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# **Managing Legal and Institutional Constraints On Aquaculture In Dredged Material Containment Areas**

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# Introduction

A large portion of the approximately 300 million cubic yards of sediment dredged annually by the Corps of Engineers (CE) is disposed in dredged material containment areas (DMCA) (Engler et al. 1988). Since the enactment of the National Environmental Policy Act (NEPA) in 1969, there has been increased reliance on confined or on-land facilities for disposal of dredged material. In recent years, concerns for improvement and/or maintenance of water quality and protection of aquatic nursery and feeding areas have caused dredgers to generally turn toward upland sites for DMCA (Mathis 1989).

Most DMCA's are located on private land, and acquisition of easements for disposal is the responsibility of the dredging project sponsors, such as a local port authority or navigation district. Although DMCA's often have a usable life span of up to 50 years, an estimated 7,000 acres of new DMCA's are needed annually (Coleman et al. 1988). Acquisition is increasingly difficult because of high real estate values, the long-term nature of the easements, and the perception by landowners that dredged material is not aesthetic.

To overcome these difficulties, the CE has worked to develop beneficial-use concepts that identify ways in which the landowner can use the acreage for activities that are financially attractive but do not interfere with periodic disposal of dredged material. One of these beneficial use concepts with a high potential for obtaining new sites is aquaculture (Coleman et al. 1983).

Aquaculture is promising as a compatible activity with disposal, because aquaculture ponds and DMCA's share many design characteristics. Common features include perimeter levees to retain water, construction on relatively impervious soils, and control structures for water discharge and drainage. Both facilities have similar regulatory and permitting requirements for construction and operation; and both types of facilities include locations adjacent to waterways in coastal areas, often on large tracts of land and near transportation routes and/or major markets.

For the CE, the primary benefit of aquaculture in a DMCA is to facilitate acquisition of new disposal sites. Significant benefits can also be realized from DMCA aquaculture by the aquaculture industry, port and waterway interests, and landowners. High land and construction costs and restrictive legal and regulatory requirements have hindered the development of pond-based coastal aquaculture in the United States. Thus, prospective aquaculturists will benefit from increased availability of suitable sites for pond culture and reduction of certain construction costs. The waterway interests and dredging industry will benefit from increased availability of needed real estate for DMCA's. Landowners will benefit from site improvements and from a greater return from their land as operational income or lease fees. Finally, the local economy will be enhanced by the introduction of a new industry, and the national economy will be enhanced by replacement of imported seafood with a local product (Coleman et al. 1988).

In order to demonstrate the technical and economic feasi-

bility of aquaculture in DMCA, the CE conducted the Containment Area Aquaculture Program (CAAP) in which a commercial-sized aquaculture facility (marine shrimp farm) was built and operated on an active DMCA near Brownsville, Texas (Coleman and Konikoff 1988). The objectives of the CAAP were to demonstrate the technical and economic feasibility of containment area aquaculture. The demonstration was conducted in an active DMCA using commercial-sized ponds and standard shrimp culture practices. Specific objectives were the determination of design specifications and construction methods that would allow multiple use of DMCA for aquaculture and dredged material disposal, development of management strategies to maximize the compatibility of aquaculture with disposal activities, documentation of construction and operations costs, identification of any constraints to the concept, and the compilation of documents, including six technical reports.

The results of the demonstration are documented in a series of six CE technical reports that elaborate the details of:

- Site selection and planning (Wilson et al. 1991);
- Legal and institutional constraints (Robertshaw et al. 1991);
- Chemical suitability (Tatem 1990);
- Design and construction (Homziak and Veal 1991);
- Pond operations (Coleman and Konikoff 1991); and
- Marketing and economics (C-K Associates 1991).

This report summarizes information contained in the CAAP technical report on legal and institutional constraints on aquaculture in a DMCA (Robertshaw et al. 1991). The report covers information in two main areas: 1) an outline of laws, regulations, and permit requirements that may apply to DMCA aquaculture; and 2) identification and suggested methods of avoiding potential legal difficulties.

The first section includes information on federal agencies and estimates of time required to complete permit actions. The second section presents information on issues that should be identified and addressed in contracts among the parties involved in DMCA aquaculture: the CE, the landowner, the local dredging sponsor, and the aquaculturist.

## Part One: Containment Area Aquaculture—A Regulatory Overview

Since specific steps needed to insure compliance with federal and state laws will ultimately depend on site-specific considerations, and since federal and state laws governing aquaculture and dredging change frequently, this publication is **intended only as a general guide** to the various permit requirements, laws, and regulations that may apply to aquaculture in DMCA. This guide is a summary document to be consulted for **informational purposes only** and not relied on for conclusive permit information or legal advice. For more complete information, consult Robertshaw et al. (1991). It is recommended that a qualified attorney be consulted for site-specific legal recommendations and advice.

## Federal Regulation of DMCA's

CE district personnel are familiar with the regulatory steps when a new DMCA is approved. The steps taken for a DMCA associated with aquaculture are essentially the same, and these are described first. Additional permit steps will be required for specialized additional features required for aquaculture, such as water intake structures, feed storage buildings, electrical generating and distribution systems, and access roads—these will be discussed later.

There are four main federal regulations that must be addressed in order to construct and operate a DMCA: 1) National Environmental Policy Act (NEPA); 2) Section 404 of the Clean Water Act; 3) Section 401 of the Clean Water Act; and 4) Coastal Zone Management Act (CZMA). In addition, there are several minor ones that bear attention.

### National Environmental Policy Act

The NEPA of 1969 requires full disclosure and consideration of the environmental impacts of any federal agency project that significantly affects the environment. This would include CE projects that involve the discharge of dredged material; therefore, the act requires a detailed accounting of disposal alternatives. As a practical matter, for each such project, an Environmental Impact Statement (EIS) or an Environmental Assessment (EA) must be prepared.

An EIS is a complex and time-consuming document that thoroughly explores the environmental consequences of the project to the extent scientifically and practically feasible. It requires formal interagency coordination, generates a record of decision on the proposed project, and usually takes over a year to complete. The EA alternative, however, briefly discusses the need for the proposed action and alternatives to it. It also analyzes the adverse environmental impacts and positive aspects of the proposed action. The EA must be accompanied by a finding of no significant impact (FONSI) detailing reasons why an EIS is not required. An EA, for most beneficial use activities, can be prepared in about 2 weeks. An example of an action that would normally require an EA, but not necessarily an EIS, would be the use of a new disposal area not covered by the overall project EA or EIS, but in a similar habitat to an area that had been covered by an EIS (Mathis 1989).

Some actions, such as minor maintenance dredging along existing disposal sites, are exempt from NEPA requirements. However, these exemptions would not likely affect DMCA aquaculture projects since these are designed to facilitate the acquisition of additional disposal acreage, rather than the conversion of existing sites. Furthermore, even if an activity falls within the category of an exempted activity, "extraordinary circumstances" may exist that mandate the preparation of at least an EA. Building a new commercial-sized aquaculture facility would generally qualify as an extraordinary circumstance.

### Section 404

Section 404 of the Clean Water Act (also known as the Federal Water Pollution Control Act Amendments of 1972, 1977, and 1987) regulates and requires a permit for construction and dredging activity (including disposal) associated with navigable waters, tidelands, and wetlands. The CE serves as the regulatory agency for Section 404, and private parties wishing to dispose of dredged material (or do any sort of construction in a wetland or a navigable waterway) must secure a permit from the CE (Leibesman 1990).

