

STATUS: Open.

MATTER TO BE CONSIDERED: The Commission will consider and act upon the following:

1. Mohave Concrete and Materials, Inc., Docket No. WEST 86-14-M. (Issue include consideration of Mohave's request that the Chief Administrative Law Judge's finding of default and order to pay the proposed civil penalties be set aside.)

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 20 CFR 2706.150(a)(3) and 2706.160(e).

CONTACT PERSON FOR MORE

INFORMATION: Jean Ellen (202) 653-5629.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 86-25689 Filed 11-10-86; 11:46 am]

BILLING CODE 6735-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of November 10, 17, 24, and December 1, 1986.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington DC.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:**Week of November 10**

Monday, November 10

2:00 p.m.

Briefing on Thermal Hydraulic Research Program (Public Meeting)

Friday, November 14

10:00 a.m.

Briefing on Improving Effectiveness of Initial Startup Programs (Public Meeting)

11:30 a.m.

Affirmation Meeting (Public Meeting) (if needed)

Week of November 17—Tentative

Wednesday, November 19

10:00 a.m.

Discussion of Pending Investigations (Closed—Ex. 5 & 7) (Postponed from October 31)

2:00 p.m.

Briefing in Advanced of Publication of Draft NUREG-1150 (Source Term) (Public Meeting)

Thursday, November 20

10:00 a.m.

Briefing on Initiatives to Improve Maintenance Performance (Public Meeting) (Postponed from November 6)

2:00 p.m.

Periodic Meeting with NUMARC (Public Meeting)

3:30 p.m.

Affirmation Meeting (Public Meeting) (if needed)

Friday, November 21

10:00 a.m.

Discussion/Possible Vote on Davis Besse Restart (Public Meeting)

1:30 p.m.

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

Week of November 24—Tentative

Wednesday, November 26

10:00 a.m.

Affirmation Meeting (Public Meeting) (if needed)

Week of December 1—Tentative

Thursday, December 4

3:30 p.m.

Affirmation Meeting (Public Meeting) (if needed)

ADDITIONAL INFORMATION

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6) was held on November 6.

Affirmation of "Braidwood—Draft Order for Resolution of Dispute Between Braidwood Board and OI Over Disclosure of Investigation Information" (Public Meeting) was postponed from November 6 to November 7.

Affirmation of "Licensing Decision for Perry-1" (Public Meeting) is scheduled for November 7.

TO VERIFY THE STATUS OF MEETING CALL (RECORDING): (202) 634-1498.

CONTACT PERSON FOR MORE

INFORMATION: Robert McOsker (202) 634-1410.

Robert B. McOsker,

Office of the Secretary.

November 6, 1986.

[FR Doc. 86-25654 Filed 11-7-86; 8:45 am]

BILLING CODE 7590-01-M

POSTAL RATE COMMISSION

Amended Notice of Meeting

TIME AND DATE: 10:00 a.m. on November 19, 1986.

PLACE: Room 300, 1333 H Street, NW., Washington, DC 20268-0001.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The Notice published in Volume 51, No. 215, Federal Register, p. 40370, November 6, 1986, is amended under "MATTERS TO BE CONSIDERED" to read: To consider motions to dismiss the Complaint of the Sacramento Bee, et al, which is Docket No. C86-2, and to consider motions to dismiss the Complaint of the United Parcel Service, which is Docket No. C86-3.

CONTACT PERSON FOR MORE

INFORMATION: Charles L. Clapp, Secretary, Postal Rate Commission, Room 300, 1333 H Street, NW; Washington, DC 20268-0001, Telephone (202) 789-6840.

Charles L. Clapp,

Secretary.

[FR Doc. 25762 Filed 11-10-86; 3:48 pm]

BILLING CODE 7715-01-M

RAILROAD RETIREMENT BOARD

Notice is hereby given that the Railroad Retirement Board will hold a meeting on November 19, 1986, 9:00 a.m., at the Board's meeting room on the 8th floor of its headquarters building, 844 Rush Street, Chicago, Illinois, 60611. The agenda for the meeting follows:

Portion Open to the Public

- (1) Proposed Changes in the RULA Regulations
- (2) Board Order 75-3
- (3) Final Rule Regulations on Primary Insurance Amount Determinations
- (4) Proposal to Recognize the Disability Programs Section
- (5) Proposal Impacting Disability Programs
- (6) Change in Agency Budget Request for Fiscal Year 1988
- (7) Appeal of Claude J. Hahne Under the Railroad Unemployment Insurance Act
- (8) Appeal of Alexander Zelinsky of the Service and Compensation Credited Under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Portion Closed to the Public

- (A) Appeal from Referee's Denial of Disability Annuity, Anthony Rich.

The person to contact for more information is Beatrice Ezerski, Secretary to the Board, COM No. 312-751-4920, FTS No. 387-4920.

Dated: November 7, 1986.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 25682 Filed 11-10-86; 8:45 am]

BILLING CODE 7905-01-M

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Federal Register

Thursday
November 13, 1986

Part II

Department of Defense

**Corps of Engineers, Department of the
Army**

**33 CFR Parts 320 through 330
Regulatory Programs of the Corps of
Engineers; Final Rule**

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Final rule.

SUMMARY: We are hereby issuing final regulations for the regulatory program of the Corps of Engineers. These regulations consolidate earlier final, interim final, and certain proposed regulations along with numerous changes resulting from the consideration of the public comments received. The major changes include modifications that provide for more efficient and effective management of the decision-making processes, clarifications and modifications of the enforcement procedures, modifications to the nationwide permit program, revision of the permit form, and implementation of special procedures for artificial reefs as required by the National Fishing Enhancement Act of 1984.

EFFECTIVE DATE: January 12, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson or Mr. Bernie Goode, HQDA (DAEN-CWO-N), Washington, DC 20314-1000, (202) 272-0199.

SUPPLEMENTARY INFORMATION:

Consolidation of Corps Permit Regulations

These final regulations consolidate and complete the six following rulemaking events affecting the Corps regulatory program:

1. *Interim Final Regulations.* These regulations contained Parts 320-330 and were published (47 FR 31794) on July 22, 1982, to incorporate policy and procedural changes resulting from legislative, judicial, and administrative actions that had occurred since the previous final regulations had been published in 1977. Because it had been almost two years since we had proposed changes to the 1977 regulations, we published the 1982 regulations as "interim final" and asked for public comments. We received nearly 200 comments.

2. *Proposed Regulatory Reform Regulations.* On May 12, 1983, we published (48 FR 21466) proposed revisions to the interim final regulations to implement the May 7, 1982, directives of the Presidential Task Force on Regulatory Relief. The Task Force

directed the Army to reduce uncertainty and delay, give the states more authority and responsibility, reduce conflicting and overlapping policies, expand the use of general permits, and redefine and clarify the scope of the permit program. Since these regulations proposed changes to our existing nationwide permits and the addition of two new nationwide permits, a public hearing was held in Washington, DC, on October 12, 1983, to obtain comments on these proposed changes. As a result of the public comments received, nearly 500 in response to the proposed regulations and 22 at the public hearing, we have determined that some of the proposed revisions should be adopted and some should not. We have adopted some of the provisions that were designed to clarify policies for evaluating permit applications, to revise certain permit processing procedures, to add additional conditions to existing nationwide permits, and to modify certain nationwide permit procedures. We have not adopted some of the other proposed changes, including the two proposed new nationwide permits.

3. *Settlement Agreement Final Regulations.* On October 5, 1984, we published (49 FR 39478) final regulations to implement a settlement agreement reached in a suit filed by 16 environmental organizations in December of 1982 against the Department of the Army and the Environmental Protection Agency (*NWF v. Marsh*) concerning several provisions of the July 22, 1982, interim final regulations. The court approved the settlement agreement on February 10, 1984, and on March 29, 1984, we published (49 FR 12660) the implementing proposed regulations. We received over 150 comments on these proposed regulations covering a full range of views. Those comments which were applicable to the provisions of the March 29, 1984, proposals were considered and addressed in the final regulations published on October 5, 1984. The remaining comments have been considered in the development of the final regulations we are issuing today.

In the October 5, 1984, final rule there were several new provisions relating to the 404(b)(1) guidelines. In 33 CFR 320.4(a)(1) we clarified the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines.

If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. In 33 CFR 323.6(a) we stated that district engineers will deny permits for discharges which fail to comply with

the 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to section 404(b)(2) of the Clean Water Act. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to issuance), the 404(b)(1) evaluation is conducted simultaneously with the public interest review set forth in 33 CFR 320.4(a).

4. *Proposed Permit Form Regulations.* On May 23, 1985, we published (50 FR 21311) proposed revisions to 33 CFR Part 325 (Appendix A), which contains the standard permit form used for the issuance of Corps permits and the related provisions concerning special conditions. This proposal provided for the complete revision of the permit form and its related provisions to make them easier for permittees to understand. General permit conditions were written in plain English and greatly reduced in number; unnecessary material was deleted; and material which is informational in nature was reformatted under a "FURTHER INFORMATION" heading. We received 18 comments on this proposal.

5. *Proposed Regulations to Implement the National Fishing Enhancement Act of 1984 (NFEA).* On July 26, 1985, we published (50 FR 30479) proposed regulations to implement a portion of the Corps regulatory responsibilities pursuant to the NFEA. Specialized procedures relative to the processing of Corps permits for artificial reefs were proposed for inclusion in Parts 322 and 325. Eight organizations commented on these proposed regulations. The NFEA also authorizes the Secretary of the Army to assess a civil penalty on any person who, after notice and an opportunity for a hearing, is found to have violated any provision of a permit issued for an artificial reef. Procedures for implementing such civil penalties will be proposed at a later date. In addition, we are hereby notifying potential applicants for artificial reef permits that the procedures contained in Part 323 relating to the discharge of dredged or fill materials and those in Part 324 relating to the transportation of dredged material for the purpose of dumping in ocean waters will be used in the processing of artificial reef permits when applicable.

6. *Proposed Regulations (Portion of Part 323 and All of Part 326).* On March 20, 1986, we published (51 FR 9691) a proposed change to 33 CFR 323.2(d), previously 323.2(j), to reflect the Army's policy regarding *de minimis* or incidental soil movements occurring

during normal dredging operations and a proposed, complete revision of the Corps of Engineers enforcement procedures (33 CFR Part 326). Seventeen comment letters were received on these proposed regulations. These comments and the resulting changes reflected in the final regulations for § 323.2(d) and Part 326 are discussed in detail below.

Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Appropriate environmental documentation has been prepared for all permit decisions. Environmental assessments for each of the nationwide permits previously issued or being modified today are available from the Corps of Engineers. You may obtain these assessments by writing to the address listed in this preamble. Considering the potential impacts, we have determined that none required an environmental impact statement.

Discussion of Public Comments and Changes

Part 320—General Regulatory Policies

Section 320.1(a)(6): In order to provide clarity to the public, we have added a provision to codify existing practice that when a district engineer makes certain determinations under these regulations, the public can rely on that determination as a Corps final agency action.

Section 320.3(o): The National Fishing Enhancement Act of 1984 has been added to the list of related laws in § 320.3.

Section 320.4: In the May 12, 1983, proposed rule and the March 29, 1984, proposed rule we proposed changes to §§ 320.4(a)(1)—public interest review, 320.4(b)(5)—effect on wetlands, 320.4(c)—fish and wildlife, 320.4(g)—consideration of property ownership, and 320.4(j)—other Federal, state or local requirements. Changes to these paragraphs were adopted in the October 5, 1984, final rule. The various comments relating to these proposals have been fully discussed in the October 5, 1984 final rule (49 FR 39478).

Section 320.4(a)(3): Many commenters objected, some strongly, to the deletion in the October 5, 1984, final regulations of the term "great weight" from § 320.4(c), the paragraph concerning the consideration of opinions expressed by fish and wildlife agencies. Many stated that fish and wildlife agencies had the expertise and knowledge to know the impact of work in wetlands; therefore, their opinions should be given strong

consideration. Some commenters supported removal of the "great weight" statement expecting less value would be given fish and wildlife agency views. It is not our intention to reduce or discount the value or expertise of fish and wildlife agency comments or those of any other experts in any field. Comments also varied from support of to objection to the deletion of the "great weight" statement from the other policy statements such as energy and navigation in § 320.4. Therefore, we added a new paragraph (a)(3) to clarify our position on how we consider comments from the public, including those from persons or agencies with special expertise on particular factors in the public interest review.

Section 320.4(b)(1): One commenter objected to the placement of the word "some" in this paragraph as a rewrite of E.O. 11990 which places no qualifier on "wetlands" indicating that all wetlands are vital. We have found through experience in administering the Section 404 permit program that wetlands vary in value. While some are vital areas, others have very little value; however, most are important. We recognize that "some wetlands are vital . . ." is being read by some people as "Some wetlands are important . . ." This was not our intent. To avoid this confusion we have revised this paragraph by deleting "some wetlands are vital areas . . ." and indicating that "most" wetlands are important.

Section 320.4(b)(2)(vi): We have included in the list of important wetlands those wetlands that are ground water discharge areas that maintain minimum baseflows important to aquatic resources. Scientific research now indicates that wetlands more often serve as discharge areas than recharge areas. Those discharge areas which are necessary to maintain a minimum baseflow necessary for the continued existence of aquatic plants and animals are recognized as important.

Section 320.4(b)(2)(viii): We have included in the list of important wetlands those which are unique in nature or scarce in quantity to the region or local area.

Section 320.4(d): We have revised this paragraph to clarify that impacts from both point source and non-point source pollution are considered in the Corps public interest review. However, section 208 of the Clean Water Act provides for control of non-point sources of pollution by the states.

Section 320.4(j)(1): Clarifying language has been added to this section to eliminate confusion regarding denial procedures when another Federal, state,

and/or local authorization or certification has been denied.

Section 320.4(p): Some commenters felt that environmental considerations should take precedence over other factors. Other commenters believed that guidance should be given as to who determines whether there are environmental benefits to a project. Many commenters indicated that the regulation does not define the possible range of environmental benefits that will be considered. Environmental benefits are determined by the district engineer and the district staff based on responses received from the general public, special interest groups, other government agencies and staff evaluation of the proposed activity. Defining the possible range of environmental benefits would be almost impossible to cover in the rules in sufficient detail, since circumstances vary considerably for each permit application. After considering all the comments we have decided to make the change as proposed on May 12, 1983.

Section 320.4(q): Some commenters believed that this rule would distort review criteria by inserting inappropriate economic assumptions and minimizing environmental criteria. Some commenters suggested that the Corps revise this paragraph to include a provision to challenge an applicant's economic data and that of governmental agencies as well. Other commenters believe that economic factors do not belong in these regulations since the intent of the Clean Water Act is: "to restore and maintain the chemical, physical, and biological integrity of the nation's waters"; therefore, any regulation under the CWA should have, as its primary objective, provisions which give environmental factors the greatest weight. They were concerned that this part may be applied to allow economic benefits to offset negative environmental effects. Some commenters, however, believed that the Corps should assume that projects proposed by state and local governmental interests and private industry are economically viable and are needed in the marketplace. They also believed that the Corps and other governmental agencies should not engage in detailed economic evaluations. Economics has been included in the Corps list of public interest factors since 1970. However, there has never been a specific policy on economics in the regulations. The Corps generally accepts an applicant's determination that a proposed activity is needed and will be economically viable, but makes its own decision on whether

a project should occur in waters of the U.S. The district engineer may determine that the impacts of a proposed project on the public interest may require more than a cursory evaluation of the need for the project. The depth of the evaluation would depend on the significance of the impacts and in unusual circumstances could include an independent economic analysis. The Corps will balance the economic need for a project along with other factors of the public interest. Accordingly, § 320.4(q) has been modified from the proposed rule to provide that the district engineer may make an independent review of the need for a project from the perspective of the public interest.

Section 320.4(r): Many comments were offered as to the intent, scope and implementation of the proposed mitigation policy. Comments were almost equally divided between those who felt that the policy should be expanded and those that felt it should be more limited. The issues that were raised include: mitigation should not be used to outweigh negative public interest factors; mitigation should not be integrated into the public interest review; mitigation should be on-site to the maximum extent practicable; off-site mitigation extends the range of concerns beyond those required by Section 404. A wide range of views were expressed on our proposed mitigation policy, but virtually all commenters expressed need for a policy. The Corps has been requiring mitigation as permit conditions for many years based on our regulations and the 404(b)(1) guidelines. Because of the apparent confusion on this matter, we have decided to clarify our existing policy at 320.4(r).

The concept of "mitigation" is many-faceted, as reflected in the definition provided in the Council on Environmental Quality (CEQ) NEPA regulations at 40 CFR 1508.20. Viewing "mitigation" in its broadest sense, practically any permit condition or best management practice designed to avoid or reduce adverse effects could be considered "mitigation." Mitigation considerations occur throughout the permit application review process and are conducted in consultation with state and Federal agencies responsible for fish and wildlife resources. District engineers will normally discuss modifications to minimize project impacts with applicants at pre-application meetings (held for large and potentially controversial projects) and during the processing of applications. As a result of these discussions, district engineers may condition permits to

require minor project modifications, even though that project may satisfy all legal requirements and the public interest review test without those modifications.

For applications involving Section 404 authority, mitigation considerations are required as part of the Section 404(b)(1) guidelines analysis; permit conditions requiring mitigation must be added when necessary to ensure that a project complies with the guidelines. To emphasize this, we have included a footnote to § 320.4(r) regarding mitigation requirements for Section 404, Clean Water Act, permit actions. Some types of mitigation measures are enumerated in Subpart H of the guidelines. Other laws such as the Endangered Species Act may also lead to mitigation requirements in order to ensure that the proposal complies with the law. In addition to the mitigation developed in preapplication consultations and through application of the 404(b)(1) guidelines and other laws, these regulations provide for further mitigation should the public interest review so indicate.

One form of mitigation is "compensatory mitigation," defined at 40 CFR 1508.20(e) to mean "compensating for the impact by replacing or providing substitute resources or environments." Federal and state natural resource agencies sometimes ask the Corps to require permit applicants to compensate for wetlands to be destroyed by permitted activities. Such compensatory mitigation might be provided by constructing or enhancing a wetland; by dedicating wetland acreage for public use; or by contributing to the construction, enhancement, acquisition or preservation of such "mitigation lands." Compensatory mitigation of this type is often referred to as "off-site" mitigation. However, it can be provided either on-site or off-site. Such mitigation can be required by permit conditions only in compliance with 33 CFR 325.4, and specifically with 33 CFR 325.4(a)(3). In addition to those restrictions, the Corps has for many years declined to use, and does now decline to use, the public interest review to require permit applicants to provide compensatory mitigation unless that mitigation is required to ensure that an applicant's proposed activity is not contrary to the public interest. If an applicant refuses to provide compensatory mitigation which the district engineer determines to be necessary to ensure that the proposed activity is not contrary to the public interest, the permit must be denied. If an applicant voluntarily offers to provide

compensatory mitigation in excess of the amount needed to find that the project is not contrary to the public interest, the district engineer can incorporate a permit condition to implement that mitigation at the applicant's request.

Part 321—Permits for Dams and Dikes in Navigable Waters of the United States

The Secretary of the Army delegated his authority under Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 to the Assistant Secretary of the Army (Civil Works). The Assistant Secretary in turn delegated his authority under Section 9 for structures in intrastate navigable waters of the United States to the Chief of Engineers and his authorized representative. District engineers have been authorized in 33 CFR 325.8 to issue or deny permits for dams or dikes in intrastate navigable waters of the United States" under Section 9 of the Rivers and Harbors Act of 1899. This section of the regulation and §§ 325.5(d) and 325.8(a) have been revised to reflect this delegation.

Part 322—Permits for Structures or Work in or Affecting Navigable Waters of the United States

Section 322.2(a): We have revised the term "navigable waters of the United States" to reference 33 CFR Part 329 since it and all other terms relating to the geographic scope of the Section 10 program are defined at 33 CFR Part 329.

Section 322.2(b): Commenters on the definition of structures indicated that several terms needed further amplification. It was suggested that the term "boom" be defined to exclude a float boom, as would be used in front of a spillway. The term was not redefined because those dams constructed in Section 10 waters do require a permit for a float boom. However, most dams in the United States are constructed in non-Section 10 waters and do not require a permit for a boom (floating or otherwise) unless it involves the discharge of dredged or fill material. It was suggested that the term "obstacle or obstruction" be modified to reinstate the language from the July 19, 1977, final regulations. We have adopted the suggestion which will clarify our intent that obstacles or obstructions, whether permanent or not, do require a permit; it will also assist in jurisdictional decisions on enforcement. It was suggested that "boat docks" and "boat ramps" be included in the list of structures, since these are frequently proposed structures. These have been included. It was suggested that the term "artificial gravel island" be added, as

Congress, by Section 4(e) of the Outer Continental Shelf Lands Act of 1953, extended the regulatory program to the Outer Continental Shelf, and specifically cited artificial islands as falling under Section 10 jurisdiction. This type of structure is also constructed on state lands within the territorial seas. Accordingly, artificial islands have been included.

Section 322.2(c): Two commenters discussed the definition of "work"; one stated that it was too broad and the other that it should be expanded. The present definition of the term "work" has remained unchanged for many years and has achieved general acceptance by the regulators and those requiring a permit. The present language has been retained.

Sections 322.2(f)(2) and 323.2(n)(2): Both of these sections are concerned with the definition of general permits. Several commenters expressed support for the additional criteria contained in the May 12, 1983 proposed rule. Other commenters expressed concern that the proposed criteria were illegal. Some commenters believed that the proposal would amount to a delegation of the Section 404 program to the states, and that this is not a prerogative of the Corps of Engineers. Many commenters expressed serious concern that state programs were not comprehensive enough to properly represent the public interest review. Still others objected to the proposal because there were no assurances that the state approved projects themselves were "similar in nature" or would have "minimal adverse environmental effects"; those objections extended to the proposal to assess the impacts of the differences in the State/Corps decisions. Some commenters suggested that an automatic "kick-out" provision, whereby concerned agencies could cause the Corps to require an individual application on a case-by-case basis, may provide sufficient safeguards for the proposal to go forward. Some commenters suggested that a preferred approach to reducing duplication would be for the Corps to express, in its regulations, direction for its districts to vigorously pursue joint processing, permit consolidation, pre-application consultation, joint applications, joint public notices and special area management planning. This change was proposed in 1983. At that time we believed that additional flexibility in the types of general permits which could be developed was necessary to effectively administer the regulatory program. Our experience since then has shown that the existing definitions of general permit at both of these sections is flexible

enough to develop satisfactory general permits. Therefore we have decided not to adopt this proposed change. Because several definitions previously found in Part 323 have been moved to Part 322, § 323.2(n) has been redesignated § 323.2(h).

Section 322.2(g): This section adds the definition of the term "artificial reefs" from the National Fishing Enhancement Act and clarifies what activities or structures the term does not include. Two commenters suggested modifications, or clarifications, to this definition to ensure that old oil and gas production platforms can be considered for use as artificial reefs. We agree with their suggestion. The definition would include the use of some production platforms, either abandoned in place or relocated, as artificial reefs as long as they are evaluated and permitted as meeting the standards of Section 203 of the Act.

Section 322.2(h): This section was proposed to add the definition of the term "outer continental shelf" from the Outer Continental Shelf Lands Act (OCSLA). Two commenters suggested that the territorial sea off the Gulf Coast of Florida and Texas is greater than three nautical miles from the coast line. We have determined that this is not the case, and have decided not to include a definition of the term "outer continental shelf" in these regulations and to rely instead on the definition of this term that is already in the OCSLA.

Sections 322.3(a) and 322.4: Activities which do not require a permit have been moved from § 322.3 and included in § 322.4. The limitation of the applicability of Section 154 of the Water Resource Development Act of 1976 in certain waterbodies has been deleted because no such limitation exists in that Act.

Section 322.5(b): This section addresses the policies and procedures for processing artificial reef applications. One commenter suggested that the opportunity for a general permit should not be precluded by this section. A general permit for artificial reefs is not precluded by this regulation change. Furthermore, the opportunity for the issuance of general permits may be enhanced with the implementation of the National Artificial Reef Plan by the Department of Commerce.

Section 322.5(b)(1): This section cites the standards established under section 203 of the National Fishing Enhancement Act. These standards are to be met in the siting and construction, and subsequent monitoring and managing, of artificial reefs. Two commenters insisted that these should

be called goals or objectives, and several commenters said that more specific guidelines or criteria are needed to evaluate proposed artificial reefs against the standards or goals. Section 204 of the Act states that the Department of Commerce will develop a National Artificial Reef Plan which will be consistent with the standards established under Section 203, and will include criteria relating to siting, constructing, monitoring, and managing artificial reefs. Specification of such criteria in these rules would be inappropriate in view of the intent of Congress to have the Department of Commerce perform this function. The National Marine Fisheries Service (NMFS), acting for the Department of Commerce, has consulted with us in developing the National Artificial Reef Plan, and we will continue to consult with them to ensure permits are issued consistent with the criteria established in that plan. The Department of Commerce announced the availability of the National Artificial Reef Plan in the Federal Register on November 14, 1985.

The U.S. Coast Guard was particularly concerned that these rules be more specific with regard to information and criteria that will be used to ensure navigation safety and the prevention of navigational obstructions. Section 204 of the National Fishing Enhancement Act requires that the Department of Commerce consult the U.S. Coast Guard in the development of the National Artificial Reef Plan regarding the criteria to be established in the plan. One of the standards with which the criteria must be consistent is the prevention of unreasonable obstructions to navigation. In addition, the district engineer shall consult with any governmental agency or interested party, as appropriate, in issuing permits for artificial reefs. This includes pre-application consultation with the U.S. Coast Guard, and placing conditions in permits recommended by the U.S. Coast Guard to ensure navigational safety.

Section 322.5(b)(2) and (3): These sections state that the district engineer will consider the National Artificial Reef Plan, and that he will consult with governmental agencies and interested parties, as necessary, in evaluating a permit application. Two commenters supported this coordination. The NMFS requested notification of decisions to issue permits which either deviate from or comply with the plan. Paragraph (b)(2) requires the district engineer to notify the Department of Commerce of any need to deviate from the plan. In addition, the NMFS receives a monthly list of permit applications on which the

district engineer has taken final action. This should be sufficient notification for those permits which do not deviate from the plan.

Section 322.5(b)(4): Although some commenters strongly supported this section describing the liability of permittees authorized to build artificial reefs, several expressed concern that this provision was not clearly written or required specific criteria to assist the district engineer in determining financial liability. This paragraph has been rewritten to correspond closely with the wording in the National Fishing Enhancement Act, and examples of ways an applicant can demonstrate financial responsibility have been added.

Section 322.5(g): We have revised this paragraph on canals and other artificial waterways by eliminating procedural-only provisions which are redundant with requirements in 33 CFR Parts 325 and 326.

Section 322.5(l): A new section on fairways and anchorage areas has been added. This section was formerly found at 33 CFR 209.135. We are moving this provision to consolidate all of the permit regulations on structures to this part. We will delete 33 CFR 209.135 by separate notice in the Federal Register.

Part 323—Permits for Discharges of Dredged or Fill Material Into Waters of the United States

Section 323.2: Several commenters supported moving the definitions relating to waters of the United States to a separate paragraph. As proposed on May 12, 1983, we have moved the term "waters of the United States" and all other terms related to the geographic scope of jurisdiction of Section 404 of the CWA to 33 CFR Part 328 which is titled "Definition of the Waters of the United States." We believe that, by setting these definitions apart in a separate and distinct Part of the regulation and including in that Part all of the definitions of terms associated with the scope of the Section 404 permit program, we are better able to clarify the scope of our jurisdiction. We have not changed any existing definitions nor added any definitions proposed on May 12, 1983. Comments related to these definitions are addressed in Part 328 below.

We have not changed the definition of fill material at § 323.2(e). However, the Corps has entered into a Memorandum of Agreement with the Environmental Protection Agency to better identify the difference between section 402 and section 404 discharges under the Clean Water Act.

Section 323.2(d)—Previously 323.2(j): The proposed modification of this paragraph states that "de minimis or incidental soil movement occurring during normal dredging operations" is not a "discharge of dredged material," the term defined by this paragraph.

Eight commenters raised concerns relating to this provision. Most of these supported the regulation of "de minimis or incidental soil movement occurring during normal dredging operations" in varying degrees. Two specifically expressed a belief that the fallback from dredging operations constituted a discharge within the intent of section 404 of the Clean Water Act. One of these stated that the proposed provision was contrary to a binding decision by the U. S. District Court for the Northern District of Ohio in *Reid v. Marsh*, No. C-81-690 (N. D. Ohio, 1984). Another commenter objected to the provision on the basis that it would force states that perceived a need to regulate dredging operations to regulate such activities under their National Pollutant Discharge Elimination System authority. The recommendations of the above group of commenters included the regulation of dredging activities on an individual or general permit basis or on a selective basis that would take into account the scopes and anticipated effects of the projects involved. Two commenters expressed concern over the fact that discharge activities such as the sidestepping of dredged material might be considered "soil movement" that was "incidental" to a "normal dredging operation." The final concern raised related to the list of dredging equipment cited as examples. This list was seen, alternatively, as too limited or as not limited enough in reference to the types of equipment that may be used in a "normal dredging operation." Four commenters supported the proposed provision as a reasonable interpretation of the section 404 authority of the Corps.

Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404. The purpose of dredging is to remove material from the water, not to discharge material into the water. Therefore, the fallback in a "normal dredging operation" is incidental to the

dredging operation and *de minimis* when compared to the overall quantities removed. If there are tests involved, we believe they should relate to the dredging operator's intent and the result of his dredging operations. If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a "normal dredging operation" that is not subject to section 404.

Based on the above discussion, we have not adopted any of the recommendations relating to the revision or deletion of this provision for the purpose of bringing about the regulation of "normal dredging operations" in varying degrees. We have replaced the "or" between the words "de minimis" and "incidental" with a comma to more clearly reflect the fact that the incidental fallback from a "normal dredging operation" is considered to be *de minimis* when compared to the overall quantities removed. In addition, we have deleted the examples of dredging equipment at the end of the proposed provision to make it clear that *de minimis* or incidental soil movement occurring during any "normal dredging operation" is not a "discharge of dredged material." However, we wish to also make it clear that this provision applies only to the incidental fallback occurring during "normal dredging operations" and not to the disposal of the dredged material involved. If this material is disposed of in a water of the United States, by sidestepping or by other means, this disposal will be considered to be a "discharge of dredged material" and will be subject to regulation under section 404.

Section 323.4: We have made some minor corrections to this section to be consistent with EPA's permit exemption regulations at 40 CFR Part 233.

Part 324—Ocean Disposal

Section 324.4(c): The language of this section on the EPA review process has been rewritten to clarify the procedures the district engineer will follow when the Regional Administrator advises that a proposed dumping activity does not comply with the criteria established pursuant to section 102(a) of the Marine Protection, Research and Sanctuaries Act (MPRSA), or the restrictions established pursuant to section 102(c) thereof, in accordance with the provisions of 40 CFR 225.2(b).

Part 325—Permit Processing

Several minor changes have been made in this part. These changes involve requesting additional information from

an applicant, providing for a reasonable comment period, combining permit documentation, and documenting issues of national importance.

Section 325.1(b): This section has been rewritten to clarify the pre-application consultation process for major permit applications. No significant changes have been made in the content of this section.

Section 325.1(d)(1): One commenter on this content of applications paragraph asked that where, through experience, it has been found that specific items of additional information are routinely necessary for permit review, the district engineer should be allowed to develop supplemental information forms. Another observed that restricting production of local forms may inhibit joint permit application processes. If it becomes necessary to routinely request additional information, the Corps can change the application form, but that must be done at Corps headquarters with the approval of the Office of Management and Budget. This change does not place any additional restrictions on developing local forms. As is now the case, local forms may be developed for joint processing with a Federal or state agency.

Section 325.1(d)(8): This is a new section requiring an applicant to include provisions for siting, construction, monitoring and managing the artificial reef as part of his application for a permit. One commenter suggested that the criteria for accomplishing these activities must be completed in the National Artificial Reef Plan before establishment of such reefs can be encouraged. Another recommended that the regulation describe more specifically the information to be supplied by an applicant with regard to monitoring and maintaining an artificial reef. The plan includes general mechanisms and methodologies for monitoring the compliance of reefs with permit requirements, and managing the use of those reefs. It can be used as a guide for the information to be supplied by the permit applicant. Specific conditions for monitoring and managing, as well as for maintaining artificial reefs generally need to be site-specific and should be developed during permit processing.

The U.S. Coast Guard requested that they be provided copies of permit applications for artificial reefs, and that a permittee be required to notify the Coast Guard District Commander when reef construction begins and when it is completed so timely information can be included in notices to mariners. The district engineer may elect to consult with the Coast Guard, when appropriate, during the pre-application

phase of the permit process. At any rate, the Coast Guard will receive public notices of permit applications, and may make recommendations to ensure navigational safety on a case-by-case basis. Appropriate conditions can be added to permits to provide for such safety.

Section 325.1(e): Several commenters expressed concern with language changes requiring only additional information "essential to complete an evaluation" rather than the former requirement for information to "assist in evaluation of the application." They felt this change would reduce the data base on which decisions would be made. They indicated further that without necessary additional information, district engineers would not be able to make a reasonable decision, the public's ability to provide meaningful comments would be limited, and resource agencies would have to spend more time contacting the applicant and gathering information. They felt this could increase delays rather than limiting them. Several commenters asked that the regulations be altered to specifically require submission of information necessary for a 404(b)(1) evaluation. Similar concerns were expressed with the change stating that detailed engineering plans and specifications would not be required for a permit application. Commenters advised that without adequate plans or the ability to routinely require supplemental information it may be impossible to insure compliance with applicable water quality criteria or make reasonable permit decisions. Other commenters wanted further restrictions placed on the district engineer's ability to request additional information. Suggestions included altering the regulations to specify the type, need for, and level of detail which could be requested, and requiring the district engineer to prepare an analysis of costs and benefits of such information. Some commenters objected to requirements for providing information on project alternatives and on the source and composition of dredged or fill material.

This paragraph has been changed as proposed. The intent of this change was to assure that information necessary to make a decision would be obtained, while requests for non-essential information and delays associated with such requests would be limited.

Section 325.2(a)(6): The new requirement to document district engineer decisions contrary to state and local decisions was adopted essentially as proposed. The reference to state or local decisions in the middle of this paragraph incorrectly did not reference

§ 320.4(j)(4) in addition to § 320.4(j)(2). The adopted paragraph references state and local decisions in both of these paragraphs.

Section 325.2(b)(1)(ii): The May 12, 1983, proposed regulations sought to speed up the process by reducing the standard 60 day comment/waiver period to 30 days for state water quality certifications. Commenters on this paragraph offered a complete spectrum of views from strong support for the proposed changes to strong opposition to the proposal. Comments within this spectrum included opinions that: states must have 60 days; certification time should be the same as allowed by EPA (i.e. 6 months); the proposal is illegal; it conflicts with some state water quality certification regulations and procedures; and it would reduce state and public input to the decision-making process. Most states objected to this reduction with many citing established water quality certification procedures required by statute and/or regulations which require notice to the public (normally 30 days) and which allow requests for public hearings which cannot be completed within the 30-day period. We have, therefore, retained the 60 day period in the July 22, 1982, regulations. Some Corps districts have developed formal or informal agreements with the states, which identify procedures and time limits for submittal of water quality certifications and waivers. Where these are in effect, problems associated with certifications are minimized.

Many commenters objected to the May 12, 1983, proposal to delete from the July 22, 1982, regulations the statement, "The request for certification must be made in accordance with the regulations of the certifying agency." Deleting this statement will not delete the requirement that valid requests for certification must be made in accordance with State laws. However, we have found that, on a case-by-case basis in some states, the state certifying agency and the district engineer have found it beneficial to have some flexibility to determine what constitutes a valid request. Furthermore, we believe that the state has the responsibility to determine if it has received a valid request. If this statement were retained in the Corps regulation, it would require the Corps to determine if a request has been submitted in accordance with state law. To avoid this problem, we have decided to eliminate this statement.

Section 325.2(d)(2): Numerous commenters expressed concern with comment periods of less than 30 days. They were concerned that, in order to expedite processing times, 15 day

notices would become the norm. These commenters stated that 15 days was insufficient to prepare substantive comments and would not allow the public adequate participation in the permit process as mandated by Section 101 of the CWA. State agencies noted that, with internal and external mail requiring as much as a week each for the Corps and the state, 15 days would not provide any time for consideration of a project. Several commenters noted that such expedited review times might actually be counter-productive, as Federal and state agencies might routinely oppose projects and request permit denial so that they would then have sufficient time to review a project and to work with an applicant to resolve conflicts. We recognize that 15 days is a very short comment period considering internal agency processing and mail time. We expect that comment periods as short as 15 days would be used only for minor projects where experience has shown there would be little or no controversy. Some districts have been routinely using comment periods of less than 30 days (20 and 25 days) while others have used such procedures in only a limited number of special cases. In adopting this provision, we have modified the May 12, 1983, proposal to require the district engineer to consider the nature of the proposal, mail time, the need to obtain comments from remote areas, comments on similar proposals, and the need for site visits before designating public notice periods of less than 30 days. Additionally, after considering the length of the original comment period as well as those items noted above, the district engineer may extend the comment period an additional 30 days if warranted. We believe this provides the desired flexibility with the necessary restraints on when to use comment periods of less than 30 days.

