned community are not valid purposes from the applicant's perspective, or that they are not sound business proposals. EPA's regulatory role is rather to evaluate whether

discharges of pollutants into the nation's waters should be permitted, particularly if the activities can be practicably relocated into uplands.

Certain multiple-purpose projects really are multiple projects. For example, a race track might be proposed in association with a hotel convention center, an amusement park, and a light industrial complex. In such a case, the alternatives analysis may have to be structured to evaluate options for each of the project purposes separately. As a general rule, separate project purposes which are not functionally linked will be considered separate projects for the purpose of the 404(b)(1) alternatives analysis. The rationale is that if some of the project purposes can be practicably built in uplands, they must be.

Even if an applicant can demonstrate that certain elements of a multiple-purpose project are necessary to financially support other elements, the alternatives analysis will assume that this financial support can still be provided if certain project elements are relocated to upland sites. In other words, financial linkage does not constitute the functional linkage justifying permitting the entire project in a "water of the United States". Unless there is a compelling functional reason that the projects be on the same site, the analysis of alternatives will consider other sites which could accommodate the entire multiple-purpose project and/or smaller, individual project purpose elements.

Obviously, projects are ultimately designed to utilize particular parcels of land. If that parcel happens to be on, or in, the water, it may be wise from a developer's perspective to incorporate water-oriented facilities and/or amenities to maximize the use and potential profits from that parcel. It should be equally obvious, however, that to consider these site-specific facilities and amenities as the basic purpose of the project for regulatory purposes would eliminate consideration of any alternative sites or configurations that were not in, or near the water. The result is to reduce the scope of alternatives to "waters of the United States", including wetlands, the very areas that the Clean Water Act seeks to avoid as discharge sites.

a. Are there unacceptable project purposes?

There are no basic project purposes which are invalid under the 404(b)(1) Guidelines, but many unacceptable ways of defining them. As stated earlier, EPA does not, for example, consider "waterfront housing" to be an acceptable basic or overall project purpose under the Guidelines. Similarly, "development" or "redevelopment" is not a valid basic or

overall project purpose for regulatory purposes, being too general to allow an applicant to conduct a meaningful search for alternative sites or configurations.

"Making money" or "increasing a tax base" or "generating revenues for redevelopment" are further examples of inappropriate basic project purposes under the Guidelines. Given that there are an infinite number of ways to "make money", an applicant proposing an undefined project to achieve this basic project purpose would have to consider all alternative ways to achieve this purpose and all available sites where money could be made. Such an analysis would be impossible, and the applicant could not obtain a permit.

An example of another difficult purpose to evaluate is flood control. In general, EPA considers flood control to be a valid project purpose where the proposed activity is designed to protect existing upland development. However, if the project is being built in order to enable development in a floodplain or wetland, EPA will generally consider the project purpose to be the basic purpose of the enabled development, rather than flood control. Thus, if a stream corridor is being channelized with flood control levees to allow a housing development to be built in the floodplain, EPA would consider the basic project purpose to be housing.

To do otherwise leads to an unworkable situation, since virtually any project that requires fill in "waters of the United States", including wetlands, is placing that fill for the main purpose of raising the base of the project so that the project does not flood. Taken to the extreme, one could argue that all fill projects are flood control projects.

Finally, there are instances where the "no-project" or "no-action" alternative may be considered a practicable means of achieving the basic project purpose. This situation may arise in cases where the basic project purpose is defined by the applicant as expansion of an existing, profitable operation. From a regulatory perspective, it may be considered practicable to achieve the regulatory basic project purpose without the expansion.

#### 4. What is the geographic scope of the alternatives analysis?

The geographic scope of analysis will, to some extent, be determined on a case-by-case basis and may vary, depending upon a number of factors. For example, the basic purpose of a project will in many cases serve to set the reasonable scope. The constraints that are inherent to siting a nuclear power plant are obviously different from those governing the siting of housing or restaurants. In general, the scope will include all areas that would be reasonable to consider in the industry.

A developer seeking to build housing within a certain community may be forced under the Clean Water Act regulations to consider sites somewhat far removed from that community, should the developer propose a project in a regulated wetland site. Clearly, there are no Clean Water Act regulatory concerns if the developer selects a site within the desired community which has no regulated "waters of the United States" that would be filled. If, however, a regulated wetland site is proposed, the developer may be required to consider other communities within which housing could be built practicably without filling wetlands or other "waters of the United States", or where such filling would have less adverse environmental impacts.

Certain projects may entail very large geographical scopes, if the project purpose is one that could be practicably built almost anywhere and/or which cannot be reasonably tied to any particular market.

- a. If the applicant is a local or county government agency, is it appropriate to limit the geographical scope of the analysis of alternative sites to only those properties within the limits of their jurisdiction?

In cases where a local or county government seeks to sponsor a project, the basic project purpose will generally determine the appropriate geographical scope. Thus, if a city is seeking a permit for housing as part of a redevelopment plan, the scope of alternatives will be similar to that which would be required of a private housing developer and may include sites outside of the city boundaries.

5. How is the scale and configuration of the project assessed?

In determining which alternative constitutes the least environmentally-damaging practicable alternative for Clean Water Act permitting, any project which achieves the basic project purpose practicably should be considered. Thus, a housing project which can avoid or reduce impacts by alteration of its configuration ("footprint"), reduction of units, and/or relocation to an alternate site or sites and remain practicable will not be permissible as originally configured by the applicant. By regulation, only the least-damaging practicable alternative can be considered for permitting.

6. Are costs incurred in seeking to develop the applicant's preferred site assignable to costs associated with alternatives analyzed under the 404(b)(1) Guidelines?

In general, the "sunk costs" associated with one site cannot be assigned to alternatives. For example, if a developer has invested in site-specific architectural designs, or has installed infrastructure on a regulated site, these costs cannot be added to the costs of developing a less-damaging design or site. The



developer assumes a certain risk in moving forward financially for a project which requires Clean Water Act authorization. This risk cannot be transferred to the costs of another site, nor can these sunk costs be used to justify a finding that another site is not practicable on the basis of costs.

**7. Is the financial standing of the applicant considered in determining what alternatives are practicable?**

In general, the financial standing of an applicant is not considered applicable in determining whether or not the basic project purpose can be practicably achieved. The Guidelines state specifically that the term "cost" was used in defining "practicable" so as to avoid construing the term 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" [see preamble to EPA's 404(b)(1) Guidelines -- Alternatives -- 40 CFR 230].

Accordingly, a developer who has insufficient resources to acquire an available upland site upon which the project could be built profitably will be unable to obtain a permit for the project on a wetland site. Similarly, a large, multi-national development corporation will generally be asked to consider the same market area and constraints as a local developer seeking to build for the same basic project purpose.

**8. Is there a relationship between the 404(b)(1) alternatives analysis and the Corps' public interest determination?**

In granting a permit pursuant to Section 404 of the Clean Water Act, the Corps must determine that the project complies fully with EPA's 404(b)(1) Guidelines and that the project is not contrary to the public interest. Therefore, a project which the Corps may find to be in the public interest will not qualify for a permit if it fails to comply with the Guidelines. Similarly, a project which does comply with the Guidelines will not receive a permit if the Corps determines the issuance of the permit to be contrary to the public interest.

EPA's Guidelines do not consider the "public need" of a project, but rather its environmental impacts and its practicability. Thus, a proposal to build a warehouse in a wetland in a market where 90% of warehouses are vacant may comply with EPA's Guidelines, but may be found to be contrary to the public interest by the Corps.

## **Part XII - Miscellaneous Guidelines**

<i>Section 1</i>	<b>EPA Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings . . . . .</b>	<b>599</b>
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**PART XII - MISCELLANEOUS GUIDELINES**

**Section 1**

**EPA Supplemental Guidelines for the Evaluation  
of Risk and Avoidance of Unanticipated Takings**

EPA SUPPLEMENTAL GUIDELINES  
FOR THE EVALUATION OF  
RISK AND AVOIDANCE OF UNANTICIPATED TAKINGS

I. PURPOSE OF THE EPA SUPPLEMENTAL GUIDELINES

The purpose of the EPA Supplemental Guidelines is to implement Executive Order 12630, 53 Fed. Reg. 8859 (March 18, 1988) and to adopt the Attorney General Guidelines, dated June 30, 1988, where specifically incorporated by reference in these Supplemental Guidelines.

These Supplemental Guidelines together with Executive Order 12630 and the Attorney General Guidelines apply to EPA policies and actions that directly affect the value and use of distinct property interests and shall be construed to neither hinder or alter the carrying out of statutorily authorized responsibilities nor to impair the exercise of the Agency's best professional judgment as to how to administer its laws and regulations. Rather, they are to be used to inform, where appropriate, EPA decisionmakers as to any likely or significant taking implications.

II. EXCLUSIONS

To supplement the exclusions set forth in Section 2(c) of Executive Order 12630 and subsections II.B. and II.C. of the Attorney General Guidelines, the following EPA exclusions are provided:

A. State, Local Government, and Indian Tribe Policies and Actions.

Policies and actions taken by a State, local government or Indian Tribe under the authority of any Federal law or regulation administered by EPA are excluded. Examples include but are not limited to: (1) State or Indian Tribe environmental programs authorized by EPA statutes or regulations; (2) State, local government, or Indian Tribe projects funded under Federal grant, cooperative agreement, or contract; or (3) any other cooperative activities or communications carried out with a State, local government, or Indian Tribe.

B. EPA Policies or Actions Reducing Federal Restrictions on Use of Private Property.

EPA policies or actions that lessen interference with the use of distinct property interests are excluded. Examples include but are not limited to: (1) policies or actions that authorize, license, or permit the use of distinct property interests where such use but for the EPA policies or actions would be completely prohibited by Federal law; (2) EPA policies or actions that amend existing policies or actions in a manner that lessens interference with the use of private property or increases the uses of private property; or (3) EPA policies or actions that will reduce public health or safety risks in a manner that increases the use or value of distinct property interests.

C. Seizures of Distinct Property Interests.

All policies or actions involving seizures of distinct property interests by EPA pursuant to statutory authority are excluded. For purposes of this exclusion the term "seizure" means the taking of legal possession of any distinct property interest by court order, administrative order, subpoena or any other legal means for use in a civil, criminal or administrative proceeding or action.

D. Agency Plans and Studies.

Preliminary data gathering and evaluation activities as set forth in II.B.4. of the Attorney General Guidelines are excluded. Examples of preliminary data gathering and evaluation activities are studies, plans, reports, requests for information, listing of distinct property interest identifiers, etc. that will be used by EPA to develop, analyze, or implement a proposed policy or action. This exclusion focuses not on the type of activity but rather upon the timing. Hence, this exclusion does not cover a proposed policy or action other than a policy or action to gather and evaluate preliminary data once it has advanced beyond a preliminary stage unless the proposed policy or action recognizes that additional preliminary data gathering and evaluation activities are necessary.

E. Federal Property and EPA Operational Activities.

EPA policies or actions that relate to federally owned or leased property are excluded. EPA operational activities such as internal Agency practices and procedures, regulation of personnel, procurement activities, and financial assistance activities are also excluded.

F. Pending or Imminent Litigation, Enforcement Actions Seeking Statutorily Authorized Penalties, Debt Collection, or the Like.

In addition to the excluded activities specified in II.B.9. of the Attorney General Guidelines, enforcement actions (civil or administrative) seeking equitable relief; administrative adjudicatory actions or proceedings authorized by Federal law, regulation, Executive Order, Office of Management and Budget Circular; or any other administrative remedy that must be exhausted as a precondition to filing suit in Federal court are also excluded.

G. Ancillary Exclusion.

Any policies, actions or comments by, to, or from EPA related to or implementing an exclusion authorized by Executive Order 12630, Attorney General Guidelines, or EPA Supplemental Guidelines are excluded. Written EPA recommendations or comments that are not required by law to other Federal agencies are also excluded.

### III. AGENCY APPLICABILITY

Executive Order 12630 applies to EPA. The general principles and assessment factors contained in the Attorney General Guidelines generally apply to EPA. These Supplemental Guidelines have adopted the Attorney General Guidelines implementation, management, and special reporting requirements as appropriate to conform with EPA statutory authorities.

### IV. DEFINITIONS

In addition to the definitions provided in Executive Order 12630 and the Attorney General Guidelines, the following definitions are to be used for EPA policies and actions.

- A. "Agency": "Agency" as used in these Supplemental Guidelines is the United States Environmental Protection Agency or EPA.
- B. "Designated EPA Takings Official": The "Designated EPA Takings Official" is the Assistant Administrator for the Office of Policy, Planning, and Evaluation (OPPE).
- C. "Deputy Designated EPA Takings Officials": Assistant Administrators other than for OPPE and Regional Administrators are designated as "Deputy Designated Takings Officials".
- D. "Distinct Property Interest": A "Distinct Property Interest" is an existing and specifically known private property interest that is owned by a person or persons and that is directly identifiable and legally recognizable by law at the time EPA is proposing or applying a policy or action.
- E. "Policies and Actions That Have No Taking Implications": "Policies and actions that have no taking implications" include EPA regulations, proposed EPA regulations, proposed Federal legislation related to EPA statutory authorities, EPA comment on any proposed Federal legislation or any other EPA policies or actions that:
  1. Establish a lawful permit or registration system including program approval requirements, with respect to subsequent uses of private property (U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) (Mere act of establishing permit system not a taking; taking can occur "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question".));
  2. Establish a lawful rule or standard through rulemaking that: (a) does not involve distinct property interests; notwithstanding, that the subsequent application of the rule or standard to distinct property interests may affect the use or value of such property interest (Id.; Penn Central Transportation Co. v. New York City, 438 U.S. 104, 125 (1978) (Constitution protects only those

"interests that ... constitute 'property' for Fifth Amendment purposes."); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc., et al.*, 452 U.S. 264, 295 (1981) (Takings analysis must be conducted with respect to specific property.); (b) does not regulate all uses of a distinct property interest or does not deny all economically viable use, either in domestic or international markets, of any distinct property interest, considered in appropriate circumstances separately or in relation with other commonly owned distinct property interests (*Nollan v. California Coastal Commission*, U.S. , 107 S. Ct. 3141, 3146 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, U.S. , 107 S. Ct. 1232, 1242 (1987) (Regulatory action that substantially advances legitimate State interest constitutes taking only if it denies owner economically viable use of property); *Id.* at 1248-51 (consider rights in parcel as a whole); *Penn Central Transportation Co. v. New York City*, 438 U.S. at 130-31; and *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)); or (c) collects information or data pursuant to statutory authority (*Ruckelshaus v. Monsanto Company*, 467 U.S. 981, 1007 (1984) (Collection and use of confidential business information consistent with statutory authority is not a taking.));

3. Issue, deny, modify, or cancel a permit or registration or apply a rule or standard that does not regulate all uses of a distinct property interest or does not deny all economically viable use, either in domestic or international markets, of any distinct property interest, considered in appropriate circumstances separately or in relation with other commonly owned distinct property interests (See cases cited in paragraph 2(b) above.);
4. Reduce a public health or safety risk in a manner authorized by and consistent with specific Federal law or regulation or where the property interest owner has or may have caused or contributed to or has or may have any other legal responsibility for such risk (*Keystone Bituminous Coal Association v. DeBenedictis*, *supra* at, 1243-46, 1243 n. 17, 1245 n. 20, 1246 n. 22; See also *Id.* at 1256 (Rehnquist, J., dissenting)); or
5. Result in a temporary physical occupation, invasion, or deprivation of a distinct property interest or a delay in the decisionmaking processes related to the use or value of a distinct property interest where: (a) such temporary physical occupation, invasion, or deprivation or delay in association with other related governmental action affecting such distinct property interest is not a denial of all economically viable uses of such distinct property interest; (b) such temporary physical occupation, invasion, or deprivation is

imposed by court order or administrative order or subpoena authorized by Federal law; or (c) such temporary physical occupation, invasion, or deprivation is necessary to determine or reduce a public health or safety risk in a manner authorized by and consistent with specific Federal law or regulation or where the property interest owner has or may have caused or contributed to or has or may have any other legal responsibility for such risk. (Id. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, U.S. , 107 S. Ct. 2378, 2384-85, 2388-89 (1987)).

- F. "Statutes Having a Public Health or Safety Purpose": The following Federal statutes administered by EPA have a statutory public health or safety purpose: Clean Water Act, Clean Air Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act, Superfund Amendments and Reauthorization Act of 1986, Toxic Substances Control Act, Federal Insecticide, Fungicide and Rodenticide Act, Marine Protection, Research and Sanctuaries Act and Atomic Energy Act.

## V. SUPPLEMENTAL GENERAL PRINCIPLES AND ASSESSMENT FACTORS

### A. Regulatory Takings.

In reviewing a policy or action that may give rise to a "regulatory takings", a key consideration is whether a distinct property interest is being affected. If the policy or action does not involve a distinct property interest, there are no taking implications. However, if the application or implementation of such policy or action may later involve a distinct property interest, there is no compensable taking if the government policy or action substantially advances legitimate governmental interests and is not so severe as to prohibit all economically viable uses of the owner's property interest. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, supra at, 1235 (1987) *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, et al., supra at, 294-5 (1981), and *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). If the policy or action involves a distinct property interest, then the Agency must consider the economic impact of the government action, its interference with reasonable investment-backed expectations, and the character of the government action in addition to whether the policy or action substantially advances legitimate governmental interests. *Penn Central Transportation Co. v. New York City*, supra at 124. These factual inquiries must be conducted with respect to distinct property interests. In addressing the factual inquiries, the statutory framework can be used to define some of the



requirements that are part of the reasonable investment-backed expectations, and in certain circumstances a statutory requirement or compliance with a statutory requirement can be used as the sole factor in addressing the taking question. *Ruckelshaus v. Monsanto Company*, supra at 1005 (1984).

In examining the economic impact, one major consideration is whether the policy or action singles out one property interest owner to bear the sole burden of remedying a problem to which the property interest owner had not disproportionately contributed. An examination of the economic impact of a governmental action on a specific property owner should not focus solely on the burden the action imposes on that owner. Each citizen is burdened by restrictions society places on individual conduct, but all citizens "benefit greatly from the restrictions that are placed on others." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, supra at 1245. For this reason, the government need not "calculate whether a specific individual has suffered burdens" from a particular government action that exceed that action's benefits to that individual. *Id.* at 1245, n. 21. Moreover, when the actions of an individual property owner, either alone or, cumulatively, in conjunction with the acts of other property owners, substantially contribute to a problem, no taking occurs when the government addresses the problem by regulating the actions of the individual property owner. *Nollan v. California Coastal Commission*, supra at 3147. Where this is not the case, singling out a particular individual to bear a disproportionate share of the burden of efforts to remedy a problem may violate either the Takings Clause or the Equal Protection Clause. *Id.* at 3147 n. 4. Where the property interest owner as well as the public shares the benefits and burdens of the policy or action, such benefits must be considered along with any diminution in market value that the property interest owner may suffer as part of the economic impact. *Agins v. Tiburon*, supra at 262.

#### B. Actions to Protect Public Health and Safety.

For the past one hundred years, the courts have recognized that the valid exercise of police power to protect public health and safety is not a taking. *Mugler v. State of Kansas*, 123 U.S. 623 (1887). The government may adopt a wide variety of regulations that affect the uses to which an owner may put his property without compensating the owner. *Sierra Club v. EPA*, 540 F.2d. 1114, 1140 (D.C. Cir.) (air pollution controls); *Smoke Rise, Inc. v. Washington Suburban San. Com.*, 400 F.Supp. 1369, 1382-83 (D.C. Md. 1975) (moratorium on sewer hookups). Property owners may even be required to destroy hazardous property without compensation, or

the government may itself act to eliminate or destroy the property that poses the risk. *Jarboe-Lackey Feedlots, Inc. v. United States*, 7 Cl. Ct. 329, 338-39 (1985) (seizure of meat implanted with prohibited drug). The nature of the government's authority to respond evolves to meet the changing threats to public health and safety. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935).

The special status of this type of governmental action was recently articulated in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, supra. In *Keystone* a statute prohibiting the mining of coal beneath certain structures was challenged. The statute was enacted for the protection of "the health, safety and general welfare of the people...by providing for the conservation of surface land areas..., to aid in protection of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands...". *Id.*, at 1242.

The Court found that the Commonwealth was acting to protect the public interest in health, the environment and the fiscal integrity of the area. Such mining would lead to subsidence of the surface and was therefore "akin to a public nuisance." *Id.*, at 1243.

The Court then analyzed the long line of cases where the exercise of police power to combat a public nuisance was not found to constitute a compensable taking. *Mugler v. State of Kansas*, supra; *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). The Court explained that restraints on uses of property that are tantamount to a public nuisance are "properly treated as part of the burden of common citizenship". *Id.*, at 1245, citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Property is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Id.*, at 1245, citing *Mugler v. State of Kansas*, supra. "(T)he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Id.*, at 1245-1246, citing *Mugler v. State of Kansas*, supra. In a footnote, the Court adopts Professor Epstein's conclusion that "the issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant." *Id.*, at 1246, n.22.

Neither *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, supra, nor *Nollan v. California Coastal Commission*, supra, addresses the issue of whether a taking may have occurred in the context of a regulatory action to protect public health or safety. The *First English* and *Nollan* opinions are not so broad as to modify the treatment of public

health and safety activities by the courts. In contrast, Keystone has reinforced the long line of cases holding that such actions do not constitute compensable takings even where the impact on the property owner is very severe.

Where the health and safety purpose is clear from the Agency's statutory authorities, the Agency does not need to undertake any further analysis to identify the public purpose for which a policy or action is being carried out. In Keystone, the public purpose was reflected in the legislature's conclusion that existing mine subsidence legislation had failed to protect the public interest. Having examined the operative provisions of the statute, as instructed in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).., the Court agreed with the lower courts that the "legislative purposes set forth in the statute were genuine, substantial, and legitimate." *Id.*, at 1242. Hence, the legislative purpose is a critical element in determining the public purpose.

### C. Property Interest.

In analyzing a distinct property interest, how much is taken and what property interest is taken must be considered.

#### 1. How Much is Taken

To protect against a public health or safety risk, a governmental action can deny a property owner all economically viable use of a distinct property interest without effecting a compensatory taking where such denial substantially advances a legitimate state public health or safety interest. *Mugler v. State of Kansas*, *supra*. For other activities, the Supreme Court has unequivocally stated that a governmental action regulating property use can constitute "a taking only 'if ... [it] does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land.'" *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) quoting *Agins v. Tiburon*, *supra* at 260; see also *Nollan v. California Coastal Commission*, *supra* at 3146; *Keystone Bituminous Coal Assoc. v. DeBenedictis*, *supra* at 1242 (both quoting same language). Thus government action is not considered a taking unless and until there is no "economically viable use" of the property left to its owner. The Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values ... [or] real property interests." *Penn Central Transportation Co. v. New York City*, *supra* at 124-25. An owner can be deprived of the best use of his property without compensation. *Goldblatt v.*

Hempstead, supra. The extent of the diminution of value is not dispositive, and even a substantial diminution may not be a taking. See e.g. Hadacheck v. Sebastian, supra (reduction in value from \$800,000 to \$60,000); Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (75% diminution in value). See generally Penn Central, supra at 123-27.

## 2. What Interest is Taken

The Supreme Court has recognized that it is "critical" to define the unit of property that must be analyzed to determine how much value has been lost in a takings case. *Keystone Bituminous Coal Assoc., v. DeBenedictis*, supra at 1248.

In *Keystone*, plaintiffs asserted that they had been denied two types of economically viable use. They first argued that they had been denied all economically viable use of the particular tons of coal the challenged statute prevented them from mining. Noting that zoning ordinances often "place limits on the property owner's right to make use of some segments of his property," *Id.* at 1249, the Court held that the specific tons of coal did not "constitute a separate segment of property for takings law purposes," since they could not properly be viewed as separate from the entire parcel of coal the plaintiffs owned. *Id.*

The plaintiffs also noted that Pennsylvania law recognizes a "support estate" as a distinct property interest giving its owner the right to mine coal even when the mining might cause surface subsidence. They therefore asserted that a statute limiting subsidence deprived them of that property interest. The Court rejected this argument as an attempt to draw "legalistic distinctions within a bundle of property rights." *Id.* at 1250.

The Court's analysis is consistent with its reasoning in prior cases. In *Penn Central* the Court characterized the proper framework for analysis as follows:

"'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole...."

Penn Central Transportation Co. v. New York City, supra at 130-31, quoted in Keystone Bituminous Coal Assoc. v. DeBenedictis, supra at 1248. Similarly, in Andrus v. Allard, 444 U. S. 51 (1979) the Court noted that:

"where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."

Id. at 65-66, quoted in Keystone Bituminous, supra at 1248.

The Court has consistently followed this approach, evaluating takings claims only in the context of the entire property interest of the claimant where the governmental purpose is for the public benefit. Government actions that have completely deprived owners of their interest in using their property in certain ways have not been found to constitute takings. In Penn Central the Court found that no taking occurred when a property owner was denied the right to erect a structure above an existing building (air rights). In Andrus v. Allard, a complete denial of the right to sell certain types of property legally in the owner's possession was likewise found not to constitute a taking because that denial was "necessary to [an] environmental protection regulatory scheme". Hodel v. Irving, U.S. , 107 S. Ct. 2076, 2084 (1987). See also Mugler v. Kansas, supra (deprivation of right to brew beer in a brewery was held not to be a taking); Miller v. Schoene, supra, (deprivation of right to have ornamental trees harboring an organism harmless to them but harmful to nearby apple trees was held not to be a taking), Goldblatt v. Hempstead, supra (State ban of excavations below water table that effectively prohibited continuation of well-established business was held not to be a taking). See generally Penn Central Transportation Co. v. New York City, supra at 124-28 and cases cited therein.

## VI. EPA IMPLEMENTATION, MANAGEMENT, AND SPECIAL REPORTING REQUIREMENTS

### A. EPA Implementation.

1. If an EPA proposed policy or action is not within an exclusion or the above definition of "policies and actions that have no taking-implications" and the proposed policy or action may directly affect the use or value of a distinct property interest, then the EPA proposed policy or action may be subject to evaluation as described in paragraph 5 of this section.

2. To determine whether such proposed policy or action as delineated in paragraph 1 of this section may be subject to evaluation, it is important to distinguish between physical intrusion and other policies and actions that either involve a distinct property interest or do not involve a distinct property interest at the time but may later.

(a) Physical intrusion by permanent or temporary physical occupation, or invasion will be subject to evaluation.

(b) For other policies and actions that at the time do not involve a distinct property interest but may involve a distinct property interest later in applying or implementing the policy or action, the only takings question is whether the property interest owner is denied all economically viable uses of the property interest. If the answer is yes, then the policy or action is subject to evaluation. If the answer is no, see IV.E.2. and E.3.

(c) For other policies and actions that involve a distinct property interest, the character of the EPA action, its interference with the reasonable investment-backed expectations, and its economic impact (factual inquiries) are to be considered.

3. In considering the factual inquiries described in paragraph 2.(c) above, the first step is to look to the EPA statute for guidance.

(a) The statute may define requirements that must be included in the consideration of the reasonable investment-backed expectations. Some examples of such statutory requirements are meeting standards, obtaining permits, or using property in a manner to avoid causing a public health, safety or environmental risk. Where the proposed policy or action is legally consistent with the statutory requirement, there is per se no interference with the reasonable investment-backed expectations irrespective of when the distinct property interest was acquired. In such instances, this factor disposes of any taking implications without the need to examine the other two factors, and no further evaluation is required.

(b) In instances where the proposed policy or action is carrying out a statutory requirement, then the character of the EPA action may be determined from the statute (i.e., protecting public health, safety, or the environment) without further inquiry. See IV.F. above. If

the character of the proposed policy or action is to protect against a public health and safety risk, see IV.E.4. above.

(c) It is unlikely that the statute will be helpful in determining the economic impact of the proposed policy or action. This may require additional analysis. Where such analysis is needed, it must be done only at the point if and when a distinct property interest can be identified. In considering the economic impacts, an important factor is whether the property interest owner is being singled out to solely bear the burden of a policy or action where the property interest owner has not disproportionately contributed to the problem being remedied by the policy or action. Where the property interest owner as well as the public shares the benefits and burdens of a policy or action, the benefits are to be considered together with any diminution in market value of the property interest. See V.A. above for additional guidance.

4. Where the statute does not provide guidance in analyzing the factual inquiries, policy and action evaluation criteria are provided in the Attorney General Guidelines at pages 17-19. In addition, where a proposed policy or action is intended to protect against a public health and safety risk without a statutory reference, assessment criteria for such policy or action to be given public health and safety deference is provided in the Attorney General Guidelines at pages 15-16.
5. For those proposed policies and actions subject to evaluation, a Takings Implication Assessment (TIA) must be prepared. The TIA is described in the Attorney General Guidelines at pages 21-23.

#### B. EPA Management.

1. The Designated Takings Official is the EPA contact for EPA implementation of Executive Order 12630.
2. The Designated Takings Official may assign the Deputy Designated Takings Officials any necessary duties to assure compliance with Executive Order 12630 and to support any certifications required to be made by the Designated Takings Official.
3. Except as provided in paragraph 4 below, the Designated Takings Official shall approve and the General Counsel shall concur on any EPA determination that:

- (a) a policy or action has no taking implications;
- (b) a policy or action is not subject to evaluation; or
- (c) a policy or action has significant taking implications.

Where appropriate, Assistant Administrators and Regional Administrators can seek such approval and concurrence on a program-wide basis.

- 4. Each Regional Administrator shall approve and the Regional Counsel shall concur on any EPA determination that:
  - (a) a specific regional policy or action has no taking implications; or
  - (b) a specific regional policy or action is not subject to evaluation.
- 5. In developing a TIA, each Assistant Administrator and Regional Administrator should coordinate with the Designated Takings Official and General Counsel or Regional Counsel as appropriate. The TIA requirement for an estimate of the potential financial exposure to the government should be prepared only in those instances where the General Counsel or Regional Counsel has determined there is a likely expectation or probability of a Federal court finding the proposed policy or action to be a compensatory taking.
- 6. The General Counsel with the concurrence of the Designated Takings Official shall review and update these Supplemental Guidelines as necessary, and both are to provide implementational guidance in their respective areas to Assistant Administrators and Regional Administrators as needed.

C. EPA Reporting Requirements.

- 1. Only significant taking implications are to be discussed in proposed rulemakings published in the Federal Register. All other discussions related to EPA implementation and determinations are not required to be discussed in rulemakings published in the Federal Register.
- 2. To the extent permitted by the Freedom of Information Act, all documents related to EPA implementation and determinations are entitled to be protected from disclosure.



3. The Designated Takings Official will coordinate and transmit all reports except for EPA budget submissions required to be submitted to comply with Executive Order 12630.
4. The Assistant Administrator for Office of Administration and Resources Management will comply with any budget submission requirements required by Executive Order 12630.

Lee M. Thomas  
Administrator

Date

**PART XII - MISCELLANEOUS GUIDELINES**

**Section 2**

**Commerce Clause Jurisdiction in Isolated Waters  
(Army Corps of Engineers)**

DAEN-CWO-N

SUBJECT: Commerce Clause Jurisdiction in Isolated Waters

Commander, Southwestern Division

1. On 25 October 1985, the Assistant Secretary of the Army (Civil Works) was notified pursuant to Section 505 of the Clean Water Act (CWA) of an alleged violation of Section 404 of the CWA. The notice specifically identified the isolated waterbody known as Pond No. 12 within the boundaries of the Galveston District. On 15 January 1986, a formal complaint was filed in the United States District Court, Southern District of Texas. These actions caused us to analyze the particulars of the case, precipitated a field investigation of the area, and induced us to review existing policy and guidance on the subject.
2. You will recall that on 8 November 1985, I transmitted to all field operating activities (FOA) a legal memorandum on CWA jurisdictions over isolated waters which had been prepared by the Environmental Protection Agency (EPA). That document clarified for the first time the factors which are indicative of a connection to interstate commerce for purposes of the CWA. While the limits of some of those factors need clarifications, and will be addressed when a national policy is finalized, Corps FOAs should implement the guidance provided in the EPA memorandum for jurisdictional calls on isolated water bodies.
3. Based on the EPA memorandum, I must now conclude that the guidance provided in your Regulatory Information Memo (RIM) No. 85-07, dated 2 April 1985, is no longer appropriate. Specifically, I find that guidance provided at paragraph 3.b. on significance of effect on commerce conflicts with the EPA legal opinion on the subject. Note that waters which "are or could be used" by migratory birds which cross state lines are subject to CWA jurisdiction.
4. On the other hand, guidance provided at paragraph 3.a. of the RIM is correct and appropriate. The distinction between an ephemeral puddle and a true waterbody must be made.
5. You should review RIM 85-07 and any other guidance dealing with this subject and modify it consistent with the EPA memorandum on isolated waters. In addition, you should notify your districts that, effective immediately, all waterbodies which are or reasonably could be used by migratory birds are waters of the United States and should be regulated as such for all ongoing and future discharges of dredged or fill material.

DAEN-CWO-N

SUBJECT: Commerce Clause Jurisdiction in Isolated Waters

6. Because other FOAs are wrestling with similar questions, I am forwarding a copy of this letter to all divisions. Questions on this letter should be addressed to DAEN-CWO-N (ATTN: Robert Pierce; 272-1786).

FOR THE COMMANDER:

Signed

PATRICK J. KELLY  
Brigadier General, USA  
Deputy Director of Civil Works

# **PART XIII - Supplementary Information**

<i>Section 1</i>	<b>U.S. Fish and Wildlife Service List of Migratory Birds 50 CFR 10.13 (11-23-90 edition) . . . . .</b>	<b>618</b>
<i>Section 2</i>	<b>Endangered and Threatened Wildlife and Plants 50 CFR 17.11 &amp; 17.12 (August 23, 1993) . . . . .</b>	<b>634</b>
<i>Section 3</i>	<b>Field Indicators of Saturated Hydric Soils (draft 2-1-94) . . . . .</b>	<b>676</b>

**PART XI - SUPPLEMENTARY INFORMATION**

**Section 1**

**U.S. Fish and Wildlife Service List of Migratory Birds**

# TITLE 50, CODE OF FEDERAL REGULATIONS, PART 10

## GENERAL PROVISIONS

### Subpart A-Introduction

- Sec.
- 10.1 Purpose of regulations.
  - 10.2 Scope of regulations.
  - 10.3 Other applicable laws.
  - 10.4 When regulations apply.

### Subpart B-Definitions

- 10.11 Scope of definitions.
- 10.12 Definitions.
- 10.13 List of Migratory Birds.

### Subpart C-Addresses

- 10.21 Director.
- 10.22 Law enforcement offices.

Authority; 18 U.S.C. 42; 16 U.S.C. 703-712; 16 U.S.C. 668a-d; 19 U.S.C. 1202, 16 U.S.C. 1531-1543; 16 U.S.C. 1361-1384, 1401-1407; 16 U.S.C. 742a-742j-l; 16 U.S.C. 3371-3378.

Source: 38 FR 22015, Aug. 15, 1973, unless otherwise noted.

### Subpart A - Introduction

#### 10.1 Purpose of regulations

The regulations of this Subchapter B are promulgated to implement the following statutes enforced by the U.S. Fish and Wildlife Service which regulate the taking, possession, transportation, sale, purchase, barter, exportation, and importation of wildlife:

Lacey Act, 18 U.S.C. 42.  
Lacey Act Amendments of 1981, 16 U.S.C. 3371-78.  
Migratory Bird Treaty Act' 16 U.S.C. 703-71L  
Bald and Golden Eagle Protection Act, 16 U.S.C. 1531-1543.  
Endangered Species Act of 1973, 16 U.S.C. 1531-1543.  
Tariff Classification Act of 1962, 19 U.S.C. 1202, [Schedule 1. Part 15D, Headnote 2(d), T.S.U.S.]  
Fish and Wildlife Act of 1956, 16 U.S.C. 742a-742j-l.  
Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1384, 1401-1407.

[38 FR 22015, Aug. 15, 1973, as amended at 53 FR 6649, Mar. 2, 1988].

#### § 10.2 Scope of regulations.

The various parts of this Subchapter B are related, and particular note should be taken

that the parts must be construed with reference to each other.

#### § 10.3 Other applicable laws.

No statute or regulation of any State shall be construed to relieve a person from the restrictions, conditions, and requirements contained in this Subchapter B. In addition, nothing in this Subchapter B, nor any permit issued under this Subchapter B, shall be construed to relieve a person from any other requirements imposed by a statute or regulation of any State or of the United States, including any applicable health, quarantine, agricultural, or customs laws or regulations, or other Service enforced statutes or regulations.

#### § 10.4 When regulations apply.

The regulations of this Subchapter B shall apply to all matters arising after the effective date of such regulations, with the following exceptions:

(a) *Civil penalty proceedings.* Except as otherwise provided in §11.25, the civil penalty assessment procedures contained in this Subchapter B shall apply only to any proceeding instituted by notice of violation dated subsequent to the effective date of these regulations, regardless of when the act or omission which is the basis of a civil penalty proceeding occurred.

(b) *Permits.* The regulations in this Subchapter B shall apply to any permit application received after the effective date of the appropriate regulations in this Subchapter B and, insofar as appropriate, to any permit which is renewed after such effective date.

[38 FR 22015, Aug. 15, 1973, as amended at 39 FR 1159, Jan. 4, 1974]

### Subpart B-Definitions

#### § 10.11 Scope of definitions.

In addition and subject to definitions contained in applicable statutes and subsequent parts or sections of this Subchapter B, words or their variants shall have the meanings ascribed in this subpart. Throughout this Subchapter B words in the singular form shall include the plural, words in the plural form shall include the singular, and words in the masculine form shall include the feminine.

#### § 10.12 Definitions.

"Aircraft" means any contrivance used for flight in the air. "Amphibians" means a member of the class, Amphibia, including, but not limited to, frogs, toads, and salamanders; including any part, product, egg, or offspring thereof, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"Animal" means an organism of the animal kingdom, as distinguished from the plant kingdom; including any part, product, egg, or offspring thereof, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"Birds" means a member of the class Aves; including any part, product, egg, or offspring thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"Country of exportation" means the last country from which the animal was exported before importation into the United States.

"Country of origin" means the country where the animal was taken from the wild, or the country of natal origin of the animal.

"Crustacean" means a member of the class Crustacea, including but not limited to, crayfish, lobsters, shrimps, crabs, barnacles, and some terrestrial forms; including any part, product, egg, or offspring thereof, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"Director" means the Director of the United States Fish and Wildlife Service, Department of the Interior, or his authorized representative.

"Endangered wildlife" means any wildlife listed in § 17.11 or § 17.12 of this subchapter.

"Fish" means a member of any of the following classes:

- (1) Cyclostomata, including, but not limited to, hagfishes and lampreys;
- (2) Elasmobranchii, including but not limited to, sharks, skates, and rays; and
- (3) Pisces, including but not limited to trout, perch, bass, minnows, and catfish, including any part, product, egg, or offspring thereof, or the

dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"Fish or wildlife" means any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and including any part, product, egg, or offspring thereof.

"Foreign commerce" includes, among other things, any transaction (1) between persons within one foreign country, or (2) between person's in two or more foreign countries, or (3) between a person within the United States and a person in one or more foreign countries, or (4) between persons within the United States, where the fish or wildlife in question are moving in any country or countries outside the United States.

"Fossil" means the remains of an animal of past geological ages which has been preserved in the earth's crust through mineralization of the object.

"Import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the tariff laws of the United States.

"Injurious Wildlife" means any wildlife for which a permit is required under Sub-part B of Part 16 of this subchapter before being imported into or shipped between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States.

"Mammal" means a member of the class, Mammalia; including any part, product, egg, or offspring, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"Migratory bird" means any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in § 10.13, or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird or any product, whether or not manufactured which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.

"Migratory game birds" See § 20.11 of this subchapter.

"Mollusk" means a member of the phylum, Mollusca, including but not limited to, snails, mussels, clams, oysters, scallops, abalone, squid, and octopuses; including any part, product, egg, or offspring thereof, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"Permit" means any document designated as a "permit," "license," "certificate," or any other document issued by the Service to authorize, limit, or describe activity and signed by an authorized official of the Service.

"Person" means any individual, firm, corporation, association, partnership, club, or private body, any one or all, as the context requires.

"Plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

"Possession" means the detention and control, or the manual or ideal custody of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Possession includes the act or state of possessing and that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. Possession includes constructive possession which means not actual but assumed to exist, where one claims to hold by virtue of some title, without having actual custody.

"Public" as used in referring to museums, zoological parks, and scientific or educational institutions, refers to such as are open to the general public and are either established, maintained, and operated as a governmental service or are privately endowed and organized but not operated for profit.

"Reptile" means a member of the class, Reptilia, including but not limited to turtles, snakes, lizards, crocodiles, and alligators, including any part, product, egg, or offspring thereof or the dead body or parts thereof whether or not included in a manufactured product or in a processed food product

"Secretary" means the Secretary of the Interior or his authorized representative.

"Service" means the United States Fish and Wildlife Service Department of the Interior.

"Shellfish" means an aquatic invertebrate animal having a shell including, but not limited to, (a) an oyster, clam, or other mollusk and (b) a lobster or

other crustacean; or any part, product, egg, or offspring thereof, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.

"State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Guam.

"Take" means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect. (With reference to marine mammals, see Part 18 of this subchapter.)

"Transportation" means to ship, convey, carry or transport by any means whatever, and deliver or receive for such shipment, conveyance, carriage, or transportation.

"United States" means the several states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Guam.

"Whoever" means the same as person.

"Wildlife" means the same as fish or wildlife.

[38 FR 22015, AUG. 15, 1973, as amended at 42 FR 32377, June 24, 1977; 42 FR 59358, Nov. 16, 1977, 45 FR 56673, Aug. 25, 1980; 50 FR 5 Dec. 26, 1985]

#### § 10.13 List of Migratory Birds

The following is a list of all species of migratory birds protected by the Migratory Bird Treaty Act (16 U.S.C. 703-711) and subject to the regulations on migratory birds contained in this Subchapter B of Title 50 CFR. The species listed are those protected by the Convention for the Protection of Migratory Birds, August 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628; the Convention for the Protection of Migratory Birds and Game Mammals, February 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912; the Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990; and the Convention for the Conservation of Migratory Birds and Their Environment, United States-U.S.S.R., November 26, 1976, 92 Stat. 3110, T.I.A.S. 9073, 16 U.S.C. 703, 712.

The species are listed two ways. In the first part of the list species are arranged alphabetically by English (common) name groups, with the scientific name following the English (common) name.



31 species of ducks are listed together under the heading "Ducks". In the second part of the List, species are listed by scientific name arranged in taxonomic order. Taxonomy and nomenclature follows the American Ornithologists' Union's Check-list of North American Birds (6th Edition, 1983).

