

## DEPARTMENT OF DEFENSE

## Corps of Engineers, Department of the Army

33 CFR Parts 209, 335, 336, 337, and 338

## Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Final rule.

**SUMMARY:** This rule revises and relocates 33 CFR 209.145 for Army Corps of Engineers (Corps) operations and maintenance activities involving the discharge of dredged or fill material in waters of the United States and ocean waters. These revisions are needed to reflect laws, Executive Orders (EOs), court decisions, and policy changes that have occurred since the current regulations were issued on July 22, 1974. The purpose of this rule is to provide for the environmental compliance aspects of the Corps' national dredging program which balances economics, engineering and environmental requirements. These regulations provide updated procedures for compliance with state water quality certification and coastal zone consistency requirements of Corps maintenance dredging and disposal activities; provide procedures to promote consistent implementation of the environmental protection requirements of Corps operation and maintenance activities; and will better enable the Corps to implement the provisions of the Clean Water Act (CWA) and Ocean Dumping Act (ODA) when undertaking operations and maintenance activities involving dredged material disposal in waters of the U.S. and ocean waters.

EFFECTIVE DATE: April 28, 1988.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dave Mathis or Mr. Joe Wilson, (202) 272-0397.

**SUPPLEMENTARY INFORMATION:**

On May 30, 1986, we published (51 FR 19694) proposed revisions to 33 CFR 209.145 (39 FR 26636, July 22, 1974). On July 10, 1986, the Corps sent a copy of the proposed rule to the Governors of each of the 50 states. The comment period for the proposed rule closed on July 29, 1986. Fifty-six letters of comment were received in response to the Federal Register notice and letters to the Governors.

## Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. An Environmental Assessment (EA) has been prepared discussing the proposed changes to the current regulation, subsequent expected environmental impacts, and overall need for revisions. The EA and Finding of No Significant Impact are available upon request.

## Determination Under Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Army has determined that the revisions to these regulations do not contain a major proposal requiring the preparation of a regulatory analysis under EO 12291. The Department of the Army certifies, pursuant to section 605(b) of the Regulatory Flexibility Act of 1980, that these regulations will not have a significant economic impact on a substantial number of entities.

These final regulations implement changes in environmental laws, EOs, court decisions, and policy changes that have occurred since the 1974 rule was issued. Generally, this rule will clarify and codify numerous policies regarding Corps maintenance dredging and disposal activities that were established since the 1974 rule was issued. This rule will also specifically address five areas of the Corps dredging program that are contributing to delays and increasing costs of routine maintenance dredging and disposal activities.

1. *Section 335.4 Policy.* This regulation prescribes the policies and procedures that should be followed to establish environmental compliance for Corps operations and maintenance activities. The need and justification for operations and maintenance work are made during the Army Civil Works annual Congressional budget review process. Once the relative priority of a maintenance project is determined and Congress allocates funds, it is the responsibility of the Corps to carry out the work by selecting the dredged material disposal alternative(s) which is the least costly and consistent with sound engineering practices and appropriate environmental quality standards. This regulation focuses on procedures and documentation necessary to establish compliance with certain environmental statutes and regulations. Cost and engineering feasibility considerations, however, play a critical role in the ultimate course of action.

The policy statement in Part 335 indicates that the Corps undertakes

operations and maintenance activities in a manner which recognizes cost, engineering requirements, and other factors while ensuring environmentally responsible choices. When evaluating operations and maintenance projects, the Corps fully considers all practicable alternatives on an equal basis.

2. *Section 335.7 Federal Standard.* In recent years, questions have arisen regarding respective roles and decision authorities of the states and the federal government in actions involving the disposal of dredged material. The Federal standard should clarify the respective roles and ensure a greater degree of National consistency in management of dredged material disposal. The procedures of the environmental laws and regulations (primarily the CWA and the ODA) require consideration of all facets of the dredging and disposal operation to include cost, engineering feasibility, environmental concerns, and all practicable alternatives. The alternative selected should be the one which meets required environmental laws and regulations in the least costly manner consistent with sound engineering practices. This is defined as the Federal Standard. When seeking state certifications or evaluating resource agency and public comments, the district engineer will be using the alternative(s) selected on this basis as a point of reference.

3. *Section 336.2 Corps Authority to Select Dredged Material Disposal Sites in the Territorial Sea and Ocean Waters.* Presently, the Environmental Protection Agency (EPA) has authority under section 102 of the ODA for designating ocean disposal sites in the territorial sea and ocean waters. The Secretary of the Army has authority under section 103 of the ODA to authorize the transportation for disposal of dredged material in the territorial sea and ocean waters and also to select ocean disposal sites for dredged material should an EPA designated site not be feasible for use. The Secretary will continue to exercise this site selection authority as necessary. In exercising its authority, the Secretary is required to apply the environmental factors and criteria established by the EPA pursuant to section 102(a), relating to the site selection process. Presently, the EPA has designated 107 ocean dredged material disposal sites serving approximately 100 coastal Federally authorized navigation projects. To the extent feasible, the Corps uses and will continue to use the EPA designated sites; however, the Corps may select an ocean dredged material disposal site or

sites under the authority of section 103 of the ODA, in consultation with EPA, for situations where no EPA designated site exists or can be feasibly used.

4. *Section 336.1(b)(8) and (9) State Requirements.* Since implementation of the 1977 amendments to the CWA, the Corps has sought state water quality certification for dredged material disposal activities that occur in waters of the United States. Additionally, the Coastal Zone Management Act (CZMA) in general terms, requires the Corps to provide a determination that its activities subject to the CZMA are consistent with an approved state coastal zone management plan to the maximum degree practicable.

Some confusion has existed over respective authorities and responsibilities of the Federal government and the states under the CWA and CZMA. Appropriate sections have been added to the regulation to recognize the role of the states in evaluating water quality and coastal zone impacts of Corps maintenance dredging and disposal projects, while assuring that the states provide timely responses as required by Congress in the relevant Federal statutes.

5. *Section 336.1(b)(8) and (9) Certification Requests.* Since implementation of the CWA and CZMA, the Corps has been providing information to affected states in support of requests for water quality certification and coastal zone consistency determinations. Generally, thorough project description information is adequate to determine compliance with state water quality standards and impacts to approved coastal zone programs. The absence of a Federal regulation to specify what information would be provided to the state in support of the water quality certification request and coastal zone consistency determination has led to inconsistent field implementation. The rule specifies the information that will be provided to the states in support of Corps requests for water quality certification and coastal zone consistency determinations.

#### Section-by-Section Analysis

*Part 335—Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged or Fill Material Into Waters of the U.S. or Ocean Waters*

*Section 335.3:* One commenter inquired as to whether these regulations were intended to apply to Corps activities other than construction and maintenance of navigation projects. As stated in § 335.3, these regulations apply

only to operation and maintenance activities at Army Corps Civil Works projects. Another commenter noted that the regulations should provide that the Corps meet the same requirements as the regulations that apply to the general public. The Corps is subject to the same Federal environmental laws and regulations as the general public even though the Corps does not issue a permit document to authorize its activities. This rule reflects the requirement to meet the same standards (see § 336.1(a)). There is, however, a somewhat different perspective between projects undertaken by the general public and Corps operations and maintenance activities. When a private entity proposes to perform work requiring a Corps permit, the Corps must decide whether that work would be contrary to the public interest. In contrast, this rule applies to operation and maintenance of Federal projects which have already been determined by the Congress to be in the public interest. This difference shifts the Corps focus from a question of whether the work should be accomplished to a question of how the work can most reasonably be accomplished. The Corps analysis, therefore, is directed at evaluation of the environmental effects of dredged material disposal alternatives and demonstration of compliance with the applicable environmental laws and regulations rather than a basic decision of whether a particular project should proceed.

*Section 335.4:* Several commenters expressed concern with language requiring that alternatives be developed in a "least costly" manner and "consistent with engineering requirements established for the project." One commenter stated that the policy statement would limit the scope of alternatives evaluation in a manner inconsistent with applicable law. It is the policy of the Corps to evaluate maintenance dredging and disposal activities to seek maximum public benefits and economy as well as full compliance with environmental laws and regulations. Cost and engineering practicability play vital roles in selecting the ultimate course of action. We do not, however, intend to limit consideration of practicable alternatives nor to minimize or neglect the importance of the environment in the decision-making process. The scope of the alternatives evaluation is as broad as practicable, including the no dredging alternative. We believe the policy statement in § 335.4 reflects that all practicable alternatives will be evaluated on an equal basis and that cost, engineering requirements, and the

environment must be fully considered in the ultimate course of action. We have substituted the word "requirement" for "constraints" at the end of the definition to avoid confusion.

*Sections 335.5 and 335.6:* Two commenters noted that the listing of applicable Federal laws and EOs fails to provide the reader with the relationship of each law and EO to the proposed rule nor the relative importance of each to the proposed rule; and that we should explicitly state which statutory provisions apply. The relevant provisions of each law and EO apply to dredging and disposal activities. We do not believe that a synopsis or specific statutory reference is necessary, since these laws and EOs "speak for themselves" (i.e., the texts are readily available to the public). Evaluation of the applicability of these authorities are made on a case-by-case basis. One commenter noted that the list of laws made no reference to the applicability of the Resource Conservation and Recovery Act (RCRA) to dredged material.