Sections 325.2(e)(1) and 325.5(b)(2): Commenters supporting the use of letters of permission (LOP) for minor section 404 activities stated that applicants will realize significant time savings for minor requests while there will be no loss in environmental protection. Objectors believe that the Corps is seeking administrative expediency at the cost of environmental protection. Issues raised by commenters include: the legality of the 404 LOP procedure without providing for notice and opportunity for public hearing (Section 404(a) of the CWA); the legality of issuing a permit which would become effective upon the receipt or waiver of 401 certification and/or a consistency certification under the CZMA; the need

to be more definitive as to the criteria for making a decision as to the categories of activities eligible for authorization under the LOP; and the lack of coordination with Federal and state resource agencies. A few commenters were concerned that the notice in the May 12, 1983, Proposed Rules was insufficient because it did not give the scope and location of the work to be covered. The commenting states also indicated that the notice was insufficient for water quality certification and coastal zone consistency determination purposes. Other commenters were concerned that, while LOP's would be coordinated with Federal and state fish and wildlife agencies, other resource agencies such as EPA should also review Section 404 LOP's. Based on the comments on the proposed 404 LOP procedures, we have decided not to adopt the 404 LOP procedures as proposed. We are not changing § 325.5(b)(2), LOP format, nor are we changing the section 10 LOP provisions. Rather, we have revised § 325.2(e)(1) to describe a separate section 404 LOP process. Unlike the section 10 LOP process, the section 404 process involves the identification of categories of discharges and a generic public notice. This LOP process is a type of abbreviated permit process which could and has been developed under the July 22, 1982, interim final regulations. These procedures will avoid unnecessary paperwork and delays for many minor section 404 projects in accordance with the intent of Section 101(f) of the Clean Water Act

Section 325.7(b): We have added a provision that, when considering a modification to a permit, the district engineer will consult with resource agencies when considering a change to terms, conditions, or features in which that agency has expressed a significant interest.

Section 325.9: One commenter generally supported this section on the district engineer's authority to determine jurisdiction but indicated that § 325.9(c) should not be adopted because it reflects the provisions of a Memorandum of Understanding (MOU) with EPA and would not be applicable if the MOU is revised or deleted. We have determined that this paragraph is not now needed and have decided not to adopt it.

Appendix A—Permit Form and Special Conditions

A. Permit Form

Project Description: A comment was received stating that intended use should be specified for all permitted

work and not just for the fills involved. A comment was also received suggesting that we be more specific on what discharges are covered by permit authorizations. We agree with these points and have made appropriate changes to the instructional material relating to project descriptions.

General Conditions

General Condition 1: Several commenters stated that the specified three month lead time on the requesting of permit extensions was too long. We agree with these commenters and have, therefore, reduced this lead time from three to one month.

General Condition 2: One commenter recommended that the wording of this condition, relating to the maintenance of authorized work, be modified to indicate that restoration may be required if the permittee fails to comply with the condition. We agree and have modified the condition accordingly. Another commenter stated that it would not be reasonable to enforce this condition when a permitted underground facility is abandoned. We generally agree with this statement. However, we believe the procedures governing the enforcement of permit conditions are flexible enough to allow a reasonable approach in such situations.

General Condition 3: One commenter indicated that this condition should be modified to require the permittee to halt work that could damage discovered historic resources and to protect those resources from inadvertent damage. That commenter also indicated that under certain circumstances it would not be necessary to notify the Corps or to halt work. This notification requirement has been in effect since 1982, and the continuation of this requirement provides for the Corps to be notified in a timely manner. With this notification, the Corps can react quickly to determine the appropriate course of action. We believe this approach has proven to be satisfactory. Therefore, this condition is being adopted as proposed.

Proposed General Condition 4: In our proposal, we specifically requested comments on this condition, which would require recording the permit on the property deed. More than half the comments received were on this proposal. All but one of the commenters who addressed this condition were critical of it to a greater or lesser degree. Institutional interest observed that this condition would only add to their costs, since once lands were purchased they were seldom sold. Institutional and industrial interests observed that permits often relate to easements and

not to fee simple ownership and that compliance with the proposed condition, in such situations, would not be possible or meaningful in some locations. One commenter stated that a recordation condition should not be necessary, provided permittees complied with proposed General Condition 5, which requires owners to notify the Corps when property is transferred. To strengthen the property transfer condition, we have modified the statement preceding the transferee's signature to specify that the requirement to comply with the terms and conditions of the permit moves with the property. One commenter stated that a general condition requiring recordation where possible would be unfair, since it would not be uniformly applicable to all permittees. Further coordination with our field offices indicates that compliance with and use of the proposed condition probably occurs only in a few locations. This coordination also indicates that for some jurisdictions, where recordation is possible, the cost of recordation may be so great that it exceeds the benefits. Given that recordation may not be practical or appropriate for all Corps permits, we have deleted this general condition from the permit form and renumbered the remaining general conditions accordingly. On the other hand, the recordation requirement is appropriate and useful for many types of structures needing Corps permits, to provide fundamental fairness toward future purchasers of real property and to facilitate enforcement of permit conditions against future purchasers. For example, if the Corps were to issue a permit for a pier, that permit would require the owner to maintain the pier in good condition and in conformance with the terms and conditions of the permit. If the builder of the pier were to allow the pier to deteriorate, he could easily transfer the pier and associated property with no notice to the purchaser of the legal obligation to repair and maintain the pier, unless the permit were recorded along with the title documents relating to the associated property. This failure to give notice to prospective purchasers would be unfair, and would increase the Federal Government's difficulty in enforcing permit conditions against future purchasers. Because of this important notice function, we have added a recordation condition under B. Special Conditions, for use wherever recordation is found to be reasonably practicable and appropriate.

General Condition 4 (Proposed General Condition 5): One commenter suggested that this condition, relating to

the transference of the permit with the property, be modified to provide for notice and approval from the Corps before the permit is transferred. The reason given for this suggestion was that the Corps may have special knowledge of the particular transferee's history and capabilities and may wish to modify the terms and conditions of the permit accordingly. The suggested change would require the issuing office to conduct a review and prepare decision documentation every time property is transferred and there is a Corps permit involved. We believe that such a review in every case involving the transfer of a permit would constitute an inefficient use of available resources. Under the procedures contained in 33 CFR 325.7, a permit is subject to suspension, modification, or revocation at any time the Corps determines such action is warranted. We believe this is a better approach, and have, therefore, retained the proposed wording of this condition.

General Condition 5 (Proposed General Condition 6): One commenter recommended that this proposed condition, which relates to compliance with the provisions of the water quality certification, be changed to provide for the modification of the Corps permit if EPA promulgates a revised Section 307 standard or prohibition which applies to the permitted activity. We agree that permits must be modified when circumstances warrant. Procedures governing modifications are contained in 33 CFR 325.7, and we advise permittees of these procedures in item 5 (Reevaluation of Permit Decision) under the "Further Information" heading. Therefore, since we believe this potential requirement for permit modifications is adequately covered under the "Further Information" heading, we have retained the proposed wording of this condition.

General Condition 6 (Proposed General Condition 7): One commenter noted that compliance inspections should be conducted during normal working hours. As a general rule, this observation seems reasonable. However, since we believe that compliance inspections will be scheduled during normal working hours when possible, we have not made any changes to the proposed wording of this condition.

Further Information

Limits of Federal Liability: One commenter suggested that the Government could, under certain circumstances, be held liable for damages caused by activities authorized by the permit and suggested that Item 3, which limits the Government's liability,

be deleted in its entirety. While it is true that some courts have found the United States liable for damages sustained by the owners of permitted structures or by individuals injured in some way by those structures, it has never been the intent of the Corps to assume either type of liability or to insure that no interference or damage to a permitted structure will occur after it has been built. In permitting structures within navigable waters, the Corps does not assume any duty to guarantee the safety of that structure from damages caused by the permittee's work or by other authorized activities in the water, such as channel maintenance dredging. This is viewed as an acceptable limitation on the privilege of constructing a private structure for private benefit in a public waterway, particularly since insurance is readily available to protect the permittee from any damage his structure may sustain. Accordingly, the language in Item 3 has been further clarified to preclude any inference that the Government assumes any liability for interference with or damage to a permitted structure as a result of work undertaken by or on behalf of the United States in the public interest.

Reevaluation of Permit Decision: One commenter recommended that reevaluations be limited to the three circumstances listed. Although we believe that the vast majority of the reevaluations required will qualify under one of the three listed circumstances, we cannot exclude the possibility of non-qualifying, unique situations where the public's good may require a reevaluation of a permit decision. Therefore, we have retained the wording which states that reevaluations will not necessarily be limited to the circumstances listed. Another commenter recommended that we add to this item that we have the authority to issue administrative orders to require compliance with the terms and conditions of permits and to initiate legal actions where appropriate. The procedures governing these actions are contained in 33 CFR 326.4 and 326.5 and reference was made to these procedures in the proposed wording. However, we agree that it would be helpful to modify the proposed wording to provide permittees with a better understanding of our enforcement options; we have modified the text accordingly.

B. Special Conditions

One commenter suggested that Special Condition 5, which requires permittees authorized to perform certain types of work to provide advance notifications to the National Ocean

Service and the Corps before beginning work, be changed to allow verbal notifications followed by written confirmations. We have determined that this suggestion, if adopted, would greatly increase the chance of errors in notice documents published by the Government and would not be in the best interest of mariners. Two weeks advance notice is a reasonable period of time both for construction scheduling and for Government notification to mariners. Therefore, we have not adopted this suggestion.

One commenter suggested that a special condition be added, for use when appropriate, to require the permittee to carry out a historic preservation plan attached to the permit. The wording of special conditions are normally determined on a case-by-case basis. Only those that are used often and are subject to standardized wording are listed in Appendix A (B. Special Conditions). While we agree that special conditions of this nature may be required, we do not believe they lend themselves sufficiently to standardized wording to warrant adding a specific special condition to Appendix A.

Three comments were received which related to General Condition (n) on the previous permit form. This condition required the permittee to notify the issuing office of the date when the work authorized would start and of any prolonged suspensions before the work was complete. Two of the commenters recommended that this provision be retained as a general condition, and one commenter recommended that it be specified as a special condition. Our research indicates that this condition, as a general condition applicable to all permitted activities, has been virtually unenforceable in most areas and of limited use as a permit monitoring tool. We agree that special conditions requiring permittees to notify the Corps, in advance, of the dates permitted activities will start, are appropriate in certain situations. Two of these situations are covered by Special Condition 3 (maintenance dredging) and Special Condition 5 (charting of activities by National Ocean Service). Since we believe our field offices are in the best position to identify any other situations in which similar special conditions would be appropriate, we have not adopted these recommendations.

As discussed under Proposed General Condition 4 above, we have added a sixth special recordation condition for use where recordation is found to be reasonably practicable.

General: In addition to several editorial changes, we have added

definitions for the word "you" and its derivatives and the term "this office" at the beginning of the permit form. We have substituted the term "this office" for references to the district engineer throughout the form.

Part 326—Enforcement

General: Three commenters objected to what they perceived as a lack of specific requirements and recommended that the word "should" be changed to "shall" throughout Part 326. Another commenter stated that the proposed regulations were too specific and recommended that a significant amount of the procedures in this Part be deleted and addressed in internal guidance. The word "should," where used, allows district engineers to base their enforcement actions on an assessment of what is the best approach on a case-by-case basis. The word "shall" would require district engineers to implement specified actions even though such actions may be obviously inappropriate in relation to a particular case. We believe this flexibility is appropriate and have, therefore, retained the word "should" in most of the places where it occurred in the proposed regulations. However, the word "will" is used at various places in this Part where flexibility is not appropriate. We believe that the proposed language achieves a proper balance between the providing of necessary guidance and flexibility.

Finally, one commenter suggested that Part 326 be rewritten to include only two requirements: orders for immediate restoration of filled wetlands and referrals for legal action if these orders are not complied with. When Congress established the Corps regulatory authorities, it allowed for the issuance of permits. To ignore the issuance of permits as one means of resolving violations would be inappropriate.

Section 326.1: As a result of further internal coordination, we have determined that it would be appropriate to make it clear that nothing in this Part establishes a non-discretionary duty on the part of a district engineer. Further, nothing in this Part should be considered as a basis for a private right of action against a district engineer. Therefore, we have modified this paragraph accordingly.

Section 326.2: One commenter recommended that this statement of general enforcement policy be expanded to provide priority guidance on enforcement actions. Two other commenters recommended strengthening of this paragraph, with one recommending that it cite the firm and fair enforcement of the law to prohibit and deter damage, to require

restoration, and to punish violators as the purpose of the Corps enforcement program. In that we refer in this paragraph to unauthorized activities, we are reflecting the fact that these activities are unauthorized and subject to enforcement actions pursuant to the legal authorities cited at the beginning of this Part. Further, the other recommended changes would simply duplicate the discussions of enforcement methods and procedures already contained in §§ 326.3, 326.4, and 326.5. However, we have added a statement to this provision to reflect the fact that EPA has independent enforcement authorities under the Clean Water Act, and thus, district engineers should normally coordinate with EPA.

Section 326.3(b): One commenter recommended that this paragraph be amended to require the establishment of numbered file systems for violations. Most Corps districts already assign control numbers to enforcement actions, and since this is an administrative function, we have determined that it would be inappropriate to include this requirement in a Federal regulation designed to provide enforcement policy.

Section 326.3(c)(2): One commenter suggested rewording of this paragraph to make it clear that a violation involving a completed activity may or may not be resolved through the issuance of a Corps permit. The reference in the proposed wording to not initiating "any additional work before obtaining required Department of the Army authorizations" apparently led to the commenter misunderstanding this paragraph. The intent of this wording related to warning a violator not to initiate work on other projects before obtaining required Corps permits. Since the violator is in the process of being made aware of the legal requirements for obtaining Corps permits, we have determined that this warning is unnecessary and have, therefore, deleted it.

Section 326.3(c)(3): One commenter recommended that this paragraph be amended to indicate that the information requested will also be used for determining whether legal action is appropriate in addition to determining what initial corrective measures may be required. We agree that the information obtained from violators may provide a basis for enforcement decisions other than those relating to interim corrective measures. Therefore, we have revised this provision to provide for notifying violators of potential enforcement consequences and for the more generalized use of the information provided by violators in the

identification of appropriate enforcement measures.

Section 326.3(c)(4): One commenter recommended that this provision be reworded to indicate that the limitations on unauthorized work of an emergency nature are to be established in conjunction with Federal and state resource agencies. We believe it is understandable that actions of this type will be completed on an expedited basis with the procedures in § 326.3(c-d) being followed concurrently. Since § 326.3(d) already provides for interagency consultations, in appropriate cases, we do not believe it is necessary to duplicate that guidance in this provision.

Section 326.3(d)(1): One commenter recommended that "initial corrective measures" be defined as measures "which substantially eliminate all current and future detrimental impacts resulting from the unauthorized work." This commenter also recommended that the procedures in 33 CFR 320.4 and 40 CFR Part 230 be referenced for use in determining what "initial corrective measures" are required. Essentially, this commenter is recommending that all violators be denied a Corps authorization and required to undertake full corrective measures in the initial stage of an enforcement action. This would not be a reasonable or practical approach, since it would eliminate public participation and would result in the removal of work that may have been permitted under normal circumstances. Another commenter objected to the statement that further enforcement actions "should normally" be unnecessary if the initial corrective measures substantially eliminate all current and future detrimental impacts. This commenter sees this provision as barring legal action in appropriate cases such as those involving willful, flagrant, or repeated violations. This is not the case. To say that such corrective measures "should normally" resolve a violation does not mean that they will "always" resolve a violation. Another commenter stated that consultations with the Fish and Wildlife Service and the National Marine Fisheries Service should be made mandatory in this paragraph pursuant to the Fish and Wildlife Coordination Act. The reason given was that this provision would result in the issuance of permits which would require such consultations. This paragraph deals with initial corrective measures and not with the issuance of permits. These agencies will be given an opportunity to comment in response to a public notice before any decision is made on an after-the-fact permit application. In view of the above

discussion, we have retained the proposed wording of this paragraph.

Section 326.3(d)(2): One commenter recommended that this paragraph be deleted on the basis that it provided the district engineer with too much discretion and questioned the cross-reference to § 326.3(3). This paragraph was intended to provide guidance to district engineers in situations involving prior initiations of litigation or denials of essential authorizations or certifications by other Federal, state or local agencies. We believe district engineers should have the discretionary authority to determine what is a reasonable and practical course of action for the Corps under these circumstances. However, we have revised this paragraph to clarify its intent and to correct the cross-reference.

Section 326.3(d)(3): As a result of further review within the Corps, we have determined that the provision proposed as § 326.3(e)(1)(i), which states that it is not necessary to issue a Corps permit for initial corrective measures, should be moved to § 326.3(d) to more appropriately reflect the sequence of enforcement procedures. Therefore, we have modified this provision and established it as new § 326.3(d)(3).

Section 326.3(e): One commenter objected to the after-the-fact permit process, and observed that the process was generally seen as a mechanism to avoid compliance with the law. Exceptions to the processing of after-the-fact permit applications are contained in § 326.3(e)(i-iv). However, in most cases, the public participation associated with the processing of an application is necessary before a violation can be appropriately resolved.

Section 326.3(e)(1): One commenter recommended that this paragraph be amended to specify the criteria for legal action and to require that public notices associated with after-the-fact permit applications clearly identify that a violation is involved. The criteria for legal actions are given in § 326.5(a), and permit decisions are based on whether an activity complies with the section 404(b)(1) Guidelines, where applicable, and on whether it is or is not found to be contrary to the public interest. Permit decisions are not based on whether a permit application is before or after-the-fact. We have, therefore, retained the proposed wording of this paragraph.

Proposed Section 326.3(e)(1)(i): We have deleted this provision here and have moved a modified version of it to new § 326.3(d)(3); see discussion under § 326.3(d)(3).

Section 326.3(e)(1)(i)—Proposed as 326.3(e)(1)(ii): This provision indicates

that the processing of an after-the-fact permit application will not be necessary "when" detrimental impacts have been eliminated by restoration. One commenter recommended that district engineers be required to consult with EPA before determining that restoration has been completed that eliminates current and future detrimental impacts. We have addressed this comment by modifying § 326.2 and § 326.3(g) to provide for such coordination when the district engineer is aware of an enforcement action being considered by EPA under its independent enforcement authorities. Another commenter observed that the word "when" appeared to be in error and recommended substituting the word "unless." This would indicate that the Corps should process an after-the-fact permit application only after restoration had taken place and there is no work requiring a permit. This obviously would not be reasonable. In view of the above discussion, we have retained the proposed wording of this provision.

Section 326.3(e)(1)(iii)—Proposed as 326.3(e)(1)(iv): One commenter recommended that a provision be added to this paragraph to prohibit the acceptance of an application for a Corps permit where an activity is not in compliance with other Federal, state, or local authorizations or certifications. In essence, this amounts to requiring district engineers to take steps to enforce the terms and conditions of another agency's authorization or certification. We believe this is the issuing agency's responsibility and not the responsibility of the Corps. Of course, where that other agency has denied a requisite authorization, the Corps would not accept an application for processing.

Section 326.3(e)(1)(iv)—Proposed as 326.3(e)(1)(v): Two commenters recommended rewording of this paragraph to prohibit the acceptance or processing of any after-the-fact permit application when the Corps is aware of litigation or other enforcement actions that have been initiated by other Federal, state or local agencies. We believe the Corps should, in appropriate situations, be able to take positions on cases that are in conflict with the viewpoints of other agencies. Therefore, we have retained the wording of this paragraph essentially as proposed. However, since EPA has independent enforcement authorities, we have provided for coordination with EPA in §§ 326.2 and 326.3(g).

Section 326.3(g): One commenter indicated that this paragraph should delineate EPA's responsibility over

recognizing and reporting unpermitted discharges. This paragraph deals only with cases where EPA is considering an enforcement action. The reporting of violations is covered under § 326.3(a). Another commenter recommended that this paragraph be reworded to ensure that Corps actions under Part 326 are not in conflict with EPA enforcement actions. Another commenter, a state agency, suggested that this provision be expanded to require similar consultations with state agencies that have initiated enforcement actions. The reason we have provided for consultations with EPA in this paragraph is due to the fact that both the Corps and EPA have overlapping authorities pursuant to the Clean Water Act. This is not the case with state agencies. Nevertheless, we believe district engineers will wish to consult with state agencies in appropriate circumstances. In any event, as we stated in our discussion relating to the wording of § 326.3(e)(iv), we believe the Corps should have the right to take a position that may conflict with another agency's viewpoint. However, we have revised this provision to emphasize that district engineers should coordinate with EPA when they are aware of enforcement actions being considered by EPA under its independent enforcement authorities.

Section 326.4(a-b): As a result of further internal coordination, we have determined that § 326.4(a) should make it clear that district engineers have the discretionary authority to determine when the inspection of permitted activities is appropriate. We have modified § 326.4(a) accordingly. In addition, we have added a new § 326.4(b) to further discuss inspection limitations.

Section 326.4(d)—Proposed as 326.4(c): One commenter, a state agency, objected to the provisions in this paragraph for attempting to obtain voluntary compliance before issuing a formal compliance order. The rationale given was that the absence of a formal order would make coordination between the Corps and the state difficult. Another state agency recommended consultations with state agencies and with EPA. The proposed, non-compliance procedures do not prohibit early coordination with other regulatory agencies, when appropriate, and presumably, if the permittee quickly brings his work into compliance, such coordination should not be necessary.

One commenter objected to allowing a district engineer to issue a compliance order and to not making the use of Corps suspension/revocation procedures or

legal actions mandatory. Another commenter recommended that suspension/revocation procedures or legal actions be made mandatory if a violator fails to comply with a compliance order. The issuance of a compliance order is provided for in section 404(s) of the Clean Water Act, and in most cases, we believe that the methods available for obtaining voluntary compliance should be used before discretionary consideration is given to using the Corps suspension/revocation procedures or initiating legal action.

Another commenter objected to the term "significantly serious to require an enforcement action" on the basis that all violations are worthy of some enforcement action. Minor deviations from the terms and conditions of a Corps permit may not always warrant an enforcement action. For example, would a dock authorized to be constructed with a length of 50 feet but inadvertently constructed with a length of 51 feet constitute a violation warranting an enforcement action? We agree there may be extenuating circumstances, such as the additional length of the dock being just enough to impact the water access of a neighbor. However, this is a judgment that is best made by the district engineer involved.

One Commenter objected to the term "mutually agreeable solution" on the basis that such a solution could invalidate the prior results of coordination with resource agencies. Since this term refers to bringing the permitted activity into compliance or the resolution of the violation with a permit modification using the modification procedures in 33 CFR 325.7(b), such resolutions would not invalidate prior coordination. In view of the above discussion, we have retained the proposed wording of this paragraph.

Section 326.5(a): One commenter requested that the words "willful" and "repeated" be deleted from this paragraph, the rationale being, apparently, that most violators are not repeat or willful offenders and that the Corps should take the one opportunity it has to bring legal action against these one-time violators. We do not agree with this approach as being either reasonable or practical. Another commenter recommended adding violations that result in substantial impacts to the list of violations that should be considered appropriate for legal action. We agree with this recommendation and have modified the wording of this provision accordingly.

Section 326.5(c): One commenter recommended rewording of this

paragraph to require that copies be provided to EPA of Corps referrals to local U.S. Attorneys. We believe it would be more appropriate to address matters relating to the detailed aspects of interagency coordination in interagency agreements. Therefore, we have retained the proposed wording of this paragraph.

Section 326.5(d)(2): As a result of further internal coordination, we have determined that litigation cases involving isolated water no longer need to be referred to the Washington level on a routine basis. Therefore, we have deleted this provision.

Section 326.5(e): One commenter recommended that the word "may" be replaced with the words "encouraged to" in the provision relating to sending litigation reports to the Office of the Chief of Engineers when the district engineer determines that an enforcement case warrants special attention and the local U.S. Attorney has declined to take legal action. We agree with this recommendation and have made the change.

Another commenter suggested that wording be added to this paragraph to address circumstances in which permits are not required. The fact that a legal option may not be available does not mean that a permit is not required. If the district engineer chooses to close the case record, the activity in question will still be unauthorized and therefore illegal. Such unauthorized activities will be taken into account if the responsible parties become involved in future violations. One commenter suggested that Corps attorneys initiate legal actions as an alternative to actions by local U.S. Attorneys. However, the Corps does not have the authority under existing Federal laws to initiate legal actions on its own.

Another commenter recommended that this paragraph be modified to provide for joint Federal/state prosecution of violators. Since this involves discretionary decisions on the part of the Department of Justice, it would not be appropriate to include a provision of this nature in the Corps enforcement regulations.

Part 328—Definition of Waters of the United States

This part is being added in order to clarify the scope of the Section 404 permit program. This part was added in direct response to many concerns expressed by both the public and the Presidential Task Force on Regulatory Relief. We have not made changes to existing definitions; however, we have provided clarification by simply setting

them apart in a separate and distinct Part 328 of the regulation.

The format for Part 328 has been changed slightly from the proposed regulation in order to improve clarity and reduce duplication. The content of the proposed § 328.2 "General Definitions" has been partially combined with § 328.3 "Definitions." The remainder has been reestablished as § 328.5, "Changes in Limits of Waters of the United States." Section 328.2 has been established as "General Scope." The proposed §§ 328.4 and 328.5 have been combined into § 328.4 and renamed "Limits of Jurisdiction."

A number of commenters appeared to have misinterpreted the intent of this part. Many thought we were trying to reduce the scope of jurisdiction while others believed we were trying to expand the scope of jurisdiction. Neither is the case. The purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted.

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

The term "navigable waters of the United States" has not been added to this section since it is defined in Part 329.

A number of comments were received concerning the proposed change to the definition of the terms "adjacent" and the proposed definitions for the terms "inundation", "saturated", "prevalence", and "typically adapted." A number of commenters believed that these terms may better define the scope of jurisdiction of the section 404 program, but such definitions should more rightfully be within the province of the Environmental Protection Agency in order to remain consistent with the opinion of Benjamin Civiletti, Attorney General (September 5, 1979). These definitions would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time.

To respond to requests for clarification, we have added a definition for "tidal waters." The definition is consistent with the way the Corps has traditionally interpreted the term.

Section 328.4: Limits of Jurisdiction. Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.

Section 328.5: Changes in Limits of Waters of the United States. This section was changed to reflect both natural and man-made changes to the limits of waters of the United States. This change was made for clarification and resulted from consultation with the Environmental Protection Agency.

Section 328.6: Supplemental Clarification. Most commenters favored the Corps plans to give special consideration to unique areas such as Arctic Tundra that do not easily fit the generic "wetlands" definition. Several

commenters indicated that the Corps should clarify its intended use of this section, and one questioned the need to "describe" unique areas in the Federal Register. A number of commenters indicated that criteria should be specified for determining wetland types to be included as unique areas. Some commenters stated that close coordination between the Corps and the Environmental Protection Agency will be necessary when selecting unique areas and developing procedures for making wetland determinations in such areas, since the Environmental Protection Agency has the final authority to determine the scope of "Waters of the United States."

While we believe that supplemental clarification of unique areas will be a positive step in clarifying the scope of jurisdiction under the section 404 permit program, we have determined that such supplemental clarification can be done under existing regulations of the Environmental Protection Agency and the Corps and therefore have deleted this section.

Part 329—Definition of Navigable Waters of the United States

We are currently planning to propose a complete revision of Part 329 in the near future, to simplify and clarify the procedures involved, while retaining the essential aspects of the relevant policy. In the interim, we are making the two minor changes discussed below.

Section 329.11: This section has been modified to clarify that the lateral extent of jurisdiction in rivers and lakes extends to the edge of all such waterbodies as it does in bays and estuaries (§ 329.12(b)).

Section 329.12(a): This section has been corrected to reflect that the territorial seas, for the purpose of Rivers and Harbors Act of 1899 jurisdiction, extend 3 geographic miles everywhere and are measured from the baseline.

Part 330—Nationwide Permits

We are reissuing the 26 nationwide permits at § 330.5(a) as modified and conditioned. The nationwide permits will be in effect for 5 years beginning with the effective date of this regulation, unless sooner revised or revoked.

Section 330.1: This section was restructured and updated in order to improve its readability and technical accuracy. The definition concerning the division engineer's discretionary authority was deleted from this section since similar language appears in § 330.2. "Definitions." The discussion concerning the applicability of nationwide permits as they relate to

other Federal, state, and local authorizations was deleted from this section and relocated to § 330.5(d) "Further Information."

Section 330.2: The definition of the term "headwaters" was deleted from Part 323 and relocated to § 330.2(b), since the definition is used as part of the nationwide permit program. The definition of the term "natural lake" which was proposed at § 330.2(c) has been deleted. Changes to the "headwaters"/"isolated waters" nationwide permit which is found at § 330.5(a)(26) have obviated the need for this definition.

Section 330.5: In order to better inform the public of the statutory authority under which each nationwide permit has been issued, we have added the authority by parenthetical expression at the end of each nationwide permit.

We had proposed nationwide permits for activities funded or authorized by another Federal agency or department and for activities adjacent to Corps of Engineers civil works projects. Most commenters discussed the two proposed nationwide permits together. The most frequent comments questioned whether they would comply with section 404(e) of the CWA. They believed these nationwide permits could authorize a wide variety of Federal projects that would not be similar in nature and projects which could have significant adverse environmental impacts on aquatic resources. Numerous commenters stated that the Corps would be delegating its 404(b)(1) compliance responsibilities to other agencies and that there is a natural tendency of such agencies to be self-serving. Many commenters, including some states, objected that the public and other agencies would not have an opportunity to review some large individual projects. Many commenters encouraged the adoption of these nationwide permits; in most cases they based their opinion upon reduction in duplication and the expediting of project authorization. Based on the comments received we have decided that clarification of activities that could be covered by nationwide permits would be necessary to insure proper understanding and field application. Because of the complexity of doing this and an evaluation of the comments received, we have decided not to adopt these two nationwide permits.

Section 330.5(a)(3): This nationwide permit for repair, rehabilitation, or replacement of existing structures or fill has been clarified to show that beach restoration is not authorized by this nationwide permit.

Section 330.5(a)(6): This nationwide permit for survey activities was clarified to show that it does not authorize the drilling of exploration-type bore holes for oil and gas exploration.

Section 330.5(a)(7): This nationwide permit for outfall structures was clarified by adding language concerning minor excavation, filling and other work which is routinely associated with the installation of intake and outfall structures.

Section 330.5(a)(18): This nationwide permit for discharges up to 10 cubic yards was clarified by indicating that it does not authorize discharges for the purpose of stream diversion. The footnote was deleted because it was redundant with the terms of the nationwide permit itself.

Section 330.5(a)(19): This nationwide permit for dredging up to 10 cubic yards was clarified by indicating that it does not authorize the connection of canals or other artificial waterways to navigable waters of the United States.

Section 330.5(a)(22): This nationwide permit for the removal of obstructions to navigation was clarified by indicating that it does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Section 330.5(b)(3): This condition for the protection of endangered species was modified to set forth more clearly options available to the district engineer to satisfy section 7 of the Endangered Species Act when it has been determined that an activity may adversely affect any listed endangered species or its critical habitat.

Section 330.5(b)(7): This condition for the protection of wild and scenic rivers was modified to define more clearly components of the National Wild and Scenic River System by showing that it includes any Congressionally designated "study river."

Section 330.5(b)(9): This condition for the protection of historic properties was added in response to numerous comments which expressed concern for an apparent lack of consideration which was being given historic properties. This condition outlines the procedures to be followed by both the permittee and the district engineer to provide for modification, suspension, or revocation of a nationwide permit or contact with the Advisory Council on Historic Preservation if an activity authorized by a nationwide permit may adversely affect a historic property.

Section 330.5(b)(10): This condition was added as a result of comments which expressed concern that activities performed under the nationwide permits could impair reserved tribal rights.

Section 330.5(b)(11) and (12): These conditions were adopted as proposed. They provide notification to the public that, within certain states, authorization for the activity may have been denied without prejudice as a result of state 401 water quality certification denial or nonconcurrence with Coastal Zone Management consistency. These conditions trigger the provisions of §§ 330.9 and 330.10.

Section 330.5(b)(13): This condition was added to alert the public that regional conditions may have been added by the division engineer in accordance with § 330.8(a).

Section 330.5(c): The Grandfathering provision included in the October 5, 1984, final regulations expires on April 5, 1986, before the effective date of these regulations and is, therefore, no longer needed and has been deleted. A new paragraph has been added to provide the public further information on nationwide permits as they relate to such things as compliance with conditions, other required authorizations, property rights, Federal projects, and revised or modified water quality standards.

Section 330.5(d): This paragraph has been added to clarify that the Chief of Engineers has the authority to modify, suspend, or revoke any nationwide permit.

Some states indicated in their comments that there might be other ways to reduce burdens on the public within their state other than the nationwide permits. One state suggested that it might be appropriate to revoke all the nationwide permits in favor of regional permits subject to interagency review. The authority exists for the Chief of Engineers to revoke some or all of the nationwide permits within a state. There are also existing provisions in the regulations for district engineers and the states to develop a permit system designed around specific state authorities. These existing provisions include regional general permits, programmatic general permits, transfer of the 404 program (see 33 CFR 323.5), joint processing, permit consolidation, preapplication consultation and special area management planning. Before adopting a permit system designed around specific state authorities, a public notice providing an opportunity for a public hearing would be issued outlining the proposed permit system within the state and the proposal to revoke the nationwide permits. If such a system is developed, the Chief of Engineers will consider revoking all or most of the nationwide permits within a state.

Section 330.8(a): The concept of case-by-case regional conditioning authority received overwhelming support. This new paragraph allows the division engineer through discretionary authority to add activity specific conditions to nationwide permits on a case-by-case basis. The district engineer may do the same when there is mutual agreement with the permittee or when conditions are necessary based on conditions of a state 401 certification.

Section 330.8(c): This paragraph was modified to clarify that, although the division engineer has used discretionary authority to require individual permits, he may subsequently allow the activity to be authorized by nationwide permit if the impediment to using the nationwide permit, which triggered the discretionary authority, has been removed.

Section 330.8(c)(2): This paragraph has been modified to allow division engineers the discretionary authority to require individual permits for categories of activities or specific geographic areas. This authority was previously exercised by the Chief of Engineers. However, the Chief of Engineers is retaining this authority on a statewide or nationwide basis.

Section 330.9: Many commenters objected to the issuance of nationwide permits when a state denies 401 certification. Their objections were based on the Clean Water Act requirement that "No license or permit shall be granted until the certification . . . has been obtained or has been waived." Commenters expressed strong concerns about the validity of such permits, and stated that issuance would constitute a de facto transfer of the administration of this portion of the 401 permit program to the objecting states. An attendant concern was that, if states were unable to respond within the time specified by the Corps, a waiver would be presumed, and the nationwide permit would become effective, whether or not this would have been the intent of the state. Some commenters suggested that states would be forced to deny certifications because of inadequate time to ensure that proposed activities would not violate water quality standards. Most commenters opposed district engineers having discretionary authority over conditions to the 401 certification. One commenter believes this authority conflicts with states' rights. Another suggested that the proposed action could prod states into adopting their own wetland laws and regulatory programs. Several commenters supported the proposal, stating that it was a means of preserving the utility of the general permit program.

Section 330.9 has been modified to provide that, if a state denies a required 401 certification for a particular nationwide permit, then authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. We did not adopt the 30 day waiver period but rather will rely on the language at § 325.2(b)(1) which defines a reasonable period of time. This section was also modified to notify the public that the district engineer will include conditions of the 401 water quality certification as special conditions of the nationwide permit.

Section 330.9(b): This subsection has been added to notify the public of the certification requirements of the various nationwide permits.

Section 330.10: A number of coastal states commented that consistency determination or waiver thereof must have been obtained prior to the promulgation of the nationwide permits. Some commenters asserted that such a requirement is not a statutory prerequisite to permit issuance. Others contend that assuming a waiver of certification preempts the individual state's authority and thwarts Congressional intent that the permit process involves oversight by the state as well as Federal agencies.

Section 330.10 has been modified to state that, in certain instances where a state has not concurred that a particular nationwide permit is consistent with its coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has either concurred in that determination or waived its right to do so.

Section 330.11: This subsection was added to clarify existing procedures to establish a time limit in which a permittee may rely on confirmation from the district engineer that an activity is covered by a nationwide permit, and to specify procedures to modify, suspend, or revoke the permittee's right to proceed under the nationwide permit after the district engineer notified the permittee that the activity may proceed.

Section 330.12: This subsection was modified to provide a twelve month transition period for projects which may be affected by future changes in

nationwide permits. After considering equity established in reliance on the nationwide permit and that the public will in all likelihood receive ample notice of proposed changes, we believe that this transition period is both reasonable and equitable. In addition, if necessary on a case-by-case basis we can, even though there is a grandfather provision, exercise discretionary authority pursuant to § 330.8 or modify, suspend or revoke individual authorization pursuant to 33 CFR 325.7.