## I. ALPHABETICAL LISTING

Accentor, Siberian, *Prunella montanella*

Albatross:

Black footed, *Diomedea nigripes*

Laysan, *Diomedea immutabilis*

Short-tailed, *Diomedea albatrus*

Yellow-nosed, *Diomedea chlororhynchos*

Anhinga, *Anhinga anhinga*

Ani:

Groove-billed, *Crotophaga sulcirostris*

Smooth-billed, *Crotophaga ani*

Auklet:

Cassin's, *Ptychoramphus aleuticus*

Crested, *Aethia cristatella*

Least, *Aethia pusilla*

Parakeet, *Cyclorhynchus Psittacula*

Rhinoceros, *Cerorhinca monocerata*

Whiskered, *Aethia pygmaea*

Avocet, American, *Recurvirostra americana*

Barn-Owl, Common, *Tyto alba*

Beardless-Tyrannulet, Northern, *Camptostoma*

*imberbe*

bird, Rose-throated, *Pachyrhamphus aglaiae*

Bittern:

American, *Botaurus lentiginosus*

Chinese, *Ixobrychus sinensis*

Least, *Ixobrychus exilis*

Schrenk's, *Ixobrychus eurhythmus*

Black-Hawk, Common, *Buteogallus anthracinus*

Blackbird:

Brewer's, *Euphagus cyanocephalus*

Red-winged, *Agelaius phoeniceus*

Rusty, *Euphagus carolinus*

Tawny-shouldered, *Agelaius humeralis*

Tricolored, *Agelaius tricolor*

Yellow-headed, *Xanthocephalus xanthocephalus*

Yellow-shouldered, *Agelaius xanthomus*

Bluebird:

Eastern, *Sialia sialis*

Mountain, *Sialia currucoides*

Western, *Sialia mexicana*

Bluethroat, *Luscinia svecica*

Bobolink, *Dolichonyx oryzivorus*

Booby:

Blue-footed, *Sula nebouxi*

Brown, *Sula leucogaster*

Masked, *Sula dactylatra*

Red-footed, *Sula sula*

Brambling, *Fringilla montifringilla*

Brant, *Branta bernicla*

Bufflehead (see DUCKS)

Bullfinch:

Asian, *Pyrrhula pyrrhula*

Puerto Rican, *Loxigilla portoricensis*

Bunting:

Indigo, *Passerina cyanea*

Lark, *Calamospiza melanocorys*

Lazuli, *Passerina amoena*

McKay's, *Plectrophenax hyperboreus*

Painted, *Passerina ciris*

Reed (see Reed-Bunting)

Rustic, *Emberiza rustica*

Snow, *Plectrophenax nivalis*

Varied, *Passerina versicolor*

Bushtit, *Psaltriparus minimum*

Canvasback (see DUCKS)

Caracara, Crested, *Polyborus plancus*

Cardinal, Northern, *Cardinalis cardinalis*

Carib, Green-throated, *Eulampis holosericeus*

Catbird, Gray, *Dumetella carolinensis*

Chat, Yellow-breasted, *Icteria virens*

Chickadee (see Tit):

Black-capped, *Parus atricapillus*

Boreal, *Parus hudsonicus*

Carolina, *Parus carolinensis*

Chestnut-backed, *Parus rufescens*

Mexican, *Parus sclateri*

Mountain, *Parus gambeli*

Chuck-will's-widow, *Caprimulgus carolinensis*

Condor, California, *Gymnogyps californianus*

Coot:

American, *Fulica americana*

Caribbean, *Fulica caribaea*

Eurasian, *Fulica ara*

Cormorant:

Brandt's, *Phalacrocorax penicillatus*

Double-crested, *Phalacrocorax auritus*

Great, *Phalacrocorax carbo*

Olivaceous, *Phalacrocorax olivaceus*

Pelagic, *Phalacrocorax pelagicus*

Red-faced, *Phalacrocorax urile*

Cowbird:

Bronzed, *Molothrus aeneus*

Brown-headed, *Molothrus ater*

Shiny, *Molothrus bonariensis*

Crake:

Corn, *Crex crex*

Yellow-breasted, *Porzana flaviventris*

Crane:

Common, *Grus grus*

Sandhill, *Grus canadensis*

Whooping, *Grus americana*

Creeper, Brown, *Certhia americana*

Crossbill:

Red, *Laxia curvirostra*

White-winged, *Laxia leptoptera*

Crow:

American, *Corvus brachyrhynchos*

Fish, *Corvus ossifragus*

Hawaiian, *Corvus hawaiiensis*

Mexican, *Corvus imparatus*

Northwestern, *Corvus caurinus*

White-necked, *Corvus leucognathus*

Cuckoo:

Black-billed, *Coccyzus erythrophthalmus*

Common, *Cuculus canorus*

Hawk (see Hawk Lizard Cuckoo)

Mangrove, *Coccyzus minor*

Oriental, *Cuculus saturatus*

Yellow-billed, *Coccyzus americanus*

Curlew (see Whimbrel):

Bristle-thighed, *Numenius tahitiensis*

Eskimo, *Numenius borealis*

Far Eastern, *Numenius madagascariensis*

Least, *Numenius minutus*

Long-billed, *Numenius americanus*

Dickcissel, *Spiza americana*

Dipper, American, *Cinclus mexicanus*

Dotterel, Eurasian, *Charadrius morinellus*

Dove:

Ground (see Ground-Dove)

Inca, *Columbina inca*

Mourning, *Zenaida macroura*

Quail (see Quail-Dove)

White-tipped, *Leptotila verreauxi*

White-winged, *Zenaida asiatica*

Zenaida, *Zenaida aurita*

Dovekie, *Alle alle*

Dowitcher:

Long-billed, *Limnodromus scolopaceus*

Short-billed, *Limnodromus griseus*

## DUCKS

American Black Duck, *Anas rubripes*

Bufflehead, *Bucephala albeola*

Canvasback, *Aythya valisineria*

Eider:

Common, *Somateria mollissima*

King, *Somateria spectabilis*

Spectacled, *Somateria fischeri*

Steller's, *Polysticia stelleri*

Gadwall, *Anas strepera*

Garganey, *Anas querquedula*

Goldeneye:

Barrow's, *Bucephala islandica*

Common, *Bucephala clangula*

Harlequin Duck, *Histrionicus histrionicus*

Hawaiian Duck, *Anas wyvilliana*

Laysan Duck, *Anas laysanensis*

Mallard, *Anas platyrhynchos*

Masked Duck, *Oxyura dominica*

Merganser:

Common, *Mergus merganser*

Hooded, *Lophodytes cucullatus*

Red-breasted, *Mergus serrator*

Mottled Duck, *Anas fulvigula*

Oldsquaw, *Clangula hyemalis*

Pintail:

Northern, *Anas acuta*

White-cheeked, *Anas bahamensis*

Pochard:

Bac's, *Aythya baeri*

Common, *Aythya ferina*

Redhead, *Aythya americana*

Ring-necked Duck, *Aythya collaris*

Ruddy Duck, *Oxyura jamaicensis*

Scaup:  
 Greater, *Aythya marila*  
 Lesser, *Aythya affinis*  
 Scoter:  
 Black, *Melanitta nigra*  
 Surf, *Melanitta perspicillata*  
 White-winged, *Melanitta fusca*  
 Shoveler, Northern, *Anas chrypeata*  
 Smew, *Mergellus albellus*  
 Teal:  
 Baikal, *Anas formosa*  
 Blue-winged, *Anas discors*  
 Cinnamon, *Anas cyanoptera*  
 Falcated, *Anas falcata*  
 Green-winged, *Anas crecca*  
 Tufted Duck, *Aythya fuligula*  
 Whistling-Duck:  
 Black-bellied, *Dendrocygna autumnalis*  
 Fulvous, *Dendrocygna bicolor*  
 West Indian, *Dendrocygna arborea*  
 Wigeon:  
 American, *Anas americana*  
 Eurasian, *Anas penelope*  
 Wood Duck, *Aix sponsa*

**END OF DUCKS**

Dunlin, *Calidris alpina*  
 Eagle:  
 Bald, *Haliaeetus leucocephalus*  
 Golden, *Aquila chrysaetos*  
 Sea (see Sea-Eagle)  
 White-tailed, *Haliaeetus albicilla*  
 Egret:  
 Cattle, *Bubulcus ibis*  
 Chinese, *Egretta eulophotes*  
 Great, *Casmerodius albus*  
 Plumed, *Egretta intermedia*  
 Reddish, *Egretta rufescens*  
 Snowy, *Egretta thula*  
 Eider (see DUCKS)  
 Elaenia, Caribbean, *Elaenia martinica*  
 Emerald, Puerto Rican, *Chlorostilbon maugaeus*  
 Euphonia, Antillean, *Euphonia musica*  
 Falcon:  
 Aplomado, *Falco femoralis*  
 Peregrine, *Falco peregrinus*  
 Prairie, *Falco mexicanus*  
 Fieldfare, *Turdus pilaris*  
 Finch:  
 Cassin's, *Carpodacus*  
 House, *Carpodacus mexicanus*  
 Purple, *Carpodacus purpureus*  
 Rosy, *Leucosticte arctica*  
 Flamingo, Greater, *Phoenicopterus ruber*  
 Flicker, Northern, *Colaptes auratus*  
 Flycatcher:  
 Acadian, *Empidonax virescens*  
 Alder, *Empidonax alorum*  
 Ash-throated, *Myiarchus cinerascens*  
 Brown-crested, *Myiarchus tyrannulus*  
 Buff-breasted, *Empidonax fulvifrons*

Dusky, *Empidonax oberholseri*  
 Dusky-capped, *Myiarchus tuberculifer*  
 Fork-tailed, *Tyrannus savana*  
 Gray, *Empidonax wrightii*  
 Gray-spotted, *Muscicapa griseisticta*  
 Great Crested, *Myiarchus crinitus*  
 Hammond's, *Empidonax hammondi*  
 Least, *Empidonax minimus*  
 Narcissus, *Muscicapa narcissina*  
 Nutting's, *Myiarchus nuyongi*  
 Olive-sided, *Contopus borealis*  
 Puerto Rican, *Myiarchus antillarum*  
 Scissor-tailed, *Tyrannus forficatus*  
 Sulphur-bellied, *Myiodiastis luteiventris*  
 Vermilion, *Pyrocephalus rubinus*  
 Western, *Empidonax difficilis*  
 Willow, *Empidonax traillii*  
 Yellow-bellied, *Empidonax flaviventris*  
 Frigatebird:  
 Great, *Fregata minor*  
 Magnificent, *Fregata magnificens*  
 Lesser, *Fregata ariel*  
 Fulmar, Northern, *Fulmarus glacialis*  
 Gadwall (see DUCKS)  
 Gallinule, Purple, *Porphyrio maritima*  
 Gannet, Northern, *Sula bassanus*  
 Garganey (see DUCKS)  
 Gnatcatcher:  
 Black-capped, *Poliopitila nigriceps*  
 Black-tailed, *Poliopitila melanura*  
 Blue-gray, *Poliopitila caerulea*  
 Godwit:  
 Bar-tailed, *Limosa lapponica*  
 Black-tailed, *Limosa limosa*  
 Hudsonian, *Limosa haemastica*  
 Marbled, *Limosa fedoa*  
 Golden-Plover, Lesser, *Pluvialis dominica*  
 Goldeneye (see DUCKS)  
 Goldfinch:  
 American, *Carduelis tristis*  
 Lawrence's, *Carduelis lawrencei*  
 Lesser, *Carduelis psaltria*  
 Goose:  
 Barnacle, *Branta leucopsis*  
 Bean, *Anser fabalis*  
 Canada, *Branta canadensis*  
 Emperor, *Chen canagica*  
 Greater White-fronted, *Anser albifrons*  
 Hawaiian, *Nesochen sandvicensis*  
 Ross', *Chen rossii*  
 Snow, *Chen caerulescens*  
 Goshawk, Northern, *Accipiter gentilis*  
 Grackle:  
 Boat-tailed, *Quiscalus major*  
 Common, *Quiscalus quiscula*  
 Great-tailed, *Quiscalus mexicanus*  
 Greater Antillean, *Quiscalus niger*  
 Grasshopper-Warbler, Middendorff's, *Locustella ochotensis*  
 Grassquit:  
 Black-faced, *Tiaris bicolor*  
 Yellow-faced, *Tiaris olivacea*

Grebe:  
 Eared, *Podiceps nigricollis*  
 Horned, *Podiceps auritus*  
 Least, *Tachybaptus dominicus*  
 Pied-billed, *Podilymbus podiceps*  
 Red-necked, *Podiceps grisegena*  
 Western, *Aechmophorus occidentalis*  
 Greenfinch, Oriental, *Carduelis sinica*  
 Greenshank, Common, *Tringa nebularia*  
 Grosbeak:  
 Black-headed, *Pheucticus melanocephalus*  
 Blue, *Guiraca caerulea*  
 Crimson-collared, *Rhodothraupis celaeno*  
 Evening, *Coccothraustes vespertinus*  
 Pine, *Pinicola enucleator*  
 Rose-breasted, *Pheucticus ludovicianus*  
 Yellow, *Pheucticus chrysopleus*  
 Ground-Dove:  
 Common, *Columbina passerina*  
 Ruddy, *Columbina talpacoti*  
 Guillemot:  
 Black, *Cephus grylle*  
 Pigeon, *Cephus columba*  
 Gull:  
 Bonaparte's, *Larus philadelphia*  
 California, *Larus californicus*  
 Common Black-headed, *Larus ridibundus*  
 Franklin's, *Larus pipixcan*  
 Glaucous, *Larus hyperboreus*  
 Glaucous-winged, *Larus glaucescens*  
 Great Black-backed, *Larus marinus*  
 Heermann's, *Larus heermanni*  
 Herring, *Larus argentatus*  
 Iceland, *Larus glaucoideus*  
 Ivory, *Pagophila eburnea*  
 Laughing, *Larus atricilla*  
 Lesser Black-backed, *Larus fuscus*  
 Little, *Larus minutus*  
 Mew, *Larus canus*  
 Ring-billed, *Larus delawarensis*  
 Ross', *Rhodostethia rosea*  
 Sabine's, *Xema sabini*  
 Slaty-backed, *Larus schistisagus*  
 Thayer's, *Larus thayeri*  
 Western, *Larus occidentalis*  
 Yellow-footed, *Larus livens*  
 Gyrfalcon, *Falco rusticolus*  
 Harrier, Northern, *Circus cyaneus*  
 Hawfinch, *Coccothraustes coccothraustes*  
 Hawk:  
 Asiatic Sparrow, *Accipiter gularis*  
 Black (see Black-Hawk)  
 Broad-winged, *Buteo platypterus*  
 Cooper's, *Accipiter cooperii*  
 Ferruginous, *Buteo regalis*  
 Gray, *Buteo nitidus*  
 Harris', *Parabuteo unicinctus*  
 Hawaiian, *Buteo solitarius*  
 Red-shouldered, *Buteo lineatus*  
 Red-tailed, *Buteo jamaicensis*  
 Rough-legged, *Buteo lagopus*  
 Sharp-shinned, *Accipiter striatus*

Short-tailed, *Buteo brachyurus*  
Swainson's, *Buteo swainsoni*  
White-tailed, *Buteo albicaudatus*  
Zone-tailed, *Buteo albonotatus*  
Hawk-Cuckoo, Hodgson's, *Cuculus fugax*  
Hawk-Owl, Northern, *Surnia ulula*

Heron:

Great Blue, *Ardea herodias*  
Green-backed, *Butorides striatus*  
Little Blue, *Egretta caerulea*  
Night (see Night-Heron)  
Pacific Reef, *Egretta sacra*  
Tricolored, *Egretta tricolor*

Hoopoe, *Upupa epops*

House-Martin, Common, *Delichon urbica*  
Hummingbird

(see Carib, Emerald Mango, Starthroat,  
Woodstar, Violet-ear):

Allen's, *Selasphorus sasin*  
Anna's, *Calypte anna*  
Antillean Crested, *Orthorhynchus cristatus*  
Berylline, *Amazilia beryllina*

Black-chinned, *Archilochus alexandri*

Blue-throated, *Lampornis clemenciae*

Broad-billed, *Cyananthus latirostris*

Broad-tailed, *Selasphorus platycercus*

Buff-Bellied, *Amazilia yucatanensis*

Calliope, *Stellula calliope*

Costa's, *Calypte costae*

Lucifer, *Calothorax lucifer*

Magnificent, *Eugenes fulgens*

Ruby-throated, *Archilochus colubris*

Rufous, *Selasphorus rufus*

Violet-crowned, *Amazilia violiceps*

White-eared, *Hylocharis leucotis*

Ibis:

Glossy, *Plegadis falcinellus*

Scarlet, *Eudocimus ruber*

White, *Eudocimus albus*

White-faced, *Plegadis chihi*

Jabiru, *Jabiru mycteria*

Jacana, Northern, *Jacana spinosa*

Jaeger:

Long-tailed, *Stercorarius longicaudus*

Parasitic, *Stercorarius parasiticus*

Pomarine, *Stercorarius pomarinus*

Jay:

Blue, *Cyanocitta cristata*

Brown, *Cyanocorax norio*

Gray, *Perisoreus canadensis*

Gray-breasted, *Aphelocoma ultramarina*

Green, *Cyanocorax yncas*

Pinyon, *Gymnorhinus cyanocephalus*

Scrub, *Aphelocoma coerulescens*

Steller's, *Cyanocitta stelleri*

Junco:

Dark-eyed, *Junco hyemalis*

Yellow-eyed, *Junco phaeonotus*

kestrel:

American, *Falco sparverius*

Eurasian, *Falco tinnunculus*

Ideer, *Charadrius vociferans*

Kingbird:

Cassin's, *Tyrannus vociferans*

Couch's, *Tyrannus couchii*

Eastern, *Tyrannus tyrannus*

Gray, *Tyrannus dominicensis*

Loggerhead, *Tyrannus caudifasciatus*

Thick-billed, *Tyrannus crassirostris*

Tropical, *Tyrannus melancholicus*

Western, *Tyrannus verticalis*

Kingfisher:

Belted, *Ceryle alcyon*

Green, *Chloroceryle americana*

Ringed, *Ceryle torquata*

Kinglet:

Golden-crowned, *Regulus satrapa*

Ruby-crowned, *Regulus calendula*

Kiskadee, Great, *Pitangus sulphuratus*

Kite:

American Swallow-tailed, *Elanoides forficatus*

Black, *Milvus migrans*

Black-shouldered, *Elanus caeruleus*

Hook-billed, *Chondrohierax uncinatus*

Mississippi, *Ictinia mississippiensis*

Snail, *Rostrhamus sociabilis*

Kittiwake:

Black-legged, *Larus tridactyla*

Red-legged, *Larus brevis*

Knot:

Great, *Calidris tenuirostris*

Red, *Calidris canutus*

Lapwing, Northern, *Vanellus vanellus*

Lark, Horned, *Eremophila alpestris*

Limpkin, *Aramus guarana*

Lizard-Cuckoo, Puerto Rican,

*Saurothera vieilloti*

Longspur:

Chestnut-collared, *Calcarius ornatus*

Lapland, *Calcarius lapponicus*

McCown's, *Calcarius mccownii*

Smith's, *Calcarius pictus*

Loon:

Arctic, *Gavia arctica*

Common, *Gavia immer*

Red-throated, *Gavia stellata*

Yellow-billed, *Gavia adamsii*

Magpie:

Black-billed, *Pica pica*

Yellow-billed, *Pica nuttalli*

Mallard (see DUCKS)

Mango:

Antillean, *Anthracothorax dominicus*

Green, *Anthracothorax viridis*

Martin:

Caribbean, *Progne dominicensis*

Cuban, *Progne cryptoleuca*

Gray-breasted, *Progne chalybea*

House (see House-Martin)

Purple, *Progne subis*

Meadowlark:

Eastern, *Sturnella magna*

Western, *Sturnella neglecta*

Merganser (see DUCKS)

Merlin, *Falco columbarius*

Mockingbird, Northern, *Mimus polyglottos*

Moorhen, Common, *Gallinula chloropus*

Murre:

Common, *Uria aalge*

Thick-billed, *Uria lomvia*

Murrelet:

Ancient, *Synthliboramphus antiquus*

Craveri's, *Synthliboramphus craveri*

Kittlitz's, *Brachyramphus brevirostris*

Marbled, *Brachyramphus marmoratus*

Xantus', *Synthliboramphus hypoleucus*

Needletail, White-throated, *Hirundapus caudacutus*

Night-Heron:

Black-crowned, *Nycticorax nycticorax*

Japanese, *Nycticorax goisagi*

Malay, *Nycticorax melanolophus*

Yellow-crowned, *Nycticorax violaceus*

Nighthawk:

Antillean, *Chordeiles gundlachii*

Common, *Chordeiles minor*

Lesser, *Chordeiles acutipennis*

Nightjar:

Buff-collared, *Caprimulgus ridgwayi*

Jungle, *Caprimulgus indicus*

Puerto Rican, *Caprimulgus noctitherus*

Noddy:

Black, *Anous minutus*

Blue-gray, *Procelsterna cerulea*

Brown, *Anous stolidus*

Lesser, *Anous tenuirostris*

Nutcracker, Clark's, *Nucifraga columbiana*

Nuthatch:

Brown-headed, *Sitta pusilla*

Pygmy, *Sitta pygmaea*

Red-breasted, *Sitta canadensis*

White-breasted, *Sitta carolinensis*

Oldsquaw (see DUC KS)

Oriole:

Altamira, *Icterus gu laris*

Audubon's, *Icterus gadiuacauda*

Black-cowled, *Icterus dominicensis*

Black-vented, *Icterus wagleri*

Hooded, *Icterus cucullatus*

Northern, *Icterus galbula*

Orchard, *Icterus spurius*

Scott's, *Icterus parisorum*

Streak-backed, *Icterus pustulanus*

Osprey, *Pandion haliaetus*

Ovenbird, *Seiurus auroc apillus*

Owl:

Barn (see Barn-Owl)

Barred, *Strix varia*

Boreal, *Aegolius funereus*

Burrowing, *Athene cunicularia*

Elf, *Micrathene whitneyi*

Flammulated, *Onus flammeolus*

Great Gray, *Strix nebulosa*

Great Horned, *Bubo virginianus*

Hawk (see Hawk-Owl)

Long-eared, *Asio otus*

- Pygmy (see Pygmy-Owl)  
 Saw-whet (see Saw-Whet Owl)  
 Screech (see Screech-Owl)  
 Short-eared, *Asio flammeus*  
 Snowy, *Nyctea scandiaca*  
 Spotted, *Srix occidentalis*  
**Oystercatcher:**  
 American, *Haematopus polliatus*  
 Black, *Haematopus bachmani*  
**Parula:**  
 Northern, *Parula americana*  
 Tropical, *Parula pitayumi*  
 Pauraque, Common, *Nyctidromus albicollis*  
**Pelican:**  
 American White, *Pelecanus erythrorhynchos*  
 Brown, *Pelecanus occidentalis*  
**Petrel:**  
 Black-capped, *Pterodroma hesitata*  
 Bonin, *Pterodroma hypoleuca*  
 Bulwer's, *Bulweria bulwerii*  
 Cook's, *Pterodroma cookii*  
 Dark-rumped, *Pterodroma phaeopygia*  
 Herald, *Pterodroma arminjoniana*  
 Kermadec, *Pterodroma neglecta*  
 Mottled, *Pterodroma inexpectata*  
 Murphy's, *Pterodroma ultima*  
 Storm (see Storm-Petrel)  
 White-necked, *Pterodroma externa*  
**Pewee:**  
 Greater, *Contopus pertinax*  
 Lesser Antillean, *Contopus latirostris*  
 Wood (see Wood-Pewee)  
**Phainopepla, Phainopepla nitens**  
**Phalarope:**  
 Red, *Phalaropus fulicaria*  
 Red-necked, *Phalaropus lobatus*  
 Wilson's, *Phalaropus tricolor*  
**Phoebe:**  
 Black, *Sayornis nigricans*  
 Eastern, *Sayornis phoebe*  
 Say's, *Sayornis saya*  
**Pigeon:**  
 Band-tailed, *Columba fasciata*  
 Plain, *Columba inornata*  
 Red-billed, *Columba flavirostris*  
 Scaly naped, *Columba squamosa*  
 White-crowned, *Columba leucocephala*  
**Pintail (see DUCKS)**  
**Pipit:**  
 Pechora, *Anthus gustavi*  
 Red-throated, *Anthus cervinus*  
 Sprague's, *Anthus spragueii*  
 Tree (see Tree-Pipit)  
 Water, *Anthus spinoleta*  
**Plover:**  
 Black-bellied, *Pluvialis squatarola*  
 Common Ringed, *Charadrius hiaticula*  
 Golden (see Golden-Plover)  
 Great Sand, *Charadrius leschenaultii*  
 Little Ringed, *Charadrius dubius*  
 Mongolian, *Charadrius mongolus*  
 Mountain, *Charadrius montanus*  
 Piping, *Charadrius melodus*  
 Semipalmated, *Charadrius semipalmatus*  
 Snowy, *Charadrius alexandrinus*  
 Wilson's, *Charadrius wilsonia*  
 Pochard (see DUCKS)  
 Poorwill, Common, *Phalaenoptilus nuttallii*  
**Puffin:**  
 Atlantic, *Fratercula arctica*  
 Horned, *Fratercula corniculata*  
 Tufted, *Fratercula cirrhata*  
**Pygmy-Owl:**  
 Ferruginous, *Glaucidium brasilianum*  
 Northern, *Glaucidium gnoma*  
 Pyrrhuloxia, *Cardinalis sinuatus*  
**Quail-Dove:**  
 Bridled, *Geotrygon mystacea*  
 Key West, *Geotrygon chrysis*  
 Ruddy, *Geotrygon montana*  
**Rail:**  
 Black, *Laterallus jamaicensis*  
 Clapper, *Rallus longirostris*  
 King, *Rallus elegans*  
 Sora (see Sora)  
 Virginia, *Rallus limicola*  
 Yellow, *Coumnicops noveboracensis*  
**Raven:**  
 Chihuahuan, *Corvus cryptoleucus*  
 Common, *Corvus corax*  
 Razorbill, *Alca torda*  
 Redpoll (see DUCKS)  
**Redpoll:**  
 Common, *Carduelis flammea*  
 Hoary, *Carduelis hornemanni*  
 Redshank, Spotted, *Tringa erythropus*  
**Redstart:**  
 American, *Setophaga ruticilla*  
 Painted, *Myioborus picus*  
 Slaty-throated, *Myioborus miniatus*  
**Reed-Bunting:**  
 Common, *Emberiza schoeniculus*  
 Pallas', *Emberiza pallasii*  
**Roadrunner, Greater, Geococcyx californianus**  
**Robin:**  
 American, *Turdus migratorius*  
 Clay-colored, *Turdus grayi*  
 Rufous-backed, *Turdus rufopallianus*  
**Rosefinch, Common, Corpodacus erythrinus**  
**Rough-winged Swallow, Northern, Stelgidopteryx serripennis**  
**Rubythroat, Siberian, Luscinia calliope**  
**Ruff, Philomochus pugnax**  
**Sanderling, Calidris alba**  
**Sandpiper:**  
 Baird's, *Calidris bairdii*  
 Broad-billed, *Limicola falcinellus*  
 Buff-breasted, *Tryngites subruficollis*  
 Common, *Actitis hypoleucos*  
 Curlew, *Calidris ferruginea*  
 Least, *Calidris minutilla*  
 Marsh, *Tringa stagnatilis*  
 Pectoral, *Calidris melanotos*  
 Purple, *Calidris maritima*  
 Rock, *Calidris pilocnemis*  
 Semipalmated, *Calidris pusilla*  
 Sharp-tailed, *Calidris acuminata*  
 Solitary, *Tringa solitaria*  
 Spoonbill, *Eurynorthynchus pygmeus*  
 Spotted, *Actitis macularia*  
 Stilt, *Calidris himantopus*  
 Terek, *Xenus cinereus*  
 Upland, *Bartramia longicauda*  
 Western, *Calidris mauri*  
 White-rumped, *Calidris fuscicollis*  
 Wood, *Tringa glareola*  
**Sapsucker:**  
 Red-breasted, *Sphyrapicus ruber*  
 Williamson's, *Sphyrapicus thyroideus*  
 Yellow-bellied, *Sphyrapicus varius*  
 Saw-whet Owl, Northern, *Aegolius acadicus*  
**Scaup (see DUCKS)**  
**Scoter (see DUCKS)**  
**Screech-Owl:**  
 Eastern, *Otus asio*  
 Puerto Rican, *Otus nudipes*  
 Western, *Otus kennicottii*  
 Whiskered, *Otus trichopsis*  
 Sea-Eagle, Steller's, *Haliaeetus pelagicus*  
 Seedeater, White-collared, *Sporophila torqueola*  
**Shearwater:**  
 Audubon's, *Puffinus lherminieri*  
 Black-vented, *Puffinus opisthomelas*  
 Buller's, *Puffinus bulleri*  
 Christmas, *Puffinus nativitatis*  
 Cory's, *Calonectris diomedea*  
 Flesh-footed, *Puffinus carneipes*  
 Greater, *Puffinus gravis*  
 Little, *Puffinus assimilis*  
 Manx, *Puffinus puffinus*  
 Pink-footed, *Puffinus creatopus*  
 Short-tailed, *Puffinus tenuirostris*  
 Soot, *Puffinus griseus*  
 Townsend's, *Puffinus auricularis*  
 Wedge-tailed, *Puffinus pacificus*  
**Shoveler (see DUCKS)**  
**Shrike:**  
 Loggerhead, *Lanius ludovicianus*  
 Northern, *Lanius excubitor*  
 Siskin, Pine, *Carduelis pinus*  
 Skimmer, Black, *Rhynchops niger*  
**Skua:**  
 Great, *Catharacta skua*  
 South Polar, *Catharacta maccormicki*  
 Skylark, Eurasian, *Alauda arvensis*  
**Smew (see Ducks)**  
**Snipe:**  
 Common, *Callinago gallinago*  
 Jack, *Lymnocyptes millimus*  
 Pin-tailed, *Gallinago stenura*  
 Swinhoe's, *Gallinago megala*  
 Solitaire, Townsend's, *Myadestes townsendi*  
**Sora, Porzana carolina**  
**Sparrow:**  
 American Tree, *Spizella arborea*  
 Bachman's, *Aimophila aestivalis*

Jaird's, *Ammodramus bairdii*  
Black-chinned, *Spizella atrogularis*  
Black-throated, *Amphispiza bilineata*  
Botteri's, *Aimophila botteri*  
Brewer's, *Spizella breweri*  
Cassin's, *Aimophila cassinii*  
Chipping, *Spizella passerina*  
Clay-colored, *Spizella pallida*  
Field, *Spizella pusilla*  
Five-striped, *Amphispiza quinquestriata*  
Fox, *Passerella iliaca*  
Golden-crowned, *Zonotrichia atricapilla*  
Grasshopper, *Ammodramus savannarum*  
Harris', *Zonotrichia querula*  
Henslow's, *Ammodramus henslowii*  
Lark, *Chondestes grammacus*  
Le Conte's, *Ammodramus leconteii*  
Lincoln's, *Melospiza lincolni*  
Olive, *Arremonops rufivirgatus*  
Rufous-crowned, *Aimophila ruficeps*  
Rufous-winged, *Aimophila carpalis*  
Sage, *Amphispiza belli*  
Savannah, *Passerculus sandwichensis*  
Seaside, *Ammodramus maritimus*  
Sharp-tailed, *Ammodramus caudacutus*  
Song, *Melospiza melodia*  
Swamp, *Melospiza georgiana*  
Vesper, *Poocetes gramineus*  
White-crowned, *Zonotrichia leucophrys*  
White-throated, *Zonotrichia albicollis*  
Worthen's, *Spizella wortheni*  
Wrenbill, Roseate, *Ajaia ajaja*  
Starling:  
Ashy, *Sturnus cineraceus*  
Violet-backed, *Sturnus philippensis*  
Starthroat, Plain-capped, *Heliomaster constantii*  
Stilt, Black-necked, *Himantopus mexicanus*  
Stint:  
Little, *Calidris minuta*  
Long-toed, *Calidris subminuta*  
Rufous-necked, *Calidris ruficollis*  
Temminck's, *Calidris temminckii*  
Stork, Wood, *Mycteria americana*  
Storm-Petrel:  
Ashy, *Oceanodroma homochroa*  
Band-rumped, *Oceanodroma castro*  
Black, *Oceanodroma melania*  
Fork-tailed, *Oceanodroma furcata*  
Leach's, *Oceanodroma leucorhoa*  
Least, *Oceanodroma microsoma*  
Sooty, *Oceanodroma tristrami*  
Wedge-rumped, *Oceanodroma tethys*  
White-faced, *Pelagadroma marina*  
Wilson's, *Oceanites oceanicus*  
Surf-bird, *Aphriza virgata*  
Swallow:  
Bahama, *Tachycineta cyaneoviridis*  
Bank, *Riparia riparia*  
Barn, *Hirundo rustica*  
Cave, *Hirundo fulva*  
Cliff, *Hirundo pyrrhonota*  
Rough-winged (see Rough-winged Swallow)

Tree, *Tachycineta bicolor*  
Violet-green, *Tachycineta thalassina*  
Swan:  
Trumpeter, *Cygnus buccinator*  
Tundra, *Cygnus columbianus*  
Whooper, *Cygnus cygnus*  
Swift:  
Antillean Palm, *Tachornis phoenicobia*  
Black, *Cypseloides niger*  
Chimney, *Chaetura pelagica*  
Common, *Apus apus*  
Fork-tailed, *Apus pacificus*  
Needle-tailed (see Needle-tail)  
Vaux's, *Chaetura vauxi*  
White-collared, *Streptoprocne zonaris*  
White-throated, *Aeronautes saxatalis*  
Tanager:  
Hepatica, *Piranga flava*  
Puerto Rican, *Neospingus speculiferus*  
Scarlet, *Piranga divacea*  
Stripe-headed, *Spindalis zena*  
Summer, *Piranga rubra*  
Western, *Piranga ludoviciana*  
Tattler:  
Gray-tailed, *Heteroscelus brevipes*  
Wandering, *Heteroscelus incanus*  
Teal (see DUCKS)  
Tern:  
Aleutian, *Sterna aleu*  
Arctic, *Sterna paradisaea*  
Black, *Chlidonias niger*  
Black-naped, *Sterna sumatrana*  
Bridled, *Sterna anaethetus*  
Caspian, *Sterna caspia*  
Common, *Sterna hirundo*  
Elegant, *Sterna elegans*  
Forster's, *Sterna forsteri*  
Gray-backed, *Sterna lunata*  
Gull-billed, *Sterna nilotica*  
Least, *Sterna antillarum*  
Little, *Sterna albifrons*  
Roseate, *Sterna dougallii*  
Royal, *Sterna maxima*  
Sandwich, *Sterna sandvicensis*  
Sooty, *Sterna fuscata*  
White, *Gygis alba*  
White-winged, *Chlidonias leucopterus*  
Thrasher:  
Bendire's, *Taxostoma bendirei*  
Brown, *Taxostoma rufum*  
California, *Taxostoma redivivum*  
Crissal, *Taxostoma crissale*  
Curve-billed, *Taxostoma curvirostre*  
Le Conte's, *Taxostoma lecontei*  
Long-billed, *Taxostoma longirostre*  
Pearly-eyed, *Margarops fuscatus*  
Sage, *Oreoscoptes montanus*  
Thrush:  
Aztec, *Ridgwayia pinicola*  
Blue Rock, *Monticola solitarius*  
Dusky, *Turdus naumanni*  
Eye-browed, *Turdus obscurus*

Gray-cheeked, *Catharus minimus*  
Hawaiian, *Phaeornis obscurus*  
Hermit, *Catharus guttatus*  
Red-legged, *Turdus plumbeus*  
Small Kauai, *Phaeornis palmeri*  
Swainson's, *Catharus ustulatus*  
Varied, *Ixoreus naevius*  
Wood, *Hylocichla minima*  
Tit, Siberian, *Parus cinctus*  
Titmouse:  
Bridled, *Parus wollweberi*  
Plain, *Parus inornatus*  
Tufted, *Parus bicolor*  
Towhee:  
Abert's, *Pipilo aberti*  
Brown, *Pipilo fuscus*  
Green-tailed, *Pipilo chlorurus*  
Rufous-sided, *Pipilo erythrophthalmus*  
Tree-Pipit, Olive, *Anthus hodgsoni*  
Trogon:  
Eared, *Euptilotes neaxenus*  
Elegant, *Trogon elegans*  
Tropicbird:  
Red-billed, *Phaethon aethereus*  
Red-tailed, *Phaethon rubricauda*  
White-tailed, *Phaethon lepturus*  
Turnstone:  
Black, *Arenaria melanocephala*  
Ruddy, *Arenaria interpres*  
Veery, *Catharus fuscescens*  
Verdin, *Auriparus flaviceps*  
Violet-Ear, Green, *Colibri thalassinus*  
Vireo:  
Bell's, *Vireo bellii*  
Black-capped, *Vireo atricapillus*  
Black-whiskered, *Vireo altiloquus*  
Gray, *Vireo vicinior*  
Hutton's, *Vireo huttoni*  
Philadelphia, *Vireo philadelphicus*  
Puerto Rican, *Vireo lanimeri*  
Red-eyed, *Vireo olivaceus*  
Solitary, *Vireo solitarius*  
Warbling, *Vireo gilvus*  
White-eyed, *Vireo griseus*  
Yellow-throated, *Vireo flavifrons*  
Vulture:  
Black, *Coragyps atrax*  
Turkey, *Cathartes aura*  
Wagtail:  
Black-backed, *Motacilla lugens*  
Gray, *Motacilla cinerea*  
White, *Motacilla alba*  
Yellow, *Motacilla flava*  
Warbler:  
Adelaide's, *Dendroica adelaidae*  
Arctic, *Phylloscopus borealis*  
Bachman's, *Vermivora bachmanii*  
Bay-breasted, *Dendroica castanea*  
Black-and-white, *Mniotilta varia*  
Black-throated Blue, *Dendroica caerulescens*  
Black-throated Gray, *Dendroica nigrescens*  
Black-throated Green, *Dendroica virens*

Blackburnian, *Dendroica fusca*  
 Blackpoll, *Dendroica striata*  
 Blue-winged, *Vermivora pinus*  
 Canada, *Wilsonia canadensis*  
 Cape May, *Dendroica tigrina*  
 Cerulean, *Dendroica cerulea*  
 Chestnut-sided, *Dendroica pensylvanica*  
 Colima, *Vermivora crissalis*  
 Connecticut, *Oporornis agilis*  
 Elfin Woods, *Dendroica angelae*  
 Golden-cheeked, *Dendroica chrysoparia*  
 Golden-crowned, *Basileuterus culicivorus*  
 Golden-winged, *Vermivora chrysoptera*  
 Grace's, *Dendroica graciae*  
 Grasshopper (see Grasshopper-Warbler)  
 Hermit, *Dendroica occidentalis*  
 Hooded, *Wilsonia citrina*  
 Kentucky, *Oporornis formosus*  
 Kirtland's, *Dendroica kirtlandii*  
 Lucy's, *Vermivora luciae*  
 MacGillivray's, *Oporornis tolmiei*  
 Magnolia, *Dendroica magnolia*  
 Mourning, *Oporornis philadelphia*  
 Nashville, *Vermivora ruficapilla*  
 Olive, *Peucedramus taeniatus*  
 Orange-crowned, *Vermivora celata*  
 Palm, *Dendroica palmarum*  
 Parula (see Parula)  
 Pine, *Dendroica pinus*  
 Prairie, *Dendroica discolor*  
 Prothonotary, *Protonotaria citrea*  
 Red-faced, *Cardellina rubrifrons*  
 Rufous-capped, *Basileuterus rufifrons*  
 Swainson's, *Limnothlypis swainsonii*  
 Tennessee, *Vermivora peregrina*  
 Townsend's, *Dendroica townsendi*  
 Virginia's, *Vermivora virginiae*  
 Willow, *Phylloscopus trochilus*  
 Wilson's, *Wilsonia pusilla*  
 Worm-eating, *Helmitheros vermivorus*  
 Yellow, *Dendroica petechia*  
 Yellow-rumped, *Dendroica coronata*  
 Yellow-throated, *Dendroica dominica*  
 Waterthrush:  
 Louisiana, *Seiurus motacilla*  
 Northern, *Seiurus noveboracensis*  
 Waxwing:  
 Bohemian, *Bombicilla garrulus*  
 Cedar, *Bombicilla cedrorum*  
 Wheatear, Northern, *Oenanthe oenanthe*  
 Whimbrel, *Numenius phaeopus*  
 Whip-poor-will, *Caprimulgus vociferus*  
 Whistling-Duck (see DUCKS)  
 Wigeon (see DUCKS)  
 Willet, *Catoptrophorus semipalmatus*  
 Wood-Pewee:  
 Eastern, *Contopus virens*  
 Western, *Contopus sordidulus*  
 Woodcock:  
 American, *Scolopax minor*  
 Eurasian, *Scolopax rusticola*

Woodpecker:  
 Acorn, *Melanerpes formicivorus*  
 Black-backed, *Picoides arcticus*  
 Downy, *Picoides pubescens*  
 Gila, *Melanerpes uropygialis*  
 Golden-fronted, *Melanerpes aurifrons*  
 Hairy, *Picoides villosus*  
 Ivory-billed, *Campephilus principalis*  
 Ladder-backed, *Picoides scalaris*  
 Lewis', *Melanerpes lewis*  
 Nuttall's, *Picoides nuttalli*  
 Pileated, *Dryocopus pileatus*  
 Puerto Rican, *Melanerpes portoricensis*  
 Red-bellied, *Melanerpes carolinus*  
 Red-cockaded, *Picoides borealis*  
 Red-headed, *Melanerpes erythrocephalus*  
 Strickland's, *Picoides stricklandi*  
 Three-toed, *Picoides tridactylus*  
 White-headed, *Picoides albolarvatus*  
 Woodstar, Bahama, *Calliphlox evelynae*  
 Wren:  
 Bewick's, *Thryomanes bewickii*  
 Cactus, *Campylorhynchus brunneicapillus*  
 Canyon, *Catherpes mexicanus*  
 Carolina, *Thryothorus ludovicianus*  
 House, *Troglodytes aedon*  
 Marsh, *Cistothorus palustris*  
 Rock, *Salpinctes obsoletus*  
 Sedge, *Cistothorus platensis*  
 Winter, *Troglodytes troglodytes*  
 Wryneck, Eurasian, *Jynx torquilla*  
 Yellowlegs:  
 Greater, *Tringa melanoleuca*  
 Lesser, *Tringa flavipes*  
 Yellowthroat:  
 Common, *Geothlypis trichas*  
 Gray-crowned, *Geothlypis poliocephala*

## II. Taxonomic listing

### Order GAVIIFORMES

#### Family GAVIIDAE

*Gavia stellata*, Red-throated Loon  
*Gavia arctica*, Arctic Loon  
*Gavia immer*, Common Loon  
*Gavia adamsii*, Yellow-billed Loon

### Order PODICIPEDIFORMES

#### Family PODICIPEDIDAE

*Tachybaptus dominicus*, Least Grebe  
*Podilymbus podiceps*, Pied-billed Grebe  
*Podiceps auritus*, Horned Grebe  
*Podiceps grisegena*, Red-necked Grebe  
*Poëceps nigricollis*, Eared Grebe  
*Aechmophorus occidentalis*, Western Grebe

### Order PROCELLARIIFORMES

#### Family DIOMEDEIDAE

*Diomedea albatrus*, Short-tailed Albatross  
*Diomedea nigripes*, Black-footed Albatross  
*Diomedea immutabilis*, Laysan Albatross  
*Diomedea chlororhynchus*, Yellow-nosed Albatross

#### Family PROCELLARIIDAE

*Fulmarus glacialis*, Northern Fulmar  
*Pterodroma hosiata*, Black-capped Petrel  
*Pterodroma phaeopygia*, Dark-rumped Petrel  
*Pterodroma externa*, White-necked Petrel  
*Pterodroma inexpectata*, Mottled Petrel  
*Pterodroma ultima*, Murphy's Petrel  
*Pterodroma neglecta*, Kermadec Petrel  
*Pterodroma arminjoniana*, Herald Petrel  
*Pterodroma cookii*, Cook's Petrel  
*Pterodroma hypoleuca*, Bonin Petrel  
*Bulweria bulwerii*, Bulwer's Petrel  
*Calonecris diomedea*, Cory's Shearwater  
*Puffinus creatopus*, Pink-footed Shearwater  
*Puffinus carneipes*, Flesh-footed Shearwater  
*Puffinus gravis*, Greater Shearwater  
*Puffinus pacificus*, Wedge-tailed Shearwater  
*Puffinus bulleri*, Buller's Shearwater  
*Puffinus griseus*, Sooty Shearwater  
*Puffinus tenuirostris*, Short-tailed Shearwater  
*Puffinus nativitatis*, Christmas Shearwater  
*Puffinus puffinus*, Manx Shearwater  
*Puffinus opisthomelas*, Black-vented Shearwater  
*Puffinus auricularis*, Townsend's Shearwater  
*Puffinus assimilis*, Little Shearwater  
*Puffinus lherminieri*, Audubon's Shearwater

#### Family HYDROBATIDAE

*Oceanites oceanicus*, Wilson's Storm Petrel  
*Pelagodroma marina*, White-faced Storm-Petrel  
*Oceanodroma furcata*, Fork-tailed Storm-Petrel  
*Oceanodroma leucorhoa*, Leach's Storm-Petrel  
*Oceanodroma homochroa*, Ashy Storm-Petrel  
*Oceanodroma castro*, Band-rumped Storm-Petrel  
*Oceanodroma teihy*, Wedge-rumped Storm-Petrel  
*Oceanodroma melania*, Black Storm-Petrel  
*Oceanodroma tristrami*, Sooty Storm-Petrel  
*Oceanodroma microsoma*, Least Storm-Petrel

### Order PELECANIFORMES

#### Family PHAETHONTIDAE

*Phaethon lepturus*, White-tailed Tropicbird  
*Phaethon aethereus*, Red-billed Tropicbird  
*Phaethon rubricauda*, Red-tailed Tropicbird

#### Family SULIDAE

*Sula dactylatra*, Masked Booby  
*Sula nebouxi*, Blue-footed Booby

*leucogaster*, Brown Booby  
*Sula sula*, Red-footed Booby  
*Sula bassanus*, Northern Gannet

#### Family PELECANIDAE

*Pelecanus erythrorhynchos*, American White Pelican  
*Pelecanus occidentalis*, Brown Pelican

#### Family PHALACROCORACIDAE

*Phalacrocorax carbo*, Great Cormorant  
*Phalacrocorax auritus*, Double-crested Cormorant  
*Phalacrocorax olivaceus*, Olivaceous Cormorant  
*Phalacrocorax penicillatus*, Brandt's Cormorant  
*Phalacrocorax pelagicus*, Pelagic Cormorant  
*Phalacrocorax urile*, Red-faced Cormorant

#### Family ANHINGIDAE

*Anhinga anhinga*, Anhinga

#### Family FREGATIDAE

*Fregata magnificens*, Magnificent Frigatebird  
*Fregata minor*, Great Frigatebird  
*Fregata ariel*, Lesser Frigatebird

#### Order CICONIIFORMES

##### Family ARDEIDAE

*Arus lentiginosus*, American Bittern  
*Nycticorax exilis*, Least Bittern  
*Nycticorax sinensis*, Chinese Bittern  
*Nycticorax eurhythmus*, Schrenk's Bittern  
*Ardea herodias*, Great Blue Heron  
*Nasmerodius albus*, Great Egret  
*Egretta eulophotes*, Chinese Egret  
*Egretta sacra*, Pacific Reef Heron  
*Egretta intermedia*, Plumed Egret  
*Egretta thula*, Snowy Egret  
*Egretta caerulea*, Little Blue Heron  
*Egretta tricolor*, Tricolored Heron  
*Egretta rufescens*, Reddish Egret  
*Ardeola ibis*, Cattle Egret  
*Nycticorax nycticorax*, Black-crowned Night-Heron  
*Nycticorax melanolophus*, Malay Night-Heron  
*Nycticorax goisagi*, Japanese Night-Heron  
*Nycticorax violaceus*, Yellow-crowned Night-Heron

##### Family THRESKIORNITHIDAE

*Ardeotis albus*, White Ibis  
*Ardeotis ruber*, Scarlet Ibis  
*Ardeotis falcinellus*, Glossy Ibis  
*Ardeotis chihi*, White-faced Ibis  
*Ardeotis ajaaj*, Roseate Spoonbill

#### Family CICONIIDAE

*Jabiru nycticorax*, Jabiru  
*Nycticorax americana*, Wood Stork

#### Order PHOENICOPTERIFORMES

##### Family PHOENICOPTERIDAE

*Phoenicopterus ruber*, Greater Flamingo

#### Order ANSERIFORMES

##### Family ANATIDAE

*Dendrocygna bicolor*, Fulvous Whistling-Duck  
*Dendrocygna autumnalis*, Black-bellied Whistling-Duck  
*Dendrocygna arborea*, West Indian Whistling-Duck  
*Cygnus columbianus*, Tundra Swan  
*Cygnus cygnus*, Whooper Swan  
*Cygnus buccinator*, Trumpeter Swan  
*Anser fabalis*, Bean Goose  
*Anser albifrons*, Greater White-fronted Goose  
*Chen caerulescens*, Snow Goose  
*Chen rossii*, Ross' Goose  
*Chen canagica*, Emperor Goose  
*Branta bernicla*, Brant  
*Branta leucopsis*, Barnacle Goose  
*Branta canadensis*, Canada Goose  
*Nesochen sandvicensis*, Hawaiian Goose  
*Aix sponsa*, Wood Duck  
*Anas crecca*, Green-winged Teal  
*Anas formosa*, Baiikal Teal  
*Anas falcata*, Falcated Teal  
*Anas rubripes*, American Black Duck  
*Anas fulvigula*, Mottled Duck  
*Anas platyrhynchos*, Mallard  
*Anas wyvilliana*, Hawaiian Duck  
*Anas laysanensis*, Laysan Duck  
*Anas bahamensis*, White-checked Pintail  
*Anas acuta*, Northern Pintail  
*Anas querquedula*, Garganey  
*Anas discors*, Blue-winged Teal  
*Anas cyanoptera*, Cinnamon Teal  
*Anas clypeata*, Northern Shoveler  
*Anas strepera*, Gadwall  
*Anas penelope*, Eurasian Wigeon  
*Anas americana*, American Wigeon  
*Aythya ferina*, Common Pochard  
*Aythya valisineria*, Canvasback  
*Aythya americana*, Redhead  
*Aythya baeri*, Baer's Pochard  
*Aythya collaris*, Ring-necked Duck  
*Aythya fuligula*, Tufted Duck  
*Aythya marila*, Greater Scaup  
*Aythya affinis*, Lesser Scaup  
*Somateria mollissima*, Common Eider  
*Somateria spectabilis*, King Eider  
*Somateria fischeri*, Spectacled Eider  
*Polysticcia stelleri*, Steller's Eider  
*Histrionicus histrionicus*, Harlequin Duck

*Clangula hyemalis*, Oldsquaw  
*Melanitta nigra*, Black Scoter  
*Melanitta perspicillata*, Surf Scoter  
*Melanitta fusca*, White-winged Scoter  
*Bucephala clangula*, Common Goldeneye  
*Bucephala islandica*, Barrow's Goldeneye  
*Bucephala albeola*, Bufflehead  
*Mergellus albellus*, Smew  
*Lophodytes cucullatus*, Hooded Merganser  
*Mergus merganser*, Common Merganser  
*Mergus serrator*, Red-breasted Merganser  
*Oxyura jamaicensis*, Ruddy Duck  
*Oxyura dominica*, Masked Duck

#### Order FALCONIFORMES

##### Family CATHARTIDAE

*Coragyps aratus*, Black Vulture  
*Cathartes aura*, Turkey Vulture  
*Gymnogyps californianus*, California Condor

##### Family ACCIPITRIDAE

*Pandion haliaetus*, Osprey  
*Chondrohierax uncinatus*, Hook-billed Kite  
*Elanoides forficatus*, American Swallow-tailed Kite  
*Elanus caeruleus*, Black-shouldered Kite  
*Rostrhamus sociabilis*, Snail Kite  
*Ictinia mississippiensis*, Mississippi Kite  
*Milvus migrans*, Black Kite  
*Haliaeetus leucocephalus*, Bald Eagle  
*Haliaeetus albicilla*, White-tailed Eagle  
*Haliaeetus pelagicus*, Steller's Sea-Eagle  
*Circus cyaneus*, Northern Harrier  
*Accipiter gularis*, Asiatic Sparrow Hawk  
*Accipiter striatus*, Sharp-shinned Hawk  
*Accipiter cooperii*, Cooper's Hawk  
*Accipiter gentilis*, Northern Goshawk  
*Buteogallus anthracinus*, Common Black-Hawk  
*Parabuteo unicinctus*, Harris' Hawk  
*Buteo nitidus*, Gray Hawk  
*Buteo lineatus*, Red-shouldered Hawk  
*Buteo platypterus*, Broad-winged Hawk  
*Buteo brachyurus*, Short-tailed Hawk  
*Buteo swainsoni*, Swainson's Hawk  
*Buteo albicaudatus*, White-tailed Hawk  
*Buteo albonotatus*, Zone-tailed Hawk  
*Buteo solitarius*, Hawaiian Hawk  
*Buteo jamaicensis*, Red-tailed Hawk  
*Buteo regalis*, Ferruginous Hawk  
*Buteo lagopus*, Rough-legged Hawk  
*Aquila chrysaetos*, Golden Eagle

##### Family FALCONIDAE

*Polyborus plancus*, Crested Caracara  
*Falco tinnunculus*, Eurasian Kestrel  
*Falco sparverius*, American Kestrel  
*Falco columbarius*, Merlin  
*Falco femoralis*, Aplomado Falcon  
*Falco peregrinus*, Peregrine Falcon

*Falco rusticolus*, Gyrfalcon  
*Falco mexicanus*, Prairie Falcon

Order GRUIFORMES

Family RALLIDAE

*Coturnicops noveboracensis*, Yellow Rail  
*Laterallus jamaicensis*, Black Rail  
*Crex crex*, Corn Crake  
*Rallus longirostris*, Clapper Rail  
*Rallus elegans*, King Rail  
*Rallus limicola*, Virginia Rail  
*Porzana carolina*, Sora  
*Porzana flaviventer*, Yellow-breasted Crake  
*Porphyryla martinica*, Purple Gallinule  
*Gallinula chloropus*, Common Moorhen  
*Fulica atra*, Eurasian Coot  
*Fulica americana*, American Coot  
*Fulica caribaea*, Caribbean Coot

Family ARAMIDAE

*Aramus guarana*, Limpkin

Family GRUIDAE

*Grus canadensis*, Sandhill Crane  
*Grus grus*, Common Crane  
*Grus americana*, Whooping Crane

Order CHARADRIIFORMES

Family CHARADRIIDAE

*Vanellus vanellus*, Northern Lapwing  
*Pluvialis squatarola*, Black-bellied Plover  
*Pluvialis dominica*, Lesser Golden-Plover  
*Charadrius mongolus*, Mongolian Plover  
*Charadrius leschenaultii*, Great Sand Plover  
*Charadrius alexandrinus*, Snowy Plover  
*Charadrius wilsonia*, Wilson's Plover  
*Charadrius hiaticula*, Common Ringed Plover  
*Charadrius semipalmatus*, Semipalmated Plover  
*Charadrius melodus*, Piping Plover  
*Charadrius dubius*, Little Ringed Plover  
*Charadrius vociferus*, Killdeer  
*Charadrius montanus*, Mountain Plover  
*Charadrius morinellus*, Eurasian Dotterel