After careful study of RCRA and its legislative history, we do not believe that Congress intended that RCRA regulate dredged material disposal. Dredged material does not clearly fall within the RCRA definitions of solid waste or hazardous waste. Also, the CWA and ODA provide the appropriate legal and regulatory regimes for dredged material disposal, and those regimes are substantially incompatible with regulation under RCRA. Notwithstanding this legal distinction, we are concerned with the substance of the issue of disposal of dredged material that may be considered highly contaminated. Over the past several years, the Corps has been actively developing state-of-the-art procedures for evaluating and managing all types of dredged material including the 1-3 percent of dredged material which is considered highly contaminated. These procedures have been developed because the EPA RCRA testing and disposal guidelines are technically inappropriate for characterizing the environmental impacts of highly contaminated dredged material. The Corps-developed testing protocol and management strategy for the disposal of dredged material considers the degree of contamination and the potential migration pathways of the contaminants to the environment when evaluating disposal alternatives and results in an equivalent level of environmental protection as would occur under RCRA.

*Section 335.7:* Several commenters indicated that the definition of

emergency was overly broad, particularly with respect to the term economic hardship. The definition of emergency and its use at § 337.7 allows the Corps to respond to certain unexpected dredging and disposal operations on an expedited basis. We do not intend to bypass the requirements of Federal environmental laws but rather to assure that the necessary environmental standards are met in a time period necessary to remedy the emergency situation. We have modified § 337.7 to remove some of the equivocal terminology. One commenter noted that the definition of emergency should include situations which might result in unacceptable environmental degradation. Should the district engineer determine that unacceptable adverse impacts would result from dredging and disposal operations, he has the discretion and obligation to correct the situation. Such corrective actions do not generally fall within the purview of the emergency definition and procedures which focus on the Corps responsibility for maintaining safe, reliable, and economically efficient Federal interstate navigation system in circumstances where emergency conditions jeopardize that national requirement.

The definition and use of the term "Federal standard" received a great deal of comment. Many commenters objected to the Federal standard concept and its use. A number of commenters did not understand how the Corps could develop a Federal standard before factoring in the requirements of the CZMA and CWA. Some commenters noted that the Federal standard must reflect mandatory compliance with the CWA 404(b)(1) guidelines. One commenter recommended use of the term "Corps preferred alternative," instead of "Federal Standard". Regardless of whether we change the term to "preferred alternative" the meaning and use of the term would not change. We believe the term "Federal standard" more accurately describes our intent. In developing dredged material disposal alternatives, the Corps must consider all facets of the dredged and disposal operation to include cost, engineering feasibility, environmental concerns, and the no dredging option. The alternative selected should represent the least costly one consistent with sound engineering practices and meeting required environmental standards. We believe that developing the Federal standard for dredging and disposal projects is essential for assuring consistency in how we manage the Corps national dredging program.

Some comments received indicated the major concern was not over whether the Corps develops the Federal standard, but rather when the alternatives are developed, which lead to a determination of the Federal standard i.e., before or after the Corps request for water quality certification or consistency determination. When the Corps issues CWA public notices and seeks state CWA 401 certifications and CZMA determinations for dredging and disposal projects, the Corps must specify proposed disposal site(s). The disposal alternatives are developed using the 404(b)(1) guidelines or ocean disposal criteria. Through the public involvement processes of the CWA or ODA, the Corps solicits public review of the alternatives. The Corps also seeks specific state review of the Corps' alternatives through the certification and consistency determination requirements of the CWA/CZMA. In accordance with long held Corps procedures and consistent with requirements of the CWA and NEPA, all public input is fully considered and the final course of action chosen which appropriately reflects the public interest.

State water quality standards are established in accordance with the provisions of the CWA and are available to the Corps and concerned public. The Corps uses the 404(b)(1) guidelines to determine the appropriate tests to be performed on the dredged material to demonstrate compliance with the guidelines and state water quality standards. Appropriate chemical/biological testing is performed on the material to be dredged and on the disposal site using the 40 CFR Subpart G—Evaluation and Testing procedures or, if appropriate, the ocean disposal criteria at 40 CFR Part 227 Criteria for the Evaluation of Permit Applications for the Ocean Dumping of Materials. The 404(b)(1) guidelines in 40 CFR Subpart B § 230.10(b)(1) prohibit the disposal of dredged material that "causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable state water quality standards." The Corps assesses through the 404(b)(1) guidelines, or, if appropriate the ocean disposal criteria, if the proposed disposal activity will violate state water quality standards. The findings concerning compliance with the 404(b)(1) guidelines or ocean disposal criteria and state water quality standards are submitted to the state along with the request for water quality certification. The Corps Federal standard will comply with the 404(b)(1) guidelines, or, if appropriate the ocean disposal criteria.

Similarly, state coastal zone management plans are approved by the Secretary of Commerce and are made available to the Corps and concerned public. The Corps evaluates the proposed dredging and disposal activity against the state coastal zone management plan and provides the state coastal zone management agency with a consistency determination. The Federal standard must be developed before the request for a consistency determination; otherwise, the state would not be able to determine consistency. The state must either concur or object to the Corps consistency determination. The National Oceanic and Atmospheric Administration (NOAA) Office of Coastal Resource Management has determined that the NOAA regulations implementing the CZMA do not contemplate conditional concurrences by state coastal zone management agencies.

We have deleted that portion of the Federal standard definition after "criteria" to reflect that the Federal standard is developed using the 404(b)(1) guidelines or ocean disposal criteria and should not be construed as an alternative developed through public involvement. We believe that developing a Federal standard before the request for the state water quality certification and coastal zone consistency determinations is procedurally appropriate.

Some commenters noted that the Federal standard would be developed on economic rather than environmental concerns. As stated in the policy in § 335.4, all alternatives are considered on an equal basis. This includes consideration of cost, beneficial uses of dredged material, and the environment. Given this policy statement, development of the Federal standard will provide proper focus to both economic and environmental concerns. Two commenters indicated that beneficial uses of dredged material should be incorporated into the Federal standard. It is the policy of the Corps (§ 337.9) to use dredged material beneficially within existing authority and funding, and consistent with the Federal standard process.

One commenter stated that the term "Navigable Waters of the U.S." should be changed to "Tidal Waters of the U.S." In the draft, we repeated parts of the definition of navigable waters of the U.S. from the Corps regulatory program at 33 CFR Part 329 and added a qualifier at the end of the definition. Our intent was not to change the meaning of navigable waters within the context of the Corps regulatory program, but to

include for the purposes of this regulation those situations where dredged material is removed from navigation approach channels seaward of the outer limit of the territorial sea.

Two commenters noted that the term "practicable" focused on cost to the exclusion of environmental protection and another stated that the definition should include consideration of fish and wildlife resources and water quality. The term practicable was taken from the Environmental Protection Agency 404(b)(1) guidelines in 40 CFR 230.3(q). We believe that cost, engineering requirements, and the environment all play appropriate roles in determining the Corps' ultimate course of action. We repeated the EPA definition because of its relevance to the Corps' dredging program. One commenter recommended that the term practicable in places other than those pertaining to the coastal zone consistency process should be clarified since the term "practicable" may have a different meaning within the context of the NOAA regulations for the CZMA. We have attempted to reduce the use of the term practicable in the final regulation except as the term pertains to the coastal zone consistency process.

The states of Texas and Florida requested recognition of the jurisdictional variation of their territorial sea on the Gulf as 10.3 miles. The proposed definition of territorial sea was taken directly from the CWA definition. Based on Federal laws and treaties, the U.S. territorial sea extends three miles seaward from the baseline established by the Convention of the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606. We believe the definition accurately reflects the extent of the U.S. Territorial Sea and have retained the definition in the final rule.

*Part 336—Factors to be Considered in the Evaluation of Army Corps of Engineers Navigation Dredging Projects Involving the Discharge of Dredged Material Into Waters of the U.S. and Ocean Waters*

*Section 336.0:* One commenter noted that the Corps treatment of the ODA and CWA in the territorial sea appears contrary to a settled legal case (*Pacific Legal Foundation v. Quarles*). In that case, the court concluded that the CWA controlled discharges into navigable waters, including the territorial sea, and that the ODA covered pollution from vessels beyond the territorial sea. While the court discussed the overlap of CWA and ODA jurisdiction in the territorial sea as it relates to section 402 discharges, the court did not consider the jurisdictional relationship as it relates to section 404 and the disposal of

dredged material in the territorial sea. The respective ODA and the CWA jurisdictions overlap in the territorial sea, but do not conflict, as evidenced by the fact that both Acts were under consideration by Congress at the same time in 1972. The legislative history of the ODA indicates Congress intended the ODA to have jurisdiction over disposal of dredged material in the territorial sea. Additionally, the EPA 404(b)(1) guidelines in 40 CFR 230.2(b) have required the application of the ODA criteria for discharges of dredged material in the territorial sea since 1975. Furthermore, the same EPA regulations require the application of the CWA 404(b)(1) guidelines for discharges of fill material into the territorial sea. We believe that in those cases where the intent is to fill, that the 404(b)(1) guidelines provide a more appropriate means of evaluating the environmental consequences of the activity.

