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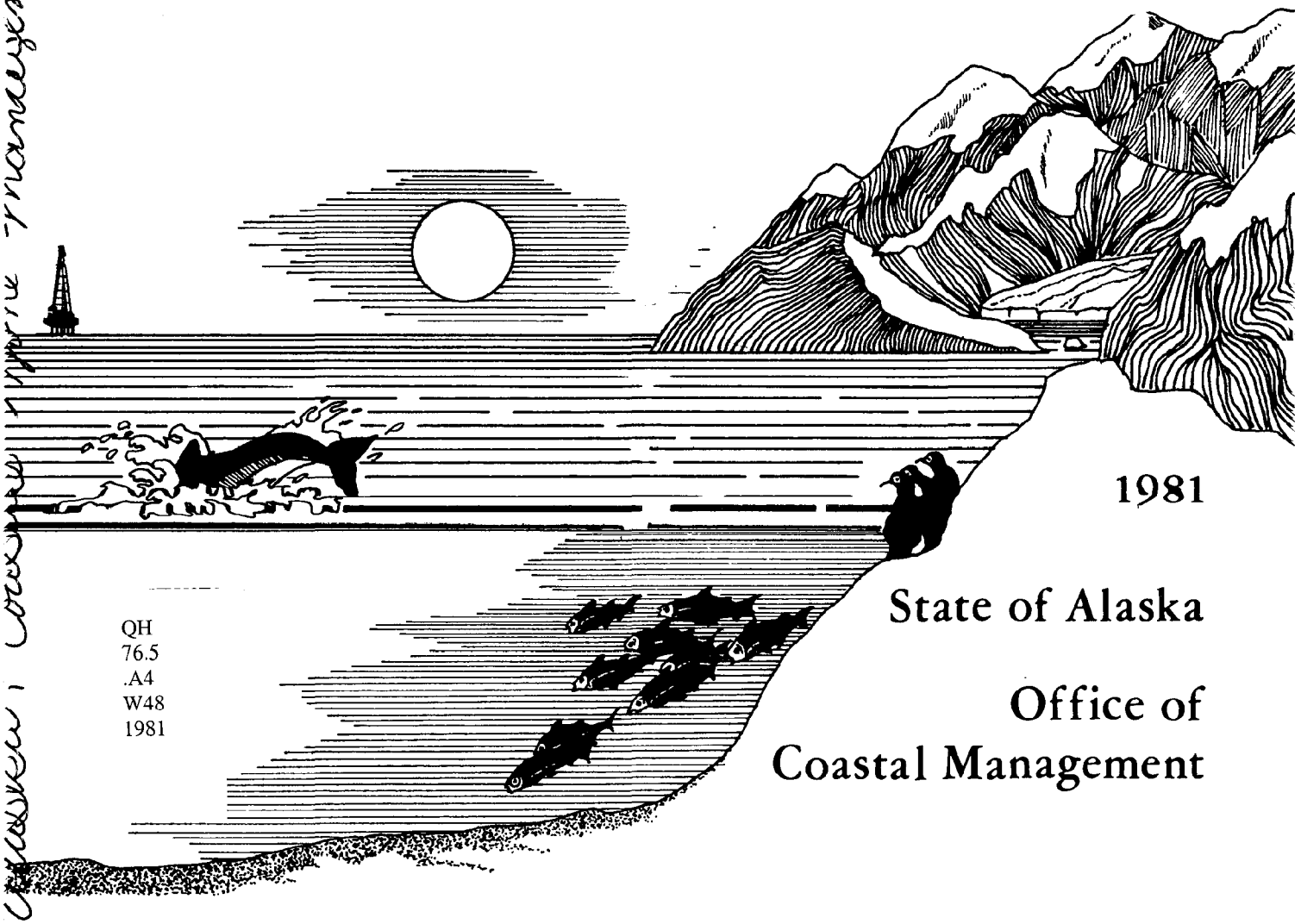
Wetlands Management in Alaska:

A Report to the Alaska Coastal Policy Council



1981

State of Alaska

Office of Coastal Management

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Errata - Wetlands Management in Alaska

1. In the Table of Contents (in the list of appendices), references to the federal regulations for the Corps o and the Environmental Protection Agency are incorrect read:

   U.S. Army Corps of Engineers' Regulations, 33 CFR 320

   U.S. Environmental Protection Agency's Final 404 Guid 40 CFR 230

2. The title to Appendix 5 should cite EPA's regulations 230.

The preparation of the Wetlands Management in Alaska was financed in part by a coastal management program implementation grant from the National Oceanic and Atmospheric Administration, under the provisions of the Coastal Zone Management Act of 1972 (Public Law 92-583, as amended).

18217

Alaska. Coastal zone management program.
QH 76.5.A4 W48 1981 c.1

WETLANDS MANAGEMENT IN ALASKA

A Report To The Alaska Coastal Policy Council

State of Alaska

Office of Coastal Management

Division of Policy Development and Planning

Office of the Governor

Pouch AP

Juneau, Alaska 99811

April 1981

WETLANDS MANAGEMENT IN ALASKA

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PREFACE

Wetlands are a focus of contention in Alaska. Federal and state measures have been enacted within the last few years to limit destruction of wetlands and to protect their important natural resource values. Those who wish to develop wetlands have found that constraints have been placed on projects. At the same time, those who wish to preserve valuable wetlands have found that wetlands are being altered. Both those interested in development and those interested in conservation have expressed reservations about the effectiveness of the existing system for managing wetlands.

Wetlands controversies have been discussed in many forums. A great deal of misunderstanding has surrounded much of this discussion and has made it difficult to focus on the real, and important, issues. The Alaska Coastal Policy Council has considered wetlands issues at several of its meetings during the last two years. Protection of important wetland values and resolution of conflicts between different levels of government in planning for and managing coastal development are important objectives of the Alaska Coastal Management Program (ACMP).

This report was prepared at the request of the Coastal Policy Council by the Office of Coastal Management (OCM) and was written by Amy D. Kyle. Major objectives were to provide information on the issues related to wetlands management and regulation, analyze the current wetlands management system, identify problems with the system, and recommend approaches to solving some of these problems. The report is based on review of existing

literature and materials, extensive interviews, and analysis of the case histories of roughly 100 applications for permits for discharge of dredged or fill material to wetlands. Recommendations presented were endorsed by the Coastal Policy Council in February 1981.

Since work on this report was begun, several state and federal government agencies have begun a cooperative effort to improve wetlands management in Alaska. One important event was the formation in October 1980 of the Alaska Wetlands Task Force (AWTF) to promote cooperation in working on these issues. Several actions have already been taken to improve the regulatory process. The recommendations contained in the report have been endorsed by the AWTF and are meant to contribute to this overall cooperative effort.

This report consists of six chapters. Chapter One provides an introduction to wetlands and wetlands management. Chapter Two outlines the issues related to wetlands regulation and wetlands protection in Alaska. Chapter Three describes classification systems for wetlands. Chapter Four describes federal and state legal authorities pertaining to wetlands. Chapter Five describes the workings of the major wetlands regulatory program, administered by the federal government. Chapter Six presents recommendations and outlines a strategy for improving management of wetlands in Alaska, with emphasis on actions that can be taken by the ACMP.

Chapter One: Introduction to Wetland Values and the Rationale for Regulation

The term "wetlands" is used to describe several very different kinds of lands that may perform similar ecological and physical functions. Swamps, bogs, salt marshes, wet tundra and other lands that are periodically inundated by water or that support plants that are adapted for wet areas are included under this general definition.

Providing habitat is the most widely recognized function or value of wetlands. Many species of fish find breeding and rearing grounds in wetlands. Wetlands are extremely important to resident and migratory birds for resting, feeding, and nesting areas. Wetlands can be important foraging grounds for large mammals such as caribou. Wetlands provide habitat for other species, including shellfish and furbearers. Wetlands may also produce organic material that becomes an important part of the aquatic food chain.

The role that wetlands play in maintaining hydrological systems and the quality of surface and ground waters is also important. Some wetlands can absorb large quantities of water and act as natural flood control systems for rivers by gradually releasing flood waters and reducing the magnitude of high flows. Wetlands may slow the rate of runoff during periods of normal rainfall and allow water that would otherwise run off to be released gradually into aquifers. Wetlands may serve as natural storm buffers and physically shield coastal lands from the effects of

tidal action. In some cases, sediments and pollutants may be filtered out of waters draining through wetlands, and water quality may be thereby improved. Wetlands may also serve as important resources for recreation and provide opportunities for bird watching, berry-picking, hunting, and other activities. A full treatment of wetland values is beyond the scope of this paper. (References are included.)

The natural values and functions of wetlands have only recently begun to be understood. Before 1960, little was known of the values of wetlands, which were generally considered to be wastelands. Government policy historically favored filling or draining of wetlands to allow uses such as agriculture or to provide land for roads or buildings.

In the contiguous 48 states, a significant percentage of wetlands has been destroyed or altered beyond reclamation, though estimates of the exact percentage vary. The U.S. Fish and Wildlife Service (USFWS) estimated in 1976 that 40 percent of all wetlands had been destroyed. Studies indicate that half the wetlands in the prairie pothole region of the Midwest had been drained by 1950. About 125,000 acres of these wetlands were drained between 1964 and 1968, and 188,000 acres were converted to farmland in the 1950's. In California, one study estimated that only 450,000 of an original 3.5 million acres of wetlands remained in 1954. Many wetlands, especially marshes, have been converted to resort housing along the East Coast and the Gulf of Mexico. Until recently, spoils from dredging have been routinely dumped on accessible wetlands.*

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*Figures cited in this section were obtained from Horwitz, 1978.

Few incentives have existed for a private landowner to protect the important natural functions and values of wetlands. The natural values and functions of wetlands tend to benefit the public in a general way and not to increase the monetary value of wetlands to the private landowner. Development of wetlands that causes destruction of their natural functions and values can often result in financial gain to the owner of the wetlands.

Increased recognition of the important public benefits and functions of wetlands and the extent to which they have been altered has resulted in efforts by some states to exercise some control over development in wetlands. Massachusetts adopted the first state statute regulating wetlands development in 1963. Several other coastal states have adopted wetlands statutes, though Alaska is one exception. State programs vary greatly in their scope and effectiveness.

In 1972, the U.S. Congress determined that wetlands were resources of national importance that required protection under federal law. As part of the Federal Water Pollution Control Act Amendments of 1972, a regulatory program that required permits for discharges of dredged or fill materials to many wetlands was created. The federal regulatory program is the main mechanism for regulation of wetlands development in the State of Alaska and consequently is the source of much of the controversy over wetlands regulation.

WETLANDS IN ALASKA

In Alaska, characteristics of wetlands vary tremendously among different regions of the state. In the mountainous terrain of Southeastern Alaska and Prince William Sound, coastal wetlands most often occur at the mouths of streams or heads of bays and in areas that have been associated with glacial movements. Larger wetlands are usually found in or near the deltas of streams carrying large sediment loads. Muskegs, which are pockets of poorly drained soil, are also common.

Southcentral Alaska, including the Matanuska and Susitna River valleys and the Kenai Peninsula, has large areas of wetlands. Extensive wetlands are associated with the major river valleys and may be found in unconsolidated glacial deposits that are common in the region.

Vast areas of Western and Northern Alaska are wetlands because of hydrologic and geologic conditions resulting from the presence of permafrost. On the North Slope there are large areas of wet tundra with low topographic relief and nearly universal near-surface sheet flows of water. Permafrost forms an impermeable layer underlying the surface and prevents water from draining downward. In Western Alaska, vast areas of low relief and extensive wetlands are associated with the major river systems and deltas of the Yukon and Kuskokwim Rivers.

The different regions of the state also experience different types of development in wetlands. In Southeast, a large percentage of development in wetlands is associated with log transfer and storage sites. Residential

development on waterfronts is an important demand on wetlands in Southeastern and Southcentral Alaska as is demand for sites for commercial and industrial facilities. In Western Alaska, housing development has been a primary demand for wetlands. In Northern Alaska, activities related to petroleum extraction and transport are the most important. The construction of roads and other transportation facilities such as airports in wetlands is another important wetlands development issue.

Chapter Two: Regulation of Wetlands Development in Alaska - Discussion of Issues

With passage of the Federal Water Pollution Control Act Amendments (FWPCA) in 1972, the federal government made a major commitment to protect wetlands from development. Section 404 of the FWPCA requires a federal permit for discharge of dredged or fill material in many wetlands. The resultant permit program, called the "404" program, is the focus of most outcry against wetlands regulation in Alaska.

Many issues have been raised that relate to the federal regulatory program and other programs that apply to wetlands management. These seem generally to fall into two groups. First are procedural problems with the federal regulatory program and its relationship to other federal, state, and local requirements. Second are disagreements with the way in which substantive decisions are made under the existing system, from both conservation and development oriented perspectives. Other issues that are broader in scope relate to the proper level of protection of wetlands and proper relationship between government regulation and private property rights. This report focuses primarily on the issues related to the existing management system and touches only briefly on the larger philosophical and political issues.

PROCEDURAL PROBLEMS WITH THE SYSTEM

Representatives of all interests involved in the 404 permit program have expressed dissatisfaction with some of the procedures of the existing system. The major concerns are outlined in this section.

Length of Processing Times for Permits

The length of time required for processing of 404 permit applications is probably the most common and universal procedural complaint. Some permit applications for controversial projects have, in past years, been held indefinitely without final action. Relatively small and noncontroversial projects have routinely required more than six months for a final decision. Processing times of up to a year have not been uncommon. During the last year, processing times have been decreased and indefinite delays largely eliminated. Still, applications for noncontroversial projects require roughly 115 days to be processed. Controversial projects may take much longer. Developers who are not aware of the average processing times may not submit applications until shortly before the planned date of construction. Projects sometimes must be delayed when permits are not processed within the available time period.

Duplicative Reviews

A second common complaint about the permitting system is duplication in review of applications. Though the U.S. Army Corps of Engineers (COE) is responsible for administering the 404 program, many other federal, state, and local government agencies review proposed projects and offer comments to the COE on what its decision should be. Many projects that require a 404 permit will also require other governmental permits or authorizations. Consequently, a single project may be reviewed more than once by a single agency as different permits are obtained. In

addition, a number of different state and federal agencies consider the same factors, if not the same criteria and standards, in reviewing each permit application. One or both of these practices are seen by some as duplicative.

The issue of "duplicative" reviews is sometimes raised as way of expressing disagreement with the substantive comments or stipulations offered by an agency. A particular agency's review may be called "duplicative" if the review turns out to be unfavorable to a particular perspective.

Applicants' Difficulties in Understanding the System

An applicant's success in dealing with the 404 review process depends in part on the capabilities and resources available to the applicant. Preparation of the initial application may be difficult for individuals without certain resources. An applicant familiar with the review process can arrange for preliminary review before a proposal is formally submitted and can often work out potential objections at the outset. A less knowledgeable applicant usually does not discover any problems until well after the formal proposal is submitted. The full range of issues and factors considered during the review is not made clear to applicants.

Applicants who are not able to remain in communication with reviewing agencies and to provide information as needed may be at a disadvantage. Negotiations on stipulations for proposed projects may be more difficult

for an applicant without technical resources. Applicants may experience frustration and find it difficult to respond constructively.

Lack of Predictability in Permit Decisions

At present, the only way to determine whether a project can receive a 404 permit is to prepare an application, submit it, and wait until the final decision is made. There are no manuals that explain the types of designs or projects that are approvable in a given area. Regulations governing permit decisions offer some guidance, but are open to interpretation. In areas distant from Anchorage, it is difficult for an applicant to arrange for a site inspection to determine whether a development site is located wholly or partially within a wetland subject to the 404 program. This makes it difficult for landowners to predict the outcome of regulatory decisions and to plan for development.

Inadequate Enforcement Capability for the 404 Permit Program

The lack of enforcement capability for the 404 program is generally perceived to be a major issue. The COE does not have personnel available to conduct a comprehensive surveillance program to detect unauthorized wetland fills and must rely instead on isolated inspections and reports from other agencies and individuals. There is virtually no inspection for compliance with permit conditions. Morever, resources available to prosecute violations are inadequate. This is generally felt to provide an incentive for developers to ignore the requirements of the law.

CONCERNS WITH THE SUBSTANCE OF DECISIONS

Perhaps the most serious concerns about the 404 permit program relate to the substantive basis for the decisions made. There is obvious disagreement on this issue between different groups involved in the 404 permit process. Perspectives of resource managers charged with responsibilities in the 404 permit program, representatives of local governments, and different elements of the public vary significantly.

Limitations of Permit Review as a Management Tool

Many representatives of resource agencies responsible for reviewing permit applications express frustration with the limitations of case-by-case review of projects as a management tool. Review of individual projects is currently conducted in the absence of assessment of the effects of development on each affected ecosystem as a whole and without mechanisms to resolve conflicts on a broader basis. As a result, important resource management controversies are repeated as projects continuously come up for review. Some agencies have adopted a "conservative" attitude by objecting to or limiting the number of projects in critical areas where cumulative impacts could pose a problem.

Lack of Information on Locations and Values of Wetlands

Virtually all groups involved in the 404 permit program agree that too little information is available on the locations of wetlands. The areas under the federal jurisdiction have not been mapped, with a very few

exceptions. Developers and regulators alike are hampered in their efforts by uncertainty over which areas are legally included under wetlands regulations. Many people unfamiliar with the details of the legal requirements have expressed confusion over different scientific and administrative definitions of wetlands.

Substantial agreement also exists that too little information is available on the values and functions of wetlands to ensure that sound decisions can be made. This issue is perceived somewhat differently by different groups. Federal resource agencies are responsible for protecting wetlands, which are assumed to be valuable under federal law. In the absence of information on the values of wetlands, federal agencies may take a conservative approach to approving projects. Difficulty in distinguishing between extremely valuable and less important wetlands requires that all wetlands be protected. Resource agencies support further research to assess wetland values. By contrast, some developers and other members of the public believe that wetland values are overprotected by federal law and overestimated by resource agencies, based on the evidence available. Many object to any conservative approach to reviews of projects. Feelings on the value of additional research are mixed.

Documentation of the values of wetlands is seen by some to be needed to overcome public perceptions that undervalue wetlands, even in economic terms. The history of destruction of wetlands reveals poor analysis and understanding of the economic impacts wetlands development may have on

local areas in terms of increased flood damage, increased water treatment costs, loss of valuable species of fish and birds, and loss of recreational opportunities.

Lack of Clear Criteria To Guide Decisions

The procedures used by government agencies in their reviews of 404 permit applications are defined, to a certain extent, in the form of regulations adopted by the COE and Environmental Protection Agency (EPA), and guidelines adopted by the Alaska Coastal Management Program (ACMP). The guidance contained in these regulations is open to significant interpretation. Application of regulations is not always uniform. Moreover, agencies' adherence to their own legal authorities during reviews is in some cases questionable.

Definition of Uses Permissible in Wetlands

Regulations adopted pursuant to the federal law establishing the 404 program generally allow development in wetlands only when there are no "practicable" alternative and no adverse impacts on important aquatic resources. Only those activities that are "water-dependent" are usually allowed. The federal agencies have largely reserved to themselves the right to define the uses that are "water-dependent." Increased involvement of the public and local governments in defining this term and applying the regulations in a way that reflects conditions in Alaska is an important concern for many.

ISSUES OUTSIDE THE REGULATORY FRAMEWORK

Consideration of appropriate means of managing wetlands raises several broader issues. The effect of regulation of wetlands development on private owners of wetlands is important. Restriction of development can result in decreased property values. Federal regulation of wetlands development has not been considered by the courts to be a "taking" of private property without compensation. However, many owners of wetlands where development is restricted feel that compensation should be paid.

The types of wetlands and development activities that should be subject to regulation is another basic issue. The federal regulatory program applies only to discharge of dredged or fill material, but not alteration of wetlands by other means such as draining. The federal regulatory program excludes some isolated wetlands from regulation. A few states protect wetlands that fall outside the federal program. Some feel that such an effort, either through administrative or legislative actions, would be appropriate for Alaska.

Chapter Three: Definition, Identification, and Assessment of Values of Wetlands

The goal of wetlands management programs is to preserve the important natural resource values of wetlands. An early step in developing any program to manage or regulate wetlands is to define what wetlands are, where they are located, and what these important resource values are.

In Alaska, both regulatory and planning approaches to wetlands management are hampered by the lack of very basic information. Although the term "wetlands" has been defined, little information is available on locations and values of wetlands. Lack of this basic information undermines the credibility and effectiveness of any management program. Resource managers, who must often make decisions on the probable effects of development on wetlands with minimal information, and developers, who are often unable to determine whether their lands fall under a regulatory program, are affected.

FEDERAL REGULATORY AND OTHER DEFINITIONS OF WETLANDS

A single definition of wetlands has been developed and adopted for federal regulation of discharges to wetlands. This definition was prepared by the U.S. Army Corps of Engineers (COE) and is contained in the COE's regulations. It defines wetlands as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas (Part 323.2(c) of Title 33, Code of Federal Regulations).

This definition is used for all reviews and comments under the federal regulatory program.

The adequacy of this definition for conditions in Alaska has been questioned for two reasons. The definition can be interpreted to include wet tundra, moist tundra, and muskeg. The COE has determined that wet tundra falls under this definition and is now considering whether the definition includes moist tundra. There is some question over whether tundra and muskeg fall under the intent of the Clean Water Act, particularly in view of the vast extent of tundra in Alaska. The definition has also been criticized for requiring the presence of vegetation, as some low-lying areas immediately adjacent to watercourses are not vegetated.

Different definitions of wetlands have been adopted by other agencies to meet other needs. Though there are significant differences among them, these have no bearing on the federal regulatory definition.

The U.S. Fish and Wildlife Service (USFWS) has developed a wetlands definition and a classification system suitable for use by the scientific community and resource managers (Cowardin, 1979). Wetlands are defined by vegetation, soils, and timing of flooding or soil saturation.

(The definition and classification system are more fully explained in the following section.)

The State of Alaska has adopted a definition of wetlands under the regulations of the Alaska Coastal Management Program (6 AAC 80.919). This definition states that

> "Wetlands" includes both freshwater and saltwater wetlands; "freshwater wetlands" means those environments characterized by rooted vegetation which is partially submerged either continuously or periodically by surface freshwater with less than .5 parts per thousand salt content and not exceeding three meters in depth; "saltwater wetlands" means those coastal areas along sheltered shorelines characterized by halophlic hydrophytes and macroalgae extending from extreme low tide to an area above extreme high tide which is influenced by sea spray or tidally-induced water table changes.

Halophylic hydrophytes are plants that are found in wet areas and that tolerate salty soil. The ACMP definition is used primarily to define areas subject to certain planning requirements.

EFFORTS TO IDENTIFY LOCATIONS AND VALUES OF WETLANDS

Several state and federal agencies have undertaken projects to identify wetlands in Alaska. Most of these projects focus on a particular area and a particular resource management issue, with the significant exception of the National Wetlands Inventory.

Differences between definitions of wetlands becomes an issue in wetlands identification projects. The definitions of wetlands used for mapping

projects vary. The definition adopted for a particular project depends in part on the methods of data collection and analysis that are used. Mapping projects usually have not used the federal regulatory definition of wetlands adopted by the COE.

There are several reasons why the mapping efforts have not focused on defining the federal jurisdiction over wetlands. To do so requires information on hydrology, including both surface and subsurface flows and connections, that is not necessary for many other purposes and that cannot be obtained from the remote sensing imagery that is used in many projects. To define the COE's jurisdiction also requires interpretive decisions that would normally be made by the COE. The scale needed to show precisely the extent of the COE's jurisdiction is much larger than that employed by most mapping projects. Since wetland systems can change rapidly, detailed maps may become obsolete within a few years. Lastly, some scientists feel that the federal regulatory definition does not adequately define the areas that are of concern from an ecological perspective.

Identification of wetlands is only a first step in managing wetlands resources. After the wetlands are identified, their resource values and functions must be determined. This is necessary to allow wetlands that serve important functions to be distinguished from those that do not.