Family HAEMATOPODIDAE

*Haematopus palliatus*, American Oystercatcher  
*Haematopus bachmani*, Black Oystercatcher

Family RECURVITROSTRIDAE

*Himantopus mexicanus*, Black-necked stilt  
*Recurvirostra americana*, American Avocet

Family JACANIDAE

*Jacana spinosa*, Northern Jacana

Family, SCOLOPACIDAE

*Tringa nebularia*, Common Greenshank  
*Tringa melanoleuca*, Greater Yellowlegs  
*Tringa flavipes*, Lesser Yellowlegs  
*Tringa stagnanilis*, Marsh Sandpiper  
*Tringa erythropus*, Spotted Redshank  
*Tringa glareola*, Wood Sandpiper  
*Tringa solitaria*, Solitary Sandpiper  
*Catoptrophorus semipalmatus*, Willet  
*Heteroscelus incanus*, Wandering Tattler  
*Heteroscelus brevipes*, Gray-tailed Tattler  
*Actitis hypoleucos*, Common Sandpiper  
*Actitis macularia*, Spotted Sandpiper  
*Xenus cinereus*, Terek Sandpiper  
*Barramia longicauda*, Upland Sandpiper  
*Numenius minutus*, Least Curlew  
*Numenius borealis*, Eskimo Curlew  
*Numenius phaeopus*, Whimbrel  
*Numenius tahitiensis*, Bristle-thighed Curlew  
*Numenius madagascariensis*, Far Eastern Curlew  
*Numenius americanus*, Long-billed Curlew  
*Limosa limosa*, Black-tailed Godwit  
*Limosa haemastica*, Hudsonian Godwit  
*Limosa lapponica*, Bar-tailed Godwit  
*Limosa fedoa*, Marbled Godwit  
*Arenaria interpres*, Ruddy Turnstone  
*Arenaria melanocephala*, Black Turnstone  
*Aphriza virgata*, Surfbird  
*Calidris tenuirostris*, Great Knot  
*Calidris canutus*, Red Knot  
*Calidris alba*, Sanderling  
*Calidris pusilla*, Semipalmated Sandpiper  
*Calidris mauri*, Western Sandpiper  
*Calidris ruficollis*, Rufous-necked Stint  
*Calidris minuta*, Little Stint  
*Calidris temminckii*, Temminck's Stint  
*Calidris subminuta*, Long-toed Stint  
*Calidris minutilla*, Least Sandpiper  
*Calidris fuscicollis*, White-rumped Sandpiper  
*Calidris bairdii*, Baird's Sandpiper  
*Calidris melanotos*, Pectoral Sandpiper  
*Calidris acuminata*, Sharp-tailed Sandpiper  
*Calidris maritima*, Purple Sandpiper  
*Calidris pilocnemis*, Rock Sandpiper  
*Calidris alpina*, Dunlin  
*Calidris ferruginea*, Curlew Sandpiper  
*Calidris himantopus*, Stilt Sandpiper  
*Eurynorhynchus pygmeus*, Spoonbill Sandpiper  
*Limicola falcinellus*, Broad-billed Sandpiper  
*Tryngites subruficollis*, Buff-breasted Sandpiper  
*Philomachus pugnax*, Ruff  
*Limnodromus griseus*, Short-billed Dowitcher  
*Limnodromus scolopaceus*, Long-billed Dowitcher  
*Limnocyrtus minimus*, Jack Snipe  
*Gallinago gallinago*, Common Snipe  
*Gallinago stenura*, Pin-tailed Snipe  
*Gallinago megala*, Swinhoe's Snipe

*Scolopax rusticola*, Eurasian Woodcock  
*Scolopax minor*, American Woodcock  
*Phalaropus tricolor*, Wilson's Phalarope  
*Phalaropus lobatus*, Red-necked Phalarope  
*Phalaropus fulicaria*, Red Phalarope

Family LARIDAE

*Stercorarius pomarinus*, Pomarine Jaeger  
*Stercorarius parasiticus*, Parasitic Jaeger  
*Stercorarius longicaudus*, Long-tailed Jaeger  
*Catharacta skua*, Great Skua  
*Catharacta maccormicki*, South Polar Skua  
*Larus arcticus*, Laughing Gull  
*Larus pipixcan*, Franklin's Gull  
*Larus minutus*, Little Gull  
*Larus ridibundus*, Common Blackheaded Gull  
*Larus philadelphia*, Bonaparte's Gull  
*Larus heermanni*, Heermann's Gull  
*Larus canus*, Mew Gull  
*Larus delawarensis*, Ring-billed Gull  
*Larus californicus*, California Gull  
*Larus argentatus*, Herring Gull  
*Larus thayeri*, Thayer's Gull  
*Larus glaucoides*, Iceland Gull  
*Larus fuscus*, Lesser Black-backed Gull  
*Larus schistisagus*, Slaty-backed Gull  
*Larus livens*, Yellow-footed Gull  
*Larus occidentalis*, Western Gull  
*Larus glaucescens*, Glaucous-winged Gull  
*Larus hyperboreus*, Glaucous Gull  
*Larus marinus*, Great Black-backed Gull  
*Rissa tridactyla*, Black-legged Kittiwake  
*Rissa brevirostris*, Red-legged Kittiwake  
*Rhodostethia rosea*, Ross' Gull  
*Xema sabini*, Sabine's Gull  
*Pagophila eburnea*, Ivory Gull  
*Sterna nilotica*, Gull-billed Tern  
*Sterna caspia*, Caspian Tern  
*Sterna maxima*, Royal Tern  
*Sterna elegans*, Elegant Tern  
*Sterna sandvicensis*, Sandwich Tern  
*Sterna dougallii*, Roseate Tern  
*Sterna hirundo*, Common Tern  
*Sterna paradisaea*, Arctic Tern  
*Sterna aleutica*, Aleutian Tern  
*Sterna forsteri*, Forster's Tern  
*Sterna antillarum*, Least Tern  
*Sterna albifrons*, Little Tern  
*Sterna sumatrana*, Black-naped Tern  
*Sterna lunata*, Gray-backed Tern  
*Sterna anaethetus*, Bridled Tern  
*Sterna fuscata*, Sooty Tern  
*Chlidonias leucopterus*, White-winged Tern  
*Chlidonias niger*, Black Tern  
*Anous stolidus*, Brown Noddy  
*Anous minutus*, Black Noddy  
*Anous tenuirostris*, Lesser Noddy  
*Procelsterna cerulea*, Blue-Gray Noddy  
*Gygis alba*, White Tern  
*Rynchops niger*, Black Skimmer



## ily ALCIDAE

*Leucophaea* alle, Dovekie  
*Uria lomvia* aalge, Common Murre  
*Uria lomvia*, Thick-billed Murre  
*Alca torda*, Razorbill  
*Cephus grylle*, Black Guillemot  
*Cephus columba*, Pigeon Guillemot  
*Brachyramphus marmoratus*, Marbled Murrelet  
*Brachyramphus brevirostris*, Kittlitz's Murrelet  
*Synthliboramphus hypoleucus*, Xantus' Murrelet  
*Synthliboramphus craveni*, Craveri's Murrelet  
*Synthliboramphus antiquus*, Ancient Murrelet  
*Pycorhamphus aleuticus*, Cassin's Auklet  
*Cyclorhynchus psittacula*, Parakeet Auklet  
*Aethia pusilla*, Least Auklet  
*Aethia pygmaea*, Whiskered Auklet  
*Aethia cristatella*, Crested Auklet  
*Cerorhinca monocerata*, Rhinoceros Auklet  
*Fratercula cirrhata*, Tufted Puffin  
*Fratercula arctica*, Atlantic Puffin  
*Fratercula corniculata*, Horned Puffin

## Order COLUMBIFORMES

### Family COLUMBIDAE

*Columba squamosa*, Scaly-naped Pigeon  
*Columba leucocephala*, White-crowned Pigeon  
*Columba flavirostris*, Red-billed Pigeon  
*Columba inornata*, Plain Pigeon  
*Columba fasciata*, Band-tailed Pigeon  
*Zenaidura macroura*, White-winged Dove  
*Zenaidura macroura*, Zenaidura Dove  
*Zenaidura macroura*, Mourning Dove  
*Columbina inca*, Inca Dove  
*Columbina passerina*, Common Ground-Dove  
*Columbina talpacoti*, Ruddy Ground-Dove  
*Coturnix coturnix*, White-tipped Dove  
*Coturnix coturnix*, Key West Quail-Dove  
*Coturnix coturnix*, Bridled Quail-Dove  
*Coturnix montana*, Ruddy Quail-Dove

## Order CUCULIFORMES

### Family CUCULIDAE

*Cuculus canorus*, Common Cuckoo  
*Cuculus saturatus*, Oriental Cuckoo  
*Cuculus fugax*, Hodgson's Hawk-Cuckoo  
*Coccyzus erythrophthalmus*, Black-billed Cuckoo  
*Coccyzus americanus*, Yellow-billed Cuckoo  
*Coccyzus minor*, Mangrove Cuckoo  
*Coccyzus californianus*, Greater Roadrunner  
*urothera vieilloti*, Puerto Rican Lizard-Cuckoo  
*otophaga ani*, Smooth-billed Ani  
*otophaga sulcirostris*, Groove-billed Ani

## Order STRIGIFORMES

### Family TYTONIDAE

*Tyto alba*, Common Barn-Owl

### Family STRIGIDAE

*Otus flammeolus*, Flammulated Owl  
*Otus asio*, Eastern Screech-Owl  
*Otus kennicottii*, Western Screech-Owl  
*Otus trichopsis*, Whiskered Screech-Owl  
*Otus nudipes*, Puerto Rican Screech-Owl  
*Bubo virginianus*, Great Horned Owl  
*Nyctea scandiaca*, Snowy Owl  
*Surnia ulula*, Northern Hawk-Owl  
*Glaucidium gnoma*, Northern Pygmy Owl  
*Glaucidium brasilianum*, Ferruginous Pygmy Owl  
*Micrathene wheineyi*, Elf Owl  
*Athene cunicularia*, Burrowing Owl  
*Strix occidentalis*, Spotted Owl  
*Strix varia*, Barred Owl  
*Strix nebulosa*, Great Gray Owl  
*Asio otus*, Long-eared Owl  
*Asio flammeus*, Short-eared Owl  
*Aegolius funereus*, Boreal Owl  
*Aegolius acadicus*, Northern Saw-whet Owl

## Order CAPRIMULGIFORMES

### Family CAPRIMULGIDAE

*Chordeiles acutipennis*, Lesser Nighthawk  
*Chordeiles minor*, Common Nighthawk  
*Chordeiles gundlachi*, Antillean Nighthawk  
*Nyctidromus albicollis*, Common Pauraque  
*Phalaenoptilus nuttallii*, Common Poorwill  
*Caprimulgus carolinensis*, Chuck-will's-widow  
*Caprimulgus ridgwayi*, Buff-collared Nightjar  
*Caprimulgus vociferus*, Whip-poor-will  
*Caprimulgus noctitherus*, Puerto Rican Nightjar  
*Caprimulgus indicus*, Jungle Nightjar

## Order APODIFORMES

### Family APODIDAE

*Cypseloides niger*, Black Swift  
*Streptoprocne zonaris*, White-collared Swift  
*Chaetura pelagica*, Chimney Swift  
*Chaetura vauxi*, Vaux's Swift  
*Hirundapus caudacutus*, White-throated Needletail  
*Apus apus*, Common Swift  
*Apus pacificus*, Fork-tailed Swift  
*Aeronautes saxatalis*, White-throated Swift  
*Tachornis phoenicobia*, Antillean Palm Swift

### Family TROCHILIDAE

*Colibri thalassinus*, Green Violet-ear  
*Anthracothorax dominicus*, Antillean Mango

*Anthracothorax viridis*, Green Mango  
*Eulampis holosericeus*, Green-throated Carib  
*Orthorhynchus cristatus*, Antillean Crested Hummingbird  
*Chlorostilbon maugaeus*, Puerto Rican Emerald  
*Cyanthus latirostris*, Broad-billed Hummingbird  
*Flycocharis leucotis*, White-eared Hummingbird  
*Amazilia beryllina*, Berylline Hummingbird  
*Amazilia yucatanensis*, Buff-bellied Hummingbird  
*Amazilia violiceps*, Violet-crowned Hummingbird  
*Lampornis clemenciae*, Blue-throated Hummingbird  
*Eugenes fulgens*, Magnificent  
*Heliomaster constantii*, Plain-capped Starthroat  
*Calliphlox evelynae*, Bahama Woodstar  
*Calothorax lucifer*, Lucifer Hummingbird  
*Archilochus colubris*, Ruby-throated Hummingbird  
*Archilochus alexandri*, Black-chinned Hummingbird  
*Calypte anna*, Anna's Hummingbird  
*Calypte costae*, Costa's Hummingbird  
*Stellula calliope*, Calliope Hummingbird  
*Selasphorus playtercerus*, Broad-tailed Hummingbird  
*Selasphorus rufus*, Rufous Hummingbird  
*Selasphorus sasin*, Allen's Hummingbird

## Order TROGONIFORMES

### Family TROGONIDAE

*Trogon elegans*, Elegant Trogon  
*Euphonia neaxenus*, Eared Trogon

## Order CORACIIFORMES

### Family UPUPIDAE

*Upupa epops*, Hoopoe

## Family ALCEDINIDAE

*Ceryle torquata*, Ringed Kingfisher  
*Ceryle alcyon*, Belted Kingfisher  
*Chloroceryle americana*, Green Kingfisher

## Order PICIFORMES

### Family PICIDAE

*Jynx torquilla*, Eurasian Wryneck  
*Melanerpes lewis*, Lewis' Woodpecker  
*Melanerpes erythrocephalus*, Red-headed Woodpecker  
*Melanerpes formicivorus*, Acorn Woodpecker  
*Melanerpes uropygialis*, Gila Woodpecker  
*Melanerpes aurifrons*, Golden-fronted Woodpecker  
*Melanerpes carolinus*, Red-bellied Woodpecker  
*Melanerpes portoricensis*, Puerto Rican Woodpecker  
*Sphyrapicus varius*, Yellow-bellied Sapsucker  
*Sphyrapicus ruber*, Red-breasted Sapsucker  
*Sphyrapicus thyroideus*, Williamson's Sapsucker  
*Picoides scalaris*, Ladder-Backed Woodpecker  
*Picoides nuttallii*, Nuttall's Woodpecker

*Picoides pubescens*, Downy Woodpecker  
*Picoides villosus*, Hairy Woodpecker  
*Picoides stricklandi*, Strickland's Woodpecker  
*Picoides borealis*, Red-cockaded Woodpecker  
*Picoides albolarvatus*, White-headed Woodpecker  
*Picoides tridactylus*, Three-toed Woodpecker  
*Picoides arcicus*, Black-backed Woodpecker  
*Colaptes auratus*, Northern Flicker  
*Dryocopus pileatus*, Pileated Woodpecker  
*Campephilus principalis*, Ivory-billed Woodpecker  
Order PASSERIFORMES

#### Family TYRANNIDAE

*Elaenia martinica*, Caribbean Elaenia  
*Campyostoma imberbe*, Northern  
Beardless-Tyrannulet  
*Contopus borealis*, Olive-sided Flycatcher  
*Contopus pertinax*, Greater Pewee  
*Contopus sordidulus*, Western Wood-Pewee  
*Contopus virens*, Eastern Wood Pewee  
*Contopus latirostris*, Lesser Antillean Pewee  
*Empidonax flaviventris*, Yellow-bellied Flycatcher  
*Empidonax virescens*, Acadian Flycatcher  
*Empidonax alnorum*, Alder Flycatcher  
*Empidonax traillii*, Willow Flycatcher  
*Empidonax minimus*, Least Flycatcher  
*Empidonax hammondi*, Hammond's Flycatcher  
*Empidonax oberholseri*, Dusky Flycatcher  
*Empidonax wrightii*, Gray Flycatcher  
*Empidonax difficilis*, Western Flycatcher  
*Empidonax fulvifrons*, Buff-breasted Flycatcher  
*Sayornis nigricans*, Black Phoebe  
*Sayornis phoebe*, Eastern Phoebe  
*Sayornis saya*, Say's Phoebe  
*Pyrocephalus rubinus*, Vermilion Flycatcher  
*Myiarchus tuberculifer*, Dusky-capped Flycatcher  
*Myiarchus cinerascens*, Ash-throated Flycatcher  
*Myiarchus nuttingi*, Nutting's Flycatcher  
*Myiarchus crinitus*, Great Crested Flycatcher  
*Myiarchus tyrannulus*, Brown-crested Flycatcher  
*Myiarchus antillarum*, Puerto Rican Flycatcher  
*Pitangus sulphuratus*, Great Kiskadee  
*Myiodynastes luteiventris*, Sulpher-bellied Flycatcher  
*Tyrannus melancholicus*, Tropical Kingbird  
*Tyrannus couchii*, Couch's Kingbird  
*Tyrannus vociferans*, Cassin's Kingbird  
*Tyrannus crassirostris*, Thick-billed Kingbird  
*Tyrannus verticalis*, Western Kingbird  
*Tyrannus tyrannus*, Eastern Kingbird  
*Tyrannus dominicensis*, Gray Kingbird  
*Tyrannus caudifasciatus*, Loggerhead Kingbird  
*Tyrannus forficatus*, Scissor-tailed Flycatcher  
*Tyrannus savana*, Fork-tailed Flycatcher  
*Pachyrhamphus nglaiiae*, Rose-throated Becard

#### Family ALAUDIDAE

*Alauda arvensis*, Eurasian Skylark  
*Eremophila alpestris*, Horned Lark

#### Family HIRUNDINIDAE

*Progne subis*, Purple Martin  
*Progne cryptoleuca*, Cuban Martin  
*Progne dominicensis*, Caribbean Martin  
*Progne chalybea*, Gray-breasted Martin  
*Tachycineta bicolor*, Tree Swallow  
*Tachycineta thalassina*, Violet-green Swallow  
*Tachycineta cyaneoviridis*, Bahama Swallow  
*Stelgidopteryx serripennis*, Northern Rough-winged Swallow  
*Riparia ripario*, Bank Swallow  
*Hirundo pyrrhonota*, Cliff Swallow  
*Hirundo fulva*, Cave Swallow  
*Hirundo rustica*, Barn Swallow  
*Delichon urbica*, Common House-Martin

#### Family CORVIDAE

*Perisoreus canadensis*, Gray Jay  
*Cyanocitta stelleri*, Steller's Jay  
*Cyanocitta cristata*, Blue Jay  
*Cyanocorax yncas*, Green Jay  
*Cyanocorax morio*, Brown Jay  
*Aphelocoma coerulescens*, Scrub Jay  
*Aphelocoma ultramarina*, Gray-breasted Jay  
*Gymnorhinus cyanocephalus*, Pinyon Jay  
*Nucifraga columbiana*, Clark's Nutcracker  
*Pica pica*, Black-billed Magpie  
*Pica nuttalli*, Yellow-billed Magpie  
*Corvus brachyrhynchos*, American Crow  
*Corvus caurinus*, Northwestern Crow  
*Corvus leucognathus*, White-necked Crow  
*Corvus imparanus*, Mexican Crow  
*Corvus ossifragus*, Fish Crow  
*Corvus hawaiiensis*, Hawaiian Crow  
*Corvus cryptoleucus*, Chihuahuan Raven  
*Corvus corax*, Common Raven

#### Family PARIDAE

*Parus atricapillus*, Black-capped Chickadee  
*Parus carolinensis*, Carolina Chickadee  
*Parus sclateri*, Mexican Chickadee  
*Parus gambeli*, Mountain Chickadee  
*Parus cinctus*, Siberian Tit  
*Parus hudsonicus*, Boreal Chickadee  
*Parus rufescens*, Chestnut-backed Chickadee  
*Parus wollweberi*, Bridled Titmouse  
*Parus inornatus*, Plain Titmouse  
*Parus bicolor*, Tufted Titmouse

#### Family REMIZIDAE

*Auriparus flaviceps*, Verdin

#### Family AEFTHALIDAE

*Psaltriparus minimus*, Bushtit

#### Family SITTIDAE

*Sitta canadensis*, Red-breasted Nuthatch  
*Sitta carolinensis*, White-breasted Nuthatch  
*Sitta pygmaea*, Pygmy Nuthatch  
*Sitta pusilla*, Brown-headed Nuthatch

#### Family CERTHIIDAE

*Certhia americana*, Brown Creeper

#### Family TROGLODYTIDAE

*Campylorhynchus brunneicapillus*, Cactus Wren  
*Salpinctes obsoletus*, Rock Wren  
*Catherpes mexicanus*, Canyon Wren  
*Thryothorus ludovicianus*, Carolina Wren  
*Thryomanes bewickii*, Bewick's Wren  
*Troglodytes aedon*, House Wren  
*Troglodytes troglodytes*, Winter Wren  
*Cistothorus platensis*, Sedge Wren  
*Cistothorus palustris*, Marsh Wren

#### Family CINCLIDAE

*Cinclus mexicanus*, American Dipper

#### Family MUSCICAPIDAE

##### Subfamily SYLVIINAE

*Locustella ochotensis*, Middendorff's Grasshopper-Warbler  
*Phylloscopus borealis*, Arctic Warbler  
*Phylloscopus trochilus*, Willow Warbler  
*Regulus satrapa*, Golden-crowned Kinglet  
*Regulus calendula*, Ruby-crowned Kinglet  
*Polioptila caerulea*, Blue-gray Gnatcatcher  
*Polioptila melanura*, Black-tailed Gnatcatcher  
*Polioptila nigriceps*, Black-capped Gnatcatcher

##### Subfamily MUSCICAPINAE

*Muscicapa griseisticta*, Gray-spotted Flycatcher  
*Muscicapa narcissina*, Narcissus Flycatcher

##### Subfamily TURDINAE

*Luscinia calliope*, Siberian Rubythroat  
*Luscinia svecica*, Bluethroat  
*Monticola solitarius*, Blue Rock Thrush  
*Oenanthe oenanthe*, Northern Wheatear  
*Sialis sialis*, Eastern Bluebird  
*Sialis mexicana*, Western Bluebird  
*Sialis currucoides*, Mountain Bluebird  
*Myadestes townsendi*, Townsend's Solitaire  
*Phaeornis obscurus*, Hawaiian Thrush  
*Phaeornis palmeri*, Small Kauai Thrush  
*Catharus fuscescens*, Veery  
*Catharus minimus*, Gray-checked Thrush  
*Catharus usulatus*, Swainson's Thrush  
*Catharus guttatus*, Hermit Thrush

*Trochilichtha mustelina*, Wood Thrush  
*Turdus plumbeus*, Red-legged Thrush  
*Turdus obscurus*, Eye-browed Thrush  
*Turdus naumanni*, Dusky Thrush  
*Turdus pilaris*, Fieldfare  
*Turdus grayi*, Clay-colored Robin  
*Turdus rufopalliatu*s, Rufous-backed Robin  
*Turdus migratorius*, American Robin  
*Icterus naevius*, Varied Thrush  
*Ridgwayia pinicola*, Aztec Thrush

#### Family MIMIDAE

*Dumetella carolinensis*, Gray Catbird  
*Mimus polyglottus*, Northern Mockingbird  
*Oreoscoptes montanus*, Sage Thrasher  
*Toxostoma rufum*, Brown Thrasher  
*Toxostoma longirostre*, Long-billed Thrasher  
*Toxostoma bendirei*, Bendire's Thrasher  
*Toxostoma curvirostre*, Curve-billed Thrasher  
*Toxostoma redivivum*, California Thrasher  
*Toxostoma crissale*, Crissal Thrasher  
*Toxostoma lecontei*, Le Conte's Thrasher  
*Margarops fuscatus*, Pearly-eyed Thrasher

#### Family PRUNELLIDAE

*Prunella montanella*, Siberian Accentor

#### Family MOTACILLIDAE

*Motacilla flava*, Yellow Wagtail  
*Motacilla cinerea*, Gray Wagtail  
*Motacilla alba*, White Wagtail  
*Motacilla lugens*, Black-backed Wagtail  
*Anthus hodgsoni*, Olive Tree-Pipit  
*Anthus gustavi*, Pechora Pipit  
*Anthus cervinus*, Red-throated Pipit  
*Anthus spinoletta*, Water Pipit  
*Anthus spragueii*, Sprague's Pipit

#### Family BOMBYCILLIDAE

*Bombycilla garrulus*, Bohemian Waxwing  
*Bombycilla cedrorum*, Cedar Waxwing

#### Family PITILOCONATIDAE

*Phainopepla nitens*, Phainopepla

#### Family LANIIDAE

*Lanius excubitor*, Northern Shrike  
*Lanius ludovicianus*, Loggerhead Shrike

#### Family STURNIDAE

*Sturnus philippensis*, Violet-backed Starling  
*Sturnus cineraceus*, Ashy Starling

#### Family VIREONIDAE

*Vireo griseus*, White-eyed Vireo  
*Vireo laniieri*, Puerto Rican Vireo  
*Vireo bellii*, Bells' Vireo  
*Vireo aricapillus*, Black-capped Vireo  
*Vireo vicinior*, Gray Vireo  
*Vireo solitarius*, Solitary Vireo  
*Vireo flavifrons*, Yellow-throated Vireo  
*Vireo huttoni*, Hutton's Vireo  
*Vireo gilvus*, Warbling Vireo  
*Vireo philadelphicus*, Philadelphia Vireo  
*Vireo olivaceus*, Red-eyed Vireo  
*Vireo altiloquus*, Black-whiskered Vireo

#### Family EMBERIZIDAE

##### Subfamily PARULINAE

*Vermivora bachmanii*, Bachman's Warbler  
*Vermivora pinus*, Blue-winged Warbler  
*Vermivora chrysoptera*, Golden-winged Warbler  
*Vermivora peregrina*, Tennessee Warbler  
*Vermivora celata*, Orange-crowned Warbler  
*Vermivora ruficapilla*, Nashville Warbler  
*Vermivora virginiae*, Virginia's Warbler  
*Vermivora crissalis*, Colima Warbler  
*Vermivora luciae*, Lucy's Warbler  
*Parula americana*, Northern Parula  
*Parula pitayumi*, Tropical Parula  
*Dendroica petechia*, Yellow Warbler  
*Dendroica pensylvanica*, Chestnut-sided Warbler  
*Dendroica magnolia*, Magnolia Warbler  
*Dendroica tigrina*, Cape May Warbler  
*Dendroica caerulescens*, Black-throated Blue Warbler  
*Dendroica coronata*, Yellow-rumped Warbler  
*Dendroica nigrescens*, Black-throated Gray Warbler  
*Dendroica townsendi*, Townsend's Warbler  
*Dendroica occidentalis*, Hermit Warbler  
*Dendroica virens*, Black-throated Green Warbler  
*Dendroica chrysoparia*, Golden-cheeked Warbler  
*Dendroica fusca*, Blackburnian Warbler  
*Dendroica dominica*, Yellow-throated Warbler  
*Dendroica graciae*, Grace's Warbler  
*Dendroica adelaidae*, Adelaide's Warbler  
*Dendroica pinus*, Pine Warbler  
*Dendroica kirtlandii*, Kirtland's Warbler  
*Dendroica discolor*, Prairie Warbler  
*Dendroica palmarum*, Palm Warbler  
*Dendroica castanea*, Bay-breasted Warbler  
*Dendroica smiata*, Blackpoll Warbler  
*Dendroica cerulea*, Cerulean Warbler  
*Dendroica angelae*, Elf-in Woods Warbler  
*Mniotilta varia*, Black-and-White Warbler  
*Setophaga ruticilla*, American Redstart  
*Protonotaria citrea*, Prothonotary Warbler  
*Helminthophila vermivorus*, Worm-eating Warbler  
*Limnothlypis swainsonii*, Swainson's Warbler  
*Seiurus aurocapillus*, Ovenbird  
*Seiurus noveboracensis*, Northern Waterthrush  
*Seiurus motacilla*, Louisiana Waterthrush

*Oporornis formosus*, Kentucky Warbler  
*Oporornis agilis*, Connecticut Warbler  
*Oporornis philadelphia*, Mourning Warbler  
*Oporornis tolmiei*, MacGillivray's Warbler  
*Geothlypis trichas*, Common Yellowthroat  
*Geothlypis poliocephala*, Gray-crowned Yellowthroat  
*Wilsonia citrina*, Hooded Warbler  
*Wilsonia pusilla*, Wilson's Warbler  
*Wilsonia canadensis*, Canada Warbler  
*Cardellina rubrifrons*, Red-faced Warbler  
*Myioborus pictus*, Painted Redstart  
*Myioborus miniatus*, Slaty-throated Redstart  
*Basileuterus culicivorus*, Golden-crowned Warbler  
*Basileuterus rufifrons*, Rufous-capped Warbler  
*Icteria virens*, Yellow-breasted Chat  
*Peucedramus taeniatus*, Olive Warbler

##### Subfamily THRAUPINAE

*Spindalis zena*, Stripe-headed Tanager  
*Neospingus speculariferus*, Puerto Rican Tanager  
*Piranga flava*, Hepatic Tanager  
*Piranga rubra*, Summer Tanager  
*Piranga olivacea*, Scarlet Tanager  
*Piranga ludoviciana*, Western Tanager  
*Euphonia musica*, Antillean Euphonia

##### Subfamily CARDINALINAE

*Rhodothraupis celaeno*, Crimson-collared Grosbeak  
*Cardinalis cardinalis*, Northern Cardinal  
*Cardinalis sinuatus*, Pyrrhuloxia  
*Pheucticus chrysopleurus*, Yellow Grosbeak  
*Pheucticus ludovicianus*, Rose-breasted Grosbeak  
*Pheucticus melanocephalus*, Black-headed Grosbeak  
*Guiraca caerulea*, Blue Grosbeak  
*Passerina amoena*, Lazuli Bunting  
*Passerina cyanea*, Indigo Bunting  
*Passerina versicolor*, Varied Bunting  
*Passerina ciris*, Painted Bunting  
*Spiza americana*, Dickcissel

##### Subfamily EMBERIZINAE

*Arremonops rufivirgatus*, Olive Sparrow  
*Pipilo chlorurus*, Green-tailed Towhee  
*Pipilo erythrophthalmus*, Rufous-sided Towhee  
*Pipilo fuscus*, Brown Towhee  
*Pipilo aberti*, Abert's Towhee  
*Sporophila torqueola*, White-collared Seedeater  
*Tiaris olivacea*, Yellow-faced Grassquit  
*Tiaris bicolor*, Black-faced Grassquit  
*Loxigilla portoricensis*, Puerto Rican Bullfinch  
*Aimophila aestivalis*, Bachman's Sparrow  
*Aimophila botteri*, Botteri's Sparrow  
*Aimophila cassinii*, Cassin's Sparrow  
*Aimophila carpalis*, Rufous-winged Sparrow  
*Aimophila ruficeps*, Rufous-crowned Sparrow  
*Spizella arborea*, American Tree Sparrow  
*Spizella passerina*, Chipping Sparrow  
*Spizella pallida*, Clay-colored Sparrow

*Spizella breweri*, Brewer's Sparrow  
*Spizella pusilla*, Field Sparrow  
*Spizella wortheni*, Worthen's Sparrow  
*Spizella atrogularis*, Black-chinned Sparrow  
*Pooecetes gramineus*, Vesper Sparrow  
*Chondestes grammacus*, Lark Sparrow  
*Amphispiza bilineata*, Black-throated Sparrow  
*Amphispiza belli*, Sage Sparrow  
*Amphispiza quinquestriata*, Five-striped Sparrow  
*Calamospiza melanocorys*, Lark Bunting  
*Passerculus sandwichensis*, Savannah Sparrow  
*Ammodramus bairdii*, Baird's Sparrow  
*Ammodramus savannarum*, Grasshopper Sparrow  
*Ammodramus henslowii*, Henslow's Sparrow  
*Ammodramus leconteii*, Le Conte's Sparrow  
*Ammodramus caudacutus*, Sharp-tailed Sparrow  
*Ammodramus marianus*, Seaside Sparrow  
*Passerella iliaca*, Fox Sparrow  
*Melospiza melodia*, Song Sparrow  
*Melospiza lincolni*, Lincoln's Sparrow  
*Melospiza georgiana*, Swamp Sparrow  
*Zonotrichia albicollis*, White-throated Sparrow  
*Zonotrichia atricapilla*, Golden-crowned Sparrow  
*Zonotrichia leucophrys*, White-crowned Sparrow  
*Zonotrichia querula*, Harris' Sparrow  
*Junco hyemalis*, Dark-eyed Junco  
*Junco phaeonotus*, Yellow-eyed Junco  
*Emberiza rustica*, Rustic Bunting  
*Emberiza pallasi*, Pallas' Reed-Bunting  
*Emberiza schoeniculus*, Common Reed-Bunting  
*Calcarius mccownii*, McCown's Longspur  
*Calcarius lapponicus*, Lapland Longspur  
*Calcarius picus*, Smith's Longspur  
*Calcarius ornatus*, Chestnut-collared Longspur  
*Plectrophenax nivalis*, Snow Bunting  
*Plectrophenax hyperboreus*, McKay's Bunting

**Subfamily ICTERINAE**

*Dolichonyx oryzivorus*, Bobolink  
*Agelaius phoeniceus*, Red-winged Blackbird  
*Agelaius tricolor*, Tricolored Blackbird  
*Agelaius humeralis*, Tawny-shouldered Blackbird  
*Agelaius xanthomus*, Yellow-shouldered Blackbird  
*Sturnella magna*, Eastern Meadowlark  
*Sturnella neglecta*, Western Meadowlark  
*Xanthocephalus xanthocephalus*, Yellow-headed Blackbird  
*Euphagus carolinus*, Rusty Blackbird  
*Euphagus cyanocephalus*, Brewer's Blackbird  
*Quiscalus mexicanus*, Great-tailed Grackle  
*Quiscalus major*, Boat-tailed Grackle  
*Quiscalus quiscula*, Common Grackle  
*Quiscalus niger*, Greater Antillean Grackle  
*Molothrus bonariensis*, Shiny Cowbird  
*Molothrus aeneus*, Bronzed Cowbird  
*Molothrus ater*, Brownheaded Cowbird  
*Icterus dominicensis*, Black-cowled Oriole  
*Icterus wagleri*, Black-vented Oriole  
*Icterus spurius*, Orchard Oriole  
*Icterus cucullatus*, Hooded Oriole  
*Icterus pusillatus*, Streak-backed Oriole

*Icterus gularis*, Altamira Oriole  
*Icterus graduacauda*, Audubon's Oriole  
*Icterus galbula*, Northern Oriole  
*Icterus parisorum*, Scott's Oriole

**Family FRINGILLIDAE**

**Subfamily FRINGILLINAE**

*Fringilla montifringilla*, Brambling

**Subfamily CARDUELINAE**

*Leucosticte arctoa*, Rosy Finch  
*Pinicola enucleator*, Pine Grosbeak  
*Carpodacus erythrinus*, Common Rosefinch  
*Carpodacus purpureus*, Purple Finch  
*Carpodacus cassinii*, Cassin's Finch  
*Carpodacus mexicanus*, House Finch  
*Loxia curvirostra*, Red Crossbill  
*Loxia leucoptera*, White-winged Crossbill  
*Carduelis flammea*, Common Redpoll  
*Carduelis hornemanni*, Hoary Redpoll  
*Carduelis pinus*, Pine Siskin  
*Carduelis psaltria*, Lesser Goldfinch  
*Carduelis lawrencei*, Lawrence's Goldfinch  
*Carduelis arvensis*, American Goldfinch  
*Carduelis sinica*, Oriental Greenfinch  
*Pyrrhula pyrrhula*, Eurasian Bullfinch  
*Coccothraustes vespertinus*, Evening Grosbeak  
*Coccothraustes coccothraustes*, Hawfinch

[50 FR 13710, April 5, 1985]

**Subpart C-Addresses**

**§ 10.21 Director.**

(a) Mail forwarded to the Director for law enforcement purposes should be addressed:

Chief, Division of Law Enforcement  
 U.S. Fish and Wildlife Service  
 P.O. Box 3247  
 Arlington, Virginia 22203-3247.

(b) Mail forwarded to the Director with reference to permits should be addressed:

Chief, Office of Management Authority  
 U.S. Fish and Wildlife Service  
 4401 North Fairfax Drive  
 Room 432  
 Arlington, Virginia 22203.

[55 FR 48851, Nov. 23, 1990]

**§ 10.22 Law Enforcement officers.**

Service law enforcement offices and their areas of responsibility follow. Mail should be addressed:

\*Assistant Regional Director  
 Division of Law Enforcement  
 U.S. Fish and Wildlife Service  
 (appropriate address below)\*:

**AREAS OF RESPONSIBILITY AND ADDRESSES**

California, Hawaii, Idaho, Nevada, Oregon, Washington, American Samoa, Guam, the Marshall Islands, Northern Mariana Islands, and the Trust Territory of the Pacific Islands (Region 1):

Eastside Federal Complex  
 911 N.E. 11th Avenue  
 Portland, OR 97232-4181  
 Telephone: (503) 231-6125.

Arizona, New Mexico, Oklahoma, and Texas (Region 2):

P.O. Box 329  
 Albuquerque, NM 87103  
 Telephone: (505) 766-2091.

Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin (Region 3):

P.O. Box 45  
 Federal Building, Fort Snelling  
 Twin Cities, MN 55111  
 Telephone: (612) 725-3530.

Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the Virgin Islands (Region 4):

P.O. Box 4839  
 Atlanta, GA 30302  
 Telephone: (404) 331-5872.

Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia (Region 5):

P.O. Box 129  
 New Town Branch  
 Boston, MA 02258  
 Telephone: (617) 965-2298.

Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming (Region 6):

P.O. Box 25486  
 Denver Federal Center  
 Denver, CO 80225  
 Telephone: (303) 236-7540.

aska (Region 7):

P.O. Box 92597  
Anchorage, AK 99509-2597  
Telephone: (907)786-3311.

Any foreign country (Washington Office):

P.O. Box 3247  
Arlington, VA 22203-3247  
Telephone: (703) 358-1949.

(Pub. L. 97-79, 95 Stat. 1072; 16 U.S.C. 3371-3378)  
[48 FR 1313, Jan. 12, 1983; 48 FR 37040, Aug. 16,  
1983, as amended at 49 FR 31291, Aug. 6, 1984; 51  
FR 23551, June 30, 1986; 53 FR 6649, March 2,  
1988; 55 FR 48851, Nov. 23, 1990]

**PART XIII - SUPPLEMENTARY INFORMATION**

**Section 2**

**Endangered and Threatened Wildlife and Plants**

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# Endangered and Threatened Wildlife and Plants

**50 CFR 17.11 & 17.12**

August 23, 1993



## Title 50—Wildlife and Fisheries

### PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

#### Subpart B—Lists

##### § 17.11 Endangered and threatened wildlife.

(a) The list in this section contains the names of all species of wildlife which have been determined by the Services to be Endangered or Threatened. It also contains the names of species of wildlife treated as Endangered or Threatened because they are sufficiently similar in appearance to Endangered or Threatened species (see § 17.50 *et seq.*).

(b) The columns entitled "Common Name," "Scientific Name," and "Vertebrate Population Where Endangered or Threatened" define the species of wildlife within the meaning of the Act. Thus, differently classified geographic populations of the same vertebrate subspecies or species shall be identified by their differing geographic boundaries, even though the other two columns are identical. The term "Entire" means that all populations throughout the present range of a vertebrate species are listed. Although common names are included, they cannot be relied upon for identification of any specimen, since they may vary greatly in local usage. The Services shall use the most recently accepted scientific name. In cases in which confusion might arise, a synonym(s) will be provided in parentheses. The Services shall rely to the extent practicable on the *International Code of Zoological Nomenclature*.

(c) In the "Status" column the following symbols are used: "E" for Endangered, "T" for Threatened, and "E [or T] (S/A)" for similarity of appearance species.

(d) The other data in the list are nonregulatory in nature and are provided for the information of the reader. In the annual revision and compilation of this title, the following information may be amended

without public notice: the spelling of species' names, historical range, footnotes, references to certain other applicable portions of this title, synonyms, and more current names. In any of these revised entries, neither the species, as defined in paragraph (b) of this section, nor its status may be changed without following the procedures of Part 424 of this title.

(e) The "historic range" indicates the known general distribution of the species or subspecies as reported in the current scientific literature. The present distribution may be greatly reduced from this historic range. This column does not imply any limitation on the application of the prohibitions in the Act or implementing rules. Such prohibitions apply to all individuals of the species, wherever found.

(f)(1) A footnote to the Federal Register publication(s) listing or reclassifying a species is indicated under the column "When listed." Footnote numbers to §§ 17.11 and 17.12 are in the same numerical sequence, since plants and animals may be listed in the same Federal Register document. That document, at least since 1973, includes a statement indicating the basis for the listing, as well as the effective date(s) of said listing.

(2) The "Special rules" and "Critical habitat" columns provide a cross reference to other sections in Parts 17, 222, 226, or 227. The "Special rules" column will also be used to cite the special rules that describe experimental populations and determine if they are essential or nonessential. Separate listing will be made for experimental populations, and the status column will include the following symbols: "XE" for an essential experimental population and "XN" for a nonessential experimental population. The term "NA" (not applicable) appearing in either of these two columns indicates that there are no special rules and/or critical habitat for that particular species. However, all other appropriate rules in Parts 17, 217 through 227, and 402 still apply to that species. In addition, there may be other rules in this title that relate to such wildlife, e.g., port-of-entry requirements. It is not intended

that the references in the "Special rules" column list all the regulations of the two Services which might apply to the species or to the regulations of other Federal agencies or State or local governments.

(g) The listing of a particular taxon includes all lower taxonomic units. For example, the genus *Hylobates* (gibbons) is listed as Endangered throughout its entire range (China, India, and SE Asia); consequently, all species, subspecies, and populations of that genus are considered listed as Endangered for the purposes of the Act. In 1978 (43 FR 6230-6233) the species *Haliaeetus leucocephalus* (bald eagle) was listed as Threatened in "USA (WA, OR, MN, WI, MI)" rather than its entire population; thus, all individuals of the bald eagle found in those five States are considered listed as Threatened for the purposes of the Act.

(h) The "List of Endangered and Threatened Wildlife" is provided below:

**Editorial Note:** This is a compilation and special reprint of 50 CFR 17.11 and 17.12 and is current as of the date shown on the cover. Minor changes and corrections to the October 1, 1991, compilation of 50 CFR have been incorporated in this printing, as well as all published final rules that have subsequently appeared in the Federal Register. Otherwise no entry in these lists has been significantly affected. This list has been prepared by the staff of the Division of Endangered Species, U.S. Fish and Wildlife Service, Washington, D.C. 20240. Readers are requested to advise the Service of any errors in this list. Copies are available from the Publication Unit, U.S. Fish and Wildlife Service, 130-WEBB, Washington, D.C. 20240.

**Special Reprint Symbols:** To aid readers in comparing this list with previous reprints and the last codification of Title 50, the Service has inserted symbols in front of certain entries. These symbols and their use are as follows:

+—entry has been added by a published rule; see the "When Listed" number for citation.

\*—entry has been amended by a published rule; see the last "When Listed" number for citation.

These symbols are not included in the annual codification and are being used here on a trial basis for the first time. User response will be monitored to see if this information will be included in future special reprints of these lists.



Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
<b>MAMMALS</b>							
Anoa, lowland	<i>Bubalus depressicornis</i> (=B. anoa depressicornis).	Indonesia	Entire	E	3	NA	NA
Anoa, mountain	<i>Bubalus quarlesi</i> (=B. anoa quarlesi)	.....do	.....do	E	15	NA	NA
Antelope, giant sable	<i>Hippotragus niger varians</i>	Angola	.....do	E	15	NA	NA
Argali	<i>Ovis ammon</i>	Afghanistan, China, India, Kazakhstan, Kyrgyzstan, Mongolia, Nepal, Pakistan, Russia, Tajikistan, Uzbekistan.	Entire except Kyrgyzstan, Mongolia, and Tajikistan.	E	15, 475	NA	NA
Do	.....do	.....do	Kyrgyzstan, Mongolia, and Tajikistan.	T	475	NA	17.40(j)
Armadillo, giant	<i>Priodontes maximus</i> (=giganteus)	Venezuela and Guyana to Argentina	Entire	E	15	NA	NA
Armadillo, pink fairy	<i>Chlamyphorus truncatus</i>	Argentina	.....do	E	3	NA	NA
Ass, African wild	<i>Equus asinus</i> (=africanus)	Somalia, Sudan, Ethiopia	Somalia, Sudan, Ethiopia.	E	3, 22	NA	NA
Ass, Asian wild (=kulan, onager)	<i>Equus hemionus</i>	Southwestern and Central Asia	Entire	E	3	NA	NA
Avahi	<i>Avahi</i> (=Lichanotus) laniger (=entire genus).	Malagasy Republic (=Madagascar)	.....do	E	3	NA	NA
Aye-aye	<i>Daubentonia madagascariensis</i>	.....do	.....do	E	3	NA	NA
Babirusa	<i>Babyrousa babyrousa</i>	Indonesia	.....do	E	15	NA	NA
Baboon, gelada	<i>Theropithecus gelada</i>	Ethiopia	.....do	T	16	NA	17.40(c)
Bandicoot, barred	<i>Perameles bougainville</i>	Australia	.....do	E	4	NA	NA
Bandicoot, desert	<i>Perameles eremiana</i>	.....do	.....do	E	6	NA	NA
Bandicoot, lesser rabbit	<i>Macrotis leucura</i>	.....do	.....do	E	4	NA	NA
Bandicoot, pig-footed	<i>Chaeropus ecaudatus</i>	.....do	.....do	E	4	NA	NA
Bandicoot, rabbit	<i>Macrotis lagotis</i>	.....do	.....do	E	4	NA	NA
Banteng	<i>Bos javanicus</i> (=banteng)	Southeast Asia	.....do	E	3	NA	NA
Bat, Bulmer's fruit (flying fox)	<i>Aproteles bulmerae</i>	Papua New Guinea	.....do	E	139	NA	NA
Bat, bumblebee	<i>Craseonycteris thonglongyai</i>	Thailand	.....do	E	139	NA	NA
Bat, gray	<i>Myotis grisescens</i>	Central and Southeastern U.S.A.	.....do	E	13	NA	NA
Bat, Hawaiian hoary	<i>Lasiurus cinereus semotus</i>	U.S.A. (HI)	.....do	E	2	NA	NA
Bat, Indiana	<i>Myotis sodalis</i>	Eastern and Midwestern U.S.A.	.....do	E	1	17.95(a)	NA
Bat, little Mariana fruit	<i>Pteropus tokudae</i>	Western Pacific Ocean: U.S.A. (Guam).	.....do	E	156	NA	NA
Bat, Mariana fruit	<i>Pteropus mariannus mariannus</i>	Western Pacific Ocean: U.S.A. (Guam, Rota, Tinian, Saipan, Agiguan).	Guam	E	156	NA	NA
Bat, Mexican long-nosed	<i>Leptonycteris nivalis</i>	U.S.A. (NM, TX), Mexico, Central America.	Entire	E	336	NA	NA
Bat, Ozark big-eared	<i>Plecotus townsendii ingens</i>	U.S.A. (MO, OK, AR)	.....do	E	85	NA	NA
Bat, Rodrigues fruit (flying fox)	<i>Pteropus rodricensis</i>	Indian Ocean: Rodrigues Island	.....do	E	139	NA	NA
Bat, Sanborn's long-nosed	<i>Leptonycteris sanborni</i> (=yerbabuenae).	U.S.A. (AZ, NM), Mexico, Central America.	.....do	E	336	NA	NA
Bat, Singapore roundleaf horseshoe	<i>Hipposideros ridleyi</i>	Malaysia	.....do	E	139	NA	NA
Bat, Virginia big-eared	<i>Plecotus townsendii virginianus</i>	U.S.A. (KY, NC, WV, VA)	.....do	E	85	17.95(a)	NA
Bear, American black	<i>Ursus americanus</i>	North America	U.S.A. (LA, MS, TX)	T(S/A)	456	NA	17.40(i)
Bear, Baluchistan	<i>Ursus thibetanus gedrosianus</i>	Iran, Pakistan	Entire	E	233	NA	NA
Bear, brown	<i>Ursus arctos arctos</i>	Paleartic	Italy	E	15, 15A	NA	NA
Do	<i>Ursus arctos pruinosus</i>	China (Tibet)	Entire	E	15	NA	NA
Bear, grizzly (=brown)	<i>Ursus arctos</i> (incl. <i>U. a. horribilis</i> & <i>U. a. stickeenensis</i> ).	Holarctic	U.S.A. (48 conterminous States).	T	1, 2D, 9	NA	17.40(b)
Bear, Louisiana black	<i>Ursus americanus luteolus</i>	U.S.A. (LA, MS, TX)	Entire	T	456	NA	17.40(i)
Bear, Mexican grizzly	<i>Ursus arctos</i> (=U. a. nelsoni)	.....do	Mexico	E	3	NA	NA

Beaver	<i>Castor fiber birulai</i>	Mongolia	Entire	E	15	NA	NA
Beaver, Point Arena mountain	<i>Aplodontia rufa nigra</i>	U.S.A. (CA)	.....do	E	454	NA	NA
Bison, wood	<i>Bison bison athabascae</i>	Canada, Northwestern U.S.A	Canada	E	3	NA	NA
Bobcat	<i>Felis rufus escuinapae</i>	Central Mexico	Entire	E	15	NA	NA
Bontebok (antelope)	<i>Damaliscus dorcas dorcas</i>	South Africa	.....do	E	15	NA	NA
Camel, Bactrian	<i>Camelus bactrianus (=ferus)</i>	Mongolia, China	.....do	E	15	NA	NA
Caribou, woodland	<i>Rangifer tarandus caribou</i>	U.S.A. (AK, ID, ME, MI, MN, MT, NH, VT, WA, WI), Canada.	U.S.A. (ID, WA), Canada (that part of S.E. British Columbia bounded by the U.S.-Can. border, Columbia R., Kootenay R., Kootenay L., and Kootenai R.)..	E	128E, 136E, 143	NA	NA
Cat, Andean	<i>Felis jacobita</i>	Chile, Peru, Bolivia, Argentina	Entire	E	15	NA	NA
Cat, black-footed	<i>Felis nigripes</i>	Southern Africa	.....do	E	15	NA	NA
Cat, flat-headed	<i>Felis planiceps</i>	Malaysia, Indonesia	.....do	E	15	NA	NA
Cat, Iriomote	<i>Felis (Mayailurus) iriomotensis</i>	Japan (Iriomote Island, Ryukyu Islands).	.....do	E	50	NA	NA
Cat, leopard	<i>Felis bengalensis bengalensis</i>	India, Southeast Asia	.....do	E	15	NA	NA
Cat, marbled	<i>Felis marmorata</i>	Nepal, Southeast Asia, Indonesia	.....do	E	15	NA	NA
Cat, Pakistan sand	<i>Felis margarita scheffeli</i>	Pakistan	.....do	E	139	NA	NA
Cat, Temminck's (=golden cat)	<i>Felis temmincki</i>	Nepal, China, Southeast Asia, Indonesia (Sumatra).	.....do	E	15	NA	NA
Cat, tiger	<i>Felis tigrinus</i>	Costa Rica to northern Argentina	.....do	E	5	NA	NA
Chamois, Apennine	<i>Rupicapra rupicapra ornata</i>	Italy	.....do	E	15	NA	NA
Cheetah	<i>Acinonyx jubatus</i>	Africa to India	.....do	E	3, 5	NA	NA
Chimpanzee	<i>Pan troglodytes</i>	Africa-see 17.40(c)(3)	Wherever found in the wild.	E	16, 376	NA	NA
Do	.....do	.....do	Wherever found in captivity.	T	16, 376	NA	17.40(c)
Chimpanzee, pygmy	<i>Pan paniscus</i>	Zaire	Entire	E	16, 376	NA	NA
Chinchilla	<i>Chinchilla brevicaudata boliviana</i>	Bolivia	.....do	E	15	NA	NA
Civet, Malabar large-spotted	<i>Viverra megaspila civettina</i>	India	.....do	E	50	NA	NA
Cochito (=Gulf of California harbor porpoise).	<i>Phocoena sinus</i>	Mexico (Gulf of California)	.....do	E	169	NA	NA
Cougar, eastern	<i>Felis concolor cougar</i>	Eastern North America	.....do	E	6	NA	NA
Deer, Bactrian	<i>Cervus elaphus bactrianus</i>	Tajikistan, Uzbekistan, Afghanistan	.....do	E	50	NA	NA
Deer, Barbary	<i>Cervus elaphus barbarus</i>	Morocco, Tunisia, Algeria	.....do	E	50	NA	NA
Deer, Bawean	<i>Axis (=Cervus) porcinus kuhli</i>	Indonesia	.....do	E	3	NA	NA
Deer, Cedros Island mule	<i>Odocoileus hemionus cedrosensis</i>	Mexico (Cedros Island)	.....do	E	10	NA	NA
Deer, Columbian white-tailed	<i>Odocoileus virginianus leucurus</i>	U.S.A. (WA, OR)	.....do	E	1	NA	NA
Deer, Corsican red	<i>Cervus elaphus corsicanus</i>	Corsica, Sardinia	.....do	E	50	NA	NA
Deer, Eld's brow-antlered	<i>Cervus eldi</i>	India to Southeast Asia	.....do	E	3	NA	NA
Deer, Formosan sika	<i>Cervus nippon taiouanus</i>	Taiwan	.....do	E	50	NA	NA
Deer, hog	<i>Axis (=Cervus) porcinus annamiticus</i>	Thailand, Indochina	.....do	E	15	NA	NA
Deer, key	<i>Odocoileus virginianus clavium</i>	U.S.A. (FL)	.....do	E	1	NA	NA
Deer, marsh	<i>Blastocercus dichotomus</i>	Argentina, Uruguay, Paraguay, Bolivia, Brazil.	.....do	E	3	NA	NA
Deer, McNeill's	<i>Cervus elaphus macneilli</i>	China (Sinkiang, Tibet)	.....do	E	3	NA	NA
Deer, musk	<i>Moschus spp. (all species)</i>	Central and East Asia	Afghanistan, Bhutan, Burma, China (Tibet, Yunnan), India, Nepal, Pakistan, Sikkim..	E	15	NA	NA
Deer, North China sika	<i>Cervus nippon mandarinus</i>	China (Shantung and Chihli Provinces).	Entire	E	50	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Deer, pampas	<i>Ozotoceros bezoarticus</i>	Brazil, Argentina, Uruguay, Bolivia, Paraguay.	....do	E	15	NA	NA
Deer, Persian fallow	<i>Dama dama mesopotamica</i>	Iraq, Iran	....do	E	3	NA	NA
Deer, Philippine	<i>Axis (=Cervus) porcinus calamanensis</i>	Philippines (Calamian Islands)	....do	E	15	NA	NA
Deer, Ryukyu sika	<i>Cervus nippon keramae</i>	Japan (Ryukyu Islands)	....do	E	50	NA	NA
Deer, Shansi sika	<i>Cervus nippon grassianus</i>	China (Shansi Province)	....do	E	50	NA	NA
Deer, South China sika	<i>Cervus nippon kopschi</i>	Southern China	....do	E	50	NA	NA
Deer, swamp (=barasingha)	<i>Cervus duvauceli</i>	India, Nepal	....do	E	3	NA	NA
Deer, Visayan	<i>Cervus alfredi</i>	Philippines	....do	E	320	NA	NA
Deer, Yarkand	<i>Cervus elaphus yarkandensis</i>	China (Sinkiang)	....do	E	50	NA	NA
Dhole (=Asiatic wild dog)	<i>Cuon alpinus</i>	C.I.S., Korea, China, India, Southeast Asia.	....do	E	3	NA	NA
Dibbler	<i>Antechinus apicalis</i>	Australia	....do	E	4	NA	NA
Dog, African wild	<i>Lycaon pictus</i>	Sub-Saharan Africa	....do	E	139	NA	NA
Dolphin, Chinese river (=whitefin)	<i>Lipotes vexillifer</i>	China	....do	E	350	NA	NA
Dolphin, Indus River	<i>Ptatanista minor</i>	Pakistan (Indus R. and tributaries)	....do	E	417	NA	NA
Drill	<i>Papio leucophaeus</i>	Equatorial West Africa	....do	E	16	NA	NA
Dugong	<i>Dugong dugon</i>	East Africa to southern Japan, including U.S.A. (Trust Territories).	Entire, except U.S.A.	E	4	NA	NA
Duiker, Jentink's	<i>Cephalophus jentinki</i>	Sierra Leone, Liberia, Ivory Coast	Entire	E	50	NA	NA
Eland, Western giant	<i>Taurotragus derbianus derbianus</i>	Senegal to Ivory Coast	....do	E	50	NA	NA
Elephant, African	<i>Loxodonta africana</i>	Africa	....do	T	40	NA	17 40(e)
Elephant, Asian	<i>Elephas maximus</i>	South-central and Southeast Asia	....do	E	15	NA	NA
Ferret, black-footed	<i>Mustela nigripes</i>	Western U.S.A., Western Canada	Entire, except where listed as an experimental population below.	E	1, 3, 433	NA	NA
Do	....do	....do	WY: in the wild, south and east of N. Platte R. within Natrona, Carbon, and Albany Cos.	XN	433	NA	17.84(g)
Fox, Northern swift	<i>Vulpes velox hebes</i>	U.S.A. (northern plains), Canada	Canada	E	3	NA	NA
Fox, San Joaquin kit	<i>Vulpes macrotis mutica</i>	U.S.A. (CA)	Entire	E	1	NA	NA
Fox, Simien	<i>Canis (Simenia) simensis</i>	Ethiopia	....do	E	50	NA	NA
Gazelle, Arabian	<i>Gazella gazella</i>	Arabian Peninsula, Palestine, Sinai	....do	E	50	NA	NA
Gazelle, Clark's (=Dibatag)	<i>Ammodorcas clarkei</i>	Somalia, Ethiopia	....do	E	3	NA	NA
Gazelle, Cuvier's	<i>Gazella cuvieri</i>	Morocco, Algeria, Tunisia	....do	E	3	NA	NA
Gazelle, Mhorr	<i>Gazella dama mhorr</i>	Morocco	....do	E	3	NA	NA
Gazelle, Moroccan (=Dorcas)	<i>Gazella dorcas massaesyta</i>	Morocco, Algeria, Tunisia	....do	E	3	NA	NA
Gazelle, Pelzeln's	<i>Gazella dorcas pelzelni</i>	Somalia	....do	E	3	NA	NA
Gazelle, Rio de Oro Dama	<i>Gazella dama lozanoi</i>	Western Sahara	....do	E	50	NA	NA
Gazelle, sand	<i>Gazella subgutturosa manica</i>	Jordan, Arabian Peninsula	....do	E	3	NA	NA
Gazelle, Saudi Arabian	<i>Gazella dorcas saudiya</i>	Israel, Iraq, Jordan, Syria, Arabian Peninsula	....do	E	50	NA	NA
Gazelle, slender-horned (=Rhim)	<i>Gazella leptoceros</i>	Sudan, Egypt, Algeria, Libya	....do	E	3	NA	NA
Gibbons	<i>Hylobates</i> spp. (including <i>Nomascus</i> )	China, India, Southeast Asia	....do	E	3, 15	NA	NA
Goat, wild (=Chittan markhor)	<i>Capra aegagrus (=falconeri chittanensis)</i>	Southwestern Asia	Chittan Range of west-central Pakistan.	E	15	NA	NA
Goral	<i>Nemorhaedus goral</i>	East Asia	Entire	E	15	NA	NA
Gorilla	<i>Gorilla gorilla</i>	Central and Western Africa	....do	E	3	NA	NA
hispid	<i>Caprolagus hispidus</i>	Central and Western Africa	....do	E	15	NA	NA

Hartebeest, Swayne's	<i>Alcelaphus buselaphus swaynei</i>	Ethiopia, Somalia	.....do	E	3,50	NA	NA
Hartebeest, Tora	<i>Alcelaphus buselaphus tora</i>	Ethiopia, Sudan, Egypt	.....do	E	50	NA	NA
Hog, pygmy	<i>Sus salvanius</i>	India, Nepal, Bhutan, Sikkim	.....do	E	3	NA	NA
Horse, Przewalski's	<i>Equus przewalskii</i>	Mongolia, China	.....do	E	15	NA	NA
Huemul, North Andean	<i>Hippocamelus antisensis</i>	Ecuador, Peru, Chile, Bolivia, Argentina	.....do	E	15	NA	NA
Huemul, South Andean	<i>Hippocamelus bisulcus</i>	Chile, Argentina	.....do	E	15	NA	NA
Hutia, Cabrera's	<i>Capromys angelcabrerai</i>	Cuba	.....do	E	233	NA	NA
Hutia, dwarf	<i>Capromys nana</i>	.....do	.....do	E	233	NA	NA
Hutia, large-eared	<i>Capromys auritus</i>	.....do	.....do	E	233	NA	NA
Hutia, little eared	<i>Capromys sanfelipensis</i>	.....do	.....do	E	233	NA	NA
Hyena, Barbary	<i>Hyaena hyaena barbara</i>	Morocco, Algeria, Tunisia	.....do	E	3	NA	NA
Hyena, brown	<i>Hyaena brunnea</i>	Southern Africa	.....do	E	3	NA	NA
Ibex, Pyrenean	<i>Capra pyrenaica pyrenaica</i>	Spain	.....do	E	3	NA	NA
Ibex, Wallia	<i>Capra walia</i>	Ethiopia	.....do	E	3	NA	NA
Impala, black-faced	<i>Aepyceros melampus petersi</i>	Namibia, Angola	.....do	E	3	NA	NA
Indri	<i>Indri indri</i> (=entire genus)	Malagasy Republic (=Madagascar)	.....do	E	3	NA	NA
Jaguar	<i>Panthera onca</i>	U.S.A. (TX, NM, AZ), C. and S. America	Mexico southward ..	E	5	NA	NA
Jaguarundi	<i>Felis yagouaroundi cacomitti</i>	U.S.A. (TX), Mexico	Entire	E	15	NA	NA
Do	<i>Felis yagouaroundi fossata</i>	Mexico, Nicaragua	.....do	E	15	NA	NA
Do	<i>Felis yagouaroundi panamensis</i>	Nicaragua, Costa Rica, Panama	.....do	E	15	NA	NA
Do	<i>Felis yagouaroundi tolteca</i>	U.S.A. (AZ), Mexico	.....do	E	15	NA	NA
Kangaroo, eastern gray	<i>Macropus giganteus</i> (all subsp. except <i>tasmaniensis</i> )	Australia	.....do	T	7	NA	17.40(a)
Kangaroo, red	<i>Macropus (=Megaleia) rufus</i>	.....do	.....do	T	7	NA	17.40(a)
Kangaroo, Tasmanian forester	<i>Macropus giganteus tasmaniensis</i>	Australia (Tasmania)	.....do	E	6	NA	NA
Kangaroo, western gray	<i>Macropus fuliginosus</i>	Australia	.....do	T	7	NA	17.40(a)
Kouprey	<i>Bos sauveli</i>	Vietnam, Laos, Cambodia, Thailand	.....do	E	3	NA	NA
Langur, capped	<i>Presbytis pileata</i>	India, Burma, Bangladesh	.....do	E	15	NA	NA
Langur, Douc	<i>Pygathrix nemaeus</i>	Cambodia, Laos, Vietnam	.....do	E	3	NA	NA
Langur, entellus	<i>Presbytis entellus</i>	China (Tibet), India, Pakistan, Kashmir, Sri Lanka, Sikkim, Bangladesh	.....do	E	15	NA	NA
Langur, Francois'	<i>Presbytis francoisi</i>	China (Kwangsi), Indochina	.....do	E	16	NA	NA
Langur, golden	<i>Presbytis geei</i>	India (Assam), Bhutan	.....do	E	15	NA	NA
Langur, long-tailed	<i>Presbytis potenziani</i>	Indonesia	.....do	T	16	NA	17.40(c)
Langur, Pagi Island	<i>Nasalis (Simias) concolor</i>	.....do	.....do	E	3	NA	NA
Langur, purple-faced	<i>Presbytis senex</i>	Sri Lanka (=Ceylon)	.....do	T	16	NA	17.40(c)
Lechwe, red	<i>Kobus leche</i>	Southern Africa	.....do	T	3, 15, 106	NA	NA
Lemurs	Lemuridae (incl. Cheirogaleidae, Lepilemuridae); all members of genera <i>Lemur</i> , <i>Phaner</i> , <i>Hapalemur</i> , <i>Lepilemur</i> , <i>Microcebus</i> , <i>Allocebus</i> , <i>Cheirogaleus</i> , <i>Varecia</i> .	Malagasy Republic (=Madagascar)	.....do	E	3, 15, 15A	NA	NA
Leopard	<i>Panthera pardus</i>	Africa, Asia	Wherever found, except where it is listed as Threatened as set forth below..	E	3, 5, 114	NA	NA
Do	.....do	.....do	In Africa, in the wild, south of, and including, the following countries: Gabon, Congo, Zaire, Uganda, Kenya..	T	3, 5, 114	NA	17.40(f)

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Leopard, clouded	<i>Neofelis nebulosa</i>	Southeast and south-central Asia, Taiwan	Entire	E	3-15	NA	NA
Leopard, snow	<i>Panthera uncia</i>	Central Asia	do	E	5	NA	NA
Linsang, spotted	<i>Prionodon pardicolor</i>	Nepal, Assam, Vietnam, Cambodia, Laos, Burma	do	E	15	NA	NA
Lion, Asiatic	<i>Panthera leo persica</i>	Turkey to India	do	E	3	NA	NA
Lion, mountain	<i>Felis concolor</i> (all subsp. except <i>coryi</i> )	Canada to South America	U.S.A. (FL)	T(S/A)	432	NA	17-40(h)
Loris, lesser slow	<i>Nycticebus pygmaeus</i>	Indochina	Entire	T	16	NA	17-40(c)
Lynx, Spanish	<i>Felis (=Lynx) pardina</i>	Spain, Portugal	do	T	3	NA	NA
Macaque, Formosan rock	<i>Macaca fuscipis</i>	Taiwan	do	T	16	NA	17-40(c)
Macaque, Japanese	<i>Macaca fuscata</i>	Japan (Shikoku, Kyushu and Honshu Islands)	do	T	16	NA	17-40(c)
Macaque, lion-tailed	<i>Macaca silenus</i>	India	do	E	3	NA	NA
Macaque, stump-tailed	<i>Macaca arctoides</i>	India (Assam) to southern China	do	T	16	NA	17-40(c)
Macaque, Toque	<i>Macaca sinica</i>	Sri Lanka (=Ceylon)	do	T	16	NA	17-40(c)
Manatee, Amazonian	<i>Trichechus inunguis</i>	South America (Amazon R. basin)	do	E	3	NA	NA
Manatee, West African	<i>Trichechus senegalensis</i>	West Coast of Africa from Senegal R. to Cuanza R.	do	T	52	NA	NA
Manatee, West Indian (=Florida)	<i>Trichechus manatus</i>	U.S.A. (southeastern), Caribbean Sea, South America	do	E	1, 3	17-95(a)	NA
Mandrill	<i>Papio sphinx</i>	Equatorial West Africa	do	E	16	NA	NA
Mangabey, Tana River	<i>Cercocebus galeritus</i>	Kenya	do	E	3	NA	NA
Mangabey, white-collared	<i>Cercocebus torquatus</i>	Senegal to Ghana; Nigeria to Gabon	do	E	16	NA	NA
Margay	<i>Felis wiedii</i>	U.S.A. (TX), C. and S. America	Mexico southward	E	5	NA	NA
Markhor, Kabal	<i>Capra falconeri megaceros</i>	Afghanistan, Pakistan	Entire	E	15	NA	NA
Markhor, straight-horned	<i>Capra falconeri jerdoni</i>	do	do	E	15	NA	NA
Marmoset, buff-headed	<i>Callithrix flaviceps</i>	Brazil	do	E	139	NA	NA
Marmoset, buffy tufted-ear	<i>Callithrix jacchus aurita</i>	do	do	E	233	NA	NA
Marmoset, cotton-top	<i>Saguinus oedipus</i>	Costa Rica to Colombia	do	E	16	NA	NA
Marmoset, Goeldi's	<i>Callimico goeldii</i>	Brazil, Colombia, Ecuador, Peru, Bolivia	do	E	3	NA	NA
Marmot, Vancouver Island	<i>Marmota vancouverensis</i>	Canada (Vancouver Island)	do	E	139	NA	NA
Marsupial, eastern jerboa	<i>Antechinomys laniger</i>	Australia	do	E	4	NA	NA
Marsupial-mouse, large desert	<i>Sminthopsis psammophila</i>	do	do	E	4	NA	NA
Marsupial-mouse, long-tailed	<i>Sminthopsis longicaudata</i>	do	do	E	4	NA	NA
Marten, Formosan yellow-throated	<i>Martes flavigula chrysospila</i>	Taiwan	do	E	3	NA	NA
Monkey, black colobus	<i>Colobus satanas</i>	Equatorial Guinea, People's Republic of Congo, Cameroon, Gabon	do	E	16	NA	NA
Monkey, black howler	<i>Alouatta pigra</i>	Mexico, Guatemala, Belize	do	T	16	NA	17-40(c)
Monkey, Diana	<i>Cercopithecus diana</i>	Coastal West Africa	do	E	16	NA	NA
Monkey (=langur), Guizhou snub-nosed	<i>Rhinopithecus (=Pygathrix) brelichi</i>	China	do	E	400	NA	NA
Monkey, howler	<i>Alouatta palliata (=villosa)</i>	Mexico to South America	do	E	15	NA	NA
Monkey, L'hoest's	<i>Cercopithecus lhoesti</i>	Upper Eastern Congo Basin, Cameroon	do	E	16	NA	NA
Monkey, Preuss' red colobus	<i>Colobus badius preussi</i>	Cameroon	do	E	139	NA	NA
Monkey, proboscis	<i>Nasalis larvatus</i>	Borneo	do	E	15	NA	NA
Monkey, red-backed squirrel	<i>Saimiri oerstedii</i>	Costa Rica, Panama	do	E	3	NA	NA
Monkey, red-bellied	<i>Cercopithecus erythrogaster</i>	Western Nigeria	do	E	16	NA	NA
Monkey, red-eared nose-spotted	<i>Cercopithecus erythrotis</i>	Nigeria, Cameroon, Fernando Po	do	E	16	NA	NA
Monkey (=langur), Sichuan snub-nosed	<i>Rhinopithecus (=Pygathrix) roxellana</i>	China	do	E	400	NA	NA
Monkey, spider	<i>Ateles geoffroyi frontatus</i>	Costa Rica, Nicaragua	do	E	3	NA	NA

Do	<i>Ateles geoffroyi panamensis</i>	Costa Rica, Panama	do	E	3	NA	NA
Monkey, Tana River red colobus	<i>Colobus rufomitratus (=badius) rufomitratus.</i>	Kenya	do	E	3	NA	NA
Monkey (=langur), Tonkin snub-nosed	<i>Rhinopithecus (=Pygathrix) avunculus</i>	Vietnam	do	E	16,400	NA	NA
Monkey, woolly spider	<i>Brachyteles arachnoides</i>	Brazil	do	E	3	NA	NA
Monkey, yellow-tailed woolly	<i>Lagothrix flavicauda</i>	Andes of northern Peru	do	E	16	NA	NA
Monkey (=langur), Yunnan snub-nosed.	<i>Rhinopithecus (=Pygathrix) bieti</i>	China	do	E	400	NA	NA
Monkey, Zanzibar red colobus	<i>Colobus kirki</i>	Tanzania	do	E	3	NA	NA
Mouse, Alabama beach	<i>Peromyscus polionotus ammobates</i>	U.S.A. (AL)	do	E	183	17.95(a)	NA
Mouse, Anastasia Island beach	<i>Peromyscus polionotus phasma</i>	U.S.A. (FL)	do	E	349	NA	NA
Mouse, Australian native	<i>Notomys aquilo</i>	Australia	do	E	15	NA	NA
Do	<i>Zyzomys (=Notomys) pedunculatus</i>	do	do	E	15	NA	NA
Mouse, Choctawahatchee beach	<i>Peromyscus polionotus allophrys</i>	U.S.A. (FL)	do	E	183	17.95(a)	NA
Mouse, Field's	<i>Pseudomys fieldi</i>	Australia	do	E	4	NA	NA
Mouse, Gould's	<i>Pseudomys gouldii</i>	do	do	E	6	NA	NA
Mouse, Key Largo cotton	<i>Peromyscus gossypinus allapaticola</i>	U.S.A. (FL)	do	E	131E,	NA	NA
Mouse, New Holland	<i>Pseudomys novaehollandiae</i>	Australia	do	E	160	NA	NA
Mouse, Perdido Key beach	<i>Peromyscus polionotus trissyllepsis</i>	U.S.A. (AL, FL)	do	E	4	NA	NA
Mouse, salt marsh harvest	<i>Reithrodontomys raviventris</i>	U.S.A. (CA)	do	E	183	17.95(a)	NA
Mouse, Shark Bay	<i>Pseudomys praeconis</i>	Australia	do	E	2	NA	NA
Mouse, Shortridge's	<i>Pseudomys shortridgei</i>	do	do	E	4	NA	NA
Mouse, Smoky	<i>Pseudomys fumeus</i>	do	do	E	4	NA	NA
Mouse, southeastern beach	<i>Peromyscus polionotus niveiventris</i>	U.S.A. (FL)	do	E	4	NA	NA
Mouse, western	<i>Pseudomys occidentalis</i>	Australia	do	T	349	NA	NA
Muntjac, Faa's	<i>Muntiacus faae</i>	Northern Thailand, Burma	do	E	4	NA	NA
Native-cat, eastern	<i>Dasyurus viverrinus</i>	Australia	do	E	50	NA	NA
Numbat	<i>Myrmecobius fasciatus</i>	do	do	E	6	NA	NA
Ocelot	<i>Felis pardalis</i>	do	do	E	4, 6	NA	NA
Orangutan	<i>Pongo pygmaeus</i>	U.S.A. (AZ, TX) to C. and S. America	do	E	5, 119	NA	NA
Oryx, Arabian	<i>Oryx leucoryx</i>	Borneo, Sumatra	do	E	3	NA	NA
Otter, Cameroon clawless	<i>Aonyx (Paraonyx) congica microdon</i>	Arabian Peninsula	do	E	3	NA	NA
Otter, giant	<i>Pteronura brasiliensis</i>	Cameroon, Nigeria	do	E	3	NA	NA
Otter, long-tailed	<i>Lutra longicaudis (incl. platensis)</i>	South America	do	E	3	NA	NA
Otter, marine	<i>Lutra felina</i>	do	do	E	3, 15	NA	NA
Otter, southern river	<i>Lutra provocax</i>	Peru south to Straits of Magellan	do	E	15	NA	NA
Otter, southern sea	<i>Enhydra lutris nereis</i>	Chile, Argentina	do	E	15	NA	NA
Do	do	West Coast, U.S.A. (WA, OR, CA) south to Mexico (Baja California).	do	T	21, 284	NA	NA
Do	do	do	do	See 17.84 (d)	21, 284	NA	17.84(d)
Panda, giant	<i>Ailuropoda melanoleuca</i>	China	Entire	E	139	NA	NA
Pangolin (=scaly anteater)	<i>Manis temmincki</i>	Africa	do	E	15	NA	NA
Panther, Florida	<i>Felis concolor coryi</i>	U.S.A. (LA and AR east to SC and FL).	do	E	1	NA	NA
Planigale, little	<i>Planigale ingrami subtilissima (formerly P. subtilissima).</i>	Australia	do	E	4	NA	NA
Planigale, southern	<i>Planigale tenuirostris</i>	do	do	E	4	NA	NA
Porcupine, thin-spined	<i>Chaetomys subspinosus</i>	Brazil	do	E	3	NA	NA
Possum, Leadbeater's	<i>Gymnobelideus leadbeateri</i>	do	do	E	233	NA	NA
Possum, mountain pygmy	<i>Burramys parvus</i>	Australia	do	E	4	NA	NA
Possum, scaly-tailed	<i>Wyulda squamicaudata</i>	do	do	E	4	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Prairie dog, Mexican	<i>Cynomys mexicanus</i>	Mexico	do	E	3	NA	NA
Prairie dog, Utah	<i>Cynomys parvidens</i>	U.S.A. (UT)	do	T	6, 149	NA	17.40(g)
Pronghorn, peninsular	<i>Antilocapra americana peninsularis</i>	Mexico (Baja California)	do	E	10	NA	NA
Pronghorn, Sonoran	<i>Antilocapra americana sonoriensis</i>	U.S.A. (AZ), Mexico	do	E	1, 3	NA	NA
Pudu	<i>Pudu pudu</i>	Southern South America	do	E	15	NA	NA
Puma, Costa Rican	<i>Felis concolor costaricensis</i>	Nicaragua, Panama, Costa Rica	do	E	15	NA	NA
Quokka	<i>Setonix brachyurus</i>	Australia	do	E	6	NA	NA
Rabbit, Lower Keys	<i>Sylvilagus palustris hefneri</i>	U.S.A. (FL)	do	E	390	NA	NA
Rabbit, Ryukyu	<i>Pentalagus furnessi</i>	Japan (Ryukyu Islands)	do	E	50	NA	NA
Rabbit, volcano	<i>Romerolagus diazi</i>	Mexico	do	E	3	NA	NA
Rat, false water	<i>Xeromys myoides</i>	Australia	do	E	4	NA	NA
Rat, Fresno kangaroo	<i>Dipodomys nitratoides exilis</i>	U.S.A. (CA)	do	E	170	17.95(a)	NA
Rat, giant kangaroo	<i>Dipodomys ingens</i>	do	do	E	251	NA	NA
Rat, Morro Bay kangaroo	<i>Dipodomys heermanni morroensis</i>	do	do	E	2	17.95(a)	NA
Rat, rice (=silver rice)	<i>Oryzomys palustris natator</i> (=O. argentatus).	U.S.A. (FL)	Lower FL Keys (west of Seven Mile Bridge).	E	421	NA	NA
Rat, Stephens' kangaroo	<i>Dipodomys stephensi</i> (incl. <i>D. cascus</i> ).	U.S.A. (CA)	Entire	E	338	NA	NA
Rat, stick-nest	<i>Leporillus conditor</i>	Australia	do	E	6	NA	NA
Rat, Tipton kangaroo	<i>Dipodomys nitratoides nitratoides</i>	U.S.A. (CA)	do	E	312	NA	NA
Rat-kangaroo, brush-tailed	<i>Bettongia penicillata</i>	Australia	do	E	4	NA	NA
Rat-kangaroo, Gaimard's	<i>Bettongia gaimardi</i>	do	do	E	6	NA	NA
Rat-kangaroo, Lesueur's	<i>Bettongia lesueur</i>	do	do	E	4	NA	NA
Rat-kangaroo, plain	<i>Caloprymnus campestris</i>	do	do	E	4	NA	NA
Rat-kangaroo, Queensland	<i>Bettongia tropica</i>	do	do	E	4	NA	NA
Rhinoceros, black	<i>Diceros bicornis</i>	Sub-Saharan Africa	do	E	97	NA	NA
Rhinoceros, great Indian	<i>Rhinoceros unicornis</i>	India, Nepal	do	E	4	NA	NA
Rhinoceros, Javan	<i>Rhinoceros sondaicus</i>	Indonesia, Indochina, Burma, Thailand, Sikkim, Bangladesh, Malaysia.	do	E	3	NA	NA
Rhinoceros, northern white	<i>Ceratotherium simum cottoni</i>	Zaire, Sudan, Uganda, Central African Republic.	do	E	3	NA	NA
Rhinoceros, Sumatran	<i>Dicerorhinus</i> (=Didermoceros) <i>sumatrensis</i> .	Bangladesh to Vietnam to Indonesia (Borneo).	do	E	3	NA	NA
Saiga, Mongolian (antelope)	<i>Saiga tatarica mongolica</i>	Mongolia	do	E	15	NA	NA
Saki, southern bearded	<i>Chiropotes satanas satanas</i>	Brazil	do	E	233	NA	NA
Saki, white-nosed	<i>Chiropotes albinasus</i>	do	do	E	3	NA	NA
Sea-lion, Steller (=northern)	<i>Eumetopias jubatus</i>	U.S.A. (AK, CA, OR, WA), Canada, Russia; North Pacific Ocean.	do	T	384E, 408	NA	227.12
Seal, Caribbean monk	<i>Monachus tropicalis</i>	Caribbean Sea, Gulf of Mexico	do	E	1, 2D, 45	NA	NA
Seal, guadalupe fur	<i>Arctocephalus townsendi</i>	U.S.A. (Farallon Islands of CA) south to Mexico (Islas Revillagigedo).	do	T	1, 2D, 212	NA	227.11
Seal, Hawaiian monk	<i>Monachus schauinslandi</i>	U.S.A. (HI)	do	E	18	226.11	NA
Seal, Mediterranean monk	<i>Monachus monachus</i>	Mediterranean, Northwest African Coast and Black Sea.	do	E	3	NA	NA
+ Seal, Saimaa	<i>Phoca hispida saimensis</i>	Finland (Lake Saimaa)	do	E	508	NA	NA
Seledang (=Gaur)	<i>Bos gaurus</i>	Bangladesh, Southeast Asia, India	do	E	3	NA	NA
Serow	<i>Capricornis sumatraensis</i>	East Asia, Sumatra	do	E	15	NA	NA
Serval, Barbary	<i>Felis serval constantina</i>	Algeria	do	E	3	NA	NA
Shapo	<i>Ovis vignei vignei</i>	Kashmir	do	E	15	NA	NA
Shou	<i>Cervus elaphus wallichi</i>	Tibet, Bhutan	do	E	3	NA	NA
Shrew, Dismal Swamp southeastern	<i>Sorex longirostris fisheri</i>	U.S.A. (VA, NC)	do	E	246	NA	NA
Siamang	<i>Symphalangus syndactylus</i>	Malaysia, Indonesia	do	E	15	NA	NA

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Sifakas .....	<i>Propithecus</i> spp. (all species) .....	Malagasy Republic (=Madagascar) .....	do .....	E	4	NA	NA
Sloth, Brazilian three-toed .....	<i>Bradypus torquatus</i> .....	Brazil .....	do .....	E	3	NA	NA
Solenodon, Cuban .....	<i>Solenodon (Atopogale) cubanus</i> .....	Cuba .....	do .....	E	3	NA	NA
Solenodon, Haitian .....	<i>Solenodon paradoxus</i> .....	Dominican Republic, Haiti .....	do .....	E	3	NA	NA
Squirrel, Carolina northern flying .....	<i>Glaucomys sabrinus coloratus</i> .....	U.S.A. (NC, TN) .....	do .....	E	189	NA	NA
Squirrel, Delmarva Peninsula fox .....	<i>Sciurus niger cinereus</i> .....	U.S.A. (Delmarva Peninsula to south-east PA). .....	Entire, except Sussex Co., DE. .....	E	1, 161, 168	NA	NA
Do .....	do .....	do .....	U.S.A. (DE—Sussex County). .....	XN	161	NA	17.84(a)
Squirrel, Mount Graham red .....	<i>Tamiasciurus hudsonicus grahamensis</i> . .....	U.S.A. (AZ) .....	Entire .....	E	268	17.95(a)	NA
Squirrel, Virginia northern flying .....	<i>Glaucomys sabrinus fuscus</i> .....	U.S.A. (VA, WV) .....	do .....	E	189	NA	NA
Stag, Barbary .....	<i>Cervus elaphus barbarus</i> .....	Tunisia, Algeria .....	do .....	E	3	NA	NA
Stag, Kashmir .....	<i>Cervus elaphus hanglu</i> .....	Kashmir .....	do .....	E	3	NA	NA
Suni, Zanzibar .....	<i>Neotragus (Nesotragus) moschatus moschatus</i> . .....	Zanzibar (and nearby islands) .....	do .....	E	50	NA	NA
Tahr, Arabian .....	<i>Hemitragus jayakari</i> .....	Oman .....	do .....	E	50	NA	NA
Tamaraw .....	<i>Bubalus mindorensis</i> .....	Philippines .....	do .....	E	4	NA	NA
Tamarin, golden-rumped (=golden-headed tamarin; =golden-lion marmoset). .....	<i>Leontopithecus (=Leontideus) spp.</i> (all species). .....	Brazil .....	do .....	E	3	NA	NA
Tamarin, pied .....	<i>Saguinus bicolor</i> .....	do .....	do .....	E	16	NA	NA
Tamarin, white-footed .....	<i>Saguinus leucopus</i> .....	Colombia .....	do .....	T	16	NA	17.40(c)
Tapir, Asian .....	<i>Tapirus indicus</i> .....	Burma, Laos, Cambodia, Vietnam, Malaysia, Indonesia, Thailand. .....	do .....	E	15	NA	NA
Tapir, Brazilian .....	<i>Tapirus terrestris</i> .....	Colombia and Venezuela south to Paraguay and Argentina. .....	do .....	E	3	NA	NA
Tapir, Central American .....	<i>Tapirus bairdii</i> .....	Southern Mexico to Colombia and Ecuador. .....	do .....	E	3	NA	NA
Tapir, mountain .....	<i>Tapirus pinchaque</i> .....	Colombia, Ecuador and possibly Peru and Venezuela. .....	do .....	E	3	NA	NA
Tarsier, Philippine .....	<i>Tarsius syrichta</i> .....	Philippines .....	do .....	T	16	NA	17.40(c)
Tiger .....	<i>Panthera tigris</i> .....	Temperate and Tropical Asia .....	do .....	E	3, 5	NA	NA
Tiger, Tasmanian (=Thylacine) .....	<i>Thylacinus cynocephalus</i> .....	Australia .....	do .....	E	3	NA	NA
Uakari (all species) .....	<i>Cacajao</i> spp. (all species) .....	Peru, Brazil, Ecuador, Colombia, Venezuela. .....	do .....	E	3	NA	NA
Urial .....	<i>Ovis musimon (=orientalis) ophion</i> .....	Cyprus .....	do .....	E	15	NA	NA
Vicuna .....	<i>Vicugna vicugna</i> .....	South America (Andes) .....	do .....	E	3	NA	NA
Vole, Amargosa .....	<i>Microtus californicus scirpensis</i> .....	U.S.A. (CA) .....	do .....	E	166	17.95(a)	NA
Vole, Florida salt marsh .....	<i>Microtus pennsylvanicus dukecampbelli</i> . .....	U.S.A. (FL) .....	do .....	E	415	NA	NA
Vole, Hualapai Mexican .....	<i>Microtus mexicanus hualpaiensis</i> .....	U.S.A. (AZ) .....	do .....	E	292	NA	NA
Wallaby, banded hare .....	<i>Lagostrophus fasciatus</i> .....	Australia .....	do .....	E	4	NA	NA
Wallaby, brindled nail-tailed .....	<i>Onychogalea fraenata</i> .....	do .....	do .....	E	4	NA	NA
Wallaby, crescent nail-tailed .....	<i>Onychogalea lunata</i> .....	do .....	do .....	E	4	NA	NA
Wallaby, Parma .....	<i>Macropus parma</i> .....	do .....	do .....	E	4	NA	NA
Wallaby, Western hare .....	<i>Lagorchestes hirsutus</i> .....	do .....	do .....	E	4	NA	NA
Wallaby, yellow-footed rock .....	<i>Petrogale xanthopus</i> .....	do .....	do .....	E	4	NA	NA
Whale, blue .....	<i>Balaenoptera musculus</i> .....	Oceanic .....	do .....	E	6	NA	NA
Whale, bowhead .....	<i>Balaena mysticetus</i> .....	Oceanic (north latitudes only) .....	do .....	E	3	NA	NA
Whale, finback .....	<i>Balaenoptera physalus</i> .....	Oceanic .....	do .....	E	3	NA	NA
Whale, gray .....	<i>Eschrichtius robustus</i> .....	North Pacific Ocean: coastal and Bering Sea, formerly North Atlantic Ocean. .....	do .....	E	3	NA	NA
Whale, humpback .....	<i>Megaptera novaeangliae</i> .....	Oceanic .....	do .....	E	3	NA	222.31
Whale, right .....	<i>Balaena glacialis</i> (incl. <i>australis</i> ) .....	do .....	do .....	E	3	NA	NA
Whale, Sei .....	<i>Balaenoptera borealis</i> .....	do .....	do .....	E	3	NA	NA
Whale, sperm .....	<i>Physeter macrocephalus</i> (=cetodon) .....	do .....	do .....	E	3	NA	NA



Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Wolf, gray	<i>Canis lupus</i>	Holarctic	U.S.A. (48 conterminous States, except MN), Mexico.	E	1, 6, 13, 15, 35	17.95(a)	NA
Do	do	do	U.S.A. (MN)	T	35	17.95(a)	17.40(d)
Wolf, maned	<i>Chrysocyon brachyurus</i>	Argentina, Bolivia, Brazil, Paraguay, Uruguay.	Entire	E	4	NA	NA
Wolf, red	<i>Canis rufus</i>	U.S.A. (SE U.S.A., west to central TX).	Entire, except where listed as experimental populations below.	E	1, 248, 449	NA	NA
Do	do	do	U.S.A. (portions of NC and TN—see 17.84(c)(9)).	XN	248, 449	NA	17.84(c)
Wombat, hairy-nosed (=Barnard's and Queensland hairy-nosed).	<i>Lasiorchinus krefftii</i> (formerly <i>L. barnardi</i> and <i>L. gillespiei</i> ).	Australia	Entire	E	4, 6	NA	NA
Woodrat, Key Largo	<i>Neotoma floridana smalli</i>	U.S.A. (FL)	do	E	131E, 160	NA	NA
Yak, wild	<i>Bos grunniens mutus</i>	China (Tibet), India	do	E	3	NA	NA
Zebra, Grevy's	<i>Equus grevyi</i>	Kenya, Ethiopia, Somalia	do	T	54	NA	NA
Zebra, Hartmann's mountain	<i>Equus zebra hartmannae</i>	Namibia, Angola	do	T	54, 111	NA	NA
Zebra, mountain	<i>Equus zebra zebra</i>	South Africa	do	E	15, 111	NA	NA
BIRDS							
'Akepa, Hawaii (honeycreeper)	<i>Loxops coccineus coccineus</i>	U.S.A. (HI)	do	E	2	NA	NA
'Akepa, Maui (honeycreeper)	<i>Loxops coccineus ochraceus</i>	do	do	E	2	NA	NA
'Akiapola, Kauai (honeycreeper)	<i>Hemignathus procerus</i>	do	do	E	1	NA	NA
'Akiapola'au (honeycreeper)	<i>Hemignathus munroi</i> (=wilsoni)	do	do	E	1	NA	NA
Albatross, short-tailed	<i>Diomedea albatrus</i>	North Pacific Ocean: Japan, Russia, U.S.A. (AK, CA, HI, OR, WA).	Entire, except U.S.A.	E	3	NA	NA
Blackbird, yellow-shouldered	<i>Agelaius xanthomus</i>	U.S.A. (PR)	Entire	E	17	17.95(b)	NA
Bobwhite, masked (quail)	<i>Colinus virginianus ridgwayi</i>	U.S.A. (AZ), Mexico (Sonora)	do	E	1, 3	NA	NA
Booby, Abbott's	<i>Sula abbotti</i>	Indian Ocean: Christmas Island	do	E	15	NA	NA
Bristlebird, western	<i>Dasyornis brachypterus longirostris</i>	Australia	do	E	3	NA	NA
Bristlebird, western rufous	<i>Dasyornis broadbenti littoralis</i>	do	do	E	15	NA	NA
Broadbill, Guam	<i>Myiagra freycineti</i>	Western Pacific Ocean: U.S.A. (Guam).	do	E	156	NA	NA
Bulbul, Mauritius olivaceous	<i>Hypsipetes borbonicus olivaceus</i>	Indian Ocean: Mauritius	do	E	3	NA	NA
Bullfinch, Sao Miguel (finch)	<i>Pyrrhula pyrrhula murina</i>	Eastern Atlantic Ocean: Azores	do	E	3	NA	NA
Bushwren, New Zealand	<i>Xenicus longipes</i>	New Zealand	do	E	3	NA	NA
Bustard, great Indian	<i>Choriotis nigricaps</i>	India, Pakistan	do	E	3	NA	NA
Cahow (=Bermuda petrel)	<i>Pterodroma cahow</i>	North Atlantic Ocean: Bermuda	do	E	3	NA	NA
Caracara, Audubon's crested	<i>Polyborus plancus audubonii</i>	U.S.A. (AZ, FL, LA, NM, TX) south to Panama; Cuba.	U.S.A. (FL)	T	280	NA	NA
Condor, Andean	<i>Vultur gryphus</i>	Colombia to Chile and Argentina	Entire	E	4	NA	NA
Condor, California	<i>Gymnogyps californianus</i>	U.S.A. (OR, CA), Mexico (Baja California).	U.S.A. only	E	1	17.95(b)	NA
Coot, Hawaiian (= 'alae-ke'oke'o)	<i>Fulica americana alai</i>	U.S.A. (HI)	Entire	E	2	NA	NA
Cotinga, banded	<i>Cotinga maculata</i>	Brazil	do	E	15	NA	NA
Cotinga, white-winged	<i>Xipholena atropurpurea</i>	do	do	E	15	NA	NA
Crane, black-necked	<i>Grus nigricollis</i>	China (Tibet)	do	E	15	NA	NA
Crane, Cuba sandhill	<i>Grus canadensis nesiotis</i>	West Indies: Cuba	do	E	15	NA	NA
Crane, hooded	<i>Grus monacha</i>	Japan, Russia	do	E	4	NA	NA
Crane, Japanese	<i>Grus japonensis</i>	China, Japan, Korea, Russia	do	E	3	NA	NA
Crane, Mississippi sandhill	<i>Grus canadensis pulla</i>	U.S.A. (MS)	do	E	6	95	NA