State Certification of Nationwide Permits

Most states have issued or waived 401 certification and/or Coastal Zone Management consistency concurrence for one or more of the twenty six nationwide permits. Many states have issued a conditional certification and some have denied certification/consistency concurrence. Final action is still pending in some of the states but is imminent. The primary mechanism for keeping the public informed of the status and/or changes in state certifications or Coastal Zone Management consistency concurrence will be public notices issued by the district engineers within the affected states. The district engineers will be issuing public notices concurrent with the publication of these regulations. Subsequent notices will be issued as changes occur.

Listed below are those states which, as of the date of this printing, have either denied or conditionally issued 401 certification and/or coastal zone management consistency concurrence for one or more of the nationwide permits. For more current and detailed information you should consult with the appropriate district engineer.

Alaska, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia and Wisconsin.

Determinations under Executive Order 12291 and the Regulatory Flexibility Act. The Department of the Army has determined that the revisions to these regulations do not contain a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. The Department of the Army certifies, pursuant to section 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.

Note 1.—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 320

Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 321

Dams, Intergovernmental relations, Navigation, Waterways.

33 CFR Part 322

Continental shelf, Electric power, Navigation, Water pollution control, Waterways.

33 CFR Part 323

Navigation, Water pollution control, Waterways.

33 CFR Part 324

Water pollution control.

33 CFR Part 325

Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

33 CFR Part 326

Investigations, Intergovernmental relations, Law enforcement, Navigation, Water pollution control, Waterways.

33 CFR Part 327

Administrative practice and procedure, Navigation, Water pollution control, Waterways.

33 CFR Part 328

Navigation, Water pollution control, Waterways.

33 CFR Part 329

Waterways.

33 CFR Part 330

Navigation, Water pollution control, Waterways.

Dated: November 4, 1986.

Robert K. Dawson,

Assistant Secretary of the Army (Civil Works).

Accordingly, the Department of the Army is revising 33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 329, and 330 and adding Part 328 to read as follows:

PART 320—GENERAL REGULATORY POLICIES

Sec.

- 320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related laws.

Sec.

320.4 General policies for evaluating permit applications.

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

§ 320.1 Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.* (1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers. If a district or division engineer makes a final decision on a permit application in accordance with the procedures and authorities contained in these regulations (33 CFR Parts 320–330), there is no administrative appeal of that decision.

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CFR Parts 325 and 330 is the primary method of eliminating unnecessary federal control over activities which do not justify individual control or which are adequately regulated by another agency.

(4) The Corps is neither a proponent nor opponent of any permit proposal. However, the Corps believes that applicants are due a timely decision. Reducing unnecessary paperwork and delays is a continuing Corps goal.

(5) The Corps believes that state and federal regulatory programs should complement rather than duplicate one another. The Corps uses general permits, joint processing procedures, interagency review, coordination, and authority transfers (where authorized by law) to reduce duplication.

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to

this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

(b) *Types of activities regulated.* This Part and the Parts that follow (33 CFR Parts 321–330) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army (DA) permits for controlling certain activities in waters of the United States or the oceans. This part identifies the various federal statutes which require that DA permits be issued before these activities can be lawfully undertaken; and related Federal laws and the general policies applicable to the review of those activities. Parts 321–324 and 330 address special policies and procedures applicable to the following specific classes of activities:

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

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

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

(4) Construction of artificial islands, installations, and other devices on the outer continental shelf (Part 322);

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

(6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters (Part 324); and

(7) Nationwide general permits for certain categories of activities (Part 330).

(c) *Forms of authorization.* DA permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of individual applications and general permits that authorize a category or categories of activities in specific geographical regions or nationwide. The term "general permit" as used in these regulations (33 CFR Parts 320–330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits which are issued by the Chief of Engineers through publication in the Federal Register and are applicable throughout the nation. The nationwide permits are found in 33 CFR Part 330. If an activity is covered by a general permit, an application for a DA permit

does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a DA permit. In certain cases pre-notification may be required before initiating construction. (See 33 CFR 330.7)

(d) *General instructions.* General policies for evaluating permit applications are found in this part. Special policies that relate to particular activities are found in Parts 321 through 324. The procedures for processing individual permits and general permits are contained in 33 CFR Part 325. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. "Navigable waters of the United States" are defined in 33 CFR Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899. "Waters of the United States" are defined in 33 CFR Part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the Rivers and Harbors Act, approved March 3, 1899 (33 U.S.C. 401) (hereinafter referred to as section 9), prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit (See 33 CFR Part 321.) Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (49 U.S.C. 1155g(6)(A)). A DA permit pursuant to section 404 of the Clean Water Act is required for the discharge of dredged or fill material into

waters of the United States associated with bridges and causeways. (See 33 CFR Part 323.)

(b) Section 10 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 403) (hereinafter referred to as section 10), prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. The authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf, by section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See 33 CFR Part 322.)

(c) Section 11 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 404), authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads, or other works may be extended or deposits made without approval of the Secretary of the Army. Effective May 27, 1970, permits for work shoreward of those lines must be obtained in accordance with section 10 and, if applicable, section 404 of the Clean Water Act (see § 320.4(o) of this Part).

(d) Section 13 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 407), provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency (EPA), and the states under sections 402 and 405 of the Clean Water Act, (33 U.S.C. 1342 and 1345). (See 40 CFR Parts 124 and 125.)

(e) Section 14 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 408), provides that the Secretary

of the Army, on the recommendation of the Chief of Engineers, may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. (See 33 CFR Part 323.) The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army and published in 40 CFR Part 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers shall consider the economic impact on navigation and anchorage of such a prohibition in reaching his decision. Furthermore, the Administrator can deny, prohibit, restrict or withdraw the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. (See 40 CFR Part 230.)

(g) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for the purpose of disposal in the ocean where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of the EPA in consultation with the Secretary of the Army and published in 40 CFR Parts 220-229. However, similar to the EPA Administrator's limiting authority cited in paragraph (f) of this section, the Administrator can prevent the issuance of a permit under this authority if he

finds that the disposal of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas. (See 33 CFR Part 324).

§ 320.3 Related laws.

(a) Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any applicant for a federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or would originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1456(c)), requires federal agencies conducting activities, including development projects, directly affecting a state's coastal zone, to comply to the maximum extent practicable with an approved state coastal zone management program. Indian tribes doing work on federal lands will be treated as a federal agency for the purpose of the Coastal Zone Management Act. The Act also requires any non-federal applicant for a federal license or permit to conduct an activity affecting land or water uses in the state's coastal zone to furnish a certification that the proposed activity will comply with the state's coastal zone management program. Generally, no permit will be issued until the state has concurred with the non-federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the state's coastal zone management program. (See 15 CFR Part 930.)

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1432), authorizes the Secretary of Commerce, after consultation with other interested federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters, of the Great Lakes and their connecting waters, or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such

an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

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

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

(f) The Federal Power Act of 1920 (16 U.S.C. 791a *et seq.*), as amended, authorizes the Federal Energy Regulatory Agency (FERC) to issue licenses for the construction and the operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydro-power project. However, where such structures will affect the navigable capacity of any navigable water of the United States (as

defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a DA recommendation to FERC for the inclusion of appropriate provisions in the FERC license rather than the issuance of a separate DA permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction and the operation and maintenance of physical structures licensed by FERC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *et seq.* remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of disposal in ocean waters, section 404 or section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for such listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 *et seq.*), which amends the Act of June 27, 1960. By this Act, whenever a federal construction project or federally licensed project, activity, or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project.

(h) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires DA authorization, the property report is required by Housing and Urban Development regulation to state whether

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

(i) The Endangered Species Act (16 U.S.C. 1531 *et seq.*) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act requires that federal agencies, in consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, use their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized, funded, or carried out by the Agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical. (See 50 CFR Part 17 and 50 CFR Part 402.)

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for section 10, section 404 and section 103 permits which may also be required pursuant to the authorities listed in section 320.2 and the policies specified in section 320.4 of this Part.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a

permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act.

(l) Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 *et seq.*) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.

(m) The Ocean Thermal Energy Conversion Act of 1980, (42 U.S.C. section 9101 *et seq.*) establishes a licensing regime administered by the Administrator of NOAA for the ownership, construction, location, and operation of ocean thermal energy conversion (OTEC) facilities and plantships. An application for an OTEC license filed with the Administrator constitutes an application for all federal authorizations required for ownership, construction, location, and operation of an OTEC facility or plantship, except for certain activities within the jurisdiction of the Coast Guard. This includes applications for section 10, section 404, section 103 and other DA authorizations which may be required.

(n) Section 402 of the Clean Water Act authorizes EPA to issue permits under procedures established to implement the National Pollutant Discharge Elimination System (NPDES) program. The administration of this program can be, and in most cases has been, delegated to individual states. Section 402(b)(6) states that no NPDES permit will be issued if the Chief of Engineers, acting for the Secretary of the Army and after consulting with the U.S. Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

(o) The National Fishing Enhancement Act of 1984 (Pub. L. 98-623) provides for the development of a National Artificial Reef Plan to promote and facilitate responsible and effective efforts to establish artificial reefs. The Act establishes procedures to be followed by the Corps in issuing DA permits for artificial reefs. The Act also establishes the liability of the permittee and the United States. The Act further creates a

civil penalty for violation of any provision of a permit issued for an artificial reef.

§ 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for DA permits. Additional policies specifically applicable to certain types of activities are identified in 33 CFR Parts 321-324.

(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

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

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

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

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

(3) The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise.

(b) *Effect on wetlands.* (1) Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. For projects to be undertaken or partially or entirely funded by a federal, state, or local agency, additional requirements on wetlands considerations are stated in Executive Order 11990, dated 24 May 1977.

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

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

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

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

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

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

(vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;

(vii) Wetlands which serve significant water purification functions; and

(viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

(3) Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area. In addition, the district engineer may undertake, where appropriate, reviews of particular wetland areas in consultation with the Regional Director of the U. S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate state agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) of this section or because of provisions of paragraph (b)(3), of this section unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR Part 230.10(a) (1), (2), (3)).

(5) In addition to the policies expressed in this subpart, the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90-454, and state regulatory laws or programs for classification and protection of wetlands will be considered.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this section) district engineers will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. The Army will give full consideration to the

views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits.

(d) *Water quality.* Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

(e) *Historic, cultural, scenic, and recreational values.* Applications for DA permits may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties and National Landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar federal controls or policies. Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

(f) *Effects on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. Generally, the coast line or base line is the line of ordinary low water on

the mainland; however, there are exceptions where there are islands or lowtide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and *United States v. California*, 381 U.S.C. 139 (1965), 382 U.S. 448 (1966)). Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, DC 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the administrative record of the application. After completion of standard processing procedures, the record will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Consideration of property ownership.* Authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) An inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.

(2) Because a landowner has the general right to protect property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appears contrary to the public interest, the district engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources.

(3) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which

create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(4) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized federal project, the applicant should be apprised in writing of the fact and of the possibility that a federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the Rivers and Harbors Act of 1899 or by section 404 of the Clean Water Act which may be caused by, or result from, future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes, and no claims or right to compensation will accrue from any such damage.

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

(6) A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application. The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision.

(h) *Activities affecting coastal zones.* Applications for DA permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives

of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency and Indian tribe applicants for DA permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved state coastal zone management programs.

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

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a DA permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the DA permit will normally not be delayed pending action by another Federal, state or local agency (See 33 CFR 325.2 (d)(4)). However, where the required Federal, state and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application, the district engineer will, after considering the likelihood of subsequent approval of the other authorization and/or certification and the time and effort remaining to complete processing the Army permit application, either immediately deny the Army permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, he will conclude by either denying the permit as contrary to the public interest, or denying it without prejudice indicating that except for the other Federal, state or local denial the Army permit could, under appropriate conditions, be issued. Denial without prejudice means that there is no prejudice to the right of the applicant to reinstate processing of the Army permit

application if subsequent approval is received from the appropriate Federal, state and/or local agency on a previously denied authorization and/or certification. Even if official certification and/or authorization is not required by state or federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

(3) A proposed activity may result in conflicting comments from several agencies within the same state. Where a state has not designated a single responsible coordinating agency, district engineers will ask the Governor to express his views or to designate one state agency to represent the official state position in the particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324, and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another federal agency's determination to proceed is

entitled to substantial consideration in the Corps' public interest review.

(5) Where general permits to avoid duplication are not practical, district engineers shall develop joint procedures with those local, state, and other Federal agencies having ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for DA permits may be processed jointly with the state or other federal applications to an independent conclusion and decision by the district engineer and the appropriate Federal or state agency. (See 33 CFR 325.2(e).)

(6) The district engineer shall develop operating procedures for establishing official communications with Indian Tribes within the district. The procedures shall provide for appointment of a tribal representative who will receive all pertinent public notices, and respond to such notices with the official tribal position on the proposed activity. This procedure shall apply only to those tribes which accept this option. Any adopted operating procedures shall be distributed by public notice to inform the tribes of this option.

(k) *Safety of impoundment structures.* To insure that all impoundment structures are designed for safety, non-Federal applicants may be required to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons and, in appropriate cases, that the design has been independently reviewed (and modified as the review would indicate) by similarly qualified persons.

(l) *Floodplain management.* (1) Floodplains possess significant natural values and carry out numerous functions important to the public interest. These include:

(i) Water resources values (natural moderation of floods, water quality maintenance, and groundwater recharge);

(ii) Living resource values (fish, wildlife, and plant resources);

(iii) Cultural resource values (open space, natural beauty, scientific study, outdoor education, and recreation); and

(iv) Cultivated resource values (agriculture, aquaculture, and forestry).

(2) Although a particular alteration to a floodplain may constitute a minor change, the cumulative impact of such changes may result in a significant degradation of floodplain values and functions and in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order 11988,

as part of their public interest review, should avoid to the extent practicable, long and short term significant adverse impacts associated with the occupancy and modification of floodplains, as well as the direct and indirect support of floodplain development whenever there is a practicable alternative. For those activities which in the public interest must occur in or impact upon floodplains, the district engineer shall ensure, to the maximum extent practicable, that the impacts of potential flooding on human health, safety, and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains are restored and preserved.

(3) In accordance with Executive Order 11988, the district engineer should avoid authorizing floodplain developments whenever practicable alternatives exist outside the floodplain. If there are no such practicable alternatives, the district engineer shall consider, as a means of mitigation, alternatives within the floodplain which will lessen any significant adverse impact to the floodplain.

(m) *Water supply and conservation.* Water is an essential resource, basic to human survival, economic growth, and the natural environment. Water conservation requires the efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. Actions affecting water quantities are subject to Congressional policy as stated in section 101(g) of the Clean Water Act which provides that the authority of states to allocate water quantities shall not be superseded, abrogated, or otherwise impaired.

(n) *Energy conservation and development.* Energy conservation and development are major national objectives. District engineers will give high priority to the processing of permit actions involving energy projects.

(o) *Navigation.* (1) Section 11 of the Rivers and Harbors Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on 27 May 1970 (33 CFR 209.150) which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications

would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to 27 May 1970 do not require specific authorization.

(2) The policy of considering harbor lines as guidance for assessing impacts on navigation continues.

(3) Protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government.

(4) District engineers should protect navigational and anchorage interests in connection with the NPDES program by recommending to EPA or to the state, if the program has been delegated, that a permit be denied unless appropriate conditions can be included to avoid any substantial impairment of navigation and anchorage.

(p) *Environmental benefits.* Some activities that require Department of the Army permits result in beneficial effects to the quality of the environment. The district engineer will weigh these benefits as well as environmental detriments along with other factors of the public interest.

(q) *Economics.* When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values. Many projects also contribute to the National Economic Development (NED), (i.e., the increase in the net value of the national output of goods and services).

(r) *Mitigation.*¹ (1) Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application

¹ This is a general statement of mitigation policy which applies to all Corps of Engineers regulatory authorities covered by these regulations (33 CFR Parts 329-330). It is not a substitute for the mitigation requirements necessary to ensure that a permit action under section 404 of the Clean Water Act complies with the section 404(b)(1) Guidelines. There is currently an interagency Working Group formed to develop guidance on implementing mitigation requirements of the Guidelines.

review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location. Mitigation requirements generally fall into three categories.

(i) Project modifications to minimize adverse project impacts should be discussed with the applicant at pre-application meetings and during application processing. As a result of these discussions and as the district engineer's evaluation proceeds, the district engineer may require minor project modifications. Minor project modifications are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need. Such modifications can include reductions in scope and size; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed. For example, erosion control features could be required on a fill project to reduce sedimentation impacts or a pier could be reoriented to minimize navigational problems even though those projects may satisfy all legal requirements (paragraph (r)(1)(ii) of this section) and the public interest review test (paragraph (r)(1)(iii) of this section) without such modifications.

(ii) Further mitigation measures may be required to satisfy legal requirements. For Section 404 applications, mitigation shall be required to ensure that the project complies with the 404(b)(1) Guidelines. Some mitigation measures are enumerated at 40 CFR 230.70 through 40 CFR 230.77 (Subpart H of the 404(b)(1) Guidelines).

(iii) Mitigation measures in addition to those under paragraphs (r)(1) (i) and (ii) of this section may be required as a result of the public interest review process. (See 33 CFR 325.4(a).) Mitigation should be developed and incorporated within the public interest review process to the extent that the mitigation is found by the district engineer to be reasonable and justified. Only those measures required to ensure that the project is not contrary to the public interest may be required under this subparagraph.

(2) All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the

human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. District engineers will require all forms of mitigation, including compensatory mitigation, only as provided in paragraphs (r)(1) (i) through (iii) of this section. Additional mitigation may be added at the applicants' request.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.

321.1 General.

321.2 Definitions.

321.3 Special policies and procedures.

Authority: 33 U.S.C. 401.

§ 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require DA permits under section 404 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for DA permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of section 404.

§ 321.2 Definitions.

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

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dike or dam" means, for the purposes of section 9, any impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce. The term does not include a weir. Weirs are regulated pursuant to section 10 of the Rivers and Harbors Act of 1899. (See 33 CFR Part 322.)

§ 321.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of permit applications under this regulation:

(a) The Assistant Secretary of the Army (Civil Works) will decide whether DA authorization for a dam or dike in an interstate navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the district engineer when forwarding the report to the Assistant Secretary of the Army (Civil Works), through the Chief of Engineers.

(b) District engineers are authorized to decide whether DA authorization for a dam or dike in an intrastate navigable water of the United States will be issued (see 33 CFR 325.8).

(c) Processing a DA application under section 9 will not be completed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate state legislature has been obtained if the navigable water of the United States is an intrastate waterbody (i.e., the navigable portion of the navigable water of the United States is solely within the boundaries of one state). The district engineer, upon receipt of such an application, will notify the applicant that the consent of Congress or the state legislature must be obtained before a permit can be issued.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.

- 322.1 General.
322.2 Definitions.
322.3 Activities requiring permits.
322.4 Activities not requiring permits.
322.5 Special policies.

Authority: 33 U.S.C. 403.

§ 322.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) (hereinafter referred to as section 10). See 33 CFR 320.2(b). Certain structures

or work in or affecting navigable waters of the United States are also regulated under other authorities of the DA. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A DA permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 322.2 Definitions.

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

(a) The term "navigable waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 329. Generally, they are those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.

(b) The term "structure" shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.2(e).

(e) The term "individual permit" means a DA authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR Part 325, and a

determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320.

(f) The term "general permit" means a DA authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

(g) The term "artificial reef" means a structure which is constructed or placed in the navigable waters of the United States or in the waters overlying the outer continental shelf for the purpose of enhancing fishery resources and commercial and recreational fishing opportunities. The term does not include activities or structures such as wing deflectors, bank stabilization, grade stabilization structures, or low flow key ways, all of which may be useful to enhance fisheries resources.

§ 322.3 Activities requiring permits.

(a) *General.* DA permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States except as otherwise provided in § 322.4 below. Certain activities specified in 33 CFR Part 330 are permitted by that regulation ("nationwide general permits"). Other activities may be authorized by district or division engineers on a regional basis ("regional general permits"). If an activity is not exempted by section 322.4 of this part or authorized by a general permit, an individual section 10 permit will be required for the proposed activity. Structures or work are in navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) of this section, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity. For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

(b) *Outer continental shelf.* DA permits are required for the construction

of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf, pursuant to section 4(f) of the Outer Continental Shelf Lands Act as amended. (See 33 CFR 320.2(b).)

(c) *Activities of Federal agencies.* (1) Except as specifically provided in this paragraph, activities of the type described in paragraphs (a) and (b) of this section, done by or on behalf of any Federal agency are subject to the authorization procedures of these regulations. Work or structures in or affecting navigable waters of the United States that are part of the civil works activities of the Corps of Engineers, unless covered by a nationwide or regional general permit issued pursuant to these regulations, are subject to the procedures of separate regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and district engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(2) Congress has delegated to the Secretary of the Army in section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States, upon recommendation of the Chief of Engineers. The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of section 10. If an agency asserts that it has Congressional authorization meeting the test of section 10 or would otherwise be exempt from the provisions of section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(3) The policy provisions set out in 33 CFR 320.4(j) relating to state or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy, e.g., section 313 and section 401 of the Clean Water Act.

§ 322.4 Activities not requiring permits.

(a) Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR 320.4(o)) do not require section 10 permits; however, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972, a section 404 permit is required. (See 33 CFR Part 323.)

(b) Pursuant to section 154 of the Water Resource Development Act of 1976 (Pub. L. 94-587), Department of the Army permits are not required under section 10 to construct wharves and piers in any waterbody, located entirely within one state, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce.

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 10 permits. The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* DA permits are required for structures or work in or affecting navigable waters of the United States. However, certain structures or work specified in 33 CFR Part 330 are permitted by that regulation. If a structure or work is not permitted by that regulation, an individual or regional section 10 permit will be required.

(b) *Artificial Reefs.* (1) When considering an application for an artificial reef, as defined in 33 CFR 322.2(g), the district engineer will review the applicant's provisions for siting, constructing, monitoring, operating, maintaining, and managing the proposed artificial reef and shall determine if those provisions are consistent with the following standards:

- (i) The enhancement of fishery resources to the maximum extent practicable;
- (ii) The facilitation of access and utilization by United States recreational and commercial fishermen;
- (iii) The minimization of conflicts among competing uses of the navigable waters or waters overlying the outer continental shelf and of the resources in such waters;
- (iv) The minimization of environmental risks and risks to personal health and property;

(v) Generally accepted principles of international law; and
(vi) The prevention of any unreasonable obstructions to navigation. If the district engineer decides that the

applicant's provisions are not consistent with these standards, he shall deny the permit. If the district engineer decides that the provisions are consistent with these standards, and if he decides to issue the permit after the public interest review, he shall make the provisions part of the permit.

(2) In addition, the district engineer will consider the National Artificial Reef Plan developed pursuant to section 204 of the National Fishing Enhancement Act of 1984, and if he decides to issue the permit, will notify the Secretary of Commerce of any need to deviate from that plan.

(3) The district engineer will comply with all coordination provisions required by a written agreement between the DOD and the Federal agencies relative to artificial reefs. In addition, if the district engineer decides that further consultation beyond the normal public commenting process is required to evaluate fully the proposed artificial reef, he may initiate such consultation with any Federal agency, state or local government, or other interested party.

(4) The district engineer will issue a permit for the proposed artificial reef only if the applicant demonstrates, to the district engineer's satisfaction, that the title to the artificial reef construction material is unambiguous, that responsibility for maintenance of the reef is clearly established, and that he has the financial ability to assume liability for all damages that may arise with respect to the proposed artificial reef. A demonstration of financial responsibility might include evidence of insurance, sponsorship, or available assets.

(i) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall not be liable for damages caused by activities required to be undertaken under any terms and conditions of the permit, if the permittee is in compliance with such terms and conditions.

(ii) A person to whom a permit is issued in accordance with these regulations and any insurer of that person shall be liable, to the extent determined under applicable law, for damages to which paragraph (i) does not apply.

(iii) Any person who has transferred title to artificial reef construction materials to a person to whom a permit is issued in accordance with these regulations shall not be liable for damages arising from the use of such materials in an artificial reef, if such materials meet applicable requirements

of the plan published under section 204 of the National Artificial Reef Plan, and are not otherwise defective at the time title is transferred.

(c) *Non-Federal dredging for navigation.* (1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging access channels to docks and berthing facilities or deepening such channels to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, state, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with these regulations. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will be accorded to the fullest extent possible to both Federal and non-Federal operations. Permits for non-Federal dredging operations will normally contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation may also authorize the periodic maintenance dredging of the project. Authorization procedures and limitations for maintenance dredging shall be as prescribed in 33 CFR 325.6(e). The permit will require the permittee to give advance notice to the district engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* (1) In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District engineers will inform applicants of the hazards involved and encourage safety in location, design, and operation. District engineers will encourage cooperative or group use facilities in lieu of individual proprietary use facilities.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a resource manager are normally subject to permit authorities cited in § 322.3, of this section, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake resource manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the Rivers and Harbors Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of its control of marking, lighting and standardization of such navigation aids. A Section 10 nationwide permit has been issued for such aids provided they are approved by, and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR 330.5(a)(1)). Electrical service cables to such aids are not included in the nationwide permit (an individual or regional Section 10 permit will be required).

(f) *Outer continental shelf.* Artificial islands, installations, and other devices located on the seabed, to the seaward

limit of the outer continental shelf, are subject to the standard permit procedures of this regulation. Where the islands, installations and other devices are to be constructed on lands which are under mineral lease from the Mineral Management Service, Department of the Interior, that agency, in cooperation with other federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, of this Part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of these regulations. For all other canals, the exercise of regulatory authority is restricted to those activities which affect the course, location, condition, or capacity of the navigable waters of the United States. The district engineer will consider, for applications for canal work, a proposed plan of the entire development and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal.

(h) *Facilities at the borders of the United States.* (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural

gas to or from a foreign country, must be made to the Secretary of Energy. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), as amended by Executive Order 12038, February 3, 1978, and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766).

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways, and similar facilities for the transportation of persons and/or things, to or from a foreign country. (Executive Order 11423, August 16, 1968).

(5) A DA permit under section 10 of the Rivers and Harbors Act of 1899 is also required for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has been issued as provided above, the district engineer, in evaluating the general public interest, may consider the basic existence and operation of the facility to have been primarily examined and permitted as provided by the Executive Orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate DA authorizations under section 404 of the Clean Water Act or under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, are also required. (See 33 CFR Parts 323 and 324.)

(i) *Power transmission lines.* (1) Permits under section 10 of the Rivers and Harbors Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Department of Energy under the Federal Power Act of 1920. If an application is received for a permit for lines which are part of such a water power project, the applicant will be instructed to submit the application to the Department of Energy. If the lines

are not part of such a water power project, the application will be processed in accordance with the procedures of these regulations.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outlined in the National Electrical Safety Code.

Nominal system voltage, KV	Minimum additional clearance (feet) above clearance required for bridges
115 and below.....	20
138.....	22
161.....	24
230.....	26
350.....	30
500.....	35
700.....	42
750-765.....	45

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(4) Corps of Engineer regulation ER 1110-2-4401 prescribes minimum vertical clearances for power and communication lines over Corps lake projects. In instances where both this regulation and ER 1110-2-4401 apply, the greater minimum clearance is required.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require DA permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, district engineer, and other interested parties as to the effects of the proposal on the use of airspace. The district engineer will, therefore, refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due

consideration to its recommendations when evaluating the general public interest.

(3) If the seaplane base would serve air carriers licensed by the Department of Transportation, the applicant must receive an airport operating certificate from the FAA. That certificate reflects a determination and conditions relating to the installation, operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the district engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(4) For regulations pertaining to seaplane landings at Corps of Engineers projects, see 36 CFR 327.4.

(k) *Foreign trade zones.* The Foreign Trade Zones Act (48 Stat. 998-1003, 19 U.S.C. 81a to 81u, as amended) authorizes the establishment of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published at Title 15 of the Code of Federal Regulations, Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the district engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of these regulations. Evaluation by a district engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

(l) *Shipping safety fairways and anchorage areas.* DA permits are required for structures located within shipping safety fairways and anchorage areas established by the U.S. Coast Guard.

(1) The Department of the Army will grant no permits for the erection of structures in areas designated as fairways, except that district engineers may permit temporary anchors and attendant cables or chains for floating or semisubmersible drilling rigs to be placed within a fairway provided the following conditions are met:

(i) The installation of anchors to stabilize semisubmersible drilling rigs within fairways must be temporary and shall be allowed to remain only 120 days. This period may be extended by the district engineer provided reasonable cause for such extension can

be shown and the extension is otherwise justified.

(ii) Drilling rigs must be at least 500 feet from any fairway boundary or whatever distance necessary to insure that minimum clearance over an anchor line within a fairway will be 125 feet.

(iii) No anchor buoys or floats or related rigging will be allowed on the surface of the water or to a depth of 125 feet from the surface, within the fairway.

(iv) Drilling rigs may not be placed closer than 2 nautical miles of any other drilling rig situated along a fairway boundary, and not closer than 3 nautical miles to any drilling rig located on the opposite side of the fairway.

(v) The permittee must notify the district engineer, Bureau of Land Management, Mineral Management Service, U.S. Coast Guard, National Oceanic and Atmospheric Administration and the U.S. Navy Hydrographic Office of the approximate dates (commencement and completion) the anchors will be in place to insure maximum notification to mariners.

(vi) Navigation aids or danger markings must be installed as required by the U.S. Coast Guard.

(2) District engineers may grant permits for the erection of structures within an area designated as an anchorage area, but the number of structures will be limited by spacing, as follows: The center of a structure to be erected shall be not less than two (2) nautical miles from the center of any existing structure. In a drilling or production complex, associated structures shall be as close together as practicable having due consideration for the safety factors involved. A complex of associated structures, when connected by walkways, shall be considered one structure for the purpose of spacing. A vessel fixed in place by moorings and used in conjunction with the associated structures of a drilling or production complex, shall be considered an attendant vessel and its extent shall include its moorings. When a drilling or production complex includes an attendant vessel and the complex extends more than five hundred (500) yards from the center or the complex, a structure to be erected shall be not closer than two (2) nautical miles from the near outer limit of the complex. An underwater completion installation in an anchorage area shall be considered a structure and shall be marked with a lighted buoy as approved by the United States Coast Guard.

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

Sec.

- 323.1 General.
- 323.2 Definitions.
- 323.3 Discharges requiring permits.
- 323.4 Discharges not requiring permits.
- 323.5 Program transfer to states.
- 323.6 Special policies and procedures.

Authority: 33 U.S.C. 1344.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for DA permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) (hereinafter referred to as section 404). (See 33 CFR 320.2(g).) Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A DA permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

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

- (a) The term "waters of the United States" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 328.
- (b) The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or

restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

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

(d) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). The term does not include *de minimis*, incidental soil movement occurring during normal dredging operations.

(e) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.

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

intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms).

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

(h) The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

§ 323.3 Discharges requiring permits.

(a) *General.* Except as provided in § 323.4 of this Part, DA permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"). If a discharge of dredged or fill material is not exempted by § 323.4 of this Part or permitted by 33 CFR Part 330, an individual or regional section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

(b) *Activities of Federal agencies.* Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR Part 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest

extent in expediting the processing of their applications.

§ 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii) (A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(1) Minor Drainage means:

(i) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops,

involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(ii) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(iii) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs (a)(1)(iii)(C)(1) (i) and (ii) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.)

(iv) The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(2) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition,

minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of

fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a state has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR Part 233.22(i), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the

encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1)-(6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)-(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a

permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(d) Federal projects which qualify under the criteria contained in section 404(r) of the CWA are exempt from section 404 permit requirements, but may be subject to other state or Federal requirements.

§ 323.5 Program transfer to states.

Section 404(h) of the CWA allows the Administrator of the Environmental Protection Agency (EPA) to transfer administration of the section 404 permit program for discharges into certain waters of the United States to qualified states. (The program cannot be transferred for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line, including wetlands adjacent thereto). See 40 CFR Parts 233 and 124 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved and in effect, the Corps of Engineers will suspend processing of section 404 applications in the applicable waters and will transfer pending applications to the state agency responsible for administering the program. District engineers will assist EPA and the states in any way practicable to effect transfer and will develop appropriate procedures to ensure orderly and expeditious transfer.

§ 323.6 Special policies and procedures.

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 404 permits. The district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated

by the Administrator, EPA, under authority of section 404(b)(1) of the CWA. (see 40 CFR Part 230.) Subject to consideration of any economic impact on navigation and anchorage pursuant to section 404(b)(2), a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be contrary to the public interest.

(b) The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 CFR 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with section 404(c) of the Clean Water Act. However the Corps will continue to complete the administrative processing of the application while the section 404(c) procedures are underway including completion of final coordination with EPA under 33 CFR Part 325.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec.

- 324.1 General.
- 324.2 Definitions.
- 324.3 Activities requiring permits.
- 324.4 Special procedures.

Authority: 33 U.S.C. 1413.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the transportation of dredged material by vessel or other vehicle for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require DA permits under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) for the dredging in navigable waters of the United States. Applicants for DA permits under this Part should also refer

to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

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

(a) The term "ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(b) The term "dredged material" means any material excavated or dredged from navigable waters of the United States.

(c) The term "transport" or "transportation" refers to the conveyance and related handling of dredged material by a vessel or other vehicle.

§ 324.3 Activities requiring permits.

(a) *General.* DA permits are required for the transportation of dredged material for the purpose of dumping it in ocean waters.

(b) *Activities of Federal agencies.* (1) The transportation of dredged material for the purpose of disposal in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers is subject to the procedures of this regulation.

Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under these regulations. Division and district engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the transportation of dredged material for disposal in ocean waters are regulated by 33 CFR 209.145.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to state or local authorizations do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are responsible for conformance with such laws and policies. (See EO 12088, October 18, 1978.) Federal agencies are not required to obtain and provide certification of compliance with effluent limitations and water quality standards from state or interstate water pollution control agencies in connection with activities involving the transport of dredged material for dumping into ocean waters beyond the territorial sea.

§ 324.4 Special procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 103 permits. The following additional procedures shall also be applicable under this regulation.

(a) *Public notice.* For all applications for section 103 permits, the district engineer will issue a public notice which shall contain the information specified in 33 CFR 325.3.

(b) *Evaluation.* Applications for permits for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated to determine whether the proposed dumping will unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems or economic potentialities. District engineers will apply the criteria established by the Administrator of EPA pursuant to section 102 of the Marine Protection, Research and Sanctuaries Act of 1972 in making this evaluation. (See 40 CFR Parts 220-229) Where ocean dumping is determined to be necessary, the district engineer will, to the extent feasible, specify disposal sites using the recommendations of the Administrator pursuant to section 102(c) of the Act.

(c) *EPA review.* When the Regional Administrator, EPA, in accordance with 40 CFR 225.2(b), advises the district engineer, in writing, that the proposed dumping will comply with the criteria, the district engineer will complete his evaluation of the application under this part and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the district engineer, in writing, that the proposed dumping does not comply with the criteria, the district engineer will proceed as follows:

(1) The district engineer will determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer will evaluate them in accordance with 33 CFR Parts 320, 322, 323, and 325 and this Part, as appropriate.

(2) If the district engineer determines that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be not contrary to the public interest, he will so advise the Regional Administrator setting forth his reasons for such determination. If the Regional Administrator has not removed his objection within 15 days, the district engineer will submit a report of his determination to the Chief of Engineers

for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain the analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(d) *Chief of Engineers review.* The Chief of Engineers shall evaluate the permit application and make a decision to deny the permit or recommend its issuance. If the decision of the Chief of Engineers is that ocean dumping at the proposed disposal site is required because of the unavailability of economically feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with 40 CFR 225.4.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.	
325.1	Applications for permits.
325.2	Processing of applications.
325.3	Public notice.
325.4	Conditioning of permits.
325.5	Forms of permits.
325.6	Duration of permits.
325.7	Modification, suspension, or revocation of permits.
325.8	Authority to issue or deny permits.
325.9	Authority to determine jurisdiction.
325.10	Publicity.

Appendix A—Permit Form and Special Conditions

Appendix B—Reserved (For Future NEPA Regulation)

Appendix C—Reserved (For Historic Properties Regulation)

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

§ 325.1 Applications for permits.

(a) *General.* The processing procedures of this Part apply to any Department of the Army (DA) permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324, 327 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for DA permits.