Several approaches have been taken to understanding values of wetlands. The simplest, though least tenable, approach is to assume that all wetlands are valuable. This is the basic assumption expressed in the

guidelines prepared by EPA for analysis of 404 permit applications. A second approach is to specify the resource values that are usually associated with different types of wetlands that can be identified by easily measured traits, such as vegetation. Under such a system, all wetlands with the same type are assumed to have similar values. The wetlands evaluation for the proposed gas pipeline corridor, described in the next section, has used this approach. A third approach is to determine the valuable functions of wetlands on a site-specific basis. This is the approach taken by the Alaska Department of Fish and Game (ADFG) in evaluating habitat values of wetlands near Sitka, as described in the next section.

Each of the three approaches has advantages. The first approach provides for most effective protection of wetland values and requires no expenditures for data collection. However, it places constraints on development that are unacceptable to many people. The second approach has the significant advantage of allowing wetland values to be identified primarily on the basis of data that is relatively easy to obtain, such as remote sensing imagery. Site-specific field surveys, which are time-consuming and expensive, are not needed. The major constraints on this approach are the limitations on the ability of resource managers to accurately correlate resource values of wetlands with more easily measured physical and biological traits. The third approach, surveying wetland values directly, allows the best understanding of wetland values. The expense of this kind of survey is its major drawback and limits its usefulness.

National Wetlands Inventory

The most comprehensive wetlands mapping project in Alaska is the National Wetlands Inventory (NWI) conducted by the USFWS. The mapping is based on remote sensing imagery. It uses a classification system that was developed by the USFWS to be as universally applicable as possible, reflect ecological relationships, and lead to reasonable mapping units. The classification system is described in a 1979 report (Cowardin, 1979). The mapping is ongoing in Alaska and other parts of the country.

The USFWS defines wetlands as:

> lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification wetlands must have one or more of the following three attributes: 1) at least periodically, the land supports predominantly hydrophytes; 2) the substrate is predominantly undrained hydric soil; 3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season each year (Cowardin, 1979, p. 3, emphasis added)

This definition differs from the federal regulatory definiton most notably in that it allows any of three factors - wetland vegetation, hydric soil, or presence of water - to serve as an indicator of wetlands. By contrast, the COE's interpretation of the federal regulatory definition for Alaska requires the presence of all three factors.

The USFWS classification system divides wetlands into five groupings - marine, estuarine, riverine, lacustrine, palustrine. The system allows further subdivision of the main groupings into subsystems, classes, subclasses, and subdominance types (see Figure 1).

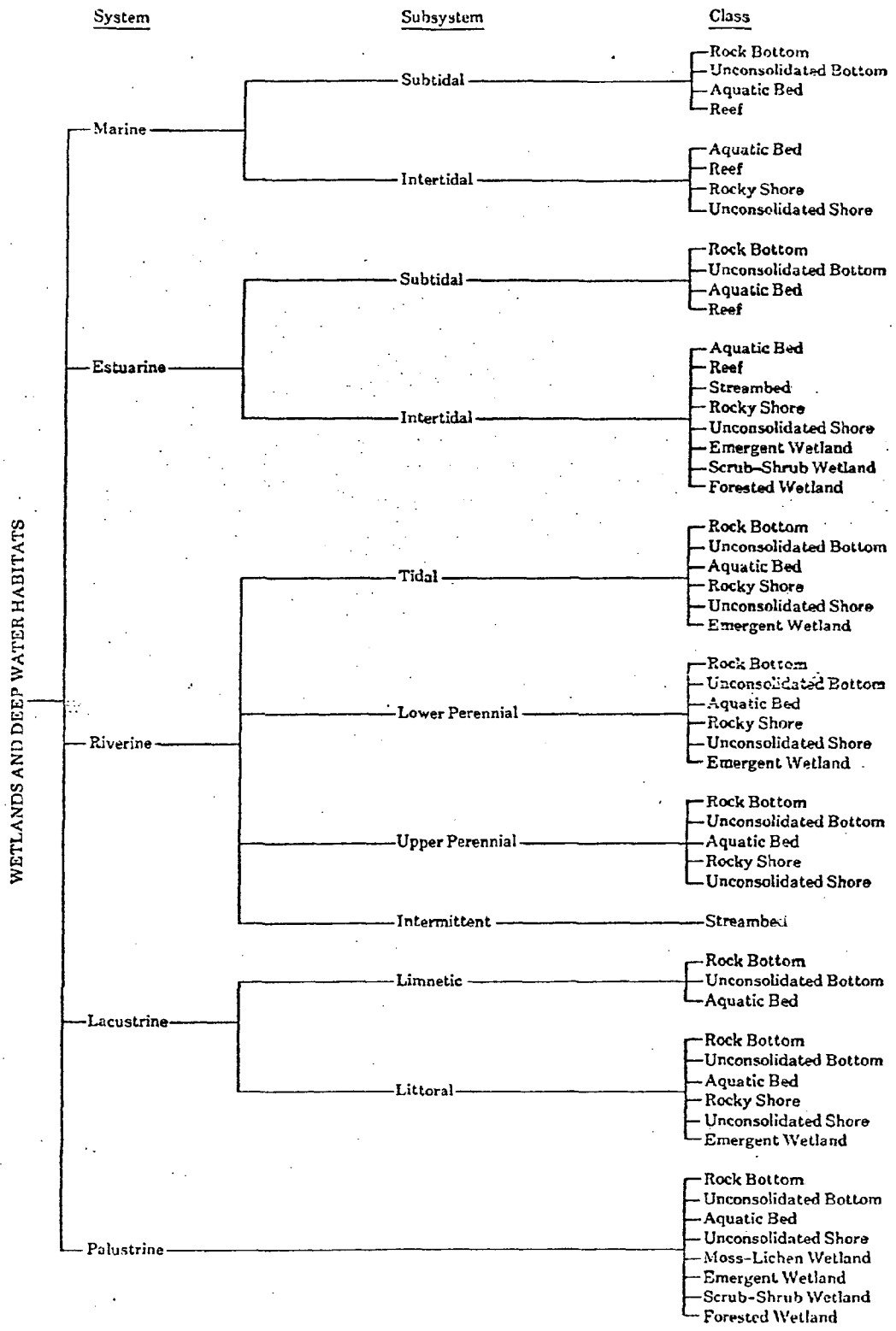

Fig. 1. Classification hierarchy of wetlands and deepwater habitats, showing systems, subsystems, and classes. The Palustrine System does not include deepwater habitats.

The USFWS has prepared NWI maps for some parts of Alaska. Draft maps of wetlands in the U.S. Geological Survey's (USGS) 1:250,000 Kenai quadrangle and portions of the Anchorage quadrangle are available at a scale of 1:63,360. Production of an additional 100 quadrangles at a scale of 1:63,360 is planned for the next two years, focusing on parts of the North Slope, Southcentral Alaska, and Southeast. The schedule for map production and a list of existing maps are shown in Figure 2. Data are obtained from high altitude photography made available by the National Aeronautics and Space Administration (NASA). High altitude photography is supplemented by field surveys, soil surveys where available, and use of USGS maps. The maps are prepared at the NWI headquarters in Florida with direction from USFWS staff in Alaska.

NASA Demonstration Project

The National Aeronautics and Space Administration (NASA) has funded a project to research ways of using digitized satellite imagery in wetlands identification. Results of field surveys of soils and vegetation will be used to develop a method to allow digitized imagery to be interpreted to identify wetlands. If a successful method is developed, it should be possible to generate maps of wetlands in similar areas quickly from the digitized data with a minimum of supplemental field surveys. Roughly $200,000 will be available during the next two years to develop and use these methods.

Figure 2. CURRENT STATUS OF NATIONAL WETLANDS INVENTORY MAPS FOR ALASKA

Draft Maps Available

Anchorage (Scale - 1:25,000)

B-6NW, B-7NE, B-7NW
C-6SE, C-6SW, C-7SE, C-7SW

Anchorage (Scale - 1:63,360)

A-1 through A-8
B-1 through B-4
C-1 through C-4, C-8
D-1 through D-5, D-7, D-8

Kenai (Scale - 1:63,360)

A-4, A-5, A-7, A-8
B-1 through B-8
C-1 through C-4, C-8
D-3 and D-4
D-5, D-7, D-8

Maps Scheduled for Production during 1980

- Remainder of Anchorage 1:63,360 maps
- Remainder of Kenai 1:63,360 maps
- All of Tyonek 1:63,360 maps

Maps Scheduled for Production in Fiscal Year 1981

Beechey Point (A-1 through A-5, B-1 through B-5)
Harrison Bay (A-1, A-2, B-1, B-2)
Sagavanirktok (C-3 through C-5, D-1 through D-5)
Umiat (C-1 through C-3, D-1 through D-3)
Flaxman Island (A-3 through A-5)
Mt. Michaelson (C-4, C-5, D-4, D-5)
Juneau (B-3 through B-6, C-3 through C-6, D-3)
Ketchikan (A-2 through A-4, B-5, B-6)
Skagway (A-1, A-2, B-2 through B-4)
Bradfield Canal (C-6, D-6)
Petersburg (C-3, D-1, D-3)
Valdez (A-2 through A-7, B-2 through B-4, C-2 through C-4, D-2 through D-4)
Seward (A-7, B-7, C-6, C-7, D-6, D-7)
Cordova (B-2 through B-4, C-2 through C-5, D-2, D-3)
Gulkana (A-3 through A-6, B-2 through B-4, C-1 through C-4, D-3, D-4)

ADEC Wetland Inventory

In 1977, the Alaska Department of Environmental Conservation (ADEC) produced a Preliminary Inventory of Tidally-Influenced Wetlands (Imamura, 1977). The report proposed a definition for tidally-influenced wetlands. USGS maps were used to identify areas where tidally-influenced wetlands were likely to exist, and their acreages were computed. The maps have not been reprinted, and a final version of the report is not planned.

ADFG Habitat Evaluation in Sitka

The Alaska Department of Fish and Game (ADFG) has recently completed a demonstration habitat evaluation project for the City and Borough of Sitka, as part of the district coastal management program. ADFG has identified the important aquatic habitats. Under this program, all of the wetlands were inventoried and their values described on a site specific basis, based on field surveys. Orthophoto base maps have been prepared for the area. Using the habitat data, the City and Borough of Sitka expects to seek issuance of several general permits by the COE through its coastal management program.

Gas Pipeline Corridor Wetlands Identification and Classification

The proposed gas pipeline corridor includes many wetlands. Large quantities of fill will be placed within this corridor to form a foundation for the gas pipeline. This work could require hundreds of 404 permits. In an attempt to minimize the paperwork required for the permits, the resource

agencies, working with the COE, have devised a classification system for the gasline corridor wetlands. Using detailed aerial photos, the locations of wetlands were identified. Wetlands were divided into 18 different habitat types, according to type of vegetation and other factors. The 18 types of wetlands were then divided into three classes corresponding to their natural value. The classification system has identified important wetlands. This will allow the gas pipeline to be relocated away from any critical wetlands encountered in the proposed route. Placement of the gravel pad in wetlands in the category for least sensitive wetlands may be allowed under a general permit.

Chapter Four: Federal, State, and Local Legal Authorities Related to Wetlands

Federal, state, and local legal authorities and programs all contribute to the existing wetlands management system in Alaska. It may be in part because there are several authorities and because their provisions and inter-relationships are complex that wetlands issues appear to be difficult to resolve.

The legal authority that has had the greatest impact on Alaska, and on the nation as a whole, is the Federal Water Pollution Control Act Amendments (FWPCA) of 1972, as amended by the Clean Water Act of 1977. The state authorities that have the greatest effect on wetlands development decisions in Alaska are the Alaska Coastal Management Act, the Alaska water quality standards, and state anadromous fish protection statutes. State law also provides substantial additional authority to regulate land and water uses that affect wetlands. Through planning and zoning powers, local governments have substantial authority to restrict wetlands development.

FEDERAL AUTHORITIES FOR WETLANDS PROTECTION

Federal authority over wetlands has been expanded in recent years to encompass a national regulatory program, wetland acquisition programs, and an executive order requiring federal agencies to minimize destruction of wetlands.

Federal Regulation of Discharges to Wetlands

The Federal regulatory program established by Section 404 of the Clean Water Act is the most comprehensive authority for wetlands protection. The regulatory system as it currently exists has developed through a complicated series of administrative determinations, legal findings and statutory changes. The evolution of the legal framework for the 404 permit program is described in this section. The way in which the program functions in Alaska is described in Chapter Five.

History of the 404 Permit Program

The "404" permit program was established with passage of the Federal Water Pollution Control Act Amendments (FWPCA, P.L. 92-500, 33 USC 466 et seq)* on October 18, 1972. Section 404 of the FWPCA, in conjunction with Section 301, requires that permits be obtained from the Secretary of the Army for any discharge of dredged or fill material into navigable waters. The term "navigable waters" was defined in the FWPCA to mean "the waters of the United States, including the territorial seas." The role of administering the 404 permit program was given to the U.S. Army Corps of Engineers (COE) because of the COE's longstanding responsibility for regulating construction in navigable waters, under the Rivers and Harbors Act of 1899 (33 USC 401).

* Portions of the current law, including the 1977 amendments, are reprinted in Appendix 3.

The 1899 Act authorized the COE to issue several kinds of permits. Under Section 10, the Corps issues permits for construction of structures such as "piers, breakwaters, bulkheads, revetments, power transmission lines, aids to navigation," and for work such as "dredging and stream channelization, excavation, and filling."

Consideration of environmental concerns in COE permits decisions preceded passage of the FWPCA in 1972. As a result of amendments to the Fish and Wildlife Coordination Act (passed in 1934, amended since; 16 USC 661 et seq.), the COE was required to consider environmental issues in its review of permits beginning in 1968. New regulations published on December 18, 1968 defined a process called the "public interest review" to address environmental concerns.

After the FWPCA was passed in 1972, the COE initially interpreted the authority granted under Section 404 very narrowly and considered its jurisdiction under Section 404 to be the same as that established under the 1899 Rivers and Harbors Act. This definition, as formulated in 1972, included "all waters susceptible to use in their ordinary condition or by reasonable improvement for transport of interstate or foreign commerce and all waters subject to the ebb and flow of the tide." This definition did not take into account the redefinition of "navigable waters" in the FWPCA to mean "all waters of the United States."

The Natural Resources Defense Council (NRDC) and the National Wildlife Federation (NWF) filed suit against the COE for its interpretation of its jurisdiction. The NRDC and NWF were concerned that the COE's narrow

definition of jurisdiction was not consistent with the broad goals and intent of the FWPCA. On March 27, 1975 the District Court for the District of Columbia found in favor of the NRDC and the NWF (NRDC vs. Callaway, 392 F. Supp. 685). The court ordered the COE to rescind its regulations and rewrite them to reflect the broader intent and objectives of the FWPCA.

The COE expanded its jurisdiction for 404 permits in response to the court's decision and published new regulations on July 25, 1975. A schedule for expansion of the program was adopted and included three phases. During Phase I, which began immediately, the COE assumed jurisdiction over all waters included under its previous definition of navigable waters and their adjacent wetlands. At the start of Phase II, in September 1976, the COE asserted jurisdiction over primary tributaries to Phase I waters and lakes greater than five acres in surface area, plus wetlands adjacent to these waters. In July 1977, all waters of the United States were included under the 404 jurisdiction. Thus, though the FWPCA was passed in 1972, provisions of Section 404 were not fully implemented until 1977.

Regulations Governing the 404 Program

The scope of the COE's review of permit applications is, by regulation, very broad. Under Title 33 of the Code of Federal Regulations, 320.4(a), the COE conducts a public interest review:

> based on an evaluation of the probable impact of the proposed activity and its intended use on the public interest . . . . All factors which may be relevant to the proposal may be considered, among these are conservation, economics, aesthetics, general environ-

> mental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production.

Under Part 320.4(b) of its regulations, the COE specifically considers effects on wetlands. The regulations list seven values of wetlands that are to be preserved and mandates consideration of cumulative impacts. The section gives the COE the option of drawing on the expertise of other federal agencies in making technical determinations and in evaluating particular values.

Though the 404 permit program is administered by the COE, the U.S. Environmental Protection Agency (EPA) was also given an important role in the program. Under Section 404(b) of the Clean Water Act, EPA was directed to prepare guidelines to be applied by the COE during review of all permit applications for environmental factors. A proposed project that does not meet the tests required by the 404(b) guidelines can be approved by the COE only in very limited circumstances. Consequently, the 404(b) guidelines, which function as regulations, provide critical guidance for the implementation of the federal law. EPA adopted interim guidelines on September 5, 1975. These were replaced by Final Guidelines for Specification of Disposal Sites for Dredged or Fill Material published on December 24, 1980, at page 85336 of Volume 245 of the Federal Register. They went into effect on March 23, 1981.

The basic analytic structure of the 404(b)(1) guidelines is set out in Section 230.10. This section outlines four basic requirements, which are amplified in other portions of the regulations.

Section 230.10.(a) requires that discharges to waters of the United States, including wetlands, be prohibited if "practicable alternatives" exist unless such alternatives are likely to have other, more significant adverse impacts. Alternatives may include either changes in project design to avoid discharge of dredged or fill material or selection of a site that does not include waters of the United States or wetlands. The following statement (at Section 230.10.(a)(2)) defines "practicable alternatives."

> 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.

The presumption expressed in the guidelines is that practicable alternatives to discharge of dredged or fill material to wetlands always exist, unless explicitly demonstrated to be otherwise.

Section 230.10(c) prohibits discharges that "will cause or contribute to significant degradation of the waters of the United States." Extensive tests and methods of analysis pertaining to this section are contained in the regulations, in Subparts B through G. Significant adverse effects are defined as:

> (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 [i.e. wetlands]

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life . . . .

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability . . . .

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

Section 230.10(d) requires that any permitted discharge be undertaken only after "appropriate and practicable steps have been taken . . . (to) minimize potential adverse impacts of the discharge on the aquatic ecosystem."

The guidelines detail how different factors should be analyzed, but speak only in general terms to the main issues. The new guidelines differ from earlier versions in several ways, most notably in omitting the requirement that an applicant demonstrate the "need" for any proposed activity. The definition of "practicable alternatives" has also been simplified, and "cost" has been added as an important factor.

Under Section 404(c) of the Clean Water Act, EPA was also given the power to veto any decision made by the COE to issue a permit. The veto may be applied either to permit applications or permits that have been issued. EPA has exercised this power only very rarely.

Legislative Changes Under the 1977 Clean Water Act

The most recent legislative changes to the 404 program were enacted in 1977 with passage of the Clean Water Act (P.L. 95-217). Several provisions were added to Section 404. A nationwide authorization, which

eliminated the need for permits, was given to some activities, particularly those related to agriculture and silviculture, in Section 404(f). The COE was authorized for the first time to issue general permits to allow specific kinds of discharges identified in certain areas to be undertaken without need for individual permits, in Section 404(e).

The Clean Water Act also allowed the states to assume responsibility for much of the administration of the 404 program in areas that were not included under the COE's 1972 definition of navigable waters, in Sections 404(g-1). However, the states were not given the flexibility to follow a structure different from that used by the federal agencies. This option has proved to be unattractive to the states. No state has yet assumed the 404 program.

Participation of Federal Resource Agencies

The participation of two federal resource agencies in the permit program is mandated by the U.S. Fish and Wildlife Coordination Act (FWCA, 16 USC 661 et seq.) One objective of the FWCA was to provide for consideration of impacts on fish and wildlife values as well as other factors in COE decisions on projects. The FWCA calls for review of projects affecting waterways by the U.S. Fish and Wildlife Service (USFWS) and the state agency responsible for habitat management before authorization by the Corps of Engineers. Under the provisions of Executive Reorganization Plan Number 4, the National Marine Fisheries Service (NMFS) also reviews permit applications.

Role of the States Under Federal Laws

The states participate in the review of 404 permits under several federal authorities.

The U.S. Congress gave each state a veto over the issuance of federal permits for discharges under the Clean Water Act in Section 401. Before a permit may be issued under the Act, the state must certify that the activity to be permitted will not violate state water quality standards or other applicable state laws. The state is given up to one year to make each determination. The Alaska Department of Environmental Conservation (ADEC) has the authority to certify permits for the State of Alaska.

The federal Coastal Zone Management Act (FCZMA, P.L. 92-583, amended in 1976 and 1980) provides authorization and funding for states to develop and implement coastal management programs tailored to their individual needs and encompassing national objectives. Once state programs are developed and approved, Section 307 of the FCZMA requires most federal actions to be consistent with the state programs. The states may review proposed federal actions, including grant proposals, regulations, and permit applications, to determine whether they are consistent with state programs. In Alaska, 404 permit applications for activities within the coastal area are subject to "consistency review" coordinated by the Division of Policy Development and Planning (DPDP). Proposed uniform procedures for permit processing will, if adopted, allocate this function among several agencies.

As mentioned previously, the Fish and Wildlife Coordination Act requires that the fish and wildlife management agency in each state be consulted before the COE may issue a permit. The Alaska Department of Fish and Game (ADFG) fulfills this responsibility. Though the COE must consider comments provided by ADFG in its determinations, the consultation provisions of the FWCA do not constitute a state veto power.

Land Acquisition Programs

The federal government first recognized the value of wetlands as habitat with passage of the Migratory Bird Conservation Act of 1929 (16 USC 715a-715s) and the Migratory Bird Hunting and Conservation Stamp Act of 1934 (16 US 718). These acts created the first of several federal programs to acquire important habitat areas and authorized the U.S. Fish and Wildlife Service (USFWS) to purchase lands or easements on land to preserve important waterfowl habitat. The program is funded by stamps required of hunters and by a loan program created in 1961. Over 2.2 million acres of waterfowl habitat were acquired between 1935 and 1976.

The USFWS currently administers several refuges primarily for water birds in Alaska, including the Clarence Rhode and Izembek National Wildlife Refuges. The refuges include extensive wetlands. The USFWS has identified other critical habitat areas and recommended areas for acquisition. Lands for additional refuges were withdrawn under the Alaska lands bill passed by the U.S. Congress in 1980. The current policy of the USFWS is to purchase lands only when other means of protecting wetlands are not available.

The Land and Water Conservation Fund was established under authority of the Land and Water Conservation Fund Act (16 U.S.C. 460L-4 to 460L-11) to provide funds for purchase of fee and easement interests in lands for protection of fish and wildlife and endangered species, as well as for other reasons. Some of these funds are available to the USFWS and other agencies for land purchase. Some funds are also available to the states.

Under the Water Bank Program, the U.S. Department of Agriculture is authorized to enter into contracts with landowners for preservation of wetlands determined to be important for nesting and breeding of waterfowl, under authority of the Water Bank Act of 1970 (USC 1301-1311). The owner receives annual payment for protecting wetlands at a rate fixed at the date of contract. The fixed rate has resulted in a high rate of contract cancellation. The program applies only to certain types of inland freshwater wetlands.

Executive Order On Wetlands

The executive branch of the federal government has taken steps to minimize damage to wetlands resulting from government development activities. Executive Order No. 11990, reprinted in Appendix 8, was signed on May 24, 1977. It requires each federal agency to determine how its activities affect wetlands and to revise regulations to minimize adverse impacts on wetlands. This is an important action, since many wetlands have been destroyed with federal assistance or subsidy in efforts to develop agricultural land, construct flood control projects, and build roads and many other kinds of projects. The order applies only to federal projects.

STATE AUTHORITIES

Regulations of the Alaska Coastal Management Program and provisions for designation of state game refuges, sanctuaries and critical habitats are two state authorities that most directly address protection of wetlands. Several other existing environmental protection and resource management laws pertain directly or indirectly to wetlands.

Department of Environmental Conservation

The Alaska Department of Environmental Conservation (ADEC) is responsible for environmental protection. Title 46, Chapters 3 and 35, of the Alaska Statutes includes authority that pertains to wetlands. Article 1 of Chapter 3 is the Declaration of Policy and states:

> It is the policy of the state to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the State and their overall economic and social well-being (AS 46.03.010)

Article 2 defines the powers of ADEC and conveys broad authority to promulgate regulations for control of all types of pollution.