Crane, Siberian white	<i>Grus leucogeranus</i>	C.I.S. (Siberia) to India, including Iran and China.	do	E	4	NA	NA
Crane, white-naped	<i>Grus vipio</i>	Mongolia	do	E	15	NA	NA
Crane, whooping	<i>Grus americana</i>	Canada, U.S.A. (Rocky Mountains east to Carolinas), Mexico.	Entire, except where listed as an experimental population.	E	1, 3, 487	17.95(b)	NA
Do	do	do	U.S.A. (FL)	XN	487	NA	17.84.(h)
Creepers, Hawaii	<i>Oreomystis (=Loxops) mana</i>	U.S.A. (HI)	Entire	E	10	NA	NA
Creepers, Molokai (=kakawahie)	<i>Paroreomyza (=Oreomystis, =Loxops) flammea</i>	do	do	E	2	NA	NA
Creepers, Oahu (=alauwahoo)	<i>Paroreomyza (=Oreomystis, =Loxops) maculata</i>	do	do	E	2	NA	NA
Crow, Hawaiian (=alala)	<i>Corvus hawaiiensis (=tropicus)</i>	do	do	E	1	NA	NA
Crow, Mariana	<i>Corvus kubaryi</i>	Western Pacific Ocean: U.S.A. (Guam, Rota).	do	E	156	NA	NA
Crow, white-necked	<i>Corvus leucognaphalus</i>	U.S.A. (PR), Dominican Republic, Haiti.	do	E	419	NA	NA
Cuckoo-shrike, Mauritius	<i>Coquus (=Coracina) typicus</i>	Indian Ocean: Mauritius	do	E	3	NA	NA
Cuckoo-shrike, Reunion	<i>Coquus (=Coracina) newtoni</i>	Indian Ocean: Reunion	do	E	3	NA	NA
Curassow, razor-billed	<i>Mitu (=Crax) mitu mitu</i>	Brazil (Eastern)	do	E	15	NA	NA
Curassow, red-billed	<i>Crax blumenbachii</i>	Brazil	do	E	4	NA	NA
Curassow, Trinidad white-headed	<i>Pipile pipile pipile</i>	West Indies: Trinidad	do	E	3	NA	NA
Curlew, Eskimo	<i>Numerius borealis</i>	Alaska and northern Canada to Argentina.	do	E	1, 3	NA	NA
Dove, cloven-feathered	<i>Drapanoptila holosericea</i>	Southwest Pacific Ocean: New Caledonia.	do	E	3	NA	NA
Dove, Grenada gray-fronted	<i>Leptotila rufaxilla wellsii</i>	West Indies: Grenada	do	E	3	NA	NA
Duck, Hawaiian (=koloa)	<i>Anas wyvilliana</i>	U.S.A. (HI)	do	E	1	NA	NA
Duck, Laysan	<i>Anas laysanensis</i>	do	do	E	1	NA	NA
Duck, pink-headed	<i>Rhodonessa caryophyllacea</i>	India	do	E	15	NA	NA
Duck, white-winged wood	<i>Cairina scutulata</i>	India, Malaysia, Indonesia, Thailand	do	E	3	NA	NA
Eagle, bald	<i>Haliaeetus leucocephalus</i>	North America south to northern Mexico.	U.S.A. (contiguous U.S., except MI, MN, OR, WA, WI).	E	1, 34	NA	NA
Do	do	do	U.S.A. (MI, MN, OR, WA, WI).	T	34	NA	17.41(a)
Eagle, Greenland white-tailed	<i>Haliaeetus albicilla groenlandicus</i>	Greenland and adjacent Atlantic islands.	Entire	E	15	NA	NA
Eagle, harpy	<i>Harpia harpyja</i>	Mexico south to Argentina	do	E	15	NA	NA
Eagle, Philippine (=monkey-eating)	<i>Pitheophaga jefferyi</i>	Philippines	do	E	3	NA	NA
Eagle, Spanish imperial	<i>Aquila heliaca adalberti</i>	Spain, Morocco, Algeria	do	E	3	NA	NA
Egret, Chinese	<i>Egretta eulophotes</i>	China, Korea	do	E	3	NA	NA
Eider, spectacled	<i>Somateria (=Arctonetta, =Lampronetta) fischeri</i>	U.S.A. (AK), Russia	do	T	503	NA	NA
Falcon, American peregrine	<i>Falco peregrinus anatum</i>	Nests from central Alaska across north-central Canada to central Mexico, winters south to South America.	do	E	2, 3, 145	17.95(b)	NA
Falcon, Arctic peregrine	<i>Falco peregrinus tundrius</i>	Nests from northern Alaska to Greenland; winters south to C. and S. America.	do	T	2, 3, 145	NA	NA
Falcon, Eurasian peregrine	<i>Falco peregrinus peregrinus</i>	Europe, Eurasia south to Africa and Mideast.	do	E	15	NA	NA
Falcon, northern aplomado	<i>Falco femoralis septentrionalis</i>	U.S.A. (AZ, NM, TX), Mexico, Guatemala.	do	E	216	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Falcon, peregrine	<i>Falco peregrinus</i>	Worldwide, except Antarctica and most Pacific Islands.	Wherever found in wild in the conterminous 48 States.	E(S/A)	145	NA	NA
Finch, Laysan (honeycreeper)	<i>Telespyza (=Psittirostra) cantans</i>	U.S.A. (HI)	Entire	E	1	NA	NA
Finch, Nihoa (honeycreeper)	<i>Telespyza (=Psittirostra) ultima</i>	.....do	.....do	E	1	NA	NA
Flycatcher, Euler's	<i>Empidonax euleri johnstonei</i>	West Indies: Grenada	.....do	E	3	NA	NA
Flycatcher, Seychelles paradise	<i>Terpsiphone corvina</i>	Indian Ocean: Seychelles	.....do	E	3	NA	NA
Flycatcher, Tahiti	<i>Pomarea nigra</i>	South Pacific Ocean: Tahiti	.....do	E	3	NA	NA
Fody, Seychelles (weaver-finch)	<i>Foudia sechellarum</i>	Indian Ocean: Seychelles	.....do	E	3	NA	NA
Frigatebird, Andrew's	<i>Fregata andrewsi</i>	East Indian Ocean	.....do	E	15	NA	NA
+ Gnatcatcher, coastal California	<i>Poliopitila californica californica</i>	U.S.A. (CA), Mexico	.....do	T	496	NA	NA
Goose, Aleutian Canada	<i>Branta canadensis leucopareia</i>	U.S.A. (AK, CA, OR, WA), Japan	.....do	T	1, 3, 410	NA	NA
Goose, Hawaiian (=nene)	<i>Nesochen (=Branta) sandvicensis</i>	U.S.A. (HI)	.....do	E	1	NA	NA
Goshawk, Christmas Island	<i>Accipiter fasciatus natalis</i>	Indian Ocean: Christmas Island	.....do	E	3	NA	NA
Grackle, slender-billed	<i>Quiscalus (=Cassidix) palustris</i>	Mexico	.....do	E	3	NA	NA
Grasswren, Eyrean (flycatcher)	<i>Amytornis goyderi</i>	Australia	.....do	E	3	NA	NA
Grebe, Atitlan	<i>Podilymbus gigas</i>	Guatemala	.....do	E	3	NA	NA
Greenshank, Nordmann's	<i>Tringa guttifer</i>	Russia, Japan, south to Malaya, Borneo.	.....do	E	15	NA	NA
Guan, horned	<i>Oreophasis derbianus</i>	Guatemala, Mexico	.....do	E	3	NA	NA
Guan, white-winged	<i>Penelope albipennis</i>	Peru	.....do	E	401	NA	NA
Gull, Audouin's	<i>Larus audouinii</i>	Mediterranean Sea	.....do	E	3	NA	NA
Gull, relict	<i>Larus relictus</i>	India, China	.....do	E	15	NA	NA
Hawk, Anjouan Island sparrow	<i>Accipiter francesii pusillus</i>	Indian Ocean: Comoro Islands	.....do	E	3	NA	NA
Hawk, Galapagos	<i>Buteo galapagoensis</i>	Ecuador (Galapagos Islands)	.....do	E	3	NA	NA
Hawk, Hawaiian (=io)	<i>Buteo solitarius</i>	U.S.A. (HI)	.....do	E	1	NA	NA
Hermit, hook-billed (hummingbird)	<i>Glaucis (=Ramphodon) dohrnii</i>	Brazil	.....do	E	15	NA	NA
Honeycreeper, crested (=akohekohe)	<i>Palmeria dolei</i>	U.S.A. (HI)	.....do	E	1	NA	NA
Honeyeater, helmeted	<i>Meliphaga cassidix</i>	Australia	.....do	E	4	NA	NA
Hornbill, helmeted	<i>Rhinoplax vigil</i>	Thailand, Malaysia	.....do	E	15	NA	NA
Ibis, Japanese crested	<i>Nipponia nippon</i>	China, Japan, Russia, Korea	.....do	E	3	NA	NA
Ibis, northern bald	<i>Geronticus eremita</i>	Southern Europe, southwestern Asia, northern Africa.	.....do	E	401	NA	NA
Jay, Florida scrub	<i>Apelocoma coerulescens</i> <i>coerulescens.</i>	U.S.A. (FL)	.....do	T	267	NA	NA
Kagu	<i>Rhynochetos jubatus</i>	South Pacific Ocean: New Caledonia	.....do	E	3	NA	NA
Kakapo (=owl-parrot)	<i>Strigops habroptilus</i>	New Zealand	.....do	E	3	NA	NA
Kestrel, Mauritius	<i>Falco punctatus</i>	Indian Ocean: Mauritius	.....do	E	3	NA	NA
Kestrel, Seychelles	<i>Falco araea</i>	Indian Ocean: Seychelles Islands	.....do	E	3	NA	NA
Kingfisher, Guam Micronesian	<i>Halcyon cinnamomina cinnamomina</i>	West Pacific Ocean: U.S.A. (Guam)	.....do	E	156	NA	NA
Kite, Cuba hook-billed	<i>Chondrohierax uncinatus wilsonii</i>	West Indies: Cuba	.....do	E	3	NA	NA
Kite, Everglade snail	<i>Rostrhamus sociabilis plumbeus</i>	U.S.A. (FL), Cuba	U.S.A. (FL)	E	1	17.95(b)	NA
Kite, Grenada hook-billed	<i>Chondrohierax uncinatus mirus</i>	West Indies: Grenada	Entire	E	3	NA	NA
Kokako (wattlebird)	<i>Callaeas cinerea</i>	New Zealand	.....do	E	3	NA	NA
Macaw, glaucous	<i>Anodorhynchus glaucus</i>	Paraguay, Uruguay, Brazil	.....do	E	15	NA	NA
Macaw, indigo	<i>Anodorhynchus leari</i>	Brazil	.....do	E	15	NA	NA
Macaw, little blue	<i>Cyanopsitta spixii</i>	.....do	.....do	E	15	NA	NA
Magpie-robin, Seychelles (thrush)	<i>Copsychus sechellarum</i>	Indian Ocean: Seychelles Islands	.....do	E	3	NA	NA
Malkoha, red-faced (cuckoo)	<i>Phaenicophaeus pyrrhocephalus</i>	Sri Lanka (=Ceylon)	.....do	E	3	NA	NA
Mallard, Mariana	<i>Anas oustaleti</i>	West Pacific Ocean: U.S.A. (Guam, Mariana Islands).	.....do	E	23	NA	NA
Megapode, Maleo	<i>Macrocephalon maleo</i>	Indonesia (Celebes)	.....do	E	3		NA

Megapode, Micronesian (=La Perouse's)	<i>Megapodius laperouse</i>	West Pacific Ocean: U.S.A. (Palau Island, Mariana Islands)	.....do	E	3	NA	NA
Millerbird, Nihoa (old world warbler)	<i>Acrocephalus familiaris kingi</i>	U.S.A. (HI)	.....do	E	1	NA	NA
Monarch, Tinian (old world flycatcher)	<i>Monarcha takatsukaseae</i>	West Pacific Ocean: U.S.A. (Mariana Islands)	.....do	T	3, 261	NA	NA
Moorhen (=gallinule), Hawaiian common.	<i>Gallinula chloropus sandvicensis</i>	U.S.A. (HI)	.....do	E	1	NA	NA
Moorhen (=gallinule), Mariana common.	<i>Gallinula chloropus guami</i>	West Pacific Ocean: U.S.A. (Guam, Tinian, Saipan, Pagan)	.....do	E	156	NA	NA
+ Murrelet, marbled	<i>Brachyramphus marmoratus marmoratus</i>	U.S.A. (CA, OR, WA, AK), Canada (B.C.)	U.S.A. (CA, OR, WA)	T	479	NA	NA
Nightjar (=whip-poor-will), Puerto Rican.	<i>Caprimulgus noctitherus</i>	U.S.A. (PR)	Entire	E	6	NA	NA
Nukupu'u (honeycreeper)	<i>Hemignathus lucidus</i>	U.S.A. (HI)	.....do	E	1, 2	NA	NA
'O'o, Kauai (=o'o 'a'a) (honeyeater)	<i>Moho braccatus</i>	.....do	.....do	E	1	NA	NA
Ostrich, Arabian	<i>Struthio camelus syriacus</i>	Jordan, Saudi Arabia	.....do	E	3	NA	NA
Ostrich, West African	<i>Struthio camelus spatzi</i>	Spanish Sahara	.....do	E	3	NA	NA
'O'u (honeycreeper)	<i>Psittirostra psittacea</i>	U.S.A. (HI)	.....do	E	1	NA	NA
Owl, Anjouan scops	<i>Otus rutilus capnodes</i>	Indian Ocean: Comoro Island	.....do	E	3	NA	NA
Owl, giant scops	<i>Otus gurneyi</i>	Philippines: Marinduque and Mindanao Island.	.....do	E	15	NA	NA
Owl, Madagascar red	<i>Tyto soumagnei</i>	Madagascar	.....do	E	401	NA	NA
+ Owl, Mexican spotted	<i>Strix occidentalis lucida</i>	U.S.A. (AZ, CO, NM, TX, UT), Mexico.	.....do	T	494	NA	NA
Owl, northern spotted	<i>Strix occidentalis caurina</i>	U.S.A. (CA, OR, WA), Canada (B.C.)	.....do	T	393	17.95(b)	NA
Owl, Seychelles	<i>Otus insularis</i>	Indian Ocean: Seychelles Islands	.....do	E	3	NA	NA
Owlet, Morden's (=sokoke)	<i>Otus irenae</i>	Kenya	.....do	E	3	NA	NA
Pailia (honeycreeper)	<i>Loxioides (=Psittirostra) bailleui</i>	U.S.A. (HI)	.....do	E	1	17.95(b)	NA
Parakeet, Forbes'	<i>Cyanoramphus auriceps forbesi</i>	New Zealand	.....do	E	3	NA	NA
Parakeet, golden	<i>Aratinga guarouba</i>	Brazil	.....do	E	15	NA	NA
Parakeet, golden-shouldered (=hooded).	<i>Psephotus chrysopterygius</i>	Australia	.....do	E	3	NA	NA
Parakeet, Mauritius	<i>Psittacula echo</i>	Indian Ocean: Mauritius	.....do	E	3	NA	NA
Parakeet, Norfolk Island	<i>Cyanoramphus novaezelandiae cookii</i>	Australia (Norfolk Island)	.....do	E	401	NA	NA
Parakeet, ochre-marked	<i>Pyrrhura cruentata</i>	Brazil	.....do	E	3	NA	NA
Parakeet, orange-bellied	<i>Neophema chrysogaster</i>	Australia	.....do	E	4	NA	NA
Parakeet, paradise (=beautiful)	<i>Psephotus pulcherrimus</i>	.....do	.....do	E	4	NA	NA
Parakeet, scarlet-chested (=splendid)	<i>Neophema splendida</i>	.....do	.....do	E	4	NA	NA
Parakeet, turquoise	<i>Neophema pulchella</i>	.....do	.....do	E	3	NA	NA
Parrot, Australian	<i>Geopsittacus occidentalis</i>	.....do	.....do	E	3	NA	NA
Parrot, Bahaman or Cuban	<i>Amazona leucocephala</i>	West Indies: Cuba, Bahamas, Caymans.	.....do	E	3, 15	NA	NA
Parrot, ground	<i>Pezoporus wallicus</i>	Australia	.....do	E	6	NA	NA
Parrot, imperial	<i>Amazona imperialis</i>	West Indies: Dominica	.....do	E	3	NA	NA
Parrot, Puerto Rican	<i>Amazona vittata</i>	U.S.A. (PR)	.....do	E	1	NA	NA
Parrot, red-browed	<i>Amazona rhodocorytha</i>	Brazil	.....do	E	3	NA	NA
Parrot, red-capped	<i>Pionopsitta pileata</i>	.....do	.....do	E	15	NA	NA
Parrot, red-necked	<i>Amazona arausiaca</i>	West Indies: Dominica	.....do	E	50	NA	NA
Parrot, red-spectacled	<i>Amazona pretrei pretrei</i>	Brazil, Argentina	.....do	E	15	NA	NA
Parrot, red-tailed	<i>Amazona brasiliensis</i>	Brazil	.....do	E	401	NA	NA
Parrot, St. Lucia	<i>Amazona versicolor</i>	West Indies: St. Lucia	.....do	E	3	NA	NA
Parrot, St. Vincent	<i>Amazona guildingii</i>	West Indies: St. Vincent	.....do	E	3	NA	NA
Parrot, thick-billed	<i>Rhynchopsitta pachyrhyncha</i>	Mexico, U.S.A. (AZ, NM)	Mexico	E	3	NA	NA
Parrot, vinaceous-breasted	<i>Amazona vinacea</i>	Brazil	Entire	E	15	NA	NA
Parrotbill, Maui (honeycreeper)	<i>Pseudonestor xanthophrys</i>	U.S.A. (HI)	.....do	E	1	NA	NA
Pelican, brown	<i>Pelecanus occidentalis</i>	U.S.A. (Carolinas to TX, CA), West Indies, C. and S. America: Coastal.	Entire, except U.S. Atlantic coast, FL.	E	2, 3, 171	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Penguin, Galapagos	<i>Spheniscus mendiculus</i>	Ecuador (Galapagos Islands)	Entire	E	3	NA	NA
Petrel, Hawaiian dark-rumped	<i>Pterodroma phaeopygia sandwichensis</i>	U.S.A. (HI)	do	E	1	NA	NA
Pheasant, bar-tailed	<i>Symaticus humale</i>	Burma, China	do	E	3	NA	NA
Pheasant, Blyth's tragopan	<i>Tragopan blythii</i>	Burma, China, India	do	E	3	NA	NA
Pheasant, brown eared	<i>Crossoptilon mantchuricum</i>	China	do	E	3	NA	NA
Pheasant, Cabot's tragopan	<i>Tragopan caboti</i>	do	do	E	3	NA	NA
Pheasant, cheer	<i>Catreus wallichii</i>	India, Nepal, Pakistan	do	E	401	NA	NA
Pheasant, Chinese monal	<i>Lophophorus lhuysii</i>	China	do	E	3	NA	NA
Pheasant, Edward's	<i>Lophura edwardsi</i>	Vietnam	do	E	3	NA	NA
Pheasant, Elliot's	<i>Symaticus ellioti</i>	China	do	E	15	NA	NA
Pheasant, imperial	<i>Lophura imperialis</i>	Vietnam	do	E	3	NA	NA
Pheasant, Mikado	<i>Symaticus mikado</i>	Taiwan	do	E	3	NA	NA
Pheasant, Palawan peacock	<i>Polyplectron emphanum</i>	Philippines	do	E	3	NA	NA
Pheasant, Sclater's monal	<i>Lophophorus sclateri</i>	Burma, China, India	do	E	3	NA	NA
Pheasant, Swinhoe's	<i>Lophura swinhoii</i>	Taiwan	do	E	3	NA	NA
Pheasant, western tragopan	<i>Tragopan melanocephalus</i>	India, Pakistan	do	E	3	NA	NA
Pheasant, white eared	<i>Crossoptilon crossoptilon</i>	China (Tibet), India	do	E	4	NA	NA
Pigeon, Azores wood	<i>Columba palumbus azorica</i>	East Atlantic Ocean: Azores	do	E	3	NA	NA
Pigeon, Chatham Island	<i>Hemiphaga novaeseelandiae chathamensis</i>	New Zealand	do	E	3	NA	NA
Pigeon, Mindoro zone-tailed	<i>Ducula mindorensis</i>	Philippines	do	E	15	NA	NA
Pigeon, Puerto Rican plain	<i>Columba inornata wetmorei</i>	U.S.A. (PR)	do	E	2	NA	NA
Piping-guan, black-fronted	<i>Pipile jacutinga</i>	Argentina	do	E	15	NA	NA
Pitta, Koch's	<i>Pitta kochi</i>	Philippines	do	E	15	NA	NA
Plover, New Zealand shore	<i>Thinornis novaeseelandiae</i>	New Zealand	do	E	3	NA	NA
Plover, piping	<i>Charadrius melodus</i>	U.S.A. (Great Lakes, northern Great Plains, Atlantic and Gulf coasts, PR, VI), Canada, Mexico, Bahamas, West Indies..	Great Lakes watershed in States of IL, IN, MI, MN, NY, OH, PA, and WI and Canada (Ont.)..	E	211	NA	NA
Do	do	do	Entire, except those areas where listed as endangered above.	T	211	NA	NA
+ Plover, Western snowy	<i>Charadrius alexandrinus nivosus</i>	U.S.A. (AZ, CA, CO, KS, NM, NV, OK, OR, TX, UT, WA), Mexico.	U.S.A. (CA, OR, WA), Mexico (Within 50 miles of Pacific coast).	T	493	NA	NA
Po'ouli (honeycreeper)	<i>Melamprosops phaeosoma</i>	U.S.A. (HI)	Entire	E	10	NA	NA
Prairie-chicken, Attwater's greater	<i>Tympanuchus cupido attwateri</i>	U.S.A. (TX)	do	E	1	NA	NA
Quail, Merriam's Montezuma	<i>Cyrtonyx montezumae merriami</i>	Mexico (Vera Cruz)	do	E	15	NA	NA
Quetzal, resplendent	<i>Pharomachrus mocinno</i>	Mexico to Panama	do	E	15	NA	NA
Rail, Auckland Island	<i>Rallus pectoralis muelleri</i>	New Zealand	do	E	3	NA	NA
Rail, California clapper	<i>Rallus longirostris obsoletus</i>	U.S.A. (CA)	do	E	2	NA	NA
Rail, Guam	<i>Rallus owstoni</i>	Western Pacific Ocean: U.S.A. (Guam).	Entire, except Rota	E	146E, 156, 371	NA	NA
Do	do	do	Rota	XN	371	NA	17.84(f)
Rail, light-footed clapper	<i>Rallus longirostris levipes</i>	U.S.A. (CA), Mexico (Baja California)	U.S.A. only	E	2	NA	NA
Rail, Lord Howe wood	<i>Tricholimnas sylvestris</i>	Australia (Lord Howe Island)	Entire	E	15	NA	NA
Rail, Yuma clapper	<i>Rallus longirostris yumanensis</i>	Mexico, U.S.A. (AZ, CA)	U.S.A. only	E	1	NA	NA
Rhea, Darwin's	<i>Pterocnemia pennata</i>	Argentina, Bolivia, Peru, Uruguay	Entire	E	3	NA	NA
Robin, Chatham Island	<i>Petroica traversi</i>	Chatham Island	do	E	3	NA	NA

Robin, scarlet-breasted (flycatcher) .....	<i>Petroica multicolor multicolor</i> .....	Australia (Norfolk Island) .....	.....do .....	E	3	NA	NA
Rockfowl, grey-necked .....	<i>Picathartes oreas</i> .....	Cameroon, Gabon .....	.....do .....	E	3	NA	NA
Rockfowl, white-necked .....	<i>Picathartes gymnocephalus</i> .....	Africa: Togo to Sierra Leone .....	.....do .....	E	3	NA	NA
Roller, long-tailed ground .....	<i>Uratelornis chimaera</i> .....	Malagasy Republic (=Madagascar) ..	.....do .....	E	3	NA	NA
Scrub-bird, noisy .....	<i>Atrichornis clamosus</i> .....	Australia .....	.....do .....	E	3	NA	NA
Shama, Cebu black (thrush) .....	<i>Copsychus niger cebuensis</i> .....	Philippines .....	.....do .....	E	3	NA	NA
Shearwater, Newell's Townsend's (for- merly Manx) (=a'o) .....	<i>Puffinus auricularis (=puffinus)</i> <i>newelli</i> .....	U.S.A. (HI) .....	.....do .....	T	10	NA	NA
Shrike, San Clemente loggerhead .....	<i>Lanius ludovicianus mearnsi</i> .....	U.S.A. (CA) .....	.....do .....	E	26	NA	NA
Siskin, red .....	<i>Carduelis (=Spinus) cucullata</i> .....	South America .....	.....do .....	E	15	NA	NA
Sparrow, Cape Sable seaside .....	<i>Ammodramus (=Ammospiza)</i> <i>maritimus mirabilis</i> .....	U.S.A. (FL) .....	.....do .....	E	1	17.95(b)	NA
Sparrow, Florida grasshopper .....	<i>Ammodramus savannarum floridanus</i> .....	.....do .....	.....do .....	E	239	NA	NA
Sparrow, San Clemente sage .....	<i>Amphispiza belli clementeae</i> .....	U.S.A. (CA) .....	.....do .....	T	26	NA	NA
Starling, Ponape mountain .....	<i>Aplonis pelzelni</i> .....	West Pacific Ocean: Federated States of Micronesia .....	.....do .....	E	3	NA	NA
Starling, Rothschild's (myna) .....	<i>Leucopsar rothschildi</i> .....	Indonesia (Bal) .....	.....do .....	E	3	NA	NA
Stilt, Hawaiian (=ae'o) .....	<i>Himantopus mexicanus</i> <i>(=himantopus) knudseni</i> .....	U.S.A. (HI) .....	.....do .....	E	2	NA	NA
Stork, oriental white .....	<i>Ciconia ciconia boyciana</i> .....	China, Japan, Korea, Russia .....	.....do .....	E	3	NA	NA
Stork, wood .....	<i>Mycteria americana</i> .....	U.S.A., (CA, AZ, TX, to Carolinas), Mexico, C. and S. America .....	U.S.A. (AL, FL, GA, NC, SC) .....	E	142	NA	NA
Swiftlet, Mariana gray (=vanikoro) .....	<i>Aerodramus (=Collocalia)</i> <i>vanikorensis bartschi</i> .....	Western Pacific Ocean: U.S.A. (Guam, Rota, Tinian, Saipan, Agiguan) .....	Entire .....	E	156	NA	NA
Teal, Campbell Island flightless .....	<i>Anas aucklandica nesiotis</i> .....	New Zealand (Campbell Island) .....	.....do .....	E	15	NA	NA
Tern, California least .....	<i>Sterna antillarum (=albitrons) browni</i> ..	Mexico, U.S.A. (CA) .....	.....do .....	E	2, 3	NA	NA
Tern, least .....	<i>Sterna antillarum</i> .....	U.S.A. (Atlantic and Gulf coasts, Miss. R. Basin, CA), Gr. and Less- er Antilles, Bahamas, Mexico; win- ters C. America, northern S. Amer- ica .....	U.S.A. AR, CO, IA, IL, IN, KS, KY, LA (Miss. R. and tribs. N of Baton Rouge), MS (Miss. R.) MO, MT, ND, NE, NM, OK, SD, TN, TX (Except within 50 miles of coast). U.S.A. (Atlantic Coast south to NC), Canada (NF, NS, QU), Ber- muda .....	E	182	NA	NA
Tern, roseate .....	<i>Sterna dougallii dougallii</i> .....	Tropical and temperate coasts of At- lantic Basin and East Africa .....	U.S.A. (Atlantic Coast south to NC), Canada (NF, NS, QU), Ber- muda .....	E	296	NA	NA
Do .....	.....do .....	.....do .....	Western Hemi- sphere and adja- cent oceans, incl. U.S.A. (FL, PR, VI), where where not listed as en- dangered .....	T	296	NA	NA
Thrasher, white-breasted .....	<i>Ramphocinclus brachyurus</i> .....	West Indies: St. Lucia, Martinique .....	Entire .....	E	3	NA	NA
Thrush, large Kauai .....	<i>Myadestes (=Phaenornis) myadestinus</i> ..	U.S.A. (HI) .....	.....do .....	E	2	NA	NA
Thrush, Molokai (=oloma'o) .....	<i>Myadestes (=Phaenornis) lanaiensis</i> <i>(=obscurus) rutha</i> .....	.....do .....	.....do .....	E	2	NA	NA
Thrush, New Zealand (wattlebird) .....	<i>Turnagra capensis</i> .....	New Zealand .....	.....do .....	E	3	NA	NA
Thrush, small Kauai (=puaiohi) .....	<i>Myadestes (=Phaenornis) palmeri</i> .....	U.S.A. (HI) .....	.....do .....	E	1	NA	NA
Tinamou, solitary .....	<i>Tinamus solitarius</i> .....	Brazil, Paraguay, Argentina .....	.....do .....	E	15	NA	NA
Towhee, Inyo California (=brown) .....	<i>Pipilo crissalis (=fuscus) eremophilus</i> ..	U.S.A. (CA) .....	.....do .....	T	282	17.95(b)	NA
Trembler, Martinique (thrasher) .....	<i>Cinclocerthia ruficauda gutturalis</i> .....	West Indies: Martinique .....	.....do .....	E	3	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Vireo, black-capped	<i>Vireo atricapillus</i>	U.S.A. (KS, LA, NE, OK, TX), Mexico..	do	E	294	NA	NA
Vireo, least Bell's	<i>Vireo bellii pusillus</i>	U.S.A. (CA), Mexico	do	E	228	NA	NA
Wanderer, plain (collared-hemipode)	<i>Pedionomus torquatus</i>	Australia	do	E	6	NA	NA
Warbler (wood), Bachman's	<i>Vermivora bachmanii</i>	U.S.A. (Southeastern), Cuba	do	E	1, 3	NA	NA
Warbler (wood), Barbados yellow	<i>Dendroica petechia petechia</i>	West Indies: Barbados	do	E	3	NA	NA
Warbler (wood), golden-cheeked	<i>Dendroica chrysoparia</i>	U.S.A. (TX), Mexico, Guatemala, Honduras, Nicaragua, Belize.	do	E	387E, 411	NA	NA
Warbler (wood), Kirtland's	<i>Dendroica kirtlandii</i>	U.S.A. (principally MI), Canada, West Indies: Bahama Islands.	do	E	1, 3	NA	NA
Warbler (Old World), nightingale reed	<i>Acrocephalus luscina</i>	Western Pacific Ocean	U.S.A. (Mariana Islands).	E	3, 4	NA	NA
Warbler (Old World), Rodrigues	<i>Bebrornis rodericanus</i>	Mauritius (Rodrigues Islands)	Entire	E	3	NA	NA
Warbler (wood), Semper's	<i>Leucopoeza semperi</i>	West Indies: St. Lucia	do	E	3	NA	NA
Warbler (Old World), Seychelles	<i>Bebrornis sechellensis</i>	Indian Ocean: Seychelles Island	do	E	3	NA	NA
Whipbird, Western	<i>Psophodes nigrogularis</i>	Australia	do	E	3	NA	NA
White-eye, bridled	<i>Zosterops conspicillatus conspicillatus</i>	Western Pacific Ocean: U.S.A. (Guam).	do	E	156	NA	NA
White-eye, Norfolk Island	<i>Zosterops albogularis</i>	Indian Ocean: Norfolk Islands	do	E	15	NA	NA
White-eye, Ponape greater	<i>Rukia longirostra (=sanfordi)</i>	West Pacific Ocean: Federated States of Micronesia.	do	E	3	NA	NA
White-eye, Seychelles	<i>Zosterops modesta</i>	Indian Ocean: Seychelles	do	E	3	NA	NA
Woodpecker, imperial	<i>Campephilus imperialis</i>	Mexico	do	E	3	NA	NA
Woodpecker, ivory-billed	<i>Campephilus principalis</i>	U.S.A. (southcentral and southeastern), Cuba.	do	E	1, 3	NA	NA
Woodpecker, red-cockaded	<i>Picoides (=Dendrocopos) borealis</i>	U.S.A. (southcentral and southeastern).	do	E	2	NA	NA
Woodpecker, Tristram's	<i>Dryocopus javensis richardsi</i>	Korea	do	E	3	NA	NA
Wren, Guadeloupe house	<i>Troglodytes aedon guadeloupensis</i>	West Indies: Guadeloupe	do	E	3	NA	NA
Wren, St. Lucia house	<i>Troglodytes aedon mesoleucus</i>	West Indies: St. Lucia	do	E	3	NA	NA
REPTILES							
Alligator, American	<i>Alligator mississippiensis</i>	Southeastern U.S.A.	Entire	T(S/A)	1, 11, 20, 47, 51, 60, 113, 134, 186, 269	NA	17.42(a)
Alligator, Chinese	<i>Alligator sinensis</i>	China	Entire	E	15	NA	NA
Anole, Culebra Island giant	<i>Anolis roosevelti</i>	U.S.A. (PR; Culebra Island)	do	E	25	17.95(c)	NA
Boa, Jamaican	<i>Epicrates subflavus</i>	Jamaica	do	E	3	NA	NA
Boa, Mona	<i>Epicrates monensis monensis</i>	U.S.A. (PR)	do	T	33	17.95(c)	NA
Boa, Puerto Rican	<i>Epicrates inornatus</i>	do	do	E	2	NA	NA
Boa, Round Island [no common name]	<i>Casarea dussumieri</i>	Indian Ocean: Mauritius	do	E	88	NA	NA
Do	<i>Bolyeria multocarinata</i>	do	do	E	88	NA	NA
Boa, Virgin Islands tree	<i>Epicrates monensis granti</i>	U.S. and British Virgin Islands	do	E	2, 86	NA	NA
Caiman, Apaporis River	<i>Caiman crocodilus apaporiensis</i>	Colombia	do	E	15	NA	NA
Caiman, black	<i>Melanosuchus niger</i>	Amazon basin	do	E	15	NA	NA
Caiman, broad-snouted	<i>Caiman latirostris</i>	Brazil, Argentina, Paraguay, Uruguay	do	E	15	NA	NA
Caiman, Yacare	<i>Caiman crocodilus yacare</i>	Bolivia, Argentina, Peru, Brazil	do	E	3	NA	NA
Chuckwalla, San Esteban Island	<i>Sauromalus varius</i>	Mexico	do	E	88	NA	NA
Crocodile, African dwarf	<i>Osteolaemus tetraspis tetraspis</i>	West Africa	do	E	15	NA	NA
Crocodile, African slender-snouted	<i>Crocodylus cataphractus</i>	Western and central Africa	do	E	5	NA	NA
Crocodile, American	<i>Crocodylus acutus</i>	U.S.A. (FL), Mexico, Caribbean, C. America.	do	E	10, 87	NA	NA

Crocodile, Ceylon mugger .....	<i>Crocodylus palustris kimbula</i> .....	Sri Lanka .....	.....do .....	E	15	NA	NA
Crocodile, Congo dwarf .....	<i>Osteolaemus tetraspis osborni</i> .....	Congo R. drainage .....	.....do .....	E	15	NA	NA
Crocodile, Cuban .....	<i>Crocodylus rhombifer</i> .....	Cuba .....	.....do .....	E	3	NA	NA
Crocodile, Morelet's .....	<i>Crocodylus moreletii</i> .....	Mexico, Belize, Guatemala .....	.....do .....	E	3	NA	NA
Crocodile, mugger .....	<i>Crocodylus palustris palustris</i> .....	India, Pakistan, Iran, Bangladesh .....	.....do .....	E	15	NA	NA
Crocodile, Nile .....	<i>Crocodylus niloticus</i> .....	Africa, Middle East .....	Entire, except popu- lations in Zimbabwe.	E	3, 279, 334	NA	NA
Do .....	.....do .....	.....do .....	Zimbabwe .....	T	3, 279, 334	NA	17.42(c)
Crocodile, Orinoco .....	<i>Crocodylus intermedius</i> .....	South America: Orinoco R. basin .....	Entire .....	E	3	NA	NA
Crocodile, Philippine .....	<i>Crocodylus novaeguineae mindorensis.</i>	Philippine Islands .....	.....do .....	E	15	NA	NA
Crocodile, saltwater (=estuarine) .....	<i>Crocodylus porosus</i> .....	Southeast Asia, Australia, Papua- New Guinea, Pacific Islands, U.S.A. (Palau).	Entire, except Papua-New Guin- ea.	E	87	NA	NA
Crocodile, Siamese .....	<i>Crocodylus siamensis</i> .....	Southeast Asia, Malay Peninsula .....	Entire .....	E	15	NA	NA
Gavial (=gharial) .....	<i>Gavialis gangeticus</i> .....	Pakistan, Burma, Bangladesh, India, Nepal.	.....do .....	E	3	NA	NA
Gecko, day .....	<i>Phelsuma edwardnewtoni</i> .....	Indian Ocean: Mauritius .....	.....do .....	E	3	NA	NA
Gecko, Monito .....	<i>Sphaerodactylus micropithecus</i> .....	U.S.A. (PR) .....	.....do .....	E	125	17.95(c)	NA
Gecko, Round Island day .....	<i>Phelsuma guentheri</i> .....	Indian Ocean: Mauritius .....	.....do .....	E	3	NA	NA
Gecko, Serpent Island .....	<i>Cyrtodactylus serpensinsula</i> .....	.....do .....	.....do .....	T	129	NA	NA
Iguana, Acklins ground .....	<i>Cyclura rileyi nuchalis</i> .....	West Indies: Bahamas .....	.....do .....	T	129	NA	NA
Iguana, Allen's Cay .....	<i>Cyclura cychlura inornata</i> .....	.....do .....	.....do .....	T	129	NA	NA
Iguana, Andros Island ground .....	<i>Cyclura cychlura cychlura</i> .....	.....do .....	.....do .....	T	129	NA	NA
Iguana, Anegada ground .....	<i>Cyclura pinguis</i> .....	West Indies: British Virgin Islands (Anegada Island).	.....do .....	E	3	NA	NA
Iguana, Barrington land .....	<i>Conolophus pallidus</i> .....	Ecuador (Galapagos Islands) .....	.....do .....	E	3	NA	NA
Iguana, Cayman Brac ground .....	<i>Cyclura nubila caymanensis</i> .....	West Indies: Cayman Islands .....	.....do .....	T	129	NA	NA
Iguana, Cuban ground .....	<i>Cyclura nubila nubila</i> .....	Cuba .....	Entire (excluding population intro- duced in Puerto Rico).	T	129	NA	NA
Iguana, Exuma Island .....	<i>Cyclura cychlura figginsi</i> .....	West Indies: Bahamas .....	Entire .....	T	129	NA	NA
Iguana, Fiji banded .....	<i>Brachylophus fasciatus</i> .....	Pacific: Fiji, Tonga .....	.....do .....	E	88	NA	NA
Iguana, Fiji crested .....	<i>Brachylophus vitiensis</i> .....	Pacific: Fiji .....	.....do .....	E	88	NA	NA
Iguana, Grand Cayman ground .....	<i>Cyclura nubila lewisi</i> .....	West Indies: Cayman Islands .....	.....do .....	E	129	NA	NA
Iguana, Jamaican .....	<i>Cyclura collei</i> .....	West Indies: Jamaica .....	.....do .....	E	129	NA	NA
Iguana, Mayaguana .....	<i>Cyclura carinata bartschi</i> .....	West Indies: Bahamas .....	.....do .....	T	129	NA	NA
Iguana, Mona ground .....	<i>Cyclura stejnegeri</i> .....	U.S.A. (PR: Mona Island) .....	.....do .....	T	33	17.95(c)	NA
Iguana, Turks and Caicos .....	<i>Cyclura carinata carinata</i> .....	West Indies: Turks and Caicos Is- lands.	.....do .....	T	129	NA	NA
Iguana, Watling Island ground .....	<i>Cyclura rileyi rileyi</i> .....	West Indies: Bahamas .....	.....do .....	E	129	NA	NA
Iguana, White Cay ground .....	<i>Cyclura rileyi cristata</i> .....	.....do .....	.....do .....	T	129	NA	NA
Lizard, blunt-nosed leopard .....	<i>Gambelia (=Crotaphytus) sikus</i> .....	U.S.A. (CA) .....	.....do .....	E	1	NA	NA
Lizard, Coachella Valley fringe-toed .....	<i>Uma inornata</i> .....	.....do .....	.....do .....	E	105	17.95(c)	NA
Lizard, Hierro giant .....	<i>Gallotia simonyi simonyi</i> .....	Spain (Canary Islands) .....	.....do .....	E	144	NA	NA
Lizard, Ibiza wall .....	<i>Podarcis pityusensis</i> .....	Spain (Balearic Islands) .....	.....do .....	T	144	NA	NA
Lizard, Island night .....	<i>Xantusia (=Kauberina) riversiana</i> .....	U.S.A. (CA) .....	.....do .....	T	26	NA	NA
Lizard, Maria Island ground .....	<i>Cnemidophorus vanzoi</i> .....	West Indies: St. Lucia (Maria Islands)	.....do .....	E	443	NA	NA
Lizard, St. Croix ground .....	<i>Ameiva polops</i> .....	U.S.A. (VI) .....	.....do .....	E	24	17.95(c)	NA
Monitor, Bengal .....	<i>Varanus bengalensis</i> .....	Iran, Iraq, India, Sri Lanka, Malaysia, Afghanistan, Burma, Vietnam, Thailand.	.....do .....	E	15	NA	NA
Monitor, desert .....	<i>Varanus griseus</i> .....	North Africa to Aral Sea, through Central Asia to Pakistan, North- west India.	.....do .....	E	15	NA	NA



Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Monitor, Komodo Island	<i>Varanus komodoensis</i>	Indonesia (Komodo, Rintja, Padar, and western Flores Island).	.....do	E	15	NA	NA
Monitor, yellow	<i>Varanus flavescens</i>	West Pakistan through India to Bangladesh.	.....do	E	15	NA	NA
Python, Indian	<i>Python molurus molurus</i>	Sri Lanka and India	.....do	E	15	NA	NA
Rattlesnake, Aruba Island	<i>Crotalus unicolor</i>	Aruba Island (Netherland Antilles)	.....do	T	129	NA	NA
Rattlesnake, New Mexican ridgenosed.	<i>Crotalus willardi obscurus</i>	U.S.A. (NM), Mexico	.....do	T	43	17.95(c)	NA
Skink, bluetail (=blue-tailed) mole	<i>Eumeces egregius lividus</i>	U.S.A. (FL)	.....do	T	299	NA	17.42(d)
Skink, Round Island	<i>Leiolopisma telfairi</i>	Indian Ocean: Mauritius	.....do	T	129	NA	NA
Skink, sand	<i>Neoseps reynoldsi</i>	U.S.A. (FL)	.....do	T	299	NA	17.42(d)
Snake, Atlantic salt marsh	<i>Nerodia clarkii (=fasciata) taeniata</i>	.....do	.....do	T	30	NA	NA
Snake, Concho water	<i>Nerodia paucimaculata (=harteri p.)</i>	U.S.A. (TX)	.....do	T	241	17.95(c)	NA
Snake, eastern indigo	<i>Drymarchon corais couperi</i>	U.S.A. (AL, FL, GA, MS, SC)	.....do	T	32	NA	NA
Snake, Maria Island	<i>Lioophus ornatus</i>	West Indies: St. Lucia (Maria Islands)	.....do	E	443	NA	NA
Snake, San Francisco garter	<i>Thamnophis sirtalis tetrataenia</i>	U.S.A. (CA)	.....do	E	1	NA	NA
Tartaruga	<i>Podocnemis expansa</i>	South America: Orinoco R. and Amazon R. basins.	.....do	E	3	NA	NA
Terrapin, river (=tuntong)	<i>Batagur baska</i>	Malaysia, Bangladesh, Burma, India, Indonesia.	.....do	E	3	NA	NA
Tomistoma	<i>Tomistoma schlegelii</i>	Malaysia, Indonesia	.....do	E	15	NA	NA
Tortoise, angulated	<i>Geochelone yniphora</i>	Malagasy Republic (=Madagascar)	.....do	E	15	NA	NA
Tortoise, Bolson	<i>Gopherus flavomarginatus</i>	Mexico	.....do	E	46	NA	NA
Tortoise, desert	<i>Gopherus (=Xerobates, =Scaptochelys) agassizii</i>	U.S.A. (AZ, CA, NV, UT), Mexico	Entire, except AZ south and east of Colorado R., and Mexico.	T	103, 357E, 378	17.95(c)	NA
Do	.....do	.....do	AZ south and east of Colorado R. and Mexico, when found outside of Mexico or said range in AZ.	T(S/A)	357E, 378	NA	17.42(e)
Tortoise, Galapagos	<i>Geochelone elephantopus</i>	Ecuador (Galapagos Islands)	Entire	E	3	NA	NA
Tortoise, gopher	<i>Gopherus polyphemus</i>	U.S.A. (AL, FL, GA, LA, MS, SC)	Wherever found west of Mobile and Tombigbee Rivers in AL, MS, and LA.	T	281	NA	NA
Tortoise, radiated	<i>Geochelone (=Testudo) radiata</i>	Malagasy Republic (=Madagascar)	Entire	E	3	NA	NA
Tracaja	<i>Podocnemis unifilis</i>	South America: Orinoco R. and Amazon R. basins.	.....do	E	3	NA	NA
Tuatara	<i>Sphenodon punctatus</i>	New Zealand	.....do	E	3	NA	NA
Turtle, Alabama redbelly (=red-bellied)	<i>Pseudemys alabamensis</i>	U.S.A. (AL)	.....do	E	278	NA	NA
Turtle, aquatic box	<i>Terrapene coahuila</i>	Mexico	.....do	E	6	NA	NA
Turtle, black softshell	<i>Trionyx nigricans</i>	Bangladesh	.....do	E	15	NA	NA
Turtle, Brazilian (=Hoge's) sideneck	<i>Phrynops hogei</i>	Brazil	.....do	E	443	NA	NA
Turtle, Burmese peacock	<i>Morenia ocellata</i>	Burma	.....do	E	15	NA	NA
Turtle, Cat Island	<i>Trachemys terrapen</i>	West Indies: Jamaica, Bahamas	Cat Island in the Bahamas.	E	443	NA	NA
Turtle, Central American river	<i>Dermatemys mawii</i>	Mexico, Belize, Guatemala	Entire	E	12	NA	NA
Turtle, Cuatro Ciénegas softshell	<i>Trionyx ater</i>	.....do	.....do	E	15	NA	NA

Turtle, flattened musk .....	<i>Sternotherus depressus</i> .....	U.S.A. (AL) .....	Black Warrior R. system upstream from Bankhead Dam. Entire .....	T	272	NA	NA
Turtle, geometric .....	<i>Psammobates geometricus</i> (= <i>Geochelone geometrica</i> ) .....	South Africa .....	Entire .....	E	15	NA	NA
Turtle, green sea .....	<i>Chelonia mydas</i> (incl. <i>agassizi</i> ) .....	Circumglobal in tropical and temperate seas and oceans. ....do .....	Wherever found except where listed as endangered below. Breeding colony populations in FL and on Pacific coast of Mexico. Entire .....	T	42	NA	17.42(b), 227.71, 227.72
Do .....	<i>Chelonia mydas</i> .....	.....do .....	Breeding colony populations in FL and on Pacific coast of Mexico. ....do .....	E	42	NA	222.41
Turtle, hawksbill sea (=carey) .....	<i>Eretmochelys imbricata</i> .....	Tropical seas .....	Entire .....	E	3	17.95(c)	222.41
Turtle, Inagua Island .....	<i>Trachemys stejnegeri malonei</i> .....	West Indies: Bahamas (Great Inagua Island). ....do .....	.....do .....	E	443	NA	NA
Turtle, Indian sawback .....	<i>Kachuga tecta tecta</i> .....	India .....	.....do .....	E	15	NA	NA
Turtle, Indian softshell .....	<i>Trionyx gangeticus</i> .....	Pakistan, India .....	.....do .....	E	15	NA	NA
Turtle, Kemp's (=Atlantic) ridley sea ...	<i>Lepidochelys kempii</i> .....	Tropical and temperate seas in Atlantic Basin, incl. Gulf of Mexico. ....do .....	.....do .....	E	4	NA	222.41
Turtle, leatherback sea .....	<i>Dermochelys coriacea</i> .....	Tropical, temperate, and subpolar seas. ....do .....	.....do .....	E	3	17.95(c)	222.41
Turtle, loggerhead sea .....	<i>Caretta caretta</i> .....	Circumglobal in tropical and temperate seas and oceans. ....do .....	.....do .....	T	42	NA	17.42(b), 227.71, 227.72
Turtle, olive (=Pacific) ridley sea .....	<i>Lepidochelys olivacea</i> .....	Circumglobal in tropical and temperate seas. ....do .....	Wherever found except where listed as endangered below. Breeding colony populations on Pacific coast of Mexico. ....do .....	T	42	NA	17.42(b), 227.71, 227.72
Do .....	.....do .....	.....do .....	Breeding colony populations on Pacific coast of Mexico. ....do .....	E	42	NA	222.41
Turtle, peacock softshell .....	<i>Trionyx hurum</i> .....	India, Bangladesh .....	Entire .....	E	15	NA	NA
Turtle, Plymouth redbelly (=red-bellied)	<i>Pseudemys</i> (= <i>Chrysemys</i> ) <i>rubriventris bangsi</i> .....	U.S.A. (MA) .....	.....do .....	E	90	17.95(c)	NA
Turtle, ringed map (=sawback) .....	<i>Graptemys oculifera</i> .....	U.S.A. (LA, MS) .....	.....do .....	T	250	NA	NA
Turtle, short-necked or western swamp.	<i>Pseudemys umbrina</i> .....	Australia .....	.....do .....	E	3	NA	NA
Turtle, South American red-lined .....	<i>Trachemys scripta callirostris</i> .....	Colombia, Venezuela .....	.....do .....	E	443	NA	NA
Turtle, spotted pond .....	<i>Geoclemys</i> (= <i>Damonina</i> ) <i>hamiltonii</i> .....	North India, Pakistan .....	.....do .....	E	15	NA	NA
Turtle, three-keeled Asian .....	<i>Melanochelys</i> (= <i>Geoemyda</i> , = <i>Nicoria</i> ) <i>tricarinata</i> .....	Central India to Bangladesh and Burma. ....do .....	.....do .....	E	15	NA	NA
Turtle, yellow-blotched map (=sawback).	<i>Graptemys flavimaculata</i> .....	U.S.A. (MS) .....	.....do .....	T	416	NA	NA
Viper, Lar Valley .....	<i>Vipera latifii</i> .....	Iran .....	.....do .....	E	129	NA	NA
AMPHIBIANS							
Coqui, golden .....	<i>Eleutherodactylus jasperii</i> .....	U.S.A. (PR) .....	.....do .....	T	29	17.95(d)	NA
Frog, Israel painted .....	<i>Discoglossus nigriventer</i> .....	Israel .....	.....do .....	E	3	NA	NA
Frog, Panamanian golden .....	<i>Ateolopus varius zeteki</i> .....	Panama .....	.....do .....	E	15	NA	NA
Frog, Stephen Island .....	<i>Leiopelma hamiltoni</i> .....	New Zealand .....	.....do .....	E	3	NA	NA
Salamander, Cheat Mountain .....	<i>Plethodon nettingi</i> .....	U.S.A. (WV) .....	.....do .....	T	358	NA	NA
Salamander, Chinese giant .....	<i>Andrias davidianus davidianus</i> .....	Western China .....	.....do .....	E	15	NA	NA
Salamander, desert slender .....	<i>Batrachoseps aridus</i> .....	U.S.A. (CA) .....	.....do .....	E	6	NA	NA
Salamander, Japanese giant .....	<i>Andrias davidianus japonicus</i> .....	Japan .....	.....do .....	E	15	NA	NA
Salamander, Red Hills .....	<i>Rhyacophila</i> .....	.....do .....	.....do .....	E	15	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Salamander, Santa Cruz long-toed	<i>Ambystoma macrodactylum croceum</i>	U.S.A. (CA)	do	E	1	NA	NA
Salamander, Shenandoah	<i>Plethodon shenandoah</i>	U.S.A. (VA)	do	E	358	NA	NA
Salamander, Texas blind	<i>Typhlomolge rathbuni</i>	U.S.A. (TX)	do	E	1	NA	NA
Toads, African viviparous	<i>Nectophrynoides</i> spp. (all)	Tanzania, Guinea, Ivory Coast, Cameroon, Liberia, Ethiopia.	do	E	15	NA	NA
Toad, Cameroon	<i>Bufo superciliaris</i>	Equatorial Africa	do	E	15	NA	NA
Toad, Houston	<i>Bufo houstonensis</i>	U.S.A. (TX)	do	E	2	17.95(d)	NA
Toad, Monte Verde	<i>Bufo perigrinus</i>	Costa Rica	do	E	15	NA	NA
Toad, Puerto Rican crested	<i>Peltophyne lemur</i>	U.S.A. (PR), British Virgin Islands	do	T	283	NA	NA
Toad, Wyoming	<i>Bufo hemiophrys baxteri</i>	U.S.A. (WY)	do	E	138	NA	NA
FISHES							
Aia Balik (trout)	<i>Salmo platycephalus</i>	Turkey	do	E	3	NA	NA
Ayumodoki (loach)	<i>Hymenophysa (=Botia) curta</i>	Japan	do	E	3	NA	NA
Blindcat, Mexican (catfish)	<i>Prietella phreatophila</i>	Mexico	do	E	3	NA	NA
Bonytongue, Asian	<i>Scleropages formosus</i>	Thailand, Indonesia, Malaysia	do	E	15	NA	NA
Catfish [no common name]	<i>Pangasius sanitwongsei</i>	Thailand	do	E	3	NA	NA
Catfish, giant	<i>Pangasianodon gigas</i>	do	do	E	3	NA	NA
Catfish, Yaqui	<i>Ictalurus pricei</i>	U.S.A. (AZ), Mexico	do	T	157	17.95(e)	17.44(g)
Cavefish, Alabama	<i>Speoplatyrhinus poulsoni</i>	U.S.A. (AL)	do	E	28, 328	17.95(e)	NA
Cavefish, Ozark	<i>Amblyopsis rosae</i>	U.S.A. (AR, MO, OK)	do	T	164	NA	NA
Chub, bonytail	<i>Gila elegans</i>	U.S.A. (AZ, CA, CO, NV, UT, WY)	do	E	92	NA	NA
Chub, Borax Lake	<i>Gila boraxobius</i>	U.S.A. (OR)	do	E	94E, 124	17.95(e)	NA
Chub, Chihuahua	<i>Gila nigrescens</i>	U.S.A. (NM), Mexico (Chihuahua)	do	T	132	NA	17.44(g)
Chub, humpback	<i>Gila cypha</i>	U.S.A. (AZ, CO, UT, WY)	do	E	1	NA	NA
Chub, Hutton tui	<i>Gila bicolor</i> ssp.	U.S.A. (OR)	do	T	174	NA	17.44(j)
Chub, Mohave tui	<i>Gila bicolor mohavensis</i>	U.S.A. (CA)	do	E	2	NA	NA
Chub, Owens tui	<i>Gila bicolor snyderi</i>	do	do	E	195	17.95(e)	NA
Chub, Pahrangat roundtail (=bonytail)	<i>Gila robusta jordani</i>	U.S.A. (NV)	do	E	2	NA	NA
Chub, slender	<i>Erimystax (=Hybopsis) cahni</i>	U.S.A. (TN, VA)	do	T	28	17.95(e)	17.44(c)
Chub, Sonora	<i>Gila ditaenia</i>	U.S.A., (AZ), Mexico	do	T	227	17.95(e)	17.44(o)
Chub, spotfin (=turquoise shiner)	<i>Cyprinella (=Hybopsis) monacha</i>	U.S.A. (AL, GA, NC, TN, VA)	do	T	28	17.95(e)	17.44(c)
Chub, Virgin River	<i>Gila robusta semidnuda</i>	U.S.A. (AZ, NV, UT)	do	E	361	NA	NA
Chub, Yaqui	<i>Gila purpurea</i>	U.S.A. (AZ), Mexico	do	E	157	17.95(e)	NA
Cicek (m inow)	<i>Acanthorutilus handlirschi</i>	Turkey	do	E	3	NA	NA
Cui-ui	<i>Chasmistes cujus</i>	U.S.A. (NV)	do	E	1	NA	NA
Dace, Ash Meadows speckled	<i>Rhinichthys osculus nevadensis</i>	do	do	E	117E, 127E, 130	17.95(e)	NA
Dace, blackside	<i>Phoxinus cumberlandensis</i>	U.S.A. (KY, TN)	do	T	273	NA	NA
Dace, Clover Valley speckled	<i>Rhinichthys osculus oligoporus</i>	U.S.A. (NV)	do	E	370	NA	NA
Dace, desert	<i>Er emichthys acros</i>	do	do	T	1, 2D, 210	17.95(e)	17.44(m)
Dace, Fosskett speckled	<i>Rhinichthys osculus</i> ssp.	U.S.A. (OR)	do	T	174	NA	17.44(j)
Dace, Independence Valley speckled	<i>Rhinichthys osculus lethoporus</i>	U.S.A. (NV)	do	E	370, 372	NA	NA
Dace, Kendall Warm Springs	<i>Rhinichthys osculus thermalis</i>	U.S.A. (WY)	do	E	2	NA	NA
Dace, Moapa	<i>Moapa coriacea</i>	U.S.A. (NV)	do	E	1	NA	NA
Darter, amber	<i>Percina antesella</i>	U.S.A. (GA, TN)	do	E	196	17.95(e)	NA
Darter, bayou	<i>Etheostoma rubrum</i>	U.S.A. (MS)	do	T	10	NA	17.44(b)
Darter, boulder (=Elk River)	<i>Etheostoma wapiti</i>	U.S.A. (AL, TN)	do	E	322	NA	NA
Darter, duskytail	<i>Etheostoma (Catonotus) sp</i>	U.S.A. (TN, VA)	do	E	502	NA	NA
Darter, fountain	<i>Etheostoma fonticola</i>	U.S.A. (TX)	do	E	2	7.95(e)	NA
Darter, goldline	<i>Percina aurolineata</i>	U.S.A. (AL, GA, TN)	do	T	462	NA	NA
Darter, leopard	<i>Percina pantherina</i>	AR, OK	do	T	31	7	17.44(d)