One commenter suggested that ocean disposal activities in the territorial sea should meet the requirements of both the CWA and ODA. Another commenter indicated that the CWA should be used to supplement, but not substitute for, the ODA criteria where the CWA applies. The jurisdiction of the CWA extends to all navigable waters of the U.S. including the territorial sea. The jurisdiction of the ODA begins at the baseline (as defined in the Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606) and extends beyond the seaward limit of the territorial sea. The EPA regulations in 40 CFR 230.2(b) address the jurisdiction of activities involving the discharge of dredged or fill material into regulated waters. We do not believe that Congress intended for the Corps to duplicate or delay its evaluation of a dredged material disposal activity by requiring analysis pursuant to both statutes.

The Congress declared in Title I of the CWA that "It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage . . . the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government" 33 USC 1351(f). The procedures in § 336.0 recognize the overlapping jurisdiction of the CWA and ODA in the territorial sea and provide a means for evaluating the dredged material disposal activity using the most appropriate regulations (i.e., CWA or ODA). We believe this approach fulfills Congressional intent, complies with the statutes and regulations and eliminates duplicative evaluations. Additionally, the EPA may veto a Corps discharge

activity using its CWA 404(c) procedures or reject the district engineer's ODA 103 determination of acceptability for ocean dredged material disposal using the ODA 103(c) procedures. We believe that this EPA authority provides adequate safeguards should the EPA not agree with a Corps evaluation.

*Section 336.1 (a), (b), and (c):* We have decided to move those provisions of § 336.1, (a) (b), and (c) that pertain to water quality certification and coastal zone consistency to the new § 336.1(b)(8) and § 336.1(b)(9) respectively. The number of comments received and the apparent confusion over our procedures necessitates this change. Although we have not made substantive changes in the procedures in the new subsections, we have gone into a greater level of detail.

The analysis of the comments to § 336.1 will follow the numerical sequence of the FR version as proposed on May 30, 1986.

*Section 336.1(a)(3) moved to 336.1 (b)(9):* Many commenters objected, some strongly, to the Corps assertion that dredging and disposal activities must be "within" rather than "directly affecting" the state's coastal zone before the consistency provisions of the CZMA apply. As discussed earlier, it is important to clarify respective authorities and responsibilities of the Federal and state governments relative to the CWA and CZMA. Our intent is to recognize the role of the states in evaluating water quality and coastal zone impacts of Corps maintenance dredging and disposal activities while ensuring that the states provide timely responses as required by Congress and the relevant Federal statutes. We did not intend to misstate existing court interpretations or the scope of the CZMA. However, we believe that the CZMA and case law leave some doubt regarding the authority of a state to control Corps dredging and disposal activities not physically located "within" a state's coastal zone or within a Federal enclave and directly affecting the coastal zone. The Corps will comply with section 307 of the CZMA as interpreted by the decisions of the Federal courts. Accordingly, the wording of this section has been modified.

*Section 336.1(b)(3) moved to 336.1(b)(8) and 1(b)(9):* A number of commenters questioned whether the information in a public notice was sufficient to constitute a request for water quality certification and coastal zone consistency. Two commenters suggested that the regulation distinguish the consistency review from the request

for certification. One commenter indicated that applications for certification must be made in accordance with the procedures of the certifying agency. Moving the water quality certification and coastal zone consistency procedures to § 336.1(b)(8) and § 336.1(b)(9), respectively, should avoid confusion and clarify the Corps procedures. We agree that the water quality certification and coastal zone consistency procedures are distinct and should be treated separately.

The NOAA procedures in 15 CFR Part 930, Subpart C provide a procedural guide for consistency determinations. Consistency determinations will include the information required at 15 CFR 930.39. The final regulation requires the district engineer to supplement the information contained in the public notice if it is not sufficient to meet the requirements of 15 CFR 930.39. The public notice information at § 337.1 has been revised to include the information requirements of 15 CFR 930.39.

In their letter of comment, the NOAA Office of Coastal Resource Management has advised the Corps that the NOAA regulations do not contemplate conditional concurrences. If the state's recommendations for making a project consistent would require the Corps to exceed either authorization or appropriation, then the Corps has complied to the maximum extent practicable without adding such conditions. Thus, we are requiring in the final regulation that district engineers carefully evaluate a state's recommendations and adopt the conditions, controls and requirements necessary to make a project consistent to the maximum extent practicable while assuring that the Corps authority and funding for the project are not exceeded. In cases where state-imposed requirements would exceed Corps authority or available funds dredging will be deferred. Costs associated with requirements that exceed Congressional appropriations will be referred to the non-Federal project sponsor. Any such additional costs will be allocated to project costs. Projects, whether with or without non-Federal project sponsors, will be re-evaluated to determine their continued economic feasibility where a state imposed conditions would serve to increase project costs.

In accordance with the provisions of sections 401 and 404 of the CWA, the Corps will seek state water quality certifications and will comply with state water quality standards. The EPA regulations in 40 CFR 121.3 allow the Corps to determine the appropriate information to be included in the request

for state water quality certification. In conjunction with the public notice for the project, the Corps will provide data and the water quality analyses, which may include that information required by the 404(b)(1) guidelines, in support of the request for water quality certification.

*Section 336.1(b)(7):* A number of comments were received concerning inclusion of local beneficiaries activities in the compliance process for the Corps activity. Most commenters supported this provision. Three commenters believed that the procedures in this section would undermine the Corps section 404 regulatory program. One commenter indicated that this section was contrary to the CZMA. We do not agree that this section is contrary to the CZMA. Furthermore, NOAA regulations in 15 CFR 930.21 support our efforts to include local sponsor's activities in the Corps compliance process. We believe that inherent in construction and maintenance of Congressionally authorized Federal navigation projects is the local project users ability to receive timely authorization for construction and maintenance activities for which the Federal project was intended. This provision is also contained in the Corps regulations in 33 CFR 322.5(c). We have made some clarifications to provide for consistency with the Corps regulatory program.

*Section 336.1(c)(1):* A number of comments were received concerning the Corps "Federal standard" concept. See background discussion at Supplementary Information concerning development and rationale of the Federal standard. We have clarified that the formal public involvement processes (primarily NEPA coordination and CWA public notice) follow designation of the Federal standard and that the ultimate decision may depart from the Federal standard in appropriate cases.

Several comments were received concerning Corps economic evaluations. One commenter requested that we clarify how economic evaluations were performed, since states do not always agree on how these evaluations are developed. Two commenters asked that we require tradeoff analysis among economic and environmental effects of alternative methods and levels of maintenance dredging and disposal. Another commenter indicated that the regulation should not give full consideration to the impact of the failure to maintain navigation on local and regional economies, since these are more properly the responsibility of state and local governments. This regulation pertains to maintenance of

Congressionally authorized navigation projects. The economic justification for such projects is contained in the project authorizing documents. Normally, economic projections extend to the life of a project (50 years). Since both the project conditions and the economic justification for any particular project may change, the Corps periodically evaluates the project conditions to ensure that there is a continuing need for the proposed dredging and it is in the overall public interest.

The Corps has a number of sources for determining commercial traffic through Corps navigation projects including data from the Waterborne Commerce Statistics Center in New Orleans, Louisiana. Frequently, it is difficult to determine if local waterborne commerce benefits local, regional, or national economies. Interstate, recreational boat traffic stopping at a local marina for fuel and supplies would be difficult to factor into economic benefits, but nonetheless would be considered interstate commerce. We agree that the impact of navigation projects on local economies is more appropriately the responsibility of state and local governments. Any reference to local benefits has been deleted. In certain instances regional benefits are also national benefits. Thus, we have retained inclusion of regional benefits in appropriate cases in economic justifications.

*Section 336.1(c)(2):* We have expanded this section to explain our water quality evaluations under the 404(b)(1) guidelines or ocean disposal criteria. The information pertaining to state water quality certifications has been moved to new § 336.1(b)(8). Many comments were received concerning the time requirements for state's response to Corps requests for water quality certification. Many of the same commenters questioned the Corps authority to impose time limits on the state's response and the type and amount of information that would constitute a valid request for state water quality certification. A number of commenters indicated that the proposed regulation arbitrarily restricts the state to a two-month review period, rather than the one-year authorized by the CWA. The CWA provides that states must act on requests for certification within a *reasonable* period of time, which shall not exceed one year from the date of the request. Additionally, the EPA regulations in 40 CFR 121.16 provide that a waiver can be presumed when the licensing or permitting agency notifies EPA "of the failure of the State or interstate agency concerned to act on such request for certification within a

reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered six months, but in any event shall not exceed one year)." Based on our experience since enactment of the 1977 CWA amendments, we believe that two months is a reasonable period of time for states to act on requests for routine maintenance dredged material disposal activities. More complex projects or projects with potential water quality problems may require more time. Thus, we believe that the requirement for the states to act on requests for certification within two months, and within six months as a maximum period of time, is reasonable.