Part of the permitting process allows for public notice, review by federal and state resource-management agencies, and opportunity for public comment and hearing. Although the CE does not issue itself a permit for its own projects, it does undertake an internal compliance process, including notice to and coordination with other federal and state agencies. In addition, in the 404 permit process, the CE must comply with other federal environmental laws, such as the NEPA, CZMA, and the National Pollution Discharge Elimination Act (NPDES).

One of the most sensitive issues associated with Section 404 is wetlands protection. According to Section 404(b)(1) guidelines for CE projects, uplands are to be preferred over wetlands for disposal of dredged material, and wetland disposal can take place **only** when certain restrictive requirements are met, including: 1) no practicable alternative; 2) no significant adverse impacts on aquatic resources; 3) all reasonable mitigation is employed; and 4) no statutory violations.

Although the guidelines seem straightforward, the delineation of wetlands is a complex subject. Over the years, the various federal agencies, with an interest in wetlands, developed different methods of determining whether a given site is a wetland (with various emphases on hydrophytic vegetation, hydrology, and hydric soils), and there were often uncertainties. In an attempt to resolve the resulting inconsistencies, a unified Federal Manual for Identifying and Delineating Jurisdictional Wetlands (Tiner 1989) was adopted by several agencies and is in current use. It is, however, being challenged in both the courts and in Congress and could be altered. In the meantime, the CE uses the unified manual to determine whether a site is a wetland and if so, applies Section 404(b)(1) guidelines.

Two other Section 404 stipulations that could affect DMCA aquaculture are 404(c), which gives the Environmental Protection Agency (EPA) veto power as to the use of a particular site, and 404(e) under which general, regional, or national permits are allowed. Under Section 404(c), the EPA administrator may decide, after notice, hearing, and consulting with the CE, that discharge at a site will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas. The EPA then may prohibit or restrict the use of the proposed site. However, if a site is acceptable under Section 401 (which deals with water quality and is discussed below), it is not likely to trigger Section 404(c).

General permits for certain frequently occurring activities are allowed under Section 404(e). These permits are often used for disposal in upland sites as long as the runoff from the site is acceptable under Section 401 (water quality discussed below). If a DMCA aquaculture project is proposed for an upland site, the use of one of the existing 404(e) permits would be desirable.

## Section 401

Section 401 of the Clean Water Act requires that the CE secure a certification from the appropriate state agency attesting that the discharges from a DMCA do not violate state water quality standards. The standards are set by the states, subject to the EPA's minimum standards and review. Early in the Section 404 compliance process, the CE evaluates the water quality impacts of the proposed project and requests a Section 401 water quality certification from the state. Within two months of this request, the state must take action on it or ask for an extension. If, after 2 months, no action is taken, the CE will then notify the state of its intention to presume a waiver of the water quality certification requirement. If no action is taken for 6 months, a waiver can be conclusively presumed.

## Coastal Zone Management Act

Section 307 of the CZMA requires that any federal development projects in the coastal zone or any projects in the coastal zone that are supported by a federal agency must be consistent to the maximum extent practicable with the federally-approved state coastal zone management plan. Procedural steps are similar to those in securing a state water quality certification. Early in the Section 404 compliance process, the CE requests concurrence from the appropriate state agency that its proposed project complies with the state's coastal plan and that the activity will be conducted in a manner consistent with the plan. The state must respond to the request within 45 days or file for an extension. The entire period from the date of the initial consistency determination to the date of final action by the state should not exceed 6 months.

## Other Federal Regulations and Executive Orders

Although there are over 30 federal laws and presidential Executive Orders (EO) that may apply to CE dredging and disposal activities, often compliance can be demonstrated with a sentence or two on the NEPA document (Mathis 1989). Furthermore, not all of the laws and EO apply to every dredging project. Early in the planning and site-selection stage, care should be exercised to determine what laws and EO apply to the specific site and how these may affect the proposed project. A summary of federal laws and EO that are likely to affect aquaculture follows.

**National Historic Preservation Act (NHPA)** requires that a federal agency consult the state historical preservation authority to determine whether significant historical struc-

tures or archaeological sites will be affected by that project. The **Endangered Species Act** provides generally that federal agencies may not take actions that jeopardize the continued existence of endangered species, designated threatened species, or their critical habitat. It is administered by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. The **Fish and Wildlife Coordination Act** requires that the CE coordinate its activities with federal and state fish and game agencies and fully consider their recommendations and ways to prevent loss and damage of fish and wildlife resources due to the proposed operations (Mathis 1989). The **Wild and Scenic Rivers Act** provides protection of designated rivers. The **Estuaries Protection Act** is designed to protect and improve water quality of designated estuaries threatened by overdevelopment and pollution. It is administered by the EPA.

There are several EO's that may apply to DMCA's to be used in aquaculture. **EO 12372** provides state and local officials with a chance to consult with federal agencies (as the CE) when federal activities are proposed. **EO 11990** prohibits construction in wetlands unless no practical alternative exists. **EO 11988** requires the evaluation of the potential effect of CE actions on floodplain areas. **EO 11593** requires the CE to take into account laws designed for the protection of cultural resources when making development plans. If it is determined that an EO applies to a proposed project, it can usually be addressed in the NEPA document.

## State Regulation of DMCA's

Although dredging and DMCA's mostly fall under federal regulations due to their connections to interstate commerce, states also have the power to regulate disposal of dredged material because of their ownership interest in uplands and submerged lands within their borders. Because of the limited scope of this report, it does not cover regulations at the state level, except to note their importance. Because of the many differences among states, consult individual state regulatory agencies for information on laws and regulations applicable to aquaculture and dredging and disposal. In addition, local level regulations, such as zoning requirements, may also affect aquaculture and confined disposal area development. Local expertise, often available through the CE district office, should be sought to clarify these issues.

Under the CAAP, state regulations that would affect containment area aquaculture were studied in six model states: Alabama, Florida, Louisiana, Maryland, South Carolina, and Texas. These states were chosen because 1) they represent a variety of regulatory environments; 2) they have confined dredge material disposal on-going, requiring future additional DMCA acreage; and 3) they are states in which aquaculture is a potentially significant industry.

In several of the states, such as Alabama and Louisiana, the permitting process functions with the CE as the lead agency, responsible for notification and interagency coordination. In other states, such as South Carolina and Maryland, the

permitting process is comprehensive, and interagency coordination is accomplished through a special state agency. A summary of the regulatory process in each model state examined by Robertshaw et al. (1991) includes the following concerns:

- 1) Land protection and management (including coastal lands, wetlands, public lands, and land-use planning;
- 2) Water resource protection (including water quality, water management, and levee construction); and
- 3) Biological resource protection.

## **Part 2. Aquaculture Permitting Within the Federal Statutory Framework**

Aquaculture is regulated in varying degrees within the states. Federal regulation further adds to the framework within which the aquaculturist will operate. This section is designed to provide the reader with a look at the various federal agencies involved in the permitting process and with a brief description of the jurisdictional parameters of those agencies.

It is important to note that some aquaculture activities will not require permitting; however, the aquaculturist should become familiar with the overall regulatory framework of aquaculture within a particular state and vigorously attempt to comply with all related laws.

The information contained herein is intended as a mere guide to permitting agencies, and it is not intended to supplant the need for legal counsel, where required.

### **Environmental Protection Agency**

The Environmental Protection Agency (EPA) is charged with ensuring the protection of the nation's water and air quality, which includes the prevention of adverse impacts to fish and wildlife resources and the public health in general. EPA has responsibility for issuing National Pollution Elimination Discharge System (NPDES) permits. EPA also regulates pesticide use and application through registration and the establishment of tolerance levels. Aquaculturists should become familiar with the various tolerance levels of any pesticide to be used. (See Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C., Section 136).