Darter, Maryland	<i>Etheostoma sellare</i>	U.S.A. (MD)	do	E	1	17.95(e)	NA
Darter, Niangua	<i>Etheostoma nianguae</i>	U.S.A. (MO)	do	T	185	17.95(e)	17.44(k)
Darter, Okaloosa	<i>Etheostoma okaloosae</i>	U.S.A. (FL)	do	T	8	NA	NA
Darter, slackwater	<i>Etheostoma boschungii</i>	U.S.A. (AL, TN)	do	T	28	17.95(e)	17.44(c)
Darter, snail	<i>Percina tanasi</i>	U.S.A. (AL, GA, TN)	do	T	12, 150	NA	NA
Darter, watercress	<i>Etheostoma nuchale</i>	U.S.A. (AL)	do	T	2	NA	NA
Gambusia, Big Bend	<i>Gambusia gaigei</i>	U.S.A. (TX)	do	E	1	NA	NA
Gambusia, Clear Creek	<i>Gambusia heterochir</i>	do	do	E	1	NA	NA
Gambusia, Pecos	<i>Gambusia nobilis</i>	U.S.A. (NM, TX)	do	E	2	NA	NA
Gambusia, San Marcos	<i>Gambusia georgei</i>	U.S.A. (TX)	do	E	98	17.95(e)	NA
Logperch, Conasauga	<i>Percina jenkinsi</i>	U.S.A. (GA, TN)	do	E	196	17.95(e)	NA
Logperch, Roanoke	<i>Percina rex</i>	U.S.A. (VA)	do	E	359	NA	NA
Madtom, Neosho	<i>Noturus placidus</i>	U.S.A. (KS, MO, OK)	do	E	388	NA	NA
Madtom, pygmy	<i>Noturus stanauil</i>	U.S.A. (TN)	do	E	502	NA	NA
Madtom, Scioto	<i>Noturus trautmani</i>	U.S.A. (OH)	do	E	10	NA	NA
Madtom, Smoky	<i>Noturus baileyi</i>	U.S.A. (TN)	do	E	163	17.95(e)	NA
Madtom, yellowfin	<i>Noturus flavipinnis</i>	U.S.A. (TN, VA)	do	E	28, 317	17.95(e)	17.44(c)
Do	do	do	Entire, except where listed as an experimental population below.				
			N. Fork Holston R., VA, TN; S. Fork Holston R., upstream to Ft. Patrick Henry Dam, TN; Holston R., downstream to John Sevier Detention Lake Dam, TN; and all tributaries thereto..	XN	317	NA	17.84(e)
Minnow, loach	<i>Rhinichthys (=Tiaroga) cobitis</i>	U.S.A. (AZ, NM), Mexico	Entire	T	247	NA	17.44(q)
Nekogigi (catfish)	<i>Coreobagrus ichikawai</i>	Japan	do	E	3	NA	NA
Poolfish (=killifish), Pahump	<i>Empetrichthys latos</i>	U.S.A. (NV)	do	E	1	NA	NA
Pupfish, Ash Meadows Amargosa	<i>Cyprinodon nevadensis mionectes</i>	do	do	E	117E, 127E,	17.95(e)	NA
Pupfish, Comanche Springs	<i>Cyprinodon elegans</i>	U.S.A. (TX)	do	E	130		
Pupfish, desert	<i>Cyprinodon macularius</i>	U.S.A. (AZ, CA) Mexico	do	E	1	NA	NA
Pupfish, Devils Hole	<i>Cyprinodon diabolis</i>	U.S.A. (NV)	do	E	222	17.95(e)	NA
Pupfish, Leon Springs	<i>Cyprinodon bovinus</i>	U.S.A. (TX)	do	E	1	NA	NA
Pupfish, Owens	<i>Cyprinodon radiosus</i>	U.S.A. (CA)	do	E	102	17.95(e)	NA
Pupfish, Warm Springs	<i>Cyprinodon nevadensis pectoralis</i>	U.S.A. (NV)	do	E	1	NA	NA
Salmon, chinook	<i>Oncorhynchus tshawytscha</i>	Pacific Ocean	do	E	2	NA	NA
Salmon, sockeye (=red, =blueback)	<i>Oncorhynchus nerka</i>	North Pacific Basin from U.S.A. (CA) to Russia.	U.S.A. (CA: Sacramento R. winter run).	T	383E, 407	226.21	227.21
			U.S.A. (Snake River, ID stock wherever found.).	E	455	NA	NA
Sculpin, pygmy	<i>Cottus pygmaeus</i>	U.S.A. (AL)	Entire	T	385	NA	17.44(u)
Shiner, beautiful	<i>Cyprinella (=Notropis) formosa</i>	U.S.A. (AZ, NM), Mexico	do	T	157	17.95(e)	17.44(g)
Shiner, blue	<i>Cyprinella (=Notropis) caerulea</i>	U.S.A. (AL, GA)	do	T	482	NA	NA
Shiner, Cahaba	<i>Notropis cahabae</i>	U.S.A. (AL)	do	T	405	NA	NA
Shiner, Cape Fear	<i>Notropis mekistocholas</i>	U.S.A. (NC)	do	E	290	17.95(e)	NA
Shiner, Palezone	<i>Notropis sp.</i>	U.S.A. (AL, KY, TN)	do	E	502	NA	NA
Shiner, Pecos bluntnose	<i>Notropis simus pecosensis</i>	U.S.A. (NM)	do	T	258	17.95(e)	17.44(r)
Silverside, Waccamaw	<i>Menidia extensa</i>	U.S.A. (NC)	do	T	265	17.95(e)	17.44(s)
Smelt, delta	<i>Hypomesus transpacificus</i>	U.S.A. (CA)	do	T	492	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Spinedace	<i>Meda fulgida</i>	U.S.A. (AZ, NM), Mexico	.....do	T	236	NA	17.44(p)
Spinedace, Big Spring	<i>Lepidomeda mollispinis pratensis</i>	U.S.A. (NV)	.....do	T	173	17.95(e)	17.44(f)
Spinedace, Little Colorado	<i>Lepidomeda vittata</i>	U.S.A. (AZ)	.....do	T	287	17.95(e)	17.44(f)
Spinedace, White River	<i>Lepidomeda albivallis</i>	U.S.A. (NV)	.....do	E	203	17.95(e)	NA
Springfish, Hiko White River	<i>Crenichthys baileyi grandis</i>	.....do	.....do	E	206	17.95(e)	NA
Springfish, Railroad Valley	<i>Crenichthys nevadae</i>	.....do	.....do	T	224	17.95(e)	17.44(n)
Springfish, White River	<i>Crenichthys baileyi baileyi</i>	.....do	.....do	E	206	17.95(e)	NA
Squawfish, Colorado	<i>Ptychocheilus lucius</i>	U.S.A. (AZ, CA, CO, NM, NV, UT, WY), Mexico.	Entire, except Salt and Verde R. drainages, AZ.	E	1, 193	NA	NA
Do	.....do	.....do	Salt and Verde R. drainages, AZ.	XN	193	NA	17.84(b)
Stickleback, unarmored threespine	<i>Gasterosteus aculeatus williamsoni</i>	U.S.A. (CA)	Entire	E	2	NA	NA
Sturgeon, Gulf	<i>Acipenser oxyrinchus desotoi</i>	U.S.A. (AL, FL, GA, LA, MS)	.....do	T	444	NA	17.44(v)
Sturgeon, pallid	<i>Scaphirhynchus albus</i>	U.S.A. (AR, IA, IL, KS, KY, LA, MO, MS, MT, ND, NE, SD, TN).	.....do	E	399	NA	NA
Sturgeon, shortnose	<i>Acipenser brevirostrum</i>	U.S.A. and Canada (Atlantic Coast)	.....do	E	1	NA	NA
Sucker, June	<i>Chasmistes liorus</i>	U.S.A. (UT)	.....do	E	223	17.95(e)	NA
Sucker, Lost River	<i>Detistes luxatus</i>	U.S.A. (CA, OR)	.....do	E	313	NA	NA
Sucker, Modoc	<i>Catostomus microps</i>	U.S.A. (CA)	.....do	E	184	17.95(e)	NA
Sucker, razorback	<i>Xyrauchen texanus</i>	U.S.A. (AZ, CA, CO, NM, NV, UT, WY), Mexico.	.....do	E	447	NA	NA
Sucker, shortnose	<i>Chasmistes brevirostris</i>	U.S.A. (CA, OR)	.....do	E	313	NA	NA
Sucker, Warner	<i>Catostomus warnerensis</i>	U.S.A. (OR)	.....do	T	205	17.95(e)	17.44(l)
Tango, Miyako (Tokyo bitterling)	<i>Tanakia tanago</i>	Japan	.....do	E	3	NA	NA
Temoleh, Ikan (minnow)	<i>Probarbus jullieni</i>	Thailand, Cambodia, Vietnam, Malaysia, Laos.	.....do	E	15	NA	NA
Topminnow, Gila (incl. Yaqui)	<i>Poeciliopsis occidentalis</i>	U.S.A. (AZ, NM), Mexico	U.S.A. only	E	1	NA	NA
Totoaba (seatrout or weakfish)	<i>Cynoscion macdonaldi</i>	Mexico (Gulf of California)	Entire	E	48	NA	NA
Trout, Apache (=Arizona)	<i>Oncorhynchus (=Salmo) apache</i>	U.S.A. (AZ)	.....do	T	1, 8	NA	17.44(a)
Trout, Gila	<i>Oncorhynchus (=Salmo) gilae</i>	U.S.A. (AZ, NM)	.....do	E	1	NA	NA
Trout, greenback cutthroat	<i>Oncorhynchus (=Salmo) clarki stomias.</i>	U.S.A. (CO)	.....do	T	1, 38	NA	17.44(f)
Trout, Lahontan cutthroat	<i>Oncorhynchus (=Salmo) clarki henshawi.</i>	U.S.A. (CA, NV, OR, UT)	.....do	T	2, 8	NA	17.44(a)
Trout, Little Kern golden	<i>Oncorhynchus (=Salmo) aguabonita whitei.</i>	U.S.A. (CA)	.....do	T	37	17.95(e)	17.44(e)
Trout, Paiute cutthroat	<i>Oncorhynchus (=Salmo) clarki seleniris.</i>	.....do	.....do	T	1, 8	NA	17.44(a)
Woundfin	<i>Plagiopsis argenteus</i>	U.S.A. (AZ, NV, UT)	Entire, except Gila R. drainage, AZ, NM.	E	2, 193	NA	NA
Do	.....do	.....do	Gila R. drainage, AZ, NM.	XN	193	NA	17.84(b)
CLAMS							
+ Acornshell, southern	<i>Epioblasma othcaloogensis</i>	U.S.A. (AL, GA, TN)	NA	E	495	NA	NA
+ Clubshell	<i>Pleurobema clava</i>	U.S.A. (AL, IL, IN, KY, MI, OH, PA, TN, WV).	NA	E	488	NA	NA
Clubshell, black (=Curtus' mussel)	<i>Pleurobema curtum</i>	U.S.A. (AL, MS)	NA	E	262	NA	NA
+ Clubshell, ovate	<i>Pleurobema perovatum</i>	U.S.A. (AL, GA, MS, TN)	NA	E	495	NA	NA
+ Clubshell, southern	<i>Pleurobema declivum</i>	.....do	NA	E	495	NA	NA
Combshell, southern (=penitent mussel).	<i>Epioblasma (=Dysnomia) penita</i>	U.S.A. (AL, MS)	NA	E	262	NA	NA
+ Combshell, upland	<i>Epioblasma metastrata</i>	AL, GA, TN)	NA	E	495	NA	NA

Fanshell	<i>Cyprogenia stegaria (=irrorata)</i>	U.S.A. (AL, IL, IN, KY, OH, PA, TN, VA, WV).	NA	E	391	NA	NA
Fatmucket, Arkansas	<i>Lampsilis powelli</i>	U.S.A. (AR)	NA	T	382	NA	NA
+ Heelsplitter, Carolina	<i>Lasmigona decorata</i>	U.S.A. (NC, SC)	NA	E	505	NA	NA
Heelsplitter, inflated	<i>Potamilus inflatus</i>	U.S.A. (AL, LA, MS)	NA	T	404	NA	NA
+ Kidneyshell, triangular	<i>Ptychobranthus greeni</i>	U.S.A. (AL, GA, TN)	NA	E	495	NA	NA
+ Moccasinshell, Alabama	<i>Medionidus acutissimus</i>	U.S.A. (AL, GA, MS)	NA	T	495	NA	NA
+ Moccasinshell, Coosa	<i>Medionidus parvulus</i>	U.S.A. (AL, GA, TN)	NA	E	495	NA	NA
+ Mucket, orange-nacre	<i>Lampsilis perovalis</i>	U.S.A. (AL, MS)	NA	T	495	NA	NA
Mussel, dwarf wedge	<i>Alasmidonta heterodon</i>	U.S.A. (CT, DC, DE, MA, MD, NC, NH, NJ, PA, VA, VT), Canada (N.B.).	NA	E	377	NA	NA
Mussel, ring pink (=golf stick pearly)	<i>Obovaria retusa</i>	U.S.A. (AL, IL, IN, KY, OH, PA, TN, WV).	NA	E	369	NA	NA
Mussel, winged mapleleaf	<i>Quadrula fragosa</i>	U.S.A. (IA, IL, IN, KY, MN, MO, NE, OH, OK, TN, WI).	NA	E	426	NA	NA
Pearlshell, Louisiana	<i>Margaritifera hembell</i>	U.S.A. (LA)	NA	E	304	NA	NA
Pearly mussel, Alabama lamp	<i>Lampsilis virescens</i>	U.S.A. (AL, TN)	NA	E	15	NA	NA
Pearly mussel, Appalachian monkeyface.	<i>Quadrula sparsa</i>	U.S.A. (TN, VA)	NA	E	15	NA	NA
Pearly mussel, birdwing	<i>Conradilla caelata</i>	.....do	NA	E	15	NA	NA
Pearly mussel, cracking	<i>Hemistena (=Lastena) lata</i>	U.S.A. (AL, IL, IN, KY, OH, TN, VA)	NA	E	366	NA	NA
Pearly mussel, Cumberland bean	<i>Villosa (=Micromya) trabalis</i>	U.S.A. (KY, TN)	NA	E	15	NA	NA
Pearly mussel, Cumberland monkeyface.	<i>Quadrula intermedia</i>	U.S.A. (AL, TN, VA)	NA	E	15	NA	NA
Pearly mussel, Curtis'	<i>Epioblasma (=Dysnomia) florentina curtisi</i>	U.S.A. (MO)	NA	E	15	NA	NA
Pearly mussel, dromedary	<i>Dromus dromas</i>	U.S.A. (TN, VA)	NA	E	15	NA	NA
Pearly mussel, green-blossom	<i>Epioblasma (=Dysnomia) torulosa gubernaculum</i>	.....do	NA	E	15	NA	NA
Pearly mussel, Higgins' eye	<i>Lampsilis higginsii</i>	U.S.A. (IL, IA, MN, MO, NE, WI)	NA	E	15	NA	NA
Pearly mussel, little-wing	<i>Pegias fabula</i>	U.S.A. (AL, KY, NC, TN, VA)	NA	E	342	NA	NA
Pearly mussel, Nicklin's	<i>Megaloniais nicklineana</i>	Mexico	NA	E	15	NA	NA
Pearly mussel (=pimple back), orange-footed.	<i>Plethobasus cooperianus</i>	U.S.A. (AL, IN, IA, KY, OH, PA, TN)	NA	E	15	NA	NA
Pearly mussel, pale lilliput	<i>Toxolasma (=Carunculina) cylindrellus</i>	U.S.A. (AL, TN)	NA	E	15	NA	NA
Pearly mussel, pink mucket	<i>Lampsilis abrupta (=orbiculata)</i>	U.S.A. (AL, IL, IN, KY, MO, OH, PA, TN, WV).	NA	E	15	NA	NA
Pearly mussel, purple cat's paw	<i>Epioblasma (=Dysnomia) obliquata obliquata (=E. sulcata sulcata).</i>	U.S.A. (AL, IL, IN, KY, OH, TN)	NA	E	394	NA	NA
Pearly mussel, Tampico	<i>Cyrtoneias tampicoensis tecomatensis.</i>	Mexico	NA	E	15	NA	NA
Pearly mussel, tubercled-blossom	<i>Epioblasma (=Dysnomia) torulosa torulosa.</i>	U.S.A. (IL, IN, KY, TN, WV)	NA	E	15	NA	NA
Pearly mussel, turgid-blossom	<i>Epioblasma (=Dysnomia) turgidula</i>	U.S.A. (AL, TN)	NA	E	15	NA	NA
Pearly mussel, white cat's paw	<i>Epioblasma (=Dysnomia) sulcata delicata.</i>	U.S.A. (IN, MI, OH)	NA	E	15	NA	NA
Pearly mussel, white wartyback	<i>Plethobasus cicatricosus</i>	U.S.A. (AL, IN, TN)	NA	E	15	NA	NA
Pearly mussel, yellow-blossom	<i>Epioblasma (=Dysnomia) florentina florentina.</i>	U.S.A. (AL, TN)	NA	E	15	NA	NA
Pigtoe, Cumberland (=Cumberland pigtoe mussel).	<i>Pleurobema gibberum</i>	U.S.A. (TN)	NA	E	423	NA	NA
+ Pigtoe, dark	<i>Pleurobema furvum</i>	U.S.A. (AL)	NA	E	495	NA	NA
Pigtoe, fine-rayed	<i>Fusconaia cuneolus</i>	U.S.A. (AL, TN, VA)	NA	E	15	NA	NA
Pigtoe, flat (=Marshall's mussel)	<i>Pleurobema marshalli</i>	U.S.A. (AL, MS)	NA	E	262	NA	NA
Pigtoe, heavy (=Judge Tait's mussel)	<i>Pleurobema taitianum</i>	.....do	NA	E	262	NA	NA
Pigtoe, rough	<i>Pleurobema plenum</i>	U.S.A. (IN, KY, TN, VA)	NA	E	15	NA	NA
Pigtoe, shiny	<i>Fusconaia cor (=edgariana)</i>	U.S.A. (AL, TN, VA)	NA	E	15	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
+ Pigtoe, southern	<i>Pleurobema georgianum</i>	U.S.A. (AL, GA, TN)	NA	E	495	NA	NA
Pocketbook, fat	<i>Potamilus (=Proptera) capax</i>	U.S.A. (AR, IN, MO, OH)	NA	E	15	NA	NA
+ Pocketbook, fine-lined	<i>Lampsilis atilis</i>	U.S.A. (AL, GA)	NA	T	495	NA	NA
Pocketbook, speckled	<i>Lampsilis streckeri</i>	U.S.A. (AR)	NA	E	345	NA	NA
+ Riffleshell, northern	<i>Epioblasma torulosa rangiana</i>	U.S.A. (IL, IN, KY, MI, OH, PA, WV), Canada (Ont.)	NA	E	488	NA	NA
Riffleshell, tan	<i>Epioblasma walkeri</i>	U.S.A. (KY, TN, VA)	NA	E	27	NA	NA
Rock-pocketbook, Ouachita (=Wheeler's pearly mussel)	<i>Arkansia (=Arcidens) wheeleri</i>	U.S.A. (AR, OK)	NA	E	446	NA	NA
Spnymussel, James River (=Virginia)	<i>Pleurobema (=Fusconaia, =Elliptio, =Canthyria) collina</i>	U.S.A. (VA, WV)	NA	E	316	NA	NA
Spnymussel, Tar River	<i>Elliptio (Canthyria) steinstansana</i>	U.S.A. (NC)	NA	E	188	NA	NA
Stirrupshell	<i>Quadrula stapes</i>	U.S.A. (AL, MS)	NA	E	262	NA	NA
SNAILS							
+ Ambersnail, Kanab	<i>Oxytoma haydeni kanabensis</i>	U.S.A. (AZ, UT)	NA	E	431E, 459, 477	NA	NA
+ Limpet, Banbury Springs	<i>Larx n. sp.</i>	U.S.A. (ID)	NA	E	485	NA	NA
Shagreen, Magazine Mountain	<i>Mesodon magazinensis</i>	U.S.A. (AR)	NA	T	348	NA	NA
+ Snail, Bliss Rapids	Undescribed hydrobiid genus & species.	U.S.A. (ID)	NA	T	485	NA	NA
Snail, Chittenango ovate amber	<i>Succinea chittenangoensis</i>	U.S.A. (NY)	NA	T	41	NA	NA
Snail, flat-spined three-toothed	<i>Triodopsis platysayoides</i>	U.S.A. (WV)	NA	T	41	NA	NA
Snail, Iowa Pleistocene	<i>Discus macclintocki</i>	U.S.A. (IA)	NA	E	41	NA	NA
Snail, Manus Island tree	<i>Papustyla pulcherrima</i>	Pacific Ocean: Admiralty is. (Manus is.)	NA	E	3	NA	NA
Snail, noonday	<i>Mesodon clarki nantahala</i>	U.S.A. (NC)	NA	T	41	NA	NA
Snail, painted snake coiled forest	<i>Angulospira picta</i>	U.S.A. (TN)	NA	T	41	NA	NA
+ Snail, Snake River physa	<i>Physa natricina</i>	U.S.A. (ID)	NA	E	485	NA	NA
Snail, Stock Island tree	<i>Orthalicus reses</i> (not incl. <i>nesodryas</i> )	U.S.A. (FL)	NA	T	41	NA	NA
Snail, tulotoma (=Alabama live-bearing)	<i>Tulotoma magnifica</i>	U.S.A. (AL)	NA	E	412	NA	NA
+ Snail, Utah valvata	<i>Valvata utahensis</i>	U.S.A. (ID)	NA	E	485	NA	NA
Snail, Virginia fringed mountain	<i>Polygyris virginiensis</i>	U.S.A. (VA)	NA	E	41	NA	NA
Snails, Oahu tree	<i>Achatinella</i> spp. (all species)	U.S.A. (HI)	NA	E	108, 112	NA	NA
Springsnail, Alamosa	<i>Tryonia alamosae</i>	U.S.A. (NM)	NA	E	442	NA	NA
+ Springsnail, Bruneau Hot	<i>Pyrgulopsis bruneauensis</i>	U.S.A. (ID)	NA	E	489	NA	NA
+ Springsnail, Idaho	<i>Fontelicella idahoensis</i>	.....do	NA	E	485	NA	NA
Springsnail, Socorro	<i>Pyrgulopsis neomexicana</i>	U.S.A. (NM)	NA	E	442	NA	NA
INSECTS							
Beetle, American burying (=giant carion).	<i>Nicrophorus americanus</i>	U.S.A. (eastern States south to FL, west to SD and TX), eastern Canada.	NA	E	351	NA	NA
+ Beetle, Coffin Cave mold	<i>Batrissodes texanus</i>	U.S.A. (TX)	NA	E	513	NA	NA
Beetle, delta green ground	<i>Elaphrus viridis</i>	U.S.A. (CA)	NA	T	100	17.95(i)	NA
Beetle, Kretschmarr Cave mold	<i>Texamaurops reddelli</i>	U.S.A. (TX)	NA	E	327, 513	NA	NA
Beetle, northeastern beach tiger	<i>Cicindela dorsalis dorsalis</i>	U.S.A. (CT, MA, MD, NJ, NY, PA, RI, VA).	NA	T	396	NA	NA
Beetle, Puritan tiger	<i>Cicindela puritana</i>	U.S.A. (CT, MA, MD, NH, VT)	NA	T	396	NA	NA
Beetle, Tooth Cave ground	<i>Rhadine persephone</i>	U.S.A. (TX)	NA	E	327	NA	NA
Beetle, valley elderberry longhorn	<i>Desmocerus californicus dimorphus</i>	U.S.A. (CA)	NA	T	99	NA	NA
Butterfly, bay checkerspot	<i>Euphydryas editha bayensis</i>	.....do	NA	T	288	NA	NA
Butterfly, Corsican swallowtail	<i>Papilio hospiton</i>	Sardinia	NA	E	486	NA	NA

Butterfly, El Segundo blue .....	<i>Euphilotes (=Shijimiaeoides) battoides allyni</i> .....	U.S.A. (CA) .....	NA .....	E	14	NA	NA
+ Butterfly, Homerus swallowtail .....	<i>Papilio homerus</i> .....	Jamaica .....	NA .....	E	486	NA	NA
+ Butterfly, Karner blue .....	<i>Lycaeides melissa samuelis</i> .....	U.S.A. (IL, IN, MA, MI, MN, NH, NY, OH, PA, WI), Canada (Ont.) .....	NA .....	E	484	NA	NA
Butterfly, Lange's metalmark .....	<i>Apodemia mormo langei</i> .....	U.S.A. (CA) .....	NA .....	E	14	NA	NA
Butterfly, lotis blue .....	<i>Lycaeides argyrognomon lotis</i> .....	.....do .....	NA .....	E	14	NA	NA
+ Butterfly, Luzon peacock swallowtail .....	<i>Papilio chikae</i> .....	Philippines .....	NA .....	E	486	NA	NA
Butterfly, mission blue .....	<i>Icaricia icarioides missionensis</i> .....	U.S.A. (CA) .....	NA .....	E	14	NA	NA
Butterfly, Mitchell's satyr .....	<i>Neonympha mitchellii mitchellii</i> .....	U.S.A. (IN, MI, NJ, OH) .....	NA .....	E	426E, 469	NA	NA
+ Butterfly, Myrtle's silverspot .....	<i>Speyeria zerene myrtilae</i> .....	U.S.A. (CA) .....	NA .....	E	472	NA	NA
Butterfly, Oregon silverspot .....	<i>Speyeria zerene hippolyta</i> .....	U.S.A. (CA, OR, WA) .....	NA .....	T	95	17.95(i)	NA
Butterfly, Palos Verdes blue .....	<i>Glaucopsyche lygdamus palosverdesensis</i> .....	U.S.A. (CA) .....	NA .....	E	96	17.95(i)	NA
Butterfly, Queen Alexandra's birdwing .....	<i>Troides (=Ornithoptera) alexandrae</i> .....	Papua New Guinea .....	NA .....	E	364	NA	NA
Butterfly, San Bruno elfin .....	<i>Callophrys mossii bayensis</i> .....	U.S.A. (CA) .....	NA .....	E	14	NA	NA
Butterfly, Schaus swallowtail .....	<i>Heracides (=Papilio) aristodemus ponceanus</i> .....	U.S.A. (FL) .....	NA .....	E	13, 159	NA	NA
Butterfly, Smith's blue .....	<i>Euphilotes (=Shijimiaeoides) enoptes smithi</i> .....	U.S.A. (CA) .....	NA .....	E	14	NA	NA
Butterfly, Uncompahgre fritillary .....	<i>Boloria acrocroma</i> .....	U.S.A. (CO) .....	NA .....	E	427	NA	NA
Moth, Kern primrose sphinx .....	<i>Euproserpinus euterpe</i> .....	U.S.A. (CA) .....	NA .....	T	91	NA	NA
Naucorid, Ash Meadows .....	<i>Ambrysus amargosus</i> .....	U.S.A. (NV) .....	NA .....	T	181	17.95(i)	NA
Skipper, Pawnee montane .....	<i>Hesperia leonard (=pawnee) montana</i> .....	U.S.A. (CO) .....	NA .....	T	289	NA	NA
ARACHNIDS							
+ Harvestman, Bee Creek Cave .....	<i>Texella reddelli</i> .....	.....do .....	NA .....	E	327, 513	NA	NA
+ Harvestman, Bone Cave .....	<i>Texella reyesi</i> .....	.....do .....	NA .....	E	513	NA	NA
Pseudoscorpion, Tooth Cave .....	<i>Microcreagris texana</i> .....	.....do .....	NA .....	E	327	NA	NA
Spider, Tooth Cave .....	<i>Leptoneta myopica</i> .....	.....do .....	NA .....	E	327	NA	NA
CRUSTACEANS							
Amphipod, Hay's Spring .....	<i>Stygobromus hayi</i> .....	U.S.A. (DC) .....	NA .....	E	115	NA	NA
Crayfish, cave [no common name] .....	<i>Cambarus zophonastes</i> .....	U.S.A. (AR) .....	NA .....	E	263	NA	NA
+ Do .....	<i>Cambarus aculabrum</i> .....	.....do .....	NA .....	E	499	NA	NA
Crayfish, Nashville .....	<i>Orconectes shoupi</i> .....	U.S.A. (TN) .....	NA .....	E	242	NA	NA
Crayfish, Shasta (=placid) .....	<i>Pacifastacus fortis</i> .....	U.S.A. (CA) .....	NA .....	E	337	NA	NA
+ Isopod, Lee County cave .....	<i>Lirceus usdagalun</i> .....	U.S.A. (VA) .....	NA .....	E	483	NA	NA
Isopod, Madison Cave .....	<i>Antrolana lira</i> .....	.....do .....	NA .....	T	123	NA	17.46(a)
Isopod, Socorro .....	<i>Thermosphaeroma (=Exosphaeroma) thermophilus</i> .....	U.S.A. (NM) .....	NA .....	E	36	NA	NA
Shrimp, Alabama cave .....	<i>Palaemonias alabamiae</i> .....	U.S.A. (AL) .....	NA .....	E	323	NA	NA
Shrimp, California freshwater .....	<i>Syncaris pacifica</i> .....	U.S.A. (CA) .....	NA .....	E	340	NA	NA
Shrimp, Kentucky cave .....	<i>Palaemonias ganteri</i> .....	U.S.A. (KY) .....	NA .....	E	135	17.95(h)	NA
+ Shrimp, Riverside fairy .....	<i>Streptocephalus wooltoni</i> .....	U.S.A. (CA) .....	NA .....	E	512	NA	NA
Shrimp, Squirrel Chimney Cave (=Florida cave) .....	<i>Palaemonetes cummingi</i> .....	U.S.A. (FL) .....	NA .....	T	390	NA	NA

Symbols used in the "when listed" column:

D—Indicates FR where species was Delisted; relisting of the species is indicated by subsequent number(s).

E—Indicates Emergency rule publication (see FR document for effective dates); subsequent number(s) indicate FR final rule, if applicable, under "When listed".

EDITORIAL NOTE: See the following list for the "when listed" citations.



- 1—32 FR 4001; March 11, 1967.  
2—35 FR 16047; October 13, 1970.  
3—35 FR 8495; June 2, 1970.  
4—35 FR 18320; December 2, 1970.  
5—37 FR 6176; March 30, 1972.  
6—38 FR 14678; June 4, 1973.  
7—39 FR 44991; December 30, 1974.  
8—40 FR 29864; July 16, 1975.  
9—40 FR 31736; July 28, 1975.  
10—40 FR 44151; September 25, 1975.  
11—40 FR 44418; September 26, 1975.  
12—40 FR 47506; October 9, 1975.  
13—41 FR 17740; April 28, 1976.  
14—41 FR 22044; June 1, 1976.  
15—41 FR 24064; June 14, 1976.  
15A—41 FR 26019; June 24, 1976.  
16—41 FR 45993; October 19, 1976.  
17—41 FR 51021; November 19, 1976.  
18—41 FR 51612; November 23, 1976.  
19—41 FR 53034; December 3, 1976.  
20—42 FR 2076; January 10, 1977.  
21—42 FR 2968; January 14, 1977.  
22—42 FR 15971; March 24, 1977.  
23—42 FR 28137; June 2, 1977.  
24—42 FR 28545; June 3, 1977.  
25—42 FR 37373; July 21, 1977.  
26—42 FR 40685; August 11, 1977.  
27—42 FR 42353; August 23, 1977.  
28—42 FR 45528; September 9, 1977.  
29—42 FR 58755; November 11, 1977.  
30—42 FR 60745; November 29, 1977.  
31—43 FR 3715; January 27, 1978.  
32—43 FR 4028; January 31, 1978.  
33—43 FR 4621; February 3, 1978.  
34—43 FR 6233; February 14, 1978.  
35—43 FR 9612; March 9, 1978.  
36—43 FR 12691; March 27, 1978.  
37—43 FR 15429; April 13, 1978.  
38—43 FR 16345; April 18, 1978.  
40—43 FR 20504; May 12, 1978.  
41—43 FR 28932; July 3, 1978.  
42—43 FR 32808; July 28, 1978.  
43—43 FR 34479; August 4, 1978.  
45—44 FR 21289; April 10, 1979.  
46—44 FR 23064; April 17, 1979.  
48—44 FR 29480; May 21, 1979.  
50—44 FR 37126; June 25, 1979.  
51—44 FR 37132; June 25, 1979.  
52—44 FR 42911; July 20, 1979.  
54—44 FR 49220; August 21, 1979.  
60—44 FR 59084; October 12, 1979.  
85—44 FR 69208; November 30, 1979.  
86—44 FR 70677; December 7, 1979.  
87—44 FR 75076; December 18, 1979.  
88—45 FR 18010; March 20, 1980.  
90—45 FR 21833; April 2, 1980.  
91—45 FR 24090; April 8, 1980.  
92—45 FR 27713; April 23, 1980.  
93—45 FR 28722; April 30, 1980.  
94—45 FR 35821; May 28, 1980.  
95—45 FR 44935; July 2, 1980.  
96—45 FR 44939; July 2, 1980.  
97—45 FR 47352; July 14, 1980.  
98—45 FR 47355; July 14, 1980.  
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103—45 FR 55654; August 20, 1980.  
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106—45 FR 65132; October 1, 1980.  
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111—46 FR 11665; February 10, 1981.  
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113—46 FR 40664; August 10, 1981.  
114—47 FR 4204; January 28, 1982.  
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117—47 FR 19995; May 10, 1982.  
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124—47 FR 43962; October 5, 1982.  
125—47 FR 46093; October 15, 1982.  
127—48 FR 612; January 5, 1983.  
128—48 FR 1726; January 14, 1983.  
129—48 FR 28464; June 22, 1983.  
130—48 FR 40184; September 2, 1983.  
131—48 FR 43043; September 21, 1983.  
132—48 FR 46057; October 11, 1983.  
134—48 FR 46336; October 12, 1983.  
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136—48 FR 49249; October 25, 1983.  
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142—49 FR 7335; February 28, 1984.  
143—49 FR 7394; February 29, 1984.  
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149—49 FR 22334; May 29, 1984.  
150—49 FR 27514; July 5, 1984.  
156—49 FR 33885; August 27, 1984.  
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161—49 FR 35954; September 13, 1984.  
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164—49 FR 43969; November 1, 1984.  
166—49 FR 45163; November 15, 1984.  
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170—50 FR 4226; January 30, 1985.  
171—50 FR 4945; February 4, 1985.  
173—50 FR 12302; March 28, 1985.  
174—50 FR 12305; March 28, 1985.  
181—50 FR 20786; May 20, 1985.  
182—50 FR 21792; May 28, 1985.  
183—50 FR 23884; June 6, 1985.  
184—50 FR 24530; June 11, 1985.  
185—50 FR 24653; June 12, 1985.  
186—50 FR 25678; June 20, 1985.  
188—50 FR 26575; June 27, 1985.  
189—50 FR 27002; July 1, 1985.  
193—50 FR 30194; July 24, 1985.  
195—50 FR 31596; August 5, 1985.  
196—50 FR 31603; August 5, 1985.  
203—50 FR 37198; September 12, 1985.  
205—50 FR 39117; September 27, 1985.  
206—50 FR 39123; September 27, 1985.  
210—50 FR 50308; December 10, 1985.  
211—50 FR 50733; December 11, 1985.  
212—50 FR 51252; December 16, 1985.  
216—51 FR 6690; February 25, 1986.  
222—51 FR 10850; March 31, 1986.  
223—51 FR 10857; March 31, 1986.  
224—51 FR 10864; March 31, 1986.  
227—51 FR 16047; April 30, 1986.  
228—51 FR 16482; May 2, 1986.  
233—51 FR 17980; May 16, 1986.  
236—51 FR 23781; July 1, 1986.  
239—51 FR 27495; July 31, 1986.  
241—51 FR 31422; September 3, 1986.  
242—51 FR 34412; September 26, 1986.  
246—51 FR 34425; September 26, 1986.  
247—51 FR 39478; October 28, 1986.  
248—51 FR 41796; November 19, 1986.  
250—51 FR 45910; December 23, 1986.  
251—52 FR 288; January 5, 1987.  
258—52 FR 5302; February 20, 1987.  
261—52 FR 10892; April 6, 1987.  
262—52 FR 11169; April 7, 1987.  
263—52 FR 11172; April 7, 1987.  
265—52 FR 11286; April 8, 1987.  
267—52 FR 20719; June 3, 1987.  
268—52 FR 20999; June 3, 1987.  
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281—52 FR 25380; July 7, 1987.  
282—52 FR 28785; August 3, 1987.  
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287—52 FR 35040; September 16, 1987.  
288—52 FR 35378; September 18, 1987.  
289—52 FR 36180; September 25, 1987.  
290—52 FR 36038; September 25, 1987.  
292—52 FR 36779; October 1, 1987.  
294—52 FR 37423; October 6, 1987.  
296—52 FR 42068; November 2, 1987.  
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304—53 FR 3570; February 5, 1988.  
312—53 FR 25611; July 8, 1988.  
313—53 FR 27134; July 18, 1988.  
316—53 FR 27693; July 22, 1988.  
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320—53 FR 33992; September 1, 1988.  
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345—54 FR 8341; February 28, 1989.  
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357—54 FR 32331; August 4, 1989.  
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361—54 FR 35311; August 24, 1989.  
364—54 FR 38951; September 21, 1989.  
365—54 FR 39849; September 28, 1989.  
366—54 FR 39853; September 28, 1989.  
369—54 FR 40112; September 29, 1989.  
370—54 FR 41453; October 10, 1989.  
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372—54 FR 47861; November 17, 1989.  
376—55 FR 9135; March 12, 1990.  
377—55 FR 9451; March 14, 1990.  
378—55 FR 12191; April 2, 1990.  
382—55 FR 12801; April 5, 1990.

383—55 FR 12832; April 6, 1990.  
 384—55 FR 13488; April 10, 1990.  
 387—55 FR 18845; May 4, 1990.  
 388—55 FR 21153; May 22, 1990.  
 390—55 FR 25591; June 21, 1990.  
 391—55 FR 25595; June 21, 1990.  
 393—55 FR 26194; June 26, 1990.  
 394—55 FR 28213; July 10, 1990.  
 396—55 FR 32094; August 7, 1990.  
 399—55 FR 36647; September 6, 1990.  
 400—55 FR 39416; September 27, 1990.  
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 404—55 FR 39872; September 28, 1990.  
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 407—55 FR 49623; November 30, 1990.  
 408—55 FR 50006; December 4, 1990.  
 410—55 FR 51112; December 12, 1990.  
 411—55 FR 53160; December 27, 1990.  
 412—56 FR 800; January 9, 1991.  
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 419—56 FR 13600; April 3, 1991.  
 421—56 FR 19814; April 30, 1991.  
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 426—56 FR 28349; June 20, 1991.  
 427—56 FR 28717; June 24, 1991.  
 428—56 FR 28828; June 25, 1991.  
 431—56 FR 37671; August 8, 1991.  
 432—56 FR 40267; August 14, 1991.  
 433—56 FR 41488; August 21, 1991.  
 442—56 FR 43649; September 30, 1991.  
 443—56 FR 43653; September 30, 1991.  
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 446—56 FR 54957; October 23, 1991.  
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 449—56 FR 56333; November 4, 1991.  
 454—56 FR 64723; December 12, 1991.  
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 459—57 FR 13661; April 17, 1992.  
 462—57 FR 14790; April 22, 1992.  
 469—57 FR 21569; May 20, 1992.  
 472—57 FR 27858; June 22, 1992.  
 475—57 FR 28024; June 23, 1992.  
 479—57 FR 45337; October 1, 1992.  
 483—57 FR 54726; November 20, 1992.  
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 508—58 FR 40538; July 28, 1993.  
 512—58 FR 41391; August 3, 1993.  
 513—58 FR 43819; August 18, 1993.

#### § 17.12 Endangered and threatened plants.

(a) The list in this section contains the names of all species of plants which have been determined by the Services to be Endangered or Threatened. It also contains the names of species of plants treated as Endangered or Threatened because they are sufficiently similar in appearance to Endangered or Threatened species (see § 17.50 *et seq.*)

(b) The columns entitled "Scientific name" and "Common name" define the species of plant within the meaning of the Act. Although common names are included, they cannot be relied upon for identification of any specimen, since they may vary greatly in local usage. The Services shall use the most recently accepted scientific name. In cases in which confusion might arise, a synonym(s) will be provided in parentheses. The Services shall rely to the extent practicable on the *International Code of Botanical Nomenclature*.

(c) In the "Status" column the following symbols are used: "E" for Endangered, "T" for Threatened, and "E [or T] (S/A)" for similarity of appearance species.

(d) The other data in the list are nonregulatory in nature and are provided for the information of the reader. In the annual revision and compilation of this title, the following information may be amended without public notice: the spelling of species names, historical range, footnotes, references to certain other applicable portions of this title, synonyms, and more current names. In any of these revised entries, neither the species, as defined in paragraph (b) of this section, nor its status may be changed without following the procedures of Part 424 of this title.

(e) The "Historic range" indicates the known general distribution of the species or subspecies as reported in the current scientific literature. The present distribution may be greatly reduced from this historic range. This column does not imply any limitation on the application of the prohibitions in the Act or implementing rules. Such prohibitions apply to all individuals of the plant species, wherever found.

(f)(1) A footnote to the Federal Register publication(s) listing or reclassifying a species is indicated under the column "When listed." Footnote numbers to §§ 17.11 and 17.12 are in the same numerical sequence, since plants and animals may be listed in the same Federal Register document. That document, at least since 1973, includes a statement indicating the basis for the listing, as well as the effective date(s) of said listing.

(2) The "Special rules" and "Critical habitat" columns provide a cross reference to other sections in Parts 17, 222, 226, or 227. The "Special rules" column will also be used to cite the special rules which describe experimental populations and determine if they are essential or nonessential. Separate listings will be made for experimental populations, and the status column will include the following symbols: "XE" for an essential experimental population and "XN" for a nonessential experimental population. The term "NA" (not applicable) appearing in either of these two columns indicates that there are no special rules and/or critical habitat for that particular species. However, all other appropriate rules in Parts 17, 217 through 227, and 402 still apply to that species. In addition, there may be other rules in this title that relate to such plants, e.g., port-of-entry requirements. It is not intended that the references in the "Special rules" column list all the regulations of the two Services which might apply to the species or to the regulations of other Federal agencies or State or local governments.

(g) The listing of a particular taxon includes all lower taxonomic units (see § 17.11(g) for examples).