Some commenters indicated that the time frame for processing a water quality certification should begin only after a state has given written notification that an application is complete. We believe that the EPA regulations in 40 CFR 121.3 allow the Corps to determine what information should be provided to the state in support of the request for certification. The final rule at § 336.1(b)(8) will require that the public notice and information demonstrating compliance with applicable state water quality standards will be provided to the state in support of the request for certification.

In such cases where the dredged material disposal may violate applicable state water quality standards after considering disposal site dilution and dispersion, the district engineer will follow the procedures outlined in the Corps technical manual for contaminant testing and controls. This report is currently cited as: Francingues, N.R., Jr., et al., 1985, "Management Strategy for Disposal of Dredged Material: Contaminant Testing and Controls," Miscellaneous Paper D-85-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. This manual, which has received extensive peer review from both the scientific and regulatory community, was developed in response to our concern over the continued leaching of contaminants from point and non-point sources into Corps navigation projects. It will be modified and updated as appropriate. The testing protocol and management strategy provide a scientifically valid systematic process for evaluating cost-effective, environmentally responsible alternatives for disposal of contaminated dredged material. The Corps district engineers will refer to and use this manual for cases where dredged material contains contaminants at a level sufficient to cause environmental

concern. This technical manual will be updated as the state of knowledge regarding evaluation of highly contaminated sediments advances.

One commenter indicated that dredging activities are not exempt from the water quality certification requirements because dredging activities constitute a discharge into navigable waters. We do not agree. The CWA requires regulation of discharges of dredged or fill material. Incidental soil movement as a result of the dredging operation does not constitute the discharge of dredged or fill material for purposes of regulation under the CWA. As indicated in the preamble of the Corps regulations in 51 Federal Register page 41210, November 13, 1986, regarding de minimis discharges associated with normal dredging operations, the purpose of dredging is to remove material from the water, not to discharge material into the water. Therefore, de minimis releases in a normal dredging operation are incidental to the dredging operation. If there are tests involved, we believe they should relate to the intent and result of the dredging operations. If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a normal dredging operation and not subject to section 404 of the CWA.

*Section 336.1(c)(3) moved in part to 336.1(b)(9):* The procedural parts of this section have been moved to the new § 336.1(b)(9). A number of commenters disagreed with the time requirements for the state to act on Corps consistency determinations. The NOAA regulations in 15 CFR 930.41 allow 45 days for state review with an additional 15 day upon request by the state. We will not depart from the time allowances provided by the NOAA regulations. Some commenters noted that water quality certification may be required as a condition of coastal zone consistency. We believe that the water quality certification and coastal zone consistency processes are separate and one should not be a prerequisite to the other.

*Section 336.1(c)(4):* One commenter indicated that this section radically amended the treatment of wetlands in existing § 209.145(e)(3). Another commenter recommended referring to wetlands designated on the National Wetlands Inventory as being important. The existing section on wetlands has been in effect since 1974. Since that time, a number of court cases and regulatory changes have occurred, but the essential regulatory treatment of wetlands is similar between the 1974

and the current regulation. As noted on the National Wetlands Inventory maps, the maps may include or exclude wetlands subject to consideration under the CWA. Generally, wetlands jurisdictional determinations are made on a case-by-case basis by the Corps. We have substituted the word "most" for "some" at the beginning of the section for consistency with the Corps regulatory program.

*Section 336.1(c)(5):* One commenter recommended consideration of state-listed endangered species. State fish and game agencies have an opportunity to comment on proposed maintenance dredging and disposal activities through the public coordination process. The Corps will consider recommendations concerning state-listed endangered species from such state agencies. However, we will rely on the recommendations from the U.S. Fish and Wildlife Service regarding Federally protected threatened or endangered species for purposes of compliance with the Federal Endangered Species Act.

*Section 336.1(c)(6):* Several comments were received from the Advisory Council on Historic Preservation (ACHP) regarding the procedures for protecting historic resources. We have included reference to section 106 of the National Historic Preservation Act and deleted reference to the term "cultural resources" as the ACHP believes this term to be misleading. The terms "historic properties" and "historic resources" have been substituted instead. We have also modified this section to be more consistent with the ACHP regulations. The first paragraph of this section has been revised to remove some of the restrictive terminology.

*Section 336.1(c)(8):* One commenter indicated that limiting resource agency review to the public notice comment period is inconsistent with the intent of the Fish and Wildlife Coordination Act. One commenter asked that this section require minimization of impacts to fish and wildlife resources. A commenter recommended that the first paragraph be modified to require evaluation of all justifiable and appropriate means or measures to protect and conserve fish and wildlife resources by including modification of or mitigation for proposed operations to eliminate or mitigate any damage to fish and wildlife resources.

It is the policy of the Corps to fully consider all facets of the dredging and disposal operation with a view towards attaining maximum overall public benefits. Over the past 15 years, the Corps has constructed over 19,000 acres

of wetlands and over 2,000 dredged material disposal islands, some of which are considered the richest bird rookeries in the country. Unfortunately, as with almost any construction operation, some adverse impacts to fish and wildlife resources will occur. The creation of wetlands using dredged material requires alteration of the topography of the water bottom to the detriment of the benthic communities, for example. In such cases, a trade-off of water bottoms and benthic communities for wetlands occurs. It is with these trade-offs in mind that we actively solicit the views and recommendations of the resource agencies through the public involvement processes of the CWA and ODA. In some cases we are able to use the dredged material to benefit fish and wildlife resources without long-term adverse effects. In the final analysis, we believe it is a Corps responsibility to determine the most appropriate course of action, including justifiable means and measures to lessen the damage to fish and wildlife resources. The public notification process is the means by which we solicit input from all concerned agencies and individuals. We believe the notification period, which is normally 30 days, is adequate for resource agency review and comment.

Two commenters indicated that the statement "Corps funding of Fish and Wildlife Service activities is not applicable for Corps operations and maintenance projects" was inconsistent with the conservation mandates of the Fish and Wildlife Coordination Act. The Transfer of Funds Agreement between the Corps and Fish and Wildlife Service implementing the Fish and Wildlife Coordination Act does not apply to Corps maintenance activities.

*Section 336.1(c)(10):* Several commenters requested clarification of the statement in this section regarding our policy for not seeking permits or licenses that were not reasonably related to the control or abatement of pollution. One commenter indicated that this statement overlooked the fact that the state may own submerged lands. The Federal navigation servitude provides authority for Federal activities in aid of navigation notwithstanding ownership of submerged lands. See *Cherokee Nation of Oklahoma v. United States*, —U.S. (1987). Moreover, established principles of U.S. law make clear that a Federal agency cannot be required to seek a state or local governmental permit absent a clear, explicit, and unambiguous Congressional waiver of Federal sovereign immunity. We have revised this

section to be consistent with those principles of U.S. law.

*Section 336.1(c)(11):* The first sentence of paragraph (i) has been moved to the new § 336.1(b) (8) and (9).

*Section 336.2:* The EPA regulations in 40 CFR Part 227, Subpart C provide guidance on evaluating the need for ocean disposal and alternatives to ocean disposal. The Subpart C guidance does not clearly apply to all categories of dredged material or provide procedures for the Corps when evaluating the full range of disposal alternatives. This section provides supplementary guidance for evaluating the need for and alternatives to ocean disposal for Corps maintenance dredging activities. Supplementary guidance for the Corps 103 permit program is contained in 33 CFR Parts 320–330. Under section 103 of the ODA, evaluation of need for and alternatives to ocean disposal of dredged material is a Corps of Engineers responsibility. This section, in conjunction with 40 CFR Part 227 is intended to be used by the Corps to guide such evaluations for maintenance dredging activities until such time as this separate Corps regulation is promulgated.

One commenter requested the basis for the Corps assertion of authority for selecting ocean disposal sites. Section 103 of the ODA requires the Corps to make an independent determination relative to the need for, alternatives to, and appropriate locations for ocean disposal of dredged material. This section also requires permits from the Corps for the transportation for ocean disposal of all dredged material. In evaluating permits the Corps must use the criteria established by the EPA pursuant to section 102(a) of the ODA relating to the effects of disposal. The Corps must, to the extent feasible, use EPA designated sites when considering appropriate locations for disposal. Over the past ten years, the Corps has been working with the EPA to facilitate EPA site designations for dredged material. Since dredged material amounts to over 90 percent of all material disposed of in ocean waters, the Corps has considered ocean disposal site designations as a high priority. Over the past several years the EPA has been working actively with the Corps to complete final designation for the remaining ocean dredged material disposal sites. Nonetheless, we believe that the Corps has ample authority within section 103 to select (not designate for general use) ocean dredged material disposal sites, if use of an EPA designated site is not feasible. Section 336.2 provides appropriate procedural guidance for this

site selection authority, which requires consultation with EPA and use of the same site selection environmental considerations as are required by EPA under its site designation authority. We have used this selection authority in the past and will continue to use it in the future on an as needed basis.

