

Sunshine Act Meetings

Federal Register

Vol. 53, No. 80

Tuesday, April 26, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: 2:00 p.m. (eastern time) Tuesday, May 2, 1988.

PLACE: Clarence M. Mitchell, Jr., Conference Room, No. 200-C on the Second Floor of the Columbia Plaza Office Building, 2401 E Street, NW., Washington, DC 20507.

STATUS: Part of the meeting will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Vote(s)
2. A Report on Commission Operations (Optional)

Closed Session

1. Agency Adjudication and Determination on Federal Agency Discrimination Complaint Appeals
2. Litigation Authorization: General Counsel Recommendations

Note.—Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on the EEOC Commission meetings in the Federal Register, the Commission also provides a recorded announcement a full week in advance on future Commission sessions. Please telephone (202) 634-6748 at all times for information on these meetings.)

CONTACT PERSON FOR MORE

INFORMATION: Hilda D. Rodriguez, Executive Officer (Acting) on (202) 634-6748.

Date: April 21, 1988.

Hilda D. Rodriguez,
Executive Officer (Acting), Executive Secretariat.

[FR Doc. 88-9238 Filed 4-25-88; 8:45 am]

BILLING CODE 6750-06-M

NATIONAL COUNCIL ON THE HANDICAPPED QUARTERLY MEETING

ACTION: Notice of Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Council on the Handicapped. This notice also describes the functions of the Council. Notice of this meeting is required under section 522(b)(10) of the "Government in Sunshine Act" (Pub. L. 94-409).

DATES:

May 2, 1988, 9:00 a.m. to 5:00 p.m.
May 3, 1988, 8:00 a.m. to 3:00 p.m.

LOCATION: Washington Hilton & Tower, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Andrea Farbman, National Council on the Handicapped, 800 Independence Avenue, SW., Suite 814, Washington, DC 20591, (202) 267-3846, TDD: (202) 267-3232.

The National Council on the Handicapped is an independent Federal agency comprised of 15 members appointed by the President of the United States and confirmed by the Senate. Established by the 95th Congress in Title IV of the Rehabilitation Act of 1973 (as amended by Pub. L. No. 95-602 in 1978), the Council was initially an advisory board within the Department of

Education. In 1984, however, the Council was transformed into an independent agency by the Rehabilitation Act Amendments of 1984 (Pub. L. No. 98-221).

The Council is charged with reviewing all laws, programs, and policies of the Federal Government affecting disabled individuals and making such recommendations as it deems necessary to the President, the Congress, the Secretary of the Department of Education, the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research (NIDRR).

The meeting of the Council shall be open to the Public. The proposed agenda includes:

Reports from Chairperson and Executive Director

Discussion of plans and strategies pertaining to Council initiatives on: personal assistance for severely disabled people, living arrangements for severely disabled children, proposed conference of parents and family members, and due process and Least Restrictive Environment concept.

Discussion of unfinished and new business.

Records shall be kept of all Council proceedings and shall be available after the meeting for public inspection at the National Council on the Handicapped.

Signed at Washington, DC on April 19, 1988.

Lex Frieden,

Executive Director.

[FR Doc. 88-9177 Filed 4-22-88; 9:16 am]

BILLING CODE 6820-BS-M

Corrections

Federal Register

Vol. 53, No. 80

Tuesday, April 26, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25, 31, and 52

[Federal Acquisition Circular 84-36]

**Federal Acquisition Regulation (FAR);
Restrictions on Federal Public Works
Projects, and Promotion of American
Aerospace Exports at Domestic and
International Exhibits**

Correction

In rule document 88-7992 beginning on page 12128 in the issue of Tuesday, April 12, 1988, make the following correction:

On page 12129, in the second column, in the second line, the date should read "April 12, 1988"

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

**New Animal Drugs for Use in Animal
Feeds; Halofuginone and Bacitracin
Methylene Disalicylate**

Correction

In rule document 88-7368 appearing on page 11065 in the issue of Tuesday, April 5, 1988, make the following correction:

In the second column, in the first line, "Part 29" should read "Part 20".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 86N-0499]

Advisory List of Critical Devices—1988

Correction

In notice document 88-5884 beginning on page 8854 in the issue of Thursday, March 17, 1988, make the following corrections:

1. On page 8855, in the table, under **PART 868—ANESTHESIOLOGY DEVICES**, in the fourth column, in the last entry, "audit" should have read "adult".