### **Food and Drug Administration**

The U.S. Food and Drug Administration (FDA) is responsible for approving and regulating drugs that may be used in aquaculture operations (Federal Food, Drug and Cosmetic Act, 21 USC 301 et seq).

Note also that drugs do not include pesticides, which are regulated by the EPA.

Drugs used to treat diseases and parasite infections must be approved, and then they must be approved for aquaculture operations, including dosage.

The aquaculturist must follow instructions for each drug (to be in compliance with the law). For example, one drug, tricaine methanesulfonate, can be used to immobilize during transport, certain fish intended for food. However, the drug should not be used within 21 days of harvesting the fish for food.

### **Fish and Wildlife Service (FWS)**

The U.S. Fish and Wildlife Service (FWS), under the Department of the Interior, is responsible for ensuring the protection and proper management of wildlife, including fish. The FWS regulates and permits international and interstate import and export of fish and wildlife. Shipments of wildlife must enter and leave the United States only through ports designated by the FWS (see 50 CFR 10-24).

The FWS is also a commenting agency under the Fish and Wildlife Coordination Act, reviewing, commenting, and making recommendations on such things as proposed alterations to any water body by the federal government and the effect on fish and wildlife under protection by the FWS.

According to the FWS, it is the intent of the FWS to build a strong and mutually beneficial relationship with the private aquaculture industry, and to the extent possible, make its scientific and technical resources available to further the development of private aquaculture.

## **Part 3. Potential Legal Issues Affecting Aquaculture In a DMCA**

Since every site will have its own peculiar set of circumstances, it is impossible to do much more than provide a guide to the broad contours of the most important questions that may come up under the law of the states in which containment aquaculture is most likely to occur—the model states examined by Robertshaw et al. (1991).

The primary reason for identifying potential legal issues is for planning purposes. To the extent possible, participants in aquaculture within a DMCA should anticipate problem areas and try to address these areas of concern in the legal documents and agreements they draft to set up the project.

In other words, the issues "flagged" in this section should be addressed in the documents that are drafted to set up, operate, and regulate an aquaculture venture on a DMCA, to the extent that is possible. The following section is an issue by issue discussion of some of the most important legal questions that will be raised.

### **Chemical Suitability and Soil Testing Issues**

**Hypothetical ways the issue might come up:** If a seafood consumer becomes ill after eating seafood produced on a Contaminant Area Aquaculture site, that consumer might raise the argument that the CE failed to screen the site, although

it actively promoted the site as suitable for the production of food for human consumption.

Although most dredged material does not contain elevated concentrations of chemical contaminants, contaminants may be found in some aquatic sediments, especially fine-grained, organic materials (Tatem 1990).

Obviously, where the results of tests show any indications that the site will not be suitable for production of a high quality crop that can be sold for a profit, then there is no need to continue testing, and the site should be ruled out at that stage in the process. For example, any sediments that are found to be toxic to laboratory test animals will not be suitable for aquaculture production of a crop for human consumption (Tatem 1990). Testing requirements apply to the sediments in the containment area and the dredged material to be added later.

Participants in a CAAP should be able to determine early in the site-selection process whether a site will be suitable for containment area aquaculture. However, answers to factual questions do not necessarily furnish answers to the legal questions raised by the prospect of conducting aquaculture—that is, production of food for human consumption, on a site used for the disposal of dredged material.

The difficulty is that compliance with Tatem's (1990) recommendations may not prevent the emergence later in the project of troublesome legal questions. For example, if some kind of toxic "hot spot" should emerge onsite, and harmful contaminants then damage the aquaculturist's crop, will the party responsible for sediment testing be liable under a theory of legal fault for having failed to prevent this from happening?

It is unlikely that a contaminated product would ever reach a consumer; even so, if a consumer suffers an adverse reaction from eating the contaminated product, would the consumer have a cause of action? What difference would it make if the aquaculturist had been involved in deciding which tests should be conducted, and had paid for part of them?

**Standard of care:** First, there are no national criteria for labeling a sediment as chemically contaminated (Tatem 1990). Additionally, the soil samples taken from the large land areas involved in DMCA's may be "spotty" in nature.

Given these limitations and the other concerns raised by Tatem, what amount of testing and what sequence of testing will be legally sufficient to avoid liability for legal fault? Compliance with the state of the art in soil testing should put the testing party in the best possible legal position.

The soil testing question is further complicated by the fact that these two functions (disposal of dredged material and operation of an aquaculture facility) do not normally take place on the same piece of property. To help determine what test might be required when the two functions coincide, the potential aquaculturist should ask the following questions: What types of soil tests are usually done for each of these functions when they take place on **different** parcels of land? What additional testing might be required when the two functions take place on a **single** parcel of land?

When an aquaculturist intends to site an aquaculture oper-

ation on a given parcel of land, what types of soil testings or other investigations does he engage in to assure himself that the site is, in fact, chemically suitable for aquaculture? One primary concern is whether soil has been contaminated by pesticide use on or near it. The land-use history of the parcel of real estate would be examined to determine "whether row crops were ever grown on or adjacent to the site being considered" (Wellborn 1988). If that investigation gives the aquaculturist a reason to believe that pesticides were used on that property, then testing to be sure that pesticide residues in the soil do not exceed acceptable limits. Thus, the aquaculturist in the non-DMCA situation will be accustomed to conducting a background investigation into the land-use history of the property and adjacent property, and to conducting a soil test in the event the soil may have been contaminated with pesticide residues.

Likewise, what soil testing does the Corps engage in when it is citing a new dredged material containment area? The Corps usually does little in the way of sediment testing when disposing of dredged material in upland sites when no aquaculture is involved. Although practices may vary district by district, in the absence of a research or experimental use, little or no testing customarily takes place since no other surface uses of the DMCA are contemplated.

Because the dredged material disposal function may be a source of contamination to the aquaculture function, care with soil testing becomes more crucial and the standard of care higher, because food for human consumption is involved.

For example, one ground for elimination of a potential CAAP site is the existence of activities such as crop dusting, oil and gas extraction, or industrial use on a site adjacent to a potential site.

According to Tatem (1990), the approximate cost of conducting the tests that are "highly recommended" is \$11,400. That amount of money would pay for the following chemical parameters or tests: particle size, miscellaneous parameters, and mysid shrimp bioassay. Moreover, some tests labeled "optional" may turn out to be necessary and that could add as much as \$21,750 to the bill for sediment testing (Tatem 1990).

Involved parties will be held to a **higher standard of care** when dredged material is going to be involved in the **production of food for human consumption** than when no aquaculture is involved.

## Misrepresentation or Fraud

**Hypothetical ways the issue might come up:** If affirmative representations were made to the aquaculturist that the proposed site was "chemically suitable for aquaculture," and, after a significant financial investment, the site turned out to be chemically unsuitable, the aquaculturist might sue to recover his investment.

According to the eminent negligence scholar Prosser (see Keeton 1984), to establish a claim under this theory, one would have to prove the following elements:

1. There was a false representation, usually of material fact;
2. The maker of the representation knew or believed that

the representation was false, or lacked a sufficient basis of information to make that representation:

3. The maker of the representation intended to induce the aquaculturist to act or refrain from acting in reliance upon the representation;

4. The aquaculturist justifiably relied upon the representation in acting or refraining from acting; and

5. The aquaculturist was damaged as a result of such reliance (Keeton 1984).

## Waste by the Tenant or Easement-Holder

**Hypothetical ways the issue might come up:** The argument that the tenant is guilty of "waste" may arise when the tenant does or doesn't do something he is obligated to do, and thereby reduces the value of the property for the owner. The doctrine of "waste" is a legal theory used by the owner of the property to argue that the tenant or easement-holder is letting the property value decline. The hypothetical facts that may give rise to a claim like this include a situation where the aquaculturist abandons the site or somehow fails to fulfill its maintenance obligations and the property is devalued in some significant way.