*Section 336.2(c):* A number of coastal states objected to the proposition that the ODA may preempt the CZMA in the territorial sea. While we have decided to revise the language in the final rule, we still believe that the terms and legislative history of the ODA leave considerable doubt regarding whether a state has the legal authority to exert control over Corps ocean disposal of dredged material in the territorial sea. Nonetheless, voluntarily and as a matter of comity the Corps will apply for state section 401 water quality certification and determine consistency with a Federally approved coastal zone management plan for ocean disposal of dredged material within the three-mile extent of the territorial sea. Moreover, the Corps will attempt to comply with any reasonable request or suggestion made by a state in the course of the water quality certification or the CZMA consistency determination processes. Nonetheless, the Corps reserves its legal rights regarding any case where, within the limits of the territorial sea, a state unreasonably denies or conditions a water quality certification for proposed Corps disposal of dredged material or asserts that such dredging or disposal would not be consistent with an approved state CZMA plan.

*Section 336.2(d)(4):* One commenter recommended clarification to indicate that the use of an undesignated ocean disposal site does not constitute a formal site designation by EPA. We agree, and paragraph (d)(4) of this section has been changed to reflect this recommendation.

#### *Part 337—Practices and Procedures*

*Section 337.1:* A number of comments were received regarding the proposed public notice format and procedures. Some state agencies objected to the Corps procedure that would allow the public notice to serve as information sufficient to constitute a request for water quality certification or a coastal zone consistency determination. In part we agree. However, much useful information is contained in the public notice, including a description and the location of the proposed project and status of water quality certification and coastal zone consistency. Therefore, we are retaining in § 336.1(b) (8) and (9) the requirement to submit a public notice to

the respective state agencies to support the request for water quality certification and coastal zone consistency. Three commenters recommended that public notices be issued for a prescribed rather than an indefinite period of time. We do not agree. The CWA and ODA require that public notices be issued for proposed discharges of dredged material. The CWA and ODA do not prescribe an expiration period for public notices. We believe that as long as the public notice accurately describes the dredging and disposal activity, a new notice need not be issued. If a change in the disposal plan is warranted, however, and the change involves the discharge of dredged material into waters of the U.S., a new revised public notice will be issued. Three commenters recommended that public notices be issued for no less than 30 days. We do not agree. Oftentimes, maintenance activities that are otherwise routine or minor must be performed more quickly than would be possible if a 30 day public notice and comment period had to be undertaken. Such examples might include jetty stabilization to protect the integrity of a jetty or removal of a minor unexpected shoal causing a serious threat to public safety or interstate commerce. We believe that remediable procedures are necessary for such unexpected events in an expedited time period without employing the emergency procedures of § 337.7.

One commenter questioned why public notice information in existing 33 CFR 209.145 had been dropped. Over the past 15 years of issuing public notices, we have learned that certain public notice information does not solicit meaningful input into the Corps decision-making process on the proposed maintenance activity. This information, including the laws under which the activity is to be reviewed, and a description of the existing properties immediately adjacent to the disposal area, generally is included on location maps, or is subject to potentially erroneous interpretation. However, we have established a procedural format for Corps maintenance dredging and disposal public notices to promote Corps-wide consistency, and have added a number of useful items to the notice format to facilitate public involvement. Two commenters recommended adding sediment quality information to the public notice, and another commenter recommended public notices that address multiple Corps projects. We do not believe that the public notice is the proper place to describe evaluation and testing of the

dredged material. Such evaluations are more appropriately conducted in the 404(b)(1) analysis or ocean disposal criteria compliance document. We have added a statement to paragraph (a) of this section to reflect that the same public notice may be used for more than one Corps project in appropriate cases.

*Section 337.2:* A number of commenters objected, some strongly, to the statement that the local project sponsor or the state would be asked to fund state requirements deemed excessive or unnecessary by the Corps. One commenter indicated that this section gives district engineers the authority to dismiss arbitrarily the assessments and recommendations of state and Federal resource agencies regarding fish and wildlife resources and water quality unless the state or local sponsor is willing to bear all additional costs beyond those of the lowest cost alternatives. Another commenter indicated that nowhere in the CZMA, ODA, or CWA is there authority to support the Corps effort to shift to the states the financial burden of Federal compliance with state requirements. Other commenters indicated that the Corps should include state water quality certification and coastal zone consistency determination conditions and requirements as line items in annual funding requests to Congress. Several commenters indicated that state agencies should not be required to bear the cost of reasonable and necessary monitoring or testing.

We agree that neither agencies nor non-Federal project sponsors should be required to bear the cost of reasonable and necessary monitoring or testing. However, in individual cases, it is not always clear how much monitoring and testing is reasonable and necessary. The Corps through its Federal standard process determines technically sufficient monitoring or testing. State 401 requirements which exceed these provisions should not be at Federal expense unless specifically authorized and funded by Congress. The Corps assesses compliance with the applicable state water quality standards using the 404(b)(1) guidelines or ODA criteria. The Corps has spent well over \$100 million on pure and applied research during the past 15 years regarding dredging and the environmental impacts of disposal. Much of this research has directly focused on potential water quality problems of open water disposal of dredged material, with special attention to applicable state water quality standards. Thus, when the Corps submits findings of compliance with applicable water quality standards to a

state, those findings are based on sufficient data to demonstrate compliance with the state standards. Unfortunately, in some instances state agencies may disagree with Corps findings. The question then becomes one of the relative extent of Federal and state authorities for their respective programs. We do not dispute or disagree with a state's right to protect its water quality. At the same time, the Corps has a responsibility to assure that Federal funds are used to carry out authorized Federal purposes. Should the Corps believe that state requirements for testing, monitoring, or other conditions of state approval exceed reasonable Federal responsibility, three options are available. First, further coordination with the state could produce mutually satisfactory requirements to meet state water quality standards or be consistent with a Federally approved coastal zone management program. Second, the non-Federal project sponsor may wish to assume the responsibility for the additional requirements in order to allow the project to proceed. Finally, the Corps may determine it would be in the public interest to defer dredging and seek re-evaluation of the authorization and funding of the project in light of the unresolved state requirements.

The NOAA Office of Coastal Resource Management has advised us that the states do not have authority to issue conditional CZMA concurrences. Furthermore, if a state attempts to impose conditions, controls, or requirements that cause the Corps to exceed either its authority or funding for a project, then the Corps will have complied to the maximum extent practicable without adding those requirements. Thus, with the exception of minor word changes to remove some equivocal terminology and reorganization to more clearly reflect our intent, § 337.2 has not been substantially changed from the proposed rule.

*Section 337.5:* Several comments were received regarding the proposed general authorizations. Most commenters agreed with our proposed procedures. Three commenters recommended inclusion of procedures for general consistency determinations for repetitive activities and negative determinations for activities with little effect on the coastal zone. We agree and have added general consistency provisions to this section and negative determinations to § 336.1(b)(9). One commenter noted that related activities should not be included in general authorizations. The CWA and ODA do not require that general authorizations exclude categories of

users. We believe that general authorizations can allow for beneficiaries of Federal navigation projects to realize the benefits for which the projects are intended. One commenter indicated that general authorizations are contrary to the Corps background statement that "the most appropriate alternative can be selected only on a case-by-case basis." We do not believe that general authorizations are contrary to that background statement. General authorizations are intended for routine minor activities. They are not intended for controversial disposal actions involving large quantities of material or dredged material disposal projects involving potentially significant environmental impacts. Nonetheless, dredged material disposal activities meeting the criteria for a general authorization will still be evaluated to determine if the requirements of the Federal standard are satisfied. These requirements include full consideration of all practicable alternatives.

*Section 337.6:* One commenter recommended that the Statement of Findings (SOF) be submitted to the state in draft form since it stands as a final decision once it is signed. We do not agree. The district engineer is the ultimate decision maker for Corps maintenance dredging and disposal activities. The district engineer must consider a multitude of factors primarily relating to whether the project is in the Nation's best interest. Although the state may withhold or deny water quality certification or not concur in a Corps consistency determination, such actions by the state do not replace the district engineer's decision-making authority. The district engineer may elect to override a state's denial of a request for water quality certification using the CWA section 511(a) or 404(t) provisions or proceed in spite of a non-concurrence from the state coastal zone management agency. The Corps has not exercised such options in the past nor are these options necessarily expected to be used in the future. The SOF represents the final step in the district engineer's decision process. All views of interested parties are fully considered and appropriately integrated into the decision process by that time.

*Section 337.7:* In addition to comments regarding the definition of emergency at § 335.7, one commenter recommended that the states should be notified of emergency actions. Another commenter recommended that the states should be allowed to provide input in the

determination of what constitutes an emergency. This section provides that states should be notified of emergency actions to the maximum extent practicable after taking into account the emergency situation. However, we believe that it is a Corps responsibility to determine what constitutes an emergency situation. Thus, we have only edited this section to remove some equivocal terminology.