2. On the same page, in the table, under **PART 870—CARDIOVASCULAR DEVICES**, in the second column, in the 10th line from the bottom, "polytetrafluoroethylene" should not have been hyphenated.

3. On page 8856, in the table, under **PART 876—GASTROENTEROLOGY-UROLOGY DEVICES**, in the fourth column, in the last entry, insert "commercial" between "in" and "distribution".

4. On page 8858, in the table, in the second column, in the 22nd line from the bottom, "tibial" was misspelled.

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES 37978]

Recordable Disclaimer of Interest; Louisiana

Correction

In notice document 88-7600 appearing on page 11565 in the issue of Thursday, April 7, 1988, make the following correction:

In the second column, in the first paragraph, in the ninth line, "E½SE¼" should read "E½SW¼".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD11 88-02]

Regatta; Sacramento Water Festival

Correction

In proposed rule document 88-8203 appearing on page 12434 in the issue of Thursday, April 14, 1988, make the following correction:

In the second column, under **Economic Assessment and Certification**, in the 10th line, "necessary" should read "unnecessary".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121 and 135

[Docket No. 25590; Amdt. Nos. 121-196 and 135-25]

Smoking Aboard Aircraft

Correction

In rule document 88-8204 beginning on page 12358 in the issue of Wednesday, April 13, 1988, make the following corrections:

1. On page 12360, in the first column, the second line from the bottom of the page should read "when the no smoking sign is lighted, except during landing and takeoff. An exception is necessary".

2. On page 12361, in the first column, in the second complete paragraph, in the 15th line, "responsible" was misspelled.

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3304-8]

Standards of Performance for New Stationary Sources; New Residential Wood Heaters

Correction

In rule document 88-2071 beginning on page 5860 in the issue of Friday,

February 26, 1988, make the following corrections:

§ 60.533 [Corrected]

1. On page 5877, in the first column, in § 60.533(k)(2), in the 13th line, "(E)(1)(ii)" should read "(e)(1)(ii)".

§ 60.538 [Corrected]

2. On page 5883, in the first column, in § 60.538(a), the fifth line should read "(g)(2)".

Appendix A—[Corrected]

Method 5G—[Corrected]

3. On page 5888, in the first column, the first formula should read:

$$m_{av} = \left(\frac{m_s V_{av}}{V_s} \right) \quad \text{Eq. 5G-2}$$

4. On the same page, in the same column, the second formula should read:

$$PR = \left(\frac{\Theta(V_m V_s T_m T_{st})}{10(V_m V_s T_s T_m)} \right) \times 100 \quad \text{Eq. 5G-6}$$

Method 28—[Corrected]

5. On page 5904, in the third column, under 8.1, the fifth line should read "k_i

= Test run weighting factor = $P_{i+1} - P_{i-1}$."

6. On page 5905, in the first column, the first formula should read:

$$BR = \frac{60 W_{wd} 100 - \% M_w}{\theta 100} \quad \text{Eq. 28-2}$$

7. On page 5912, in the second column, under 5.5.1.2, in the second and third lines, "FO" should read "F_o".

Method 5H—[Corrected]

8. Also on page 5896, in the second and third columns, the text for 7.10 through 7.13 including equation 5H-10 is repeated for the reader because it did not flow properly, it should have read as follows:

7.10 Carbon Balance for Total Moles of Exhaust Gas (dry)/Kg of Wood Burned in the Exhaust Gas.

$$N_T = \left(\frac{K_3 N_C}{(Y_{CO_2} + Y_{CO} + Y_{HC})} \right)$$

Eq. 5H-7

where:

$K_3 = 1000$ g/kg for metric units.