**Standard of care:** The tenant is under a duty not to destroy, misuse, alter, or neglect that property. The person to whom this duty is owed is the property owner, who gets the property back after the lease expires. The doctrine of "waste" may furnish the owner of the site with a cause of action under which he sues the tenant in order to (1) stop the activity that he believes constitutes waste (by way of an injunction), or (2) get damages to compensate him after the fact for the reduced value of the property or the cost of repairs.

Here, as with other legal theories of liability, the specific legal definition of waste varies from state to state. However, the general idea is the same: A person rightfully in possession of the property but who does not have full title to the property is under a duty to the property's owner not to unreasonably or improperly use or abuse the property. In some states, waste is defined by statute; in other states, the courts, rather than the legislature, have fashioned a definition of waste.

Generally, courts distinguish between two categories of waste. The first, known as voluntary or commissive waste, entails some deliberate or voluntary destructive act on the part of the tenant, such as pulling down a building or removing fixtures from the property. The second category of waste, known as permissive waste, focuses on the tenant's failure to act, rather than his voluntary action. Permissive waste is the tenant's failure to exercise ordinary care to preserve and protect the estate, such as allowing structures to rot. In other words, permissive waste entails some omission or neglect on the part of the tenant. Some states go further than just distinguishing between the two kinds of waste—they treat voluntary waste as a more serious offense and accordingly require by statute that the persons guilty of voluntary waste pay double or triple damages.

An aquaculturist, as the lessee of the site, may be subject

to this type of liability in situations like those noted above, particularly with respect to the maintenance of the levees and the drain/harvest structures that had been tailored by the Corps to meet the special needs of the aquaculturist. Thus, were the tenant in possession to abandon the premises and leave the property unprotected or uninsured (in violation of an obligation to do so), the landowner may have a cause of action against that tenant for waste. Furthermore, in states with waste statutes containing double or treble damage provisions, the tenant may find himself liable for double or treble damages.

In terms of remedies, the plaintiff may seek an injunction to prevent commission of waste in certain cases. This may occur where damages are an imperfect remedy, or where the nature of the injury is such that a preventive remedy is indispensable and should be permanent. However, in general, if money damages will adequately and fully compensate the plaintiff, then damages may be the remedy, the precise measure of which will be determined under state law.

## Private Nuisance

**Hypothetical ways the issue might come up:** The private nuisance issue might arise where the owner of property adjacent to or near the site complains that an activity on the site constitutes a nuisance. (This discussion is concerned with private nuisance, as opposed to public nuisance or attractive nuisance. Because most sites will be located in undeveloped areas, often near industrial areas, it is unlikely that the attractive nuisance issue will come up. Discussion of the application of the attractive nuisance doctrine is, therefore, not included herein.)

For example, the neighboring landowner may complain about the following:

- Flooding;
- Destruction of crops (for example, the aquaculturist lets chemicals wash onto adjoining property);
- Pollution of a stream from which both properties take water; or
- Pollution of an underground water supply.

**General principles of liability:** The adjoining landowner may sue the aquaculturist (and in some circumstances the Corps and/or the landowner as well) seeking damages for private nuisance. The argument might be that the conduct of the aquaculturist interfered with his rights to use and enjoy his own land. However, the landowner will not be able to hold the aquaculturist liable for damages unless the interference complained of is "substantial and unreasonable, and such as would be offensive or inconvenient to the normal person." In other words, the interference has to constitute something more than "the petty annoyances and disturbances of everyday life" (Keeton 1984).

The actual legal test for nuisance liability varies from state to state. However, in general, in order to recover damages under the "private nuisance" theory of liability, the landowner who sues must prove the following four elements:

- (1) The defendant acted with the intent of interfering with



the use and enjoyment of the land by those entitled to that use;

(2) There was some interference with the use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended;

(3) The interference that resulted and the physical harm, if any, from that interference proved to be substantial....[This] requirement is to satisfy the need for a showing that the land is reduced in value because of the defendant's conduct;

(4) The interference that came about under such circumstances was of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land. "This...means that the interference [rather than the conduct] must be unreasonable..." (Prosser, cited in Keeton 1984).

The six model states discussed by Robertshaw et al. (1991) tend to follow the above rules. This nuisance theory is one of several theories of liability that courts have used to hold polluters liable. In cases where polluters have allowed harmful liquids to escape and pollute soil and water, both underground and surface, courts have used nuisance, negligence, strict liability, trespass, and some theory concerning water or riparian rights to pure water in order to hold the polluter legally responsible.

Also, the release of contaminants into a common water supply may result in civil liability for the person or entity who lets those materials escape.

A landowner who succeeds in a nuisance action may secure two different kinds of relief. First, he may be entitled to equitable relief (that is, an injunction preventing the aquaculturist from engaging further in the offensive activity) where the damage is ongoing. Second, the landowner may be entitled to damages to compensate him for losses directly attributable to the offensive conduct. The precise relief available depends on the law of the state where the CAAP is located.

## Contractual Issues

**Hypothetical ways the issue might come up:** Aquaculturists will have in place service contracts on their major pieces of equipment and may engage contractors to harvest the crop. In addition, there will be various other contracts in place, such as land leases, easement, equipment leases, and operating agreements.

In the preceding sections, several types of tort liability have been discussed. If the person suing and the target of that suit are both parties to a contract, there may be contractual liability as well as tort liability. Contractual liability may arise when the parties undertake obligations or make promises to do specific things in the future, then unjustifiably fail to do so, and that failure causes a compensable loss. Thus, in some situations, an injured party may file both a tort claim and a contract claim arising out of the same transaction or occurrence.

The general principles of contract law vary from state to state. Contract law is often more complex than the tort issues discussed previously, but the elements of proof are roughly

parallel to those in a tort claim. An injured party must prove the existence of a valid contract between the parties; the other party's failure to fulfill one of the important duties undertaken in that contract; a significant causal link that connects the failure with the damage the injured party complains about; and

the existence of damages that the law views as compensable.

In general, at least three interests are involved in contractual claims, and they all center around the contract itself. The first interest courts protect is the "expectation" interest. "The legal system protects the expectations that have been induced by the making of a promise by attempting to place the injured promisee in the position he would have been in had the promise been performed." The second interest courts attempt to protect is the "reliance" interest. Parties to whom promises are made should have the right to rely on those promises when they change their positions in reliance on that promise to their own detriment. The third interest protected is the restitution interest. Parties who breach contracts will not be permitted to reap benefits from doing so—the law requires them "to surrender the unjust enrichment (gain) and to restore the injured promisee to his position prior to the making of the promise."

It is difficult to generalize further about how a contractual claim might turn out; any contractual claims that arise will depend on the language of the particular contract on which the person sues. In addition to the variations in a given commercial contract, and the variations in contractual interpretation that exist from state to state, the remedies for contractual claims vary as well according to the contract itself and applicable state law. For example, in some circumstances, a party may seek to rescind or set aside the contract. In other circumstances, a party may seek damages to compensate that person for the breach by the other party.

## "Joint Venture" Vicarious Liability

**Hypothetical ways the issue might come up:** There is one practical reason the issue may come up (although the argument itself may not be that strong)—the Corps is perceived as a "deep pocket."