*Section 337.8:* One commenter recommended that this section be revised to be consistent with existing reporting procedures in 33 CFR 209.145(k). The reporting procedures and format were revised from the existing rule based on our experience and the need for reporting. Much of the information required in the existing reporting procedure is not needed for higher level decisionmakers. We believe the new procedures and format will facilitate decisionmaking while reducing paperwork and unnecessary information.

*Section 337.9:* Three comments were received concerning identification and use of disposal areas. One commenter recommended periodic review and reconsideration of long-term water quality certifications and consistency agreements. Another commenter recommended that long-term certifications be conditioned to indicate that the state must be notified of any changes in procedures or practices in the projects as certified. Finally, one commenter recommended that 40 CFR 230.80 should be used as a mechanism for identifying suitable disposal areas. We agree that the EPA regulations in 40 CFR 230.80 (Advanced Identification of Disposal Areas) be referenced as a useful mechanism for planning to shorten processing time. We have included this reference in the final rule. When states process requests for water quality certification and review Corps determinations of consistency for long-term dredging and disposal operations, timeframes for the operations are generally specified in the Corps requests to the state. These timeframes are usually based on past practices and projected dredging and disposal needs. Where changes occur and those changes warrant reevaluation under the CWA or CZMA, the state will be notified regarding the need to revise the water quality certification or coastal zone consistency determination. We do not expect our district offices to contact state agencies whenever changes in operations or procedures do not fall within the purview of the CWA or

CZMA. As the state of the art regarding environmental protection advances, changes in dredging or disposal operations may be warranted. State agencies will be advised of such changes if they fall within the purview of the CWA or CZMA.

#### General Comments

One comment was received regarding the lack of reflection in the regulation for increased participation by non-Federal interests resulting from the Water Resources Development Act of 1986 (Pub. L. 99-662). The recent Water Resources Development Act requires non-Federal cost-sharing for maintenance dredging of depths greater than 45 feet. We do not expect cost sharing and partnership arrangements to alter Federal responsibilities to assure cost-effective projects consistent with sound engineering principles and in compliance with Federal environmental requirements.

Three comments were received regarding our policies for managing highly contaminated dredged material. One commenter requested the basis for the Corps assertion that the substantive requirements of RCRA and the Toxic Substances Control Act are considered when evaluating alternatives for dredging and disposal projects. Another commenter indicated that the regulations presented little in the way of policy or procedure for evaluating the impact of contaminants associated with some dredging activities. Finally, one commenter recommended more reference to dredging and disposal of contaminated sediments.

Over the past several years the Corps has engaged in a concentrated effort to both identify and responsibly deal with the one to three percent of the total sediments dredged from Corps navigation projects which are considered highly contaminated. These state-of-the-art procedures are being refined and demonstrated at a number of EPA Superfund sites around the country where dredging has been identified as a potential remedial action. In response to the serious concern over highly contaminated dredged material, the Corps developed guidance regarding management and disposal of this material. This guidance includes a technical management strategy for disposal with emphasis on appropriate testing and contaminant controls. The basis of the strategy is an extensive data base developed in both Corps and EPA environmental research and

development programs and over a decade of operational experience gained in managing and disposing of contaminated dredged material in a variety of disposal environments (e.g., in-water, intertidal, upland). It is Army policy to use the management strategy, where appropriate, to supplement the review procedures and requirements outlined in the 404(b)(1) guidelines (40 CFR Part 230) and the Ocean Dumping Criteria (40 CFR Part 220). The Corps developed management strategy represents the current state of knowledge in testing and interpretation of environmental effects and consequences in disposal of contaminated dredged material. It also provides detailed guidance on the selection of contaminant controls to include technologies being considered and implemented for remedial action under the Superfund Amendments and Reauthorization Act, where dredging and disposal of highly contaminated sediments is the recommended cleanup alternative. As the state of knowledge advances, this guidance document and policy may be revised.

#### List of Subjects

##### 33 CFR Part 335

Environmental protection, Intergovernmental relations, Navigation, Definitions.

##### 33 CFR Part 336

Environmental protection procedures, Water pollution control, Navigation, Clean Water Act procedures, Marine Protection, Research and Sanctuaries Act procedures.

##### 33 CFR Part 337

Administrative practice and procedure.

##### 33 CFR Part 338

Navigation, Environmental protection, Waterways, Natural resources.

For the reasons set out in the preamble, Title 33 of the Code of Federal Regulations, is amended as set forth below:

Dated: April 5, 1988.

Robert W. Page, Sr.,  
Assistant Secretary of the Army (Civil Works).

#### PART 209—[AMENDED]

##### § 209.145 [Removed]

- 33 CFR 209.145 is removed.
- Parts 335, 336, 337, and 338 are added as set forth below:

#### PART 335—OPERATION AND MAINTENANCE OF ARMY CORPS OF ENGINEERS CIVIL WORKS PROJECTS INVOLVING THE DISCHARGE OF DREDGED OR FILL MATERIAL INTO WATERS OF THE U.S. OR OCEAN WATERS

Sec.	
335.1	Purpose.
335.2	Authority.
335.3	Applicability.
335.4	Policy.
335.5	Applicable laws.
335.6	Related laws and Executive Orders.
335.7	Definitions.

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

##### § 335.1 Purpose.

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

##### § 335.2 Authority.

Under authority delegated from the Secretary of the Army and in accordance with section 404 of the Clean Water Act of 1977 (CWA) and section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, hereinafter referred to as the Ocean Dumping Act (ODA), the Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States and the transportation of dredged material for the purpose of disposal into ocean waters. Section 404 of the CWA requires public notice with opportunity for public hearing for discharges of dredged or fill material into waters of the U.S. and that discharge sites can be specified through the application of guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army. Section 103 of the ODA requires public notice with opportunity for public hearing for the transportation for disposal of dredged material for disposal in ocean waters. Ocean disposal of dredged material must be evaluated using the criteria developed by the Administrator of EPA in consultation with the Secretary of the Army. Section 103(e) of the ODA provides that the Secretary of the Army

may, in lieu of permit procedures, issue regulations for Federal projects involving the transportation of dredged material for ocean disposal which require the application of the same criteria, procedures, and requirements which apply to the issuance of permits. Similarly, the Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters, but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.

##### § 335.3 Applicability.

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

##### § 335.4 Policy.

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

##### § 335.5 Applicable laws.

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

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

##### § 335.6 Related laws and Executive Orders.

(a) The National Historic Preservation Act of 1966 (16 U.S.C. 470a et seq.), as amended.

(b) The Reservoir Salvage Act of 1960 (16 U.S.C. 469), as amended.

(c) The Endangered Species Act (16 U.S.C. 1531 et seq.), as amended.

(d) The Estuary Protection Act (16 U.S.C. 1221).

(e) The Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), as amended.

(f) The National Environmental Policy Act (42 U.S.C. 4341 et seq.), as amended.

(g) The Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.) as amended.

(h) Section 307(c) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1456 (c)), as amended.

(i) The Water Resources Development Act of 1976 (Pub. L. 94-587).

(j) Executive Order 11593, *Protection and Enhancement of the Cultural Environment*, May 13, 1971. (36 FR 8921, May 15, 1971).

(k) Executive Order 11988, *Floodplain Management*, May 24, 1977. (42 FR 26951, May 25, 1977).

(l) Executive Order 11990, *Protection of Wetlands*, May 24, 1977. (42 FR 26961, May 25, 1977).

(m) Executive Order 12372, *Intergovernmental Review of Federal Programs*, July 14, 1982. (47 FR 3959, July 16, 1982).

(n) Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions*, January 4, 1979.

### § 335.7 Definitions.

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

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

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

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

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

"Practicable" means available and capable of being done after taking into consideration cost, existing technology,

and logistics in light of overall project purposes.

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

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

### PART 336—FACTORS TO BE CONSIDERED IN THE EVALUATION OF ARMY CORPS OF ENGINEERS DREDGING PROJECTS INVOLVING THE DISCHARGE OF DREDGED MATERIAL INTO WATERS OF THE U.S. AND OCEAN WATERS

Sec.

336.0 General.

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

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

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

#### § 336.0 General.

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

(a) The disposal into ocean waters, including the territorial sea, of dredged material excavated or dredged from navigable waters of the U.S. will be evaluated by the Corps in accordance with the ODA.

(b) In those cases where the district engineer determines that the discharge of dredged material into the territorial sea would be for the primary purpose of fill, such as the use of dredged material for beach nourishment, island creation, or construction of underwater berms, the discharge will be evaluated under section 404 of the CWA.

(c) For those cases where the district engineer determines that the materials proposed for discharge in the territorial sea would not be adequately evaluated under the section 404(b)(1) guidelines of the CWA, he may evaluate that material under the ODA.

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

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

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

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

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

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

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

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

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

(5) The EPA Administrator can prohibit or restrict the use of any defined area as a discharge site under 404(c) whenever he determines, after

notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas. Upon notification of the prohibition of a discharge site by the Administrator the district engineer will complete the administrative processing of the proposed project up to the point of signing the Statement of Findings (SOF) or Record of Decision (ROD). The unsigned SOF or ROD along with a report described in § 337.8 of this chapter will be forwarded through the appropriate Division office to the Dredging Division, Office of the Chief of Engineers.