AS 46.03.020 states that ADEC may

> adopt regulations necessary to effectuate the purposes of this chapter, including, by way of example and not limitation, regulations providing for
>
> > (A) control, prevention and abatement of air, water, or land or subsurface land pollution . . . .
> >
> > (H) such other purposes as may be required for the implementation of the policy declared in Section 10 of this chapter (AS 46.03.020)

Article 3 gives ADEC more specific authority for adoption of pollution standards for water to "determine what qualities and properties of water indicate a polluted condition actually or potentially deleterious, harmful, detrimental, or injurious to the public health, safety or welfare, to terrestrial and aquatic life or their growth and propagation, or to use of waters for domestic, commercial, industrial, agricultural, recreational, or other reasonable purposes" (AS 46.03.050).

Water quality standards adopted pursuant to Article 3, adopted as regulations (18 AAC 70), specify maximum amounts of certain pollutants that are allowed for waters to be suitable for swimming, drinking, and other uses. The standards also specify the minimum amounts of dissolved oxygen necessary to sustain aquatic life. The current or potential uses of all waters of the state are identified. As a result, maximum levels of pollutants allowed for each body of water in the state have been specified.

The water quality standards are applied to decisions on wetlands development, as ADEC reviews 404 permit applications to ensure that proposed projects will not cause violation of the water quality standards. ADEC also considers the ACMP standards in making decisions on 401 certifications. At present, ADEC has not decided whether it is appropriate for wetland values to be specifically protected through 401 certification and whether to develop guidelines to that effect.

Alaska Coastal Management Program

The Alaska Coastal Management Act (ACMA), contained in Chapter 40 of Title 46 of the Alaska Statutes, authorizes both planning and regulatory activities applicable to wetlands. Standards for the Alaska Coastal Management Program (ACMP) have been adopted as regulations by the Coastal Policy Council (CPC). The standards of the ACMP that provide for wetlands protection are found in two sections.

The Coastal Development Standard (6 AAC 80.040) states that the placement of structures and the discharge of dredged or fill material into coastal waters must, at a minimum, comply with the regulations of the COE (33 CFR 320).

The Standards for Resources and Habitats (6 AAC 80.130) define wetlands and tideflats as one of the habitat types addressed by the ACMP. The standards provide that the identified habitats, including wetlands:

> must be managed so as to maintain or enhance the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources.
>
> (c) In addition to . . . (b) of this section, the following standards apply . . . .
>
> (2) estuaries must be managed so as to assure adequate water flow, natural circulation patterns, nutrients, and oxygen levels, and avoid the discharge of toxic wastes, silt, and destruction of productive habitat;
>
> (3) wetlands and tideflats must be managed so as to assure adequate water flow, nutrients, and oxygen levels and avoid adverse effects on

> natural drainage patterns, the destruction of important habitat, and the discharge of toxic substances . . .

The standards also specify conditions under which variances to the habitat standards may be granted.

The substantive standards of the ACMP are implemented in three ways. Detailed coastal management plans are prepared by local districts. The local programs focus on local needs and issues, but must incorporate the state standards.

The ACMP's "state consistency" provisions require state agencies to carry out both planning and regulatory actions that affect the use of coastal resources in a way that is consistent with both the ACMP standards and any applicable district coastal management program. This policy is implemented through the provisions of Executive Order 54, issued on April 23, 1979. This is a far-reaching authority, since it requires consideration of uniform coastal management standards and plans in actions taken by several different agencies. Review and consideration of the standards is carried out by the state agency responsible for undertaking each specific regulatory action.

The third mechanism for implementation of the ACMP standards is through the state's review of federal actions for consistency with the state program. This review is currently carried out by the Division of Policy Development and Planning (DPDP), under Section 307 of the federal Coastal Zone Management Act, and is described in detail in the preceding section on federal authorities.

Department of Fish and Game

The Alaska Department of Fish and Game has a major role in the administration of state game refuges, state game sanctuaries, and critical habitat areas. Title 16, Chapter 20 of the Alaska Statutes establishes the process for designating state game refuges. Through this process eight game refuges have been designated, including those at Palmer Hay Flats, the Mendenhall Wetlands, Susitna Flats, and Trading Bay. The statute provides significant protection for these areas but allows lands to be made available for certain uses. Articles 2 and 3 of AS 16.20 establish the Walrus Islands and McNeil River State Game Sanctuaries. Article 5 establishes numerous critical habitat areas and provides for ADFG approval of some land use actions, such as disposal of state land, in these areas. In addition, AS 16.05.870 authorizes ADFG to regulate activities proposed for streams supporting anadromous fish.

Department of Natural Resources

The Alaska Department of Natural Resources (ADNR) exercises authorities in several areas that are related to wetlands development decisions. ADNR has authority over appropriation and use of all waters of the state. ADNR has land management authority on state land and almost all of the tidelands in the state. ADNR is responsible for classifying state land and selecting lands for disposal to the public through sales, auctions, and other means.

The Water Use Act (AS 46.15) gives ADNR authority to manage state waters for the public good. The purpose of the Act is to govern appropriation of water for water supply and to establish a system for assignment of water rights (72 AAC). Though the statute does not refer to wetlands, the language referring to appropriation of water can be interpreted to refer to activities such as draining of wetlands.

ADNR is responsible for administering the permits and leases for the state's tidelands and submerged lands (AS 38.05). Tidelands and submerged lands extend from mean high tide to three miles offshore, measured from ordinary low water. Most tidelands in Alaska are owned by the state. Tidelands are made available for public use through short or long-term leases or permits. Permits may be granted for activities of short duration when the environmental impacts will limited and no permanent structures will be erected. Leases are issued for more significant actions, such construction of docks.

ADNR is authorized to conduct resource analyses, determine values and classifications, and to prepare land and water use plans for state lands (AS 38.04.060 and .065). ADNR also has proprietary authority over state lands and may sell, trade, or convey them to municipalities, as well as retain lands in a public interest classification. Land retained by the state as public interest lands may include "watershed land" and "wildlife habitat land" (11 AAC 55.220 and 55.230), among numerous other classifications. Land within both of these categories is subject to certain use limitations. Either category could be applied to wetlands to protect important values, but there is no separate category for wetlands. ADNR also has the

authority to develop management strategies for lands and to place conditions on the use of land made available through land disposal programs.

LOCAL GOVERNMENT AUTHORITIES

Organized local governments have substantial authority to plan for and control land use under Title 29 of the Alaska Statutes. Zoning powers provide the most important local land use regulation. Under AS 29.33.090(b), zoning ordinances may restrict:

(1) land use
(2) building location and size
(3) the height and size of structures
(4) the number of stories in buildings
(5) the percentage of a lot which may be covered
(6) sizes of open spaces
(7) population density and distribution

Zoning ordinances are one means of assigning appropriate uses in a general way to wetland areas. Though zoning may be used for this purpose, this has not generally been done in Alaska.

Subdivision regulations may be adopted by a local government to control the size and arrangement of lots, streets and utilities. AS 29.33.150, on platting jurisdiction and power, states

> The planning commission acting as the platting board has jurisdiction over platting and shall adopt and publish rules and regulations to implement this power. Jurisdiction includes, but is not limited to, the control of
>
> (1) form, size and other aspects of subdivisions, dedications, and vacations of land;

(2) dimensions of lots or tracts

(3) street width, arrangement, and right-of-way, including allowance for access to lots and installation of street paving, curbs, gutters, sidewalks, sewers, water lines, drainage, and other public utility facilities and improvements.

The authority to approve subdivisions could be very important to wetlands management. Whether a given wetland may be responsibly developed for residential purposes may depend to a large degree on how the development is laid out and what provisions are made for open space and drainage. Some of the conflicts between private landholders and regulatory agencies have occurred as a result of poorly designed subdivisions.

The third power available to local governments is the power to regulate activities within their jurisdictions, established under AS 29.48.035. The law states:

> A municipality may regulate the operation and use of its public rights-of-way, public facilities and services. It may also regulate the following . . . .
>
> (14) building, housing, and related codes, which may be provided by cities within cities or . . . by first or second class boroughs.
>
> (15) condemnation and abatement of public nuisance and hazards
>
> (16) garbage and solid waste collection and disposal
>
> (17) water pollution control
>
> (18) air pollution control. . .
>
> (19) other powers and functions affecting the general health, safety, well-being, and welfare of its inhabitants.

All of these powers may be administered by municipalities; however, boroughs must satisfy certain conditions before assuming these powers.

Chapter Five: How Federal Regulation of Discharges to Wetlands Works

The process of obtaining approval for an individual 404 permit to discharge dredged or fill material into wetlands is formally begun when a prospective developer submits a completed application form to the U.S. Army Corps of Engineers (COE). The COE administers the 404 program. The application form is two pages long and must be accompanied by clear and reproducible drawings of the proposed project. A copy of the form is printed in Appendix 6.

Some assistance is currently available to applicants in preparing applications and designing their projects so that they are acceptable. In some cases, submission of an application is preceded by one or more informal meetings or telephone conversations between the applicant and the COE. Three general types of assistance can be provided to applicants: aid in determining whether an application is complete, aid in determining whether a proposed site is a wetland and subject to the 404 program, and limited assistance in choosing an appropriate design and site. Written assistance from the COE consists of a pamphlet that describes some aspects of the program and provides general information about how to fill out applications. Applicants who are able to visit the COE's office in Anchorage are able to obtain the most complete assistance in preparing their applications.

For large or complex projects, the COE, the applicant, or the Permit Information Centers operated by the Alaska Department of Environmental Conservation (ADEC), may arrange conferences between the applicant and

all agencies that review the application to identify and try to resolve any problem areas.

The Permit Information Centers' assistance to applicants usually occurs at an early stage in the permitting process. The centers help developers determine which permits they will need for their projects. The centers refer applicants to appropriate state or federal agencies for detailed or technical assistance.

The COE reviews each application to ensure that necessary information and adequate drawings have been provided. For projects in the coastal area, the COE checks to see that the applicant has submitted a certification of consistency with the applicable local and/or state coastal management program. After a completed application is supplied, the COE prepares a short document called the "Public Notice," which provides notification of the application to other agencies, local governments, interest groups, interested individuals, and owners of land adjoining the location of the proposed project. The public notice provides a brief description of the proposed project, its location, a preliminary determination of the need for an environmental impact statement, and other information. Maps and drawings of the project are also distributed. The notice specifies that comments will be received by the COE, ADEC, and the Alaska Division of Policy Development and Planning (DPDP). Under recently adopted joint notice procedures, the COE also prepares the state's published notice, which is published in a newspaper from the area where the activity is proposed.

FEDERAL AGENCIES

Several federal agencies review the proposed projects requiring 404 permits, under several authorities. The U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS) are the primary agencies that review projects for their impacts on wetlands.

U. S. Environmental Protection Agency

The U.S. Environmental Protection Agency (EPA) reviews projects against the guidelines it developed pursuant to Section 404(b) of the Clean Water Act. The guidelines are found in Title 40 of the Code of Federal Regulations, Part 320, and were published on December 24, 1980. They are printed in Appendix 5. These guidelines replace most portions of the interim guidelines adopted by EPA on September 15, 1975.

Since mid-1979, most projects in Alaska have been reviewed in Anchorage at the Alaska Operations Office of Region X of EPA. Two persons are currently responsible for review of all 404 permit applications in the state.

When EPA issued objections to projects, in the cases examined for this report, they were most often based on a finding that the proposed project was not "water-dependent." EPA's approach to protecting wetlands and other important aquatic resources through the 404 program is to avoid all unnecessary development in wetlands. According to EPA's guidelines,

before a permit application can be approved, the applicant must demonstrate that there are no less environmentally-damaging alternatives to a project proposed to be located in wetlands. For projects that are not water-dependent, EPA further requires the applicant to show that there are no other alternatives. EPA considers residential development not to be water-dependent.

In practice, applicants, especially developers without extensive experience with the permit application process, do not attempt to explain whether their projects are water-dependent or why there are no alternatives. This information and analysis is not required, requested, or recommended in the application form provided by the COE. No explanation of these tests is given to the applicant. Consequently, it is not surprising that many applicants do not mention these issues.

Another important factor considered by EPA is whether the cumulative effects of development will endanger an ecosystem. EPA may recommend denial of a permit because of the possibility that a pattern of similar development could cause significant disturbance. EPA does not usually specify mitigation measures for projects.

Any comments or objections by EPA are weighted heavily by the COE. In cases of disagreements, EPA, like other federal agencies, may elevate the level of review above the District Engineer under certain circumstances outlined in a Memorandum of Agreement between the Secretary of the Army and the Administrator of EPA adopted in March 1980. Unlike other federal agencies, however, if the COE issues a permit over EPA's

objection, EPA may veto the permit as specified in Section 404(c) of the Clean Water Act. (Regulations outlining the procedures to be followed are contained in 40 CFR 231.) This has occurred in only one instance during the history of the program.

U.S. Fish and Wildlife Service and National Marine Fisheries Service

The U.S. Fish and Wildlife Service (USFWS), an agency of the federal Department of the Interior, and the National Marine Fisheries Service (NMFS), an agency of the federal Department of Commerce, review 404 permit applications as a result of the provisions of the federal Fish and Wildlife Coordination Act (FWCA).

The USFWS maintains a large staff in Alaska, organized into several different functional groupings and with a regional structure. Their responsibilities include ecological research and management of refuges as well as review of COE permits. COE permits are reviewed in the three field offices in Anchorage, Juneau, and Fairbanks. As a result, there is some variability in the issues addressed and focus of reviews between the different regions. The findings are reviewed and formally submitted to the COE by the Regional Director.

As a wildlife management agency, the USFWS focuses on effects of proposed projects on biological systems in its reviews. The USFWS has primary responsibility for migratory birds that use nesting and resting grounds in Alaska. Its reviews reflect this and often deal with effects

of proposed projects on birds. The USFWS often also addresses the general values of an ecosystem. Appropriate measures to mitigate effects of a project are often suggested. No review procedures have been published as regulations for the USFWS, though the COE and EPA regulations, the Navigable Waters Handbook, and resource and scientific materials are consulted.

USFWS is currently taking a conservative stance and objecting to development that is not water-dependent in its review of projects in areas deemed to be critical. The USFWS is seeking to avoid numerous small developments that are not individually harmful but that, collectively, cause major adverse impacts. In its evaluation of water-dependent projects and concern with cumulative effects, USFWS follows an approach similar to that of EPA. The USFWS has advocated use of planning to resolve conflicts in critical wetland areas and to expedite the regulatory process. The USFWS has articulated this view in its responses to applications for small developments in areas with critical wetlands, such as the Kenai River corridor, and in other settings.

The National Marine Fisheries Service (NMFS) has responsibility for marine, anadromous and estuarine species and their habitats and emphasizes commercially important species and marine mammals. Most reviews are carried out by the field offices in Juneau and Anchorage. The reviews of wetlands projects generally focus on anadromous species and any habitat issues not addressed by other agencies.

NMFS recently issued a national policy setting a goal of attaining zero net loss of habitat by 1985. This is interpreted to mean that NMFS will strive to protect important habitats. In keeping with the national policy, NMFS in Alaska has increased its level of participation in federal projects affecting habitat and in the Alaska Coastal Management Program. As yet, the effect of this new policy on NMFS' role in the 404 program is uncertain.

STATE OF ALASKA

Under federal and state authorities outlined in Chapter Four, several state agencies participate in the preparation of two formal certifications and advisory comments for COE permit applications. The role of each agency is outlined in this section.

Department of Environmental Conservation

The Alaska Department of Environmental Conservation (ADEC) is responsible for providing the state's Certificate of Reasonable Assurance that proposed projects will not violate state water quality standards or other applicable state laws, as required by Section 401 of the Clean Water Act. Initial review, discussion with the applicant, and site inspection are performed by permit reviewers in the regional offices in Juneau, Anchorage, and Fairbanks. Technical assistance on larger projects is provided by the central office in Juneau. ADEC regulations require a thirty-day period for public comment. Staff findings and recommendations are transmitted to the central office in Juneau for approval by the Deputy Commissioner and submission to the COE.

ADEC's review covers several areas. The first is whether the Alaska water quality standards are likely to be violated by the proposed activity. This determination may be made after consultations with the Alaska Department of Fish and Game (ADFG) on possible adverse effects on aquatic habitat or with other agencies. In cases where long-term violations of water quality standards are unavoidable, the certification will be denied. ADEC does, however, grant short-term variances from the water quality standards when necessary to accommodate essential activities, respond to emergencies, or protect the public interest. Often, requirements for measures to lessen impacts, such as installation of erosion control devices or provision of sewage treatment, are included as conditions to the certification.

In addition to considering the water quality standards, ADEC reviews projects located in the coastal area against the standards of the Alaska Coastal Management Program (6 AAC 80), for two reasons. The Alaska Coastal Management Act is one of the "applicable state laws" to be considered during 401 certification. In addition, the "state consistency" provisions of the ACMP require that each state permit or authorization be consistent with the ACMP standards.

ADEC often bases conditions or stipulations in its certification on the ACMP standards. However, in those cases where certification is denied, the denial is not normally based on the ACMP standards. Under 6 AAC 80.130(d), variances from the ACMP standards designed to protect habitat (6 AAC 80.130(a-c)) may be allowed for a project if the following conditions are met:

1. There is a significant public need for the proposed use or activity.

2. There is no feasible prudent alternative to meet the public need for the proposed use . . .

3. All feasible and prudent steps to maximize conformance with the [habitat] standards . . . will be taken.

ADEC believes that the balancing decisions required by these standards are difficult to make in the absence of methods for cost/benefit analysis that are universally accepted and applied by all state agencies. ADEC has worked on preparation of guidelines to interpret both the water quality standards and the ACMP standards, but has not completed the project. More specific definition of the balancing standard may be needed before the provisions of ACMP can be routinely implemented by ADEC.

During the review process, protection of wetland values per se is not considered apart from the requirements of the ACMP standards. Consequently, 401 certification cannot currently be seen as a state wetlands protection program.

Division of Policy Development and Planning

The Division of Policy Development and Planning (DPDP) of the Office of the Governor was designated by Executive Order 54 as the agency responsible for certifying that federal actions within the coastal area are consistent with the ACMP, as required under Section 307 of the federal Coastal Zone Management Act. DPDP issues "consistency determinations" for 404 permit

applications for projects in the coastal area. The State Clearinghouse, located within DPDP, coordinates the logistics of the review and solicits comments from all state agencies, local governments, and other interested parties. The Office of Coastal Management (OCM), a part of DPDP, carries out the substantive analysis for the review.

OCM receives the comments submitted on each project and develops a single response based on the comments received, any applicable district coastal management program, and the ACMP standards. OCM's finding is reviewed and signed by the Director of DPDP and sent to the COE. If either the consistency certification or the 401 certification is denied, the COE cannot issue a permit.

Under the current system, DPDP and ADEC separately consider whether an application for a 404 permit within the coastal area is consistent with the ACMP standards. This occurs because legal provisions for certifying the consistency of state approvals and federal approvals are different. For all state licenses, permits, or other approvals, including the decision on 401 certification, the state agency that issues the permit also determines whether the proposed project is consistent with the ACMP. For all federal licenses, permits, or other approvals, DPDP makes a determination, as described in this chapter. Because 404 permits are federal permits that also require a certification by the state under Section 401 of the Clean Water Act, two consistency determinations are made. ADEC certifies the consistency of its state 401 decision and DPDP certifies the consistency of the federal 404 permit decision. DPDP and ADEC have worked out procedures to ensure that conflicting stipulations

are not issued and that a comprehensive interpretation of ACMP occurs. This division of responsibility is likely to change in the near future, however, as the state administration is currently considering adopting uniform procedures for permit reviews. The proposed procedures allocate responsibility for federal consistency decisions among ADEC, ADNR, and DPDP.

Department of Fish and Game

The Habitat Protection Section of the Alaska Department of Fish and Game (ADFG) reviews permit applications and prepares advisory comments to be considered by ADEC in 401 certifications, DPDP in consistency decisions, and the COE in permit decisions. The reviews are carried out by the regional offices of ADFG in Anchorage, Juneau, and Fairbanks, in consultation with biologists in other parts of the state.

ADFG usually first reviews permit applications to determine whether proposed projects are in or adjacent to anadromous fish habitats. If so, ADFG will recommend that a new site be found for the project and will work with the applicant to identify an alternative site. ADFG will analyze any other known habitat values in the area and recommend measures needed to mitigate impacts. ADFG also frequently requests restrictions on work during seasons when fish would be disturbed. ADFG will usually not object to a proposed project unless it is located in an area known to be an important habitat.

Several other state and federal agencies, including the U.S. Coast Guard, the Alaska Department of Natural Resources, and the Heritage Conservation and Recreation Service, also review 404 permits and submit comments. Since these reviews do not address wetland values and have not generally been a source of conflict within the 404 program, they will not be discussed here.

LOCAL GOVERNMENTS AND THE PUBLIC

Public notices are distributed for review by the public and any local government, as well as state and federal agencies. Comments from the public are not received in the majority of cases. The public notices are considered by some to contain too little information for meaningful review. Public comments usually have a decisive effect on the review and decision process only if they convey new information. Those that express only the opinions of the authors do not appear to be heavily weighted by the COE. Local governments typically respond through their planning and zoning commissions or planning departments. In cases examined, there were few objections to projects stated by local governments, though this may not be not the case in all parts of the state.

TIME REQUIRED FOR REVIEWS

The time required for review of projects varies significantly, sometimes even within a single agency. In the Southcentral region, ADFG is usually the first agency to send a response to the COE, submitting comments well

within the 30-day public notice period. In other parts of the state, ADFG will usually require the full 30 days. During the first year of making consistency determinations, DPDP completed its review within 30 days roughly eighty percent of the time. Since May 1980, DPDP has not issued a consistency determination until after ADEC has issued a decision on the 401 certification. This was done because ADEC's certification was, by regulation, part of the consistency decision. Before May 1980, ADEC was usually the last agency to respond, with an average processing time of 60-90 days and with occasionally longer periods for controversial permits. To incorporate ADEC's response, DPDP's processing time has been increased to an average of 72 days. The generally longer period required for ADEC's review results in part from differences between ADEC's role and that of other agencies. ADEC, unlike other reviewing agencies, has a 30-day public comment period. Also, ADEC, like DPDP, must render a formal certification, rather than prepare advisory comments. However, the length of the period required for ADEC's review has been a factor in delaying decisions on many permits.

Though the state agencies, rather than the federal agencies, are more often responsible for extending the review period, they object to permit issuance less often. State regulations do not contain as strong a presumption that placement of fill in wetlands is to be avoided as federal regulations do. However, state agencies very often impose important stipulations to mitigate impacts.

CORPS OF ENGINEERS' DECISIONS

After the COE receives comments on a project, it must analyze the infor-

mation presented and reach a decision. The Alaska District of the COE relies to a large extent on the resource agencies for information and findings on wetland values. When the COE receives objections from agencies (or others), its policy is to give the applicant an opportunity to respond to the objections. The COE does this by sending a photocopy of each statement of objection to the applicant along with a letter suggesting that it is to the applicant's advantage to resolve any problems directly with the objecting party. It is generally left to the applicant to resolve objections and accept or modify sometimes duplicative and occasionally conflicting stipulations from the various agencies. In some cases, the COE may sponsor a meeting with representatives of the agencies to resolve differences.

The COE's policy on evaluating review comments has changed during the last two years. Before 1979, the Alaska District of the COE had never denied a permit application. When objections were received, the COE would cease processing and ask the applicant to resolve any difficulties. In most cases, until and unless the objections were resolved, no action was taken to either issue or deny the permit application. In some cases, the COE would ask the applicant to withdraw the application. This policy has contributed to the history of very long processing times for permits in Alaska.

Since 1979, the COE's policies and practices have been changing. Beginning in 1979, the COE began to complete review on projects where objections were stated and to deny some permits. In 1980, the COE tightened its policy on extending the comment period beyond the required 30 days. In

the past, the COE extended the review period upon request. In an attempt to be more responsive to the public, the COE no longer grants extensions without substantial justification.