(b) *Pre-application consultation for major applications.* The district staff element having responsibility for administering, processing, and enforcing federal laws and regulations relating to the Corps of Engineers regulatory program shall be available to advise potential applicants of studies or other information foreseeably required for later federal action. The district engineer will establish local procedures and policies including appropriate publicity programs which will allow

potential applicants to contact the district engineer or the regulatory staff element to request pre-application consultation. Upon receipt of such request, the district engineer will assure the conduct of an orderly process which may involve other staff elements and affected agencies (Federal, state, or local) and the public. This early process should be brief but thorough so that the potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application. The district engineer will endeavor, at this stage, to provide the potential applicant with all helpful information necessary in pursuing the application, including factors which the Corps must consider in its permit decision making process. Whenever the district engineer becomes aware of planning for work which may require a DA permit and which may involve the preparation of an environmental document, he shall contact the principals involved to advise them of the requirement for the permit(s) and the attendant public interest review including the development of an environmental document. Whenever a potential applicant indicates the intent to submit an application for work which may require the preparation of an environmental document, a single point of contact shall be designated within the district's regulatory staff to effectively coordinate the regulatory process, including the National Environmental Policy Act (NEPA) procedures and all attendant reviews, meetings, hearings, and other actions, including the scoping process if appropriate, leading to a decision by the district engineer. Effort devoted to this process should be commensurate with the likelihood of a permit application actually being submitted to the Corps. The regulatory staff coordinator shall maintain an open relationship with each potential applicant or his consultants so as to assure that the potential applicant is fully aware of the substance (both quantitative and qualitative) of the data required by the district engineer for use in preparing an environmental assessment or an environmental impact statement (EIS) in accordance with 33 CFR Part 230, Appendix B.

(c) *Application form.* Applicants for all individual DA permits must use the standard application form (ENG Form 4345, OMB Approval No. OMB 49-R0420). Local variations of the application form for purposes of facilitating coordination with federal, state and local agencies may be used. The appropriate form may be obtained from the district office having

jurisdiction over the waters in which the activity is proposed to be located. Certain activities have been authorized by general permits and do not require submission of an application form but may require a separate notification.

(d) *Content of application.* (1) The application must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice (detailed engineering plans and specifications are not required); the location, purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made. See § 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms but may request specific information on a case-by-case basis. (See § 325.1(e)).

(2) All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.

(3) If the activity would involve dredging in navigable waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(4) If the activity would include the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters the application must include the source of the material; the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. Certification under section 401 of the Clean Water Act is required for such discharges into waters of the United States.

(5) If the activity would include the construction of a filled area or pile or float-supported platform the project

description must include the use of, and specific structures to be erected on, the fill or platform.

(6) If the activity would involve the construction of an impoundment structure, the applicant may be required to demonstrate that the structure complies with established state dam safety criteria or that the structure has been designed by qualified persons and, in appropriate cases, independently reviewed (and modified as the review would indicate) by similarly qualified persons. No specific design criteria are to be prescribed nor is an independent detailed engineering review to be made by the district engineer.

(7) *Signature on application.* The application must be signed by the person who desires to undertake the proposed activity (i.e. the applicant) or by a duly authorized agent. When the applicant is represented by an agent, that information will be included in the space provided on the application or by a separate written statement. The signature of the applicant or the agent will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action. An application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area and each owner submits a statement designating the same agent.

(8) If the activity would involve the construction or placement of an artificial reef, as defined in 33 CFR 322.2(g), in the navigable waters of the United States or in the waters overlying the outer continental shelf, the application must include provisions for siting, constructing, monitoring, and managing the artificial reef.

(9) *Complete application.* An application will be determined to be complete when sufficient information is received to issue a public notice (See 33 CFR 325.1(d) and 325.3(a).) The issuance of a public notice will not be delayed to obtain information necessary to evaluate an application.

(e) *Additional information.* In addition to the information indicated in paragraph (d) of this section, the applicant will be required to furnish only such additional information as the district engineer deems essential to make a public interest determination including, where applicable, a determination of compliance with the section 404(b)(1) guidelines or ocean

dumping criteria. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(f) *Fees.* Fees are required for permits under section 404 of the Clean Water Act, section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and sections 9 and 10 of the Rivers and Harbors Act of 1899. A fee of \$100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A \$10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be not contrary to the public interest. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of federal, state or local governments will not be required to pay any fee in connection with permits.

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.

(2) Within 15 days of receipt of an application the district engineer will either determine that the application is complete (see 33 CFR 325.1(d)(9) and issue a public notice as described in § 325.3 of this Part, unless specifically exempted by other provisions of this

regulation or that it is incomplete and notify the applicant of the information necessary for a complete application. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see § 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process. The district engineer should not delay processing of the application unless the applicant requests a reasonable delay, normally not to exceed 30 days, to provide additional information or comments.

(4) The district engineer will follow Appendix B of 33 CFR Part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact

statement unless it is included within a categorical exclusion.

(5) The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR Part 327.

(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a statement of findings (SOF) or, where an EIS has been prepared, a record of decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j) (2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit. In accordance with the authorities specified in Section 325.8 of this Part, the district engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final EIS or environmental assessment, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in a format prescribed by the Chief of Engineers. District and division engineers will notify the applicant and interested federal and state agencies that the application has been forwarded to higher headquarters. The district or division engineer may, at his option, disclose his recommendation to the news media and other interested parties, with the caution that it is only a recommendation and not a final decision. Such disclosure is encouraged in permit cases which have become controversial and have been the subject of stories in the media or have generated

strong public interest. In those cases where the application is forwarded for decision in the format prescribed by the Chief of Engineers, the report will serve as the SOF or ROD. District engineers will generally combine the SOF, environmental assessment, and findings of no significant impact (FONSI), 404(b)(1) guideline analysis, and/or the criteria for dumping of dredged material in ocean waters into a single document.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward the permit to the applicant for signature accepting the conditions of the permit. The permit is not valid until signed by the issuing official. Letters of permission require only the signature of the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document.

(8) The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees. This list will be distributed to all persons who may have an interest in any of the public notices listed.

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

(i) If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, DC 20390 Attention, Code NS12, and to the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Defense Mapping Agency, Hydrographic Center and National Ocean Service as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(iii) If the activity involves the erection of an aerial transmission line, submerged cable, or submerged pipeline

across a navigable water of the United States, to the Charting and Geodetic Services N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852.

(iv) If the activity is listed in paragraphs (a)(9) (i), (ii), or (iii) of this section, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(b) *Procedures for particular types of permit situations.*—(1) *Section 401 Water Quality Certification.* If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(i) The public notice for such activity, which will contain a statement on certification requirements (see § 325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to section 401(a)(2). If EPA determines another state's waters may be affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR Part 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state, EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be

necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

(ii) No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date, and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

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

(i) If the applicant is a federal agency, and the application involves a federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of federal activities. The federal agency applicant shall be responsible for complying with the CZM Act's directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved CZM Programs. (See 15 CFR Part 930.) If the state coastal zone agency objects to the proposed federal activity on the basis of its inconsistency with the state's approved CZM Program,

the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the CZM Act for resolving such disagreements.

(ii) If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved state CZM Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

(iii) If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands, and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.

(3) *Historic Properties.* If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historic Preservation Act implementing regulations.

(4) *Activities Associated with Federal Projects.* If the proposed activity would consist of the dredging of an access channel and/or berthing facility associated with an authorized federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the federal project to the maximum extent feasible. Separate notice, hearing, and environmental documentation will not be required for activities so included and coordinated, and the public notice issued by the district engineer for these federal and associated non-federal activities will be the notice of intent to issue permits for those included non-federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the federal project unless special considerations applicable to the proposed activity are identified. (See § 322.5(c).)

(5) *Endangered Species.* Applications will be reviewed for the potential impact on threatened or endangered species pursuant to section 7 of the Endangered Species Act as amended. The district engineer will include a statement in the public notice of his current knowledge of endangered species based on his initial review of the application (see 33 CFR 325.2(a)(2)). If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds the proposed activity may affect an endangered or threatened species or their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity, pursuant to section 7(c) of the Act. References, definitions, and consultation procedures are found in 50 CFR Part 402.

(c) [Reserved]

(d) *Timing of processing of applications.* The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:

(1) The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with paragraph 325.1(d) of this Part.

(2) The comment period on the public notice should be for a reasonable period of time within which interested parties

may express their views concerning the permit. The comment period should not be more than 30 days nor less than 15 days from the date of the notice. Before designating comment periods less than 30 days, the district engineer will consider: (i) Whether the proposal is routine or noncontroversial, (ii) mail time and need for comments from remote areas, (iii) comments from similar proposals, and (iv) the need for a site visit. After considering the length of the original comment period, paragraphs (a)(2) (i) through (iv) of this section, and other pertinent factors, the district engineer may extend the comment period up to an additional 30 days if warranted.

(3) District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or procedures required by law (see below), (ii) the case must be referred to higher authority (see § 325.8 of this Part), (iii) the comment period is extended, (iv) a timely submittal of information or comments is not received from the applicant, (v) the processing is suspended at the request of the applicant, or (vi) information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete application. Certain laws (e.g., the Clean Water Act, the CZM Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other federal agency certifications, public hearings, environmental impact statements, consultation, special studies, and testing which may prevent district engineers from being able to decide certain applications within 60 days.

(4) Once the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision on the

DA permit application. Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the DA permit. In unusual cases the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the DA permit while deferring his final decision.

(5) The applicant will be given a reasonable time, not to exceed 30 days, to respond to requests of the district engineer. The district engineer may make such requests by certified letter and clearly inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate. If additional time is requested, the district engineer will either grant the time, make a final decision, or consider the application as withdrawn.

(6) The time requirements in these regulations are in terms of calendar days rather than in terms of working days.

(e) *Alternative procedures.* Division and district engineers are authorized to use alternative procedures as follows:

(1) *Letters of permission.* Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice. The letter of permission will not be used to authorize the transportation of dredged material for the purpose of dumping it in ocean waters. Letters of permission may be used:

(i) In those cases subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

(ii) In those cases subject to section 404 of the Clean Water Act after:

(A) The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional

Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures;

(B) The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and

(C) A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.

(2) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is contrary to the public interest provided the procedures of § 325.7 of this Part are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.

(3) *Joint procedures.* Division and district engineers are authorized and encouraged to develop joint procedures with states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the procedures in paragraphs (a)(1) through (a)(5) of this section provided that the substantive requirements of those sections are maintained. Division and district engineers are also encouraged to develop management techniques such as joint agency review meetings to expedite the decision-making process. However, in doing so, the applicant's rights to a full public interest review and independent decision by the district or division engineer must be strictly observed.

(4) *Emergency procedures.* Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.

§ 325.3 Public notice.

(a) *General.* The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include the following items of information:

(1) Applicable statutory authority or authorities;

(2) The name and address of the applicant;

(3) The name or title, address and telephone number of the Corps employee from whom additional information concerning the application may be obtained;

(4) The location of the proposed activity;

(5) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills or pile or float-supported platforms, and a description of the type, composition, and quantity of materials to be discharged or disposed of in the ocean;

(6) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship

of the proposed structures to the size of the impacted waterway and depth of water in the area;

(7) If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;

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

(9) If appropriate, a statement that the activity is a categorical exclusion for purposes of NEPA (see paragraph 7 of Appendix B to 33 CFR Part 230);

(10) A statement of the district engineer's current knowledge on historic properties;

(11) A statement of the district engineer's current knowledge on endangered species (see § 325.2(b)(5));

(12) A statement(s) on evaluation factors (see § 325.3(c));

(13) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest;

(14) The comment period based on § 325.2(d)(2);

(15) A statement that any person may request, in writing, within the comment period specified in the notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing;

(16) For non-federal applications in states with an approved CZM Plan, a statement on compliance with the approved Plan; and

(17) In addition, for section 103 (ocean dumping) activities:

(i) The specific location of the proposed disposal site and its physical boundaries;

(ii) A statement as to whether the proposed disposal site has been designated for use by the Administrator, EPA, pursuant to section 102(c) of the Act;

(iii) If the proposed disposal site has not been designated by the Administrator, EPA, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;

(iv) A brief description of known dredged material discharges at the proposed disposal site;

(v) Existence and documented effects of other authorized disposals that have been made in the disposal area (e.g.,

heavy metal background reading and organic carbon content);

(vi) An estimate of the length of time during which disposal would continue at the proposed site; and

(vii) Information on the characteristics and composition of the dredged material.

(b) *Public notice for general permits.* District engineers will publish a public notice for all proposed regional general permits and for significant modifications to, or reissuance of, existing regional permits within their area of jurisdiction. Public notices for statewide regional permits may be issued jointly by the affected Corps districts. The notice will include all applicable information necessary to provide a clear understanding of the proposal. In addition, the notice will state the availability of information at the district office which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance of general permits. District engineers will publish a public notice for nationwide permits in accordance with 33 CFR 330.4.

(c) *Evaluation factors.* A paragraph describing the various evaluation factors on which decisions are based shall be included in every public notice.

(1) Except as provided in paragraph (c)(3) of this section, the following will be included:

"The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."

(2) If the activity would involve the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters, the public notice shall also indicate that the evaluation of the impact of the activity on the public interest will include application of the guidelines promulgated by the Administrator, EPA, (40 CFR Part 230) or of the criteria

established under authority of section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 229), as appropriate. (See 33 CFR Parts 323 and 324).

(3) In cases involving construction of artificial islands, installations and other devices on outer continental shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(d) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian Tribes or tribal representatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and areawide clearing houses as prescribed by OMB Circular A-95, to local news media and to any other interested party. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, U.S. Coast Guard.

(2) In addition to the general distribution of public notices cited above, notices will be sent to other addressees in appropriate cases as follows:

(i) If the activity would involve structures or dredging along the shores of the seas or Great Lakes, to the Coastal Engineering Research Center, Washington, DC 20016.

(ii) If the activity would involve construction of fixed structures or artificial islands on the outer continental shelf or in the territorial seas, to the

Assistant Secretary of Defense (Manpower, Installations, and Logistics (ASD(MI&L))), Washington, DC 20310; the Director, Defense Mapping Agency (Hydrographic Center) Washington, DC 20390, Attention, Code NS12; and the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852, and to affected military installations and activities.

(iii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.

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

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

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project. A copy of the public notice with the list of the addresses to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the district engineer may request its comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constituent or himself, the district engineer will inform the member of Congress of the final decision.

(4) District engineers will update public notice mailing lists at least once every two years.

§ 325.4. Conditioning of permits.

(a) District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

(1) Legal requirements which may be satisfied by means of Corps permit conditions include compliance with the 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state section 401 water quality certifications.

(2) Where appropriate, the district engineer may take into account the existence of controls imposed under other federal, state, or local programs which would achieve the objective of the desired condition, or the existence of an enforceable agreement between the applicant and another party concerned with the resource in question, in determining whether a proposal complies with the 404(b)(1) guidelines, ocean dumping criteria, and other applicable statutes, and is not contrary to the public interest. In such cases, the Department of the Army permit will be conditioned to state that material changes in, or a failure to implement and enforce such program or agreement, will be grounds for modifying, suspending, or revoking the permit.

(3) Such conditions may be accomplished on-site, or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment.

(b) District engineers are authorized to add special conditions, exclusive of paragraph (a) of this section, at the applicant's request or to clarify the permit application.

(c) If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.

(d) *Bonds.* If the district engineer has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

§ 325.5 Forms of permits.

(a) *General discussion.* (1) DA permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, DA Permit (Appendix A).

(2) The general conditions included in ENG Form 1721 are normally applicable to all permits; however, some conditions may not apply to certain permits and may be deleted by the issuing officer. Special conditions applicable to the

specific activity will be included in the permit as necessary to protect the public interest in accordance with Section 325.4 of this Part.

(b) *Individual permits—(1) Standard permits.* A standard permit is one which has been processed through the public interest review procedures, including public notice and receipt of comments, described throughout this Part. The standard individual permit shall be issued using ENG Form 1721.

(2) *Letters of permission.* A letter of permission will be issued where procedures of paragraph 325.2(e)(1) have been followed. It will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority, any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the relevant general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits—(1) Regional permits.* Regional permits are a type of general permit. They may be issued by a division or district engineer after compliance with the other procedures of this regulation. If the public interest so requires, the issuing authority may condition the regional permit to require a case-by-case reporting and acknowledgment system. However, no separate applications or other authorization documents will be required.

(2) *Nationwide permits.* Nationwide permits are a type of general permit and represent DA authorizations that have been issued by the regulation (33 CFR Part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit.

(3) *Programmatic permits.* Programmatic permits are a type of general permit founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program.

(d) *Section 9 permits.* Permits for structures in interstate navigable waters of the United States under section 9 of the Rivers and Harbors Act of 1899 will be drafted at DA level.

§ 325.6 Duration of permits.

(a) *General.* DA permits may authorize both the work and the resulting use. Permits continue in effect until they automatically expire or are modified, suspended, or revoked.

(b) *Structures.* Permits for the existence of a structure or other activity of a permanent nature are usually for an

indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the permit will be of limited duration with a definite expiration date.

(c) *Works.* Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with a permit of indefinite duration under paragraph (b) of this section will specify time limits for completing the work or activity. The permit may also specify a date by which the work must be started, normally within one year from the date of issuance. The date will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. Permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters will specify a completion date for the disposal not to exceed three years from the date of permit issuance.

(d) *Extensions of time.* An authorization or construction period will automatically expire if the permittee fails to request and receive an extension of time. Extensions of time may be granted by the district engineer. The permittee must request the extension and explain the basis of the request, which will be granted unless the district engineer determines that an extension would be contrary to the public interest. Requests for extensions will be processed in accordance with the regular procedures of § 325.2 of this Part, including issuance of a public notice, except that such processing is not required where the district engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued.

(e) *Maintenance dredging.* If the authorized work includes periodic maintenance dredging, an expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Parts 320 to 325. In such cases, the district engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of this regulation and 33 CFR Parts 320 to 324. If the permittee desires to continue maintenance

dredging beyond the expiration date, he must request a new permit. The permittee should be advised to apply for the new permit six months prior to the time he wishes to do the maintenance work.

§ 325.7 Modification, suspension, or revocation of permits.

(a) *General.* The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this Part, and not as modifications under this section.

(b) *Modification.* Upon request by the permittee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms or conditions of the permit. In such cases, the district engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish. In the event a mutual agreement cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where

immediate suspension is not warranted but the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR Part 326. The district engineer shall consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest in the term, condition, or feature being modified prior to permit issuance.

(c) *Suspension.* The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/or a public hearing to present information in this matter. If a hearing is requested, the procedures prescribed in 33 CFR Part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested), the district engineer will take action to reinstate, modify, or revoke the permit.

(d) *Revocation.* Following completion of the suspension procedures in paragraph (c) of this section, if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.

(e) *Regional permits.* The issuing official may, by following the procedures of this section, revoke regional permits for individual activities, categories of activities, or geographic areas. Where groups of permittees are

involved, such as for categories of activities or geographic areas, the informal discussions provided in paragraph (b) of this section may be waived and any written notification may be made through the general public notice procedures of this regulation. If a regional permit is revoked, any permittee may then apply for an individual permit which shall be processed in accordance with these regulations.

§ 325.8 Authority to issue or deny permits.

(a) *General.* Except as otherwise provided in this regulation, the Secretary of the Army, subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for dams or dikes in intrastate waters of the United States pursuant to section 9 of the Rivers and Harbors Act of 1899; for construction or other work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899; for the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act; or for the transportation of dredged material for the purpose of disposing of it into ocean waters pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits in interstate navigable waters of the United States pursuant to section 9 of the Rivers and Harbors Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District engineer's authority.* District engineers are authorized to issue or deny permits in accordance with these regulations pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899; section 404 of the Clean Water Act; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases not required to be referred to higher authority (see below). It is essential to the legality of a permit that it contain the name of the district engineer as the issuing officer. However, the permit need not be signed by the district engineer in person but may be signed for and in behalf of him by whomever he designates. In cases where permits are denied for reasons other than navigation or failure to obtain required local, state, or other federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision. District

engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state, or other federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation except in all cases required to be referred to higher authority (see below). District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with § 325.4 of this Part, except for those conditions which may have been imposed by higher authority, and to modify, suspend and revoke permits according to the procedures of § 325.7 of this Part. District engineers will refer the following applications to the division engineer for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed;

(3) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(4) When higher authority requests the application be forwarded for decision; or

(5) When the district engineer is precluded by law or procedures required by law from taking final action on the application (e.g. section 9 of the Rivers and Harbors Act of 1899, or territorial sea baseline changes).

(c) *Division engineer's authority.* Division engineers will review and evaluate all permit applications referred by district engineers. Division engineers may authorize the issuance or denial of permits pursuant to section 10 of the Rivers and Harbors Act of 1899; section 404 of the Clean Water Act; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions in accordance with § 325.4 of this Part in all cases not required to be referred to the Chief of Engineers. Division engineers will refer the following applications to the Chief of Engineers for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(3) When higher authority requests the application be forwarded for decision; or

(4) When the division engineer is precluded by law or procedures required

by law from taking final action on the application.

§ 325.9 Authority to determine jurisdiction.

District engineers are authorized to determine the area defined by the terms "navigable waters of the United States" and "waters of the United States" except:

(a) When a determination of navigability is made pursuant to 33 CFR 329.14 (division engineers have this authority); or

(b) When EPA makes a section 404 jurisdiction determination under its authority.

§ 325.10 Publicity.

The district engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in waters of the United States or ocean waters. Whenever the district engineer becomes aware of plans being developed by either private or public entities which might require permits for implementation, he should advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Whenever the district engineer is aware of changes in Corps of Engineers regulatory jurisdiction, he will issue appropriate public notices.

Appendix A—Permit Form and Special Conditions

A. Permit Form

Department of the Army Permit

Permittee _____
Permit No. _____
Issuing Office _____

Note.—The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

Project Description: (Describe the permitted activity and its intended use with references to any attached plans or drawings that are considered to be a part of the project description. Include a description of the types and quantities of dredged or fill materials to be discharged in jurisdictional waters.)

Project Location: (Where appropriate, provide the names of and the locations on the waters where the permitted activity and any off-site disposals will take place. Also, using name, distance, and direction, locate the permitted activity in reference to a nearby landmark such as a town or city.)

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on _____. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions: (Add special conditions as required in this space with reference to a continuation sheet if necessary.)

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

() Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

() Section 404 of the Clean Water Act (33 U.S.C. 1344).

() Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(Permittee)

(Date)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

(District Engineer)

(Date)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(Transferee)

(Date)

B. Special Conditions. No special conditions will be preprinted on the permit form. The following and other special conditions should be added, as appropriate, in the space provided after the general conditions or on a referenced continuation sheet:

1. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.

2. You must have a copy of this permit available on the vessel used for the authorized transportation and disposal of dredged material.

3. You must advise this office in writing, at least two weeks before you start maintenance dredging activities under the authority of this permit.

4. You must install and maintain, at your expense, any safety lights and signals prescribed by the United States Coast Guard (USCG), through regulations or otherwise, on your authorized facilities. The USCG may be reached at the following address and telephone number:

5. The condition below will be used when a Corps permit authorizes an artificial reef, an aerial transmission line, a submerged cable or pipeline, or a structure on the outer continental shelf.

National Ocean Service (NOS) has been notified of this authorization. You must notify NOS and this office in writing, at least two weeks before you begin work and upon completion of the activity authorized by this permit. Your notification of completion must include a drawing which certifies the location and configuration of the completed activity (a certified permit drawing may be used). Notifications to NOS will be sent to the following address: The Director, National Ocean Service (N/CG 222), Rockville, Maryland 20852.

6. The following condition should be used for every permit where legal recordation of the permit would be reasonably practicable and recordation could put a subsequent purchaser or owner of property on notice of permit conditions.

You must take the actions required to record this permit with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to or interest in real property.

Appendix B—[Reserved] (For Future NEPA Regulation)

Appendix C—[Reserved] (For Historic Properties Regulation)

PART 326—ENFORCEMENT

Sec.

326.1 Purpose.

326.2 Policy.

326.3 Unauthorized activities.

326.4 Supervision of authorized activities.

326.5 Legal action.

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

§ 326.1 Purpose.

This Part prescribes enforcement policies (§ 326.2) and procedures applicable to activities performed without required Department of the Army permits (§ 326.3) and to activities not in compliance with the terms and conditions of issued Department of the Army permits (§ 326.4). Procedures for initiating legal actions are prescribed in § 326.5. Nothing contained in this Part shall establish a non-discretionary duty on the part of district engineers nor shall deviation from these procedures give rise to a private right of action against a district engineer.

§ 326.2 Policy.

Enforcement, as part of the overall regulatory program of the Corps, is based on a policy of regulating the waters of the United States by discouraging activities that have not been properly authorized and by requiring corrective measures, where appropriate, to ensure those waters are not misused and to maintain the integrity of the program. There are several methods discussed in the remainder of this part which can be used either singly or in combination to implement this policy, while making the most effective use of the enforcement resources available. As EPA has independent enforcement authority under the Clean Water Act for unauthorized discharges, the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved.

§ 326.3 Unauthorized activities.

(a) *Surveillance.* To detect unauthorized activities requiring permits, district engineers should make the best use of all available resources.

Corps employees; members of the public; and representatives of state, local, and other Federal agencies should be encouraged to report suspected violations. Additionally, district engineers should consider developing joint surveillance procedures with Federal, state, or local agencies having similar regulatory responsibilities, special expertise, or interest.

(b) *Initial investigation.* District engineers should take steps to investigate suspected violations in a timely manner. The scheduling of investigations will reflect the nature and location of the suspected violations, the anticipated impacts, and the most effective use of inspection resources available to the district engineer. These investigations should confirm whether a violation exists, and if so, will identify the extent of the violation and the parties responsible.

(c) *Formal notifications to parties responsible for violations.* Once the district engineer has determined that a violation exists, he should take appropriate steps to notify the responsible parties.

(1) If the violation involves a project that is not complete, the district engineer's notification should be in the form of a cease and desist order prohibiting any further work pending resolution of the violation in accordance with the procedures contained in this part. See paragraph (c)(4) of this section for exception to this procedure.

(2) If the violation involves a completed project, a cease and desist order should not be necessary. However, the district engineer should still notify the responsible parties of the violation.

(3) All notifications, pursuant to paragraphs (c) (1) and (2) of this section, should identify the relevant statutory authorities, indicate potential enforcement consequences, and direct the responsible parties to submit any additional information that the district engineer may need at that time to determine what course of action he should pursue in resolving the violation; further information may be requested, as needed, in the future.

(4) In situations which would, if a violation were not involved, qualify for emergency procedures pursuant to 33 CFR Part 325.2(e)(4), the district engineer may decide it would not be appropriate to direct that the unauthorized work be stopped. Therefore, in such situations, the district engineer may, at his discretion, allow the work to continue, subject to appropriate limitations and conditions as he may prescribe, while the violation is being resolved in

accordance with the procedures contained in this part.

(5) When an unauthorized activity requiring a permit has been undertaken by American Indians (including Alaskan natives, Eskimos, and Aleuts, but not including Native Hawaiians) on reservation lands or in pursuit of specific treaty rights, the district engineer should use appropriate means to coordinate proposed directives and orders with the Assistant Chief Counsel for Indian Affairs (DAEN-CCI).

(6) When an unauthorized activity requiring a permit has been undertaken by an official acting on behalf of a foreign government, the district engineer should use appropriate means to coordinate proposed directives and orders with the Office, Chief of Engineers, ATTN: DAEN-CCK.

(d) *Initial corrective measures.* (1) The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the unauthorized, completed work, solicit the views of the Environmental Protection Agency; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service, and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. In determining what initial corrective measures are required, the district engineer should consider whether serious jeopardy to life, property, or important public resources (see 33 CFR Part 320.4) may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation. In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work. In unusual cases where initial corrective measures substantially eliminate all current and future detrimental impacts resulting from the unauthorized work, further enforcement actions should normally be unnecessary. For all other cases, the district engineer's order should normally specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

(2) An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-

fact permit application is prohibited or considered not appropriate pursuant to § 326.3(e)(1) (iii)-(iv) below. However, such orders will be issued only when the district engineer has reached an independent determination that such measures are necessary and appropriate.

(3) It will not be necessary to issue a Corps permit in connection with initial corrective measures undertaken at the direction of the district engineer.

(e) *After-the-fact permit applications.* (1) Following the completion of any required initial corrective measures, the district engineer will accept an after-the-fact permit application unless he determines that one of the exceptions listed in subparagraphs i-iv below is applicable. Applications for after-the-fact permits will be processed in accordance with the applicable procedures in 33 CFR Parts 320-325. Situations where no permit application will be processed or where the acceptance of a permit application must be deferred are as follows:

(i) No permit application will be processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer.

(ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (§ 326.5(a)) until such legal action has been completed.

(iii) No permit application will be accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied.

(iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

(2) Upon completion of his review in accordance with 33 CFR Parts 320-325, the district engineer will determine if a permit should be issued, with special conditions if appropriate, or denied. In reaching a decision to issue, he must determine that the work involved is not contrary to the public interest, and if section 404 is applicable, that the work also complies with the Environmental Protection Agency's section 404(b)(1) guidelines. If he determines that a denial is warranted, his notification of denial should prescribe any final corrective

actions required. His notification should also establish a reasonable period of time for the applicant to complete such actions unless he determines that further information is required before the corrective measures can be specified. If further information is required, the final corrective measures may be specified at a later date. If an applicant refuses to undertake prescribed corrective actions ordered subsequent to permit denial or refuses to accept a conditioned permit, the district engineer may initiate legal action in accordance with § 326.5.

(f) *Combining steps.* The procedural steps in this section are in the normal sequence. However, these regulations do not prohibit the streamlining of the enforcement process through the combining of steps.

(g) *Coordination with EPA.* In all cases where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures and after-the-fact permitting, as well as to appropriate legal enforcement actions.

§ 326.4 Supervision of authorized activities.

(a) *Inspections.* District engineers will, at their discretion, take reasonable measures to inspect permitted activities, as required, to ensure that these activities comply with specified terms and conditions. To supplement inspections by their enforcement personnel, district engineers should encourage their other personnel; members of the public; and interested state, local, and other Federal agency representatives to report suspected violations of Corps permits. To facilitate inspections, district engineers will, in appropriate cases, require that copies of ENG Form 4336 be posted conspicuously at the sites of authorized activities and will make available to all interested persons information on the terms and conditions of issued permits. The U.S. Coast Guard will inspect permitted ocean dumping activities pursuant to section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(b) *Inspection limitations.* Section 326.4 does not establish a non-discretionary duty to inspect permitted activities for safety, sound engineering practices, or interference with other permitted or unpermitted structures or uses in the area. Further, the regulations implementing the Corps regulatory program do not establish a non-discretionary duty to inspect permitted activities for any other purpose.

(c) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activities will normally be paid by the Federal Government unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may condition permits to require permittees to pay inspection expenses pursuant to the authority contained in Section 9701 of Pub L. 97-258 (33 U.S.C. 9701). The collection and disposition of inspection expense funds obtained from applicants will be administered in accordance with the relevant Corps regulations governing such funds.

(d) *Non-compliance.* If a district engineer determines that a permittee has violated the terms or conditions of the permit and that the violation is sufficiently serious to require an enforcement action, then he should, unless at his discretion he deems it inappropriate: (1) First contact the permittee; (2) request corrected plans reflecting actual work, if needed; and (3) attempt to resolve the violation. Resolution of the violation may take the form of the permitted project being voluntarily brought into compliance or of a permit modification (33 CFR 325.7(b)). If a mutually agreeable solution cannot be reached, a written order requiring compliance should normally be issued and delivered by personal service. Issuance of an order is not, however, a prerequisite to legal action. If an order is issued, it will specify a time period of not more than 30 days for bringing the permitted project into compliance, and a copy will be sent to the appropriate state official pursuant to section 404(s)(2) of the Clean Water Act. If the permittee fails to comply with the order within the specified period of time, the district engineer may consider using the suspension/revocation procedures in 33 CFR 325.7(c) and/or he may recommend legal action in accordance with § 326.5.

§ 326.5 Legal action.

(a) *General.* For cases the district engineer determines to be appropriate, he will recommend criminal or civil actions to obtain penalties for violations, compliance with the orders and directives he has issued pursuant to §§ 326.3 and 326.4, or other relief as appropriate. Appropriate cases for criminal or civil action include, but are not limited to, violations which, in the district engineer's opinion, are willful, repeated, flagrant, or of substantial impact.

(b) *Preparation of case.* If the district engineer determines that legal action is appropriate, he will prepare a litigation report or such other documentation that

he and the local U.S. Attorney have mutually agreed to, which contains an analysis of the information obtained during his investigation of the violation or during the processing of a permit application and a recommendation of appropriate legal action. The litigation report or alternative documentation will also recommend what, if any, restoration or mitigative measures are required and will provide the rationale for any such recommendation.

(c) *Referral to the local U.S. Attorney.* Except as provided in paragraph (d) of this section, district engineers are authorized to refer cases directly to the U.S. Attorney. Because of the unique legal system in the Trust Territories, all cases over which the Department of Justice has no authority will be referred to the Attorney General for the trust Territories. Information copies of all letters of referral shall be forwarded to the appropriate division counsel, the Office, Chief of Engineers, ATTN: DAEN-CCK, the Office of the Assistant Secretary of the Army (Civil Works), and the Chief of the Environmental Defense Section, Lands and Natural Resources Division, U.S. Department of Justice.

(d) *Referral to the Office, Chief of Engineers.* District engineers will forward litigation reports with recommendations through division offices to the Office, Chief of Engineers, ATTN: DAEN-CCK, for all cases that qualify under the following criteria:

- (1) Significant precedential or controversial questions of law or fact;
- (2) Requests for elevation to the Washington level by the Department of Justice;
- (3) Violations of section 9 of the Rivers and Harbors Act of 1899;
- (4) Violations of section 103 the Marine Protection, Research and Sanctuaries Act of 1972;
- (5) All cases involving violations by American Indians (original of litigation report to DAEN-CCI with copy to DAEN-CCK) on reservation lands or in pursuit of specific treaty rights;
- (6) All cases involving violations by officials acting on behalf of foreign governments; and
- (7) Cases requiring action pursuant to paragraph (e) of this section.

(e) *Legal option not available.* In cases where the local U.S. Attorney declines to take legal action, it would be appropriate for the district engineer to close the enforcement case record unless he believes that the case warrants special attention. In that situation, he is encouraged to forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN-CCK, for

direct coordination through the Office of the Assistant Secretary of the Army (Civil Works) with the Department of Justice. Further, the case record should not be closed if the district engineer anticipates that further administrative enforcement actions, taken in accordance with the procedures prescribed in this part, will identify remedial measures which, if not complied with by the parties responsible for the violation, will result in appropriate legal action at a later date.

PART 327—PUBLIC HEARINGS

Sec.

- 327.1 Purpose.
- 327.2 Applicability.
- 327.3 Definitions.
- 327.4 General policies.
- 327.5 Presiding officer.
- 327.6 Legal adviser.
- 327.7 Representation.
- 327.8 Conduct of hearings.
- 327.9 Filing of transcript of the public hearing.
- 327.10 Authority of the presiding officer.
- 327.11 Public notice.

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

§ 327.1 Purpose.

This regulation prescribes the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the evaluation of a proposed DA permit action or Federal project as defined in § 327.3 of this Part including those held pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended (33 U.S.C. 1413).

§ 327.2 Applicability.

This regulation is applicable to all divisions and districts responsible for the conduct of public hearings.

§ 327.3 Definitions.

(a) Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action, or Federal project, and which affords the public an opportunity to present their views, opinions, and information on such permit actions or Federal projects.

(b) Permit action, as used herein means the evaluation of and decision on an application for a DA permit pursuant to sections 9 or 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, or section 103 of the MPRSA, as amended, or the modification, suspension or revocation of any DA permit (see 33 CFR 325.7).

(c) Federal project means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to section 404 of the Clean Water Act, or section 103 of the MPRSA.

§ 327.4 General policies.

(a) A public hearing will be held in connection with the consideration of a DA permit application or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project. In addition, a public hearing may be held when it is proposed to modify or revoke a permit. (See 33 CFR 325.7).

(b) Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a DA permit application or on a Federal project, that a public hearing be held to consider the material matters at issue in the permit application or with respect to Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, he shall promptly set a time and place for the public hearing, and give due notice thereof, as prescribed in § 327.11 of this Part. Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing, and communicate his reasons therefor to all requesting parties. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(c) In case of doubt, a public hearing shall be held. HQDA has the discretionary power to require hearings in any case.

(d) In fixing the time and place for a hearing, the convenience and necessity of the interested public will be duly considered.

§ 327.5 Presiding officer.

(a) The district engineer, in whose district a matter arises, shall normally serve as the presiding officer. When the district engineer is unable to serve, he may designate the deputy district

engineer or other qualified person as presiding officer. In cases of unusual interest, the Chief of Engineers or the division engineer may appoint such person as he deems appropriate to serve as the presiding officer.

(b) The presiding officer shall include in the administrative record of the permit action the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to or in support of the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The administrative record shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.

§ 327.6 Legal adviser.

At each public hearing, the district counsel or his designee may serve as legal advisor to the presiding officer. In appropriate circumstances, the district engineer may waive the requirement for a legal advisor to be present.

§ 327.7 Representation.

At the public hearing, any person may appear on his own behalf, or may be represented by counsel, or by other representatives.

§ 327.8 Conduct of hearings.

(a) The presiding officer shall make an opening statement outlining the purpose of the hearing and prescribing the general procedures to be followed.

(b) Hearings shall be conducted by the presiding officer in an orderly but expeditious manner. Any person shall be permitted to submit oral or written statements concerning the subject matter of the hearing, to call witnesses who may present oral or written statements, and to present recommendations as to an appropriate decision. Any person may present written statements for the hearing record prior to the time the hearing record is closed to public submissions, and may present proposed findings and recommendations. The presiding officer shall afford participants a reasonable opportunity for rebuttal.