$K_3 = 1.0$ lb/lb for English units.

Note: The NO_x/SO_x portion of the gas is assumed to be negligible.

7.11 Total Stack Gas Flow Rate.

$$Q_{sd} = K_4 N_T BR \quad \text{Eq. 5H-8}$$

where:

$K_4 = 0.02406$ for metric units, dsm³/g-mole.

$= 384.8$ for English units, dscf/lb-mole.

7.12 Particulate Emission Rate.

$$E = c_s Q_{sd} \quad \text{Eq. 5H-9}$$

7.13 Proportional Rate Variation.

Calculate PR for each 10-minute interval, i, of the test run.

$$PR = \left(\frac{\theta S_i V_{mi}(\text{std})}{10 \sum_{i=1}^n [S_i V_{mi}(\text{std})]} \right) \times 100$$

Eq. 5H-10

BILLING CODE 1505-01-D

Tuesday
April 26, 1988

Part II

**Environmental
Protection Agency**

40 CFR Part 148

**Underground Injection Control Program;
Hazardous Waste Disposal Injection
Restrictions, Phase Two; Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 148

[FRL-3318-1]

Underground Injection Control Program; Hazardous Waste Disposal Injection Restrictions, Phase Two

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is today proposing rules implementing the Congressionally mandated prohibitions on the underground injection of selected hazardous wastes. This proposed action is being taken in response to amendments to the Resource Conservation and Recovery Act (RCRA) enacted through the Hazardous and Solid Waste Amendments of 1984 (HSWA).

Today's notice proposes effective dates for "California list" wastes (as defined by section 3004(d) of RCRA), as well as certain wastes prohibited under section 3004(g) of RCRA.

The general framework for implementing the land disposal restrictions for injection of hazardous wastes was proposed on August 27, 1987 (52 FR 32446 *et seq.*); that proposal should be consulted for a more thorough explanation of the Agency's rationale concerning the implementation of the no-migration standard and other general requirements.

DATES: Comments must be received on or before May 26, 1988; the public hearing will be held on May 9, 1988, from 10:00 A.M. to 5:00 P.M. EDT; requests to present oral testimony must be received on or before May 2, 1988.

ADDRESSES: Comments (in triplicate), requests to testify, and inquiries concerning the Public Docket should be addressed to Eric Callisto, EPA, Office of Drinking Water (WH-550), 401 M Street SW., Washington, DC 20460. The hearing will be held in the Auditorium of the EPA Training Center, Waterside Mall, 401 M Street, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Atcheson, Office of Drinking Water, EPA, (202) 382-5508.

SUPPLEMENTARY INFORMATION

Preamble Outline

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 2. Section 3004(g)

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 1. K062
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 - C. Paperwork Reduction Act
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I. Background

A. Statutory Authority

The Hazardous and Solid Waste Amendments of 1984 (HSWA), enacted on November 8, 1984, impose substantial new responsibilities on those who handle hazardous waste. The amendments prohibit the continued land disposal of untreated hazardous waste beyond specified dates, unless the Administrator determines that the prohibition is not required in order to protect human health and the environment for as long as the wastes remain hazardous (RCRA sections 3004(d)(1), (e)(1), (f)(2), (g)(5)). Congress established a separate schedule in section 3004(f) for making determinations regarding the disposal of dioxins and solvents and the list of wastes specified in section 3004(d)(2),

termed the California list, in injection wells.

Wastes meeting the treatment standards set by EPA under section 3004(m) of RCRA may be land disposed. The statute requires EPA to set "levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized" (RCRA section 3004(m)(1)).