In cases where objections are stated and the applicant and the resource agencies are not able to come to agreement, the COE will usually deny the permit. The COE evaluates whether an objection is within the authority of the agency stating it. In cases where the District Engineer makes a determination that a permit should be issued in spite of objections, the federal agencies may elevate the level of review of the decision. Procedures are specified in Memoranda of Understanding between the federal agencies. The COE may not issue a permit without the approval of the State, in the form of the 401 certification and, where applicable, the ACMP consistency certification.

Chapter Six: Strategy for Improving Wetlands Management

The existing wetlands management process in Alaska could be improved in both procedural and substantive ways. Different approaches, including legislative changes to regulatory requirements, adoption of a separate state program, and changes in the procedures of the current program, could be taken. A satisfactory approach must meet the needs of applicants for a less arduous regulatory process and of the public at large for effective protection of important public values of wetlands. This is in keeping with the coastal management program's objective of reconciling layers of government into a unified approach that is comprehensible, responsive to the public, and successful in protecting the state's coastal resources.

In the last several months, the government agencies involved in wetlands management have begun to work on improving the system. One important action was the establishment of the Alaska Wetlands Task Force (AWTF) in October of 1980. The AWTF, chaired by the District Engineer, is composed of representatives of environmental groups, private industry, state and federal agencies, and local governments interested in wetlands management. Its statement of purpose is printed in Appendix 7. The AWTF provides an important forum for identification and discussion of important wetland issues and for coordination of efforts to resolve these issues. The Office of Coastal Management expects to work closely with the AWTF on the recommendations contained in this section. The recommendations were endorsed by the AWTF at its meeting in January 1981 and by the Coastal Policy Council at its meeting in February 1981.

PROCEDURAL CHANGES

Resource managers and developers agree that the procedures of the existing regulatory system should be improved. Areas in which there is substantial agreement are as follows:

1. The current regulatory process takes too long.

2. The applicant does not receive adequate assistance in preparing an acceptable application or in understanding and dealing with the project review process.

3. The requirements of the regulatory program are not generally understood by the public or potential developers. The tests required by state and federal regulations are not explained. The reasons for regulation and the importance of the natural values of wetlands are poorly understood.

4. The capability of the U.S. Army Corps of Engineers to enforce the federal regulatory requirements is inadequate to ensure that all required permits are obtained and that stipulations contained in permits are carried out.

1) Length of processing time

All government agencies involved in the 404 permit program are sensitive to the need for expedited processing of permits. The COE has

implemented a new policy that requires substantial justification for requests by federal agencies or others to extend the 30-day comment period. ADEC, COE, and DPDP have implemented procedures for more timely issuance of public notices.

Recommendation: The agencies providing state certifications for 404 permits should adopt and follow review timetables that are compatible with those of the COE, so as to avoid introducing any additional delay. The COE should continue to enforce its policy limiting extensions of the 30-day comment period.

2) Assistance to applicants

Some applicants need additional assistance in preparing applications and designing projects. Explanatory materials currently available from EPA and COE are not detailed enough and do not provide guidance in addressing the criteria important during reviews.

The COE and ADEC have made some efforts to provide additional assistance. The COE's Regulatory Functions Branch has considered preparing materials explaining the COE's procedural and substantive requirements, but recently postponed this effort, pending action on proposed revision of its regulations. ADEC has undertaken a $122,000 project to produce a manual of recommended management practices and supporting educational and informational materials. The project has been funded under a planning grant from the EPA.

Recommendation: Efforts to prepare assistance materials should be supported by all parties involved in wetlands management and coordinated by the AWTF. Materials should explain the goals and requirements of the 404 permit program and provide background information on the important wetland values that need to be protected. The focus should be on typical Alaskan conditions and projects. Conditions and stipulations typically included in permits should be evaluated and, if found to be effective, clearly explained to developers. Suitable design and construction techniques should also be solicited from organizations and individuals in both the private and public sectors that have knowledge and experience in Alaskan wetlands development.

3) Need for a single point of contact

Though the 404 permit program ultimately results in issuance of a single permit, an applicant currently may have to deal separately with up to eight different agencies during the review process. More coordination is needed during an individual permit review. Both the state and the COE are currently looking into ways to allow the applicant to deal with a single contact agency.

Recommendation: The Corps of Engineers should serve as the single point of contact for the applicant. The COE, in cooperation with ADEC, should offer increased opportunity for conferences between applicants and resource agencies, before applications are submitted for controversial projects. The COE should minimize unnecessary or

confusing contacts between applicants and reviewing agencies. After the comment period, the COE should review and analyze all comments and stipulations from federal agencies and draw up a single letter to the applicant outlining any objections. This would eliminate confusion now experienced by applicants who receive a separate letter, and sometimes a separate set of stipulations, from each agency. The COE should coordinate meetings to resolve differences.

The state should increase coordination of its response to the COE. Efforts to work out a unified state response that covers consistency with ACMP, the state certification of reasonable assurance under the Clean Water Act, as well as the concerns of other agencies, should be continued. Inclusion of proprietary decisions (such as tidelands leases) in a unified response should be investigated.

4) Public understanding of the regulatory program and values of wetlands

A few efforts have been made to increase public awareness of the importance of wetlands and the existence of the regulatory requirements. COE staff have recently assisted in the preparation of articles for publication in a magazine widely distributed among those involved in the construction industry.

Recommendation: A coordinated public education program should be initiated by the government agencies involved in the 404 permit

program with participation of other interested individuals and groups. The program should be coordinated by the Alaska Wetlands Task Force. OCM should contribute financial support to such a project.

5) Enforcement capability of the U.S. Army Corps of Engineers

The COE offered a training course for personnel of other agencies on the identification of wetlands during the summer of 1980. This training resulted in the certification of personnel from other agencies as capable of performing on-site wetlands determinations for the COE. This has greatly increased the availability of determinations to the public.

Recommendation: The COE should expand its program to provide for cooperation in inspections both before and after construction. Personnel from state and federal agencies with field offices and from local governments should be trained to provide information and materials on the 404 program, to inspect sites, and to conduct surveillance investigations. Emphasis should be on prevention of improper actions. Increased familiarity of staff of local governments with the 404 program could aid in prevention of unauthorized activities.

DEVELOPMENT OF A PLANNING AND CONFLICT RESOLUTION PROCESS

Administrative changes in the 404 permit program, dissemination of additional explanatory materials, and improved enforcement could do much to improve wetlands management in Alaska and decrease the burden placed

upon developers. The use of case by case permit decisions as a management technique does, however, have limitations. It is difficult to balance resource preservation and development interests over the course of numerous permit reviews. Cumulative impacts are difficult to predict or control. Acquisition of meaningful data on the value of wetlands resources is not facilitated. For these and other reasons, a fundamentally different approach to resolving conflicts over proper use of wetlands may be more appropriate in some areas.

An approach that could serve to resolve more fundamental issues related to wetlands management is the development of "wetlands management plans" for areas where both important resource values and development pressures are present. A wetlands management plan would be based on an analysis of the locations and natural resource values of the wetlands as well as the development needs of a particular area. The plan could specify appropriate uses and management practices for wetlands within a given area. For areas where development was to be allowed in wetlands, the plan could satisfy some or all of the legally established informational requirements of the agencies with responsibilities under the 404 program. In addition, the scope of the plan could be expanded to address other regulatory requirements or issues, as appropriate.

Wetlands management plans could have numerous advantages. They could outline the kinds of development permissible in wetland areas. This would aid developers in planning projects that can be approved and increase the predictability of the permit program. Review and approval of projects consistent with the plans could be expedited. A wetlands

plan could also serve as a common statement of understanding between agencies and allow local comprehensive plans and zoning ordinances to be consistent with very real, yet previously undocumented, restrictions imposed by federal law. Cumulative impacts of small developments could be addressed through the plans. Clear designation of critical wetlands where development is not recommended would permit the state or the local government to pursue land exchange or land acquisition efforts.

Wetland management plans for coastal areas can appropriately be prepared as components of district coastal management plans. The ACMP is an existing vehicle for incorporation of concerns of many different groups and of the several levels of government into a plan subject to the federal consistency provisions of the federal Coastal Zone Management Act. The guidelines of the coastal management program currently provide for analysis of resource values, consideration of different kinds of development needs, and preparation of management plans. The process currently employed may need to be modified to allow for more formal participation by agencies involved in wetlands regulation.

Some funding could be made available through the ACMP to support such programs. Other vehicles that could be considered for development of wetlands management plans might include state water quality management plans and local comprehensive plans.

Though virtually all those involved in wetlands management agree that development of wetlands management plans has potentially great rewards, numerous issues remain to be resolved before the usefulness of the approach can be evaluated.

For a wetlands management plan to successfully identify areas that should be preserved to protect important resource values, as well as areas where needed development could be allowed, basic information on the locations and values of wetlands will have to be obtained. For many parts of Alaska, very little data currently exists. To acquire the necessary data will require significant periods of time and expenditure of funds.

A successful wetlands plan must be fully approved and endorsed by the local government and all the government agencies that are involved in the 404 program, and understood and accepted by the public. To develop a plan that can be accepted by state, federal, and local government agencies will require use of a planning process under which all interests can be identified, addressed, and resolved. Such a planning process should be designed to take into account the needs of a particular area, importance of the resource, severity and history of conflicts, and the interests of the affected groups.

The Office of Coastal Management has been working with state and federal agencies to explore these issues and to determine how much impact a wetlands management plan could have on the permitting process.

Recommendations:

a) The Office of Coastal Management should continue to work with federal, state, and local government agencies to determine the extent to which planning can be used to resolve coastal development

conflicts in wetlands. Clear statements of how wetlands management plans could satisfy federal and state requirements and a process for review and approval of plans and for resolution of conflicts should be developed.

b) Federal and state agencies concerned with protection of wetland values should seek funds for assessment of wetland values and for mapping of wetlands, to allow for improved wetlands management. Where possible, these needs may be addressed using ACMP funds through the district program process.

STATE AND LOCAL GOVERNMENT LAND TRADING PROGRAM

Though the effects of wetlands regulation on private developers have not been considered in detail in this report, this issue is of great concern. Once wetlands are identified as being of critical importance and value, either through a planning or regulatory process, it is in the interest of the state to ensure that their functions are protected. In wetlands where this can be accomplished only through prohibition of development, the state may best be able to protect them through acquisition, either through purchase or through land trading.

Recommendation:

The state agencies participating in the AWTF, working in cooperation with interested local governments, should consider creation of a program for state acquisition and protection of wetlands of critical

importance. Such program might be established in the Department of Natural Resources, but should be closely coordinated with local governments. OCM should to contribute staff time and some financial support to initiating such an effort.

ADDITIONAL REGULATION OF WETLANDS

Within the coastal area, no further legal authority is needed at this time for protection of important wetlands. The state consistency provisions of the Alaska Coastal Management Act, the ACMP guidelines, and Executive Order 54 require consideration of wetland values in most state actions that pertain to the coastal area. These requirements have been in effect since July of 1979. However, the "state consistency" provisions have been adopted only recently, and the state agencies have had to analyze their own authorities and procedures and make numerous changes to incorporate these new requirements.

Recommendation: Recognizing that some time is required for the state agencies to develop new procedures and administrative staff, OCM should evaluate the effectiveness of the state consistency procedures as they pertain to wetlands.

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AAC	Alaska Administrative Code
ACMA	Alaska Coastal Management Act
ACMP	Alaska Coastal Management Program
ADEC	Alaska Department of Environmental Conservation
ADFG	Alaska Department of Fish and Game
ADNR	Alaska Department of Natural Resources
AS	Alaska Statutes
AWTF	Alaska Wetlands Task Force
CFR	Code of Federal Regulations
COE	U.S. Army Corps of Engineers
CPC	Alaska Coastal Policy Council (composed of Commissioners of several Alaska state agencies and representatives of local governments appointed by the Governor. The CPC oversees the ACMP and is empowered to adopt regulations)
DPDP	Alaska Division of Policy Development and Planning (within the Office of the Governor)
EPA	U.S. Environmental Protection Agency
FCZMA	Federal Coastal Zone Management Act (passed in 1972, amended in 1976 and 1980)
FWCA	Fish and Wildlife Coordination Act
FWPCA	Federal Water Pollution Control Act Amendments (PL 92-500, passed in 1972)
NASA	National Aeronautics and Space Administration
NMFS	National Marine Fisheries Service (an agency of the U.S. Department of Commerce)
NRDC	Natural Resources Defense Council
NWF	National Wildlife Federation
NWI	National Wetland Inventory (a program of the USFWS)
USFWS	U.S. Fish and Wildlife Service (an agency of the U.S. Department of Interior)
USGS	U.S. Geological Survey (an agency of the U.S. Department of Interior)

APPENDICES

Appendix One: Purpose and Method of Study

On numerous occasions, the Alaska Coastal Policy Council has expressed concern about wetlands management and regulation. The Council directed the Office of Coastal Management to prepare a study of issues and authorities pertinent to wetlands and to consider the proper role of the Alaska Coastal Management Program. In Feburary 1980, the Council approved a study plan for this project. This report is the result of that study.

OCM staff reviewed and analyzed state and federal authorities applicable to wetlands management. After applicable authorities were identified, OCM determined how they were being applied to wetlands in Alaska. This was accomplished through a detailed case study of 404 permit files of the U.S. Army Corps of Engineers, for two areas of the state. OCM also obtained information from interviews with representatives of state, and federal agencies involved in wetlands management, as well as from representatives of local governments and others. A partial list of persons interviewed is included in Appendix 2. OCM also used policy documents to obtain as much information as possible on how decisions are made and on how important issues are perceived.

Appendix Two: Partial List of Persons Contacted During Wetlands Study

OCM wishes to gratefully acknowledge the assistance of the following people who contributed information and ideas to this report.

U. S. Army Corps of Engineers

Col. Lee R. Nunn, District Engineer

Regulatory Functions Branch

James Caruth, Chief
James Wolfe
Stuart Burnell
Steve Boardman
Larry Reeder

Environmental Branch

William Lloyd, Chief

U. S. Environmental Protection Agency - Alaska Operations Office

James Sweeney, Director
William Lawrence, 404 Coordinator

U. S. Fish and Wildlife Service

Keith Schreiner, Area Director
Wayne Pichon
Greg Konkel
Arthur LaPerriere

Western Alaska Ecological Services

Robert Bowker, Field Supervisor
Jon Nickles
Lee Ann Gardner
Ann Rappoport

Southeast Ecological Services

Wayne Oien
Don Montgomery
William Hughes

National Marine Fisheries Service

Robert McVey, Director
Ron Morris
Nancy Hemming
Brad Smith

U. S. Soil Conservation Service

Louis Fletcher

Alaska Department of Environmental Conservation

C. Deming Cowles, Deputy Commissioner

Division of Environmental Quality Management

Glenn J. Akins, Director
Douglas R. Redburn
Rikki Fowler
Jim Sanders

Division of Environmental Quality Operations

Robert Flint
Paul Bateman
Bruce Hoffman
Woodruff Angst

Alaska Department of Fish and Game

Habitat Protection Section

Richard Logan, Chief
Lance Trasky
Debra Clausen
Bill Donaldson
Kim Sundberg
Richard Reed
Don Kelly

Pipeline Coordinator Office

Jim Glaspell

Alaska Department of Natural Resources

Division of Research and Development

Amos Mathews, (former) Director
Ike Waits
Carol Wilson
William Beatty

Division of Forest, Land, and Water Management

Brent Petrie
Richard LeFever
Rick Smith
Dee Koester

Division of Geological and Geophysical Surveys

Ross Schaff, Director
William Long
Roger Allely

Department of Community and Regional Affairs

Division of Community Planning

Mark Stephens
Veronica Clark
Ed Busch
Jim Anderegg

Department of Transportation and Public Facilities

Dennis Dooley
Jay Bergstrand
Mike Millor

Kenai Peninsula Borough

Don Gilman, Mayor
Phil Waring, Planning Director

Municipality of Anchorage

Tony Burns, Planning Department
Dan Crevensten, Planning Department

City and Borough of Sitka

Richard Smith, (former) Planning Director

City and Borough of Juneau

Ron Bolton, Planning Department

Ketchikan Gateway Borough

Kathryn Carssow, Planning Director

Matsu Borough

Lee Wyatt, Planning Director

Appendix 3: Section 404 of the Clean Water Act Including Changes Made by the 1977 Amendments.

The bracketed sections were deleted in 1977.
The italicized sections were added in 1977.

PERMITS FOR DREDGED OR FILL MATERIAL

SEC. 404. (a) The Secretary [of the Army, acting through the Chief of Engineers,] 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 [of the Army] (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary [of the Army], which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, 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 area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (includiing 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 [of the Army]. 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 that 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) Not 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 at 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 each 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 notice 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 program 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 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 within 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 classes, 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 the 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)(1) 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 may 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 corporate 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 any 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 a 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) 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.

(t) Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill meterial 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.

Appendix 4: Portions of the Regulations Governing Review of 404 Permits by the Army Corps of Engineers, Title 33, Code of Federal Regulations, Part 320

DEPARTMENT OF DEFENSE

Department of the Army, Engineers Corps

■

REGULATORY PROGRAM OF THE CORPS OF ENGINEERS

PART 320—GENERAL REGULATORY POLICIES

Sec.
320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related legislation.
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) *Types of activities regulated.* This regulation and the regulations that follow (33 CFR 321–329) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal legislation applicable to the review of each activity that requires a Department of the Army permit; and the general policies that are applicable

to the review of all activities that require Department of the Army permits. Parts 321–324 address the various types of activities that require Department of the Army permits, including special policies and procedures applicable to those activities, as follows:

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

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

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

(4) Construction of fixed structures and artificial islands on the outer continental shelf (Part 322);

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

(6) All activities involving the transportation of dredged material for the purpose of dumping it in ocean waters (Part 324).

(b) *Forms of authorization.* Department of the Army permits for the above described activities are issued under various forms of authorization. These include individual permits; letters of permission that are issued following a review of an individual application for a Department of the Army permit; general permits that authorize the performance of a category or categories of activities in a specific geographical region after it is determined that these activities will cause only a minimal individual and cumulative adverse environmental impact; and nationwide permits that authorize the performance of certain specified activities throughout the Nation. The nationwide permits are found in 33 CFR 322.4 and 323.4. If an activity is covered by a general or nationwide permit, an application for a Department of the Army permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general or nationwide permit to satisfy the requirements of law.

(c) *General instructions.* The procedures for processing all letters of permission, individual permits, and general permits are contained in 33 CFR 325. However, before reviewing those procedures, a person desiring to perform any activity that requires a Department of the Army permit is advised to review the general and special policies that relate to the particular activity as outlined in this Part 320 and Parts 321 through 324. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important that the reader understand the difference from the outset. "Navigable waters of the United States" are defined in 33 CFR 329. These are the traditional waters where permits are required for work or structures pursuant to sections 9 and 10 of the River and Harbor Act of 1899. "Waters of the United States" are defined in 33 CFR 323.2(a). These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to section 404 of the Federal Water Pollution Control Act Amendments of 1972.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 USC 401) (hereinafter referred to as Section 9) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways 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 (80 Stat. 941, 49 USC 1155g (6)(A)). See also 33 CFR Part 321. A Department of the Army authorization is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 USC 1344). See CFR Part 323.

(b) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 USC 403) (hereinafter referred to as Section 10) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit, general permit, or letter of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by Section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)). See also 33 CFR Part 322.

(c) Section 11 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 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. By policy stated in 33 CFR 326, effective May 27, 1970, harbor lines are guidelines only for defining the offshore limits of structures and fills insofar as they impact on navigation interests. Permits for work shoreward of those lines must be obtained in accordance with Section 10 and, if applicable, Section 404.

(d) Section 13 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 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, and the States under Sections 402 and 403 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500, 86 Stat. 816, 33 U.S.C. 1342 and 1345). See 40 CFR Parts 124 and 125.

(e) Section 14 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 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 1 of the River and Harbor Act of June 13, 1902 (32 Stat. 371; 33 U.S.C. 565) allows any persons or corporations desiring to improve any navigable river at their own expense and risk to do so upon the approval of the plans and specifications by the Secretary of the Army and the Chief of Engineers. Improvements constructed under this authority, which are primarily in Federal project areas, remain subject to the control and supervision of the Secretary of the Army and the Chief of Engineers.

(g) Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500, 86 Stat. 816, 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 hearings, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. See 33 CFR 323. The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army, published in 40 CFR Part 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers may consider the economic impact on navigation of such a prohibition in reaching his decision. Furthermore, the

Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

(h) Section 103 of the Marine Protection, Research and Sancturaries Act of 1972, as amended (PL 92-532, 86 Stat. 1052, 33 U.S.C. 1413) (hereinafter referred to as Section 103) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters where it is determined that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological system, 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, published in 40 CFR Parts 220-229. However, similar to the EPA Administrator's limiting authority cited in subparagraph (g), above, the Administrator can prevent the issuance of a permit under this authority if he finds that the dumping of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas. See also 33 CFR Part 324.

§ 320.3 Related legislation.

(a) Section 401 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500; 86 Stat. 816, 33 U.S.C. 1341) requires any non-Federal 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 will 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 will 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 (PL 94-370, 90 Stat. 1013, 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. It also requires any non-Federal applicant for a Federal license or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State has concurred with the non-Federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program. See also 15 CFR Part 930.

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, (PL 92-532, 86 Stat. 1052, 16 U.S.C. 1432) authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations * * *". See also 33 CFR Part 325 and 33 CFR 209.410.

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

(f) The Federal Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 791a et seq.), as amended, authorizes the Federal Power Commission (FPC) to issue licenses for the construction, operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping in ocean waters, Section 404 or Section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (80 Stat. 915, 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 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 acheological 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. See also 33 CFR Part 305.

(h) The Interstate Land Sales Full Disclosure Act (15 USC 1701 et seq.) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 USC 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires Department of the Army authorization, the Property Report is required by Housing and Urban Development regulation to state whether or not

a permit has been applied for, issued, or denied by the Corps of Engineers for the development under Section 10 or Section 404. The Property Report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act of 1973 (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 provides that Federal agencies must utilize 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 by that Agency will not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretaries of Interior or Commerce, as appropriate, to be critical. See also 50 CFR Part 17.

(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 must also be issued by the Department of the Army pursuant to the authorities listed in § 320.2. The Secretary of Transportation must obtain the views and recommendations of all Federal agencies having jurisdiction over any aspect of the deepwater port construction and operation prior to issuing a license.

(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 (32 Stat. 906, 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. No department or agency of the United States shall recommend authorizing 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, or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this Act and would affect the component and the values to be protected by it under this Act.

(m) Section 6(f) of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897, 16 USC 460 *l-4, et seq.*) provides that no property acquired or developed with assistance from the Land and Water Conservation Fund shall, without the approval of the Secretary of the Interior, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

§ 320.4 General policies for evaluating permit applications.

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

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact 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 benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process (e.g., see 33 CFR 209.400, Guidelines for Assessment of Economic, Social and Environmental Effects of Civil Works Projects). 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; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

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

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

(ii) the desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;

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

(iv) the probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

(b) *Effect on wetlands.* (1) Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

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

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

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

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

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

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

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

(vii) Wetlands through natural water filtration processes serve to purify water.

(3) Although a particular alteration of wetlands may constitute a minor change,

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

(4) No permit will be granted to work in wetlands identified as important by subparagraph (2), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (a), above, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits. In evaluating whether a particular alteration is necessary, the District Engineer shall consider whether the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment and whether feasible alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and must provide data on the basis of which the availability of feasible alternative sites can be evaluated.

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

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (§ 320.3(e) above) Corps of Engineers officials will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the State in which the work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. They will give great weight to these views on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose.

(d) *Water quality.* Applications for permits for activities which may affect the quality of a water of the United States will be evaluated for compliance with applicable effluent limitations, water quality standards, and management practices during the construction, operation, and maintenance of the proposed activity. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Federal Water Pollution Control 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. Any permit issued may be conditioned to implement water quality protection measures.