(c) The presiding officer shall have discretion to establish reasonable limits upon the time allowed for statements of witnesses, for arguments of parties or their counsel or representatives, and upon the number of rebuttals.

(d) Cross-examination of witnesses shall not be permitted.

(e) All public hearings shall be reported verbatim. Copies of the transcripts of proceedings may be

purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate district engineer.

(f) All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the presiding officer for reasons of redundancy, be received in evidence and shall constitute a part of the record.

(g) The presiding officer shall allow a period of not less than 10 days after the close of the public hearing for submission of written comments.

(h) In appropriate cases, the district engineer may participate in joint public hearings with other Federal or state agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or state agency allows a cross-examination in its public hearing, the district engineer may still participate in the joint public hearing but shall not require cross examination as a part of his participation.

§ 327.9 Filing of the transcript of the public hearing.

Where the presiding officer is the initial action authority, the transcript of the public hearing, together with all evidence introduced at the public hearing, shall be made a part of the administrative record of the permit action or Federal project. The initial action authority shall fully consider the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as presiding officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the presiding officer and the transcript of the public hearing and evidence submitted thereat shall in such cases be fully considered by the initial action authority in making his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Authority of the presiding officer.

Presiding officers shall have the following authority:

(a) To regulate the course of the hearing including the order of all sessions and the scheduling thereof, after any initial session, and the

recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

Sec.

328.1 Purpose.

328.2 General scope.

328.3 Definitions.

328.4 Limits of jurisdiction.

328.5 Changes in limits of waters of the United States.

Authority: 33 U.S.C. 1344.

§ 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid

confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320-330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

§ 328.2 General scope.

Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and non-tidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

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

(2) All interstate waters including interstate wetlands;

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

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

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

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

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

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

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

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

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

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

(e) The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

§ 328.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) *Tidal Waters of the United States.* The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-Tidal Waters of the United States.* The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

§ 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

PART 329—DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Sec.

- 329.1 Purpose.
329.2 Applicability.
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329.5 General scope of determination.
329.6 Interstate or foreign commerce.
329.7 Intrastate or interstate nature of waterway.
329.8 Improved or natural conditions of the waterbody.
329.9 Time at which commerce exists or determination is made.
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Sec.

- 329.11 Geographic and jurisdictional limits of rivers and lakes.
329.12 Geographic and jurisdictional limits of oceanic and tidal waters.
329.13 Geographic limits: shifting boundaries.
329.14 Determination of navigability.
329.15 Inquiries regarding determinations.
329.16 Use and maintenance of lists of determinations.

Authority: 33 U.S.C. 401 *et seq.*

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of commerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this Part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically

navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.* (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (see paragraph 329.12(b) of this Part).

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is

a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in paragraph 329.8(b) of this Part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

(a) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

(1) *Baseline defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

(2) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States.

Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) *Effect on determinations.* Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

(c) *Suggested format of report of findings:*

- (1) Name of waterbody:
- (2) Tributary to:
- (3) Physical characteristics:
 - (i) Type: (river, bay, slough, estuary, etc.)
 - (ii) Length:
 - (iii) Approximate discharge volumes: Maximum, Minimum, Mean:
 - (iv) Fall per mile:
 - (v) Extent of tidal influence:
 - (vi) Range between ordinary high and ordinary low water:

(vii) Description of improvements to navigation not listed in paragraph (c)(5) of this section:

(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

(5) Authorized projects:

(i) Nature, condition and location of any improvements made under projects authorized by Congress:

(ii) Description of projects authorized but not constructed:

(iii) List of known survey documents or reports describing the waterbody:

(6) Past or present interstate commerce:

(i) General types, extent, and period in time:

(ii) Documentation if necessary:

(7) Potential use for interstate commerce, if applicable:

(i) If in natural condition:

(ii) If improved:

(8) Nature of jurisdiction known to have been exercised by Federal agencies if any:

(9) State or Federal court decisions relating to navigability of the waterbody, if any:

(10) Remarks:

(11) Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

(a) Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an emergency determination, district engineers may act in reliance on a finding prepared as in Section 329.14 of this Part. The report of findings should then be forwarded to the division engineer on an expedited basis.

(b) Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that _____ (River) (Bay) (Lake, etc.) is a navigable water of the United States from _____ to _____. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this

Department, whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or (2) if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

PART 330—NATIONWIDE PERMITS

Sec.

330.1 General.

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330.12 Expiration of nationwide permits.

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

§ 330.1 General.

The purpose of this regulation is to describe the Department of the Army's (DA) nationwide permit program and to list all current nationwide permits which have been issued by publication herein. A nationwide permit is a form of general permit which may authorize activities throughout the nation. (Another type of general permit is a "regional permit" and is issued by division or district engineers on a regional basis in accordance with 33 CFR Part 325). Copies of regional conditions and

modifications, if any, to the nationwide permits can be obtained from the appropriate district engineer.

Nationwide permits are designed to allow certain activities to occur with little, if any, delay or paperwork. Nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Failure to comply with a condition does not necessarily mean the activity cannot be authorized but rather that the activity can only be authorized by an individual or regional permit. Several of the nationwide permits require notification to the district engineer prior to commencement of the authorized activity. The procedures for this notification are located at § 330.7 of this Part. Nationwide permits can be issued to satisfy the requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and/or section 103 of the Marine Protection, Research and Sanctuaries Act. The applicable authority is indicated at the end of each nationwide permit.

§ 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321-329 are applicable to the terms used in this Part.

(b) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second. The district engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, district engineers may establish the "headwaters" as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

(c) Discretionary authority means the authority delegated to division engineers in § 330.8 of this part to override provisions of nationwide permits, to add regional conditions, or to require individual permit application.

§ 330.3 Activities occurring before certain dates.

The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:

(a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended section 404 jurisdiction to all waters of the United

States. (These phase-in dates are: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States.) (Section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation. (Section 10)

§ 330.4 Public notice.

(a) *Chief of Engineers.* Upon proposed issuance of new nationwide permits, modification to, or reissuance of, existing nationwide permits, the Chief of Engineers will publish a notice in the *Federal Register* seeking public comments and including the opportunity for a public hearing. This notice will state the availability of information at the Office of the Chief of Engineers and at all district offices which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance under general permit authority. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(b) *District engineers.* Concurrent with publication in the *Federal Register* of proposed, new, or reissued nationwide permits by the Chief of Engineers, district engineers will so notify the known interested public by an appropriate notice. The notice will include regional conditions, if any, developed by the division engineer.

§ 330.5 Nationwide permits.

(a) *Authorized activities.* The following activities are hereby permitted provided they meet the conditions listed in paragraph (b) of this section and, where required, comply with the notification procedures, of § 330.7.

(1) The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 66, Subchapter C). (Section 10)

(2) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR Part 322.5(g)). (Section 10)

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Section 10 and 404)

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, and clam and oyster digging. (Section 10)

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures. (Section 10)

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling of exploration-type bore holes for oil and gas exploration is not authorized by this nationwide permit; the plugging of such holes is authorized. (Sections 10 and 404).

(7) Outfall structures and associated intake structures where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the district or division engineer makes a determination that the individual and cumulative adverse environmental effects of the structure itself are minimal in accordance with § 330.7 (c)(2) and (d). Intake structures per se are not included—only those directly associated with an outfall structure are covered by this nationwide permit. This permit includes minor excavation, filling and other work associated with installation of the intake and outfall structures. (Sections 10 and 404)

(8) Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Mineral Management Service, provided those structures are not placed within the limits of any designated shipping safety fairway or traffic

separation scheme (where such limits have not been designated or where changes are anticipated, district engineers will consider recommending the discretionary authority provided by 330.8 of this Part, and further subject to the provisions of the fairway regulations in 33 CFR 322.5(1) (Section 10).

(9) Structures placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)

(10) Non-commercial, single-boat, mooring buoys. (Section 10)

(11) Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 30 days after its use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

(12) Discharge of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line and outfall and intake structures will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322. See also paragraph (a)(7) of this section). (Section 404)

(13) Bank stabilization activities provided:

(i) The bank stabilization activity is less than 500 feet in length;

(ii) The activity is necessary for erosion prevention;

(iii) The activity is limited to less than an average of one cubic yard per running foot placed along the bank within waters of the United States;

(iv) No material is placed in excess of the minimum needed for erosion protection;

(v) No material is placed in any wetland area;

(vi) No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

(vii) Only clean material free of waste metal products, organic materials, unsightly debris, etc. is used; and

(viii) The activity is a single and complete project. (Sections 10 and 404)

(14) Minor road crossing fills including all attendant features, both temporary and permanent, that are part of a single and complete project for crossing of a non-tidal waterbody, provided that the crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing may require a permit from the US Coast Guard if located in navigable waters of the United States. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). District engineers are authorized, where local circumstances indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (Sections 10 and 404)

(15) Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharge has been authorized by the US Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit. (Section 404)

(16) Return water from an upland, contained dredged material disposal area (see 33 CFR 323.2(d)) provided the state has issued a site specific or generic certification under section 401 of the Clean Water Act (see also 33 CFR 325.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States. The return water or runoff from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a section 404 permit. This nationwide permit satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. (Section 404)

(17) Fills associated with small hydropower projects at existing reservoirs where the project which

includes the fill is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the FERC (see 18 CFR 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal in accordance with § 330.7 (c)(2) and (d). (Section 404)

(18) Discharges of dredged or fill material into all waters of the United States other than wetlands that do not exceed ten cubic yards as part of a single and complete project provided the material is not placed for the purpose of stream diversion. (Sections 10 and 404)

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project. This permit does not authorize the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Section 10)

(20) Structures, work, and discharges for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, (40 CFR Part 300), provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action. (Sections 10 and 404)

(21) Structures, work, discharges associated with surface coal mining activities provided they were authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal in accordance with §§ 330.7 (c) (2) and (3) and (d). (Sections 10 and 404)

(22) Minor work, fills, or temporary structures required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This permit does not authorize maintenance dredging, shoal removal, or river bank snagging. (Sections 10 and 404)

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another federal agency or department where that agency or department has determined, pursuant to the CEQ Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: DAEN-CWO-N) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit comments through publication in the Federal Register. (Sections 10 and 404)

(24) Any activity permitted by a state administering its own Section 404 permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)-(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this nationwide permit but many will be exempted by section 154 of Pub. L. 94-587. (See 33 CFR 322.3(a)(2)). (Section 10)

(25) Discharge of concrete into tightly sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction. (Section 404)

(26) Discharges of dredged or fill material into the waters listed in paragraphs (a)(26) (i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of such waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification to the district engineer is required in accordance with section 330.7 of this section. (Section 404)

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

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or

navigable waters of the United States (i.e., isolated waters).

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That any discharge of dredged or fill material will not occur in the proximity of a public water supply intake.

(2) That any discharge of dredged or fill material will not occur in areas of concentrated shellfish production unless the discharge is directly related to a shellfish harvesting activity authorized by paragraph (a)(4) of this section.

(3) That the activity will not jeopardize a threatened or endangered species as identified under the Endangered Species Act (ESA), or destroy or adversely modify the critical habitat of such species. In the case of federal agencies, it is the agencies' responsibility to comply with the requirements of the ESA. If the activity may adversely affect any listed species or critical habitat, the district engineer must initiate Section 7 consultation in accordance with the ESA. In such cases, the district engineer may:

(i) Initiate section 7 consultation and then, upon completion, authorize the activity under the nationwide permit by adding, if appropriate, activity specific conditions, or

(ii) Prior to or concurrent with section 7 consultation he may recommend discretionary authority (See section 330.8) or use modification, suspension, or revocation procedures (See 33 CFR 325.7).

(4) That the activity shall not significantly disrupt the movement of those species of aquatic life indigenous to the waterbody (unless the primary purpose of the fill is to impound water);

(5) That any discharge of dredged or fill material shall consist of suitable material free from toxic pollutants (see section 307 of the Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized shall be properly maintained.

(7) That the activity will not occur in a component of the National Wild and Scenic River System; nor in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status;

(8) That the activity shall not cause an unacceptable interference with navigation;

(9) That, if the activity may adversely affect historic properties which the National Park Service has listed on, or determined eligible for listing on, the National Register of Historic Places, the permittee will notify the district

engineer. If the district engineer determines that such historic properties may be adversely affected, he will provide the Advisory Council on Historic Preservation an opportunity to comment on the effects on such historic properties or he will consider modification, suspension, or revocation in accordance with 33 CFR 325.7. Furthermore, that, if the permittee before or during prosecution of the work authorized, encounters a historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, he shall immediately notify the district engineer;

(10) That the construction or operation of the activity will not impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights;

(11) That in certain states, an individual state water quality certification must be obtained or waived (See § 330.9);

(12) That in certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (See § 330.10);

(13) That the activity will comply with regional conditions which may have been added by the division engineer (See § 330.8(a)); and

(14) That the management practices listed in § 330.6 of this part shall be followed to the maximum extent practicable.

(c) *Further information.* (1) District engineers are authorized to determine if an activity complies with the terms and conditions of a nationwide permit unless that decision must be made by the division engineer in accordance with § 330.7.

(2) Nationwide permits do not obviate the need to obtain other Federal, state or local authorizations required by law.

(3) Nationwide permits do not grant any property rights or exclusive privileges.

(4) Nationwide permits do not authorize any injury to the property or rights of others.

(5) Nationwide permits do not authorize interference with any existing or proposed Federal project.

(d) *Modification, Suspension or Revocation of Nationwide Permits.* The Chief of Engineers may modify, suspend, or revoke nationwide permits in accordance with the relevant procedures of 33 CFR 325.7. Such authority includes, but is not limited to: adding individual, regional, or nationwide conditions; revoking authorization for a category of activities

or a category of waters by requiring individual or regional permits; or revoking an authorization on a case-by-case basis. This authority is not limited to concerns for the aquatic environment as is the discretionary authority in § 330.8.

§ 330.6 Management practices.

(a) In addition to the conditions specified in § 330.5 of this Part, the following management practices shall be followed, to the maximum extent practicable, in order to minimize the adverse effects of these discharges on the aquatic environment. Failure to comply with these practices may be cause for the district engineer to recommend, or the division engineer to take, discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.8 of this Part.

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

(2) Discharges in spawning areas during spawning seasons shall be avoided.

(3) Discharges shall not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

(4) If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized.

(5) Discharge in wetlands areas shall be avoided.

(6) Heavy equipment working in wetlands shall be placed on mats.

(7) Discharges into breeding areas for migratory waterfowl shall be avoided.

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

§ 330.7 Notification procedures.

(a) The general permittee shall not begin discharges requiring pre-discharge notification pursuant to the nationwide permit at § 330.5(a)(26):

(1) Until notified by the district engineer that the work may proceed under the nationwide permit with any special conditions imposed by the district or division engineer; or

(2) If notified by the district or division engineer that an individual permit may be required; or

(3) Unless 20 days have passed from receipt of the notification by the district engineer and no notice has been

received from the district or division engineer.

(b) Notification pursuant to the nationwide permit at § 330.5(a)(26) must be in writing and include the information listed below. Notification is not an admission that the proposed work would result in more than minimal impacts to waters of the United States; it simply allows the district or division engineer to evaluate specific activities for compliance with general permit criteria.

(1) Name, address, and phone number of the general permittee;

(2) Location of the planned work;

(3) Brief description of the proposed work, its purpose, and the approximate size of the waters, including wetlands, which would be lost or substantially adversely modified as a result of the work; and

(4) Any specific information required by the nationwide permit and any other information that the permittee believes is appropriate.

(c) *District engineer review of notification.* Upon receipt of notification, the district engineer will promptly review the general permittee's notification to determine which of the following procedures should be followed:

(1) If the nationwide permit at § 330.5(a)(26) is involved and the district engineer determines either, (i) the proposed activity falls within a class of discharges or will occur in a category of waters which has been previously identified by the Regional Administrator, Environmental Protection Agency; the Regional Director, Fish and Wildlife Service; the Regional Director, National Marine Fisheries Service; or the heads of the appropriate state natural resource agencies as being of particular interest to those agencies; or (ii) the particular discharge has not been previously identified but he believes it may be of importance to those agencies, he will promptly forward the notification to the division engineer and the head and appropriate staff officials of those agencies to afford those agencies an adequate opportunity before such discharge occurs to consider such notification and express their views, if any, to the district engineer concerning whether individual permits should be required.

(2) If the nationwide permits at § 330.5(a)(7), (17), or (21) are involved and the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate state natural resource or water quality agencies forward concerns to the district engineer, he will forward those concerns to the division engineer

together with a statement of the factors pertinent to a determination of the environmental effects of the proposed discharges, including those set forth in the 404(b)(1) guidelines, and his views on the specific points raised by those agencies.

(3) If the nationwide permit at § 330.5(a)(21) is involved the district engineer will give notice to the Environmental Protection Agency and the appropriate state water quality agency. This notice will include as a minimum the information required by paragraph (b) of this section.

(d) *Division engineer review of notification.* The division engineer will review all notifications referred to him in accordance with paragraph (c)(1) or (c)(2) of this section. The division engineer will require an individual permit when he determines that an activity does not comply with the terms or conditions of a nationwide permit or does not meet the definition of a general permit (see 33 CFR 322.2(f) and 323.2(n)) including discharges under the nationwide permit at § 330.5(a)(26) which have more than minimal adverse environmental effects on the aquatic environment when viewed either cumulatively or separately. In reaching his decision, he will review factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and will give full consideration to the views, if any, of the federal and state natural resource agencies identified in paragraph (c) of this section. If the division engineer decides that an individual permit is not required, and a federal or appropriate state natural resource agency has indicated in writing that an activity may result in more than minimal adverse environmental impacts, he will prepare a written statement, available to the public on request, which sets forth his response to the specific points raised by the commenting agency. When the division engineer reaches his decision he will notify the district engineer, who will immediately notify the general permittee of the division engineer's decision.

§ 330.8 Discretionary authority.

Except as provided in paragraphs (c) (2) and (d) of this section, division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis, for a category of activities, or in specific geographic areas. Discretionary authority will be

based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to section 404(b)(1). (40 CFR Part 230)

(a) *Activity Specific conditions.* Division engineers are authorized to modify nationwide permits by adding individual conditions on a case-by-case basis applicable to certain activities within their division. Activity specific conditions may be added by the District Engineer in instances where there is mutual agreement between the district engineer and the permittee. Furthermore, district engineers will condition NWP's with conditions which have been imposed on a state section 401 water quality certification issued pursuant to § 330.9 of this Part.

(b) *Regional conditions.* Division engineers are authorized to modify nationwide permits by adding conditions on a generic basis applicable to certain activities or specific geographic areas within their divisions. In developing regional conditions, division and district engineers will follow standard permit processing procedures as prescribed in 33 CFR Part 325 applying the evaluation criteria of 33 CFR Part 320 and appropriate parts of 33 CFR Parts 321, 322, 323, and 324. Division and district engineers will take appropriate measures to inform the public of the additional conditions.

(c) *Individual permits—(1) Case-by-Case.* In nationwide permit cases where additional individual or regional conditioning may not be sufficient to address concerns for the aquatic environment or where there is not sufficient time to develop such conditions under paragraphs (a) or (b) of this section, the division engineer may suspend use of the nationwide permit and require an individual permit application on a case-by-case basis. The district engineer will evaluate the application and will either issue or deny a permit. However, if at any time the reason for taking discretionary authority is satisfied, then the division engineer may remove the suspension, reactivating authority under the nationwide permit. Where time is of the essence, the district engineer may telephonically recommend that the division engineer assert discretionary authority to require an individual permit application for a specific activity. If the division engineer concurs, he may orally authorize the district engineer to implement that authority. Oral authorization should be followed by written confirmation.

(2) *Category.* Additionally, after notice and opportunity for public hearing, division engineers may decide that individual permit applications

should be required for categories of activities, or in specific geographic areas. However, only the Chief of Engineers may modify, suspend, or revoke nationwide permits on a statewide or nationwide basis. The division engineer will announce the decision to persons affected by the action. The district engineer will then regulate the activity or activities by processing an application(s) for an individual permit(s) pursuant to 33 CFR Part 325.

(d) For the nationwide permit found at § 330.5(a)(26), after the applicable provisions of § 330.7(a) (1) and (3) have been satisfied, the permittee's right to proceed under the general permit may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 325.7.

(e) A copy of all modifications or revocations of activities covered by nationwide permits will be forwarded to the Office of the Chief of Engineers, ATTN: DAEN-CWO-N.

§ 330.9 State water quality certification.

(a) State water quality certification is required for nationwide permits which may result in any discharge into waters of the United States. If a state issues a water quality certification which includes special conditions, the district engineer will add these conditions as conditions of the nationwide permit in that state. However, if such conditions do not comply with the provisions of 33 CFR 325.4 or if a state denies a required 401 certification for a particular nationwide permit, authorization for all discharges covered by the nationwide permit within the state is denied without prejudice until the state issues an individual or generic water quality certification or waives its right to do so. A district engineer will not process an individual permit application for an activity for which authorization has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications. In instances where a state has denied the 401 water quality certification for discharges under a particular nationwide permit, applicants must furnish the district engineer with an individual or generic 401 certification or a copy of the application to the state for the certification. If a state fails to act within a reasonable period of time (see § 325.2(b)(1)(ii)), a waiver will be

presumed. Upon receipt of an individual or generic certification or a waiver of certification, the proposed work is authorized under the nationwide permit. If a state issues a conditioned individual certification, the district engineer will include those conditions that comply with 33 CFR 325.4 as special conditions of the nationwide permit (see 33 CFR Part 330.8(a)) and notify the applicant that the work is authorized under the nationwide permit provided all conditions are met.

(b) Certification requirements for nationwide permits fall into the following general categories:

(1) *No certification required.* Nationwide permits numbered 1, 2, 4, 5, 8, 9, 10, 11, and 19 do not involve activities which may result in a discharge and therefore 401 certification is not applicable.

(2) *Certification sometimes required.* Nationwide permits numbered 3, 6, 7, 13, 20, 21, 22, and 23 each involve various activities, some of which may result in a discharge and require certification, and others of which do not. State denial of certification for any specific nationwide permit in this category affects only those activities involving discharges. Those not involving discharges remain in effect.

(3) *Certification required.* Nationwide permits numbered 12, 14, 15, 16, 17, 18, 24, 25, and 26 involve activities which would result in discharges and therefore 401 certification is required.

(c) District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, an individual 401 water quality certification is required.

§ 330.10 Coastal zone management consistency determination.

In instances where a state has not concurred that a particular nationwide permit is consistent with an approved coastal zone management plan, authorization for all activities subject to such nationwide permit within or affecting the state coastal zone agency's area of authority is denied without prejudice until the applicant has furnished to the district engineer a coastal zone management consistency determination pursuant to section 307 of the Coastal Zone Management Act and the state has concurred in it. If a state does not act on an applicant's consistency statement within six months after receipt by the state, consistency shall be presumed. District engineers will take appropriate measures to inform the public of which waterbodies or regions within the state, and for which nationwide permits, such individual

consistency determination is required. District engineers will not process any permit application for an activity which has been denied without prejudice under the nationwide permit program. However, if the division engineer determines that it would otherwise be appropriate to exercise his discretionary authority, pursuant to § 330.8, to override the nationwide permit or permits in question, he may do so, and the district engineer may proceed with the processing of individual permit applications.

§ 330.11 Nationwide permit verification.

(a) General permittees may, and in some cases must, request from a district engineer confirmation that an activity complies with the terms and conditions of a nationwide permit. District engineers will respond promptly to such requests. The response will state that the verification is valid for a period of no more than two years or a lesser period of time if deemed appropriate. Section 330.12 takes precedence over this section, therefore, it is incumbent upon the permittee to remain informed of changes to nationwide permits.

(b) If the district engineer decides that an activity does not comply with the terms or conditions of a nationwide permit, he will so notify the person desiring to do the work and indicate that an individual permit is required (unless covered by a regional permit).

(c) If the district engineer decides that an activity does comply with the terms and conditions of a nationwide permit he will so notify the general permittee. In such cases, as with any activity which qualifies under a nationwide permit, the general permittee's right to proceed with the activities under the nationwide permit may be modified, suspended, or revoked only in accordance with the procedures of 33 CFR 325.7.

§ 330.12 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits on a continual basis, and will decide to either modify, reissue (extend) or revoke the permits at least every five years. If a nationwide permit is not modified or reissued within five years of publication in the **Federal Register**, it automatically expires and becomes null and void. Authorization of activities which have commenced or are under contract to commence in reliance upon a nationwide permit will remain in effect provided the activity is completed within twelve months of the date a nationwide permit has expired or was revoked unless discretionary permit authority has been exercised in

accordance with § 330.8 of this Part or modification, suspension, or revocation procedures are initiated in accordance with the relevant provisions of 33 CFR 325.7. Activities completed under the authorization of a nationwide permit which was in effect at the time the activity was completed continue to be authorized by that nationwide permit.

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29 CFR Parts 2509, 2510, 2520, and 2550

Thursday
November 13, 1986

Part III

Department of Labor

**Pension and Welfare Benefits
Administration**

**29 CFR Parts 2509, 2510, 2520, and 2550
Employee Benefit Plans: Definition of Plan
Assets and Exemption and Alternative
Method of Annual Reporting for Plans
Investing in Certain Entities; Rule**

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2509, 2510, and 2550

Final Regulation Relating to the Definition of Plan Assets

AGENCY: Department of Labor.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation that describes what constitute assets of a plan for purposes of certain provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA, or the Act) and the related prohibited transaction provisions of the Internal Revenue Code (the Code). This document also contains a redesignation of the rule relating to guaranteed governmental mortgage pool certificates that was originally codified at 29 CFR 2550.401b-1. There has been considerable uncertainty regarding what constitute "plan assets" for purposes of ERISA, and the regulation will provide guidance to plan fiduciaries, participants and beneficiaries of plans and other affected parties.

DATES: The final regulations will be effective March 13, 1987. In general, the final regulations will apply for purposes of identifying plan assets at any time after March 13, 1987. The final regulations also contain certain transitional provisions.

FOR FURTHER INFORMATION CONTACT: John S. Hunter, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 523-7901 or Shelby J. Hoover or Daniel J. Maguire, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, (202) 523-8658 or (202) 523-9595, respectively. For matters concerning Executive Order 12291, the Regulatory Flexibility Act or the Paperwork Reduction Act, contact Gary Hendricks, Office of Policy, Planning and Research, Pension and Welfare Benefits Administration, (202) 523-7933. These are not toll free numbers.

Background

I. History of the Regulation

On January 8, 1985, the Department of Labor (the Department) published a notice in the *Federal Register* containing a proposed regulation that would characterize the assets of certain entities in which plans invest as including plan assets, with the result that the managers of those entities would be considered "fiduciaries" subject to the fiduciary responsibility

provisions of ERISA.¹ The notice gave an opportunity for interested persons to comment on the proposal.

On February 15, 1985, the Department published a notice in the *Federal Register* containing an amendment modifying the effective date provision of the proposed regulation.²

A public hearing on the proposal was held in Washington, DC, on May 6, 7 and 8, 1985 at which time more than 45 commentators made oral presentations. At the conclusion of the hearing, the record in the proceeding was held open until June 30, 1985, in order to permit the filing of additional submissions.³

The Department has received more than 700 letters of comment regarding the proposal. The final regulation has been substantially revised in response to the comments received and the testimony at the public hearing.

The following discussion summarizes the proposed regulation and the major issues raised by the commentators and explains the Department's reasons for adopting the final regulation that is published with this notice.

II. Overview of the "Plan Assets" Issue

The proposed plan assets regulation described the circumstances under which the assets of an entity in which a plan invests will be considered to include "plan assets" so that the manager of the entity would be subject to the fiduciary responsibility rules of ERISA. Under ERISA, persons who exercise discretionary authority or control over the assets of a plan or who provide investment advice for a fee with respect to such assets are "fiduciaries" subject to the fiduciary responsibility provisions of the Act.⁴ Thus, identifying a plan's assets is a critical step in identifying plan fiduciaries. Moreover, the fiduciary responsibility provisions of ERISA include prohibited transaction provisions which restrict the manner in which fiduciaries may deal with the assets of a plan.⁵ In general, a fiduciary

may not use the assets of a plan to engage in transactions with "parties in interest" to the plan or plans for which he is acting.

In ERISA, the term "fiduciary" is defined broadly and in functional terms. Fiduciary status is determined with reference to a person's activities with respect to a plan; it does not depend upon any formal undertaking or agreement.⁶ In the Department's view, there are many situations where a plan, although nominally investing its assets in a separate entity, is as a practical matter retaining the persons who manage the entity to provide investment management services for the plan. For example, some institutional managers—such as banks and insurance companies—have traditionally pooled the assets of several plans for purposes of collective investment, and plans typically participate in such a fund by acquiring investment units evidencing an interest in the fund. More recently, limited partnerships have been used as devices for the collective investment of plan assets.

Although ERISA does not explicitly define what constitute "plan assets", it does deal specifically with certain kinds of collective investment arrangements. Section 401(b)(1) of ERISA provides that, in the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of the plan will be deemed to include such security, but will not, solely by reason of the plan's acquisition of the security, be deemed to include any assets of the investment company.⁷ Similarly, section 401(b)(2) of ERISA provides that when a plan acquires a "guaranteed benefit policy" from an insurance company, the assets of the plan include the policy, but do not include any of the underlying assets of the insurance company issuing the policy.

ERISA also includes provisions which indicate that the underlying assets of certain kinds of collective funds do

¹ Proposed regulation 29 CFR 2510.3-101 (50 FR 961). That document also gave notice of withdrawal of a previously proposed regulation (45 FR 38084, June 8, 1980) and the withdrawal of most of the provisions of another previously proposed regulation (44 FR 50363, August 28, 1979) both of which dealt with the definition of plan assets. The Department also noted that the regulation, if adopted, would contain a revision and clarification of Interpretive Bulletin 75-2 (29 CFR 2509.75-2).

² 50 FR 6362.

³ Transcript of Hearing for May 8, 1985, at 110.

⁴ See section 3(21) of ERISA.

⁵ See section 406 of ERISA. The prohibited transaction provisions of ERISA are complemented by section 4975 of the Code which imposes an excise tax on disqualified persons who engage in prohibited transactions.

⁶ See H.R. Rep. No. 1280, 93d Cong., 2d Sess., 323 (1974) (the Conference Report).

⁷ The Conference Report indicates that this statutory exclusion was included in ERISA in view of the existence of regulation under the Investment Company Act and because interests in registered investment companies must be widely held. Conference Report at 296. Section 3(21)(B) of ERISA also indicates that neither a registered investment company, its investment adviser nor its principal underwriter is deemed to be a fiduciary by reason of a plan's investment in the investment company, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of such company, adviser or underwriter.

include "plan assets."⁸ Thus, the Act contains special reporting and disclosure provisions where some or all of the assets of a plan are held in an insurance company separate account or a bank common or collective trust fund.⁹ In addition, the legislative history accompanying ERISA clearly indicates that the assets of such traditional investment funds should be considered "plan assets" subject to the fiduciary responsibility rules of the Act.¹⁰

In the Department's view, it would be unreasonable to suppose that Congress intended that the protections of the fiduciary responsibility provisions of the Act which are applicable where a plan directly retains a manager of its investments would not be applicable where the manager is retained indirectly through investment by the plan in a collective investment fund. It would also appear to be inconsistent with the broad functional definition of "fiduciary" in ERISA if persons who provide services that would cause them to be fiduciaries if the services were provided directly to plans are able to circumvent the fiduciary responsibility rules of the Act by the interposition of a separate legal entity between themselves and the plans (for example, by providing services to a limited partnership in which plans invest). However, neither ERISA itself nor the legislative history of the Act provides a clear indication of the extent to which the fiduciary responsibility provisions of the Act are intended to apply when a plan invests in another entity which may be a vehicle for collective investment of plan funds. In developing a regulation to address this issue the Department has taken into account the public comments on the proposed regulation and the testimony at the public hearing, the express statutory provisions of ERISA, the relevant legislative history and the existing federal regulatory structure applicable to entities in which plans invest.

⁸ In such case, a plan's assets would include its interest in the fund and an undivided interest in each of the underlying assets of the fund.

⁹ Section 103(b)(3)(C) of the Act.

¹⁰ "[I]nsurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts and the assets of these contracts are to be considered as plan assets. . . ." Conference Report, at 296. "The conferees understand that it is common practice for banks, trust companies and insurance companies to maintain pooled investment funds for plans. . . . Banks, etc. that operate such pooled investment funds are, of course, plan fiduciaries." Conference Report, at 316.

III. Description of the Proposed Regulation

In order to determine when an investment is an arrangement for the indirect provision of investment management services, the proposed regulation established a "look-through" rule pursuant to which a plan would, in cases where the rule applies, be considered to have acquired an interest in the underlying assets of an entity in which it invests so that the assets of the entity would include "plan assets." To define the scope of the look-through rule, the proposed regulation also established a series of exceptions to the rule. The proposed regulation reflected a general policy determination that the fiduciary responsibility provisions of the Act should apply to an entity in which a plan invests only if: (1) The plan's investment is such that it has an opportunity to participate in the earnings of the entity; (2) the entity itself is an investment fund; and (3) there is some indication that interests in the entity are offered especially to plans. Although, as discussed below, the Department has made several modifications to the regulation in response to the comments received, this general policy approach is reflected in the final regulation.

The first exclusion in the proposed regulation was for plan investments that are not "equity interests". This exclusion reflected a determination that only those investments which provide a plan with an opportunity to share in the success or failure of the entity to which the investment relates are likely to be vehicles for the indirect provision of investment management services. Under the proposal, "equity interests" were defined generally as interests in an entity other than instruments which are treated as indebtedness under local law and which have no substantial equity features.

The second exclusion was for "publicly-offered" securities, that is securities that are registered under the federal securities acts and which are widely-held and freely transferable. The exclusion did not extend to securities that are offered primarily to tax exempt investors.

The third exclusion was for entities in which there was no "significant" plan investment. This exclusion was intended to deal with investments in entities in which there has been no special solicitation of plan investors. Under the proposal, plan investment was "significant" if ERISA plans and certain other kinds of benefit plans own more than 20 percent of any class of outstanding equity interests in an entity.

The fourth exclusion related to "operating companies"—companies that are primarily engaged in the production or sale of a product or service other than the investment of capital. The proposal also specifically described certain "real estate operating companies" and "venture capital operating companies" which were treated as operating companies.

The proposed regulation also provided that the assets of certain entities would always include "plan assets." These included bank collective trust funds, most insurance company separate accounts and entities that are wholly owned by plans. The proposal also provided that the assets of entities, other than insurance companies licensed to do business in a state, that are established for the purpose of providing benefits to participants of investing plans would include plan assets. This provision was intended to apply primarily to so-called "multiple employer trusts."

As proposed, the plan assets regulation would have been effective 90 days after it was published in final form. Under a transitional rule, however, the regulation would not apply to entities which accepted no new plan investments after June 30, 1986.

The Final Regulation

I. The Look-Through Rule for Plan Investments

A. Comments on the General Approach of the Regulation

Several persons who submitted comments on the proposed regulation suggested that the Department should not establish any look-through rule with respect to plan investments in other entities. These commentators indicated that, in their view, references in ERISA to the "assets" of a plan should in all cases be considered to refer to a plan's investment and not to the underlying assets of the entity in which it invests. Some of the commentators suggested that the Department does not have the authority to issue a regulation characterizing the assets of a separate legal entity in which a plan invests as "plan assets". Even assuming that the Department has this authority, the commentators stated, there is no sufficiently compelling policy reason for adopting a look-through rule. With respect to these points, the commentators pointed out that the Department recognized, in its Interpretive Bulletin 75-2, that the assets of an entity in which a plan invests

generally are not "plan assets".¹¹ According to the commentators, the Interpretive Bulletin is a correct and proper interpretation of ERISA, and the Department should not depart from that rule.

Other commentators suggested that even if the Department adopts a look-through rule, different standards should be applied in determining when that rule is applicable. Several of these commentators urged the Department to adopt a rule based solely upon the degree of plan investment in an entity. Under the rule suggested by the commentators, the assets of an entity in which a plan invests would include plan assets only if aggregate plan investment exceeds a specified percentage of total investment in the entity (such as 80 percent) or only if aggregate plan investment in the entity exceeds some lesser percentage (such as 50 percent) and one plan or group of related plans holds more than 10 percent of the aggregate outstanding investments in the entity. Finally, some commentators suggested that the look-through rule should apply only where a single plan or group of related plans owns more than a specified percentage of the outstanding equity interests in an entity.

B. The Final Regulation

As noted above, the final regulation adheres to the general approach of the proposed regulation although a number of specific changes have been made.

In the Department's view, the regulation is necessary for several reasons. First, in the absence of a regulation it would be relatively easy for an investment manager to avoid compliance with the fiduciary responsibility provisions of ERISA by indirectly providing investment management services to plans through a separate legal entity. This result would be inconsistent with the broad, functional definition of fiduciary in ERISA as well as Congress's intention that fiduciary status should be imposed on all persons conducting certain specified activities on behalf of plans rather than merely on those who expressly agree to be fiduciaries.