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

(7) If it can be anticipated that related work by other Federal or non-Federal interests will occur in the same area as Corps projects, the district engineer should use all reasonable means to include it in the planning, processing, and review of Corps projects. Related work normally includes, but is not necessarily limited to, maintenance dredging of approach channels and berthing areas connected to Federal navigation channels. The district engineer should coordinate the related work with interested Federal, state, regional, and local agencies and the general public at the same time he does so for the Corps project. The district engineer should ensure that related work meets all substantive and procedural requirements of 33 CFR Parts 320 through 330. Documents covering Corps maintenance activities normally should also include an appropriate discussion of ancillary maintenance work. District engineers should assist local interests to obtain from the state

any necessary section 401 water quality certification and, if required, the section 307 coastal zone consistency concurrence. The absence of such certification or concurrence by the state or the denial of a Corps permit for related work shall not be cause for delay of the Federal project. Local sponsors will be responsible for funding any related work. If permitting of the related work complies with all legal requirements and is not contrary to the public interest, section 10, 404, and 103 permits normally will be issued by the district engineer in a separate SOF or ROD. Authorization by nationwide or regional general permit may be appropriate. If the related work does not receive a necessary state water quality certification and/or CZMA consistency concurrence, or are determined to be contrary to the public interest the district engineer should re-examine the project viability to ensure that continued maintenance is warranted.

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

(i) In addition to the Corps section 404 public notice, information and data demonstrating compliance with state water quality standards will be provided to the state water quality certifying agency along with the request for water quality certification. The information and data may be included within the 404(b)(1) evaluation. The district engineer will request water quality certification to be consistent with the maintenance dredging schedule for the project. Submission of the public notice, including information and data demonstrating compliance with the state water quality standards, will constitute a valid water quality certification request pursuant to section 401 of the CWA.

(ii) If the proposed disposal activity may violate state water quality standards, after consideration of disposal site dilution and dispersion, the district engineer will work with the state to acquire data to satisfy compliance with the state water quality standards. The district engineer will use the technical manual "Management Strategy for Disposal of Dredged Material:

Contaminant Testing and Controls" or its appropriate updated version as a guide for developing the appropriate tests to be conducted on such dredged material.

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

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

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

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

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

determination that the CZMA does not apply.

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

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

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

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

(1) *Navigation and Federal standard.* The maintenance of a reliable Federal navigation system is essential to the economic well-being and national defense of the country. The district engineer will give full consideration to the impact of the failure to maintain navigation channels on the national and, as appropriate, regional economy. It is the Corps' policy to regulate the discharge of dredged material from its projects to assure that dredged material disposal occurs in the least costly, environmentally acceptable manner, consistent with engineering requirements established for the project. The environmental assessment or environmental impact statement, in conjunction with the section 404(b)(1) guidelines and public notice coordination process, can be used as a guide in formulating environmentally acceptable alternatives. The least costly

alternative, consistent with sound engineering practices and selected through the 404(b)(1) guidelines or ocean disposal criteria, will be designated the Federal standard for the proposed project.

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

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

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

(5) *Endangered species.* All Corps operations and maintenance activities will be reviewed for the potential impact on threatened or endangered species, pursuant to the Endangered Species Act of 1973. If the district engineer determines that the proposed activity will not affect listed species or their critical habitat, a statement to this effect should be included in the public notice. If the proposed activity may affect listed species or their critical habitat,

appropriate discussions will be initiated with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, and a statement to this effect should be included in the public notice. (See 50 CFR Part 402).

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

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

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

(7) *Scenic and recreational values.* (i) Maintenance dredging and disposal activities may involve areas which possess recognized scenic, recreational, or similar values. Full evaluation requires that due consideration be given to the effect which dredging and disposal of the dredged or fill material may have on the enhancement, preservation, or development of such

values. Recognition of these values is often reflected by state, regional, or local land use classification or by similar Federal controls or policies. Operations and maintenance activities should, insofar as possible, be consistent with and avoid adverse effects on the values or purposes for which such resources have been recognized or set aside, and for which those classifications, controls, or policies were established. Special consideration must be given to rivers named in section 3 of the Wild and Scenic Rivers Act and those proposed for inclusion as provided by section 4 and 5 of the Act, or by later legislation.

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

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

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

(9) *Marine sanctuaries.* Operations and maintenance activities involving the

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

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

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

(i) The evaluation of Corps operations and maintenance activities involving the discharge of dredged or fill material into waters of the U.S. is a continuing process and should proceed concurrently with the processing of state water quality certification and, if required, the provision of a coastal zone consistency determination to the state. If a local agency having jurisdiction over or concern with the particular activity comments on the project through the public notice coordination, due consideration should be given to those official views as a reflection of local factors.

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

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

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

(b) *Procedures.* The following procedures will be followed by district engineers for dredged material disposal

into ocean waters except where emergency action as described in § 337.7 of this chapter is required.

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

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

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

(d) *Evaluation factors.* (1) In addition to the appropriate evaluation factors of § 336.1(c), activities involving the transportation of dredged material for the purpose of disposal in ocean waters will be evaluated by the Corps to determine whether the proposed disposal will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, the district engineer, in addition to considering the criteria developed by EPA on the effects of the dumping, will

also consider navigation, economic and industrial development, and foreign and domestic commerce, as well as the availability of alternatives to ocean disposal, in determining the need for ocean disposal of dredged material. Where ocean disposal is determined to be appropriate, the district engineer will, to the extent feasible, specify disposal sites which have been designated by the Administrator pursuant to section 102(c) of the ODA.

(2) As provided by the EPA regulations at 40 CFR 225.2(b-e) for implementing the procedures of section 102 of the ODA, the regional administrator of EPA may make an independent evaluation of dredged material disposal activities regulated under section 103 of the ODA related to the effects of dumping. The EPA regulations provide that the regional administrator make said evaluation within 15 days after receipt of all requested information. The regional administrator may request from the district engineer an additional 15-day period for a total of to 30 days. The EPA regulations provide that the regional administrator notify the district engineer of non-compliance with the environmental impact criteria or with any restriction relating to critical areas on the use of an EPA recommended disposal site designated pursuant to section 102(c) of the ODA. In cases where the regional administrator has notified the district engineer in writing that the proposed disposal will not comply with the criteria related to the effects of dumping or related to critical area restriction, no dredged material disposal may occur unless and until the provisions of 40 CFR 225.3 are followed and the Administrator grants a waiver of the criteria pursuant to section 103(d) of the ODA.

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

(4) In situations where an EPA-designated site is not feasible for use or where no site has been designated by the EPA, the district engineer, in accordance with the ODA and in consultation with EPA, may select a site pursuant to section 103. Appropriate NEPA documentation should be used to support site selections. District engineers should address site selection factors in the NEPA document. District engineers will consider the criteria of 40 CFR Parts 227 and 228 when selecting ocean disposal sites, as well as other technical and economic considerations.

Emphasis will be placed on evaluation to determine the need for ocean disposal and other available alternatives. Each alternative should be fully considered on an equal basis, including the no dredging option.

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

(i) The district engineer should determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer will evaluate the engineering and economic feasibility and environmental acceptability of the alternative sites.

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

(iii) If the regional administrator advises, within 15 days of the notice of the intent to issue, that he will commence procedures specified by section 103(c) of the ODA to prohibit use of a proposed disposal site, the case will be forwarded through the respective Division office and CECW-D to the Secretary of the Army or his designee for further coordination with the Administrator of EPA and final resolution. The report forwarding the case should be in the format described in § 337.8 of this chapter.

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

#### PART 337—PRACTICE AND PROCEDURE

Sec.	
337.0	Purpose.
337.1	Public notice.
337.2	State requirements.
337.3	Transfer of section 404 program to the states.
337.4	Memoranda of Agreement (MOA).
337.5	General authorizations.

Sec.	
337.6	Statement of Findings (SOF).
337.7	Emergency actions.
337.8	Reports to higher echelons.
337.9	Identification and use of disposal areas.
337.10	Supervision of Federal projects.

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

#### § 337.0 Purpose.

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

#### § 337.1 Public notice.

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

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

- (1) The name and location of the project and proposed disposal site.
- (2) A general description of the project and a description of the estimated type, composition, and quantity of materials to be discharged, the proposed time

schedule for the dredging activity, and the types of equipment and methods of dredging and conveyance proposed to be used.

(3) A sketch showing the location of the project, including depth of water in the area and all proposed discharge sites.

(4) The nature, estimated amount, and frequency of known and anticipated related dredging and discharge to be conducted by others.

(5) A list of Federal, state, and local environmental agencies with whom the activity is being coordinated.

(6) A statement concerning a preliminary determination of the need for and/or availability of an environmental impact statement.

(7) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any.

(8) A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing except in emergency situations where the procedures of § 337.7 will be followed, within which interested parties may express their views concerning the proposed project.

(9) If the proposed Federal project would occur in the territorial seas or ocean waters, a description of the project's relationship to the baseline from which the territorial sea is measured.