(e) *Historic, scenic, and recreational values.* (1) Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on the enhancement, preservation, or development of such values. Recognition of those values is often reflected by State, regional, or local land use classifications, or by similar Federal controls or policies. In both cases, action on permit applications should, insofar as possible, be consistent with, and avoid adverse effect on, the values or purposes for which those classifications, controls, or policies were established.

(2) Specific application of the policy in subparagraph (1) above, applies to:

(i) Rivers named in Section 3 of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1273 et seq.); those proposed for inclusion as provided by Sections 4 and 5 of the Act, or by later legislation; and wild, scenic, and recreational rivers established by State and local entities;

(ii) Historic, cultural, or archeological sites or practices as provided in the National Historic Preservation Act of 1966 (83 Stat. 852, 42 U.S.C. 4321 et seq.) (see also Executive Order 11593, May 13, 1971, and Statutes there cited). Particular attention should be directed toward any district, site, building, structure, or object listed or eligible for listing in the National Register of Historic Places;

(iii) Sites included in or determined eligible for listing in the National Registry of Natural Landmarks which are published periodically in the FEDERAL REGISTER;

(iv) Sites acquired or developed with the assistance of the Land and Water Conservation Fund (78 Stat. 897, 16 U.S.C. 460, 1-4, et seq.) or the Recreational Demonstrations Projects Act of 1942 (PL 77-594, 56 Stat. 326) and other public parks and recreation areas; and

(v) Any other areas named in Acts of Congress or Presidential Proclamations as National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, and such areas as may be established under Federal law for similar and related purposes, such as estuarine and marine sanctuaries.

(f) *Effect on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the three mile belt is measured for purposes of the Submerged Lands Act and International Law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or lowtide elevations offshore. (The Submerged Lands Act, 67 Stat. 29, U.S. Code Section 1301(c), and United States vs. California, 381 U.S. 139 (1965), 382 U.S. 448 (1966).) All applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The District Engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the file of the application. After completion of standard processing procedures, the file will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

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

(1) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, 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. A significant probability of resulting damage to nearby properties can be a basis for denial of an application.

(2) A landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby landowners and to the general public's right of navigation on the water surface. Proposals which create undue interference with access to, or use of, navigable waters will generally not receive favorable consideration.

(3) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized Federal project, the applicant should be apprised in writing

of the fact and of the possibility that a Federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the River and Harbor Act of 1899 (see 33 CFR Parts 321 and 322) which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claims or right to compensation will accrue from any such damage.

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

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

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

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, State, and/or local authorizations or certification. Where the required Federal State and/or local certification and/or authorization has been denied, the application for a Department of the Army permit will be denied without prejudice to the right of the applicant to reinstate processing of his application if subsequent approval is received from the appropriate Federal, State and/or local agency. Even if official certification and/or authorization is not required by State or Federal law, but a State, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

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

(3) A proposed activity may result in conflicting comments from several agencies within the same State. While many States have designated a single State agency or individual to provide a single and coordinated State position regarding pending permit applications, where a State has not so designated a single source, District Engineers will elicit from the Governor an expression of his views and desires concerning the application or, in the alternative, an expression from the Governor as to which State agency represents the official State position in this particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the processing 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 following statutes have been followed and considered: The National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archaeological 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; and the Federal Water Pollution Control Act (see § 320.3, above).

(5) If the responsible Federal, State, and/or local agency fails to take definitive action to grant or deny required authorizations or to furnish comments as provided in subparagraph (3) above, within three months of the issuance of the public notice, the District Engineer shall process the application to a conclusion.

(6) Permits will not be issued where certification or authorization of the proposed work is required by Federal, State and/or local law and that certification or authorization has been denied.

(7) The District Engineer may, in those States with ongoing permit programs for activities regulated by Department of the Army permits, enter into an agreement with the States to jointly process and evaluate Department of the Army and State permit applications. This may include the issuance of joint public notices; the conduct of joint public hearings, if held; and the joint review and analysis of information and comments developed in response to the public notice, public hearing, the environmental assessment and the environmental impact statement (if necessary), the Fish and Wildlife Coordination Act, the Historical and Archaeological 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, and the Federal Water Pollution Control Act. In such cases, applications for Department of the Army permits may be processed concurrently with the processing of the State permit to an independent conclusion and decision by the District Engineer and appropriate State agency.

(k) *Safety of impoundment structures.* Unless an adequate inspection program is required by another Federal licensing agency or will be performed by another Federal agency, the District Engineer will condition permits for impoundment structures to require that the permittee operate and maintain the structure properly to insure public safety. The District Engineer may condition such permits to require periodic inspections and to indicate that failure to accomplish actions to assure the public safety will be considered cause to revoke the permit.

(l) *Floodplains.* Executive Order 11988, dated May 24, 1977, requires each Federal agency, in its conduct of Federal programs that affect land use including the regulation of water resources, to 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 evaluating whether activities located in a floodplain that require Department of the Army permits are in the public interest, available alternatives to avoid adverse effects from and incompatible development in floodplains shall be considered.

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

Sec.

323.1 General.
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Appendix A—Delegation of authority.

AUTHORITY: 33 U.S.C. 1344.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (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 River and Harbor Act of 1899 (33 U.S.C. 401; see 33 CFR 321) and structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR 322). A Department of the Army permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this Part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

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

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

(1) The territorial seas with respect to the discharge of fill material. (The transportation of dredged material by vessel for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 USC 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.);

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)–(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[2]

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction an all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast) 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 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

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

(e) The term "natural lake" means a standing body of open water that occurs in a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream.

(f) The term "impoundment" means 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.

(g) The term "ordinary high water mark" means 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.

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

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

[2] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)–4 fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a)(1)–(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a)(5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4–2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for the aquatic environment as expressed in the EPA Guidelines (40 CFR 230) require regulation through an individual or general permit. (See 323.4–4).

by strong winds such as those accompanying a hurricane or other intense storm.

(i) 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.

(j) The term "primary tributaries" means the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters, and does not include any additional tributaries extending off of the main stems of these tributaries.

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

(l) 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 disposal 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 Federal Water Pollution Control 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.

(m) 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 Federal Water Pollution Control Act Amendments of 1972.

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, 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.

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

(p) The term "general permit" means a Department of the Army authorization that is issued for a category or categories of discharges of dredged or fill material that are substantially similar in nature and that cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of discharges in accordance with the procedures of this regulation (§ 323.3(c)), 33 CFR Part 325, and a determination that the proposed discharges will be in the public interest pursuant to 33 CFR Part 320.

(q) The term "nationwide permit" means a Department of the Army authorization that has been issued by this regulation in § 323.4 to permit certain discharges of dredged or fill material into waters of the United States throughout the Nation.

§ 323.3 Discharges requiring permits.

(a) *General.* Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in §§ 323.4–1, 323.4–2 and 323.4–3 are permitted by this regulation. If a discharge of dredged or fill material is not permitted by this regulation, an individual or general Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States in accordance with the following phased schedule:

(1) Before July 25, 1975, discharges into navigable waters of the United States.

(2) After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands.

(3) 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. (See also § 323.4–2 for discharges that are permitted by this regulation.)

(4) After July 1, 1977, discharges into all waters of the United States. (See also § 323.4–2 for discharges that are permitted by this regulation.)

(b) *Individual permits.* Unless permitted by this regulation (§§ 323.4–1, 323.4–2 and 323.4–3) or authorized by general permits (§ 323.3(c)), the discharge of dredged or fill material into waters of the United States will require an individual Department of the Army permit issued in accordance with the policies in § 320.4 and procedures in 33 CFR Part 325.

(c) *General permits.* The District Engineer may, after compliance with the other procedures of 33 CFR Part 325, issue general permits for certain clearly described categories of structures or work, including discharges of dredged or fill material, requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories will not require individual permit processing by the procedures of 33 CFR Part 325 unless the District Engineer determines, on a case-by-case basis, that the public interest requires individual review.

(1) District Engineers will include only those activities that are substantially similar in nature, that cause only minimal adverse environmental impact when performed separately, and that will have only a minimal adverse cumulative effect on the environment as categories which are candidates for general permits.

(2) The District Engineer shall include appropriate conditions as specified in Appendix C of 33 CFR Part 325 in each general permit and shall prescribe the following additional conditions:

(i) The maximum quantity of material that may be discharged and the maximum area that may be modified by a single or incidental operation (if applicable);

(ii) A description of the category or categories of activities included in the general permit; and

(iii) The type of water(s) into which the activity may occur.

(3) The District Engineer may require reporting procedures.

(4) A general permit may be revoked if it is determined that the effects of the activities authorized by it will have an adverse impact on the public interest provided the procedures of 33 CFR 325.7 are followed. Following revocation, applications for future activities in areas covered by the general permit shall be processed as applications for individual permits.

(d) *Activities of Federal agencies.* (1) Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, or instrumentality other than the Corps of Engineers, are subject to the authorization procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulation. Division and District Engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in the expeditious processing of their applications.

(2) The policy provisions set out in 33 CFR 320.4(j), relating to State or local authorizations, do not apply to discharges of dredged or fill material into

* For streams that are dry during long periods of the year, District Engineers, after notifying the Regional Administrator of EPA, may establish the headwater point as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time. The District Engineer shall notify the Regional Administrator of his determination of these headwater points.

waters of the United States undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the appropriate State, interstate and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended, in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 11752, dated 17 Dec. 73). They are not required, however, to provide certification of compliance with effluent limitations and water-quality standards from State or interstate water pollution control agencies in connection with activities involving discharges into waters of the United States.

(e) *Activities licensed under the Federal Power Act of 1920.* Any part of a structure or work licensed by the Federal Power Commission that involves the discharge of dredged or fill material into waters of the United States shall require a Department of the Army authorization under this regulation.

§ 323.4 Discharges permitted by this regulation.

(a) *General.* Discharges of dredged or fill material specified in §§ 323.4–1, 323.4–2 and 323.4–3, below, are hereby permitted for purposes of Section 404 without further processing under this regulation (individual applications are not needed), except as provided in § 323.4–4 below. Permits may, however, be required under Section 10 of the River and Harbor Act of 1899 (see 33 CFR 322). Sections 323.4–1, 323.4–2, and 323.4–3 do not obviate the requirement to obtain State or local assent required by law for the activities permitted therein.

(b) *Management practices.* In addition to the conditions specified in §§ 323.4–2(b) and 323.4–3(b), the following management practices should be followed, to the maximum extent practicable, in the discharge of dredged or fill material permitted by §§ 323.4–2 and 324.4–3 to minimize the adverse effects of these discharges on the aquatic environment:

(1) Discharges of dredged or fill material into waters of the United States should be avoided or minimized through the use of other practical alternatives;

(2) Discharges in spawning areas during spawning seasons should be avoided;

(3) Discharges should 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 waters (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, should by minimized;

(5) Discharges in wetlands areas should be avoided;

(6) Heavy equipment working in wetlands should be placed on mats;

(7) Discharges into breeding and nesting areas for migratory waterfowl should be avoided; and

(8) All temporary fills should be removed in their entirety.

§ 323.4–1 Discharges prior to effective dates of phasing.

(a) Discharges of dredged or fill material in waters of the United States that occur before the phase-in dates specified in § 323.3(a)(2)–(4) above are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met.

(b) Discharges of dredged or fill material of less than 500 cubic yards into waters other than navigable waters of the United States (see 33 CFR 329) that are part of an activity that was commenced before July 25, 1975, that were completed by January 25, 1976, and that involve a single and complete project and not a number of projects associated with a complete development plan are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met. The term "commenced" as used herein shall be satisfied if there has been, before July 25, 1975, some discharge of dredged or fill material as a part of the above activity or an entering into of a written contractual obligation to have the dredged or fill material discharged at a designated disposal site by a contractor.

(c) For the purposes of Section 404, the following conditions must have been satisfied for the discharges occurring before the dates specified in paragraph (a) and (b) above:

(1) That the discharge was not located in the proximity of a public water intake;

(2) That the discharge did not contain unacceptable levels of pathogenic organisms in areas used for recreation involving physical contact with the water;

(3) That the discharge did not occur in areas of concentrated shellfish production; and

(4) That the discharge did not destroy or endanger the critical habitat or a threatened or endangered species, as identified under the Endangered Species Act.

§ 323.4–2 Discharges into certain waters of the United States.

(a) Discharges of dredged or fill material into the following waters of the United States are hereby permitted for purposes of Section 404, provided the conditions in paragraph (b) below are met:

(1) Non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters;

(2) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are fed or drained by a river or stream above the headwaters. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark;

(3) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are isolated and not a part of a surface river or stream. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark; and

(4) Other non-tidal waters of the United States other than isolated lakes larger than 10 acres (see (3) above) that are not part of a surface tributary system to interstate waters or navigable waters of the United States (see § 323.2 (a)(5)).

(b) For purposes of Section 404, the following conditions must be satisfied for any discharge of dredged or fill material in waters described in paragraph (a), above:

(1) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species;

(2) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(3) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(4) That the discharge will not occur in a component of the National Wild and Scenic Rivers System or in a component of a State wild and scenic river system.

§ 323.4–3 Specific categories of discharges.

(a) The following discharges of dredged or fill material into waters of the United States are hereby permitted for purposes of Section 404, provided the conditions specified in this paragraph and paragraph (b) below are met:

(1) Dredged or fill material placed as backfill or bedding for utility line crossings 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 will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322.);

(2) Material discharged for bank stabilization, provided that the bank stabilization activity is less than 500 feet in length, is necessary for erosion prevention, and is limited to less than an average of one cubic yard per running foot along the bank, provided further that no material for bank stabilization is placed in any wetland area, and provided further that no material is placed in any locality or in any manner so as to impair surface water flow into or out of any wetland area. (This activity will require a Section 10 permit if in navigable waters of the United States. See 33 CFR part 322.);

(3) Minor road crossing fills including all attendant features both temporary and permanent that are part of a single and complete crossing of a nontidal waterbody, provided that the crossing is culverted or bridged to prevent the restriction of 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 will require a permit from the US Coast Guard if located in navigable waters of the United States (see 33 USC 401);

(4) Fill placed incidental to the construction of bridges across tidal waters including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills. Approach fills and causeways are not included in this permit and will require an individual or general Section 404 permit if located in waters of the United States; these fills as well as the bridge itself will also require a permit from the U.S. Coast Guard; and

(5) The repair, rehabilitation or replacement of any previously authorized, currently serviceable fill, or of any currently serviceable fill discharged prior to the requirement for authorization; provided such repair, rehabilitation or replacement does not result in a deviation from the specifications of the original work, and further provided that the fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction.

(b) For the purposes of Section 404, the following conditions must be satisfied prior to any discharge of dredged or fill material associated with the activities described above:

(1) That the discharge will not be located in the proximity of a public water supply intake;

(2) That the discharge will not occur in areas of concentrated shellfish production;

(3) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species;

(4) That the discharge will not disrupt the movement of those species of aquatic life indigenous to the waterbody;

(5) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(6) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(7) That the discharge will not occur in a component of the National Wild and Scenic River System or in a component of a State wild and scenic river system.

§ 323.4–1 Discretionary authority to require individual or general permits.

Notwithstanding the provisions of §§ 323.4–1, 323.4–2 and 323.4–3, above, the procedures of this regulation and 33 CFR Part 325, including those pertaining to individual and general permits, shall apply to any discharge(s) of dredged or fill material if the District Engineer determines that the concerns of the aquatic environment, as expressed in the guidelines (see 40 CFR Part 230) indicate the need for such action because of individual and/or cumulative adverse impacts to the affected waters. In such cases, he shall take such steps as are necessary to notify persons who would be affected by such action. If the Regional Administrator, EPA, advises the District Engineer that the concerns for the aquatic environment as expressed in the Section 404(b) Guidelines require assertion of jurisdiction under § 323.4–4, and the District Engineer and Division Engineer disagree, the Office of the Chief of Engineers (DAEN–CWO–N and DAEN–CCH) shall be notified for further coordination and resolution with the Administrator.

§ 323.5 Special policies and procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 404 permits. (See Appendix A.) The following additional special procedures shall also be applicable to the evaluation of permit applications under this regulation:

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

(b) *Coordination with EPA.* Prior to actual issuance of permits for the discharge of dredged or fill material in waters of the United States, Corps of Engineers officials will advise appropriate Regional Administrators, EPA, of the intent to issue permits to which EPA has objected, recommended conditions, or for which significant changes are proposed. If the Regional Administrator advises, within fifteen days of the advice of the intent to issue, that he objects to the issuance of the permits, the case will be forwarded to the Chief of Engineers in accordance with 33 CFR 325.11 for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain an analysis of the economic impact on navigation and anchorage that would occur by failing to authorize the use of a proposed disposal site, and whether there are other economically feasible methods or sites available other than those to which the Regional Administrator objects.

APPENDIX A.—DELEGATION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR THE DISCHARGE OF DREDGED OR FILL MATERIAL INTO NAVIGABLE WATERS

MARCH 12, 1973.

Pursuant to the authority vested in me by Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, P.L. 92–500, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits, after notice and opportunity for public hearings, for the discharge of dredged or filled material into navigable waters at specified disposal sites. The Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed discharge on the public interest. All permits issued shall specify a disposal site for the discharge of the dredged or fill material through the application of guidelines developed by the Administrator of the Environmental Protection Agency and myself. In those cases where these guidelines would prohibit the specification of a disposal site, the Chief of Engineers, in his evaluation of whether the proposed discharge is in the public interest, is authorized also to consider the economic impact on navigation and anchorage which would occur by failing to authorize the use of a proposed disposal site. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Act, other pertinent laws and any applicable memoranda of understanding between the Secretary of the Army and heads of other governmental agencies.

The Chief of Engineers and his authorized representative shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

KENNETH E. BELIEU,
Acting Secretary of the Army.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.

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

§ 325.1 Applications for permits.

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

(b) *Application form.* Any person proposing to undertake any activity requiring Department of the Army authorization as specified in 33 CFR 321-324 must apply for a permit to the District Engineer in charge of the District where the proposed activity is to be performed. Applications for permits must be prepared in accordance with instructions in Engineer Pamphlet 1145-2-1, "A Guide for Applicants," utilizing the prescribed application form (ENG Form 4345). The form and pamphlet may be obtained from the District Engineer having jurisdiction over the waterway in which the proposed activity will be located. Local variations of the application form for purposes of facilitating coordination with State and local agencies may be used.

(c) *Content of application.* (1) Generally, the application must include a complete description of the proposed activity including necessary drawings, sketches or plans; the location, purpose and intended use of the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and the approvals required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made.

(2) If the activity involves dredging in 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.

(3) If the activity includes the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the application must include the source of the material; 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. (See Part 324 for additional information requirements on ocean dumping applications.) Certification under Section 401 of the Federal Water Pollution Control Act is required for such discharges into waters of the United States.

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

(d) *Additional information.* In addition to the information indicated in subparagraph (c), above, the applicant will be required to furnish such additional information as the District Engineer may deem necessary to assist him in his 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 Environmental Assessment or Environmental Impact Statement (see § 325.4).

(e) *Signature of application.* The application must be signed by the person who desires to undertake the proposed activity; however, the application may be signed by a duly authorized agent if accompanied by a statement by that person designating the agent and agreeing to furnish, upon request, supplemental information in support of the application. In either case, the signature of the applicant will be understood to be an affirmation that he possesses the authority to undertake the activity proposed in his 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. When the application is submitted by an agent, the 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.

(f) *Fees.* Fees are required for permit applications under Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and Sections 9 and 10 of the River and Harbor Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the work is non-commercial in nature and provides personal benefits that have no connection with a commercial enterprise. The final decision as to basis for fee (commercial vs. non-commercial) shall be solely the responsibility of the District Engineer. No fee will be charged if the applicant withdraws his application at any time prior to issuance of the permit and/or if his application is denied. Collection of the fee will be deferred until the applicant is notified by the District Engineer that a public interest review has been completed and that the proposed activity has been determined to be in the public interest. Upon receipt of this notification the applicant will forward a check or money order to the District Engineer, made payable to the Treasurer of the United States. The permit will then be issued upon receipt of the application fee. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require a permit 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 or general permits. Agencies or instrumentalities of Federal, State or local governments will not be required to pay any fee in connection with the applications for permits. This fee structure will be reviewed from time to time.

§ 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 obtain from the applicant any additional information he deems necessary for further processing.

(2) When all required information has been provided, the District Engineer will issue a public notice as described in § 325.3, below, unless specifically exempted by other provisions of this regulation.

(3) The District Engineer shall consider all comments received in response to the public notice (see § 325.3) in his subsequent actions on the permit application. Receipt of the comments will be acknowledged and they will be made a part of the official file on 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. The applicant must be given the opportunity to furnish the District Engineer his proposed resolution or rebuttal to all objections from Government agencies and other substantive adverse comments before final decision will be made on the application.

(4) The District Engineer shall prepare an Environmental Assessment on all applications. The Environmental Assessment shall be dated, signed, and placed in the record and shall include the expected environmental impacts of the proposal. Where the District Engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the Environmental Assessment. In those cases requiring an Environmental Impact Statement (EIS), the draft EIS may serve as the Environmental Assessment. Where an EIS is not prepared, the Environmental Assessment will include a statement that the decision on the application is not a major Federal action significantly affecting the quality of the human environment.

(5) The District Engineer shall also evaluate the proposed 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 Findings of Fact on all applications to support his determination. The Findings of Fact shall include the District Engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material in waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the District Engineer. The Findings of Fact 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 Findings of Fact. If a permit is warranted, the District Engineer will determine the conditions and duration which should be incorporated into the permit. In accordance with the authorities specified in § 325.8, the District Engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final Environmental Impact Statement, if prepared, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in the format prescribed in § 325.11. Notice that the application has been forwarded to higher headquarters will be furnished the applicant and to any Federal agency expressing an interest in the application. Such notice shall not divulge the District Engineer's recommendations. In those cases where the application is forwarded for decision in the format prescribed in § 325.11, the report will serve as the Findings of Fact.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason for denial. If the final decision is to issue the permit, the issuing official will forward two copies of the draft permit to the applicant for signature accepting the conditions of the permit. The applicant will return both signed copies to the issuing official who then signs and dates the permit. The permit is not valid until signed by the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of his application 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. This list will be distributed to all persons who received any of the public notices listed.

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

(b) *Procedures for particular types of permit situations.* (1) If the District Engineer determines that water quality certification for the proposed activity is necessary under the provisions of the Federal Water Pollution Control Act, he shall so notify the applicant and obtain from him either the appropriate certification or a copy of his application for such certification. The District Engineer may issue the public notice of the application jointly with the certifying agency if arrangement for such joint notices have been approved by the Division Engineer. When the activity may affect the waters of another State, a copy of the certification will be forwarded to the Regional Administrator of EPA who shall determine if the proposed activity may affect the quality of the waters of any State or States other than the State in which the work is to be performed. If he needs supplemental information in order to make this determination, the Regional Administrator may request it from the District Engineer who shall obtain it from the applicant and forward it to the Regional Administrator. The Regional Administrator shall, within thirty days of receipt of the application, certification and supplemental information, notify the affected State, the District Engineer, and the applicant in the event such a second State may be affected. The second State then has sixty days to advise the District Engineer that it objects to the issuance of the permit on the basis of the effect on the quality of its waters and to request a hearing. No authorization will be granted until required certification has been obtained or has been waived. Waiver is deemed to occur if the certifying agency fails or refuses to act on a request for certification within a reasonable period of time after receipt of such request. The request for certification must be made in accordance with the regulations of the certifying agency. In determining whether or not a waiver period has commenced, the District Engineer will verify that the certifying agency has received a valid request for certification. Three months shall generally be considered to be a reasonable period of time. 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 three months, the District Engineer may afford the certifying agency up to one year to provide the required certification before determining that a waiver has occurred. District Engineers shall check with the certifying agency at the end of the allotted period of time before determining that a waiver has occurred.