Second, since many collective investment arrangements—such as limited partnerships—allow realization of economies of scale, they are often especially suited for the purposes of smaller plans. Moreover, testimony at the public hearing on the proposed regulation indicated that the traditional forms of collective investment specifically addressed in ERISA—bank

collective trust funds and insurance company separate accounts—are generally available only to larger plans. Thus, if other forms of collective investment that are suitable for small plans are not subject to the fiduciary responsibility rules of ERISA, the full protections of those rules would be available for larger plans, but would not be available for smaller plans.

Third, although the legislative history and the statute itself provide specific guidance regarding the application of the fiduciary responsibility rules to certain traditional forms of collective investment, they do not describe how those rules should apply to other forms of collective investment. Thus, if the Department does not adopt a regulation, uncertainty about the scope of the fiduciary responsibility rules will persist until such time as the issue is settled in litigation. This uncertainty would, in the Department's view, be detrimental to plans as well as to persons marketing investments to plans.

The Department also believes that the general approach of the proposed regulation, which takes into account the nature of the plan's investment, the nature of the entity to which the investment relates, and the nature of other investors, is the most appropriate way of distinguishing investments that are vehicles for the indirect provision of investment management services from those that are not. In this respect, the Department has concluded that, although the degree of plan investment in an entity is relevant to a determination whether the underlying assets of an entity include plan assets, that factor alone should not be dispositive.

Finally, the Department believes that it has authority under ERISA to promulgate the final regulation set forth here.¹²

II. Scope of the Regulation

A. The Proposed Regulation

The proposed regulation described what constitute "plan assets" with respect to a plan's investment in another entity for purposes of Subtitle A (definitional and coverage provisions) and Parts 1 and 4 (reporting and disclosure and fiduciary provisions) of Subtitle B of Title I of ERISA and for purposes of section 4975 of the Internal Revenue Code (excise tax provisions

¹² The Department notes that not only does section 505 of ERISA contain a broad grant of rulemaking authority, but that in section 11018(d) of Pub. L. 99-272 Congress has expressly instructed the Department to issue a final regulation defining "plan assets" by December 31, 1986.

relating to prohibited transactions).¹³ Since it applied to the prohibited transaction provisions of the Code as well as Title I of ERISA, the proposed regulations would have affected not only investments by plans that are subject to Title I (Title I plans), but also investments by plans that are not subject to Title I, but which are described in section 4975 of the Code.¹⁴ These plans include primarily individual retirement accounts (IRAs) and certain plans which are qualified for favorable tax treatment under the Code that cover only self-employed individuals.

B. Comments Received

The Department received several comments which expressed concern about the effect that the proposed regulation might have on investment opportunities for IRAs. In addition, several commentators raised questions regarding the extent to which the regulation should apply to plans other than Title I plans. In this respect, some commentators and a witness at the public hearing on the proposal emphasized that investment decisions with respect to IRAs are generally made by the persons for whom the accounts are established and that these investments thus differ substantially from those typically made by employer-sponsored plans. Finally, one commentator urged the Department to clarify whether the reference to "plan" in paragraph (a)(2) of the proposal refers to "benefit plan investors" (which include certain plans that are not subject to either Title I of ERISA or section 4975 of the Code) or only to plans described either in Title I of ERISA or in section 4975(e)(1) of the Code.

C. The Final Regulation

The final regulation will apply to determinations of what constitute "plan

¹³ Thus, as discussed in the preamble to the proposed regulation, the regulation is not relevant to "minimum standards" issues, such as matters relating to vesting and funding. With respect to the reporting and disclosure provisions of ERISA, the Department recognized that special difficulties are presented in reporting transactions involving collective investment funds whose assets include plan assets and therefore published a proposed alternative method of compliance for such entities (proposed regulation 29 CFR 2520.103-12 (50 FR 3362, January 24, 1985)). As discussed below, the Department is also publishing this regulation in final form in today's Federal Register.

¹⁴ Section 102 of Reorganization Plan Number 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), transferred the authority of the Secretary of the Treasury to issue regulations under most provisions of section 4975 of the Code, including those provisions to which the definition of the term "plan assets" is relevant, to the Secretary of Labor.

assets" for all purposes under the definitional provisions of ERISA and parts 1 and 4 of Title I of ERISA and section 4975 of the Internal Revenue Code. Thus, it will apply to investments made by IRAs and other plans described in section 4975(e)(1) of the Code in addition to plans that are subject to the requirements of Title I of ERISA. The Department has determined that, even though there may be differences between IRAs and Title I plans that affect the kinds of investments made by such plans, there is a need for consistent application of the prohibited transaction rules of ERISA and the related excise tax provisions of the Code. In this respect, it appears clear that Congress intended that the prohibited transaction excise tax provisions would not only operate to discourage the direct or indirect use of the assets of an IRA for purposes unrelated to retirement needs, but that they also would apply to transactions involving persons who are fiduciaries by reason of providing investment management services to such accounts.¹⁶ Although, as noted above, most of the Department of the Treasury's authority under section 4975 of the Code has been transferred to the Department, the Department has consulted with the Department of the Treasury regarding the scope of the final regulation.

III. Definition of Equity Interest

A. The Proposed Regulation

Under the proposed regulation, the assets of a plan would not have included an interest in the assets of an entity in which it invests unless the plan acquires an "equity interest" in the entity. Paragraph (b)(1) of the proposal stated that the term "equity interest" means any interest in an entity "other than an instrument that is treated as indebtedness under applicable local law and which has no substantial equity features." That paragraph also provided that a profits interest in a partnership, an undivided ownership interest in

property and a beneficial interest in a trust would be treated as equity interests.

The preamble to the proposal indicated that, while the question whether a plan's interest is an "equity interest" is an inherently factual one, an instrument will not fail to be a debt instrument merely because it has certain equity features—such as additional variable interest and conversion rights—that are incidental to the primary fixed obligation. In addition, an example in the proposal indicated that a plan would not acquire an "equity interest" at the time that it purchases a convertible debenture if the conversion feature is incidental to the primary obligation to pay principal and interest. However, the example also indicated that the plan would acquire an "equity interest" at the time that it exercises its option to convert the debenture to stock of the issuing corporation.

B. Discussion of Comments and the Terms of the Final Regulation.

1. *Applicable Law.* Several commentators noted that the proposal did not specify which state's law would control with respect to a determination whether a plan has invested in a debt instrument. One commentator indicated that the law of the state in which the entity is formed should control. Some commentators suggested that the exclusion in the regulation should apply to any instrument that is treated as indebtedness under local law, regardless of the extent to which the instrument has equity features.

—The Final Regulation

The reference to local law in the definition of equity interest in the final regulation is the same as the reference in the proposal. In the Department's view, the reference to local law provides an initial frame of reference for determinations whether an interest is indebtedness. With respect to the question of which law applies for purposes of determining whether an instrument is treated as indebtedness under "applicable local law," the Department intends that such determinations should be made under the law governing questions regarding interpretation of the instrument.

2. *Substantial Equity Features.* Some commentators requested that the Department provide a more meaningful explanation of when certain equity features will be considered "incidental" to the primary fixed obligation for purposes of the definition of equity interest. Several commentators specifically requested additional guidance regarding how the "substantial

equity features" element of the definition would apply to hybrid investments. One commentator suggested that the Department include a list of common equity features in the final regulation and provide in the regulation that the existence of any two of these features would constitute "substantial equity features". However, other commentators acknowledged that it is extremely difficult to characterize accurately an instrument that has both debt and equity features. Nonetheless, these commentators suggested that some certainty could be provided in this area if the Department established safe harbors under which certain hybrid instruments would not be considered "equity interests." Some commentators advocated a safe harbor based on the approach taken in the regulations proposed by the Department of the Treasury under section 385 of the Code, *i.e.*, that the instrument be characterized as debt or equity according to its predominant characteristic.¹⁶ One commentator suggested an alternative safe harbor for hybrid instruments which are considered "indebtedness" under state law and which have an effective annual interest rate on the fixed obligation portion equal to at least 60 percent of the current "applicable federal rate" under section 1274(d) of the Code.¹⁷ Another commentator proposed a safe harbor for hybrid instruments which contain certain characteristics typical of many securities offered by real estate firms. Finally, one commentator requested that the text of the regulation should state explicitly the principle established in the example discussed above, *i.e.*, that the mere presence of a conversion right which is incidental to the primary fixed obligation does not create an "equity interest" until such a right is exercised.

—The Final Regulation

The Department has decided not to modify the regulation to specify more precisely when equity features of a debt instrument become "substantial". As demonstrated by the comments on this issue, there are a vast number of different kinds of equity features, each of which provide investors with different opportunities to participate in the earnings of an entity. Thus, whether any particular investment has substantial equity features is an inherently factual question that must be

¹⁶ Congress expressly made prohibited transactions with respect to certain plans that are not covered by Title I of ERISA subject to the excise tax imposed by section 4975. Moreover, section 4975 expressly distinguishes between prohibited transactions that benefit beneficiaries of IRAs and those that do not: Section 408(e)(2)(A) and section 408(e)(4) of the Code provide that an individual retirement account will lose its tax exempt status if any of the assets of the account are used to engage in a prohibited transaction for the benefit of an individual who has established an account or who is a beneficiary of the account, and section 4975(c)(3) of the Code provides for the abatement of the excise tax that would otherwise be imposed with respect to such a prohibited transaction. No similar abatement is provided for other kinds of prohibited transactions involving IRAs, however.

¹⁶ Formerly 26 CFR 1.385-1—1.385-10 (adopted December 29, 1980 and withdrawn August 8, 1983).

¹⁷ Section 1274 of the Code establishes rules for imputing a rate of interest to certain debt instruments; the "applicable Federal rate" is one element in making such a determination.

resolved on a case-by-case basis. In making such a determination, however, it would be appropriate, in the Department's view, to take into account whether the equity features of an instrument are such that a plan's investment in the instrument would be a practical vehicle for the indirect provision of investment management services. Nonetheless, as reflected in the definition of equity interest, the Department has concluded that the mere fact that a debt instrument has some equity features does not require characterization of the instrument as an equity interest.

3. *Timing.* A number of comments addressed the issue of when a determination should be made that a particular instrument is debt or equity. Several commentators expressed concern with the implication in the proposal that characterization of an instrument as debt or equity might change over time. One commentator advocated that a determination of the character of an instrument be made at the time of its initial issuance. Another commentator suggested that the characterization of an instrument at the time of issuance should control unless a significant change is made to the terms of the instrument itself. Other commentators suggested that a determination of whether an instrument creates a debt or equity interest should be made at the time of the plan's investment.

—The Final Regulation

The definition of equity interest in the final regulation in effect provides that characterization of an instrument as debt or equity is made continuously during a plan's holding of the instrument. Thus, for example, if a plan acquires an instrument which is debt at the time of acquisition, but due to changing market conditions the equity features become significant, the instrument would then be characterized as an "equity interest." This approach will provide for uniform treatment among plan investors, because the characterization given a particular class of securities will not be different for different plan investors depending solely on when the plans happened to make the investment, and will assure that plans' holdings of instruments that provide a significant opportunity to participate in the earnings of the issuer will be tested under the other rules in the regulation in order to determine whether the investments are vehicles for the indirect provision of investment management services.

IV. The "Publicly-Offered" Exception

A. The Proposed Regulation

As noted above, the look-through rule in the proposed regulation would not have applied in the case of a plan's investment in "publicly-offered" securities. Thus, the managers of an issuer of publicly-offered securities would not have been considered ERISA fiduciaries solely by reason of a plan's acquisition of such securities.

Paragraph (b)(2) of the proposed regulation defined "publicly-offered securities" as securities which are widely-held, freely transferable, and part of a class of securities registered pursuant to section 12(b) or 12(g) of the Securities Exchange Act of 1934, or sold to a plan from a public offering pursuant to an effective registration statement under the Securities Act of 1933 and the class of securities of which such security is a part is subsequently registered under the 1934 Securities Act. The proposal also indicated that a security would not be publicly-offered if it is part of an offering that is directed primarily to tax-exempt entities. The Department indicated in the preamble to the proposal that, although a determination whether a security is offered primarily to tax-exempt entities would be made on a case-by-case basis, a security would be considered to be offered primarily to such entities if it is subject to restrictions on transfer that result, or are likely to result, in the security being acquired primarily by tax-exempt entities, or if the disclosure materials relating to the offering indicate that the investment is intended primarily for such entities.

With respect to the "free transferability" requirement, the Department stated in the preamble to the proposal that the extent to which any particular restriction affects the free transferability of a security is a factual question to be resolved on a case-by-case basis.

B. Discussion of Comments and the Terms of the Final Regulation

1. *"Primarily to Tax Exempt Investors" Limitation.* The limitation to the publicly-offered exception that made the exception unavailable in the case of offerings primarily to tax-exempt investors was the single most controversial provision of the proposal, and a large number of commentators urged the Department to delete the limitation. These comments were made principally by sponsors of real estate limited partnerships designed especially for plan investors and by certain real estate investment trusts (REITs).

The commentators argued that public real estate partnerships are sufficiently different from traditional pooled investment funds in which plans participate that plan investments in such partnerships should not be considered the functional equivalent of retaining the general partner to provide investment management services. Moreover, the commentators described at some length the scope of regulation of public real estate partnerships under federal and state securities laws. These commentators contended that widely-held, freely transferable securities issued by public real estate partnerships are similar to equity securities issued by registered investment companies, the underlying assets of which are not treated as plan assets under ERISA.¹⁸

The commentators also argued that if the underlying assets of a publicly-offered real estate partnership are considered to include plan assets, and if managers of public real estate partnerships are treated as ERISA fiduciaries, it would be extremely difficult, if not impossible, for many partnerships with large numbers of plan investors to comply with the ERISA prohibited transaction rules. In this respect, the commentators noted that, due to the high minimum investment requirements for participation in bank and insurance company pooled real estate vehicles, REITs and public real estate partnerships are the primary means by which small and medium sized plans invest in real estate.

Most of the commentators urged the Department to delete the "primarily to tax-exempt investors" limitation entirely so that the publicly-offered exception would be available for securities offerings directed particularly to plans. Some commentators also suggested, however, that if a limitation to the publicly-offered exception were retained in the final regulation, it should apply only to offerings made primarily to Title I plans.

—The Final Regulation

The Department has deleted the primarily offered limitation from the publicly-offered exception in the final regulation. Thus, the assets of an entity whose securities are widely-held, freely transferable and registered under the federal securities acts would not include plan assets even where those securities are offered primarily, or even exclusively, to plans. Consequently, the managers of such entities would not be ERISA fiduciaries merely because there is plan investment in the entity.

¹⁸ See section 3(21)(B) and 401(b)(1) of ERISA, discussed above.

The primary basis for the proposed publicly-offered exception was to prevent the regulation from operating to create inadvertent ERISA fiduciaries. The manager of a publicly-offered entity typically is not able to control plan investment in the entity and often is not readily able to determine whether a particular investor is, or is not, a plan. In these circumstances, the Department concluded that it would be inappropriate to impose fiduciary responsibility on the entity's managers—even where the entity is an investment fund—merely because plans happen to invest in the entity.¹⁹

The limitation to the publicly-offered exclusion in the 1985 proposal was based on the Department's conclusion that, where a securities offering in an investment fund is made especially to plans, the primary rationale for the publicly-offered exception would not be applicable because the issuer of securities that are offered primarily to plans cannot be said to have "inadvertently" assumed fiduciary responsibilities that might result from plan investment. Based on the comments received concerning the limitation, however, the Department has reexamined the role of the publicly-offered exception.

In deciding to delete the limitation, the Department has considered the existing federal regulatory structure relating to companies that invest and reinvest capital. In enacting the Investment Company Act of 1940, Congress created a system of substantive federal regulation for companies that invest in securities, but did not extend such regulation to companies that invest in property other than securities. Thus, although publicly-offered securities of companies which invest in property other than securities (such as real estate) are subject to the disclosure-oriented Securities Act of 1933 and Securities Exchange Act of 1934, these companies generally are not subject to substantive federal regulation of their business activities. Congress specifically recognized that the Investment Company Act would result in such differing regulatory treatment. In this respect, the legislative history of the Investment Company Act indicates that Congress found that investment funds consisting of securities are particularly susceptible to abuse because securities are typically highly liquid investments.²⁰ Moreover, the staff of the

Securities and Exchange Commission has recognized this distinction several times in expressing opinions regarding the scope of the Investment Company Act.²¹

As discussed above, the Department has concluded that the plan assets regulation is essential in order to protect fundamental principles under the fiduciary responsibility provisions of ERISA and to implement Congress's intent in enacting ERISA. In formulating the final regulation, however, the Department has also taken into account Congressional decisions implementing other federal policies. In the Department's view, it would be inappropriate, in the absence of compelling reasons for doing so, to take a regulatory position here which would disrupt the Congressional balancing of policy interests that is reflected in the federal securities laws. Thus, the Department has balanced the apparent need to apply the fiduciary responsibility provisions of ERISA to the issuers of publicly-offered securities against the intrusion on other federal regulatory policies that would result from such application. In this respect, it appears that, although public offerings have been developed which take into account the particular investment needs of plans, there is no clear indication that plan investments in such offerings have on the whole operated to the detriment of the investing plans or their beneficiaries.²²

Accordingly, the Department has determined that the benefits of extending the ERISA fiduciary responsibility rules to the managers of issuers of such securities are outweighed by the disruption of other federal regulatory policies which would result from such a rule.

The Department also believes that the "widely-held" and "freely transferable" requirements under the publicly-offered exception will provide plan investors two significant protections: (1) The ability to liquidate an unattractive investment; and (2) diminution of concentration of ownership in any one

investor due to the large number of investors in the entity so that it will be less likely that the entity's managers will engage in transactions for the benefit of persons related to any particular investor.

The Department also notes that investing plan fiduciaries have a duty to carefully evaluate plan investments in publicly-offered securities that are issued by entities that are similar to investment funds. A plan fiduciary is obligated under ERISA to consider all relevant information in making investment decisions.²³ Thus, whether the underlying assets of an entity include "plan assets" is one factor that a plan fiduciary should consider in making a decision to invest in an entity.

2. The Widely-Held Requirement.

Some commentators also suggested that the final regulation clarify the term "widely-held" as it is used in the publicly-offered exception. In general, these comments stated that the Department should include in the final regulation a statement made in the preamble to the 1979 plan assets proposal to the effect that interests in an entity ordinarily will be considered "widely-held" if they are held by 100 or more persons. Commentators on behalf of REITs particularly stressed this point, noting that under section 856 of the Internal Revenue Code a REIT must have 100 or more investors to qualify for favorable tax treatment. Other commentators suggested that the "widely-held" requirement be replaced by a limitation on the amount of the outstanding interests in an entity that could be held by any single investor (for example, 5 percent). According to the commentators, this test would assure that no plan investor would be able to exercise a controlling influence over the entity's management.

—The Final Regulation

In the final regulation, the Department has provided a more precise definition of the term "widely-held" as it is used in the publicly-offered exception. Under the final regulation, securities will be considered "widely-held" only if they are part of a class of securities purchased and held by 100 or more persons who are independent of the issuer and of one another.²⁴ This bright line test was chosen to provide as much clarity and certainty as possible. The requirement that the investors be independent of each other and the

¹⁹ See, e.g., Merrill, Lynch, Pierce, Fenner & Smith Inc., [1982] Fed. Sec. L. Rep. (CCH) ¶ 77,089 at 77,750 (October 5, 1981).

²⁰ In individual cases, a plan's investment in publicly-offered securities of companies which invest in property other than securities (which are thus not regulated by the Investment Company Act of 1940) might result in losses to the plan and in some cases such losses may be attributable to the misconduct of the manager of the entity to which the securities relate. The Department, however, has not identified the kind of pattern of abuse that would provide a sufficiently compelling reason for applying a look-through rule to plan investments in such securities. Of course, if such a pattern of abuse were to develop, the Department would need to reexamine its conclusions.

²³ See 29 CFR 2550.404a-1(b)(1).

²⁴ Securities will not, however, be considered to fail this test if subsequent to issuance, events beyond the issuer's control cause the securities to be held by fewer than 100 independent investors.

¹⁹ See the discussion of the similar publicly-offered exception in the Department's 1979 plan assets proposal (44 FR 50364-5, August 28, 1979).

²⁰ See H.R. Rep. No. 2639, 76th Cong., 3d Sess. 7 (1940).

management of the entity to which the investment relates will assure that this aspect of the publicly-offered exception will not be subject to manipulation, for example, by the issuance of securities to affiliates of the issuer or to small groups of related investors.

3. The Free Transferability Requirement. A number of commentators also urged that the Department either eliminate the free transferability element of the publicly-offered exception or that it specifically indicate that customary restrictions on the transfer of limited partnership and REIT interests will not cause those interests to fail to meet the requirement. In general, the commentators suggested that the Department indicate that four categories of restrictions would be permissible. These included restrictions necessary to comply with: (1) Applicable federal or state securities laws; (2) federal or state tax law; (3) state partnership laws; or (4) reasonable administrative processing needs.

Public real estate partnerships and REITs also specifically requested that the Department make it clear that the existence of a right of first refusal will not cause a security to fail to be freely transferable. In the case of partnerships, the commentators noted, a right of first refusal (*i.e.*, a requirement that an issuer be provided an opportunity to acquire securities that an investor wishes to sell before they may be sold to another party) is a useful way of preventing the premature termination or liquidation of the partnership for tax purposes; the commentators also indicated that in the case of REITs, a right of first refusal helps assure that the REIT will not lose its qualification for favorable tax treatment under section 856 of the Code.

Some commentators also suggested that the final regulation should provide that the free transferability requirement is met if investors have the ability to freely assign the economic benefits of ownership of securities even though the original investor retains legal title to the securities.

The commentators also noted that REITs and public real estate partnerships frequently require prior approval by a general partner or other co-investors as a condition to transfer of a limited partnership interest. The commentators indicated that this kind of restriction, as well as suitability standards for potential transferees, aid REITs and limited partnerships in meeting requirements under state and federal tax and securities laws, and they urged the Department to make it clear that such requirements would not affect the free transferability of securities.

Some commentators also requested that the final regulation make it clear that reasonable administrative fees could be imposed with respect to the transfer of securities without affecting the free transferability of the securities.

—The Final Regulation

In general, the Department has concluded that a determination whether a security is considered freely transferable is a factual one to be made on the basis of the circumstances of each case. Nonetheless, because the comments demonstrate that many federal and state requirements exist which might be considered to affect the "free transferability" of a security, the Department has also determined that some additional clarification is necessary. In the opinion of the Department, the minimum amount which can be purchased by an investor is a characteristic of a securities offering which will frequently affect the ability of an investor to liquidate his investment. For example, where the amount of the minimum investment is relatively low, the securities which are the subject of the offering are more likely to be widely distributed and it is more likely that the securities can be easily liquidated. Conversely, where the amount of the minimum investment is relatively high, there are likely to be more limited opportunities to dispose of the securities.

Based on the information submitted by commentators, the Department has concluded that where a minimum investment in a public offering is \$10,000 or less, the securities in question are likely to be widely distributed. Thus, although a determination whether securities offered in a public offering in which the minimum investment is \$10,000 or less are freely transferable is ultimately a factual question under the final regulation, paragraph (b)(4) contains a list of eight types of permissible restrictions which ordinarily will not, alone or in combination, affect a finding that such securities are freely transferable. These permissible restrictions are derived from the special transitional rule for publicly-offered real estate companies in Public Law 99-272.²⁵ The enumerated restrictions include restrictions necessary to permit partnerships to comply with applicable federal and state laws, to assure favorable treatment under federal or state tax law, and to meet reasonable

²⁵ Section 11018(a) of Pub. L. 99-272, in effect establishes an effective date provision for the final plan assets regulation to the extent that it would characterize the assets of publicly-offered real estate entities as including plan assets. This provision is discussed in more detail below.

administrative processing needs. Thus, the final regulation in effect establishes a presumption that securities will be considered freely transferable, notwithstanding the existence of the enumerated restrictions, where they are part of an offering in which the minimum investment is \$10,000 or less.²⁶

In those cases where the minimum investment exceeds \$10,000, whether a security is freely transferable will be determined under the final regulation based on all the relevant facts and circumstances. In such cases, the minimum investment restriction as well as any other type of restriction applicable to a security should be considered in determining whether the security is freely transferable. The Department emphasizes, however, that the existence of the kinds of restrictions on transfer that fit within one or more of the specific categories discussed above would not necessarily result in a determination that securities are not freely transferable, even where the minimum permitted investment in the securities exceeds \$10,000. However, the presumption that such restrictions do not affect the free transferability of the securities would not be available in these circumstances.

The Department believes these rules will allow publicly-offered entities to meet certain federal and state requirements while still assuring that the publicly-offered exclusion in the final regulation will only apply to securities which in fact provide a plan investor a reasonable opportunity to liquidate its investment.

V. The Significant Participation Exception

A. The Proposed Regulation

Under the proposal, the underlying assets of an entity in which a plan invests would have included plan assets only if equity participation in the entity by benefit plan investors is "significant." The proposal indicated that equity participation in an entity would be "significant" on any date if, immediately after the most recent acquisition of any equity interest in the entity, 20 percent or more of the value of any class of equity interests is held by "benefit plan investors". The proposal

²⁶ On the basis of the record, it appears to the Department that the offering value of minimum investment units of widely distributed collective investment vehicles is \$10,000 or less. Thus, with regard to those collective investment vehicles with minimum investment units valued within this range, the Department has determined that a plan's ability to dispose of its investment would not, in general, be greatly affected by the permissible restrictions listed in paragraph (b)(4).

defined the term "benefit plan investor" to include: (1) Any employee pension or welfare benefit plan whether or not the plan is subject to Title I of ERISA; (2) any plan described in section 4975(e)(1) of the Internal Revenue Code; and (3) any entity whose underlying assets include plan assets by reason of plan investment in the entity.

The preamble to the proposed regulation indicated that the significant participation test was based on the Department's conclusion that where there is substantial plan investment in an investment fund there is an expectation on the part of the investing plans that the assets of the fund will be managed in furtherance of the objectives of the investing plans and that in such circumstances the manager of the fund is likely to take the objectives of the investing plans into account in making investment decisions for the fund.

Finally, equity interests in an entity held by any person who would be a fiduciary if the assets of the entity included plan assets (as well as any equity interests held by an affiliate of such a person) were disregarded for purposes of the significant participation test in the proposed regulation.

B. Discussion of Comments and the Terms of the Final Regulation

A number of commentators objected to various aspects of the significant participation test. In particular, they asserted: (1) That the definition of the term "benefit plan investor" was too broad; (2) that the 20 percent test for "significant" plan investment was too low; (3) that the degree of investment by plan investors changes constantly and cannot be controlled by an entity's management, and that, even in an initial offering, the manager of an entity may not know the degree of plan investment. The commentators also stated that the significant participation exception is especially important in cases involving private offerings which do not meet the "publicly-offered security" exception. These entities are primarily venture capital companies and certain real estate companies.

1. *The 20 Percent Limitation.* Several commentators suggested modification of the 20 percent figure used in the significant participation test. These commentators contended that 20 percent ownership of a class of equity securities by benefit plan investors is not sufficient to establish the existence of the two factors on which the test was predicated—i.e., special solicitation of plan investors and an expectation on the part of the plan investors that the assets of the entity will be managed in

furtherance of their investment objectives.

The commentators stated that much of the nation's private capital is now concentrated in benefit plans and that, accordingly, it is quite possible that as much as 50 percent of an entity's equity capital may be provided by benefit plans without any special solicitation of such investors. Moreover, the commentators asserted that there is no reason to assume that a group of plan investors owning only 20 percent of an entity's outstanding securities will be able to influence the management of the entity. For these reasons, the commentators urged the Department to adopt a 50 percent test.

In addition, some commentators expressed the belief that even a 50 percent limitation would not necessarily be consistent with the underlying rationale for the exception. These commentators stated that where no single plan or group of related plans owns a large interest in an entity, benefit plan investment can be insignificant for purposes of influencing an entity's investment policies even where it is in excess of 50 percent of the aggregate investment in the entity. These commentators suggested that the final regulation should include two percentage tests related to plan investments: one relatively high percentage test which would be intended to identify cases where there has been special solicitation of plan investments by an entity's management and a smaller percentage limitation relating to individual plan investment to identify cases where a particular investor has the potential to influence the entity's business objectives.

Some commentators requested that the percentage test be applied on the basis of aggregate ownership of all classes of equity securities of a single entity rather than on a class by class basis.

Some commentators also objected to the exclusion of the value of equity interests owned by the entity manager (or its affiliates) in calculating whether there is significant plan investment in an entity. These commentators asserted that such an exclusion effectively lowers the percentage test, making it much more likely that there will be significant plan investment, without providing any additional evidence that the entity is managing its assets in furtherance of benefit plan investment goals.

—The Final Regulation

In the final regulation, the Department has increased the threshold percentage for the significant participation test to 25 percent. Although this revision makes

the "safe harbor" provided by the significant participation test available to entities in which there is a slightly greater degree of plan investment, the Department has retained the general approach of the proposal.

With respect to the comments urging a more substantial increase in the threshold percentage, the Department notes that the significant participation test was intended to provide a mechanical test which would permit entity managers and investing plans to more easily analyze the consequences under the regulation of an investment where characterization of the investment under other provisions of the regulation (such as the operating company exception) is unclear. The Department believes that such a safe harbor rule must be formulated narrowly in order to prevent its use as a method of evading the application of the fiduciary responsibility rules of ERISA. Thus, in the Department's view, the exception should only apply where plan investment is not so substantial that any special solicitation of plan investments is likely to have occurred and where there is no reasonable expectation that the investment policies of the entity will be affected by the special objectives of the plan investors.

The Department has also concluded that it is necessary to apply the significant participation test to each class of securities and to disregard investments by the entity's managers and their affiliates for purposes of applying the test. In the Department's view, without these restrictions the test could be easily manipulated so as to avoid a determination that plan investment is significant, even where plans provide a substantial degree of the entity's capital and constitute most of the outside investors in the entity. None of the comments suggested ways of avoiding this potential for manipulation.

2. *Benefit Plan Investor Definition.* Several commentators suggested that the Department should narrow the definition of "benefit plan investor" to include only Title I plans (or only plans subject to ERISA or the prohibited transaction provisions of the Code). These commentators argued that since Congress did not believe the protections of the fiduciary responsibility rules are necessary for plans that are not subject to Title I, it would be inappropriate for the Department to take non-covered plans into account in determining whether an entity holds plan assets. The commentators also noted that, in some circumstances, an entity has no means of determining whether an investor is a "benefit plan investor". In addition,

some commentators suggested that different categories of benefit plan investors may not necessarily have similar investment goals. For example, according to the commentators, foreign plans which are included in the "benefit plan investor" definition, but are not subject to ERISA, might have different objectives than domestic plans.

—The Final Regulation

The Department has adopted the definition of "benefit plan investor" as it was proposed. In reaching this decision, the Department has considered two factors. First, as noted above, the safe harbor rule embodied in the significant participation test is intended to exclude only those entities in which plan investment is so insignificant that it is unlikely that such investment has been especially sought or that the investment objectives of the entity will be influenced by the plan investors. In the Department's view, a broad definition of benefit plan investor is necessary in order to avoid manipulation of the significant participation test. Although the specific investment objectives of different kinds of plans may vary, the Department has concluded that unless all kinds of plans are taken into account for purposes of the test, entity managers would be able to avoid ERISA fiduciary status by rationing investments to plans that are covered by ERISA and offering the remaining investments to other plans that are not covered. Thus, it has concluded that all benefit plan investments should be taken into account in determining whether aggregate investment by plans is more than incidental.

With respect to the definition of benefit plan investor, the Department emphasizes that (as noted in the preamble to the proposed regulation) nothing in the regulation imposes responsibilities on fund managers with respect to plan investors that are not subject to ERISA or to the prohibited transaction provisions of the Code. Plan investors that are not subject to these statutes are merely taken into account for purposes of determining whether plan investment in the aggregate is "significant." This point is made clear in an example that was included in the proposed regulation and which is also included in the final regulation (see paragraph (j)(2) of the final regulation).

3. *Timing of Calculations of Significant Plan Participation.* Several commentators noted that since compliance with the significant participation test would be tested after each new investment, the test could operate in such a way that the consequences of a plan's investment in

an entity for plan assets purposes might be affected by subsequent events. In this respect, the commentators contended that the proposal could create administrative burdens for the managers of investment vehicles because frequent changes in the degree of plan ownership could cause frequent changes in the entity's status under the plan assets regulation and because it would be difficult to determine whether an entity meets the requirements for the exception at any particular time.

The commentators suggested two possible changes to address the problems that might be created under the approach of the proposed regulation. First, some commentators suggested that determinations of significant plan investment should be made as of the most recent acquisition of any equity interest in an entity from an issuer or an underwriter. Second, some commentators suggested that determinations of significant plan investment should be made only once with respect to each plan investment in an entity, at the time of the plan's investment. Under this approach, an entity's managers would have fiduciary obligations only to plans that invest in the entity at times when aggregate plan investment exceeds the threshold percentage.

—The Final Regulation

The Department has decided that the regulation should not be revised to permit determinations of significant participation less frequently than the proposal required, *i.e.*, after each new investment. Such continual testing assures consistent treatment of all plan investors in an entity and provides for more accurate characterization of the degree of plan investment in an entity at a given time. The Department also notes that, because of the broad publicly-offered exception that has been included in the final regulation, interests in most of the entities for which the significant participation exception will be dispositive are privately-offered. It should be relatively easy for managers of a privately-offered entity to identify plan investors and to determine whether or not there is significant benefit plan investor participation in an entity. Thus, many of the practical problems of compliance that were identified by the commentators (most of which related to large, public offerings) would not exist under the final regulation.

The significant participation test is not intended to affect the consequences of a plan's investment in debt or publicly-offered securities. Thus, for

example, if an investment fund issues a class of publicly-offered securities in which plans invest and issues a second class of equity securities in a private placement exclusively to plans, then the assets of the plans that acquired the privately-offered securities would include an interest in the underlying assets of the fund (because participation in the fund by benefit plan investors is significant since all of the private class of securities is held by plans). However, the assets of the plans that purchased the publicly-offered securities would consist only of those securities and would not include an interest in any of underlying assets of the issuer. Thus, the managers of the investment fund would be fiduciaries only with respect to the plans that purchased the privately-offered securities.

VI. Operating Companies

A. In General

1. *The Proposed Regulation.* The proposed regulation also contained an exception to the look-through rule of the proposal for plan investments in "operating companies." This exclusion was intended to distinguish between companies that carry on an active trade or business, and which thus are not likely vehicles for the indirect provision of investment management services, from investment funds which may well serve as conduits for the provision of such services. Under the proposed regulation, the term "operating company" included any company that is primarily engaged, either directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital.

The proposal also contained definitions describing two specific kinds of operating companies: "venture capital operating companies" and "real estate operating companies". Venture capital companies and many real estate companies have characteristics of both operating companies and investment funds, and the specific definitions were intended to provide guidance in determining whether the operating company exclusion would be available for such companies.

2. *Comments Relating to the General Operating Company Definition and Discussion of the General Definition in the Final Regulation.* Most of the comments received by the Department with respect to the operating company exception raised issues with respect to venture capital operating companies and real estate operating companies. These comments are discussed below.

However, several commentators urged the Department to clarify how companies engaged in various different kinds of businesses would be treated under the general operating company definition. These included comments filed on behalf of persons engaged in such activities as equipment leasing and oil and gas ventures.

—The Final Regulation

In general, whether a particular company is, or is not, an operating company under the final regulation is a factual question to be resolved taking into account the particular characteristics of the entity under consideration. As demonstrated by the comments, companies in which plans invest engage in a vast number of different activities. Although in most cases it is relatively easy to characterize an entity as either an operating company or an investment fund, some companies do carry on both kinds of activities. The Department has concluded, however, that, other than with respect to real estate companies and venture capital companies, it would be impractical to provide detailed guidance concerning the types of activities necessary for characterization as an operating company. Accordingly, the general operating company definition in the final regulation is the same as that in the proposal.

B. The Venture Capital Operating Company Exception

1. *The Proposed Regulation.* Under the proposed regulation, there were two elements to the definition of "venture capital operating company". First, at least 85 percent of the firm's assets (not including short-term investments) would have been required to be invested in "venture capital investments" or "derivative investments" (as defined in the proposed regulation). Second, a venture capital firm would have been required to actually exercise "management rights" in at least one of the portfolio companies in which it invests. The proposed regulation also indicated that whether an entity meets the 85 percent test is determined annually on a fixed date and that assets would be valued at their fair market value.

A "venture capital investment" was defined in the proposal as an investment in an enterprise with respect to which the investor has or obtains "management rights" and certain "derivative" investments which are related to investments which provide for management rights.

The term "management rights" was defined in the proposal as rights to

substantially participate in, or substantially influence the conduct of, the management of an enterprise. The preamble to the proposed regulation stated that the fact that the holder of corporate securities has the right to appoint one or more directors of the corporation would indicate that the securities are venture capital investments, as would the fact that a representative of the holder of such securities serves as a corporate officer. The preamble also suggested that special rights to examine the books of a nonpublic entity and the fact that an investment constitutes a significant portion of the equity capitalization of a nonpublic issuer may be indicative of management rights.