The joint venture theory of liability is a category of vicarious responsibility (i.e., holding someone else liable for an act committed by another). The idea is that a joint venture is a kind of temporary partnership where it makes sense to treat the participants as you would treat partners. On the one hand, a partnership constitutes "a more or less permanent business arrangement, creating a mutual agency between the partners for the purpose of carrying on some general business, so that the acts of one are to be charged against another." On the other hand, a joint venture lasts for a shorter period of time and has a more limited purpose than a partnership. It is generally considered "an undertaking to carry out a small number of acts or objectives" in which each member of the joint venture has "an equal voice in directing the conduct of the enterprise" (Prosser, cited in Keeton 1984).

Although the precise legal test to determine whether a joint

venture exists varies from state to state, courts look at some combination of the following factors to decide:

- Did both parties contribute money, property, effort, knowledge, skill, or other assets to a common undertaking?
- Did both parties have a joint property interest in the venture's subject matter?
- Did both parties have a right of mutual control or management of the enterprise?
- Did both parties expect to make profits and have a right to share in the profits?
- Did both parties agree to share in any losses?

In most states, "yes" answers to the above questions would translate into a finding that the Corps would be vicariously liable for the acts of the aquaculturist.

However, it is unlikely that most courts would find the Corps and the aquaculturist joint venturers for several reasons. First, a court would be hard-pressed to find a "right of mutual control," where sole responsibility for the premises shifts from the aquaculturist to the Corps and back again without the two ever sharing custody or control of the site. This is true even in emergency circumstances where provisions are made for emergency use of the disposal area in the event of natural disasters, such as a hurricane. Second, it is difficult to see how, as a practical matter, the Corps and the aquaculturist could be said to be involved in a "common undertaking," where their respective goals and uses of the subject property are different.

Third, if the documents are carefully drafted, the Corps' fortunes will not be tied to the fortunes of the aquaculturist. There should be no sharing of profits of the aquaculturist, and no expectation that the Corps will share in his losses either.

Furthermore, although both parties have a property interest in the site, it is not a "joint" property interest in the common sense of the word—they both exist simultaneously; but the Corps' easement and the aquaculturist's lease are separate and distinct interests. Having said this, it is still possible that a court may rule that the Corps was vicariously liable for the acts of the aquaculturists, since the question would be one of first impression, never before decided by courts.

## **Legal Defenses**

### **Governmental Immunity**

The doctrine of governmental immunity provides generally that the federal government is "not amenable to actions in tort except in cases in which they have consented to be sued." In other words, the Corps will argue that no recovery in damages or otherwise can be had from it, even if the person suing proves that the Corps was negligent.

There are two separate categories of governmental immunity and, therefore, two distinct legal theories on which the Corps may base its argument that it is immune from suit. First, the Corps will argue that the Federal Tort Claims Act (FrCA) provides immunity for any federal agency exercising a discretionary function. Second, depending on the factual

context, the Corps may argue that it was engaged in a flood-control project, and the government enjoys statutory immunity for damages caused by floods or floodwaters.

In addition to these immunity arguments, the Corps may raise a third argument. The Corps will try to enforce any "hold harmless" agreements that are included in its contracts or agreements with the aquaculturist or its easement from the landowner. In other words, in situations where parties contracting with the Corps agree in writing to "hold" the Corps "harmless" from liability for certain activities and categories of functions, the Corps will try to enforce those "hold harmless" agreements.

### **"Discretionary Function" Immunity Under The Federal Tort Claims Act**

The first broad category of sovereign immunity is based on an exception to the federal government's waiver of sovereign immunity with respect to tort claims (that is, its consent to be sued like any other person). The general idea is that the United States permits itself to be sued for monetary damages for loss of property when the loss is caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." However, there is an exception to this waiver of immunity. The United States does not waive its immunity for a class of claims that arise out of "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Congress intended, in enacting this section, to waive immunity for "ordinary common law torts" and to retain immunity for "acts of a governmental nature or function."

### **Statutory Immunity for Flood Control Projects**

A second type of sovereign immunity is based on a different federal statute, one dealing with flood control projects, which provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place...." The intent of the drafters of the statute "was to keep the government entirely free from liability when floods occur, despite attempted control by federal flood control projects." The statute's purpose is to provide assurance to the government of "absolute immunity for flood control projects so that Congress can safely appropriate the vast sums of money necessary...without fear of further expense should any project itself result in flooding." One of the central issues that federal courts focus on with respect to this type of immunity is the scope of the terms "flood" and "floodwaters," which, in turn, determines the scope of governmental immunity.

### **Enforceability of "Hold Harmless" Agreements In Easements and Operating Agreements**

A hold harmless provision contains language in which one

party agrees to “hold” another party “harmless” from liability for damages for certain activities or events. Often Corps districts include a “hold harmless” provision in their standard Easement for the Disposal of Dredged Material. For example, the Baltimore District of the Corps of Engineers includes the following provision in its standard “Spoil Disposal Easement”:

The GRANTOR [that is, the landowner] does hereby expressly and fully release the United States of America [acting through the Corps of Engineers], its officers, agents, servants and contractors, from liability for any and all damages done or caused to be done and from any claim or demand whatsoever or injuries suffered by or done to the said premises by reason of the deposit of such spoil or other material, excepting damages or injuries due to the fault or negligence of the Government or its contractors.

In general, the purpose of a hold harmless agreement is to shift risk by contract from one party (on whom it legally rests) to another party. Thus, the latter party agrees in writing to assume liability inherent in a situation, and thus relieve the other party of responsibility.

When the Corps’ own negligence is in issue, most states require that the Corps clearly and unequivocally express its intent to indemnify for its own negligence.

#### **Other Defenses Available to the CE in Tort Actions**

When the Corps of Engineers is sued, as any other litigant, it has certain defenses it can raise in tort actions that bar the plaintiff’s recovery in damages completely, or reduce the amount of those damages. The full range of defenses available, as well as the precise variations in statutory or judicially-created requirements, vary from state to state. Even so, the most frequently raised defenses—comparative or contributory negligence and assumption of risk—are discussed briefly. For a full explanation of all possible counterarguments available, consult an attorney.

Both defenses focus on the conduct of the party suing. With comparative or contributory negligence, if the person suing was also negligent, and if that negligence contributed to the injuries that person is claiming, then his measure of damages may be affected, and, in some states, his very right to recover. Contributory negligence can bar recovery completely; the comparative negligence doctrine is not as harsh. Most states have by now adopted a rule of comparative fault or comparative negligence, either by statute or by judicial decision. Comparative negligence entails looking at the conduct of the plaintiff, seeing whether plaintiff’s own negligence contributed to his accident or injuries, assessing the plaintiff’s proportionate share of fault, and reducing the plaintiff’s damages verdict by that proportion.

There are two main forms that comparative fault doctrines take. First, as in Louisiana, Florida, and the majority of states, a so-called “pure” comparative negligence doctrine exists in which “a plaintiff’s contributory negligence does not operate to bar his recovery, but does serve to reduce his

damages in proportion to his fault.” Louisiana’s comparative negligence law is a creature of statute, while Florida’s comparative negligence law was fashioned by its courts. The second type of comparative negligence doctrine is called the “modified or ‘50%’” system, under which a plaintiff’s contributory negligence does not bar recovery so long as it remains below a specified proportion of the total fault.

Assumption of risk again focuses on the conduct of the party filing suit. That person cannot have knowingly and intentionally exposed himself to known dangers or hazards—in other words, plaintiff may not recover where he has “assumed the risk” of the precise type of harm which he suffered.