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

(i) If the applicant is a Federal agency, and the application involves a Federal activity in or affecting the coastal zone or a Federal development project in the coastal zone, the District Engineer shall forward a copy of the public notice to

the agency of the State responsible for reviewing the consistency of Federal activities. The Federal agency applicant shall be responsible for complying with the Coastal Zone Management Act's directives for ensuring that Federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved coastal zone management programs. (See 15 CFR Part 930.) If the State coastal zone agency objects to the proposed Federal activity on the basis of its inconsistency with the State's approved coastal zone management program, the District Engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the Coastal Zone Management Act for resolving such disagreements.

(ii) If the applicant is not a Federal agency and the application involves an activity affecting the coastal zone, the District Engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved State coastal zone management program. Upon receipt of the certification, the District Engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the State coastal zone agency and request its concurrence or objection. The District Engineer can issue the public notice of the application jointly with the State agency if arrangements for such joint notices have been approved by the Division Engineer. If the State agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the District Engineer shall not issue the permit until the State concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the Coastal Zone Management Act or is necessary in the interest of national security. If the State agency fails to concur or object to a certification statement within six months of the State agency's receipt of the certification statement, State agency concurrence with the certification statement shall be conclusively presumed.

(3) If the proposed activity involves any property listed or eligible for listing in the National Register of Historic Places (which is published in its entirety in the FEDERAL REGISTER annually in February with addenda published each month), the District Engineer will proceed in accordance with 33 CFR Part 305.

(4) If the proposed activity consists 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 Impact Statement 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(a).)

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

(i) If the activity involves the construction of structures or artificial islands on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390: Attention, Code N512 and to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (fish havens) along the coasts of the United States, to Defense Mapping Agency, Hydrographic Center and National Ocean Survey as in (i), above, and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

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

(iv) If the activity is listed in subparagraphs (i), (ii), or (iii), above, 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.

(c) *Emergency procedures.* An "emergency" is a situation which would result in an unacceptable hazard to life or severe loss of property if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under required procedures. In such cases the District Engineer will explain the circumstance and recommend special procedures in writing to the Chief of Engineers, ATTN: DAEN-CWO-N. The Chief of Engineers, upon consultation with the Secretary of the Army or his authorized representative, will instruct the District Engineer as to further processing of the application.

(d) *Timing of processing of applications.* In view of the extensive coordination with other agencies and the public and the study of all aspects of proposed activities required by the above procedures, applicants must allow adequate time for the processing of their applications. The District Engineer will be guided by the following time limits for the indicated steps in processing permit applications:

(1) Public notice should be issued within fifteen days of receipt of all required information from the applicant, unless joint notice with State agencies is to be used.

(2) The receipt of comments as a result of the public notice should not extend beyond thirty days from the date of the notice. However, if unusual circumstances warrant, the District Engineer may extend the comment period up to a maximum of seventy-five days.

(3) The District Engineer should either send notice of denial to the applicant, or issue the draft permit to the applicant for acceptance and signature, or forward the application to higher headquarters within thirty days of one of the following whichever is latest: Closing of the public notice comment period with no objections received; receipt of notice of withdrawal of objections; completion of coordination following receipt of applicant's rebuttal of objections; closing of the record of a public hearing; or expiration of the waiting period following the filing of the final Environmental Impact Statement with CEQ.

§ 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 of the activity to generate meaningful comments. 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 location of the proposed activity;

(4) A brief description of the proposed activity, its purpose and intended use, 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 dumped and means of conveyance. See also 33 CFR 324 for additional information required on ocean dumping public notices;

(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) 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;

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

(8) A statement concerning a preliminary determination of the need for and/or availability of an Environmental Impact Statement;

(9) 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, including environmental values; and

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

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

(1) Except as provided in paragraph (b)(4) below, the following will be included:

The decision whether to issue a permit will be based on an evaluation of the probable impact 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; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production and, in general, the needs and welfare of the people.

(2) If the activity involves the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of dumping 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, under authority of Section 404(b) of the Federal Water Pollution Control Act (40 CFR Part 230) or of the criteria established under authority of Section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 228), as appropriate. See also 33 CFR Part 324.

(3) If the activity includes the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the following statement will also be included in the public notice:

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing.

(4) In cases involving construction of fixed structures or artificial islands on Outer Continental Shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(c) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate State agencies, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, and to any other interested party. If in the judgment of the District Engineer the proposal may result in substantial public interest, the public notice (without drawings) may be published for five consecutive days in the local newspaper, and the applicant shall reimburse the District Engineer for the costs of publication. 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 Representatvie 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, 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 addresses in appropriate cases as follows:

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

(ii) If the activity involves construction of fixed structures or artificial islands on the Outer Continental Shelf or in the territorial seas, to the Deputy Assistant Secretary of Defense (Installations and Housing), Washington, D.C. 20310; the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390, Attention, Code N512; and the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(iii) If the activity involves the construction of structures to enhance fish propagation along the Atlantic, Pacific, and Gulf coasts, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

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

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

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the application. 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 their 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.

(d) *General permit notices (RCS: DAEN–CWO–52).* For purposes of performing a nationwide analysis of the effectiveness of the general permit program, Division offices will submit "Public Notices on General Permits" reports (RCS: DAEN–CWO–52) by COB on the 15th day, following the end of each quarter, to HQDA (DAEN–CWO–N) Washington, D.C. 20314. Said reports will be in the form of a letter listing the public notices published during the previous month to announce proposals or to finalize issuances of general permits; copies of the public notices are to be made inclosures to the reports. Negative reports will be submitted if no general permit actions have taken place in the Division during the reporting period.

§ 325.4 Environmental impact statements.

(a) *General.* Section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA) requires all Federal agencies, with respect to major Federal actions significantly affecting the quality of the human environment, to submit to the President's Council on Environmental Quality a detailed statement on:

(1) The environmental impact of the proposed actions.

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

(3) Alternatives to the proposed action.

(4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(5) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. The District Engineer must determine whether such an Environmental Impact Statement (EIS) is required in connection with each permit application.

(b) *EIS procedures.* In addition to the procedures required by 33 CFR 209.410 (ER 1105–2–507), the following special procedures apply to the processing of permits involving the preparation of an EIS.

(1) The District Engineer, at the earliest practicable time prior to the is-

suance of the public notice, shall make a preliminary assessment of impacts of the project should it be approved and make a preliminary determination as to whether the quality of the human environment would be significantly affected. This preliminary assessment will normally be based on experience with similar type activities performed in the past. A statement of the District Engineer's preliminary determination shall be included in the public notice. This preliminary determination will be reconsidered as additional information is developed.

(2) If the District Engineer's final determination after consideration of all additional information developed (including responses to the public notice) is that the proposed work will not significantly affect the quality of the human environment, the District Engineer's determination shall be documented, dated, and placed in the record as his Environmental Assessment (see § 325.2(a)(4)).

(3) At such time as the District Engineer believes that a permit may be warranted but that the proposed activity would significantly affect the quality of the human environment, he will require the applicant to furnish any additional information that the District Engineer considers necessary to allow his preparation of an EIS. The applicant should also be advised at this time that there is no assurance that favorable action will ultimately be taken on his application. Additionally, if the District Engineer has previously announced a preliminary determination that no EIS would be required, he shall issue a supplemental public notice to advise the public of the changed determination. If the applicant is unable to furnish certain information considered by the District Engineer to be necessary for the EIS, the District Engineer may, after obtaining written approval from the Division Engineer, charge the applicant pursuant to 31 U.S.C. 483(a) for those extraordinary expenses incurred by the Government in developing the information. All money so collected shall be paid into the Treasury of the United States as miscellaneous receipts. Otherwise the costs of the preparation and distribution of the EIS itself shall be borne by the Federal Government. In those cases when the determination has been made that an EIS will be required, the District Engineer shall consider inviting public comments as to specific factors of concern which should be addressed in the draft EIS. Upon preparation of the draft EIS, a public notice shall be issued summarizing the facts of the case and announcing the availability of the draft EIS. A copy of that notice shall be furnished to all recipients of the draft EIS including CEQ. If a public hearing is to be held pursuant to § 325.2(a)(5), the hearing may be held anytime after completion of the draft EIS.

(4) If another agency is the lead agency as defined by the CEQ guidelines (40 CFR 1500.7(b)) the District Engineer will coordinate with that agency to insure that the resulting EIS adequately describes the impact of the activity which is subject to Corps permit authority. That previously prepared EIS will be referenced in the public notice announcing the permit application and a statement included that the effects of the proposed activity on the environment as outlined therein will be carefully considered in the evaluation of the permit application.

(c) *Public notice on EIS filing.* The 30-day wait period required by the National Environmental Policy Act for issuing a permit for which an EIS has been prepared begins with notation in the Federal Register that the FEIS has been filed with CEQ or on the date of delivery to U.S. Postal Service facilities for mailing of copies of the FEIS to agencies, groups, and individuals on the project mailing list, whichever date is later. In order to notify the interested public of their opportunity to comment on the FEIS, the District Engineer shall issue a public notice when the filing notation has been published in the Federal Register to all parties receiving the original application notice or draft EIS and to all others who have expressed an interest in the application. The public notice should include:

(1) A brief summary of application (applicant, work, date of public notice, date of draft EIS release, date of public hearing, if held);

(2) Opportunity to comment to the District Engineer on the FEIS until the deadline date projected by the 30-day wait period;

(3) A statement that the comments received on the FEIS will be evaluated and considered in arriving at the final decision on the application; and

(4) Information on how interested parties can obtain or have access to the FEIS.

§ 325.5 Forms of authorization.

(a) *General.* (1) Department of the Army authorizations under this regulation shall be in the form of an individual permit, general permit, or letter of permission, as appropriate. The basic format shall be ENG Form 1721, Department of the Army Permit (Appendix A).

(2) While the general conditions included in ENG Form 1721 are normally applicable to all permits, some may not apply to certain authorizations (e.g., after-the-fact situations where work is completed, or situations in which the permittee is a Federal agency) 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.

(b) *Letters of permission.* In those cases subject to Section 10 of the River and Harbor Act of 1899 in which, in the opinion of the District Engineer, the proposed work is minor, will not have significant impact on environmental values, and should encounter no opposition, the District Engineer may omit the publishing of a public notice and authorize the work by a letter of permission. However, he will coordinate the proposal with all concerned fish and wildlife agencies, Federal and State, as required by the Fish and Wildlife Coordination Act. The letter of permission will not be used to authorize the discharge of dredged or fill material into waters of the United States nor the transportation of dredged material for purposes of dumping it in ocean waters. The letter of permission will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority (i.e., 33 U.S.C. 403), any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits.* The District Engineer may, after compliance with the other procedures of this regulation, issue general permits for certain clearly described categories of structures or work, including discharges of dredged or fill material, requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories that are authorized by such general permits do not have to be further authorized by the procedures of this regulation unless the District Engineer determines, on a case-by-case basis, that the public interest requires.

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

(e) *Nationwide permits.* Nationwide permits mean Department of the Army authorizations that have been issued by the regulations for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or general permit.

§ 325.6 Duration of authorizations.

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

(b) *Structures.* Authorizations 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 authorization will be of limited duration with a definite expiration date. Except as provided in subparagraph (e), below, permits for the discharge of dredged material in the waters of the United States or for the transportation of dredged material for the purpose of dumping it in ocean waters will be of limited duration with a definite expiration date.

(c) *Works.* Authorizations for construction work or other activity will specify time limits for accomplishing the work or activity. The time limits will specify a date by which the work must be started, normally one year from the date

of issuance, and a date by which the work must be completed. The dates will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. An authorization for work or other activity will automatically expire if the permittee fails to request an extension or revalidation.

(d) *Extensions of time.* Extensions of time may be granted by the District Engineer for authorizations of limited duration, or for the time limitations imposed for starting or completing the work or activity. The permittee must request the extension and explain the basis of the request, which will be granted only if the District Engineer determines that an extension is in the general public interest. Requests for extensions will be processed in accordance with the regular procedures of § 325.2, including issuance of a public notice, except that such processing is not required where the District Engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued and that the work is proceeding essentially in accordance with the approved plans and conditions.

(e) *Periodic maintenance.* 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 his 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 the regulation and 33 CFR Parts 320–324. If the permittee desires to continue maintenance dredging beyond the expiration date, he must request a revalidation of that portion of his permit which authorized the maintenance dredging. The request must be made to the District Engineer six months prior to the expiration date, and include full description of the proposed methods of dredging and disposal of dredged materials. The District Engineer will process the request for revalidation in accordance with the standard procedures including the issuance of a public notice describing the authorized work to be maintained and the proposed methods of maintenance.

§ 325.7 Modification, suspension or revocation of authorizations.

(a) *General.* The District Engineer may reevaluate the circumstance and conditions of a permit either on his own motion or as the result of periodic progress inspection, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the general public interest. 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 activity authorized have changed since the permit was issued, extended or revalidated, and the continuing adequacy of the permit conditions; any significant objections to the activity authorized by the permit 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 Sec. 325.2, and not as modifications under this paragraph.

(b) *Modification.* The District Engineer, as a result of revaluation of the circumstances and conditions of a permit, may determine that protection of the general 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, which in no event shall be less than ten days from its date of issuance. In the event a mutual agreement cannot be reached by the District Engineer and the permittee, the District Engineer will proceed in accordance with subparagraph (c), below, 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 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 unless a hearing is requested within that period. If the permittee fails or refuses to comply with the modification, the District Engineer will proceed in accordance with 33 CFR Part 326.

(c) *Suspension.* The District Engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the general 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 all previously authorized activities. 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 request a hearing within 10 days of receipt of notice of the suspension to present information in this matter. If a hearing is requested the procedures prescribed in 33 CFR 327 will be followed. After the completion of the 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 is requested), the District Engineer will take action to reinstate the permit, modify the permit, or recommend revocation of the permit in accordance with subparagraph (d), below.

(d) *Revocation.* Following completion of the suspension procedures in subparagraph (c), above, if revocation of the permit is recommended, the District Engineer will prepare a report of the circumstances and forward it together with the record of the suspension proceedings to DAEN–CWO–N. The Chief of Engineers may, prior to deciding whether or not to revoke the permit, afford the permittee the opportunity to present any additional information not made available to the District Engineer at the time he made the recommendation to revoke the permit including, where appropriate, the means by which he intends to comply with the terms and conditions of the permit. The permittee will be advised in writing of the final decision.

Federal Register

Wednesday
December 24, 1980

Part IV

Environmental Protection Agency

Guidelines for Specification of Disposal Sites for Dredged or Fill Material

Part 230 is revised to read as follows:

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OR DISPOSAL SITES FOR DREDGED OF FILL MATERIAL

Subpart A—General

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230.2 Applicability.
230.3 Definitions.
230.4 Organization.
230.5 General procedures to be followed.
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Subpart B—Compliance With the Guidelines

230.10 Restrictions on discharge.
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Subpart C—Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

230.20 Substrate.
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Subpart D—Potential Impacts on Biological Characteristics of the Aquatic Ecosystem

230.30 Threatened and endangered species.
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230.40 Sanctuaries and refuges.
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230.50 Municipal and private water supplies.
230.51 Recreational and commercial fisheries.
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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.
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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.
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230.76 Actions affecting human use.
230.77 Other actions.

Subpart I—Planning To Shorten Permit Processing Time

230.80 Advanced identification of disposal areas.

Authority: This regulation is issued under authority of Sections 404(b) and 501(a) of the Clean Water Act of 1977, 33 U.S.C. § 1344(b) and § 1361(a).

Subpart A—General

§ 23.1 Purpose and policy.

(a) The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.

(b) Congress has expressed a number of policies in the Clean Water Act. These Guidelines are intended to be consistent with and to implement those policies.

(c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

(d) From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

§ 230.2 Applicability.

(a) These Guidelines have been developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army acting through the Chief of Engineers under section 404(b)(1) of the Clean Water Act (33 U.S.C. 1344). The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States. Sites may be specified through:

(1) The regulatory program of the U.S. Army Corps of Engineers under sections 404(a) and (e) of the Act (see 33 CFR 320, 323 and 325);

(2) The civil works program of the U.S. Army Corps of Engineers (see 33 CFR 209.145 and section 150 of Pub. L. 94–587, Water Resources Development Act of 1976);

(3) Permit programs of States approved by the Administrator of the Environmental Protection Agency in accordance with sections 404(g) and (h) of the Act (see 40 CFR 122, 123 and 124);

(4) Statewide dredged or fill material regulatory programs with best management practices approved under section 208(b)(4)(B) and (C) of the Act (see 40 CFR 35.1560);

(5) Federal construction projects which meet criteria specified in section 404(r) of the Act.

(b) These Guidelines will be applied in the review of proposed discharges of dredged or fill material into navigable waters which lie inside the baseline from which the territorial sea is measured, and the discharge of fill material into the territorial sea, pursuant to the procedures referred to in paragraphs (a)(1) and (a)(2) above. The discharge of dredged material into the territorial sea is governed by the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92–532, and regulations and criteria issued pursuant thereto (40 CFR Part 220–228).

(c) Guidance on interpreting and implementing these Guidelines may be prepared jointly by EPA and the Corps at the national or regional level from time to time. No modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

§ 230.3 Definitions.

For purposes of this Part, the following terms shall have the meanings indicated:

(a) The term "Act" means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92–500, as amended by Pub. L. 95–217, 33 U.S.C. 1251, *et seq.*

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

(c) The terms "aquatic environment" and "aquatic ecosystem" mean waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

(d) The term "carrier of contaminant" means dredged or fill material that contains contaminants.

(e) The term "contaminant" means a chemical or biological substance in a form that can be incorporated into, onto or be ingested by and that harms aquatic organisms, consumers of aquatic organisms, or users of the aquatic environment, and includes but is not limited to the substances on the 307(a)(1) list of toxic pollutants promulgated on January 31, 1978 (43 FR 4109).

(f) [Reserved]

(g) [Reserved]

(h) The term "discharge point" means the point within the disposal site at which the dredged or fill material is released.

(i) The term "disposal site" means that portion of the "waters of the United States" where specific disposal activities are permitted and consist of a bottom surface area and any overlying volume of water. In the case of wetlands on which surface water is not present, the disposal site consists of the wetland surface area.

(j) [Reserved]

(k) The term "extraction site" means the place from which the dredged or fill material proposed for discharge is to be removed.

(l) [Reserved]

(m) The term "mixing zone" means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge point where receiving water quality may not meet quality standards or other requirements otherwise applicable to the receiving water. The mixing zone should be considered as a place where wastes and water mix and not as a place where effluents are treated.

(n) The term "permitting authority" means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program

approved by EPA under § 404(g) and § 404(h) or his delegated representative.

(o) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the Act reflects that "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant", are radium and accelerator produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

(p) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem.

(q) The term "practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(q-1) "Special aquatic sites" means those sites identified in Subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See 230.10(a)(3))

(r) The term "territorial sea" means the belt of the sea measured from the baseline as determined in accordance with the Conventon on the Territorial Sea and the Contiguous Zone and extending seaward a distance of three miles.

(s) The term "waters of the united States" means:

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

(2) All interstate waters including interstate wetlands;

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

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

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

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

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

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

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1)–(6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(t) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

§ 230.4 Organization.

The Guidelines are divided into eight subparts. Subpart A presents those provisions of general applicability, such as purpose and definitions. Subpart B establishes the four conditions which must be satisfied in order to make a finding that a proposed discharge of dredged or fill material complies with the Guidelines. Section 230.11 of Subpart B, sets forth factual determinations which are to be considered in determining whether or not a proposed discharge satisfies the Subpart B conditions of compliance. Subpart C describes the physical and chemical components of a site and provides guidance as to how proposed discharges of dredged or fill material may affect these components. Subparts D–F detail the special characteristics of particular aquatic ecosystems in terms of their values, and the possible loss of these values due to discharges of dredged or fill material. Subpart G prescribes a number of physical, chemical, and biological evaluations and testing procedures to be used in reaching the required factual determinations. Subpart H details the means to prevent or mimimize adverse effects. Subpart I concerns advanced identification of disposal areas.

§ 230.5 General procedures to be followed.

In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence:

(a) In order to obtain an overview of the principal regulatory provisions of the Guidelines, review the restrictions on discharge in § 230.10(a)–(d), the measures to mimimize adverse impact of Subpart H, and the required factual determinations of § 230.11.

(b) Determine if a General permit (§ 230.7) is applicable; if so, the applicant needs merely to comply with its terms, and no further action by the permitting authority is necessary. Special conditions for evaluation of proposed General permits are contained in § 230.7. If the discharge is not covered by a General permit:

(c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§ 230.10(a)).

(d) Delineate the candidate disposal site consistent with the criteria and evaluations of § 230.11(f).

(e) Evaluate the various physical and chemical components which characterize the non-living environment of the candidate site, the substrate and the water including its dynamic characteristics (Subpart C).

(f) Identify and evaluate any special or critical characteristics of the candidate disposal site, and surrounding areas which might be affected by use of such site, related to their living communities or human uses (Subparts D, E, and F).

(g) Review Factual Determinations in § 230.11 to determine whether the information in the project file is sufficient to provide the documentation required by § 230.11 or to perform the pre-testing evaluation described in § 230.60, or other information is necessary.

(h) Evaluate the material to be discharged to determine the possibility of chemical contamination or physical incompatibility of the material to be discharged (§ 230.60).

(i) If there is a reasonable probability of chemical contamination, conduct the appropriate tests according to the section on Evaluation and Testing (§ 230.61).

(j) Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, based upon the specialized methods of minimization of impacts in Subpart H.

(k) Make and document Factual Determinations in § 230.11.

(l) Make and document Findings of Compliance (§ 230.12) by comparing Factual Determinations with the requirements for discharge of § 230.10.

This outline of the steps to follow in using the Guidelines is simplified for purposes of illustration. The actual process followed may be iterative, with the results of one step leading to a reexamination of previous steps. The permitting authority must address all of the relevant provisions of the Guidelines in reaching a Finding of Compliance in an individual case.

§ 230.6 Adaptability.

(a) The manner in which these Guidelines are used depends on the physical, biological, and chemical nature of the proposed extraction site, the material to be discharged, and the candidate disposal site, including any other important components of the ecosystem being evaluated. Documentation to demonstrate knowledge about the extraction site, materials to be extracted, and the candidate disposal site is an essential component of guideline application. These Guidelines allow evaluation and documentation for a variety of activities, ranging from those with large, complex impacts on the aquatic environment to those for which the impact is likely to be innocuous. It is unlikely that the Guidelines will apply in their entirety to any one activity, no matter how complex. It is anticipated that substantial numbers of permit applications will be for minor, routine activities that have little, if any, potential for significant degradation of the aquatic environment. It generally is not intended or expected that extensive testing, evaluation or analysis will be needed to make findings of compliance in such routine cases. Where the conditions for General permits are met, and where numerous applications for similar activities are likely, the use of General permits will eliminate repetitive evaluation and documentation for individual discharges.

(b) The Guidelines user, including the agency or agencies responsible for implementing the Guidelines, must recognize the different levels of effort that should be associated with varying degrees of impact and require or prepare commensurate documentation. The level of documentation should reflect the significance and complexity of the discharge activity.

(c) An essential part of the evaluation process involves making determinations as to the relevance of any portion(s) of the Guidelines and conducting further evaluation only as needed. However, where portions of the Guidelines review procedure are "short form" evaluations, there still must be sufficient information (including consideration of both individual and cumulative impacts) to support the decision of whether to specify the site for disposal of dredged or fill material and to support the decision to curtail or abbreviate the evaluation process. The presumption against the discharge in § 230.1 applies to this decision-making.

(d) In the case of activities covered by General permits or 208(b)(4)(B) and (C) Best Management Practices, the analysis and documentation required by the Guidelines will be performed at the time of General permit issuance or 208(b)(4)(B) and (C) Best Management Practices promulgation and will not be repeated when activities are conducted under a General permit or 208(b)(4)(B) and (C) Best Management Practices control. These Guidelines do not require reporting or formal written communication at the time individual activities are initiated under a General permit or 208(b)(4)(B) and (C) Best Management Practices. However, a particular General permit may require appropriate reporting.