An example in the proposed regulation indicated that a company must also actually exercise management rights in the ordinary course of its business, and not on a sporadic basis in order to be treated as a venture capital operating company. The proposed regulation also indicated that it is sufficient for a venture capital company to actually participate in the management of only one company in order to meet this requirement. The preamble to the proposal made it clear, however, that substantial resources must be devoted to management efforts.

2. *Discussion of Comments and the Terms of the Final Regulation.* Several venture capital firms commented on the venture capital operating company definition of the proposed regulation. There were three main aspects of the proposal which most concerned these commentators. First, the commentators expressed reservations about the requirement that 85 percent of a venture capital operating company's assets must be invested in companies with respect to which it obtains management rights. Second, the commentators were also concerned with certain aspects of the method of determining compliance with the 85 percent test and the method of valuing securities for purposes of that test. Third, the commentators requested the Department to clarify in the final regulation what kinds of investment covenants and other rights constitute "management rights." The commentators' concerns with each of these aspects of the proposal, and the Department's conclusions with respect to these points, are discussed below.

a. *The Percentage Test.* Most of the venture capital commentators suggested that the Department lower the 85 percent test. Their primary argument was that the 85 percent level does not allow enough flexibility for ordinary venture capital activities and would operate to deprive venture capital

companies of the opportunity to diversify investments.

The problem most frequently voiced by the commentators was that the 85 percent test would effectively preclude participation in "later stage" financings because management rights have been ceded to early and middle stage investors and later stage investors ordinarily do not acquire those rights. The commentators expressed similar concerns with respect to investments in newly issued public securities of emerging growth companies because management rights typically are not given in public offerings. According to the commentators, a lower percentage test would also provide venture capital companies with more flexibility to respond to fluctuations in the business cycle.

The most frequently suggested alternative to the 85 percent test was a 50 percent test. However, several commentators suggested alternative levels between 60 percent and 85 percent.

—The Final Regulation

In the final regulation, the Department has replaced the 85 percent test in the definition of venture capital operating company with a 50 percent test. In the Department's view, this level provides venture capital companies with flexibility to respond to changing economic conditions and will enable venture capital companies to diversify investments and thus mitigate the risk associated with venture capital investments. Since companies must devote at least half of their assets on an ongoing basis to venture capital investments, however, the Department is also of the view that the exclusion for venture capital operating companies will continue to be confined to those companies that have demonstrated a substantial ongoing commitment to the venture capital business.

b. *Computation of the Percentage Test and Valuation of Assets.* Several commentators also suggested alternatives to the annual determination of compliance with the percentage test in the definition of venture capital operating company and with the requirement that such computation be based on the fair market value of the company's assets. Specifically, some commentators suggested that compliance with the percentage standard should be determined on an acquisition basis.²⁷ Finally, several

²⁷Under an acquisition test, a company, once it has initially complied with the applicable percentage test, would cease to be treated as a

commentators suggested that a company's assets should be valued at book value (generally cost) rather than fair market value for purposes of determining compliance with the percentage test.

Some commentators also indicated that compliance with the annual valuation test in the proposed regulation would be particularly difficult for venture capital companies that have recently been formed as well as for venture capital companies that are winding up their affairs.

—The Final Regulation

The Department has made several revisions to the computational aspects of the definition of venture capital operating company.

First, in the final regulation, assets are to be valued at their cost for purposes of applying the 50 percent test. This modification should eliminate the difficulties that were identified by the commentators in valuing assets for which there is no recognized market. Moreover, the Department has determined that valuing assets at cost is a more appropriate way of applying the percentage test because that method focuses on the degree of a company's commitment of resources to venture capital activities and because, under that method, a company's compliance with the percentage test will not be affected by the relative success or failure of venture capital investments relative to other investments.

Second, the Department has modified the annual method of determining compliance with the percentage test. Under the revised test, a venture capital operating company must meet the 50 percent standard when it first makes long-term investments.²⁸ Thereafter, a company is treated as a venture capital operating company if on any day during an annual "valuation period" it complies with the 50 percent test. In the Department's view, the use of an annual valuation period will provide venture capital companies with some additional flexibility in complying with the annual 50 percent test while assuring that an entity's compliance with the requirements for treatment as a venture

venture capital operating company only if it makes an investment that is not a venture capital investment the effect of which would be to cause the initial cost of the company's non-venture capital investments to exceed the applicable percentage of the initial cost of all the company's investments.

²⁸ In the case of an existing venture capital or real estate company, the initial valuation date is any date designated by the company within the 12 month period ending on the effective date of the regulation.

capital operating company is regularly tested.²⁹

A "valuation period" is a fixed period which must occur annually, which may not exceed 90 days in duration, and which must begin no later than the anniversary of the date on which the company first becomes a venture capital operating company. The operation of the percentage test is illustrated by the following example: A venture capital company, A, makes a long-term investment on July 15, 1987 and immediately after such investment, A meets the 50 percent test described in paragraph (d)(1)(i). A's "initial valuation date" is July 15, 1987 (see paragraph (d)(1)). Since the initial annual valuation period must begin no later than the anniversary of the initial valuation date (see paragraph (d)(5)(ii)), A's first valuation period may begin no later than July 15, 1988. A establishes the period from July 15 until October 12 as its annual valuation period. Since the regulation provides that a company which complies with the 50 percent test on its initial valuation date is treated as a venture capital operating company until the end of its first valuation period (see paragraph (d)(1)), A does not need to demonstrate compliance with the 50 percent test until October 12, 1988. Thereafter, A must comply with the percentage test on at least one day within the period that begins with July 15 and ends with October 12 of each year.³⁰

Third, the definition of venture capital operating company also includes a special rule for companies that are in the process of distributing assets to investors.³¹ Under this rule, once a

²⁹ As in the proposed regulation, short-term investments pending long-term commitment are disregarded for purposes of applying the 50 percent test. In the final regulation, the Department has also made it clear that short-term investments made pending distributions to investors also may be disregarded. The Department intends that the investments which are disregarded under this exclusion would be confined to investments—such as commercial paper and similar instruments—that are in fact short-term and which in fact are held by the venture capital company pending long-term investment or distribution to investors. Thus, a venture capital operating company could not hold a portfolio of short-term investments indefinitely and continue to disregard them for purposes of the 50 percent test.

³⁰ However, the company for "good cause"—such as a change in fiscal year for independent business reasons—may change the fixed annual valuation period.

³¹ The Department notes that distributions of assets (or proceeds) in this context could also include in-kind distributions.

venture capital operating company elects to enter a "distribution period" (after it has distributed 50 percent of its assets, on a cost basis, to investors) it will continue to be treated as a venture capital operating company for the remainder of the distribution period. However, under this rule, a company that has elected to begin a distribution period will cease to be treated as a venture capital operating company if it makes any new portfolio investment (an investment in a company in which the venture capital operating company has not maintained a venture capital investment at all times since the beginning of the distribution period) or upon the expiration of 10 years after the beginning of the distribution period. For example, assume that a venture capital operating company makes three investments. Investment A is a venture capital investment and had a cost of \$500,000. Investment B is also a venture capital investment and had a cost of \$250,000. Investment C is not a venture capital investment and had a cost of \$200,000. Assume further that the venture capital operating company sells Investment A for \$1,000,000 and distributes the proceeds to investors in the venture capital company. After this sale, the venture capital operating company may elect to enter a distribution period because it has distributed the proceeds of at least 50 percent of its total investments valued at cost. If the company elects to enter a distribution period, it will continue to be treated as a venture capital operating company notwithstanding that it may thereafter fail to satisfy the annual 50 percent test (for example, by selling Investment B, the remaining venture capital investment, and distributing the proceeds to investors before selling Investment C, the non-venture capital investment). This treatment would continue until the earliest of (1) the date the venture capital operating company distributes all of its assets, (2) the date 10 years from the beginning of the distribution period, or (3) the date on which the company makes a "new portfolio investment."

c. Venture Capital Investments. A number of commentators suggested that the Department expand the definition of management rights. These commentators urged particularly that a venture capital company should be considered to have acquired management rights in cases where it participates in a syndication in which management rights are given only to a lead investor. The commentators indicated that syndications are common in the venture capital industry and that

management rights acquired by the lead investor in a syndicate should in effect be attributed to the other investors in such syndicate.

Several commentators also suggested that the Department treat "later stage" investments in portfolio companies as venture capital investments even though management rights with respect to the company have been ceded to early stage investors. These commentators urged that the final regulation indicate that if a portfolio company grants management rights to any investor (or group of investors) these management rights will be deemed also to have been granted to later stage investors so long as management rights remain in effect at the time subsequent investors acquire securities from the company. In the alternative, some commentators suggested several characteristics of later stage investments which should be treated as indicative of the existence of management rights. These included: special rights to examine books and records of an issuer, appointment of an employee of a venture capital fund to serve as a corporate officer of a public or nonpublic issuer, investment in five percent or more of the voting securities of an issuer, and rights to redeem securities, preemptive rights, or rights of co-sale with respect to a public or nonpublic issuer.

Other commentators suggested that the final regulation make it clear that newly issued public securities of emerging growth companies would be considered venture capital investments.

Several commentators also suggested revisions to the definition of "derivative investments" in the proposed regulations. These commentators noted that venture capital investors sometimes lose management rights with respect to an investment for reasons other than an initial public offering—for example, as a result of a merger or reorganization. These commentators suggested that securities acquired in exchange for venture capital investments as a result of such changes in corporate structure should be treated as derivative investments.

Some commentators also expressed concern that the standards in the proposed regulation limiting the period during which an investment may be treated as a derivative investment might have the effect of forcing a venture capital company to dispose of a derivative investment at an inopportune time. These commentators suggested that a derivative investment should in all cases continue to be treated as such an investment until the expiration of some stated period after it first becomes a derivative investment.

Finally, some commentators suggested that a venture capital fund of funds (which invests in numerous venture capital companies and in turn sells shares to plans) should be excluded from plan asset treatment by expanding the definition of "venture capital investments" to include investments in an entity which is a "venture capital operating company".

—The Final Regulation

The general definition of venture capital investments in the proposed regulation has been retained in the final regulation. The comments on the proposed regulation and the testimony at the public hearing demonstrated that venture capital companies engage in a variety of different kinds of investment activities and that the kinds of rights to participate in management that such companies obtain vary widely. Thus, it is difficult to develop standards of general application regarding what constitute venture capital investments. In addition, it would be extremely difficult, if not impossible, to fashion a definition that would be responsive to the points made by the commentators, but which would not be so inclusive that virtually any investment would qualify as a venture capital investment. In this respect, the 50 percent test in the final regulation will provide substantially greater flexibility to venture capital companies than the 85 percent test included in the proposal, particularly since determinations of compliance with the percentage test will be made on the basis of the cost of investments. Thus, the Department has concluded that there is less need for additional guidance regarding the precise scope of the term "venture capital investments".

The Department has made some clarifying modifications to the definition of venture capital investment, however. First, the regulation has been revised to make it clear that management rights must be direct contractual rights running from an operating company to a venture capital operating company. Thus, under the final regulation, management rights that are acquired by the lead investor in a syndication would not be attributed to other companies that participate in the syndication and therefore the investments through the syndication would not be venture capital investments for companies other than the lead investor.

Similarly, where management rights may be exercised only by a group of investors acting together, those rights would not be attributed to the individual members of the group. In these circumstances, an individual member of the group has a right to participate in

collective decisions with respect to the group's management rights, but it has not itself obtained rights to influence, or participate in, the management of a portfolio company. However, where members of such a group of investors appoint one lead investor to act on behalf of the group, the group has effectively delegated its contractual management rights to the lead investor and that investor would therefore be considered to have obtained management rights with respect to its investment even though it exercises those rights pursuant to an agreement with the group rather than pursuant to an agreement directly with the portfolio company. In addition, the Department notes that different venture capital investors in a single entity may obtain different kinds of management rights. For example, in a syndication arrangement, the lead venture capital investor may obtain a contractual right to appoint a member of the portfolio company's board while other venture capital investors in the syndication may contract for other kinds of management rights.

Second, the Department has modified the definition of "venture capital investment" in the proposal to make it clear that portfolio companies in which venture capital operating companies invest must themselves be operating companies. As noted above, venture capital operating companies have characteristics of passive investment funds as well as operating company characteristics. The exclusion for venture capital operating companies is based on the Department's determination that the "operating" activities of such companies predominate because they obtain and exercise management rights in portfolio companies that are actively engaged in the production or sale of a product or service other than the investment of capital. Thus, this revision is consistent with the purposes underlying the venture capital operating company exception as well as with the Department's understanding of the activities of venture capital companies. Where a company is primarily engaged in the business of investing in venture capital operating companies, however, its relationship to the management of companies that actually produce or sell a product or service is much more remote. Accordingly, as revised, the definition of venture capital investment does not extend to investments in venture capital operating companies. Thus, the venture capital operating company exception would not be available for a venture capital fund of

funds even where such a fund obtains management rights with respect to the venture capital operating companies in which it invests.

Third, the Department has modified the examples in the final regulation relating to venture capital companies to avoid an implication that management rights may only be acquired with respect to nonpublic companies.

Fourth, the Department has modified the definition of derivative investments to include certain securities acquired in a merger or corporate reorganization (provided the merger or reorganization is undertaken for independent business reasons other than extinguishing an investor's management rights) and to provide that a derivative investment will retain its status until the later of 10 years after the acquisition of the original venture capital investment to which the derivative investment relates, or 30 months after the investment becomes a derivative investment.

d. Small Business Investment Companies. Some commentators suggested that the Department specifically include small business investment companies (SBICs) within the definition of a "venture capital operating company". SBICs are created under the Small Business Investment Company Act of 1958, the commentators noted, and are investment firms created for the exclusive purpose of providing growth capital and management support for new and growing small business concerns. These companies are licensed and regulated by the Small Business Administration. The commentators noted that SBICs are similar to venture capital operating companies and are subject to oversight by another federal agency. Thus, the commentators argued, the policy considerations supporting other exclusions from the proposed regulation (particularly the venture capital operating company exception and the exclusion for registered investment companies) also support exclusion of SBICs.

—The Final Regulation

The Department has decided not to include a specific reference to small business investment companies in the definition of an "operating company" because many of the practical problems of compliance identified by the commentators would not exist under the final regulation due to changes made to the "venture capital operating company" exception. The Department has also concluded that it would be inappropriate to treat a SBIC as an additional specific kind of "operating company" unless it satisfies the definition of "operating company"

provided in the final regulation, which includes the modified definition of a "venture capital operating company". Thus, a small business investment company may qualify as a venture capital operating company under the final regulation if it invests at least 50 percent of its assets (valued at cost) in operating companies as to which it has or obtains management rights. Moreover, a small business investment company that initially meets the requirements for treatment as a venture capital operating company would, of course, be subject to the "distribution period" rule, discussed above, with respect to determinations regarding its continued qualification.

C. The Real Estate Operating Company Exception

1. The Proposed Regulation. As noted above, the proposed regulation also contained an exception from plan asset treatment for "real estate operating companies." This provision was similar to the venture capital operating company exception. Thus, the term "real estate operating company" was defined as a company at least 85 percent of the assets of which are devoted directly to the management or development of real estate. As with the venture capital operating company exception, the proposal provided for an annual determination of compliance with the percentage test and assets would have been valued at their fair market value.

The preamble to the proposed regulation indicated that, to qualify as a real estate operating company, a firm must actively participate in, or influence, management decisions with respect to the properties in which it has an interest. The preamble also stated that the enterprise must in fact devote substantial resources to its management and development activities.

The proposal also included several examples illustrating the operation of the real estate operating company exception. One example indicated that a company may qualify for the exception notwithstanding that some of its real estate management and development activities are performed by independent contractors. Another example indicated that an entity may acquire rights to manage or develop real estate through the acquisition of certain kinds of mortgages on real property as well as through the acquisition of equity ownership interests. Another example in the proposed regulation made it clear, however, that mere equity ownership of real property is not sufficient to qualify for the real estate operating company exception.

2. Discussion of Comments and the Terms of the Final Regulation. As in the case of the proposed definition of venture capital operating company, several commentators expressed concern that the 85 percent test incorporated in the definition of real estate operating company would be too restrictive and thus that the exception would not extend to actively managed real estate companies which should be treated as operating companies. Several commentators also expressed concern about various aspects of the requirement that a real estate operating company be involved "directly" in the management or development of real estate. The comments with respect to each of these issues are discussed in more detail below.

a. The Percentage Test. Several commentators asserted that the 85 percent requirement was not sufficiently flexible and might deprive real estate companies of the opportunity to make certain advantageous real estate investments. A number of these commentators suggested that the Department adopt a 50 percent test. Such a test, they suggested, would be sufficient to meet the Department's concern that the exception be available only to those real estate firms that have made a substantial ongoing commitment to active real estate management or development activities, but would also provide additional flexibility to real estate firms. Another commentator suggested a "two tier" alternative to the 85 percent test. Under this approach, a firm would initially qualify for treatment as a real estate operating company if a specified, relatively high, percentage of its assets are devoted to real estate management and development activities. After the company meets this initial qualification test, however, it would not lose its qualification unless the percentage of assets devoted to real estate management or development activities falls below another, lower percentage. Another group of commentators suggested that the Department adopt a percentage level between 50 and 80 percent (such as 60 or 70 percent) in lieu of the 85 percent test in the proposed rule.

Finally, several commentators suggested that the Department indicate more clearly whether real estate which is owned and actively managed or developed by an entity would be considered assets "devoted to" the management or development of real estate.

—The Final Regulation

The Department has decided that an entity should be treated as a real estate

operating company if at least 50 percent of its assets are invested in real estate which is managed or developed and with respect to which the entity has the right to substantially participate directly in the management or development activities. Further, in the ordinary course of its business, the entity must actually engage in real estate management or development activities. This approach is consistent with the approach taken with respect to venture capital operating companies and implements similar policy objectives—to ensure that only those entities which demonstrate a substantial ongoing commitment to managing and developing real estate will qualify for treatment as real estate operating companies—while providing additional flexibility to companies that are engaged in the real estate business. In addition, for the reasons discussed above with respect to venture capital operating companies, the Department has concluded that determinations of a company's status as a real estate operating company should be made during an annual valuation period rather than on a fixed valuation date and that assets should be valued at their cost rather than fair market value for purposes of determining whether a company complies with the test.³²

Moreover, the definition of real estate operating company has been revised to conform more closely to the venture capital operating company definition. Thus, the cost of an entity's entire investment in real estate which is actually managed or developed will be taken into account for purposes of applying the percentage test provided the entity has the right to participate in such management or development activities.

b. Management or Development of Real Estate. Several commentators expressed concern about the portion of the definition of real estate operating company that relates to the requirement that a specified percentage of the company's assets be devoted "directly" to the management or development of real estate. Most of these commentators urged the Department to make it clear that the reference to "direct" management or development of real estate does not require that a company's real estate management or development activities be performed by the company's own employees in order for

the company to qualify for the exception. These commentators asserted that no legitimate policy purpose would be served if the regulation implicitly or expressly includes such a requirement because a company is not the less engaged in real estate management or development activities because it conducts its business through independent contractors than it would be if it conducts such activities solely through its own employees.

Several commentators also requested the Department to clarify what would constitute "management or development" of real estate in certain circumstances. Specifically, those commentators requested that the Department make it clear that certain activities that involve leasing, particularly shopping center management, should be considered real estate management activities for purposes of the definition of real estate operating company.

In addition, some commentators urged the Department to expand the principle (illustrated in one of the examples) that a real estate operating company could obtain management or development rights through investments in mortgages. Specifically, they urged that management activity should include the management of mortgage loan portfolios, including servicing mortgages and identifying appropriate mortgage investments.

—The Final Regulation

Under the final regulation, a company will not fail to qualify for treatment as a real estate operating company solely because it uses independent contractors (including affiliates of general partners) exclusively in conducting its real estate management or development activities. This is made clear in an example in the final regulation (see paragraph (j)(8)). Based on the comments received, it appears that independent contractors are widely used in the real estate industry and that often using an independent contractor may be the most efficient way of managing property. Thus, the regulation indicates that the fact that a particular entity does, or does not, have its own employees who engage in real estate development or management activities would be only one factor in determining whether an entity is actively managing or developing real estate.

With respect to comments raising issues as to whether particular kinds of conduct constitute management or development activities, the Department has concluded that a determination whether a company is actively involved in the management or development of a

particular parcel of real estate is ultimately a factual question that must be resolved on a case by case basis. In the Department's view, however, an entity would not be engaged in the management or development of real estate for purposes of the definition of real estate operating company in the final regulation merely because it services mortgages on real property.³³ The Department has added an example to the regulation to illustrate the application of the management or development standard in certain circumstances. This example (paragraph (j)(8)) indicates that certain management activities associated with shopping center leasing may qualify as management activities.

VII. Entities That Always Hold Plan Assets.

A. Group Trusts, Bank Common and Collective Trust Funds and Insurance Company Separate Accounts.

1. *The Proposed Regulation.* Under the proposed regulation, the assets of insurance company separate accounts, group trusts and bank common or collective trust funds would generally include plan assets regardless of any other provisions of the proposal. Thus, for example, the proposed regulation provided that an insurance company managing a pooled separate account would be subject to the fiduciary responsibility rules of ERISA even though the account might otherwise qualify as a real estate operating company.

The proposal also stated, however, that the rule described above would not apply to a separate account registered as an investment company under the Investment Company Act of 1940 or to insurance company separate accounts that are maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable to the plan and to any annuitant under the plan are not affected in any manner by the investment performance of the account.

2. Discussion of the Comments and Terms of the Final Regulation.

³³ Some commentators suggested that private mortgage pools are similar to guaranteed governmental mortgage pools under 29 CFR 2550.401b-1 redesignated under this regulation as 29 CFR 2510.3 101(i) and should receive similar treatment. The Department believes there are differences between those mortgage investments which are guaranteed by agencies or instrumentalities of the federal government and other mortgage pools which do not provide for such guarantees. The Department also notes, however, that many private mortgage pools may qualify for the publicly-offered exception in the final regulation.

³² As in the case of the venture capital operating company exception, a company may disregard short-term investments pending long-term commitment or distribution to investors. As discussed in more detail above with respect to the definition of venture capital operating company, the Department intends this exclusion to apply only to a limited category of investments.

Representatives of several insurance companies and banks urged the Department to revise the regulation so that it would apply to separate accounts and bank common and collective trust funds in the same manner as it applies to other entities in which plans invest, thereby permitting separate accounts and common and collective trust funds to take advantage of the exceptions to the look-through rule, for example, the publicly-offered security exception and the real estate operating company exception. These commentators argued that separate accounts and common and collective trust funds are no different from other arrangements involving the pooling of investments of two or more plans in terms of the types of portfolio investments, the potential return or the services performed by the managers of the funds.

In addition, one commentator noted that some group trusts are also registered as investment companies under the Investment Company Act of 1940 and urged the Department to extend the exclusion relating to separate accounts that are registered investment companies to include registered investment companies that are also group trusts.

—The Final Regulation

In general, the Department has adopted the provisions relating to group trusts, bank common and collective trust funds and insurance company pooled separate accounts as they were proposed. This approach conforms with the express requirements of ERISA and the relevant legislative history.³⁴ Moreover, these provisions are also consistent with interpretive positions taken by the Department regarding group trusts, bank collective trust funds, and insurance company separate accounts.³⁵ The Department has, however, modified the final regulation to make it clear that the assets of a group trust or bank common or collective trust fund do not include plan assets if the trust is registered as an investment company under the Investment Company Act of 1940.³⁶ This

modification is consistent with the rule for insurance company separate accounts and with sections 3(21)(B) and 401(b)(1) of ERISA.

The Department emphasizes that even though the other exceptions in the regulation do not apply to a plan's investment in a group trust, bank common or collective trust fund or insurance company separate account, those exceptions might be applicable to a trust's or separate account's portfolio investments. Thus, for example, although the assets of an insurance company separate account always include plan assets under the final regulation, the underlying assets of the issuer of publicly-offered securities acquired by the separate account would not include plan assets.

B. Entities that are Wholly-Owned by a Plan

1. *The Proposed Regulation.* The proposed regulation also provided that when a plan owns all of the outstanding equity interests in an entity, the assets of the plan include those equity interests and all of the underlying assets of the entity. This provision reflected the Department's conclusion that when a plan is the sole owner of an entity there is no meaningful difference between the assets of the entity and the assets of the plan. Under the proposal, this rule applied without regard to the nature of the business activities of an entity owned by a plan. Thus, the assets of an operating company that is owned entirely by a plan would have been considered plan assets.

2. *Discussion of Comments Received and the Terms of the Final Regulation.* A number of commentators objected to the proposed rule relating to entities that are wholly-owned by plans. These commentators indicated that many wholly-owned entities are operating companies and that the operating company exception should be available for such entities. According to the commentators, it would be extremely difficult for the officers and employees of an operating company to manage the assets of the company in accordance with the fiduciary responsibility provisions of ERISA, particularly the prohibited transaction rules. Several commentators emphasized that the special rule for wholly-owned companies would be particularly

obligations of an insurance company. The Department notes that this provision deals solely with the issue of whether such a separate account holds "plan assets." By including such an exception, the Department is not, however, addressing any issues which may arise under sections 403(c)(1) or 404(a) of ERISA with respect to the use of such separate accounts.

disruptive to employee stock ownership plans (ESOPs).

—The Final Regulation

The final regulation generally retains the rule relating to entities that are wholly-owned by a plan and extends the rule to entities wholly-owned by a "related group" of plans.³⁷ The Department continues to believe that, as a general matter, where all of the outstanding equity interests in an entity are owned by a plan, there is no practical difference between the assets of the plan and the assets of the entity which is owned by the plan. The extension of the rule to entities wholly-owned by a related group of plans will assure that or more plans this rule will not be subject to manipulation, for example, by the purchase of the entire equity interest in an entity by two defined benefit plans, one of an employer and one of an affiliate of that employer. Finally, the Department has made a minor modification to the wholly-owned rule to make it clear that an entity will be considered wholly-owned by a plan even in those instances where shares are owned by others due to a state law requiring such ownership.

Under the final regulation, the rule relating to wholly-owned entities would not apply, however, in the case of one or more eligible individual account plan(s) (as defined in section 407(d)(3) of the Act) maintained by the same employer and which own(s) qualifying employer securities (described in section 407(d)(5) of the Act), provided that substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities or by members of a group of affiliated corporations of which the issuer is a member.³⁸ In general,

³⁷ A related group of plans is defined as two or more plans each of which receives 10 percent or more of its aggregate contributions from the same employer (or members of the same controlled group of corporations) or each of which is maintained by, or pursuant to a collective bargaining agreement negotiated by the same employee organization or affiliated organizations. The concept of a related group of plans is also used in the regulation published elsewhere in the Federal Register today which provides a reporting and disclosure alternative method of compliance for plans which invest in certain entities whose underlying assets include plan assets.

³⁸ For purposes of this provision, whether a corporation is an affiliate of another corporation is determined by applying the definition of "affiliate" in section 407(d)(7) of the Act. In general, under that definition, a "corporation" is an affiliate of another corporation if it is a member of a "controlled group of corporations" of which such latter corporation is a member, applying the principles of section 1563(a) of the Internal Revenue Code, but using a 50 percent ownership test rather than the 80 percent ownership test set forth in section 1563(a).

³⁴ See "Overview of the Plan Assets Issue," above, for a discussion of the statutory provisions and legislative history relating to bank common and collective trust funds and insurance company separate accounts.

³⁵ See, e.g., DOL Advisory Opinion 82-31A (group trusts), preamble to the Proposed Prohibited Transaction Class Exemption 78-19, 42 FR 54887 (October 11, 1977) (separate accounts), and preamble to Prohibited Transaction Class Exemption 80-51, 45 FR 49709 (July 25, 1980) (bank common and collective trust funds).

³⁶ The final regulation also includes the exception set forth in the proposed regulation for insurance company separate accounts that are maintained solely in connection with certain guaranteed

under section 407(d)(3) of the Act the term eligible individual account plan includes profit-sharing, stock bonus, thrift or savings plans and employee stock ownership plans. In such circumstances, the consequences under the final regulation of the plan's ownership of the employer securities would be determined under the other provisions of the regulation. For example, if an eligible individual account plan owns all of the outstanding stock of an operating company that is an employer of substantially all of the participants in the plan, then the operating company exception would be applicable, and accordingly the assets of the plan would include the employer securities, but would not include any interest in the underlying assets of the employer.

The provision relating to qualifying employer securities is consistent with provisions of ERISA which permit certain individual account plans to hold up to 100 percent of their assets in qualifying employer securities in order to provide an incentive to employees by allowing them to participate in the earnings of the employer through plan investments.³⁹

VIII. Effective Date/Transitional Rule Provision

A. The Proposed Regulation

The proposed general effective date for the regulation was 90 days after publication of the final rule. In addition, the proposed regulation indicated that once the regulation becomes effective it would apply to all plan assets determinations made after the effective date with respect to plan investments, regardless of when those investments are made. Thus, under the general effective date provision, the plan assets regulation would apply to both new and existing plan investments. The proposal also included a transitional rule, however, under which the regulation would not apply to plan investments in certain entities.

The proposed transitional rule had two requirements. First, the entity seeking coverage under the rule was required to be in existence on June 30, 1986. Second, the transitional rule would have applied only if no plan acquires an interest in the entity from an issuer or an underwriter at any time after June 30, 1986, except pursuant to a binding contract in effect on that date.⁴⁰ The

preamble to the proposal indicated that plan assets determinations for entities that qualify for the transitional relief would be made taking into account the provisions of ERISA itself, the legislative history of ERISA, the Department's rules and regulations and relevant judicial decisions.

B. Comments Received

A large number of commentators on the proposed regulation urged the Department to modify the effective date provision. Several commentators objected to the general approach reflected in the effective date provision of the proposal and urged the Department to apply the regulation only to new plan investments. Most of the comments, however, urged the Department to modify the expiration date of the transitional rule. These suggestions fell into two categories. The first, and most frequent, suggestion was that the expiration date for the transitional rule should be set at a specified number of days after publication of the final rule (or, as suggested by some commentators, at the later of June 30, 1986 or a set number of days after issuance of the final rule). The comments varied with respect to the period that would be appropriate. Some commentators suggested that a 90 day period would be sufficient; others indicated that 180 days would be appropriate. The second approach, suggested by only a few commentators, was to move the expiration date of the transitional period to some other fixed date beyond June 30, 1986.

Some commentators sought clarification of whether certain contractual arrangements to acquire additional securities (*i.e.*, warrants) entered into before the expiration date of the transitional rule would be considered binding contracts under that rule. Those commentators suggested that a plan's exercise of warrants after the expiration date should not cause the entity to lose its qualification for transitional relief.

C. Public Law 99-272

Section 11018 of Pub. L. 99-272 establishes a statutory transitional rule for the application of the plan assets regulation to the extent it would apply to certain publicly-offered real estate entities that are described in the statute. This statutory provision has two primary effects. First, it prohibits the application of the plan assets regulation

to plan investments in public real estate companies that have certain characteristics. In general, the statutory limitation applies only to publicly-offered real estate companies which first offer interests to plans on or before a date 120 days after the date of publication of the final regulation and in which no plan invests on or after a date 270 days from the date of publication of the regulation. Second, the statute provides that the assets of a public real estate company that meets the requirements described above would not include plan assets if they would not have been characterized as plan assets under Interpretive Bulletin 75-2 or under any of the Department's previous proposed plan assets regulations. Section 11018 of Pub. L. 99-272, however, does not prohibit the application of the regulation to such a publicly-offered real estate entity to the extent the regulation would provide a defense (*i.e.*, to the extent the assets of the entity would not include plan assets under the final regulation).

D. The Final Regulation

The Department has decided that the general approach reflected in the effective date/transitional rule provisions should be retained as proposed. To amend the effective date so that the regulation would apply only to new plan investments would delay the implementation of a final regulation because many plans have substantial outstanding long-term investments and thus it may be several years until all, or even most, of these assets are held in investments made after the effective date. Moreover, if the regulation were applied only to new plan investments, similarly situated plan investors would have different rights and remedies based solely on the date of their investment in an entity.

The Department has concluded, however, that both the effective date of the regulation and the expiration of the transitional period should be set at the later of January 1, 1987 or a date 120 days from the date of publication of the regulation. This provision will assure that affected persons will have time to assess the impact of the final regulation before the expiration of the transitional period.

The Department has also decided that warrants acquired by a plan before the expiration of the transitional period should not be considered binding contracts for purposes of the transitional rule. The binding contract provision of the transitional rule is intended to assure that the relief provided by that rule will remain available even where a

³⁹ See section 404(a)(2), 407(d)(3), and 407(b) of ERISA; see also S. Rep. No. 383, 93d Cong., 1st Sess. 32-33, 100 (1973).

⁴⁰ As originally proposed, the transitional rule required that an entity be in existence on January 4, 1985 and that no plan acquire an interest in the

entity after May 8, 1985. On February 15, 1985 the Department published an amendment to the proposal which extended the expiration date to June 30, 1986.

plan makes new equity investments in an entity after the expiration of the transitional period if the plan had obligated itself to make the investment before the expiration date. If the provision were to apply where the plan merely has an option to make such additional equity investments (but is not obligated to make the investment), an issuer could effectively continue to offer interests to plans indefinitely by issuing a large amount of warrants before the expiration of the transitional period.

The assets of most of the publicly-offered real estate companies described in section 11018 of Pub. L. 99-272 would not include plan assets because plan investments in securities issued by such companies would ordinarily qualify under the publicly-offered exception in the final regulation. The statutory transitional rule also applies, however, to a few entities that, in the absence of the availability of transitional relief, might hold plan assets under the final regulation.⁴¹

In view of the provisions of section 11018 of Pub. L. 99-272, the effective date provision of the final regulation also provides that the regulation will not apply, except as a defense, to entities that qualify for the statutory transitional relief. Under this rule, plan investments in a publicly-offered real estate entity that is described in section 11018(a) of Pub. L. 99-272, but which do not qualify for the publicly-offered exception (because, for example, there are not 100 independent investors) would nonetheless not be subject to the regulation. Of course, this additional rule would only be applicable to investments in entities that meet all of the requirements of section 11018(a), including the requirement that interests in the entity are first offered to plans before the expiration of 120 days from the date of publication of the regulation and the requirement that the entity refrain from offerings to plans after 270 days from the date of publication of the regulation. However, since the additional rule does not apply to the extent the final regulation provides a defense, a real estate company that does qualify for the publicly-offered exception under the final regulation may rely on that exception as soon as the regulation becomes effective.

The Department has also decided that other entities that are described in the

⁴¹ These include entities the interests in which are not widely-held because they are held by less than 100 independent investors (see section 11018(a)(1)(C)(i) of Pub. L. 99-272) and certain partnerships organized prior to the enactment of Pub. L. 99-272 in which plans have acquired interests in a private placement which have a value of less than \$20,000.

transitional rule (*i.e.*, entities in which no plan acquires an interest from an issuer or underwriter after the effective date), should also be permitted to rely on the final regulation after it becomes effective to the extent it provides a defense. Thus, for example, even though the transitional rule would be available for an operating company in which there are no new plan investments after the effective date of the final regulation (whether or not the entity is described in section 11018(a) of Pub. L. 99-272) the company's managers may nonetheless rely on the operating company exception of the regulation as a defense to allegations of misconduct by plan investors that are predicated on the managers' status as ERISA fiduciaries. In the Department's view, this rule will assure consistent treatment for similarly situated entities under the final regulation.

IX. Revision and Clarification of Interpretive Bulletin 75-2

As indicated in the preamble to the proposed regulation, the Department has revised Interpretive Bulletin 75-2 to coordinate it with the final regulation. As revised, the interpretive bulletin indicates that the rules established by the final "plan assets" regulation apply only for purposes of identifying plan assets on or after the effective date of the regulation and that the interpretive bulletin is effective for periods prior to that date and for investments that are subject to the transitional rule.

The remainder of the Interpretive Bulletin which discusses certain prohibited transactions under section 406 of ERISA (and section 4975 of the Code), is not affected by the final "plan assets" regulation. Also, the Department notes that the portion of Interpretive Bulletin 75-2 dealing with contracts or policies of insurance is not affected by the regulation being issued here.

The Department does not intend to effect any substantive change in the rules in the interpretive bulletin by making these revisions.⁴²

⁴² In this regard, the Department notes that the final paragraph of Interpretive Bulletin 75-2 states that the Department would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act. However, it is the Department's view that the mere fact a fiduciary makes or retains an investment in a corporation or partnership which does not hold plan assets under the final regulation does not mean the fiduciary has engaged in a transaction for the purposes of avoiding the application of the fiduciary responsibility rules within the meaning of the final paragraph of Interpretive Bulletin 75-2.

X. Reporting and Disclosure

As noted above, the regulation will apply for purposes of the reporting and disclosure requirements of ERISA as well as to the definitional provisions of the Act and the fiduciary responsibility provisions. As indicated in the proposed regulation, the Department is aware that special difficulties are presented in reporting transactions involving collective investment funds whose assets include plan assets. In order to deal with these issues, the Department published a proposed alternative method of compliance with the reporting and disclosure requirements for entities whose assets include "plan assets."⁴³ The alternative method is similar to the procedure established under the statutory and regulatory provisions now governing reporting for plan assets held in bank collective trust funds, insurance company separate accounts and master trusts. The final alternative method of compliance is being published separately in today's Federal Register.