(10) A statement on the status of state water quality certification under section 401 of the CWA.

(11) For activities requiring a determination of consistency with an approved state coastal zone management plan, the following information will be included in the notice:

(i) A statement on whether or not the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the state management program.

(ii) Sufficient information to support the consistency determination to include associated facilities and their coastal zone effect.

(iii) Data and supporting information commensurate with the expected effects of the activity on the coastal zone.

(12) A statement on historic resources, state of present knowledge, likelihood of damage or other adverse effect on such resources, etc.

(13) A statement on endangered species.

(14) A statement on evaluation factors to be considered, adapted from that presented at 33 CFR 325.3(b).

(15) The name, address, and telephone number of the Corps employee from

whom additional information concerning the project may be obtained.

(16) The signature of the district engineer or his designee on all maintenance dredged material disposal public notices.

(17) For activities regulated under section 103 of the ODA, the following additional information should be integrated into the public notice:

(i) A statement on the designation status of the disposal site.

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

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

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

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

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

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

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

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

(c) Public notices should be distributed as described in 33 CFR 325.3(c). In addition, public notices should be sent to CECW-D, Office of the Chief of Engineers, Washington, DC 20314, if the project involves the discharge of dredged material in waters of the U.S. or ocean waters. District engineers should also develop, as

appropriate, regional mailing lists for Corps maintenance dredging and disposal activities to the extent that property owners adjacent to the navigation channel and disposal area are notified of the proposed activity. In order to effect compliance with Executive Order 12372, district engineers should provide copies of public notices to concerned state and local elected officials.

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

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

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

#### § 337.2 State requirements.

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

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

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

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

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

(3) If the state denies or notifies the district engineer of its intent to deny

water quality certification or does not concur regarding coastal zone consistency, the project dredging may be deferred. A report pursuant to § 337.8 of this section will be forwarded to CECW-D, Office of the Chief of Engineers, Washington, DC 20314-1000 for resolution.

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

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

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

The establishment of joint notification procedures for Corps projects involving disposal of dredged or fill material should be actively pursued through the development of MOAs with the state. The MOAs may be used to define responsibilities between the state and the Corps district involved. The primary purpose of MOAs will be to avoid or eliminate administrative duplication, when such duplication does not contribute to the overall decision-making process. MOAs for purposes of this regulation will not be used to implement provisions not related to the maintenance or enforcement of Federally-approved state water quality standards or coastal zone management programs. District engineers are authorized and encouraged to develop MOAs with states and other Federal agencies for Corps projects involving the discharge of dredged or fill material. Copies of all MOAs will be forwarded to CECW-D, Office of the Chief of Engineers, Washington, DC 20314-1000 for approval.

#### § 337.5 General authorizations.

Under the provisions of sections 404(e) of the CWA and 104(c) of the ODA certain categories of activities may be authorized on a regional, statewide, or nationwide basis. General authorizations can be a useful mechanism for implementation of the procedural provisions of the CWA, CZMA, and ODA while avoiding

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

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

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

(a) The SOF should identify the name of the preparer, date (which may not necessarily correspond to the date signed), and name of waterway.

(b) The proposed action for which the findings are made should be described.

(c) A coordination section should be provided. The coordination section should reference the public notice number and date. The letters of comment and appropriate responses should be summarized. Any coordination undertaken by local or state agencies should also be discussed.

(d) An environmental effects and impacts section should be used to document compliance with the applicable environmental laws. This section should include the views and/or conditions of the state concerning water quality certification and, if required, the results of the coastal zone consistency process.

(e) A determinations section should reference the results of the EA and/or EIS and any conditions necessary to meet the state's water quality standards or coastal zone management program. Appropriate conditions or modifications should be included in the project specifications. This section should also contain a subsection on consideration of alternatives and cumulative impacts.

(f) A section on the district engineer's findings and conclusions concerning the proposed project should be included.

(g) The SOF should be dated and signed by the district engineer or his designee except in those cases requiring referral to higher authority.

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

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

#### § 337.7 Emergency actions.

After obtaining approval from the division engineer, the district engineer will respond to emergency situations on an expedited basis, complying with the procedures of this regulation to the maximum degree practicable. The district engineer will issue a public notice describing the emergency in accordance with § 337.1, if such a notice is practicable in view of the emergency situation; such a public notice should be forwarded to all appropriate Federal and state agencies. The district engineer should prepare a section 404(b)(1) evaluation report and, as necessary, an environmental assessment, if this is practicable in view of the emergency situation. If comments are received from the public notice which, in the judgment of the district engineer, reveal the necessity of modifying the emergency

operation, the district engineer should take appropriate measures to modify the emergency operation to reduce, avoid, or minimize adverse environmental impacts. If the district engineer, after receiving comments from the public notice, determines that the emergency action would constitute a major Federal action significantly affecting the quality of the human environment, he should, after consultation with the division engineer, coordinate with the Council on Environmental Quality about alternative arrangements for compliance with the NEPA in accordance with 40 CFR 1506.11 to the extent that it is practicable in view of the emergency situation. District engineers should consult with the appropriate state officials to seek water quality certification or waiver of certification, and should certify that the Federal action is consistent to the maximum extent practicable with an approved coastal zone management plan for emergency activities, to the extent that is practicable in view of the emergency.

#### § 337.8 Reports to higher echelons.

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

(1) When there is substantial doubt as to the authority, law, regulations, or policies applicable to the Federal project;

(2) When higher authority requests the case be forwarded for decision;

(3) When the state does not concur in a coastal zone consistency determination or attempts to concur with conditions or controls;

(4) When the state denies or unreasonably delays a water quality certification or issues the certification with conditions or controls not related to maintenance or enforcement of state water quality standards or significantly exceeding the Federal standard;

(5) When the regional administrator has advised the district engineer, pursuant to section 404(c) of the CWA, of his intent to prohibit or restrict the use of a specified discharge site; or notifies the district engineer that the discharge of dredged material in ocean waters or territorial seas will not comply with the criteria and restrictions on the use of the site established under the ODA; and the district engineer determines that the proposed disposal cannot be reasonably modified to alleviate the regional administrator's objections; and

(6) When the state fails to grant water quality certification or a waiver of certification or concurrence or waiver of coastal zone consistency for emergency actions.

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

(1) Justification showing the economic need for dredging.

(2) The impact on states outside the project area if the project is not dredged.

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

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

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

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

#### § 337.9 Identification and use of disposal areas.

(a) District engineers should identify and develop dredged material disposal management strategies that satisfy the long-term (greater than 10 years) needs for Corps projects. Full consideration should be given to all practicable alternatives including upland, open water, beach nourishment, within banks disposal, ocean disposal, etc. Within existing policy, district engineers should also explore beneficial uses of dredged material, such as marsh establishment and dewatering techniques, in order to extend the useful life of existing disposal areas. Requests for water quality certification and/or coastal zone consistency concurrence for projects with identified long-term disposal sites should include the length of time for which the certification and/or consistency concurrence is sought. The section 404(b)(1) evaluation and environmental assessment or environmental impact statement should also address long-term maintenance dredging and disposal. District engineers should use the guidance at 40 CFR 230.80 to shorten environmental compliance processing time. The Corps of Engineers will be responsible for

accomplishing or assuring environmental compliance requirements for all disposal areas. This does not preclude the adoption of other agencies NEPA documents in accordance with 40 CFR Parts 1500 through 1508.

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

**§ 337.10 Supervision of Federal projects.**

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

**PART 338—OTHER CORPS ACTIVITIES INVOLVING THE DISCHARGE OF DREDGED MATERIAL OR FILL INTO WATERS OF THE U.S.**

Sec.

338.1 Purpose.

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

Authority: 33 U.S.C. 1344.

**§ 338.1 Purpose.**

(a) The procedures of this part, in addition to the provisions of 33 CFR

Parts 335 through 337, should be followed when undertaking Corps operations and maintenance activities involving the discharge of fill material into waters of the U.S., except that the procedures of Part 336 of this chapter will be used in those cases where the discharge of fill material is also the discharge of dredged material, i.e., beach nourishment, within banks disposal for erosion control, etc.

(b) After construction of Corps Civil Works water resource projects, certain operations and maintenance activities involving the discharge of fill material require evaluation under the CWA. These activities generally include lakeshore management, installation of boat ramps, erosion protection along the banks of navigation channels, jetty maintenance, remedial erosion control, etc. While these activities are normally addressed in the existing environmental impact statement for the project, new technology or unexpected events such as storms or high waters may require maintenance or remedial work not fully addressed in existing environmental documents or state permits. In determining compliance with the applicable environmental laws and regulations the district engineer should use the CWA exemptions at 404(f) and NEPA categorical exclusions to the maximum extent practicable. If the district engineer decides that the changes have not been adequately addressed in existing environmental documentation, the procedures of this part should be followed.

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

(a) Generally, fill activities conducted by the Corps for operations and

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

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

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

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

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

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

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

[FR Doc. 88-8928 Filed 4-25-88; 8:45 am]  
BILLING CODE 3710-08-M