§ 230.7 General permits.

(a) *Conditions for the issuance of General permits.* A General permit for a category of activities involving the discharge of dredged or fill material complies with the Guidelines if it meets the applicable restrictions on the discharge in § 230.10 and if the permitting authority determines that:

(1) The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment;

(2) The activities in such category will have only minimal adverse effects when performed separately; and

(3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment.

(b) *Evaluation process.* To reach the determinations required in paragraph (a) of this section, the permitting authority shall set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated under the General permit. While some of the information necessary for this evaluation can be obtained from potential permittees and others through the proposal of General permits for public review, the evaluation must be completed before any General permit is issued, and the results must be published with the final permit.

(1) This evaluation shall be based upon consideration of the prohibitions listed in § 230.10(b) and the factors listed in § 230.10(c), and shall include documented information supporting each factual determination in § 230.11 of the Guidelines (consideration of alternatives in § 230.10(a) are not directly applicable to General permits);

(2) The evaluation shall include a precise description of the activities to be permitted under the General permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single General permit based on Subparts C–F of the Guidelines. Allowable differences between activities which will be regulated under the same General permit shall be specified. Activities otherwise similar in nature may differ in environmental impact due to their location in or near ecologically sensitive areas, areas with unique chemical or physical characteristics, areas containing concentrations of toxic substances, or areas regulated for specific human uses or by specific land or water management plans (e.g., areas regulated under an approved Coastal Zone Management Plan). If there are specific geographic areas within the purview of a proposed General permit (called a draft General permit under a State 404 program), which are more appropriately regulated by individual permit due to the considerations cited in this paragraph, they shall be clearly delineated in the evaluation and excluded from the permit. In addition, the permitting authority may require an individual permit for any proposed activity under a General permit where the nature or location of the activity makes an individual permit more appropriate.

(3) To predict cumulative effects, the evaluation shall include the number of individual discharge activities likely to be regulated under a General permit until its expiration, including repetitions of individual discharge activities at a single location.

Subpart B—Compliance With the Guidelines

§ 230.10 Restrictions on discharge.

Note.—Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under § 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demostrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a § 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under Title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under § 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by Subparts B and G, after consideration of Subparts C–F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Except as provided under § 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

§ 230.11 Factual determinations.

The permitting authority shall determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment in light of Subparts C–F. Such factual determinations shall be used in § 230.12 in making findings of compliance or non-compliance with the restrictions on discharge in § 230.10. The evaluation and testing procedures described in § 230.60 and § 230.61 of Subpart G shall be used as necessary to make, and shall be described in, such determination. The determinations of effects of each proposed discharge shall include the following:

(a) *Physical substrate determinations.* Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, on the characteristics of the substrate at the proposed disposal site. Consideration shall be given to the similarity in particle size, shape, and degree of compaction of the material

proposed for discharge and the material constituting the substrate at the disposal site, and any potential changes in substrate elevation and bottom contours, including changes outside of the disposal site which may occur as a result of erosion, slumpage, or other movement of the discharged material. The duration and physical extent of substrate changes shall also be considered. The possible loss of environmental values (§ 230.20) and actions to minimize impact (Subpart H) shall also be considered in making these determinations. Potential changes in substrate elevation and bottom contours shall be predicted on the basis of the proposed method, volume, location, and rate of discharge, as well as on the individual and combined effects of current patterns, water circulation, wind and wave action, and other physical factors that may affect the movement of the discharged material.

(b) *Water circulation, fluctuation, and salinity determinations.* Determine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows, and normal water fluctuation. Consideration shall be given to water chemistry, salinity, clarity, color, odor, taste, dissolved gas levels, temperature, nutrients, and eutrophication plus other appropriate characteristics. Consideration shall also be given to the potential diversion or obstruction of flow, alterations of bottom contours, or other significant changes in the hydrologic regime. Additional consideration of the possible loss of environmental values (§ 230.23–.25) and actions to minimize impacts (Subpart H), shall be used in making these determinations. Potential significant effects on the current patterns, water circulation, normal water fluctuation and salinity shall be evaluated on the basis of the proposed method, volume, location, and rate of discharge.

(c) *Suspended particulate/turbidity determinations.* Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, in terms of potential changes in the kinds and concentrations of suspended particulate/turbidity in the vicinity of the disposal site. Consideration shall be given to the grain size of the material proposed for discharge, the shape and size of the plume of suspended particulates, the duration of the discharge and resulting plume and whether or not the potential changes will cause violations of applicable water quality standards. Consideration should also be given to the possible loss of environmental values (§ 230.21) and to actions for minimizing impacts (Subpart H). Consideration shall include the proposed method, volume, location, and rate of discharge, as well as the individual and combined effects of current patterns, water circulation and fluctuations, wind and wave action, and other physical factors on the movement of suspended particulates.

(d) *Contaminant determinations.* Determine the degree to which the material proposed for discharge will introduce, relocate, or increase contaminants. This determination shall consider the material to be discharged, the aquatic environment at the proposed disposal site, and the availability of contaminants.

(e) *Aquatic ecosystem and organism determinations.* Determine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms. Consideration shall be given to the effect at the proposed disposal site of potential changes in substrate characteristics and elevation, water or substrate chemistry, nutrients, currents, circulation, fluctuation, and salinity, on the recolonization and existence of indigenous aquatic organisms or communities. Possible loss of environmental values (§ 230.31), and actions to minimize impacts (Subpart H) shall be examined. Tests as described in § 230.61 (Evaluation and Testing), may be required to provide information on the effect of the discharge material on communities or populations of organisms expected to be exposed to it.

(f) *Proposed disposal site determinations.* (1) Each disposal site shall be specified through the application of these Guidelines. The mixing zone shall be confined to the smallest practicable zone within each specified disposal site that is consistent with the type of dispersion determined to be appropriate by the application of these Guidelines. In a few special cases under unique environmental conditions, where there is adequate justification to show that widespread dispersion by natural means will result in no significantly adverse environmental effects, the discharged material may be intended to be spread naturally in a very thin layer over a large area of the substrate rather than be contained within the disposal site.

(2) The permitting authority and the Regional Administrator shall consider the following factors in determining the acceptability of a proposed mixing zone:

(i) Depth of water at the disposal site;

(ii) Current velocity, direction, and variability at the disposal site;

(iii) Degree of turbulence;

(iv) Stratification attributable to causes such as obstructions, salinity or density profiles at the disposal site;

(v) Discharge vessel speed and direction, if appropriate;

(vi) Rate of discharge;

(vii) Ambient concentration of constituents of interest;

(viii) Dredged material characteristics, particularly concentrations of constituents, amount of material, type of material (sand, silt, clay, etc.) and settling velocities;

(ix) Number of discharge actions per unit of time;

(x) Other factors of the disposal site that affect the rates and patterns of mixing.

(g) *Determination of cumulative effects on the aquatic ecosystem.* (1) Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.

(2) Cumulative effects attributable to the discharge of dredged or fill material in waters of the United States should be predicted to the extent reasonable and practical. The permitting authority shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications, the issuance of a General permit, and monitoring and enforcement of existing permits.

(h) *Determination of secondary effects on the aquatic ecosystem.* (1) Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. Information about secondary effects on aquatic ecosystems shall be considered prior to the time final section 404 action is taken by permitting authorities.

(2) Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff

from residential or commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S. Activities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which should be considered in evaluating the impact of creating those fast lands.

§ 230.12 Findings of compliance or non-compliance with the restrictions on discharge.

(a) On the basis of these Guidelines (Subparts C through G) the proposed disposal sites for the discharge of dredged or fill material must be:

(1) Specified as complying with the requirements of these Guidelines; or

(2) Specified as complying with the requirements of these Guidelines with the inclusion of appropriate and practicable discharge conditions (see. Subpart H) to minimize pollution or adverse effects to the affected aquatic ecosystems; or

(3) Specified as failing to comply with the requirements of these Guidelines where:

(i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or

(ii) The proposed discharge will result in significant degradation of the aquatic ecosystem under § 230.10(b) or (c); or

(iii) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or

(iv) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.

(b) Findings under this section shall be set forth in writing by the permitting authority for each proposed discharge and made available to the permit applicant. These findings shall include the factual determinations required by § 230.11, and a brief explanation of any adaptation of these Guidelines to the activity under consideration. In the case of a General permit, such findings shall be prepared at the time of issuance of that permit rather than for each subsequent discharge under the authority of that permit.

Subpart C—Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

Note.—The effects described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B.

§ 230.20 Substrate.

(a) The substrate of the aquatic ecosystem underlies open waters of the United States and constitutes the surface of wetlands. It consists of organic and inorganic solid materials and includes water and other liquids or gases that fill the spaces between solid particles.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in varying degrees of change in the complex physical, chemical, and biological characteristics of the substrate. Discharges which alter substrate elevation or contours can result in changes in water circulation, depth, current pattern, water fluctuation and water temperature. Discharges may adversely affect bottom-dwelling organisms at the site by smothering immobile forms or forcing mobile forms to migrate. Benthic forms present prior to a discharge are unlikely to recolonize on the discharged material if it is very dissimilar from that of the discharge site. Erosion, slumping, or lateral displacement of surrounding bottom of such deposits can adversely affect areas of the substrate outside the perimeters of the disposal site by changing or destroying habitat. The bulk and composition of the discharged material and the location, method, and timing of discharges may all influence the degree of impact on the substrate.

§ 230.21 Suspended particulates/turbidity.

(a) Suspended particulates in the aquatic ecosystem consist of fine-grained mineral particles, usually smaller than silt, and organic particles. Suspended particulates may enter water bodies as a result of land runoff, flooding, vegetative and planktonic breakdown, resuspension of bottom sediments, and man's activities including dredging and filling. Particulates may remain suspended in the water column for variable periods of time as a result of such factors as agitation of the water mass, particulate specific gravity, particle shape, and physical and chemical properties of particle surfaces.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in greatly elevated levels of suspended particulates in the water column for varying lengths of time. These new levels may reduce light penetration and lower the rate of photosynthesis and the primary productivity of an aquatic area if they last long enough. Sight-dependent species may suffer reduced feeding ability leading to limited growth and lowered resistance to disease if high levels of suspended particulates persist. The biological and the chemical content of the suspended material may react with the dissolved oxygen in the water, which can result in oxygen depletion. Toxic metals and organics, pathogens, and viruses absorbed or adsorbed to fine-grained particulates in the material may become biologically available to organisms either in the water column or on the substrate. Significant increases in suspended particulate levels create turbid plumes which are highly visible and aesthetically displeasing. The extent and persistence of these adverse impacts caused by discharges depend upon the relative increase in suspended particulates above the amount occurring naturally, the duration of the higher levels, the current patterns, water level, and fluctuations present when such discharges occur, the volume, rate, and duration of the discharge, particulate deposition, and the seasonal timing of the discharge.

§ 230.22 Water.

(a) Water is the part of the aquatic ecosystem in which organic and inorganic constituents are dissolved and suspended. It constitutes part of the liquid phase and is contained by the substrate. Water forms part of a dynamic aquatic life-supporting system. Water clarity, nutrients and chemical content, physical and biological content, dissolved gas levels, pH, and temperature contribute to its life-sustaining capabilities.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can change the chemistry and the physical characteristics of the receiving water at a disposal site through the introduction of chemical constituents in suspended or dissolved form. Changes in the clarity, color, odor, and taste of water and the addition of contaminants can reduce or eliminate the suitability of water bodies for populations of aquatic organisms, and for human consumption, recreation, and aesthetics. The introduction of nutrients or organic material to the water column as a result of the discharge can lead to a high biochemical oxygen demand (BOD), which in turn can lead to reduced dissolved oxygen, thereby potentially affecting the survival of many aquatic organisms. Increases in nutrients can favor one group of organisms such as algae to the detriment of other more desirable types such as submerged aquatic vegetation, potentially causing adverse health

effects, objectionable tastes and odors, and other problems.

§ 230.23 Current patterns and water circulation.

(a) Current patterns and water circulation are the physical movements of water in the aquatic ecosystem. Currents and circulation respond to natural forces as modified by basin shape and cover, physical and chemical characteristics of water strata and masses, and energy dissipating factors.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can modify current patterns and water circulation by obstructing flow, changing the direction or velocity of water flow, changing the direction or velocity of water flow and circulation, or otherwise changing the dimensions of a water body. As a result, adverse changes can occur in: location, structure, and dynamics of aquatic communities; shoreline and substrate erosion and depositon rates; the deposition of suspended particulates; the rate and extent of mixing of dissolved and suspended components of the water body; and water stratification.

§ 230.24 Normal water fluctuations.

(a) Normal water fluctuations in a natural aquatic system consist of daily, seasonal, and annual tidal and flood fluctuations in water level. Biological and physical components of such a system are either attuned to or characterized by these periodic water fluctuations.

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. Such water level modifications may change salinity patterns, alter erosion or sedimentation rates, aggravate water temperature extremes, and upset the nutrient and dissolved oxygen balance of the aquatic ecosystem. In addition, these modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas.

§ 230.25 Salinity gradients.

(a) Salinity gradients form where salt water from the ocean meets and mixes with fresh water from land.

(b) Possible loss of environmental characteristics and values: Obstructions which divert or restrict flow of either fresh or salt water may change existing salinity gradients. For example, partial blocking of the entrance to an estuary or river mouth that significantly restricts the movement of the salt water into and out of that area can effectively lower the volume of salt water available for mixing within that estuary. The downstream migration of the salinity gradient can occur, displacing the maximum sedimentation zone and requiring salinity-dependent aquatic biota to adjust to the new conditions, move to new locations if possible, or perish. In the freshwater zone, discharge operations in the upstream regions can have equally adverse impacts. A significant reduction in the volume of fresh water moving into an estuary below that which is considered normal can affect the location and type of mixing thereby changing the characteristic salinity patterns. The resulting changed circulation pattern can cause the upstream migration of the salinity gradient displacing the maximim sedimentation zone. This migration may affect those organisms that are adapted to freshwater environments. It may also affect municipal water supplies.

Note.—Possible actions to minimize adverse impacts regarding site characteristics can be found in Subpart H.

Subpart D—Potential Impacts on Biological Characteristics of the Aquatic Ecosystem

Note.—The impacts described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B.

§ 230.30 Threatened and endangered species.

(a) An endangered species is a plant or animal in danger of extinction throughout all or a significant portion of its range. A threatened species is one in danger of becoming an endangered species in the foreseeable future throughout all or a significant portion of its range. Listings of threatened and endangered species as well as critical habitats are maintained by some individual States and by the U.S. Fish and Wildlife Service of the Department of the Interior (codified annually at 50 CFR § 17.11). The Department of Commerce has authority over some threatened and endangered marine mammals, fish and reptiles.

(b) Possible loss of values: The major potential impacts on threatened or endangered species from the discharge of dredged or fill material include:

(1) Covering or otherwise directly killing species;

(2) The impairment or destruction of habitat to which these species are limited. Elements of the aquatic habitat which are particularly crucial to the continued survival of some threatened or endangered species include adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species. Each of these elements can be adversely affected by changes in either the normal water conditions for clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current patterns, circulation and fluctuation, or the physical removal of habitat; and

(3) Facilitating incompatible activities.

(c) Where consultation with the Secretary of the Interior occurs under Section 7 of the Endangered Species Act, the conclusions of the Secretary concerning the impact(s) of the discharge on threatened and endangered species and their habitat shall be considered final.

§ 230.31 Fish, crustaceans, mollusks and other aquatic organisms in the food web.

(a) Aquatic organisms in the food web include, but are not limited to, finfish, crustaceans, mollusks, insects, annelids, planktonic organisms, and the plants and animals on which they feed and depend upon for their needs. All forms and life stages of an organism, throughout its geographic range, are included in this category.

(b) Possible loss of values: The discharge of dredged or fill material can variously affect populations of fish, crustaceans, mollusks and other food web organisms through the release of contaminants which adversely affect adults, juveniles, larvae, or eggs, or result in the establishment or proliferation of an undesirable competitive species of plant or animal at the expense of the desired resident species. Suspended particulates settling on attached or buried eggs can smother the eggs by limiting or sealing off their exposure to oxygenated water. Discharge of dredged and fill material may result in the debilitation or death of sedentary organisms by smothering, exposure to chemical contaminants in dissolved or suspended form, exposure to high levels of suspended particulates, reduction in food supply, or alteration of the substrate upon which they are dependent. Mollusks are particularly

sensitive to the discharge of material during periods of reproduction and growth and development due primarily to their limited mobility. They can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals. The discharge of dredged or fill material can redirect, delay, or stop the reproductive and feeding movements of some species of fish and crustacea, thus preventing their aggregation in accustomed places such as spawning or nursery grounds and potentially leading to reduced populations. Reduction of detrital feeding species or other representatives of lower trophic levels can impair the flow of energy from primary consumers to higher trophic levels. The reduction or potential elimination of food chain organism populations decreases the overall productivity and nutrient export capability of the ecosystem.

§ 230.32 Other wildlife.

(a) Wildlife associated with aquatic ecosystems are resident and transient mammals, birds, reptiles, and amphibians.

(b) Possible loss of values: The discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem. These adverse impacts upon wildlife habitat may result from changes in water levels, water flow and circulation, salinity, chemical content, and substrate characteristics and elevation. Increased water turbidity can adversely affect wildlife species which rely upon sight to feed, and disrupt the respiration and feeding of certain aquatic wildlife and food chain organisms. The availability of contaminants from the discharge of dredged or fill material may lead to the bioaccumulation of such contaminants in wildlife. Changes in such physical and chemical factors of the environment may favor the introduction of undesirable plant and animal species at the expense of resident species and communities. In some aquatic environments lowering plant and animal species diversity may disrupt the normal functions of the ecosystem and lead to reductions in overall biological productivity.

Note.—Possible actions to minimize adverse impacts regarding characteristics of biological components of the aquatic ecosystem can be found in Subpart H.

Subpart E—Potential Impacts on Special Aquatic Sites

Note.—The impacts described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B. The definition of special aquatic sites is found in § 230.3(q-1).

§ 230.40 Sanctuaries and refuges.

(a) Sanctuaries and refuges consist of areas designated under State and Federal laws or local ordinances to be managed principally for the preservation and use of fish and wildlife resources.

(b) Possible loss of values: Sanctuaries and refuges may be affected by discharges of dredged or fill material which will:

(1) Disrupt the breeding, spawning, migratory movements or other critical life requirements of resident or transient fish and wildlife resources;

(2) Create unplanned, easy and incompatible human access to remote aquatic areas;

(3) Create the need for frequent maintenance activity;

(4) Result in the establishment of undesirable competitive species of plants and animals;

(5) Change the balance of water and land areas needed to provide cover, food, and other fish and wildlife habitat requirements in a way that modifies sanctuary or refuge management practices;

(6) Result in any of the other adverse impacts discussed in Subparts C and D as they relate to a particular sanctuary or refuge.

§ 230.41 Wetlands.

(a)(1) Wetlands consist of areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

(2) Where wetlands are adjacent to open water, they generally constitute the transition to upland. The margin between wetland and open water can best be established by specialists familiar with the local environment, particularly where emergent vegetation merges with submerged vegetation over a broad area in such places as the lateral margins of open water, headwaters, rainwater catch basins, and groundwater seeps. The landward margin of wetlands also can best be identified by specialists familiar with the local environment when vegetation from the two regions merges over a broad area.

(3) Wetland vegetation consists of plants that require saturated soils to survive (obligate wetland plants) as well as plants, including certain trees, that gain a competitive advantage over others because they can tolerate prolonged wet soil conditions and their competitors cannot. In addition to plant populations and communities, wetlands are delimited by hydrological and physical characteristics of the environment. These characteristics should be considered when information about them is needed to supplement information available about vegetation, or where wetland vegetation has been removed or is dormant.

(b) Possible loss of values: The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. The addition of dredged or fill material may destroy wetland vegetation or result in advancement of succession to dry land species. It may reduce or eliminate nutrient exchange by a reduction of the system's productivity, or by altering current patterns and velocities. Disruption or elimination of the wetland system can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland. Discharges can also change the wetland habitat value for fish and wildlife as discussed in Subpart D. When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts. Discharging fill material in wetlands as part of municipal, industrial or recreational development may modify the capacity of wetlands to retain and store floodwaters and to serve as a buffer zone shielding upland areas from wave actions, storm damage and erosion.

§ 230.42 Mud flats

(a) Mud flats are broad flat areas along the sea coast and in coastal rivers to the head of tidal influence and in inland lakes, ponds, and riverine systems. When mud flats are inundated, wind and wave action may resuspend bottom sediments. Coastal mud flats are exposed at extremely low tides and inundated at high tides with the water table at or near the surface of the substrate. The substrate of mud flats contains organic material and particles

smaller in size than sand. They are either unvegetated or vegetated only by algal mats.

(b) Possible loss of values: The discharge of dredged or fill material can cause changes in water circulation patterns which may permanently flood or dewater the mud flat or disrupt periodic inundation, resulting in an increase in the rate of erosion or accretion. Such changes can deplete or eliminate mud flat biota, foraging areas, and nursery areas. Changes in inundation patterns can affect the chemical and biological exchange and decomposition process occurring on the mud flat and change the deposition of suspended material affecting the productivity of the area. Changes may reduce the mud flat's capacity to dissipate storm surge runoff.

§ 230.43 Vegetated shallows.

(a) Vegetated shallows are permanently inundated areas that under normal circumstances support communities of rooted aquatic vegetation, such as turtle grass and eelgrass in estuarine or marine systems as well as a number of freshwater species in rivers and lakes.

(b) Possible loss of values: The discharge of dredged or fill material can smother vegetation and benthic organisms. It may also create unsuitable conditions for their continued vigor by: (1) changing water circulation patterns; (2) releasing nutrients that increase undesirable algal populations; (3) releasing chemicals that adversely affect plants and animals; (4) increasing turbidity levels, thereby reducing light penetration and hence photosynthesis; and (5) changing the capacity of a vegetated shallow to stabilize bottom materials and decrease channel shoaling. The discharge of dredged or fill material may reduce the value of vegetated shallows as nesting, spawning, nursery, cover, and forage areas, as well as their value in protecting shorelines from erosion and wave actions. It may also encourage the growth of nuisance vegetation.

§ 230.44 Coral reefs.

(a) Coral reefs consist of the skeletal deposit, usually of calcareous or silicaceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef.

(b) Possible loss of values: The discharge of dredged or fill material can adversely affect colonies of reef building organisms by burying them, by releasing contaminants such as hydrocarbons into the water column, by reducing light penetration through the water, and by increasing the level of suspended particulates. Coral organisms are extremely sensitive to even slight reductions in light penetration or increases in suspended particulates. These adverse effects will cause a loss of productive colonies which in turn provide habitat for many species of highly specialized aquatic organisms.

§ 230.45 Riffle and pool complexes.

(a) Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a steaming flow, a smooth surface, and a finer substrate. Riffle and pool complexes are particularly valuable habitat for fish and wildlife.

(b) Possible loss of values: Discharge of dredged or fill material can eliminate riffle and pool areas by displacement, hydrologic modification, or sedimentation. Activities which affect riffle and pool areas and especially riffle/pool ratios, may reduce the aeration and filtration capabilities at the discharge site and downstream, may reduce stream habitat diversity, and may retard repopulation of the disposal site and downstream waters through sedimentation and the creation of unsuitable habitat. The discharge of dredged or fill material which alters stream hydrology may cause scouring or sedimentation of riffles and pools. Sedimentation induced through hydrological modification or as a direct result of the deposition of unconsolidated dredged or fill material may clog riffle and pool areas, destroy habitats, and create anaerobic conditions. Eliminating pools and meanders by the discharge of dredged or fill material can reduce water holding capacity of streams and cause rapid runoff from a watershed. Rapid runoff can deliver large quantities of flood water in a short time to downstream areas resulting in the destruction of natural habitat, high property loss, and the need for further hydraulic modification.