## **Part 4. User Documents and Drafting Checklists**

This section is designed as a guide to documents and provisions for persons contemplating becoming involved in a DMCA aquaculture operation. This section will cover the following four hypothetical-fact situations that are the most likely scenarios for a DMCA aquaculture operation:

- Where the underlying real estate is privately owned (Figure 1);
- Where the underlying real estate is owned by the state (Figure 2);
- Where the underlying real estate is owned by the federal government, and the Corps of Engineers is the entity administering it (Figure 3); and
- Where the underlying real estate is owned by the federal government and administered by some federal agency other than the Corps of Engineers (Figure 4).

This section focuses on the legal and operational issues that should be covered in the documents used to establish the legal relationships among the parties. The purpose is two-fold. First, the information herein includes a checklist of the issues that should be discussed during negotiations and/or included in the documents, and the obligations and responsibilities peculiar to the coincidence of aquaculture and dredged material disposal—beyond those contained in the conventional aquaculture lease and disposal easement—that should be included in the documents. Additionally, this section suggests the types of documents that should be generated in each of the four factual hypothetical situations in order to establish the legal relationships among the various parties to the operation. This section should, then, provide an overview of the documents typically needed in order to get a project underway, and what provisions should or may be included in those documents.

How responsibilities and obligations will ultimately be allocated is a site-specific proposition—the exigencies, practicalities, and legal constraints of a given site will dictate the ultimate outcome of the negotiations. Since no two sites will be alike, no two sets of documents will be alike. Thus, it is not realistic to present sample documents as “definitive” user documents. However, it is possible to identify and highlight, by means of sample documents and document checklists, the

important matters that should be covered in the documents, the types of documents needed to set up the legal relationships among the parties, and allocation of risks in an equitable fashion.

## Substantive Provisions

This section discusses how the documents for a DMCA aquaculture operation might be different or more complicated when compared to a straightforward aquaculture lease or a typical easement for the disposal of dredged material.

The parties negotiating a containment area aquaculture operation should consider including in the documents setting up the venture provisions allocating the following obligations:

- Responsibility for the security of the site;
- Site suitability investigative responsibilities, such as sediment testing and study of land use history, with specific guidelines on what testing should be done when, as well as who will be financially responsible for each test;
- Securing and maintaining insurance on the site and equipment;
- Construction and maintenance of levees, water intake structures, drain structures, roads on levees, and access roads to site;
- Construction and maintenance of an on site office;
- Indemnity or "hold harmless" provisions;
- Division of responsibility for securing permits and coordination of the acquisition of the necessary state, federal, and local permits for both the aquaculture operation and the dredged material disposal operation;
- Provisions describing access for each party in the event of emergency, such as a hurricane, including the Corps' agreement to use its best efforts to avoid disposing of dredged material during the growing cycle of the aquaculturist, except in extreme emergencies;
- Responsibility for returning the site to an agreed-upon condition at the termination of the Corps' easement and/or the aquaculturist's lease; and
- Arbitration provision to govern disputes that may arise during the operation of the project.

## Required Documents

Figures 1, 2, 3, and 4 depict schematically the documents needed in the four fact situations that are likely to exist for a DMCA project. As Figures 1 and 2 illustrate, the most likely fact situation (where the land is privately owned or state-owned) will require three documents among the three parties: (1) an easement from the landowner to the Corps; (2) a lease from the landowner to the aquaculturist; and (3) some form of operating agreement or coordination document between the Corps and the aquaculturist, in order to coordinate the disposal of dredged material with the operation of the aquaculture facility. In these fact situations (Figure 1 and Figure 2), the easement may look like the sample easements in attached Appendix A. Where the land is privately owned,

state-owned, or owned by the local sponsor, the easement in favor of the Corps will look the same as the Corps' usual easement for the Disposal of Dredged Material—the involvement of the aquaculturist and the aquaculture surface use should make no difference in the way the easement is drafted. Whether aquaculture is involved or not, the Corps needs the legal right to dispose of dredged material on the site and to take other measures necessary to create and maintain an upland DMCA. The sample easements in Appendix A are of the type usually used to give the Corps the legal rights and access it needs to dispose of dredged material in a DMCA on the property of another. Probably, under all circumstances, the Corps will want its dredged material disposal rights to be superior to the aquaculturist's rights, the aquaculturist's lease, and any other estates in that property must be subject to the Corps' disposal rights. For this reason, it is not legally necessary for the Easement for Dredged Material Disposal between the landowner and the Corps to even mention the aquaculture surface use. While it is certainly fine to state in the easement that the Corps' access rights are superior to the aquaculturist's, it is not necessary as long as the lease so states.

The following is a more detailed discussion of the documents that will be needed to establish a DMCA project and to define and allocate the rights and obligations of the parties. Frequent reference to Figures 1 through 4 will be made to facilitate explanation of the parties' rights and obligations.

### (1) Where the real estate is privately owned:

There will be at minimum three entities involved in this scenario: the landowner, the aquaculturist, and the Corps. The most likely factual situation that will exist is illustrated in Figure 1. At least three documents are recommended, and these documents would diagram the relationships among the three parties to the agreement as follows:

First, the Corps should negotiate an easement from the landowner granting the right to dispose of dredged material on the underlying premises on particular terms. Second, the aquaculturist should negotiate with the landowner a lease that is made expressly subject to the Corps' disposal easement (in other words, the Corps' right is prior to and superior to the aquaculturist's rights). Third, to ensure the enforceability of the Corps' rights as to the aquaculturist, there should be some sort of operating agreement or other written document outlining the various relationships. A third document is recommended so the Corps and the aquaculturist will have their rights reduced to a writing that is enforceable between each other, should disputes arise between them.

Slight variations in state property law may necessitate somewhat different agreements, and the formalities of execution, recordation, and priority will vary from state to state. Thus, when the parties reach the drafting stage, it is essential that a qualified lawyer be employed to draft and review the agreements. In addition, the parties may want some sort of preliminary agreement fairly early in the site selection process. This agreement should outline which entity has what preliminary

responsibilities. Since site selection is so central to the success of a DMCA project, the responsibility for the steps recommended both in the "Site Selection" Technical Report (Wilson et al. 1991) and the "Chemical Suitability" Technical Report (Tatem 1990) should be specifically allocated among the parties. Furthermore, since success in the project is tied as well to the ability to secure the necessary permits for all functions to take place on the site, preliminary consultations with permitting agencies should be required by the preliminary documents, and closing may be subject to assurances that the important regulatory permits can, in fact, be secured in a timely fashion.

**(2) How the situations described in (1) would differ if the underlying real estate was owned by the state or by a local sponsor, instead of a private landowner:**

As Figure 2 illustrates, the number and type of documents will be the same here as when a private landowner is involved. Some special formalities as to execution may exist as well, and these vary from state to state.

There are at least three other issues to consider in drafting the documents setting up a DMCA aquaculture operation when the underlying real estate is owned by a state or local governmental entity, like a county, city, port district, or navigation district. First, the aquaculturist should be sure that the owner of the real estate has the legal authority to enter into a lease. In general, cities and counties do not have that authority unless the state grants them this power by statute or the municipal charter gives them this authority. Thus, during the site selection process, the aquaculturist must be satisfied from the enabling legislation or statute or provisions in the charter that the entity has the express or implied authority to lease the property to him.

A second consideration arises when the site is owned by a port authority or a navigation district and is related to the first. The enabling legislation creating the port authority or navigation district and allowing it to lease property must also give the entity sufficiently broad powers to include the leasing of its property to private concerns for the aquaculture surface use, either expressly or by implication.

Often this will not present a practical problem, because the port authority frequently will also be the local sponsor of the dredging project and thus charged with responsibility for securing disposal space for Corps dredging projects. Thus, their interests will be identical, and the port authority or navigation district will be involved from the beginning in the search for suitable dredged material disposal space, and the port master plan will be consulted early on.