(h) The "List of Endangered and Threatened Plants" is provided below:

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
<b>Acanthaceae—Acanthus family:</b>						
<i>Justicia cooleyi</i>	Cooley's water-willow	U.S.A. (FL)	E	356	NA	NA
<b>+ Adiantaceae—Maidenhair fern family:</b>						
<i>Adiantum vivesii</i>	None	U.S.A. (PR)	E	504	NA	NA
<b>Agavaceae—Agave family:</b>						
<i>Agave arizonica</i>	Arizona agave	U.S.A. (AZ)	E	147	NA	NA
<i>Nolina brittoniana</i>	Britton's beargrass	U.S.A. (FL)	E	500	NA	NA
<b>Alismataceae—Water-plantain family:</b>						
<i>Sagittaria fasciculata</i>	Bunched arrowhead	U.S.A. (NC, SC)	E	53	NA	NA
<i>Sagittaria secundifolia</i>	Kral's water-plantain	U.S.A. (AL, GA)	T	386	NA	NA
<b>Amaranthaceae—Amaranth family:</b>						
<i>Achyranthes splendens</i> var. <i>rotundata</i>	Round-leaved chaff-flower	U.S.A. (HI)	E	220	NA	NA
<i>Amaranthus pumilus</i>	Seabeach amaranth	U.S.A. (DE, MA, MD, NC, NJ, NY, RI, SC, VA)	T	498	NA	NA
<i>Nototrichium humile</i>	Kulu'i	U.S.A. (HI)	E	448	NA	NA
<b>Anacardiaceae—Cashew family:</b>						
<i>Rhus michauxii</i>	Michaux's sumac	U.S.A. (GA, NC, SC)	E	367	NA	NA
<b>Annonaceae—Custard-apple family:</b>						
<i>Asimina tetramera</i>	Four-petal pawpaw	U.S.A. (FL)	E	244	NA	NA
<i>Deeringothamnus pulchellus</i>	Beautiful pawpaw	do	E	244	NA	NA
<i>Deeringothamnus rugelii</i>	Rugel's pawpaw	do	E	244	NA	NA
<b>Apiaceae—Parsley family:</b>						
<i>Eryngium aristulatum</i> var. <i>parishii</i>	San Diego button-celery	U.S.A. (CA)	E	512	NA	NA
<i>Eryngium constancei</i>	Loch Lomond coyote-thistle	do	E	194E, 249	NA	NA
<i>Eryngium cuneifolium</i>	Snakeroot	U.S.A. (FL)	E	259	NA	NA
<i>Lomatium bradshawii</i>	Bradshaw's desert-parsley	U.S.A. (OR)	E	333	NA	NA
<i>Oxypolis canbyi</i>	Canby's dropwort	U.S.A. (DE, GA, MD, NC, SC)	E	217	NA	NA
<i>Ptilimnium nodosum</i> (= <i>P. fluviatile</i> )	Harperella	U.S.A. (AL, GA, MD, NC, SC, WV)	E	332	NA	NA
<i>Sanicula marivera</i>	None	U.S.A. (HI)	E	448	NA	NA
<b>Apocynaceae—Dogbane family:</b>						
<i>Amsonia kearneyana</i>	Kearney's blue-star	U.S.A. (AZ)	E	343	NA	NA
<i>Cycladenia humilis</i> var. <i>jonesii</i>	Jones cycladenia	U.S.A. (AZ, UT)	T	229	NA	NA
<b>Aquifoliaceae—Holly family:</b>						
<i>Ilex cookii</i>	Cook's holly	U.S.A. (PR)	E	277	NA	NA
<i>Ilex sintenisii</i>	None	do	E	461	NA	NA
<b>Arecaceae—Palm family:</b>						
<i>Calyptrogonia rivalis</i>	Palma de manaca or manac palm	U.S.A. (PR)	T	375	NA	NA
<i>Pritchardia munroi</i>	Loulu	U.S.A. (HI)	E	480	NA	NA
<b>Aristolochiaceae—Heartleaf family:</b>						
<i>Hexastylis naniflora</i>	Dwarf-flowered heartleaf	U.S.A. (NC, SC)	T	347	NA	NA
<b>Asclepiadaceae—Milkweed family:</b>						
<i>Asclepias meadii</i>	Mead's milkweed	U.S.A. (IA, IL, IN, KS, MO, WI)	T	321	NA	NA
<i>Asclepias welshii</i>	Welsh milkweed	U.S.A. (AZ, UT)	T	295	NA	NA

Asplenaceae—Spleenwort family:

*Diellia falcata* .....

*Phyllitis scolopendrium* var. *americana* (= *P. japonica* ssp. *a.*) .....

Asteraceae—Aster family:

+ *Argyroxiphium kauense* .....

*Argyroxiphium sandwicense* ssp. *macrocephalum* .....

*Argyroxiphium sandwicense* ssp. *sandwicense* .....

*Bidens cuneata* .....

*Bidens micrantha* ssp. *kalaialaha* .....

+ *Bidens wiebkei* .....

*Blennosperma bakeri* .....

*Boltonia decurrens* .....

*Chrysopsis floridana* (= *Heterotheca* f.) .....

*Cirsium pitcheri* .....

*Cirsium vinaceum* .....

*Dubautia herbstobatae* .....

*Dubautia latifolia* .....

*Dubautia pauciflora* .....

+ *Echinacea laevigata* .....

*Echinacea tenesseensis* .....

*Enceliopsis nudicaulis* var. *corrugata* .....

*Erigeron maguirei* var. *maguirei* .....

*Erigeron rhizomatus* .....

*Grindelia fraxino-pratensis* .....

*Helianthus schweinitzii* .....

*Hesperomannia erbuscula* .....

*Hesperomannia lydgatei* .....

*Hymenoxys acutis* var. *glabra* .....

*Hymenoxys texana* .....

*Lasthenia burkei* .....

*Layia carnosa* .....

*Lembertia congdonii* .....

*Liatris helleri* .....

*Liatris ohlingerae* .....

*Lipochaeta kamolensis* .....

*Lipochaeta lobata* var. *leptophylla* .....

*Lipochaeta tenuifolia* .....

*Lipochaeta venosa* .....

*Marshallia mohrii* .....

*Pityopsis ruthii* (= *Heterotheca* r., *Chrysopsis* r.) .....

*Remya kauaiensis* .....

*Remya mauiensis* .....

*Remya montgomeryi* .....

*Senecio franciscanus* .....

*Solidago albopilosa* .....

*Solidago houghtonii* .....

*Solidago shortii* .....

*Solidago spithamea* .....

*Stephanomeria malheurensis* .....

*Tetramolopium filiforme* .....

*Tetramolopium lepidotum* ssp. *lepidotum* .....

None ..... U.S.A. (HI) .....  
American hart's-tongue fern ..... U.S.A. (AL, MI, NY, TN), Canada (ON) .....

Ka'u silversword ..... U.S.A. (HI) .....  
'Ahinahina (=Haleakala silversword) .....

.....do .....  
'Ahinahina (=Mauna Kea silversword) .....

.....do .....  
Cuneate bidens .....do .....  
Ko'oko'olau .....do .....  
.....do .....do .....

Sonoma sunshine (=Baker's stickyseed) ..... U.S.A. (CA) .....

Decurrent false aster ..... U.S.A. (IL, MO) .....  
Florida golden aster ..... U.S.A. (FL) .....

Pitcher's thistle ..... U.S.A. (IL, IN, MI, WI), Canada (ON) .....

Sacramento Mountains thistle ..... U.S.A. (NM) .....  
Na'ena'ena ..... U.S.A. (HI) .....

None .....do .....  
.....do .....do .....  
Smooth coneflower ..... U.S.A. (GA, MD, NC, PA, SC, VA) .....

Tennessee purple coneflower ..... U.S.A. (TN) .....  
Ash Meadows sunray ..... U.S.A. (NV) .....

Maguire daisy ..... U.S.A. (UT) .....  
Zuni (=Rhizome) fleabane ..... U.S.A. (NM) .....

Ash Meadows gumplant ..... U.S.A. (CA, NV) .....  
Schweinitz's sunflower ..... U.S.A. (NC, SC) .....

None ..... U.S.A. (HI) .....  
.....do .....do .....  
Lakeside daisy ..... U.S.A. (IL, OH) Canada (Ont.) .....

Texas prairie dawn-flower (=Texas bitterweed) ..... U.S.A. (TX) .....

Burke's goldfields ..... U.S.A. (CA) .....  
Beach layia .....do .....  
San Joaquin wooly-threads .....do .....

Heller's blazingstar ..... U.S.A. (NC) .....  
Scrub blazingstar ..... U.S.A. (FL) .....

Nehe ..... U.S.A. (HI) .....  
.....do .....do .....  
.....do .....do .....

None .....do .....  
Mohr's Barbara's buttons ..... U.S.A. (AL, GA) .....  
Ruth's golden aster ..... U.S.A. (TN) .....

None ..... U.S.A. (HI) .....  
Maui remya .....do .....  
None .....do .....

San Francisco Peaks groundsel ..... U.S.A. (AZ) .....  
White-haired goldenrod ..... U.S.A. (KY) .....

Houghton's goldenrod ..... U.S.A. (MI), Canada (Ont.) .....  
Short's goldenrod ..... U.S.A. (KY) .....  
Blue Ridge goldenrod ..... U.S.A. (NC, TN) .....

Malheur wire-lettuce ..... U.S.A. (OR) .....  
None ..... U.S.A. (HI) .....  
.....do .....do .....

E	448	NA	NA
T	354	NA	NA
E	497	NA	NA
E	467	NA	NA
E	219	NA	NA
E	141	NA	NA
E	467	NA	NA
E	480	NA	NA
E	453	NA	NA
T	341	NA	NA
T	232	NA	NA
T	315	NA	NA
T	276	NA	NA
E	448	NA	NA
E	464	NA	NA
E	436	NA	NA
E	481	NA	NA
E	49	NA	NA
T	181	17.96(a)	NA
E	202	NA	NA
T	177	NA	NA
T	181	17.96(a)	NA
E	424	NA	NA
E	448	NA	NA
E	436	NA	NA
T	310	NA	NA
E	218	NA	NA
E	453	NA	NA
E	472	NA	NA
E	395	NA	NA
T	300	NA	NA
E	356	NA	NA
E	467	NA	NA
E	448	NA	NA
E	448	NA	NA
E	73	NA	NA
T	324	NA	NA
E	191	NA	NA
E	413	NA	NA
E	413	NA	NA
E	413	NA	NA
T	137	17.96(a)	NA
T	308	NA	NA
T	314	NA	NA
E	201	NA	NA
T	175	NA	NA
E	126	17.96(a)	NA
E	448	NA	NA
E	448	NA	NA

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
	<i>Tetramolopium remyi</i> .....	.....do .....	E	435	NA	NA
+	<i>Tetramolopium rockii</i> .....	.....do .....	T	480	NA	NA
	<i>Thymophylla tephroleuca</i> (= <i>Dyssodia</i> l.) .....	Ashy dogweed .....	E	152	NA	NA
	<i>Townsendia aprica</i> .....	Last Chance townsendia .....	T	200	NA	NA
+	<i>Vernonia proctorii</i> .....	None .....	E	501	NA	NA
	<i>Wilkesia hobbii</i> .....	Dwarf iliau .....	E	473	NA	NA
<b>Berberidaceae—Barberry family:</b>						
	<i>Berberis sonnei</i> (= <i>Mahonia</i> s.) .....	Truckee barberry .....	E	76	NA	NA
<b>Betulaceae—Birch family:</b>						
	<i>Betula uber</i> .....	Virginia round-leaf birch .....	E	39	NA	NA
<b>Bignoniaceae—Bignonia family:</b>						
	<i>Crescentia portoricensis</i> .....	Higuero de Sierra .....	E	301	NA	NA
<b>Boraginaceae—Borage family:</b>						
	<i>Amsinckia grandiflora</i> .....	Large-flowered fiddleneck .....	E	179	17.96(a)	NA
	<i>Cryptantha crassipes</i> .....	Terlingua Creek cats-eye .....	E	439	NA	NA
<b>Brassicaceae—Mustard family:</b>						
	<i>Arabis mcdonaldiana</i> .....	McDonald's rock-cress .....	E	44	NA	NA
	<i>Arabis serotina</i> .....	Shale barren rock-cress .....	E	352	NA	NA
	<i>Cardamine micranthera</i> .....	Small-anthered bittercress .....	E	363	NA	NA
	<i>Caulanthus californicus</i> .....	California jewelflower .....	E	395	NA	NA
	<i>Erysimum capitatum</i> var. <i>angustatum</i> .....	Contra Costa wallflower .....	E	39	17.96(a)	NA
	<i>Erysimum menziesii</i> .....	Menzies' wallflower .....	E	472	NA	NA
+	<i>Eutrema penlandii</i> .....	Penland alpine fen mustard .....	T	509	NA	NA
	<i>Lepidium barnebyanum</i> .....	Barneby ridge-cress (=Peppercress).	E	402	NA	NA
	<i>Lesquerella congesta</i> .....	Dudley Bluffs bladderpod .....	T	374	NA	NA
	<i>Lesquerella filiformis</i> .....	Missouri bladderpod .....	E	253	NA	NA
	<i>Lesquerella lyrata</i> .....	Lyrate bladderpod .....	T	403	NA	NA
	<i>Lesquerella pallida</i> .....	White bladderpod .....	E	260	NA	NA
	<i>Physaria obcordata</i> .....	Dudley Bluffs twinpod .....	T	374	NA	NA
+	<i>Rorippa gambellii</i> .....	Gambel's watercress .....	E	511	NA	NA
	<i>Schoenocrambe argillacea</i> .....	Clay reed-mustard .....	T	457	NA	NA
	<i>Schoenocrambe barnebyi</i> .....	Barneby reed-mustard .....	E	457	NA	NA
	<i>Schoenocrambe suffrutescens</i> (= <i>Glaucoarpum</i> s.) .....	Shrubby reed-mustard (=Toad-flax cress).	E	293	NA	NA
	<i>Thelypodium stenopetalum</i> .....	Slender-petaled mustard .....	E	158	NA	NA
	<i>Warea amplexifolia</i> .....	Wide-leaf warea .....	E	266	NA	NA
	<i>Warea carteri</i> .....	Carter's mustard .....	E	256	NA	NA
<b>Buxaceae—Boxwood family:</b>						
	<i>Buxus vahlii</i> .....	Vahl's boxwood .....	E	197	NA	NA
<b>Cactaceae—Cactus family:</b>						
	<i>Ancistrocactus tobuschii</i> (= <i>Echinocactus</i> l., <i>Mammillaria</i> l.) .....	Tobusch fishhook cactus .....	E	80	NA	NA
	<i>Cereus eriophorus</i> var. <i>fragrans</i> .....	Fragrant prickly-apple .....	E	208	NA	NA
	<i>Cereus robinii</i> .....	Key tree-cactus .....	E	153	NA	NA
	<i>Coryphantha minima</i> (= <i>C. nelliae</i> , <i>Escobaria</i> n., <i>Mammillaria</i> n.) .....	Nellie cory cactus .....	E	81	NA	NA
	<i>Coryphantha ramillosa</i> .....	Bunched cory cactus .....	T	77	NA	NA
	<i>Coryphantha robbinsorum</i> (= <i>Cochisea</i> r., <i>Escobaria</i> r.) .....	Cochise pincushion cactus .....	T	214	NA	NA
	<i>Coryphantha sneedii</i> var. <i>leei</i> (= <i>Escobaria</i> l., <i>Mammillaria</i> l.) .....	Lee pincushion cactus .....	T	61	NA	NA
	<i>Coryphantha sneedii</i> var. <i>sneedii</i> (= <i>Escobaria</i> s., <i>Mammillaria</i> s.) .....	Sneed's pincushion cactus .....	E	82	NA	NA

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<i>Echinocactus horizontalis</i> var. <i>nicholii</i>	Nichol's Turk's head cactus	U.S.A. (AZ)	E	71	NA	NA
<i>Echinocereus chisosensis</i> var. <i>chisosensis</i> (= <i>E. reichenbachii</i> var. <i>c.</i> )	Chisos Mountain hedgehog cactus	U.S.A. (TX)	T	335	NA	NA
<i>Echinocereus fendleri</i> var. <i>kuenzleri</i> (= <i>E. kuenzleri</i> , <i>E. hempelii</i> of authors, not Fobes)	Kuenzler hedgehog cactus	U.S.A. (NM)	E	70	NA	NA
<i>Echinocereus lloydii</i> (= <i>E. roetteri</i> var. <i>l.</i> )	Lloyd's hedgehog cactus	U.S.A. (TX)	E	67	NA	NA
<i>Echinocereus reichenbachii</i> var. <i>albertii</i> (= <i>E. melanocentrus</i> )	Black lace cactus	.....do	E	68	NA	NA
<i>Echinocereus triglochidiatus</i> var. <i>arizonicus</i> (= <i>E. arizonicus</i> )	Arizona hedgehog cactus	U.S.A. (AZ)	E	62	NA	NA
<i>Echinocereus triglochidiatus</i> var. <i>inermis</i> (= <i>E. coccineus</i> var. <i>l.</i> , <i>E. phoeniceus</i> var. <i>l.</i> )	Spineless hedgehog cactus	U.S.A. (CO, UT)	E	83	NA	NA
<i>Echinocereus viridiflorus</i> var. <i>davisii</i> (= <i>E. davisii</i> )	Davis' green pitaya	U.S.A. (TX)	E	81	NA	NA
<i>Harrisia portoricensis</i> (= <i>Cereus p.</i> )	Higo chumbo	U.S.A. (PR)	T	397	NA	NA
<i>Leptocereus grantianus</i>	None	.....do	E	491	NA	NA
<i>Neolloydia mariposensis</i> (= <i>Echinocactus m.</i> , <i>Echinomastus m.</i> )	Lloyd's Mariposa cactus	U.S.A. (TX), Mexico (Coahuila)	T	77	NA	NA
<i>Opuntia treleasei</i>	Bakersfield cactus	U.S.A. (CA)	E	395	NA	NA
<i>Pediocactus bradyi</i> (= <i>Toumeyia b.</i> )	Brady pincushion cactus	U.S.A. (AZ)	E	63	NA	NA
<i>Pediocactus despainii</i>	San Rafael cactus	U.S.A. (UT)	E	286	NA	NA
<i>Pediocactus knowltonii</i> (= <i>P. bradyi</i> var. <i>k.</i> , <i>Toumeyia k.</i> )	Knowlton cactus	U.S.A. (NM, CO)	E	72	NA	NA
<i>Pediocactus peeblesianus</i> var. <i>peeblesianus</i> (= <i>Echinocactus p.</i> , <i>Navajoa p.</i> , <i>Toumeyia p.</i> , <i>Utahia p.</i> )	Peebles Navajo cactus	U.S.A. (AZ)	E	69	NA	NA
<i>Pediocactus sileri</i> (= <i>Echinocactus s.</i> , <i>Utahia s.</i> )	Siler pincushion cactus	U.S.A. (AZ, UT)	E	64	NA	NA
<i>Sclerocactus glaucus</i> (= <i>Echinocactus g.</i> , <i>E. subglaucus</i> , <i>E. whipplei</i> var. <i>g.</i> , <i>Pediocactus g.</i> , <i>S. franklinii</i> , <i>S. whipplei</i> var. <i>g.</i> )	Uinta Basin hookless cactus	U.S.A. (CO, UT)	T	59	NA	NA
<i>Sclerocactus mesae-verdae</i> (= <i>Coloradoa m.</i> , <i>Echinocactus m.</i> , <i>Pediocactus m.</i> )	Mesa Verde cactus	U.S.A. (CO, NM)	T	75	NA	NA
<i>Sclerocactus wrightiae</i> (= <i>Pediocactus w.</i> )	Wright fishhook cactus	U.S.A. (UT)	E	58	NA	NA
<b>Campanulaceae—Bellflower family:</b>						
<i>Brighamia rockii</i>	Pua 'ala	U.S.A. (HI)	E	480	NA	NA
<i>Campanula robiniae</i>	Brooksville (=Robins') bellflower	U.S.A. (FL)	E	356	NA	NA
<i>Clermontia oblongifolia</i> ssp. <i>brevipes</i>	'Oha wai	U.S.A. (HI)	E	480	NA	NA
<i>Clermontia oblongifolia</i> ssp. <i>mauiensis</i>	.....do	.....do	E	467	NA	NA
<i>Cyanea lobata</i> r.	Haha	.....do	E	467	NA	NA
<i>Cyanea macrostegia</i> ssp. <i>gibsonii</i>	None	.....do	E	435	NA	NA
<i>Cyanea mannii</i>	Haha	.....do	E	480	NA	NA
<i>Cyanea mceldowneyi</i>	.....do	.....do	E	467	NA	NA
<i>Cyanea pinnatifida</i>	.....do	.....do	E	448	NA	NA
<i>Cyanea procera</i>	.....do	.....do	E	480	NA	NA
<i>Cyanea superba</i>	None	.....do	E	467	NA	NA
<i>Cyanea undulata</i>	.....do	.....do	E	436	NA	NA
<i>Lobelia niihauensis</i>	.....do	.....do	E	448	NA	NA
<b>Caryophyllaceae—Pink family:</b>						
<i>Alsiniidendron obovatum</i>	None	U.S.A. (HI)	E	448	NA	NA
<i>Alsiniidendron trinerve</i>	.....do	.....do	E	448	NA	NA
<i>Arenaria cumberlandensis</i>	Cumberland sandwort	U.S.A. (KY, TN)	E	311	NA	NA
<i>Arenaria paludicola</i>	Marsh sandwort	U.S.A. (CA)	E	511	NA	NA
<i>Geocarpon minimum</i>	None	U.S.A. (AR, MO)	T	275	NA	NA
<i>Paronychia chartacea</i> (= <i>Nyachia pulvinata</i> )	Papery whitlow-wort	U.S.A. (FL)	T	256	NA	NA
<i>Schiedea adamantis</i>	Diamond Head schiedea	U.S.A. (HI)	E	141	NA	NA
<i>Schiedea apokremnos</i>	Ma'oli'oli	.....do	E	441	NA	NA
<i>Schiedea haleakalensis</i>	None	.....do	E	467	NA	NA
<i>Schiedea kaalae</i>	.....do	.....do	E	448	NA	NA
<i>Schiedea lydgatei</i>	.....do	.....do	E	480	NA	NA
<i>Silene alexandri</i>	.....do	.....do	E	480	NA	NA
<i>Silene lanceolata</i>	.....do	.....do	E	480	NA	NA
<i>Silene perlmanii</i>	.....do	.....do	E	448	NA	NA
<i>Silene polypetala</i>	.....do	.....do	E	418	NA	NA
	Fringed campion	U.S.A. (FL, GA)	E			

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
<b>Chenopodiaceae—Goosefoot family:</b>						
<i>Nitrophila mohavensis</i>	Amargosa nitewort	U.S.A. (CA, NV)	E	181	17.96(a)	NA
<b>Cistaceae—Rockrose family:</b>						
<i>Hudsonia montana</i>	Mountain golden heather	U.S.A. (NC)	T	107	17.96(a)	NA
<b>+ Cladoniaceae—Reindeer moss family:</b>						
<i>Cladonia perforata</i>	Florida perforate cladonia	U.S.A. (FL)	E	500	NA	NA
<b>Convolvulaceae—Morning-glory family:</b>						
<i>Bonania grandiflora</i>	Florida bonamia	U.S.A. (FL)	T	297	NA	NA
<b>Crassulaceae—Stonecrop family:</b>						
<i>Dudleya traskiae</i>	Santa Barbara Island liveforever	U.S.A. (CA)	E	39	NA	NA
<i>Sedum integrifolium</i> ssp. <i>leedyi</i>	Leedy's roseroot	U.S.A. (MN, NY)	T	460	NA	NA
<b>Cucurbitaceae—Gourd family:</b>						
<i>Cucurbita okeechobeensis</i> ssp. <i>okeechobeensis</i>	Okeechobee gourd	U.S.A. (FL)	E	507	NA	NA
<b>Cupressaceae—Cypress family:</b>						
<i>Cupressus abramsiana</i>	Santa Cruz cypress	U.S.A. (CA)	E	252	NA	NA
<i>Fitzroya cupressoides</i>	Chilean false larch or alerce	Chile, Argentina	T	79	NA	NA
<b>Cyatheaceae—Tree-fern family:</b>						
<i>Cyathea dryopteroides</i>	Elfin tree fern	U.S.A. (PR)	E	277	NA	NA
<b>Cyperaceae—Sedge family:</b>						
<i>Carex specuicola</i>	Navajo sedge	U.S.A. (AZ)	T	178	17.96(a)	NA
<i>Gahnia lanaiensis</i>	None	U.S.A. (HI)	E	435	NA	NA
<i>Rhynchospora knieskernii</i>	Knieskern's beaked-rush	U.S.A. (DE, NJ)	T	429	NA	NA
<i>Scirpus ancistrochaetus</i>	Northeastern (=barbed bristle) bulrush.	U.S.A. (VA, MD, WV, PA, NY, MA, VT).	E	425	NA	NA
<b>+ Family Dryopteridaceae—Wood fern family:</b>						
<i>Polystichum aleuticum</i>	Aleutian shield-fern (=Aleutian holly-fern).	U.S.A. (AK)	E	305	NA	NA
<i>Polystichum calderonense</i>	None	U.S.A. (PR)	E	504	NA	NA
<i>Tectaria estremerana</i>	do	do	E	504	NA	NA
<b>Ericaceae—Heath family:</b>						
<i>Arctostaphylos hookeri</i> var. <i>ravenii</i> (=A. <i>pungens</i> ssp. <i>r.</i> )	Presidio (=Raven's) manzanita	U.S.A. (CA)	E	65	NA	NA
<i>Lyonia truncata</i> var. <i>proctorii</i>	None	U.S.A. (PR)	E	501	NA	NA
<i>Rhododendron chapmanii</i>	Chapman rhododendron	U.S.A. (FL)	E	47	NA	NA
<b>Euphorbiaceae—Spurge family:</b>						
<i>Chamaesyce celastroides</i> var. <i>kaenana</i>	'Akoko	U.S.A. (HI)	E	448	NA	NA
<i>Chamaesyce deltoidea</i> ssp. <i>deltoidea</i> (=Euphorbia <i>d.</i> ssp. <i>d.</i> )	Deltoid spurge	U.S.A. (FL)	E	192	NA	NA
<i>Chamaesyce garberi</i> (=Euphorbia <i>g.</i> )	Garber's spurge	do	T	192	NA	NA
<i>Chamaesyce halemanui</i>	None	U.S.A. (HI)	E	464	NA	NA
<i>Chamaesyce kuvaleana</i>	'Akoko	do	E	448	NA	NA
<i>Chamaesyce skottsbergii</i> var. <i>kalaeloana</i> (=Euphorbia <i>s.</i> var. <i>k.</i> )	'Ewa Plains 'akoko	do	E	120	NA	NA
<i>Euphorbia telephioides</i>	Telephus spurge	U.S.A. (FL)	T	463	NA	NA
<i>Jatropha costaricensis</i>	Costa Rican jatropha	Costa Rica	E	154	NA	NA
<i>Manihot walkerae</i>	Walker's manioc	U.S.A. (TX), Mexico	E	445	NA	NA
<b>Fabaceae—Pea family:</b>						
<i>Aeschynomene virginica</i>	Sensitive joint-vetch	U.S.A. (DE, MD, NC, NJ, PA, VA).	T	470	NA	NA
<i>Amorpha crenulata</i>	C...ead-plant	U.S.A. (FL)	E	11	NA	NA

<i>Apios priceana</i>	Price's potato-bean	U.S.A. (AL, IL, KY, MS, TN)	T	373	NA	NA
<i>Astragalus applegatii</i>	Applegate's milk-vetch	U.S.A. (OR)	E	510	NA	NA
<i>Astragalus bibullatus</i>	Guthrie's ground-plum	U.S.A. (TN)	E	437	NA	NA
<i>Astragalus cremnophylax</i> var. <i>cremnophylax</i>	Sentry milk-vetch	U.S.A. (AZ)	E	409	NA	NA
<i>Astragalus humillimus</i>	Mancos milk-vetch	U.S.A. (CO, NM)	E	187	NA	NA
<i>Astragalus montii</i> (= <i>A. limnocharis</i> var. <i>m.</i> )	Heliotrope milk-vetch	U.S.A. (UT)	T	298	17.96(a)	NA
<i>Astragalus osterhoutii</i>	Osterhout milk-vetch	U.S.A. (CO)	E	353	NA	NA
<i>Astragalus phoenix</i>	Ash Meadows milk-vetch	U.S.A. (NV)	T	181	17.96(a)	NA
<i>Astragalus robbinsii</i> var. <i>jesupi</i>	Jesup's milk-vetch	U.S.A. (NH, VT)	E	271	NA	NA
<i>Baptisia arachnifera</i>	Hairy rattlesweed	U.S.A. (GA)	E	39	NA	NA
<i>Caesalpinia kavaiense</i> (= <i>Mezoneuron</i> k.)	Uhiuhi	U.S.A. (HI)	E	238	NA	NA
<i>Canavalia molokaiensis</i>	'Awikiwiki	do	E	480	NA	NA
<i>Chamaecrista glandulosa</i> var. <i>mirabilis</i> (= <i>Cassia mirabilis</i> )	None	U.S.A. (PR)	E	379	NA	NA
<i>Clitoria fragrans</i>	Pigeon wings	U.S.A. (FL)	T	500	NA	NA
<i>Crotalaria avonensis</i>	Avon Park harebells	do	E	500	NA	NA
<i>Dalea foliosa</i> (= <i>Petalostemum</i> f.)	Leafy prairie-clover	U.S.A. (AL, IL, TN)	E	422	NA	NA
<i>Galactia smallii</i>	Small's milkpea	U.S.A. (FL)	E	192	NA	NA
<i>Hoffmannseggia tenella</i>	Slender rush-pea	U.S.A. (TX)	E	209	NA	NA
<i>Lespedeza leptostachya</i>	Prairie bush-clover	U.S.A. (IA, IL, MN, WI)	T	254	NA	NA
<i>Lotus dendroideus</i> ssp. <i>traskiae</i> (= <i>L. scoparius</i> ssp. <i>t.</i> )	San Clemente Island broom	U.S.A. (CA)	E	26	NA	NA
<i>Lupinus aridorum</i>	Scrub lupine	U.S.A. (FL)	E	264	NA	NA
<i>Lupinus tidestromii</i>	Clover lupine	U.S.A. (CA)	E	472	NA	NA
<i>Oxytropis campestris</i> var. <i>chartacea</i>	Fassett's locoweed	U.S.A. (WI)	T	329	NA	NA
<i>Serianthes neisonii</i>	Hayun lagu (Guam), Tronkon guafi (Rota).	Western Pacific Ocean: U.S.A. (Guam, Rota).	E	257, 259	NA	NA
<i>Stahia monosperma</i>	Cóbana negra	U.S.A. (PR), Dominican Re- public.	T	380	NA	NA
<i>Trifolium stoloniferum</i>	Running buffalo clover	U.S.A. (AR, IL, IN, KS, KY, MO, OH, WV).	E	270	NA	NA
<i>Vicia menziesii</i>	Hawaiian vetch	U.S.A. (HI)	E	39	NA	NA
<b>Fagaceae—Oak family:</b>	Hinckley's oak	U.S.A. (TX)	T	318	NA	NA
<i>Quercus hinckleyi</i>	Palo de Ramón	U.S.A. (PR)	E	255	NA	NA
<b>Flacourtiaceae—Flacourtia family:</b>	None	U.S.A. (HI)	E	464	NA	NA
<i>Banara vanderbiltii</i>	Johnston's frankenia	U.S.A. (TX), Mexico (Nuevo Leon).	E	155	NA	NA
<i>Xylosma crenatum</i>	Spring-loving centaury	U.S.A. (CA, NV)	T	181	17.96(a)	NA
<b>Frankeniaceae—Frankenia family:</b>	'Awiwi	U.S.A. (HI)	E	448	NA	NA
<i>Frankenia johnstonii</i>	Hawaiian red-flowered geranium	U.S.A. (HI)	E	465	NA	NA
<b>Gentianaceae—Gentian family:</b>	Nohoanu	do	E	467	NA	NA
<i>Centaurium namophilum</i>	Ha'iwale	U.S.A. (HI)	E	467	NA	NA
<i>Centaurium seabaeoides</i>	Dwarf naupaka	U.S.A. (HI)	E	231	NA	NA
<b>Geraniaceae—Geranium family:</b>	Clay phacelia	U.S.A. (UT)	E	44	NA	NA
<i>Geranium arboreum</i>	North Park phacelia	U.S.A. (CO)	E	121	NA	NA
<i>Geranium multiflorum</i>	Highlands scrub hypericum	U.S.A. (FL)	E	256	NA	NA
<b>Gesneriaceae—Gesneria family:</b>						
<i>Cyrtandra munroi</i>						
<b>Goodeniaceae—Goodenia family:</b>						
<i>Scaevola coriacea</i>						
<b>Hydrophyllaceae—Waterleaf family:</b>						
<i>Phacelia argillacea</i>						
<i>Phacelia formosula</i>						
<b>Hypericaceae—St. Johns-wort family:</b>						
<i>Hypericum cumulicola</i>						



Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
<b>Uvacinaceae—Uvacina family:</b>						
<i>Ottoschulzia rhodoxylon</i>	Palo de rosa	U.S.A. (PR), Dominican Republic.	E	385	NA	NA
<b>Iridaceae—Iris family:</b>						
<i>Iris lacustris</i>	Dwarf lake iris	U.S.A. (MI, WI), Canada (ON)	T	330	NA	NA
<i>Sisyrinchium dichotomum</i>	White irisette	U.S.A. (NC)	E	438	NA	NA
<b>Isoetaceae—Quillwort family:</b>						
<i>Isoetes louisianensis</i>	Louisiana quillwort	U.S.A. (LA)	E	482	NA	NA
<i>Isoetes melanospora</i>	Black-spored quillwort	U.S.A. (GA, SC)	E	302	NA	NA
<i>Isoetes tegetiformans</i>	Mat-forming quillwort	U.S.A. (GA)	E	302	NA	NA
<b>Lamiaceae—Mint family:</b>						
<i>Acanthomintha obovata</i> ssp. <i>duttonii</i>	San Mateo thornmint	U.S.A. (CA)	E	204	NA	NA
<i>Conradina brevifolia</i>	Short-leaved rosemary	U.S.A. (FL)	E	507	NA	NA
<i>Conradina etonia</i>	Etonia rosemary	do	E	507	NA	NA
<i>Conradina glabra</i>	Apalachicola rosemary	do	E	507	NA	NA
<i>Conradina verticillata</i>	Cumberland rosemary	U.S.A. (KY, TN)	T	452	NA	NA
<i>Dicerandra christmanii</i>	Garrett's mint	U.S.A. (FL)	E	207, 362	NA	NA
<i>Dicerandra cornutissima</i>	Longspurred mint	do	E	207	NA	NA
<i>Dicerandra frutescens</i>	Scrub mint	do	E	207, 362	NA	NA
<i>Dicerandra immaculata</i>	Lakela's mint	do	E	180	NA	NA
<i>Haplostachys haplostachya</i> var. <i>angustifolia</i>	None	U.S.A. (HI)	E	73	NA	NA
<i>Hedeoma apiculatum</i>	McGttrick pennyroyal	U.S.A. (NM, TX)	T	118	17.96(a)	NA
<i>Hedeoma todsenii</i>	Todsen's pennyroyal	U.S.A. (NM)	E	110, 112	17.96(a)	NA
<i>Macbridea alba</i>	White birds-in-a-nest	U.S.A. (FL)	T	463	NA	NA
<i>Phyllostegia glabra</i> var. <i>lanaiensis</i>	None	U.S.A. (HI)	E	435	NA	NA
<i>Phyllostegia mannii</i>	do	do	E	480	NA	NA
<i>Phyllostegia mollis</i>	do	do	E	448	NA	NA
<i>Pogogyne abramii</i>	San Diego mesa mint	U.S.A. (CA)	E	44	NA	NA
<i>Pogogyne nudiuscula</i>	Otay mesa mint	U.S.A. (CA), Mexico (Baja California).	E	512	NA	NA
<i>Scutellaria floridana</i>	Florida skullcap	U.S.A. (FL)	T	463	NA	NA
<i>Scutellaria montana</i>	Large-flowered skullcap	U.S.A. (GA, TN)	E	234	NA	NA
<i>Stenogyne angustifolia</i> var. <i>angustifolia</i>	None	U.S.A. (HI)	E	73	NA	NA
<i>Stenogyne bifida</i>	do	do	E	480	NA	NA
<i>Stenogyne campanulata</i>	do	do	E	464	NA	NA
<i>Stenogyne kanehoana</i>	do	do	E	466	NA	NA
<b>Lauraceae—Laurel family:</b>						
<i>Lindera melissifolia</i>	Pondberry	U.S.A. (AL, AR, FL, GA, LA, MO, MS, NC, SC).	E	240	NA	NA
<b>Lentibulariaceae—Bladderwort family:</b>						
<i>Pinguicula ionantha</i>	Godfrey's butterwort	U.S.A. (FL)	T	507	NA	NA
<b>Liliaceae—Lily family:</b>						
<i>Erythronium propullans</i>	Minnesota trout lily	U.S.A. (MN)	E	221	NA	NA
<i>Harperocallis flava</i>	Harper's beauty	U.S.A. (FL)	E	57	NA	NA
<i>Helonias bullata</i>	Swamp pink	U.S.A. (DE, GA, MD, NC, NJ, NY, SC, VA).	T	326	NA	NA
<i>Trillium persistens</i>	Persistent trillium	U.S.A. (GA, SC)	E	39	NA	NA
<i>Trillium reliquum</i>	Relict trillium	U.S.A. (AL, GA, SC)	E	306	NA	NA
<b>Limnanthaceae—False mermaid family:</b>						
<i>Limnanthes floccosa</i> ssp. <i>californica</i>	meadowfoam	U.S.A. (CA)	E	471	NA	NA

<i>Limnanthes vincularis</i> .....	Sebastopol meadowfoam .....	.....do .....	E	453	NA	NA
<b>Loasaceae—Loasa family:</b>						
<i>Mentzelia leucophylla</i> .....	Ash Meadows blazing-star .....	U.S.A. (NV) .....	T	181	17.96(a)	NA
<b>Loganiaceae—Logania family:</b>						
<i>Labordia lydgatei</i> .....	Kamakahala .....	U.S.A. (HI) .....	E	436	NA	NA
<i>Spigelia gentianoides</i> .....	Gentian pinkroot .....	U.S.A. (FL) .....	E	406	NA	NA
+ <b>Lomariopsidaceae—Vine fern family:</b>						
+ <i>Elaphoglossum serpens</i> .....	None .....	U.S.A. (PR) .....	E	504	NA	NA
<b>Lycopodiaceae—Clubmoss family:</b>						
<i>Huperzia mannii</i> (=Lycopodium m.) .....	Wawa'iole .....	U.S.A. (HI) .....	E	467	NA	NA
<b>Malvaceae—Mallow family:</b>						
<i>Abutilon eremitopetalum</i> .....	None .....	U.S.A. (HI) .....	E	435	NA	NA
<i>Abutilon menziesii</i> .....	Ko'olaa'ula .....	.....do .....	E	243	NA	NA
<i>Abutilon sandwicense</i> .....	None .....	.....do .....	E	448	NA	NA
<i>Callirhoe scabriuscula</i> .....	Texas poppy-mallow .....	U.S.A. (TX) .....	E	109, 112	NA	NA
<i>Eremalche kernensis</i> (=E. parryi ssp. k.) .....	Kern mallow .....	U.S.A. (CA) .....	E	395	NA	NA
<i>Hibiscadelphus distans</i> .....	Kauai hau kuahwi .....	U.S.A. (HI) .....	E	225	NA	NA
+ <i>Hibiscus arnottianus</i> ssp. <i>immaculatus</i> .....	Koki'o ke'oke'o .....	.....do .....	E	480	NA	NA
<i>Iliamna corei</i> .....	Peter's Mountain mallow .....	U.S.A. (VA) .....	E	230	NA	NA
<i>Kokia cookei</i> .....	Cooke's koki'o .....	U.S.A. (HI) .....	E	74	NA	NA
<i>Kokia drynarioides</i> .....	Koki'o (=hau-hale'ula or Hawaii tree cotton).	.....do .....	E	167	17.96(a)	NA
<i>Malacothamnus clementinus</i> .....	San Clemente Island bush-mallow .....	U.S.A. (CA) .....	E	26	NA	NA
+ <i>Sidalcea nelsoniana</i> .....	Nelson's checker-mallow .....	U.S.A. (OR) .....	T	490	NA	NA
<i>Sidalcea pedata</i> .....	Pedate checker-mallow .....	U.S.A. (CA) .....	E	158	NA	NA
<b>Marsileaceae—Pepperwort family:</b>						
<i>Marsilea villosa</i> .....	'Ihi'Ihi .....	U.S.A. (HI) .....	E	474	NA	NA
<b>Meliaceae—Mahogany family:</b>						
<i>Trichilia triacantha</i> .....	Bariaco (=guayabacón) .....	U.S.A. (PR) .....	E	303	NA	NA
<b>Nyctaginaceae—Four-o'clock family:</b>						
<i>Abronia macrocarpa</i> .....	Large-fruited sand-verbena .....	U.S.A. (TX) .....	E	331	NA	NA
<i>Mirabilis macfarlanei</i> .....	MacFarlane's four-o'clock .....	U.S.A. (ID, OR) .....	E	66	NA	NA
<b>Oiaceae—Oxal family:</b>						
<i>Schoepfia arenaria</i> .....	None .....	U.S.A. (PR) .....	T	420	NA	NA
<b>Oleaceae—Olive family:</b>						
<i>Chionanthus pygmaeus</i> .....	Pygmy fringe-tree .....	U.S.A. (FL) .....	E	256	NA	NA
<b>Onagraceae—Evening-primrose family:</b>						
<i>Camissonia benitensis</i> .....	San Benito evening-primrose .....	U.S.A. (CA) .....	T	172	NA	NA
<i>Oenothera avita</i> ssp. <i>eurekaensis</i> .....	Eureka Valley evening-primrose ..	.....do .....	E	39	NA	NA
<i>Oenothera deltoides</i> ssp. <i>howellii</i> .....	Antioch Dunes evening-primrose ..	.....do .....	E	39	17.96(a)	NA
<b>Orchidaceae—Orchid family:</b>						
<i>Cranichis ricartii</i> .....	None .....	U.S.A. (PR) .....	E	451	NA	NA
<i>Isotria medeoloides</i> .....	Small whorled pogonia .....	U.S.A. (CT, DC, DE, GA, IL, MA, MD, ME, MI, MO, NC, NH, NJ, NY, PA, RI, SC, TN, VA, VT), Canada (ON).	E	122	NA	NA
<i>Lepanthes eilorensis</i> .....	None .....	U.S.A. (PR) .....	E	451	NA	NA
<i>Platanthera leucophaea</i> .....	Eastern prairie fringed orchid .....	U.S.A. (AR, IA, IL, IN, ME, MI, MO, NE, NJ, NY, OH, OK, PA, VA, WI), Canada (ON,	T	368	NA	NA

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
<i>Platanthera praeclara</i>	Western prairie fringed orchid	U.S.A. (IA, KS, MN, MO, ND, NE, OK, SD), Canada (MB)	T	388	NA	NA
<i>Spiranthes diluvialis</i>	Ute ladies'-tresses	U.S.A. (CO, NV, UT)	T	458	NA	NA
<i>Spiranthes parksii</i>	Navasota ladies'-tresses	U.S.A. (TX)	E	116	NA	NA
<b>Papaveraceae—Poppy family:</b>						
<i>Arctomecon humilis</i>	Dwarf bear-poppy	U.S.A. (UT)	E	78	NA	NA
<i>Argemone pleiacantha</i> ssp. <i>pinnatisecta</i>	Sacramento prickly-poppy	U.S.A. (NM)	E	360	NA	NA
<b>Pinaceae—Pine family:</b>						
<i>Abies guatemalensis</i>	Guatemalan fir or pinabete	Mexico, Guatemala, Honduras, El Salvador.	T	84	NA	NA
<b>Piperaceae—Pepper family:</b>						
<i>Peperomia wheeleri</i>	Wheeler's peperomia	U.S.A. (PR)	E	255	NA	NA
<b>Poaceae—Grass family:</b>						
<i>Aristida chaseae</i>	None	U.S.A. (PR)	E	501	NA	NA
<i>Aristida portoricensis</i>	Pelos del diablo	do	E	398	NA	NA
<i>Orcuttia californica</i>	California Orcutt grass	U.S.A. (CA)	E	512	NA	NA
<i>Panicum fauriei</i> var. <i>carteri</i>	Carter's panicgrass	U.S.A. (HI)	E	133	17.96(a)	NA
<i>Poa sandvicensis</i>	Hawaiian bluegrass	do	E	464	NA	NA
<i>Poa siphonoglossa</i>	None	do	E	464	NA	NA
<i>Swallenia alexandrae</i>	Eureka Dune grass	U.S.A. (CA)	E	39	NA	NA
<i>Tuctoria mucronata</i> (= <i>Orcuttia</i> m.)	Solano grass	do	E	44	NA	NA
<i>Zizania texana</i>	Texas wild-rice	U.S.A. (TX)	E	39	17.96(a)	NA
<b>Polemoniaceae—Phlox family:</b>						
<i>Eriastrum densifolium</i> ssp. <i>sanctorum</i>	Santa Ana River woolly-star	U.S.A. (CA)	E	291	NA	NA
<i>Eriastrum hooveri</i>	Hoover's woolly-star	do	T	395	NA	NA
<i>Gilia tenuiflora</i> ssp. <i>arenaria</i>	Monterey gilia	do	E	472	NA	NA
<i>Phlox nivalis</i> ssp. <i>texensis</i>	Texas trailing phlox	U.S.A. (TX)	E	440	NA	NA
<b>Polygalaceae—Milkwort family:</b>						
<i>Polygala lewtonii</i>	Lawton's polygala	U.S.A. (FL)	E	500	NA	NA
<i>Polygala smallii</i>	Tiny polygala	do	E	192	NA	NA
<b>Polygonaceae—Buckwheat family:</b>						
<i>Chorizanthe howellii</i>	Howell's spineflower	U.S.A. (CA)	E	472	NA	NA
<i>Chorizanthe valida</i>	Sonoma spineflower	do	E	472	NA	NA
<i>Dodecahema leptoceras</i> (= <i>Centrostegia</i> l.)	Slender-horned spineflower	do	E	291	NA	NA
<i>Eriogonum gypsophilum</i>	Gypsum wild-buckwheat	U.S.A. (NM)	T	110, 112	17.96(a)	NA
<i>Eriogonum longifolium</i> var. <i>gnaphalifolium</i>	Scrub buckwheat	U.S.A. (FL)	T	500	NA	NA
<i>Eriogonum ovalifolium</i> var. <i>williamsiae</i>	Steamboat buckwheat	U.S.A. (NV)	E	237	NA	NA
<i>Eriogonum peltinophilum</i>	Clay-loving wild-buckwheat	U.S.A. (CO)	E	151	17.96(a)	NA
<i>Polygonella basiramia</i> (= <i>P. ciliata</i> var. <i>b.</i> )	Wireweed	U.S.A. (FL)	E	256	NA	NA
<i>Polygonella myriophylla</i>	Sandlace	do	E	500	NA	NA
<b>Potamogetonaceae—Pondweed family:</b>						
<i>Potamogeton clystocarpus</i>	Little Aguja pondweed	U.S.A. (TX)	E	450	NA	NA
<b>Primulaceae—Primrose family:</b>						
<i>Lysimachia asperulaefolia</i>	Rough-leaved loosestrife	U.S.A. (NC, SC)	E	274	NA	NA
<i>Lysimachia lydgatei</i>	None	U.S.A. (HI)	E	467	NA	NA
<i>Primula maguirei</i>	Maguire primrose	U.S.A. (UT)	T	199	NA	NA
<b>Ranunculaceae—Buttercup family:</b>						
<i>conitum noveboracense</i>	None	U.S.A. (IA, NY, OH, WI)	T	39		NA

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<i>Clematis morefieldii</i> .....	Morefield's leather-flower .....	U.S.A. (AL) .....	E	468	NA	NA
<i>Clematis socialis</i> .....	Alabama leather-flower .....	.....do .....	E	245	NA	NA
<i>Delphinium variegatum</i> ssp. <i>kinkiense</i> (=D. <i>variegatum</i> ssp. <i>k.</i> ) .....	San Clemente Island larkspur .....	U.S.A. (CA) .....	E	26	NA	NA
<i>Ranunculus acriformis</i> var. <i>festivus</i> (=R. <i>acris</i> var. <i>a.</i> ) .....	Autumn buttercup .....	U.S.A. (UT) .....	E	355	NA	NA
<i>Thalictrum cooleyi</i> .....	Cooley's meadowrue .....	U.S.A. (FL, NC) .....	E	344	NA	NA
<b>Rhamnaceae—Buckthorn family:</b>						
<i>Gouania hillebrandii</i> .....	None .....	U.S.A. (HI) .....	E	165	17.96(a)	NA
<i>Gouania meyenii</i> .....	.....do .....	.....do .....	E	448	NA	NA
<i>Ziziphus celata</i> .....	Florida ziziphus .....	U.S.A. (FL) .....	E	356	NA	NA
<b>Rosaceae—Rose family:</b>						
<i>Acaena exigua</i> .....	Uliwai .....	U.S.A. (HI) .....	E	467	NA	NA
<i>Geum radiatum</i> .....	Spreading avens .....	U.S.A. (NC, TN) .....	E	381	NA	NA
<i>Ivesia kingii</i> var. <i>eremica</i> .....	Ash Meadows ivesia .....	U.S.A. (NV) .....	E	181	17.96(a)	NA
<i>Potentilla robbinsiana</i> .....	Robbins' cinquefoil .....	U.S.A. (NH, VT) .....	E	104	17.96(a)	NA
<i>Prunus geniculata</i> .....	Scrub plum .....	U.S.A. (FL) .....	E	256	NA	NA
<i>Purshia subintegra</i> (=Cowania s.) .....	Arizona cliffrose .....	U.S.A. (AZ) .....	E	148	NA	NA
<i>Spiraea virginiana</i> .....	Virginia spiraea .....	U.S.A. (GA, KY, NC, PA, TN, VA, WV) .....	T	389	NA	NA
<b>Rubiaceae—Coffee family:</b>						
<i>Gardenia brighamii</i> .....	Na'u or Hawaiian gardenia .....	U.S.A. (HI) .....	E	198	NA	NA
<i>Hedyotis coriacea</i> .....	Kio'ele .....	.....do .....	E	467	NA	NA
<i>Hedyotis degeneri</i> .....	None .....	.....do .....	E	448	NA	NA
<i>Hedyotis mannii</i> .....	Pilo .....	.....do .....	E	480	NA	NA
<i>Hedyotis parvula</i> .....	None .....	.....do .....	E	448	NA	NA
<i>Hedyotis purpurea</i> var. <i>montana</i> .....	Roan Mountain bluet .....	U.S.A. (NC, TN) .....	E	381	NA	NA
<i>Hedyotis st. johnii</i> .....	Na Pali beach hedyotis .....	U.S.A. (HI) .....	E	441	NA	NA
<b>Rutaceae—Citrus family:</b>						
<i>Melicope mucronulata</i> (=Pelea m.) .....	Alanui .....	U.S.A. (HI) .....	E	467	NA	NA
<i>Melicope reflexa</i> .....	.....do .....	.....do .....	E	480	NA	NA
<i>Zanthoxylum thomsonianum</i> .....	St. Thomas prickly-ash .....	U.S.A. (PR, VI) .....	E	213	NA	NA
<b>Santalaceae—Sandalwood family:</b>						
<i>Santalum freycinetianum</i> var. <i>lanaiense</i> .....	Lanai sandalwood or 'i'iahi .....	U.S.A. (HI) .....	E	215	NA	NA
<b>Sapindaceae—Soapwort family:</b>						
<i>Alectryon macrococcus</i> .....	Mahoe .....	U.S.A. (HI) .....	E	467	NA	NA
<b>Sarraceniaceae—Pitcher-plant family:</b>						
<i>Sarracenia oreophila</i> .....	Green pitcher-plant .....	U.S.A. (AL, GA, TN) .....	E	56, 89	NA	NA
<i>Sarracenia rubra</i> ssp. <i>alabamensis</i> (=S. <i>alabamensis</i> ) .....	Alabama canebrake pitcher-plant .....	U.S.A. (AL) .....	E	346	NA	NA
<i>Sarracenia rubra</i> ssp. <i>jonesii</i> (=S. <i>jonesii</i> ) .....	Mountain sweet pitcher-plant .....	U.S.A. (NC, SC) .....	E	339	NA	NA
<b>Saxifragaceae—Saxifrage family:</b>						
<i>Ribes echinellum</i> .....	Micosukee gooseberry .....	U.S.A. (FL, SC) .....	T	190	NA	NA
<b>Scrophulariaceae—Snapdragon family:</b>						
<i>Agalinis acuta</i> .....	Sandplain gerardia .....	U.S.A. (CT, MA, MD, NY, RI) .....	E	325	NA	NA
<i>Amphianthus pusillus</i> .....	Little amphianthus .....	U.S.A. (AL, GA, SC) .....	T	302	NA	NA
<i>Castilleja grisea</i> .....	San Clemente Island Indian paint-brush .....	U.S.A. (CA) .....	E	26	NA	NA
<i>Cordylanthus maritimus</i> ssp. <i>maritimus</i> .....	Salt marsh bird's-beak .....	U.S.A. (CA), Mexico (BC) .....	E	44	NA	NA
<i>Cordylanthus palmatus</i> .....	Palmate-bracted bird's-beak .....	U.S.A. (CA) .....	E	235	NA	NA
<i>Mimulus glabratus</i> var. <i>michiganensis</i> .....	Michigan monkey-flower .....	U.S.A. (MI) .....	E	392	NA	NA
<i>Pedicularis furbishiae</i> .....	Furbish lousewort .....	U.S.A. (ME), Canada (NB) .....	E	39	NA	NA
<i>Penstemon haydenii</i> .....	Blowout penstemon .....	U.S.A. (NE) .....	E	285	NA	NA
<i>Penstemon penlandii</i> .....	Penland beardtongue .....	U.S.A. (CO) .....	E	353	NA	NA

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
+ <i>Schwalbea americana</i>	American chaffseed	U.S.A. (AL, CT, DE, FL, GA, MA, MD, MS, NC, NJ, NY, SC, TN, VA).	E	478	NA	NA
<b>Solanaceae—Nightshade family:</b>						
<i>Goetzea elegans</i>	Beautiful goetzea or matabuey	U.S.A. (PR)	E	176	NA	NA
<i>Solanum drymophilum</i>	Erubia	.....do	E	319	NA	NA
<b>Styracaceae—Styrax family:</b>						
<i>Styrax portoricensis</i>	Palo de jazmín	U.S.A. (PR)	E	461	NA	NA
<i>Styrax texana</i>	Texas snowbells	U.S.A. (TX)	E	162	NA	NA
<b>Taxaceae—Yew family:</b>						
<i>Torreya taxifolia</i>	Florida torreya	U.S.A. (FL, GA)	E	140	NA	NA
<b>Theaceae—Tea family:</b>						
<i> Ternstroemia luquillensis</i>	Palo colorado	U.S.A. (PR)	E	461	NA	NA
<i> Ternstroemia subsessilis</i>	None	.....do	E	461	NA	NA
<b>Thelypteridaceae—Marsh fern family:</b>						
+ <i>Thelypteris inabonensis</i>	None	U.S.A. (PR)	E	506	NA	NA
<i>Thelypteris pilosa</i> var. <i>alabamensis</i> (= <i>Leptogramma p.</i> var. <i>a.</i> )	Alabama streak-sorus fern	U.S.A. (AL)	T	476	NA	NA
+ <i>Thelypteris veracunda</i>	None	U.S.A. (PR)	E	506	NA	NA
+ <i>Thelypteris yaucoensis</i>	.....do	.....do	E	506	NA	NA
<b>Thymelaeaceae—Mezereum family:</b>						
<i>Daphnopsis hellerana</i>	None	U.S.A. (PR)	E	309	NA	NA
<b>Urticaceae—Nettle family:</b>						
<i>Neraudia angulata</i>	None	U.S.A. (HI)	E	448	NA	NA
<i>Urera kasia</i>	Opuhe	.....do	E	448	NA	NA
<b>Verbenaceae—Verbena family:</b>						
<i>Callicarpa ampla</i>	Capá rosa (=péndula cimarrona)	U.S.A. (PR)	E	461	NA	NA
<i>Cornutia obovata</i>	Palo de nigua (=capá jugüerilla)	.....do	E	307	NA	NA
<b>Violaceae—Violet family:</b>						
<i>Isodendron hosakae</i>	Aupaka	U.S.A. (HI)	E	414	NA	NA
<i>Viola chamissoniana</i> ssp. <i>chamissoniana</i>	Pamakani	.....do	E	448	NA	NA
<i>Viola helenae</i>	None	.....do	E	436	NA	NA
<i>Viola lanaiensis</i>	.....do	.....do	E	435	NA	NA
<b>Xyridaceae—Yellow-eyed grass family:</b>						

Symbol used in the "when listed" column.