XI. Guaranteed Governmental Mortgage Pool Certificates

The proposed regulation indicated that the Department's existing regulation dealing with governmental mortgage pools would be redesignated and incorporated into the final plan assets regulation. Thus, paragraph (i) of the final regulation sets forth the rule relating to governmental mortgage pools that now appears at 29 CFR 2550.401b-1.

XII. Miscellaneous Issues

A. Definition of Fiduciary

Paragraph (a)(2)(ii) of the proposed regulation stated that any person who has authority or control respecting the management or disposition of the underlying assets of any entity whose assets include plan assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan.

Several commentators suggested that the Department indicate that the provision quoted above was not intended to expand the definition of fiduciary in section 3(21)(A) of ERISA and section 4975(e)(3) of the Code or to affect the principles set forth in Interpretive Bulletins 75-5 and 75-8.⁴⁴

The final regulation is not intended to address issues relating to the kinds of activities with respect to plan assets that would cause a person to be a fiduciary. Thus, where the underlying

⁴³ 50 FR 3362, January 24, 1985.

⁴⁴ See 29 CFR 2509.75-5 and 2509.75-8.

assets of an entity include plan assets, determinations whether a person is a fiduciary with respect to such assets would be made under the standards set forth in section 3(21) of ERISA, and the Department's regulations, including Interpretive Bulletins 75-5 and 75-8. In this respect, the Department has, in accordance with the suggestion of one commentator, modified paragraph (a)(2) of the regulation to conform to the language of section 3(21) of ERISA.

B. Burden of Proof

In the preamble to the proposed regulation, the Department indicated that the burden of showing that the operating company exception or the significant participation exception applies, should be assigned to the person making that assertion. Some commentators objected to this observation, asserting that the Department does not have the authority to change normal judicial standards regarding burden of proof.

The observations regarding burden of proof in the preamble to the proposed regulation were not intended to effect any change in normal judicial standards relating to burden of proof, but rather to provide a clear indication of the Department's intent. The Department has also endeavored to draft the final regulation in such a way that, in practice, the burden of proof with respect to matters regarding application of the regulation will be assigned in the manner described in the preamble to the proposal.

C. Jointly Owned Property

The proposed regulation provided that where a plan owns property jointly with others, or where the value of a plan's equity interest relates solely to identified property of an entity, such property would be considered for purposes of the regulation as the sole property of a separate entity.

Some commentators suggested that where an independent investor enters into a venture with a plan pursuant to which it holds property jointly with the plan, such an independent investor is acting on its own behalf and is not, directly or indirectly, providing any investment advisory or investment management services to the plan. According to the commentators, it would be inappropriate to impose fiduciary responsibilities on the independent investor in such cases. Other commentators urged the Department to make it clear that plan "investments" in the hypothetical entity contemplated by the jointly owned property rule would be subject to the exceptions in the

regulation, for example, the operating company exception.

The Department has retained the jointly owned property rule in the final regulation because it has concluded that the rule is essential in order to prevent circumvention of the other provisions of the regulation. However, the extent of any investor's fiduciary responsibilities in cases where the rule applies would depend on the kind of activities that the investor conducts with respect to the property.⁴⁵

The Department does intend that the exceptions in the regulation would be applicable to plan investments in the hypothetical entity contemplated by the jointly owned property rule. Thus, for example, if a plan jointly owns a parcel of real property with others, that property may be considered a real estate operating company if the conditions to that exception are met.

Regulatory Flexibility Act

The Department has determined that this regulatory action would not have any significant economic effect on small plans or small business entities. First, small employee benefit plans (those with fewer than 100 participants) virtually never invest in privately placed pools such as those offered by venture capital or real estate organizations. Small plans tend to invest in pools whose certificates are publicly-offered. The underlying assets of these pools are not plan assets under the final rule. Hence, small plans would not generally be affected by the regulation. In rare instances, a small plan could lose money under the final regulation as compared to the 1985 proposal since under the final regulation a fiduciary will not be managing the plan's assets and, thus, the plan will not have a potential ERISA claim if losses occur.

Second, some smaller entities like those dependent on venture capital or real estate pools as sources of financing also have a stake in this regulation. The final regulation, however, substantially reduces the impact on most entities affected by the regulation. Most venture capital pools either do or will meet the 50 percent management test, and all such entities that accept less than 25 percent plan monies are exempt. Moreover, even if less plan money is made available, other investors are expected to fill this gap. To the extent that plan investments decrease, rates of return on these investments will increase, thereby drawing more non-plan monies into these industries. On balance, it is expected that the

⁴⁵ See the discussion regarding the definition of fiduciary at Part XII, A, above.

regulation will not substantially affect the amounts of money available to finance new ventures and real estate developments.

Executive Order 12291

The Department has determined that the final regulatory action would not constitute a "major rule" as that term is used in the Executive Order 12291 because the action would not result in: an annual effect on the economy of \$100 million; a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export matters.

The Department has prepared an evaluation of the cost impact of the final regulation which states that the maximum cost impact of the regulation would be \$41 million; however, the Department anticipates that the actual cost impact will be much lower.

Paperwork Reduction Act

The final plan assets regulation does not contain any new information collection requirements and does not modify any existing requirements. Some plans which have invested in entities affected by the regulation may have additional reporting requirements by virtue of the underlying assets of the entities clearly being considered plan assets, others may have less than they do currently. Since these burdens have, on average, already been included in the burden for the annual reports (Form 5500 series), the regulation will not result in any additional burden in the aggregate.

Statutory Authority

The regulation is adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93-406, 88 Stat. 894; 29 U.S.C. 1135) and under section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979); 3 CFR Part 1978 Comp., 332, under section 11018(d), Pub. L. 99-272 (100 Stat. 82); and Under Secretary of Labor's Order No. 1-86.

List of Subjects

29 CFR Part 2509

Employee Benefit Plans, Employee Retirement Income Security Act, Fiduciaries, Pensions, Pension and Welfare Benefits Administration, Plan assets, Trusts and trustees.

29 CFR Part 2510

Employee Benefit Plans, Employee Retirement Income Security Act, Pensions, Pension and Welfare Benefits Administration, Plan assets.

29 CFR Part 2550

Employee Benefit Plans, Employee Retirement Income Security Act, Employee Stock Ownership Plans, Exemptions, Fiduciaries, Investments, Investments foreign, Party in interest, Pensions, Pension and Welfare Benefits Administration, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and trustees.

For the reasons set out in the preamble, Chapter XXV of Title 29 of the Code of Federal Regulations is amended as set forth below.

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for Part 2509 is revised to read as set forth below and the authority citations following all the sections in Part 2509 are removed.

Authority: 29 U.S.C. 1135.

Section 2509.75-1 also issued under 29 U.S.C. 1114.

Section 2509.75-10 and § 2509.75-2 also issued under 29 U.S.C. 1052, 1053, 1054. Secretary of Labor's Order No. 1-86.

2. In Part 2509, § 2509.75-2 is revised to read as follows:

§ 2509.75-2 Interpretive bulletin relating to prohibited transactions.

On February 6, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75-2, with respect to whether a party in interest has engaged in a prohibited transaction with an employee benefit plan where the party in interest has engaged in a transaction with a corporation or partnership (within the meaning of section 7701 of the Internal Revenue Code of 1954) in which the plan has invested.

On November 13, 1986 the Department published a final regulation dealing with the definition of "plan assets". See § 2510.3-101 of this title. Under that regulation, the assets of certain entities in which plans invest would include "plan assets" for purposes of the fiduciary responsibility provisions of the Act. Section 2510.3-101 applies only for purposes of identifying plan assets on or after the effective date of that section, however, and § 2510.3-101 does not apply to plan investments in certain entities that qualify for the transitional relief provided for in paragraph (k) of that section. The principles discussed in paragraph (a) of this Interpretive Bulletin continue to be applicable for purposes of identifying assets of a plan for periods prior to the effective date of § 2510.3-101 and for investments that are subject to the transitional rule in § 2510.3-101(k). Paragraphs (b) and (c) of this Interpretive

Bulletin, however, relate to matters outside the scope of § 2510.3-101, and nothing in that section affects the continuing application of the principles discussed in those parts.

a. *Principles applicable to plan investments to which § 2510.3-101 does not apply.* Generally, investment by a plan in securities (within the meaning of section 3(20) of the Employee Retirement Income Security Act of 1974) of a corporation or partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets" and thereby make a subsequent transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.

For example, where a plan acquires a security of a corporation or a limited partnership interest in a partnership, a subsequent lease or sale of property between such corporation or partnership and a party in interest will not be a prohibited transaction solely by reason of the plan's investment in the corporation or partnership.

This general proposition, as applied to corporations and partnerships, is consistent with section 401(b)(1) of the Act, relating to plan investments in investment companies registered under the Investment Company Act of 1940. Under section 401(b)(1), an investment by a plan in securities of such an investment company may be made without causing, solely by reason of such investment, any of the assets of the investment company to be considered to be assets of the plan.

(b) *Contracts or policies of insurance.* If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.

(c) *Applications of the fiduciary responsibility rules.* The preceding paragraphs do not mean that an investment of plan assets in a security of a corporation or partnership may not be a prohibited transaction. For example, section 406(a)(1)(D) prohibits the direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan and section 406(b)(1) prohibits a fiduciary from dealing with the assets of the plan in his own interest or for his own account.

Thus, for example, if there is an arrangement under which a plan invests in, or retains its investment in, an investment company and as part of the arrangement it is expected that the investment company will purchase securities from a party in interest, such arrangement is a prohibited transaction.

Similarly, the purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.

Moreover, notwithstanding the foregoing, if a transaction between a party in interest and

a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if the plan may, by itself, require the corporation or partnership to engage in such transaction.

Similarly, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if such party in interest, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest may, with the aid of the plan but without the aid of any other persons, require the corporation or partnership to engage in such a transaction. However, the preceding sentence does not apply if the parties in interest engaging in the transaction, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest, may, by themselves, require the corporation or partnership to engage in the transaction.

Further, the Department of Labor emphasizes that it would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act.

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

3. The authority citation for Part 2510 is revised to read as set forth below and the authority citations following all the sections in Part 2510 are removed.

Authority: Sec. 3(2), 111(c), 505, Pub. L. 93-406, 88 Stat. 852, 894, (29 U.S.C. 1002(2), 1031, 1135); Secretary of Labor's Order No. 27-74, 1-86 and Labor-Management Services Administration Order No. 2-8, unless otherwise noted.

Section 3-101 is also issued under Sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332, and section 11018(d) of Pub. L. 99-272, 100 Stat. 82.

4. Part 2510 is amended by adding a new § 2510.3-101 in the appropriate place to read as follows:

§ 2510.3-101 Definition of "plan assets"—plan investments.

(a) *In general.* (1) This section describes what constitute assets of a plan with respect to a plan's investment in another entity for purposes of Subtitle A, and Parts 1 and 4 of Subtitle B, of Title I of the Act and section 4975 of the Internal Revenue Code. Paragraph (a)(2) of this section contains a general rule relating to plan investments. Paragraphs

(b) through (f) of this section define certain terms that are used in the application of the general rule.

Paragraph (g) of this section describes how the rules in this section are to be applied when a plan owns property jointly with others or where it acquires an equity interest whose value relates solely to identified assets of an issuer. Paragraph (h) of this section contains special rules relating to particular kinds of plan investments. Paragraph (i) describes the assets that a plan acquires when it purchases certain guaranteed mortgage certificates. Paragraph (j) of this section contains examples illustrating the operation of this section. The effective date of this section is set forth in paragraph (k) of this section.

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that—

(i) The entity is an operating company, or

(ii) Equity participation in the entity by benefit plan investors is not significant.

Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan.

(b) "Equity interests" and "publicly-offered securities". (1) The term "equity interest" means any interest in an entity other than an instrument that is treated as indebtedness under applicable local law and which has no substantial equity features. A profits interest in a partnership, an undivided ownership interest in property and a beneficial interest in a trust are equity interests.

(2) A "publicly-offered security" is a security that is freely transferable, part of a class of securities that is widely held and either—

(i) Part of a class of securities registered under section 12(b) or 12(g) of the Securities Exchange Act of 1934, or

(ii) Sold to the plan as part of an offering of securities to the public pursuant to an effective registration statement under the Securities Act of 1933 and the class of securities of which

such security is a part is registered under the Securities Exchange Act of 1934 within 120 days (or such later time as may be allowed by the Securities and Exchange Commission) after the end of the fiscal year of the issuer during which the offering of such securities to the public occurred.

(3) For purposes of paragraph (b)(2) of this section, a class of securities is "widely-held" only if it is a class of securities that is owned by 100 or more investors independent of the issuer and of one another. A class of securities will not fail to be widely-held solely because subsequent to the initial offering the number of independent investors falls below 100 as a result of events beyond the control of the issuer.

(4) For purposes of paragraph (b)(2) of this section, whether a security is "freely transferable" is a factual question to be determined on the basis of all relevant facts and circumstances. If a security is part of an offering in which the minimum investment is \$10,000 or less, however, the following factors ordinarily will not, alone or in combination, affect a finding that such securities are freely transferable:

(i) Any requirement that not less than a minimum number of shares or units of such security be transferred or assigned by any investor, provided that such requirement does not prevent transfer of all of the then remaining shares or units held by an investor;

(ii) Any prohibition against transfer or assignment of such security or rights in respect thereof to an ineligible or unsuitable investor;

(iii) Any restriction on, or prohibition against, any transfer or assignment which would either result in a termination or reclassification of the entity for federal or state tax purposes or which would violate any state or federal statute, regulation, court order, judicial decree, or rule of law;

(iv) Any requirement that reasonable transfer or administrative fees be paid in connection with a transfer or assignment;

(v) Any requirement that advance notice of a transfer or assignment be given to the entity and any requirement regarding execution of documentation evidencing such transfer or assignment (including documentation setting forth representations from either or both of the transferor or transferee as to compliance with any restriction or requirement described in this paragraph (b)(4) of this section or requiring compliance with the entity's governing instruments);

(vi) Any restriction on substitution of an assignee as a limited partner of a partnership, including a general partner

consent requirement, provided that the economic benefits of ownership of the assignor may be transferred or assigned without regard to such restriction or consent (other than compliance with any other restriction described in this paragraph (b)(4) of this section);

(vii) Any administrative procedure which establishes an effective date, or an event, such as the completion of the offering, prior to which a transfer or assignment will not be effective; and

(viii) Any limitation or restriction on transfer or assignment which is not created or imposed by the issuer or any person acting for or on behalf of such issuer.

(c) "Operating company". (1) An "operating company" is an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term "operating company" includes an entity which is not described in the preceding sentence, but which is a "venture capital operating company" described in paragraph (d) or a "real estate operating company" described in paragraph (e).

(d) "Venture capital operating company". (1) An entity is a "venture capital operating company" for the period beginning on an initial valuation date described in paragraph (d)(5)(i) and ending on the last day of the first "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is not a venture capital operating company immediately before the determination) or for the 12 month period following the expiration of an "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is a venture capital operating company immediately before the determination) if—

(i) On such initial valuation date, or at any time within such annual valuation period, at least 50 percent of its assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, are invested in venture capital investments described in paragraph (d)(3)(i) or derivative investments described in paragraph (d)(4); and

(ii) During such 12 month period (or during the period beginning on the initial valuation date and ending on the last day of the first annual valuation period), the entity, in the ordinary course of its business, actually exercises management rights of the kind described in paragraph (d)(3)(ii) with respect to one or more of the operating companies in which it invests.

(2)(i) A venture capital operating company described in paragraph (d)(1) shall continue to be treated as a venture capital operating company during the "distribution period" described in paragraph (d)(2)(ii). An entity shall not be treated as a venture capital operating company at any time after the end of the distribution period.

(ii) The "distribution period" referred to in paragraph (d)(2)(i) begins on a date established by a venture capital operating company that occurs after the first date on which the venture capital operating company has distributed to investors the proceeds of at least 50 percent of the highest amount of its investments (other than short-term investments made pending long-term commitment or distribution to investors) outstanding at any time from the date it commenced business (determined on the basis of the cost of such investments) and ends on the earlier of—

(A) The date on which the company makes a "new portfolio investment", or

(B) The expiration of 10 years from the beginning of the distribution period.

(iii) For purposes of paragraph (d)(2)(ii)(A), a "new portfolio investment" is an investment other than—

(A) An investment in an entity in which the venture capital operating company had an outstanding venture capital investment at the beginning of the distribution period which has continued to be outstanding at all times during the distribution period, or

(B) A short-term investment pending long-term commitment or distribution to investors.

(3)(i) For purposes of this paragraph (d) a "venture capital investment" is an investment in an operating company (other than a venture capital operating company) as to which the investor has or obtains management rights.

(ii) The term "management rights" means contractual rights directly between the investor and an operating company to substantially participate in, or substantially influence the conduct of, the management of the operating company.

(4)(i) An investment is a "derivative investment" for purposes of this paragraph (d) if it is—

(A) A venture capital investment as to which the investor's management rights have ceased in connection with a public offering of securities of the operating company to which the investment relates, or

(B) An investment that is acquired by a venture capital operating company in the ordinary course of its business in exchange for an existing venture capital investment in connection with:

(1) A public offering of securities of the operating company to which the existing venture capital investment relates, or

(2) A merger or reorganization of the operating company to which the existing venture capital investment relates, provided that such merger or reorganization is made for independent business reasons unrelated to extinguishing management rights.

(ii) An investment ceases to be a derivative investment on the later of:

(A) 10 years from the date of the acquisition of the original venture capital investment to which the derivative investment relates, or

(B) 30 months from the date on which the investment becomes a derivative investment.

(5) For purposes of this paragraph (d) and paragraph (e)—

(i) An "initial valuation date" is the later of—

(A) Any date designated by the company within the 12 month period ending with the effective date of this section, or

(B) The first date on which an entity makes an investment that is not a short-term investment of funds pending long-term commitment.

(ii) An "annual valuation period" is a preestablished annual period, not exceeding 90 days in duration, which begins no later than the anniversary of an entity's initial valuation date. An annual valuation period, once established may not be changed except for good cause unrelated to a determination under this paragraph (d) or paragraph (e).

(e) "Real estate operating company". An entity is a "real estate operating company" for the period beginning on an initial valuation date described in paragraph (d)(5)(i) and ending on the last day of the first "annual valuation period" described in paragraph (d)(5)(ii) (in the case of an entity that is not a real estate operating company immediately before the determination) or the expiration of an annual valuation period described in paragraph (d)(5)(ii) (in the case of an entity that is a real estate operating company immediately before the determination) if:

(1) On such initial valuation date, or on any date within such annual valuation period, at least 50 percent of its assets, valued at cost (other than short-term investments pending long-term commitment or distribution to investors), are invested in real estate which is managed or developed and with respect to which such entity has the right to substantially participate directly in the management or development activities; and

(2) During such 12 month period (or during the period beginning on the initial valuation date and ending on the last day of the first annual valuation period) such entity in the ordinary course of its business is engaged directly in real estate management or development activities.

(f) *Participation by benefit plan investors.* (1) Equity participation in an entity by benefit plan investors is "significant" on any date if, immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors (as defined in paragraph (f)(2)). For purposes of determinations pursuant to this paragraph (f), the value of any equity interests held by a person (other than a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded.

(2) A "benefit plan investor" is any of the following—

(i) Any employee benefit plan (as defined in section 3(3) of the Act), whether or not it is subject to the provisions of Title I of the Act,

(ii) Any plan described in section 4975(e)(1) of the Internal Revenue Code,

(iii) Any entity whose underlying assets include plan assets by reason of a plan's investment in the entity.

(3) An "affiliate" of a person includes any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph (f)(3), "control", with respect to a person other than an individual, means the power to exercise a controlling influence over the management or policies of such person.

(g) *Joint ownership.* For purposes of this section, where a plan jointly owns property with others, or where the value of a plan's equity interest in an entity relates solely to identified property of the entity, such property shall be treated as the sole property of a separate entity.

(h) *Specific rules relating to plan investments.* Notwithstanding any other provision of this section—

(1) Except where the entity is an investment company registered under the Investment Company Act of 1940, when a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:

(i) A group trust which is exempt from taxation under section 501(a) of the Internal Revenue Code pursuant to the principles of Rev. Rul. 81-100, 1981-1 C.B. 326.

(ii) A common or collective trust fund of a bank.

(iii) A separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account.

(2) When a plan acquires or holds an interest in any entity (other than an insurance company licensed to do business in a State) which is established or maintained for the purpose of offering or providing any benefit described in section 3(1) or section 3(2) of the Act to participants or beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

(3) When a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity. This paragraph (h)(3) does not apply, however, where all of the outstanding equity interests in an entity are qualifying employer securities described in section 407(d)(5) of the Act, owned by one or more eligible individual account plan(s) (as defined in section 407(d)(3) of the Act) maintained by the same employer, provided that substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities or by members of a group of affiliated corporations (as determined under section 407(d)(7) of the Act) of which the issuer is a member.

(4) For purposes of paragraph (h)(3), a "related group" of employee benefit plans consists of every group of two or more employee benefit plans—

(i) Each of which receives 10 percent or more of its aggregate contributions from the same employer or from members of the same controlled group of corporations (as determined under section 1563(a) of the Internal Revenue Code, without regard to section 1563(a)(4) thereof); or

(ii) Each of which is either maintained by, or maintained pursuant to a collective bargaining agreement negotiated by, the same employee organization or affiliated employee

organizations. For purposes of this paragraph, an "affiliate" of an employee organization means any person controlling, controlled by, or under common control with such organization, and includes any organization chartered by the same parent body, or governed by the same constitution and bylaws, or having the relation of parent and subordinate.

(i) *Governmental mortgage pools.* (1) Where a plan acquires a guaranteed governmental mortgage pool certificate, as defined in paragraph (i)(2), the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate.

(2) A "guaranteed governmental mortgage pool certificate" is a certificate backed by, or evidencing an interest in, specified mortgages or participation interests therein and with respect to which interest and principal payable pursuant to the certificate is guaranteed by the United States or an agency or instrumentality thereof. The term "guaranteed governmental mortgage pool certificate" includes a mortgage pool certificate with respect to which interest and principal payable pursuant to the certificate is guaranteed by:

- (i) The Government National Mortgage Association;
- (ii) The Federal Home Loan Mortgage Corporation; or
- (iii) The Federal National Mortgage Association.

(j) *Examples.* The principles of this section are illustrated by the following examples:

(1) A plan, P, acquires debentures issued by a corporation, T, pursuant to a private offering. T is engaged primarily in investing and reinvesting in precious metals on behalf of its shareholders, all of which are benefit plan investors. By its terms, the debenture is convertible to common stock of T at P's option. At the time of P's acquisition of the debentures, the conversion feature is incidental to T's obligation to pay interest and principal. Although T is not an operating company, P's assets do not include an interest in the underlying assets of T because P has not acquired an equity interest in T. However, if P exercises its option to convert the debentures to common stock, it will have acquired an equity interest in T at that time and (assuming that the common stock is not a publicly-offered security and that there has been no change in the composition of the other equity investors in T) P's assets would then include an undivided interest in the underlying assets of T.

(2) A plan, P, acquires a limited partnership interest in a limited partnership, U, which is established and maintained by A, a general partner in U. U has only one class of limited partnership interests. U is engaged in the

business of investing and reinvesting in securities. Limited partnership interests in U are offered privately pursuant to an exemption from the registration requirements of the Securities Act of 1933. P acquires 15 percent of the value of all the outstanding limited partnership interests in U, and, at the time of P's investment, a governmental plan owns 15 percent of the value of those interests. U is not an operating company because it is engaged primarily in the investment of capital. In addition, equity participation by benefit plan investors is significant because immediately after P's investment such investors hold more than 25 percent of the limited partnership interests in U. Accordingly, P's assets include an undivided interest in the underlying assets of U, and A is a fiduciary of P with respect to such assets by reason of its discretionary authority and control over U's assets. Although the governmental plan's investment is taken into account for purposes of determining whether equity participation by benefit plan investors is significant, nothing in this section imposes fiduciary obligations on A with respect to that plan.

(3) Assume the same facts as in paragraph (j)(2), except that P acquires only 5 percent of the value of all the outstanding limited partnership interests in U, and that benefit plan investors in the aggregate hold only 10 percent of the value of the limited partnership interests in U. Under these facts, there is no significant equity participation by benefit plan investors in U, and, accordingly, P's assets include its limited partnership interest in U, but do not include any of the underlying assets of U. Thus, A would not be a fiduciary of P by reason of P's investment.

(4) Assume the same facts as in paragraph (j)(3) and that the aggregate value of the outstanding limited partnership interests in U is \$10,000 (and that the value of the interests held by benefit plan investors is thus \$1000). Also assume that an affiliate of A owns limited partnership interests in U having a value of \$6500. The value of the limited partnership interests held by A's affiliate are disregarded for purposes of determining whether there is significant equity participation in U by benefit plan investors. Thus, the percentage of the aggregate value of the limited partnership interests held by benefit plan investors in U for purposes of such a determination is approximately 28.6% (\$1000/\$3500). Therefore there is significant benefit plan investment in T.

(5) A plan, P, invests in a limited partnership, V, pursuant to a private offering. There is significant equity participation by benefit plan investors in V. V acquires equity positions in the companies in which it invests, and, in connection with these investments, V negotiates terms that give it the right to participate in or influence the management of those companies. Some of these investments are in publicly-offered securities and some are in securities acquired in private offerings. During its most recent valuation period, more than 50 percent of V's assets, valued at cost, consisted of investments with respect to which V obtained management rights of the kind described above. V's managers routinely

consult informally with, and advise, the management of only one portfolio company with respect to which it has management rights, although it devotes substantial resources to its consultations with that company. With respect to the other portfolio companies, V relies on the managers of other entities to consult with and advise the companies' management. V is a venture capital operating company and therefore P has acquired its limited partnership investment, but has not acquired an interest in any of the underlying assets of V. Thus, none of the managers of V would be fiduciaries with respect to P solely by reason of its investment. In this situation, the mere fact that V does not participate in or influence the management of all its portfolio companies does not affect its characterization as a venture capital operating company.

(6) Assume the same facts as in paragraph (j)(5) and the following additional facts: V invests in debt securities as well as equity securities of its portfolio companies. In some cases V makes debt investments in companies in which it also has an equity investment; in other cases V only invests in debt instruments of the portfolio company. V's debt investments are acquired pursuant to private offerings and V negotiates covenants that give it the right to substantially participate in or to substantially influence the conduct of the management of the companies issuing the obligations. These covenants give V more significant rights with respect to the portfolio companies' management than the covenants ordinarily found in debt instruments of established, creditworthy companies that are purchased privately by institutional investors. V routinely consults with and advises the management of its portfolio companies. The mere fact that V's investments in portfolio companies are debt, rather than equity, will not cause V to fail to be a venture capital operating company, provided it actually obtains the right to substantially participate in or influence the conduct of the management of its portfolio companies and provided that in the ordinary course of its business it actually exercises those rights.

(7) A plan, P, invests (pursuant to a private offering) in a limited partnership, W, that is engaged primarily in investing and reinvesting assets in equity positions in real property. The properties acquired by W are subject to long-term leases under which substantially all management and maintenance activities with respect to the property are the responsibility of the lessee. W is not engaged in the management or development of real estate merely because it assumes the risks of ownership of income-producing real property, and W is not a real estate operating company. If there is significant equity participation in W by benefit plan investors, P will be considered to have acquired an undivided interest in each of the underlying assets of W.

(8) Assume the same facts as in paragraph (j)(7) except that W owns several shopping centers in which individual stores are leased for relatively short periods to various merchants (rather than owning properties subject to long-term leases under which

substantially all management and maintenance activities are the responsibility of the lessee). W retains independent contractors to manage the shopping center properties. These independent contractors negotiate individual leases, maintain the common areas and conduct maintenance activities with respect to the properties. W has the responsibility to supervise and the authority to terminate the independent contractors. During its most recent valuation period more than 50 percent of W's assets, valued at cost, are invested in such properties. W is a real estate operating company. The fact that W does not have its own employees who engage in day-to-day management and development activities is only one factor in determining whether it is actively managing or developing real estate. Thus, P's assets include its interest in W, but do not include any of the underlying assets of W.

(9) A plan, P, acquires a limited partnership interest in X pursuant to a private offering. There is significant equity participation in X by benefit plan investors. X is engaged in the business of making "convertible loans" which are structured as follows: X lends a specified percentage of the cost of acquiring real property to a borrower who provides the remaining capital needed to make the acquisition. This loan is secured by a mortgage on the property. Under the terms of the loan, X is entitled to receive a fixed rate of interest payable out of the initial cash flow from the property and is also entitled to that portion of any additional cash flow which is equal to the percentage of the acquisition cost that is financed by its loan. Simultaneously with the making of the loan, the borrower also gives X an option to purchase an interest in the property for the original principal amount of the loan at the expiration of its initial term. X's percentage interest in the property, if it exercises this option, would be equal to the percentage of the acquisition cost of the property which is financed by its loan. The parties to the transaction contemplate that the option ordinarily will be exercised at the expiration of the loan term if the property has appreciated in value. X and the borrower also agree that, if the option is exercised, they will form a limited partnership to hold the property. X negotiates loan terms which give it rights to substantially influence, or to substantially participate in, the management of the property which is acquired with the proceeds of the loan. These loan terms give X significantly greater rights to participate in the management of the property than it would obtain under a conventional mortgage loan. In addition, under the terms of the loan, X and the borrower ratably share any capital expenditures relating to the property. During its most recent valuation period, more than 50 percent of the value of X's assets valued at cost consisted of real estate investments of the kind described above. X, in the ordinary course of its business, routinely exercises its management rights and frequently consults with and advises the borrower and the property manager. Under these facts, X is a real estate operating company. Thus, P's assets include its interest in X, but do not include any of the underlying assets of X.

(10) In a private transaction, a plan, P, acquires a 30 percent participation in a debt instrument that is held by a bank. Since the value of the participation certificate relates solely to the debt instrument, that debt instrument is, under paragraph (g), treated as the sole asset of a separate entity. Equity participation in that entity by benefit plan investors is significant since the value of the plan's participation exceeds 25 percent of the value of the instrument. In addition, the hypothetical entity is not an operating company because it is primarily engaged in the investment of capital (*i.e.*, holding the debt instrument). Thus, P's assets include the participation and an undivided interest in the debt instrument, and the bank is a fiduciary of P to the extent it has discretionary authority or control over the debt instrument.

(11) In a private transaction, a plan, P, acquires 30% of the value of a class of equity securities issued by an operating company, Y. These securities provide that dividends shall be paid solely out of earnings attributable to certain tracts of undeveloped land that are held by Y for investment. Under paragraph (g), the property is treated as the sole asset of a separate entity. Thus, even though Y is an operating company, the hypothetical entity whose sole assets are the undeveloped tracts of land is not an operating company. Accordingly, P is considered to have acquired an undivided interest in the tracts of land held by Y. Thus, Y would be a fiduciary of P to the extent it exercises discretionary authority or control over such property.

(12) A medical benefit plan, P, acquires a beneficial interest in a trust, Z, that is not an insurance company licensed to do business in a State. Under this arrangement, Z will provide the benefits to the participants and beneficiaries of P that are promised under the terms of the plan. Under paragraph (h)(2), P's assets include its beneficial interest in Z and an undivided interest in each of its underlying assets. Thus, persons with discretionary authority or control over the assets of Z would be fiduciaries of P.

(k) *Effective date and transitional rules.* (1) In general, this section is effective for purposes of identifying the assets of a plan on or after March 13, 1987. Except as a defense, this section shall not apply to investments in an entity in existence on March 13, 1987, if no plan subject to Title I of the Act or plan described in section 4975(e)(1) of the Code (other than a plan described in section 4975(g)(2) or 4975(g)(3)) acquires an interest in the entity from an issuer or underwriter at any time on or after March 13, 1987 except pursuant to a contract binding on the plan in effect on March 13, 1987 with an issuer of underwriter to acquire an interest in the entity.

(2) Notwithstanding paragraph (k)(1), this section shall not, except as a defense, apply to a real estate entity described in section 11018(a) of Pub. L. 99-272.

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

5. The authority citation for Part 2550 is revised to read as set forth below and the authority citations following all the sections in Part 2550 are removed.

Authority: 29 U.S.C. 1135.

Section 2550.407c-3 also issued under 29 U.S.C. 1107.

Section 2550.412-1 also issued under 29 U.S.C. 1112. Section 2550.414b-1 also issued under 29 U.S.C. 1114.

Secretary of Labor Order No. 1-86.

6. Part 2550 is amended by removing § 2550.401b-1.

Signed at Washington, DC, this 6th day of November, 1986.

Dennis M. Kass.

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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BILLING CODE 4510-29-M

29 CFR Part 2520

Exemption and Alternative Method of Annual Reporting for Plans Investing in Certain Entities

AGENCY: Department of Labor.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) which would provide a limited exemption from the reporting and disclosure requirements of ERISA and an alternative method of annual reporting for plan investments in certain entities. Under a final regulation published elsewhere in today's *Federal Register*, the assets of certain entities in which plans invest would be deemed to include plan assets. This regulation will facilitate the reporting of financial information by plans with respect to investments in such entities.

DATE: The final regulation will be effective March 13, 1987, and will apply to plan years ending on or after that date.

FOR FURTHER INFORMATION CONTACT: George M. Holmes, Jr., Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 523-8515 (not a toll free number) or Daniel J. Maguire, Esq., Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, (202) 523-9595 (not a toll free number).

SUPPLEMENTARY INFORMATION:

A. Background

This document adopts a final regulation which provides an alternative method of compliance for plan investments in entities which would hold "plan assets" under the Department's final regulation defining that term which is published separately in today's *Federal Register*.¹

Under the Department of Labor's final regulations relating to the term "plan assets", when a plan invests in certain entities its assets are considered to include an undivided interest in each of the underlying assets of the entity for purposes of the reporting and disclosure and fiduciary responsibility provisions of ERISA.² This "look-through" rule applies in cases where the plan, although nominally investing in another entity, is as a practical matter retaining the persons managing the entity to provide investment management services to the plan.

In cases where the "look-through" rule of the plan assets regulation applies, information regarding both the plan's investment and the underlying assets of the entity to which the investment relates would have to be included as part of the plan's annual report required by sections 103 and 104 of ERISA to be filed with the Department and made available to plan participants and beneficiaries. In these circumstances, the plan administrator would, in the absence of a reporting alternative, be responsible for obtaining detailed information about the underlying assets of the entity and about certain transactions to which the entity is a party. The alternative method of reporting is intended to reduce the burden of complying with these annual reporting requirements. As discussed in more detail below, the Department received only two comments on the proposed reporting alternative, and the Department has decided to adopt it in the form proposed.

B. Description of the Reporting Alternative

The reporting alternative will be codified at 29 CFR 2520.103-12. Under paragraph (a) of that section, the plan administrator need not include in the plan's annual report any information regarding the underlying assets and individual transactions of an entity the

assets of which include plan assets; instead, the administrator is required to report only the value of the plan's investment or units of participation in the entity on the appropriate reporting form (Form 5500 Series), in the manner prescribed in the instructions to the form. As a condition to using this alternative, however, certain information regarding the entity must be filed directly with the Secretary on behalf of the plan administrator no later than the date on which the plan's annual report is due.³ Such information, described in paragraph (b) of the regulation, relates primarily to the financial condition of the entity for its fiscal year ending with or within the plan year for which the plan's annual report is made. Although this information would not be included with the form filed by the plan administrator, it would, nevertheless, constitute part of the plan's annual report for purposes of the reporting and disclosure requirements of ERISA.

ERISA requires a plan administrator to engage an independent public accountant to examine and provide an opinion with respect to the financial statements and schedules included in the plan's annual report. The information with respect to an entity which is required to be reported to the Department under the reporting alternative also includes a report of an independent public accountant. In this respect, the Department is amending 29 CFR 2520.103-1 to make it clear that an independent public accountant, in conducting the required audit of a plan that uses the reporting alternative, would be permitted to omit certain procedures which the accountant might ordinarily use in the course of an audit made for the purpose of expressing the opinions required by ERISA. In particular, the regulation would allow the plan's accountant to limit the scope of his opinion by relying on the entity's financial report which has been certified by an independent accountant in a

¹ The reporting alternative that is being adopted here was proposed on January 24, 1985 (50 FR 3362). The plan assets regulation to which it relates was published as a proposed regulation on January 8, 1985 (50 FR 961) and modified by a notice published on February 15, 1985 (50 FR 6361).

² The plan assets regulation is codified at 29 CFR 2510.3-101.

³ This alternative permits the plan administrator and the manager of the entity to develop a suitable procedure whereby the plan administrator can establish to his satisfaction that the Department will receive, on behalf of the plan, all the information required in paragraph (b) of the alternative regarding the assets of the entity. The alternative does not contain any detailed rules relating to the exchange of information between the plan and the entity or the certification as to the accuracy of such information. The alternative does not, of course, affect a plan administrator's responsibility to monitor the conduct of the entity manager and to obtain whatever financial information concerning the entity that is necessary for the administrator to perform his duties under ERISA.