A third and final way that the picture is complicated by state or local ownership of the property is that the lease may have to comply with additional state or local aquacultural lease laws. Such laws may impose certain restrictions on the terms that such a lease may contain.

If these requirements are not checked and satisfied, the lease may not be enforceable.

**(3) How the situation in (1) would be different if the underlying real estate was owned by the federal government:**

If the owner of the property is the United States, the Corps or local sponsor will handle things differently because of the federal character of the property owner. The precise differences in the documents needed and what they contain depend on one key variable—whether the federal land is under the jurisdiction of the Corps (Figure 3) or whether the federal land is administered by some other federal agency (Figure 4).

However, from the outset, it should be observed that the likelihood of this issue coming up in the context of Corps ownership is exceedingly slim. If the Corps already owns the property, it can presumably use the land in whatever ways it sees fit—including the disposal of dredged material—subject, of course, to any limitations contained in the deed or any restrictions it has already agreed to. In other words, if the Corps wants to dispose of dredged material there, it certainly can, subject to applicable permit requirements.

However, in the second situation—where the property is under the jurisdiction of some other federal agency (see Figure 4)—the Corps may still want to try to secure disposal space using containment area aquaculture. This issue may very well come up in coastal areas where competition for land use is the fiercest. For example, the Corps may find that it wants to put a containment area on land that is part of a military base or a Coast Guard station.

If this is the case, then the documents needed to secure the right to use the federal land for the disposal of dredged material and the coordinated aquaculture function will be different. As Figure 4 illustrates, instead of an easement from a private individual, the Corps will secure an interagency agreement or interdepartmental agreement.

With respect to the substantive provisions that the above documents should contain, where the Corps is the landowner, language in the lease should reserve rights to dispose of dredged material and maintain the legal superiority of those rights vis-a-vis the rights of the aquaculturist. However, in the other situation, where the Corps has to deal with another federal agency, the situation is closer to the original situation, where the Corps secures from the federal agency/landowner the rights it wants for the disposal of dredged material, and in those negotiations secures the superiority of those rights over the rights of the aquaculturist.

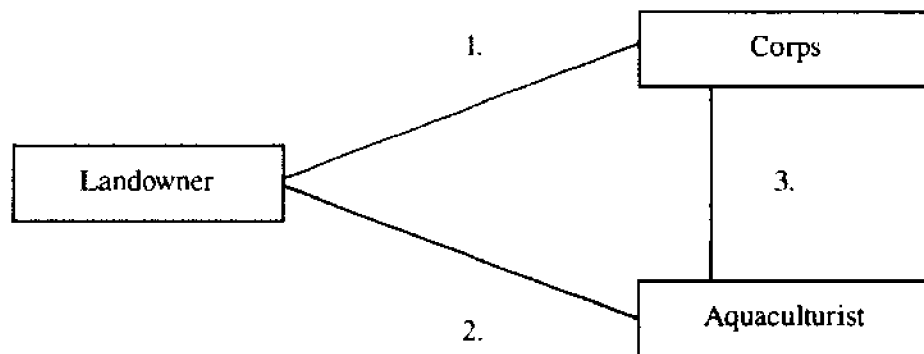
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Figure 1.

**Where Land Is Privately Owned:**

Documents recommended for establishment of a Containment Area Aquaculture Project



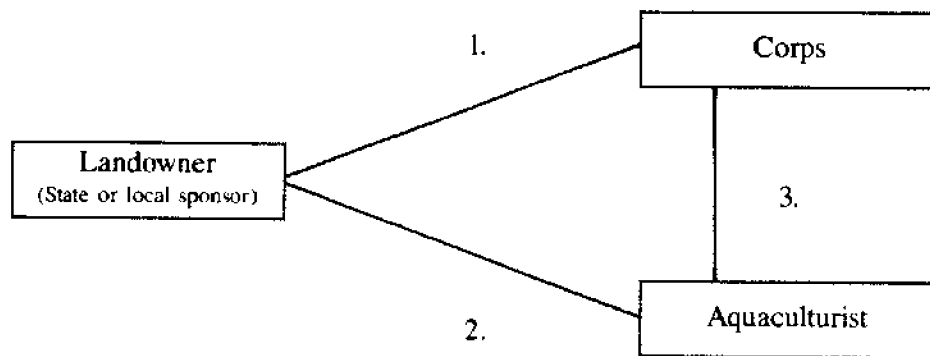
- 
1. Easement for disposal of dredged material
  2. Lease to aquaculturist (subject to Corps Disposal Easement)
  3. Operating agreement (or other coordination document)

**Note:** Preliminary agreements may precede adoption of these final documents, reducing the parties' agreement to writing.

Figure 2.

**Where Land Is Owned by the State or a Local Sponsor:**

Documents recommended for establishment of a Containment Area Aquaculture Project



- 
1. Easement for disposal of dredged material
  2. Lease to aquaculturist (subject to Corps Disposal Easement)
  3. Operating agreement (or other coordination document)

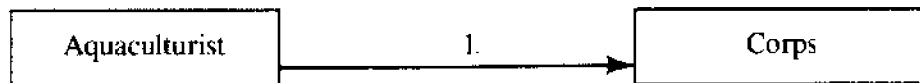
Where the **state** is the owner of the land, state law should be reviewed to see whether any laws exist governing the leasing of state-owned lands for aquaculture purposes. Where the **local sponsor** is the owner of the property, any leases or easements must fall within the entity's scope of authority in the deed, enabling legislation, or charter.

**Note:** Preliminary agreements may precede adoption of these final documents reducing the parties' agreement to writing.



Figure 3.

**When the Land Is Federally Owned and the Corps Is the Agency Administering It:**  
Documents recommended for establishment of a Containment Area Aquaculture Project

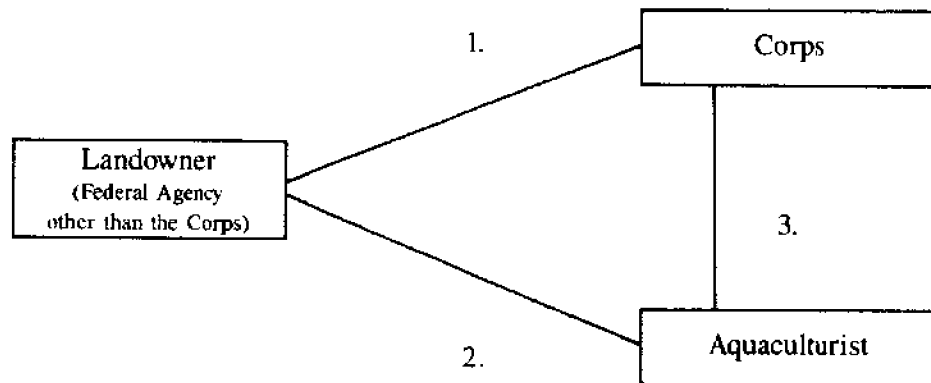


- 
1. Lease (from Corps to aquaculturist) that may also contain provisions as to operations.

Figure 4.

**Where Land Is Federally Owned and the Agency Administering It Is Not The Corps:**

Documents recommended for establishment of a Containment Area Aquaculture Project



- 
1. Easement or some combination of interagency agreement or permit allowing the Corps to use the property for the disposal of dredged material
  2. Lease to aquaculturist (subject to Corps' disposal rights)
  3. Operating agreement (or other coordination document)

**Note:** Preliminary agreements may precede adoption of these final documents, reducing the parties' agreement to writing.