E—Indicates Emergency rule publication (see FR document for effective dates); subsequent number(s) indicate FR final rule, if applicable, under "When listed"

26—42 FR 40685; August 11, 1977.  
 26—42 FR 40685; August 11, 1977.  
 39—43 FR 17916; April 26, 1978.  
 44—43 FR 44812; September 28, 1978.  
 47—44 FR 24250; April 24, 1979.  
 49—44 FR 32605; June 6, 1979.  
 53—44 FR 43701; July 25, 1979.  
 56—44 FR 54923; September 21, 1979.  
 57—44 FR 58863; October 2, 1979.  
 58—44 FR 58868; October 11, 1979.  
 59—44 FR 58870; October 11, 1979.  
 61—44 FR 61556; October 25, 1979.  
 62—44 FR 61558; October 25, 1979.  
 63—44 FR 61786; October 26, 1979.  
 64—44 FR 61788; October 26, 1979.  
 65—44 FR 61911; October 26, 1979.  
 66—44 FR 61913; October 26, 1979.  
 67—44 FR 61916; October 26, 1979.  
 68—44 FR 61920; October 26, 1979.  
 69—44 FR 61924; October 26, 1979.  
 70—44 FR 61927; October 26, 1979.  
 71—44 FR 61929; October 26, 1979.  
 72—44 FR 62246; October 29, 1979.  
 73—44 FR 62469; October 30, 1979.  
 74—44 FR 62471; October 30, 1979.  
 75—44 FR 62474; October 30, 1979.  
 76—44 FR 64247; November 6, 1979.  
 77—44 FR 64250; November 6, 1979.  
 78—44 FR 64252; November 6, 1979.  
 79—44 FR 64733; November 7, 1979.  
 80—44 FR 64738; November 7, 1979.  
 81—44 FR 64740; November 7, 1979.  
 82—44 FR 64743; November 7, 1979.  
 83—44 FR 64746; November 7, 1979.  
 84—44 FR 65005; November 8, 1979.  
 89—45 FR 18929; March 24, 1980.  
 104—45 FR 61944; September 17, 1980.  
 107—45 FR 69360; October 20, 1980.  
 109—46 FR 3184; January 13, 1981.  
 110—46 FR 5730; January 19, 1981.  
 112—46 FR 40025; August 6, 1981.  
 116—47 FR 19539; May 6, 1982.  
 118—47 FR 30440; July 13, 1982.  
 120—47 FR 36846; August 24, 1982.  
 121—47 FR 38540; September 1, 1982.  
 122—47 FR 38927; September 10, 1982.  
 126—47 FR 50885; November 10, 1982.  
 133—48 FR 46331; October 12, 1983.  
 137—48 FR 52747; November 22, 1983.  
 140—49 FR 2786; January 23, 1984.  
 141—49 FR 6102; February 17, 1984.  
 147—49 FR 21058; May 18, 1984.  
 148—49 FR 22329; May 20, 1984.  
 151—49 FR 28565; July 13, 1984.  
 152—49 FR 29234; July 19, 1984.  
 153—49 FR 29237; July 19, 1984.  
 154—49 FR 30201; July 27, 1984.  
 155—49 FR 31421; August 7, 1984.  
 158—49 FR 34500; August 31, 1984.  
 162—49 FR 40038; October 12, 1984.  
 165—49 FR 44756; November 9, 1984.  
 167—49 FR 47400; December 4, 1984.  
 168—49 FR 49639; December 21, 1984.  
 172—50 FR 5758; February 12, 1985.  
 175—50 FR 12309; March 28, 1985.  
 176—50 FR 15567; April 19, 1985.  
 177—50 FR 16682; April 26, 1985.  
 178—50 FR 19373; May 8, 1985.  
 179—50 FR 19377; May 8, 1985.  
 180—50 FR 20214; May 15, 1985.  
 181—50 FR 20786; May 20, 1985.  
 187—50 FR 26572; June 27, 1985.  
 190—50 FR 29341; July 18, 1985.  
 191—50 FR 29344; July 18, 1985.  
 192—50 FR 29349; July 18, 1985.  
 194—50 FR 31190; August 1, 1985.  
 197—50 FR 32575; August 13, 1985.  
 198—50 FR 33731; August 21, 1985.  
 199—50 FR 33734; August 21, 1985.  
 200—50 FR 33737; August 21, 1985.  
 201—50 FR 36089; September 5, 1985.  
 202—50 FR 36091; September 5, 1985.  
 204—50 FR 37863; September 18, 1985.  
 207—50 FR 45618; November 1, 1985.  
 208—50 FR 45621; November 1, 1985.  
 209—50 FR 45624; November 1, 1985.  
 213—50 FR 51870; December 21, 1985.  
 214—51 FR 956; January 9, 1986.  
 215—51 FR 3185; January 24, 1986.  
 217—51 FR 6693; February 25, 1986.  
 218—51 FR 8683; March 13, 1986.  
 219—51 FR 9820; March 21, 1986.  
 220—51 FR 10521; March 26, 1986.  
 221—51 FR 10523; March 26, 1986.  
 225—51 FR 15906; April 29, 1986.  
 229—51 FR 16530; May 5, 1986.  
 230—51 FR 17346; May 12, 1986.  
 231—51 FR 17974; May 16, 1986.  
 232—51 FR 17977; May 16, 1986.  
 234—51 FR 22524; June 20, 1986.  
 235—51 FR 23769; July 1, 1986.  
 237—51 FR 24672; July 8, 1986.  
 238—51 FR 24675; July 8, 1986.  
 240—51 FR 27500; July 31, 1986.  
 243—51 FR 34415; September 26, 1986.  
 244—51 FR 34419; September 26, 1986.  
 245—51 FR 34422; September 26, 1986.  
 249—51 FR 45907; December 23, 1986.  
 252—52 FR 679; January 8, 1987.  
 253—52 FR 682; January 8, 1987.  
 254—52 FR 784; January 9, 1987.  
 255—52 FR 1462; January 14, 1987.  
 256—52 FR 2234; January 21, 1987.  
 257—52 FR 4910; February 18, 1987.  
 259—52 FR 6651; March 4, 1987.  
 260—52 FR 7426; March 11, 1987.  
 264—52 FR 11175; April 7, 1987.  
 266—52 FR 15505; April 29, 1987.  
 270—52 FR 21480; June 5, 1987.  
 271—52 FR 21484; June 5, 1987.  
 274—52 FR 22589; June 12, 1987.  
 275—52 FR 22933; June 16, 1987.  
 276—52 FR 22936; June 16, 1987.  
 277—52 FR 22939; June 16, 1987.  
 285—52 FR 32929; September 1, 1987.  
 286—52 FR 34917; September 16, 1987.  
 291—52 FR 36270; September 28, 1987.  
 293—52 FR 37420; October 6, 1987.  
 295—52 FR 41440; October 28, 1987.  
 297—52 FR 42071; November 2, 1987.  
 298—52 FR 42657; November 6, 1987.  
 300—52 FR 44401; November 19, 1987.  
 301—52 FR 46087; December 4, 1987.  
 302—53 FR 3565; February 5, 1988.  
 303—53 FR 3567; February 5, 1988.  
 305—53 FR 4629; February 17, 1988.  
 306—53 FR 10884; April 4, 1988.  
 307—53 FR 11612; April 7, 1988.  
 308—53 FR 11615; April 7, 1988.  
 309—53 FR 23742; June 23, 1988.  
 310—53 FR 23745; June 23, 1988.  
 311—53 FR 23748; June 23, 1988.  
 314—53 FR 27137; July 18, 1988.  
 315—53 FR 27141; July 18, 1988.  
 318—53 FR 32827; August 26, 1988.  
 319—53 FR 32830; August 26, 1988.  
 321—53 FR 33996; September 1, 1988.  
 324—53 FR 34701; September 7, 1988.  
 325—53 FR 34705; September 7, 1988.  
 326—53 FR 35080; September 9, 1988.  
 329—53 FR 37972; September 28, 1988.  
 330—53 FR 37975; September 28, 1988.  
 331—53 FR 37978; September 28, 1988.  
 332—53 FR 37982; September 28, 1988.  
 333—53 FR 38451; September 30, 1988.  
 335—53 FR 38456; September 30, 1988.  
 339—53 FR 38474; September 30, 1988.  
 341—53 FR 45861; November 14, 1988.  
 343—54 FR 2134; January 19, 1989.  
 344—54 FR 5938; February 7, 1989.  
 346—54 FR 10154; March 10, 1989.  
 347—54 FR 14967; April 14, 1989.  
 352—54 FR 29658; July 13, 1989.  
 353—54 FR 29663; July 13, 1989.  
 354—54 FR 29730; July 14, 1989.  
 355—54 FR 30554; July 21, 1989.  
 356—54 FR 31196; July 27, 1989.  
 360—54 FR 35305; August 24, 1989.  
 362—54 FR 38947; September 21, 1989.  
 363—54 FR 38950; September 21, 1989.  
 367—54 FR 39857; September 28, 1989.  
 368—54 FR 39863; September 28, 1989.  
 373—55 FR 433; January 5, 1990.  
 374—55 FR 4157; February 6, 1990.  
 375—55 FR 4159; February 6, 1990.  
 379—55 FR 12790; April 5, 1990.  
 380—55 FR 12793; April 5, 1990.  
 381—55 FR 12797; April 5, 1990.  
 385—55 FR 13491; April 10, 1990.  
 386—55 FR 13911; April 13, 1990.  
 389—55 FR 24246; June 15, 1990.  
 392—55 FR 25599; June 21, 1990.  
 395—55 FR 29370; July 19, 1990.  
 397—55 FR 32255; August 8, 1990.  
 398—55 FR 32257; August 8, 1990.  
 402—55 FR 39864; September 28, 1990.  
 403—55 FR 39867; September 28, 1990.  
 406—55 FR 49050; November 26, 1990.  
 409—55 FR 50187; December 5, 1990.  
 413—56 FR 1453; January 14, 1991.  
 414—56 FR 1457; January 14, 1991.  
 418—56 FR 1936; January 18, 1991.  
 420—56 FR 16024; April 19, 1991.  
 422—56 FR 19959; May 1, 1991.  
 424—56 FR 21091; May 7, 1991.  
 425—56 FR 21096; May 7, 1991.  
 429—56 FR 32983; July 18, 1991.  
 430—56 FR 34154; July 26, 1991.  
 434—56 FR 46239; September 11, 1991.  
 435—56 FR 47694; September 20, 1991.  
 436—56 FR 47699; September 20, 1991.  
 437—56 FR 48751; September 20, 1991.  
 438—56 FR 48755; September 20, 1991.  
 439—56 FR 49636; September 30, 1991.  
 440—56 FR 49639; September 30, 1991.  
 441—56 FR 49643; September 30, 1991.  
 445—56 FR 49853; October 2, 1991.

448—56 FR 55785; October 29, 1991.  
 450—56 FR 57849; November 14, 1991.  
 451—56 FR 60937; November 29, 1991.  
 452—56 FR 60940; November 29, 1991.  
 453—56 FR 61182; December 2, 1991.  
 457—57 FR 1403; January 14, 1992.  
 458—57 FR 2053; January 17, 1992.  
 460—57 FR 14653; April 22, 1992.  
 461—57 FR 14785; April 22, 1992.  
 463—57 FR 19819; May 8, 1992.  
 464—57 FR 20588; May 13, 1992.  
 465—57 FR 20592; May 13, 1992.  
 466—57 FR 20595; May 13, 1992.  
 467—57 FR 20787; May 15, 1992.  
 468—57 FR 21564; May 20, 1992.  
 470—57 FR 21574; May 20, 1992.  
 471—57 FR 24199; June 8, 1992.  
 472—57 FR 27858; June 22, 1992.  
 473—57 FR 27863; June 22, 1992.  
 474—57 FR 27867; June 22, 1992.  
 476—57 FR 30168; July 8, 1992.  
 477—57 FR 44340; September 25, 1992.  
 478—57 FR 44708; September 29, 1992.  
 480—57 FR 46339; October 8, 1992.  
 481—57 FR 46344; October 8, 1992.  
 482—57 FR 46747; October 28, 1992.  
 490—58 FR 8242; February 12, 1993.  
 491—58 FR 11552; February 26, 1993.  
 497—58 FR 18035; April 7, 1993.  
 498—58 FR 18041; April 7, 1993.  
 500—58 FR 25754; April 27, 1993.  
 501—58 FR 25758; April 27, 1993.  
 504—58 FR 32311; June 9, 1993.  
 506—58 FR 35891; July 2, 1993.  
 507—58 FR 37443; July 12, 1993.  
 509—58 FR 40547; July 28, 1993.

510—58 FR 40551; July 28, 1993.  
 511—58 FR 41383; August 3, 1993.  
 512—58 FR 41391; August 3, 1993.

### SPECIES REMOVED FROM THE ENDANGERED AND THREATENED LISTS

The following list of wildlife removed from the list at § 17.11 is provided for informational purposes only and is not codified in the Code of Federal Regulations. Only species completely removed from the list are included below. In cases where only a portion of the vertebrate species is delisted, the entry remains in § 17.11 in the modified form with the citation to the Federal Register indicated under "When listed."

The Service's listing regulations at 50 CFR 424.11(c) and (d) are as follows:

(c) A species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or

(5) Other natural or manmade factors affecting its continued existence.

(d) The factors considered in delisting a species are those in paragraph (c) of this section as they relate to the definitions of endangered or threatened species. Such removal must be supported by the best scientific and commercial data available. The Secretary after conducting a review of the status of the species. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) *Extinction.* Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) *Recovery.* The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3) *Original data for classification in error.* Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

Species		Historic range	Former vertebrate population where endangered or threatened	Former status	Delisted	
Common name	Scientific name				Citation	Reason
Duck, Mexican	<i>Anas "blue"</i>	U.S.A. (AZ, NM, TX) to central Mexico.	U.S. only	E	43 FR 32258-61; July 25, 1978.	Original data in error
Pupfish, Tecopa	<i>Cyprinodon nevadensis calidae</i>	U.S.A. (CA)	Entire	E	47 FR 2317-18; January 15, 1982	Extinct
Cisco, longjaw	<i>Coregonus alpenae</i>	U.S.A. and Canada (Lakes Michigan, Huron, Erie).	do	E	48 FR 39941-43; September 2, 1983.	Do.
Pike, blue	<i>Stizostedion vitreum glaucum</i>	U.S.A. and Canada (Lakes Erie, Ontario)	do	E	do	Do.
Sparrow, Santa Barbara song	<i>Melospiza melodia graminea</i>	U.S.A. (CA)	do	E	48 FR 46336-37; October 12, 1983.	Do.
Treefrog, Pine Barrens	<i>Hyla andersoni</i>	U.S.A. (FL, AL, NC, SC, NJ)	Florida	E	48 FR 52740-43; November 22, 1983	Original data in error
Pearly mussel, Sampson's	<i>Epioblasma (=Dysnomia) sampsoni</i>	U.S.A. (IL, IN)	NA	E	49 FR 1057-58; January 9, 1984	Extinct
Turtle, Indian flap-shelled	<i>Lissemys punctata punctata</i>	India, Pakistan, Bangladesh	Entire	E	49 FR 7394-98; February 28, 1984	Original data in error
Butterfly, Bahama swallowtail	<i>Heracles (=Papilio) andraemon borhotei</i>	U.S.A. (FL), Bahamas	NA	T	49 FR 34501-04; August 31, 1984	Do.
Dove, Palau	<i>Gallinucula carolinensis</i>	W. Pacific; U.S.A. (Palau islands)	Entire	E	50 FR 37192-94; September 12, 1985	Recovered
Fantail, Palau (Old World flycatcher)	<i>Rhipidura lepida</i>	do	do	E	do	Do.
Owl, Palau	<i>Pyroglaux (=Otus) podergrina</i>	do	do	E	do	Do.
Gambusia, Amistad (=Goodenough)	<i>Gambusia amistadensis</i>	U.S.A. (TX)	do	E	52 FR 86083-85; December 4, 1987	Extinct
Milk-vetch, Flydberg	<i>Astragalus perianus</i>	U.S.A. (UT)	NA	T	54 FR 37941-43; September 14, 1989	Recovered
Cactus, purple-spined hedgehog	<i>Echinocereus engelmannii</i> var. <i>purpureus</i>	do	NA	E	54 FR 48749-51; November 27, 1989	Original data in error
Sparrow, dusky seaside	<i>Ammodramus (=Ammodramus) maritimus nigrescens</i>	U.S.A. (FL)	NA	E	55 FR 51112-14; December 12, 1990	Extinct
Globeberry, Tumamoc	<i>Tumamoca macdougalii</i>	U.S.A. (AZ), Mexico	NA	E	58 FR 33582-85; June 18, 1993	Original data in error

**PART XIII - SUPPLEMENTARY INFORMATION**

**Section 3**

**Field Indicators of Saturated Hydric Soils**



**FIELD INDICATORS OF SATURATED HYDRIC SOILS**  
**in**  
**PERGELIC TEMPERATURE REGIME REGIONS**  
**of the UNITED STATES**  
**Testing Version February 1, 1994**

**Category PA. Any soil:**

**PA1.** Presence of hydrogen sulfide odor within 25 cm of the surface of the uppermost mineral layer or within any organic layer above the mineral contact.

**Category PO. Organic soil:**

**PO1.** Classifies as a Histosol, except Folists

**Category PS. Sandy soils:**

**PS1.** Presence of hue 5G, 5BG, 5B or N within 25 cm and underlain by hue of 5Y or redder.

**PS2.** Presence of a continuous zone, 3 cm or more thick, of iron staining having value 4 or more and chroma 6 or more and 3 cm or more thick occurs within 15 cm of the surface of the uppermost mineral surface. The zone is immediately below a horizon in which iron/manganese oxides have been stripped from the matrix exposing the primary base color of silt and sand grains having .

**Category PM. Other Mineral soils:**

**PM1.** Hue is 5G, 5BG, 5B or N or along non-living root channels within 30 cm of the surface of the uppermost mineral layer.

**PM2.** Presence of redox concentrations as distinct or prominent pore linings, value 4 or more and chroma 6 or more, occupy more than 5 percent or more of the soil volume in a matrix having dominant hue of 5Y, 5GY, 5G, 5BG, 5B or N.

**PM3.** Directly beneath epipedon having chroma less than 2 and thickness of 30 cm or less, 60 percent or more of the matrix in all layers, to a depth of 35 cm or more, has hue 2.5Y or yellower and redox concentrations, value 4 or more and chroma 6, as masses on ped faces and interiors.

**PM4.** Presence of redox concentrations as nodules or concretions greater than 2mm in diameter occupy more than 2 percent of volume within upper 30 cm and matrix chroma is less than 2.

**FIELD INDICATORS OF SATURATED HYDRIC SOILS**  
**in**  
**CRYIC SOIL TEMPERATURE REGIME REGIONS**  
**of the UNITED STATES**  
**Testing Version February 1, 1994**

**Category CA. Any soil:**

**CA1.** Presence of hydrogen sulfide odor within 25 cm of the surface.

**Category CO. Organic soil:**

**CO1.** Classifies as a Histosol, except Folists

**Category CS. Sandy soils:**

**CS1.** Presence of hue 5G, 5BG, 5B or N within 25 cm and underlain by hue of 5Y or redder.

**CS2.** Presence of a continuous zone, 3 cm or more thick, of iron staining having value 4 or more and chroma 6 or more and 3 cm or more thick occurs within 15 cm of the surface of the uppermost mineral surface. The zone is immediately below a horizon in which iron/manganese oxides have been stripped from the matrix exposing the primary base color of silt and sand grains having .

**Category CM. Other Mineral soils:**

**CM1.** Hue is 5G, 5BG, 5B or N or along non-living root channels within 30 cm of the surface of the uppermost mineral layer.

**CM2.** Presence of redox concentrations as distinct or prominent pore linings, value 4 or more and chroma 6 or more, occupy more than 5 percent or more of the soil volume in a matrix having dominant hue of 5Y, 5GY, 5G, 5BG, 5B or N.

**CM3.** Directly beneath epipedon having chroma of 2 or less and 30 cm or less thick, 60 percent or more of the matrix in all layers, to a depth of 35 cm or more, has hue 2.5Y or yellower and redox concentrations, value 4 or more and chroma 6, as masses on ped faces and interiors.

**CM4.** Presence of redox concentrations as nodules or concretions greater than 2mm in diameter occupy more than 2 percent of volume within upper 30 cm and matrix chroma is 2 or less.

**FM5.** Presence of redox concentrations as masses and nodules or concretions greater than 2 mm in diameter occupy more than 2 percent of volume within upper 30 cm of Mollic epipedon.

**FM6.** Presence of distinct or prominent redox concentrations, on ped faces or ped interiors occupy more than 2 percent of the soil volume within a zone more than 10 cm thick in the upper 30 cm of the mineral soil and has:

- a. matrix value of 3 or less and chroma 1 or less and redox concentrations as masses with value 4 or more and chroma 4 or more, or
- b. matrix value of 3 or less and chroma 2 or less and redox concentrations as masses with value 4 or more and chroma 5 or more, or
- c. matrix value 4 or more and chroma 2 or less and black or reddish black ferromanganese stains.

**FM7.** Directly beneath a Mollic epipedon that is less than 30 cm thick; 60 percent or more of the matrix in all layers, to a depth of 35 cm or more, has:

- a. hue 10YR or redder, value 5 or more and chroma 1 or less, or
- b. hue 2.5Y or yellower, value 6 or more and chroma 2 or less, or
- c. value 4 or more and chroma 2 or less and distinct and prominent redox concentrations, or
- d. hue 5GY, 5G, 5BG, 5B.

**FM8.** A zone with an accumulation of calcium carbonate, or calcium carbonate equivalent, occurs within 30 cm of the surface. The zone is overlain by a layer having chroma 2 or less and is underlain by a layer where 60 percent or more of the matrix has:

- a. value 5 or more and chroma 1 or less, or
- c. value 5 or more and chroma 2 or less and has distinct and prominent redox concentrations as iron masses, or
- b. hue 2.5Y or yellower, value 4 or more and chroma of 1 or less, or
- d. hue 2.5Y or yellower, value 4 or more and chroma 2 or less and distinct and prominent redox concentrations, or
- e. hue 5GY, 5G, 5BG, 5B.

**FM9.** Presence of a surface layer of muck, 1 cm or more thick, value less than 3 and chroma 1 or

less, overlies a mollic epipedon where the native vegetation is grass.

**FM10.** In depressional basins in California, Oregon and Washington, 60 percent or more of the matrix in the upper 15 cm of the soil, is depleted of iron in all layers and has:

- a. value 5 or more and chroma 1 or less, or
- b. value 4 or more and chroma 2 or less and distinct or prominent redox concentrations as iron masses.

**FIELD INDICATORS OF SATURATED HYDRIC SOILS**  
in  
**FRIGID and ISO-FRIGID SOIL TEMPERATURE REGIME REGIONS**  
of the **UNITED STATES**  
Testing Version February 1, 1994

**Category FA. Any soil:**

- FA1.** Presence of hydrogen sulfide odor within 30 cm of the surface.
- FA2.** Hue is 5GY, 5G, or 5BG within 30 cm of the surface.
- FA3.** Presence of muck in the mineral surface layer that is 5 cm or more thick.

**Category FO. Organic soil:**

- FO1.** Classifies as a Histosol, except Folists

**Category FS. Sandy soils:**

- FS1.** Presence of a layer of muck 1 cm or more thick, value less than 3 and chroma 1 or less on the surface when no root or leaf mat is present.
- FS2.** Presence of a layer of muck 7 cm or more thick, value 3 or less and chroma 1 or less, on the mineral surface and under a root and leaf mat.
- FS3.** Presence of albic horizon in which iron/manganese oxides have been stripped from the matrix exposing the primary base color of silt and sand grains with value 5 or more and chroma 2 or less. Translocated iron forms a diffuse splotchy pattern of two or more colors having value 5 or more and chroma 3 or 4 within 15 cm of the mineral surface.
- Note: Requires an additional Field Indicator*

- FS4.** Presence of ochric or umbric epipedon, 10 cm or more thick, having matrix value 3 or less and chroma 1 or less, determined on the individual silt and sand grains covered or masked with organic material. At least 70 percent of the grains must be covered to represent the matrix color.

*NOTE: The matrix color of the layer immediately below the dark surface must be chroma 2 or less.*

**Category FM. Other Mineral soils:**

- FM1.** Presence of a layer of muck, value less than 3 and chroma 1 or less, 10 cm or more thick, overlies an albic, ochric or umbric horizon.
- FM2.** Presence of muck either on the surface or in the mineral surface layer having a combined thickness of 10 cm or more.
- FM3.** Directly beneath an ochric or umbric epipedon having chroma 2 or less and thickness of 30 cm or less, 60 percent or more of the matrix is depleted of iron in all layers, to a depth of 35 cm or more, and has:
- a. value 5 or more and chroma 1 or less, or  
*Note: Requires an additional Field Indicator*
  - b. value 5 or more and chroma 2 or less and has distinct or prominent redox concentrations as iron masses, or
  - c. hue of 5Y or yellower, value 4 or more and chroma 2 or less and has distinct or prominent redox concentrations as iron masses, or
  - d. hue 5GY, 5G, 5BG, 5B.
- FM4.** Presence of redox concentrations as distinct or prominent pore linings, value 4 or more and chroma 6 or more, occupy more than 5 percent of the soil volume within the upper 30 cm and the matrix has chroma 2 or less.

- MM3.** Presence of redox concentrations as distinct or prominent pore linings, value 4 or more and chroma 6 or more, occupy more than 5 percent of soil volume in matrix having dominant chroma 2 or less within upper 30 cm.
- MM4.** Presence of redox concentrations as masses with nodules or concretions greater than 2 mm in diameter occupy more than 2 percent of volume within upper 30 cm of Mollic epipedon with matrix chroma less than 2 less.
- MM5.** Presence of distinct or prominent redox concentrations, on ped faces or ped interiors occupy more than 2 percent of the soil volume within a zone more than 10 cm thick in the upper 30 cm of the mineral soil and has:
- matrix value of 3 or less and chroma 1 or less and redox concentrations as masses with value 4 or more and chroma 4 or more, or
  - matrix value of 3 or less and chroma 2 or less and redox concentrations as masses with value 4 or more and chroma 5 or more.
  - matrix value 4 or more and chroma 2 or less and black or reddish black ferromanganese stains.
- MM6.** Directly beneath a Mollic epipedon having chroma 2 or less and thickness of 30 cm or less, 60 percent or more of the matrix in all layers, to a depth of 35 cm or more, has:
- hue 10YR or redder, value 5 or more and chroma 1 or less, or
  - hue 2.5Y or yellower, value 6 or more and chroma 2 or less, or
  - hue 5Y or yellower, value 4 or more and chroma 2 or less, or
  - hue 5GY, 5G, 5BG, 5B.
- MM7.** A zone with an accumulation of calcium carbonate, or calcium carbonate equivalent, occurs within 30 cm of the surface. It is overlain by layers having chroma 2 or less and is underlain by a layer where 60 percent or more of the matrix has:
- value 5 or more and chroma 1 or less, or
  - value 5 or more and chroma 2 or less and distinct and prominent redox concentrations as iron masses, or
  - hue 2.5Y or yellower, value 4 or more and chroma of 1 or less, or
  - hue 2.5Y or yellower, value 4 or more and chroma 2 or less and distinct and prominent redox concentrations, or
  - hue 5GY, 5G, 5BG, 5B.
- MM8.** Presence of a layer of muck, 1 cm or more thick, value less than 3 and chroma 1 or less, overlies a mollic epipedon where the native vegetation is grass.
- MM9.** In depressional basins in California, Oregon and Washington, 60 percent or more of the matrix in the upper 15 cm of the soil, is depleted of iron in all layers and has:
- value 5 or more and chroma 1 or less, or
  - value 4 or more and chroma 2 or less and distinct or prominent redox concentrations as iron masses.

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**Category MA. Any soil:**

- MA1.** Presence of hydrogen sulfide odor within 30 cm of the surface.
- MA2.** Hue is 5GY, 5G, or 5BG within 30 cm of the surface.
- MA3.** Presence of muck in the mineral surface layer that is 5 cm or more thick.

**Category MO. Organic soil:**

- MO1.** Classifies as a Histosol, except Folists

**Category MS. Sandy soils:**

- MS1.** Presence of a surface layer of muck 1 cm or more thick, on the surface when no root or leaf mat is present.
- MS2.** Presence of a layer of muck 3 cm or more thick, value 3 or less and chroma 1 or less, on the mineral surface and under a root or leaf mat.
- MS3.** Presence of albic horizon in which iron/manganese oxides have been stripped from the matrix exposing the primary base color of silt and sand grains with value 5 or more and chroma 2 or less. Translocated iron forms a diffuse splotchy pattern of two or more colors having value 5 or more and chroma 3 or 4 within 15 cm of the mineral surface.
- Note: Requires an additional Field Indicator*

- MS4.** Presence of ochric epipedon, 10 cm or more thick or an umbric epipedon, having matrix value 3 or less and chroma 1 or less, determined on the individual silt and sand grains covered or masked with organic material. At least 70 percent of the visible grains must be covered to represent the matrix color.
- NOTE: The matrix color of the layer immediately below the dark surface must be chroma 2 or less.*

- MS5.** Presence in the upper 15 cm of matrix 60 percent or more depleted of iron with value 5 or more and chroma 2 or less and distinct or prominent redox concentrations as iron masses.

**Category MM. Other Mineral soils:**

- MM1.** Presence of a surface layer of muck, value less than 3 and chroma 1 or less, 10 cm or more thick, overlies an albic, ochric or umbric horizon.
- MM2.** Directly beneath an ochric or umbric epipedon having chroma 2 or less and thickness of 30 cm or less, 60 percent or more of the matrix is depleted of iron in all layers, to a depth of 35 cm or more, has:
- a. value 5 or more and chroma 1 or less, or  
*Note: Requires an additional Field Indicator*
  - b. value 5 or more and chroma 2 or less and distinct or prominent redox concentrations as iron masses, or
  - c. hue of 5Y or yellower, value 4 or more and chroma 2 or less and has distinct or prominent redox concentrations as iron masses, or
  - d. hue 5GY, 5G, 5BG, 5B.

of volume within upper 30 cm and the chroma is 2 or less.

**TM5.** Presence of distinct or prominent redox concentrations, on ped faces or ped interiors occupy more than 2 percent of the soil volume within a zone more than 10 cm thick in the upper 30 cm of the mineral soil and has:

- a. matrix value of 3 or less and chroma 2 or less and redox concentrations as masses with value 4 or more and chroma 6 or more, or
- b. matrix value 4 or more and chroma 2 or less and black or reddish black ferromanganese stains.

**TM6.** Directly beneath a Mollic epipedon having chroma 2 or less and thickness of 30 cm or less, 60 percent or more of the matrix is depleted in iron and in all layers, to a depth of 35 cm or more, has:

- a. hue 2.5Y or redder, value 5 or more and chroma 1 or less, or
- b. hue 5Y or yellower, value 6 or more and chroma 2 or less, or
- c. value 4 or more and chroma 2 or less and distinct or prominent redox concentrations, or
- d. hue 5GY, 5G, 5BG, 5B.

**TM7.** In the Mississippi Delta (MLRA 131), more than 60 percent of matrix has value 4 or more and chroma 1 or less in a zone within the 15 to 25 cm zone.

**TM8.** In depressional basins in California, 60 percent or more of the matrix in the upper 15 cm of the soil, is depleted of iron in all layers and has:

- a. value 5 or more and chroma 1 or less, or
- b. value 4 or more and chroma 2 or less and distinct or prominent redox concentrations as iron masses.

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**THERMIC and ISO-THERMIC SOIL TEMPERATURE REGIME REGIONS**  
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**Category TA. Any Soil:**

- TA1. Presence of hydrogen sulfide odor within 30 cm of the surface.
- TA2. Hue is 5GY, 5G, or 5BG within 30 cm of the surface.
- TA3. Presence of muck in the mineral surface layer that is 5 cm or more thick.

**Category TO. Organic soil:**

- TO1. Classifies as a Histosol, except Folists

**Category TS. Sandy soils:**

- TS1. Presence of a layer of muck, value less than 3 and chroma 1 or less, on the surface when no root or leaf mat is present.
- TS2. Presence of a layer of muck 1 cm or more thick, value less than 3 and chroma 1 or less, on the mineral surface and under a root and leaf mat.
- TS3. Presence of albic horizon in which iron/manganese oxides have been stripped from the matrix exposing the primary base color of silt and sand grains with value 5 or more and chroma 2 or less. Translocated iron forms a diffuse splotchy pattern of two or more colors having value 5 or more and chroma 3 or 4 within 15 cm of the mineral surface.

*Note: Requires an additional Field Indicator*

TS4. Presence of ochric or umbric epipedon, 10 cm or more thick, having matrix value 3 or less and chroma 1 or less, determined on the individual silt and sand grains covered or masked with organic material. At least 70 percent of the visible grains must be covered to represent the matrix color. *NOTE: The matrix color of the layer immediately below the dark surface must be chroma 2 or less.*

TS5. Presence of organic accretions (organic bodies) approximately 1 to 3 cm in diameter within upper 15 cm.

**Category TM. Other Mineral soils:**

- TM1. Presence of a layer of muck 5 cm or more thick, value less than 3 and chroma 1 or less on the mineral surface and under a root or leaf mat.
- TM2. Directly beneath an ochric or umbric epipedon having chroma 2 or less and thickness of 30 cm or less, 60 percent or more of the matrix is depleted of iron in all layers, to a depth of 35 cm or more, and has:
- a. value 5 or more and chroma 1 or less, or
  - b. value 5 or more and chroma 2 or less and 5 percent or more distinct or prominent redox concentrations as iron masses.
  - c. value 6 or more and chroma 2 or less.
- Note: Matrix color of E horizons are excluded unless they contain redoximorphic features.*
- TM3. Presence of redox concentrations as distinct or prominent pore linings, value 4 or more and chroma 6 or more, occupy more than 5 percent of soil volume in matrix having dominant chroma 2 or less within upper 30 cm.

TM4. Presence of redox concentrations as nodules or concretions 2 - 5 mm in diameter and having diffuse boundaries occupy more than 2 percent



**HM5.** Presence of distinct or prominent redox concentrations, on ped faces or ped interiors occupy more than 2 percent of the soil volume within a zone more than 10 cm thick in the upper 30 cm of the mineral soil and has:

- a. matrix value of 3 or less and chroma 2 or less and redox concentrations as masses with value 4 or more and chroma 6 or more, or
- b. matrix value 4 or more and chroma 2 or less and black or reddish black ferromanganese stains.

**HM6.** Directly beneath a Mollic epipedon having chroma 2 or less and thickness of 30 cm or less, 60 percent or more of the matrix is depleted in iron in all layers, to a depth of 35 cm or more, has:

- a. hue 2.5Y or redder, value 5 or more and chroma 1 or less, or
- b. hue 5Y or yellower, value 5 or more and chroma 2 or less, or
- c. hue 5GY, 5G, 5BG, 5B.

**HM7.** Presence in the uppermost mineral layer of marl texture in the Florida Peninsula.

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OF THE UNITED STATES  
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**Category HA. Any soil:**

- HA1. Presence of hydrogen sulfide odor within 30 cm of the surface.
- HA2. Hue is 5GY, 5G, or 5BG within 30 cm of the surface.
- HA3. Presence of muck in the mineral surface layer that is 5 cm or more thick.

**Category HO. Organic soil:**

- HO1. Classifies as a Histosol, except Folists

**Category HS. Sandy soils:**

- HS1. Presence of a layer of muck, value less than 3 and chroma 1 or less, on the surface when no root or leaf mat is present.
- HS2. Presence of a layer of muck 1 cm or more thick, value less than 3 and chroma 1 or less, on the mineral surface and under a root or leaf mat.
- HS3. Presence of albic horizon in which iron/manganese oxides have been stripped from the matrix exposing the primary base color of silt and sand grains with value 5 or more and chroma 2 or less. Translocated iron forms a diffuse splotchy pattern of two or more colors having value 5 or more and chroma 3 or 4 within 15 cm of the mineral surface.
- HS4. Presence of a layer 10 cm or more thick, having matrix value 3 or less and chroma 1 or less, as determined on the individual silt and sand grains covered or masked with organic material. At least 70 percent of the visible grains must be covered to represent the matrix color.

- HS5. Presence of organic accretions (organic bodies) approximately 1 to 3 cm in diameter within upper 15 cm.

- HS6. Presence of stratified layers and at least one layer contains organic material in the upper 5 cm. More than 70 percent of the visible grains must be covered or masked in the layer that contains organic material.

**Category HM. Other Mineral soils:**

- HM1. Presence of a layer of muck 2 cm or more thick, value less than 3 and chroma 1 or less on the mineral surface.
- HM2. Directly beneath an ochric or umbric epipedon having chroma 2 or less and thickness of 30 cm or less, 60 percent or more of the matrix is depleted of iron in all layers, to a depth of 35 cm or more, has:
- a. value 5 or more and chroma 1 or less, or
  - b. value 5 or more and chroma 2 or less and 5 percent or more distinct or prominent redox concentrations as iron masses.
  - c. value 6 or more and chroma 2 or less.
- Note: Matrix color of E horizons are excluded unless they contain redoximorphic features.*
- HM3. Presence of redox concentrations as distinct or prominent pore linings, value 4 or more and chroma 6 or more, occupy more than 5 percent of soil volume in matrix having dominant chroma 2 or less within upper 30 cm.
- HM4. Presence of redox concentrations as nodules or concretions 2 -5mm in diameter and having diffuse boundaries occupy more than 2 percent of the soil volume within upper 30 cm and the chroma is 2 or less.

data collection by direct measurement or by other means.

To document a hydric soil, first remove all loose leaf matter and organic material, needles, bark and other easily identified plant parts to expose the surface. Dig a pit to at least 50 cm in depth and prepare a soil description including information about each layer. Depths used in the Indicators are measured from the mineral surface, unless otherwise specified. All colors refer to moist Munsell colors. Compare the soil characteristics observed in the soil to those recorded in the soil profile description for completeness. Using the completed soil description and comparing the soil features required by each Field Indicator, specify which Indicators have been matched with the conditions observed in the soil.

Muck refers to a substance composed of rotten putrified organic materials formed in anaerobic environments. Muck has Munsell color with lower chroma, typically 1 or less, higher bulk density and lower pore space than aerobically decomposed organic materials. When moist or wetter, muck has massive structure. It often consists of sapric materials without rubbing. Advanced fiber decomposition and a reduced number of plant roots and fungal hyphae, produce a liquid consistence when wet and a greasy consistence when moist.

The partially decomposed byproducts resulting from the anaerobic decomposition of organic matter may eluviate within the organic layers until reaching the muck layer at the mineral interface or move into the pore space of the uppermost mineral layer.

Please return suggestions for modifications and supportive documentation regarding localized exceptions to these Field Indicators to:

Chris Smith, Soil Scientist  
Northeast National Technical Center  
USDA - Soil Conservation Service  
160 East 7th Street  
Chester, PA 19013  
215-499-3959

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*All services and programs of the U.S. Department of Agriculture, Soil Conservation Service, are offered on a nondiscriminatory basis, without regard to race, color, national origin, religion, sex, age, martial status or handicap.*

**FIELD INDICATORS OF SATURATED HYDRIC SOILS**  
 in the  
**UNITED STATES**  
 Testing Version FEBRUARY 1, 1994

The "Field Indicators of Hydric Soils in the United States" (Field Indicators) is a tool to help identify hydric soils in the field. The Indicators are not intended to replace or relieve the requirements contained in the definition of a hydric soil. The use of the Field Indicators presupposes knowledge of soils and soil survey.

Soil terms that are used in the Field Indicators are defined in the Soil Survey Manual (430-V-1993), National Soils Handbook (433-VI-1992), Soil Taxonomy and Redoximorphic Features for Identifying Aquic Conditions (North Carolina State University Technical Bulletin 301).

The Field Indicators are based on the soil developing diagnostic morphologic features associated with the anaerobic decomposition of organic matter and the reduction of iron as evidence that saturation has caused reducing conditions in the upper part of the soil. Unless noted, the presence of a single Field Indicator identifies a soil that has been saturated and reduced.

Current soil morphology is assumed to be in a state of dynamic equilibrium with current soil forming processes. When natural changes in the landscape happen, such as river down-cutting or lake lowering, or human induced activities, significant effects on soil forming processes influenced by groundwater may occur. Because soil morphology is slow to adjust to shifts, localized exceptions to these field indicators may occur where the new balance of soil forming factors is not yet reflected in the soil's morphology. When soil morphologic features remain in the soil after a relatively rapid shift in the balance of soil forming factors, those features are not indicative of present conditions and should be identified as "relic" and should be documented as local exceptions. Use of the term "relic" is

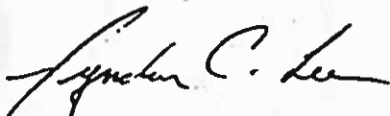
inappropriate when describing features caused by wetness that remain in the soil after the water table has been lowered by ditches and subsurface drains or by down cutting in small streams.

In deeply plowed soil, fill material or recent fluvial deposits, soil forming processes restart after each major disturbance. The time required for a soil to develop iron depletions and concentrations resulting from saturation and reduction, or to remove evidence of previous wetness, is highly variable. Cultivation may destroy the opportunity to use certain Field Indicators depending on the depth and amount of mixing, as well as the period since the last disturbance.

The Field Indicators are "test positive" methods to identify most hydric soils with a minimum of data collection. Except as noted above, the features listed are nearly always associated with hydric soils. The Field Indicators do NOT, however, identify every hydric soil. Some hydric soils, for example, are formed in red, high chroma parent materials and may have high amounts of iron resistant to reduction. Low chroma sandy parent materials may not exhibit reduction due to a low amount of iron and/or a low amount organic matter. Soils with dark surface layers can occur in both anaerobic and aerobic environments. In the anaerobic environment, redox concentrations of iron masses may be masked by high amounts of organic matter; in the aerobic environment, the redoximorphic features are not present. When soil conditions are difficult to interpret or seem inconsistent with the vegetation or hydrology, it may be necessary to obtain the assistance of an experienced soil scientist. It is expected that occasions will arise where confirmation of saturation and reduction, as required by the hydric soil definition, will depend on intensive

**DISCLAIMER**

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