Note.—Possible actions to minimize adverse impacts on site or material characteristics can be found in Subpart H.

Subpart F—Potential Effects on Human Use Characteristics

Note.—The effects described in this subpart should be considered in making the factual determinations and the findings of compliance or non-compliance in Subpart B.

§ 230.50 Municipal and private water supplies.

(a) Municipal and private water supplies consist of surface water or ground water which is directed to the intake of a municipal or private water supply system.

(b) Possible loss of values: Discharges can affect the quality of water supplies with respect to color, taste, odor, chemical content and suspended particulate concentration, in such a way as to reduce the fitness of the water for consumption. Water can be rendered unpalatable or unhealthy by the addition of suspended particulates, viruses and pathogenic organisms, and dissolved materials. The expense of removing such substances before the water is delivered for consumption can be high. Discharges may also affect the quantity of water available for municipal and private water supplies. In addition, certain commonly used water treatment chemicals have the potential for combining with some suspended or dissolved substances from dredged or fill material to form other products that can have a toxic effect on consumers.

§ 230.51 Recreational and commercial fisheries.

(a) Recreational and commercial fisheries consist of harvestable fish, crustaceans, shellfish, and other aquatic organisms used by man.

(b) Possible loss of values: The discharge of dredged or fill materials can affect the suitability of recreational and commercial fishing grounds as habitat for populations of consumable aquatic organisms. Discharges can result in the chemical contamination of recreational or commercial fisheries. They may also interfere with the reproductive success of recreational and commercially important aquatic species through disruption of migration and spawning areas. The introduction of pollutants at critical times in their life cycle may directly reduce populations of commercially important aquatic organisms or indirectly reduce them by reducing organisms upon which they depend for food. Any of these impacts can be of short duration or prolonged, depending upon the physical and chemical impacts of the discharge and the biological availability of contaminants to aquatic organisms.

§ 230.52 Water-related recreation.

(a) Water-related recreation encompasses activities undertaken for amusement and relaxation. Activities encompass two broad categories of use: consumptive, e.g., harvesting resources by hunting and fishing; and non-comsumptive, e.g. canoeing and sight-seeing.

(b) Possible loss of values: One of the more important direct impacts of dredged or fill disposal is to impair or destroy the resources which support recreation activities. The disposal of dredged or fill material may adversely modify or destroy water use for recreation by changing turbidity, suspended particulates, temperature, dissolved oxygen, dissolved materials, toxic materials, pathogenic organisms, quality of habitat, and the aesthetic qualities of sight, taste, odor, and color.

§ 230.53 Aesthetics.

(a) *Aesthetics associated with the* aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners.

(b) *Possible loss of values:* The discharge of dredged or fill material can mar the beauty of natural aquatic ecosystems by degrading water quality, creating distracting disposal sites, inducing inappropriate development, encouraging unplanned and incompatible human access, and by *destroying vital elements that contribute* to the compositional harmony or unity, visual distinctiveness, or diversity of an area. The discharge of dredged or fill material can adversely affect the particular features, traits, or characteristics of an aquatic area which make it valuable to property owners. Activities which degrade water quality, disrupt natural substrate and vegetational characteristics, deny access to or visibility of the resource, or result in changes in odor, air quality, or noise levels may reduce the value of an aquatic area to private property owners.

§ 230.54 Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar preserves.

(a) These preserves consist of areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value.

(b) Possible loss of values: The discharge of dredged or fill material into such areas may modify the aesthetic, educational, historical, recreational and/or scientific qualities thereby reducing or eliminating the uses for which such sites are set aside and managed.

Note.—Possible actions to minimize adverse impacts regarding site or material characteristics can be found in Subpart H.

Subpart G—Evaluation and Testing

§ 230.60 General evaluation of dredged or fill material.

The purpose of these evaluation procedures and the chemical and biological testing sequence outlined in § 230.61 is to provide information to reach the determinations required by § 230.11. Where the results of prior evaluations, chemical and biological tests, scientific research, and experience can provide information helpful in making a determination, these should be used. Such prior results may make new testing unnecessary. The information used shall be documented. Where the same information applies to more than one determination, it may be documented once and referenced in later determinations.

(a) If the evaluation under paragraph (b) indicates the dredged or fill material is not a carrier of contaminants, then the required determinations pertaining to the presence and effects of contaminants can be made without testing. Dredged or fill material is most likely to be free from chemical, biological, or other pollutants where it is composed primarily of sand, gravel, or other naturally occurring inert material. Dredged material so composed is generally found in areas of high current or wave energy such as streams with large bed loads or coastal areas with shifting bars and channels. However, when such material is discolored or contains other indications that contaminants may be present, further inquiry should be made.

(b) The extraction site shall be examined in order to assess whether it is sufficiently removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants. Factors to be considered include but are not limited to:

(1) Potential routes of contaminants or contaminated sediments to the extraction site, based on hydrographic or other maps, aerial photography, or other materials that show watercourses, surface relief, proximity to tidal movement, private and public roads, location of buildings, municipal and industrial areas, and agricultural or forest lands.

(2) Pertinent results from tests previously carried out on the material at the extraction site, or carried out on similar material for other permitted projects in the vicinity. Materials shall be considered similar if the sources of contamination, the physical configuration of the sites and the sediment composition of the materials are comparable, in light of water circulation and stratification, sediment accumulation and general sediment characteristics. Tests from other sites may be relied on only if no changes have occurred at the extraction sites to render the results irrelevant.

(3) Any potential for significant introduction of persistent pesticides from land runoff or percolation;

(4) Any records of spills or disposal of petroleum products or substances designated as hazardous under section 311 of the Clean Water Act (See 40 CFR 116);

(5) Information in Federal, State and local records indicating significant introduction of pollutants from industries, municipalities, or other sources, including types and amounts of waste materials discharged along the potential routes of contaminants to the extraction site; and

(6) Any possibility of the presence of substantial natural deposits of minerals or other substances which could be released to the aquatic environment in harmful quantities by man-induced discharge activities.

(c) To reach the determinations in § 230.11 involving potential effects of the discharge on the characteristics of the disposal site, the narrative guidance in Subparts C–F shall be used along with the general evaluation procedure in § 230.60 and, if necessary, the chemical and biological testing sequence in § 230.61. Where the discharge site is adjacent to the extraction site and subject to the same sources of contaminants, and materials at the two sites are substantially similar, the fact that the material to be discharged may be a carrier of contaminants is not likely to result in degradation of the disposal site. In such circumstances, when dissolved material and suspended particulates can be controlled to prevent carrying pollutants to less contaminated areas, testing will not be required.

(d) Even if the § 230.60(b) evaluation (previous tests, the presence of polluting industries and information about their discharge or runoff into waters of the U.S., bioinventories, etc.) leads to the conclusion that there is a high probability that the material proposed for discharge is a carrier of contaminants, testing may not be necessary if constraints are available to

reduce contamination to acceptable levels within the disposal site and to prevent contaminants from being transported beyond the boundaries of the disposal site, if such constraints are acceptable to the permitting authority and the Regional Administrator, and if the potential discharger is willing and able to implement such constraints. However, even if tests are not performed, the permitting authority must still determine the probable impact of the operation on the receiving aquatic ecosystem. Any decision not to test must be explained in the determinations made under § 230.11.

§ 230.61 Chemical, biological, and physical evaluation and testing.

Note.—The Agency is today proposing revised testing guidelines. The evaluation and testing procedures in this section are based on the 1975 § 404(b)(1) interim final Guidelines and shall remain in effect until the revised testing guidelines are published as final regulations.

(a) No single test or approach can be applied in all cases to evaluate the effects of proposed discharges of dredged or fill materials. This section provides some guidance in determining which test and/or evaluation procedures are appropriate in a given case. Interim guidance to applicants concerning the applicability of specific approaches or procedures will be furnished by the permitting authority.

(b) *Chemical-biological interactive effects.* The principal concerns of discharge of dredged or fill material that contain contaminants are the potential effects on the water column and on communities of aquatic organisms.

(1) *Evaluation of chemical-biological interactive effects.* Dredged or fill material may be excluded from the evaluation procedures specified in paragraphs (b)(2) and (3) of this section if it is determined, on the basis of the evaluation in § 230.60, that the likelihood of contamination by contaminants is acceptably low, unless the permitting authority, after evaluating and considering any comments received from the Regional Administrator, determines that these procedures are necessary. The Regional Administrator may require, on a case-by-case basis, testing approaches and procedures by stating what additional information is needed through further analyses and how the results of the analyses will be of value in evaluating potential environmental effects.

If the General Evaluation indicates the presence of a sufficiently large number of chemicals to render impractical the identification of all contaminants by chemical testing, information may be obtained from bioassays in lieu of chemical tests.

(2) *Water column effects.* (i) Sediments normally contain constituents that exist in various chemical forms and in various concentrations in several locations within the sediment. An elutriate test may be used to predict the effect on water quality due to release of contaminants from the sediment to the water column. However, in the case of fill material originating on land which may be a carrier of contaminants, a water leachate test is appropriate.

(ii) Major constituents to be analyzed in the elutriate are those deemed critical by the permitting authority, after evaluating and considering any comments received from the Regional Administrator, and considering results of the evaluation in § 230.60. Elutriate concentrations should be compared to concentrations of the same constituents in water from the disposal site. Results should be evaluated in light of the volume and rate of the intended discharge, the type of discharge, the hydrodynamic regime at the disposal site, and other information relevant to the impact on water quality. The permitting authority should consider the mixing zone in evaluating water column effects. The permitting authority may specify bioassays when such procedures will be of value.

(3) *Effects on benthos.* The permitting authority may use an appropriate benthic bioassay (including bioaccumulation tests) when such procedures will be of value in assessing ecological effects and in establishing discharge conditions.

(c) Procedure for comparison of sites.

(1) When an inventory of the total concentration of contaminants would be of value in comparing sediment at the dredging site with sediment at the disposal site, the permitting authority may require a sediment chemical analysis. Markedly different concentrations of contaminants between the excavation and disposal sites may aid in making an environmental assessment of the proposed disposal operation. Such differences should be interpreted in terms of the potential for harm as supported by any pertinent scientific literature.

(2) When an analysis of biological community structure will be of value to assess the potential for adverse environmental impact at the proposed disposal site, a comparison of the biological characteristics between the excavation and disposal sites may be required by the permitting authority. Biological indicator species may be useful in evaluating the existing degree of stress at both sites. Sensitive species representing community components colonizing various substrate types within the sites should be identified as possible bioassay organisms if tests for toxicity are required. Community structure studies should be performed only when they will be of value in determining discharge conditions. This is particularly applicable to large quantities of dredged material known to contain adverse quantities of toxic materials. Community studies should include benthic organisms such as microbiota and harvestable shellfish and finfish. Abundance, diversity, and distribution should be documented and correlated with substrate type and other appropriate physical and chemical environmental characteristics.

(d) Physical tests and evaluation. The effect of a discharge of dredged or fill material on physical substrate characteristics at the disposal site, as well as on the water circulation, fluctuation, salinity, and suspended particulates content there, is important in making factual determinations in § 230.11. Where information on such effects is not otherwise available to make these factual determinations, the permitting authority shall require appropriate physical tests and evaluations as are justified and deemed necessary. Such tests may include sieve tests, settleability tests, compaction tests, mixing zone and suspended particulate plume determinations, and site assessments of water flow, circulation, and salinity characteristics.

Subpart H—Actions To Minimize Adverse Effects

Note.—There are many actions which can be undertaken in response to § 203.10(d) to minimize the adverse effects of discharges of dredged or fill material. Some of these, grouped by type of activity, are listed in this subpart.

§ 230.70 Actions concerning the location of the discharge.

The effects of the discharge can be minimized by the choice of the disposal site. Some of the ways to accomplish this are by:

(a) Locating and confining the discharge to minimize smothering of organisms;

(b) Designing the discharge to avoid a disruption of periodic water inundation patterns;

(c) Selecting a disposal site that has been used previously for dredged material discharge;

(d) Selecting a disposal site at which the substrate is composed of material similar to that being discharged, such as discharging sand on sand or mud on mud;

(e) Selecting the disposal site, the discharge point, and the method of discharge to minimize the extent of any plume;

(f) Designing the discharge of dredged or fill material to minimize or prevent the creation of standing bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of areas subject to such fluctuations.

§ 230.71 Actions concerning the material to be discharged.

The effects of a discharge can be minimized by treatment of, or limitations on the material itself, such as:

(a) Disposal of dredged material in such a manner that physiochemical conditions are maintained and the potency and availability of pollutants are reduced.

(b) Limiting the solid, liquid, and gaseous components of material to be discharged at a particular site;

(c) Adding treatment substances to the discharge material;

(d) Utilizing chemical flocculants to enhance the deposition of suspended particulates in diked disposal areas.

§ 230.72 Actions controlling the material after discharge.

The effects of the dredged or fill material after discharge may be controlled by:

(a) Selecting discharge methods and disposal sites where the potential for erosion, slumping or leaching of materials into the surrounding aquatic ecosystem will be reduced. These sites or methods include, but are not limited to:

(1) Using containment levees, sediment basins, and cover crops to reduce erosion;

(2) Using lined containment areas to reduce leaching where leaching of chemical constituents from the discharged material is expected to be a problem;

(b) Capping in-place contaminated material with clean material or selectively discharging the most contaminated material first to be capped with the remaining material;

(c) Maintaining and containing discharged material properly to prevent point and nonpoint sources of pollution;

(d) Timing the discharge to minimize impact, for instance during periods of unusual high water flows, wind, wave, and tidal actions.

§ 230.73 Actions affecting the method of dispersion.

The effects of a discharge can be minimized by the manner in which it is dispersed, such as:

(a) Where environmentally desirable, distributing the dredged material widely in a thin layer at the disposal site to maintain natural substrate contours and elevation;

(b) Orienting a dredged or fill material mound to minimize undesirable obstruction to the water current or circulation pattern, and utilizing natural bottom contours to minimize the size of the mound;

(c) Using silt screens or other appropriate methods to confine suspended particulate/turbidity to a small area where settling or removal can occur;

(d) Making use of currents and circulation patterns to mix, disperse and dilute the discharge;

(e) Minimizing water column turbidity by using a submerged diffuser system. A similar effect can be accomplished by submerging pipeline discharges or otherwise releasing materials near the bottom;

(f) Selecting sites or managing discharges to confine and minimize the release of suspended particulates to give decreased turbidity levels and to maintain light penetration for organisms;

(g) Setting limitations on the amount of material to be discharged per unit of time or volume of receiving water.

§ 230.74 Actions related to technology.

Discharge technology should be adapted to the needs of each site. In determining whether the discharge operation sufficiently minimizes adverse environmental impacts, the applicant should consider:

(a) Using appropriate equipment or machinery, including protective devices, and the use of such equipment or machinery in activities related to the discharge of dredged or fill material;

(b) Employing appropriate maintenance and operation on equipment or machinery, including adequate training, staffing, and working procedures;

(c) Using machinery and techniques that are especially designed to reduce damage to wetlands. This may include machines equipped with devices that scatter rather than mound excavated materials, machines with specially designed wheels or tracks, and the use of mats under heavy machines to reduce wetland surface compaction and rutting;

(d) Designing access roads and channel spanning structures using culverts, open channels, and diversions that will pass both low and high water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement;

(e) Employing appropriate machinery and methods of transport of the material for discharge.

§ 230.75 Actions affecting plant and animal populations.

Minimization of adverse effects on populations of plants and animals can be achieved by:

(a) Avoiding changes in water current and circulation patterns which would interfere with the movement of animals;

(b) Selecting sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species which have a competitive edge ecologically over indigenous plants or animals;

(c) Avoiding sites having unique habitat or other value, including habitat of threatened or endangered species;

(d) Using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat. Use techniques that have been demonstrated to be effective in circumstances similar to those under consideration wherever possible. Where proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiate their use on a small scale to allow corrective action if unanticipated adverse impacts occur.

(e) Timing discharge to avoid spawning or migration seasons and other biologically critical time periods;

(f) Avoiding the destruction of remnant natural sites within areas already affected by development.

§ 230.76 Actions affecting human use.

Minimization of adverse effects on human use potential may be achieved by:

(a) Selecting discharge sites and following discharge procedures to prevent or minimize any potential damage to the aesthetically pleasing features of the aquatic site (e.g. viewscapes), particularly with respect to water quality;

(b) Selecting disposal sites which are not valuable as natural aquatic areas;

(c) Timing the discharge to avoid the seasons or periods when human recreational activity associated with the aquatic site is most important;

(d) Following discharge procedures which avoid or minimize the disturbance of aesthetic features of an aquatic site or ecosystem.

(e) Selecting sites that will not be detrimental or increase incompatible human activity, or require the need for frequent dredge or fill maintenance activity in remote fish and wildlife areas;

(f) Locating the disposal site outside of the vicinity of a public water supply intake.

§ 230.77 Other actions.

(a) In the case of fills, controlling runoff and other discharges from activities to be conducted on the fill;

(b) In the case of dams, designing water releases to accommodate the needs of fish and wildlife.

(c) In dredging projects funded by Federal agencies other than the Corps of Engineers, maintain desired water quality of the return discharge through agreement with the Federal funding authority on scientifically defensible pollutant concentration levels in addition to any applicable water quality standards.

(d) When a significant ecological change in the aquatic environment is proposed by the discharge of dredged or fill material, the permitting authority should consider the ecosystem that will be lost as well as the environmental benefits of the new system.

Subpart I—Planning To Shorten Permit Processing Time

§ 230.80 Advanced identification of disposal areas.

(a) Consistent with these Guidelines, EPA and the permitting authority, on their own initiative or at the request of any other party and after consultation with any affected State that is not the permitting authority, may identify sites which will be considered as:

(1) Possible future disposal sites, including existing disposal sites and non-sensitive areas; or

(2) Areas generally unsuitable for disposal site specification;

(b) The identification of any area as a possible future disposal site should not be deemed to constitute a permit for the discharge of dredged or fill material within such area or a specification of a disposal site. The identification of areas that generally will not be available for disposal site specification should not be deemed as prohibiting applications for permits to discharge dredged or fill material in such areas. Either type of identification constitutes information to facilitate individual or General permit application and processing.

(c) An appropriate public notice of the proposed identification of such areas shall be issued;

(d) To provide the basis for advanced identification of disposal areas, and areas unsuitable for disposal, EPA and the permitting authority shall consider the likelihood that use of the area in question for dredged or fill material disposal will comply with these Guidelines. To facilitate this analysis, EPA and the permitting authority should review available water resources management data including data available from the public, other Federal and State agencies, and information from approved Coastal Zone Management programs and River Basin Plans.

(e) The permitting authority should maintain a public record of the identified areas and a written statement of the basis for identification.

[FR Doc. 80-40001 Filed 12-23-80; 8:45 am]

BILLING CODE 6560-01-M

Appendix 6: Application Form for a Corps of Engineers Permit

APPLICATION FOR A DEPARTMENT OF THE ARMY PERMIT
For use of this form, see EP 1145-2-1

Form Approved - Office of Mgmt & Budget No. 49-R0420

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

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

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

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

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

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

8. Location where proposed activity exists or will occur.

Address:

Street, road or other descriptive location

In or near city or town

County State Zip Code

Tax Assessors Description: (If known)

Map No. Subdiv. No. Lot No.

Sec. Twp. Rge.

9. Name of waterway at location of the activity.

10. Date activity is proposed to commence. _____

Date activity is expected to be completed _____

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

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

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

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

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

14. Remarks or additional information.

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

_____
Signature of Applicant or Authorized Agent

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

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

Appendix 7: Statement of Purpose of Alaska Wetlands Task Force

WETLANDS TASK FORCE

1. Statement of Purpose

The Wetlands Task Force is organized to assure cooperation and communication between State, federal and local agencies, business interests and citizens in the use and management of Alaska's wetland areas.

The goal of the Task Force is to assure protection of Alaska's wetland resources, as provided in federal and State law, while preventing or minimizing unnecessary delay in the approval of projects.

The goals of the Task Force are to:

1. Determine appropriate type and scale of wetland mapping efforts, priority areas for mapping, and areas for which general permits could be developed;

2. Assist and encourage local management plans for wetlands areas, incorporating applicable State and federal standards;

3. Develop a "single-window" for permit applicants and provide other necessary services to eliminate public confusion and lost time;

4. Provide increased public information on the values of wetlands, and the purpose and methods of wetlands management programs;

5. Streamline and simplify permit processes, applications and procedures to simplify compliance with the law as much as possible; and

6. Train State, federal and local officials to better carry out assigned wetlands management responsibilities.

Appendix 8: Executive Order on Wetlands, Number 11990
(Published in Volume 42, page 26961, of the Federal Register, 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.

Protection of Wetlands: Executive Order 11990

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 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 prohibited 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 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 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.

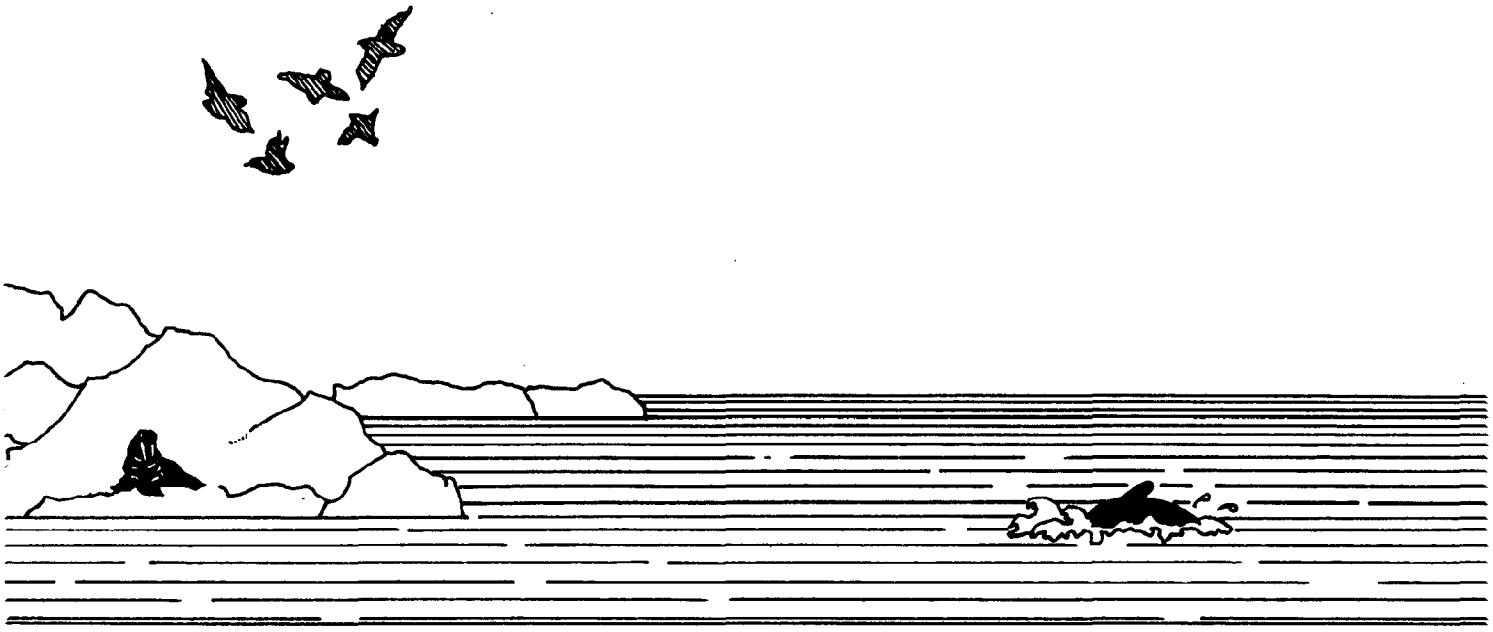
SEC. 9. Nothing in this Order shall apply to assistance provided for emergency work, essential to save lives and protect property and public health and safety, performed pursuant to Section 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

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.

NOAA OCZM
254-7100



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