**1. SAMPLE SPOIL DISPOSAL EASEMENT:  
BALTIMORE DISTRICT**

This easement deed made this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, between \_\_\_\_\_, Grantor, and \_\_\_\_\_ County, a political subdivision of the \_\_\_\_\_, Grantee.

Witnesseth:

WHEREAS, construction \_\_\_\_\_ of the \_\_\_\_\_;

WHEREAS, such authorization is subject to the condition that local interests furnish free of cost to the United States necessary rights-of-way and suitable spoil disposal easements for the \_\_\_\_\_, and hold and save the United States free from damages due to construction \_\_\_\_\_, except damages due to the fault or negligence of the Government or its contractors: and

WHEREAS, by agreement dated \_\_\_\_\_, \_\_\_\_\_ County agreed to furnish, free of cost to the United States, necessary rights-of-way and suitable spoil disposal areas \_\_\_\_\_;

WHEREAS, the Grantor is the owner in fee simple of a tract of land situated in the \_\_\_\_\_ Election District, \_\_\_\_\_ County, \_\_\_\_\_, BEING all that tract or parcel of land which by a Deed dated \_\_\_\_\_ and recorded among the land records of \_\_\_\_\_ County, \_\_\_\_\_, at Deed Book Vol. \_\_\_\_\_, Page \_\_\_\_\_, was conveyed by \_\_\_\_\_ to the said Grantor.

AND WHEREAS, the Grantee desires to acquire an interest in the said tract of land so the United States might use a portion of it for the purpose of depositing spoil from dredging operations and other uses incidental thereto which said portion of said above described parcel of land is delineated on Schedule "A" attached hereto and made a part hereof.

NOW THEREFORE, in consideration of the sum of One Dollar (\$1.00), the receipt of which is hereby acknowledged, paid by \_\_\_\_\_ County, a political subdivision of the \_\_\_\_\_, and the benefit to the Grantor from the \_\_\_\_\_, the sufficiency of which is hereby expressly acknowledged, the Grantor does hereby give, grant, and convey unto said Grantee, its successors and assigns, a right and privilege, of a period beginning with the date of this instrument and terminating in \_\_\_\_\_ years, to enter upon, occupy and use part of the land described above as delineated in Schedule "A" or any portion thereof for the purpose of depositing spoil and other dredged material excavated as a result of the \_\_\_\_\_.

RESERVING HOWEVER, to the Grantor all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby conveyed to the Grantee; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

Grantee shall have the right to clear and keep clear all trees, or undergrowth and other obstruction from the herein granted easement, and the Grantor agrees not to do any filling, upgrading, or other activity during stated period on the herein granted easement that will interfere with the normal operation and maintenance of said dredged material disposal area. It is agreed that the within named consideration is in full payment for any timber cut or to be cut in the deposit of dredged material and earth, or in the operation and/or maintenance of said dredged material disposal area.

TO HAVE AND TO HOLD FOR A PERIOD OF \_\_\_\_\_ YEARS, unto said Grantee, its successors and assigns, the rights herein granted.

THE GRANTOR does hereby expressly and fully release the United States of America, its officers, agents, servants and contractors, from liability for any and all damages done or caused to be done and from any claim or demand whatsoever or injuries suffered by or done to the said premises by reason of the deposit of such spoil or other material, excepting damages or injuries due to the fault or negligence of the Government or its contractors.

AND THE SAID Grantor will warrant and defend, for the period of the easement the right and title to the portion of the above described property which is delineated or further described in Schedule "A" unto the said Grantee against the claims of all persons whatsoever.

This easement is being acquired for use by the United States Army Corps of Engineers, Baltimore District, Baltimore, Maryland.

IN WITNESS WHEREOF, the Grantor has hereunto set hand and seal, the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\_\_\_\_\_ (SEAL)

\_\_\_\_\_ (SEAL)

COUNTY OF \_\_\_\_\_ )

ss:

STATE OF MARYLAND )

I hereby certify, that on this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ before the subscribed \_\_\_\_\_ personally appeared \_\_\_\_\_ and acknowledged the foregoing deed to be his act.

(NOTARY)  
(SEAL)

\_\_\_\_\_  
NOTARY PUBLIC

## **2. LANGUAGE FROM SAMPLE**

### **DREDGED MATERIAL DISPOSAL EASEMENT:**

#### **MOBILE DISTRICT**

A perpetual and assignable right and easement to construct, operate and maintain a dredged material disposal area on (the land described in Schedule "A") (Tracts Nos. \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_) including the right to construct and maintain dikes and buffer zone; to deposit dredged material and accomplish any alterations of contours on the land as necessary in connection with such work; to clear, borrow, excavate and remove soil, dirt, and other materials including dredged material from the land; title to and the continuing right to grow, plant, replant, cut, fell, harvest and remove all timber trees and other vegetation thereon; to remove and dispose of any and all buildings, and/or other obstructions therefrom; and for such other purposes as may be required in connection with said works within the limits of subject tract; provided that no structures for human habitation shall be constructed or maintained on the land, that no other structures shall be constructed or maintained on the land except as may be approved in writing by the representative of the United States in charge of the project, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; subject to all interest in and to oil, gas and other minerals in, on and under the herein described property outstanding in third parties, including leases, assignments and mortgages thereof; reserving, however, to the landowner, his heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with the use of the project for the purpose authorized by Congress or abridging the rights and easement hereby acquired.

**3. SAMPLE DREDGED MATERIAL DISPOSAL EASEMENT:**

**NEW ORLEANS DISTRICT**

FROM: \_\_\_\_\_

STATE OF LOUISIANA

TO: \_\_\_\_\_

PARISH OF \_\_\_\_\_

The undersigned hereby grant(s) to the \_\_\_\_\_ Parish Council, and its assigns, a temporary easement and right-of-way in, on, over and across the hereinafter described land, for a period not to exceed \_\_\_\_\_, beginning with the date possession of the land is granted to the Lafourche \_\_\_\_\_, for use by the \_\_\_\_\_ and its assigns, as a dredged material disposal area, including the right to enter upon the land and deposit dredged material thereon, and the right to lay or place disposal pipelines, with full rights of ingress and egress on the land, and the right to perform any other work necessary and incident to the \_\_\_\_\_ Waterway, together with the right to trim, cut, fell, and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles with the limits of the right-of-way; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

The consideration for this easement is the increased value to adjacent lands of the undersigned, the added convenience in use of the improved waterway, and other good and valuable considerations.

The land in, on and to which this easement applies is described as follows:

(insert legal description of property)

The undersigned hereby waive(s) and release(s) the \_\_\_\_\_ and its assigns from any and all claims for damages arising from the activity of the Council, its officers, contractors, agents, employees, representatives or assigns on said land in the reasonable exercise of this easement.

This easement includes the right of egress on adjacent lands of the owner(s) not described above, provided such ingress and ingress and egress is necessary and not otherwise conveniently available to the grantee and its assigns.

All tools, equipment, improvements or other properties placed upon the land by the council or its assigns during the exercise of this easement shall remain the property of the council or its assigns and may be removed by the council or its assigns at any time within a reasonable period after completion of the work or after the expiration of this easement.

WITNESS MY HAND AND SEAL this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ .

WITNESSES:

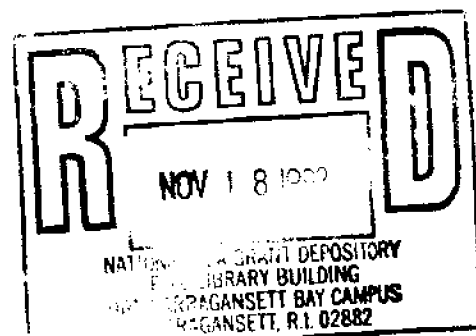
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