Land disposal prohibitions are effective immediately upon promulgation of rules banning disposal unless the Agency sets another effective date based on the earliest date that adequate alternative treatment, recovery, or disposal capacity which is protective of human health and the environment will be available (RCRA sections 3004(h)(1) and (2)). However, these effective date variances may not exceed 2 years beyond the otherwise applicable statutory effective date. In addition, two 1-year, case-by-case extensions of the effective date may be granted under certain circumstances (RCRA sections 3004(h)(3)).

For the purposes of the land disposal restrictions program, the statute specifically defines land disposal to include, but not be limited to, any placement of hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome or salt bed formation, or underground mine or cave (RCRA section 3004(k)). The statute also sets forth a series of deadlines for Agency action.

The land disposal prohibitions apply to all hazardous wastes identified or listed under RCRA section 3001 as of November 8, 1984, the date of enactment of HSWA. For any hazardous waste identified or listed under RCRA section 3001 after November 8, 1984, EPA is required to make land disposal restriction determinations within 6 months of the date of identification or listing (RCRA section 3004(g)(4)). However, the statute does not impose an automatic prohibition on land disposal if EPA misses a deadline for any newly listed or newly identified waste.

1. Section 3004(f)

Section 3004(f) addresses the disposal by injection of solvents, dioxins, and California list wastes. Specifically, this section requires the Administrator to promulgate rules prohibiting the disposal of such wastes into wells if it may "reasonably be determined that such disposal may not be protective of

human health and the environment for as long as the waste remain hazardous * * *. If EPA does not determine those instances where disposal would be protective, the injection of these wastes is prohibited on August 8, 1988, under section 3004(f)(3).

2. Section 3004(g)

Section 3004(g) of RCRA applies to all methods of land disposal. It requires the Agency to set a schedule for making land disposal restriction decisions for all hazardous wastes listed in 40 CFR Part 261 under RCRA section 3001(c) as of November 8, 1984, other than the wastes referred to in sections 3004(d) and (e). EPA promulgated this schedule on May 28, 1986 (51 FR 19300 *et seq.*)

Section 3004(g)(5) provides that the regulation promulgated by the Administrator must prohibit methods of land disposal except for methods "which the Administrator determines will be protective of human health and the environment for as long as the waste remains hazardous * * *."

Furthermore, the section provides that, except for wastes which have been treated to the standards expressed in section 3004(m), a method of land disposal may not be determined to be protective of human health and the environment, "unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous."

3. Proposed Standard for Demonstrating Protection of Human Health and the Environment

On August 27, 1987 (52 FR 32446 *et seq.*), the Agency proposed to apply the same standard to injection of hazardous waste, regardless of whether the waste was covered under section 3004(f) or section 3004(g). The comment period closed on October 26, 1987. A brief summary of that proposal follows.

As noted in that proposal, sections 3004 (f) and (g) do not use the same language, but both require a demonstration that injection is protective of human health and the environment. Under section 3004(g) it is clear that such a demonstration must include a showing of no migration from the injection zone for as long as the wastes remain hazardous. EPA believes that the no-migration standard of section 3004(g) helps define what is protective of human health and the environment under section 3004(f). Section 3004(g), by its terms, restricts the injection of certain hazardous

wastes into injection wells. Since the wastes covered under section 3004(f) are just as hazardous to human health and the environment as those under section 3004(g), EPA believes that injection of either set of wastes should be subject to the same standard. Thus, the Agency believes that the no-migration demonstration should be similar for all injection wells regardless of the type of injected waste, and that the no-migration standard should apply to all facilities injecting hazardous waste regardless of which section of the statute they are subject to.

B. Effect on State UIC Primacy

States need not seek authorization to administer the land disposal restrictions program codified in Part 148 to maintain Underground Injection Control (UIC) primacy. These provisions are in effect in all states as a matter of federal law. However, the Agency expects that State agencies which have primacy for the UIC program will wish to implement Part 148, and receive authorization to grant no-migration exemptions from land disposal restrictions as well as case-by-case extensions under section 3004(h)(3). However, before such authorization can be granted, the State would have to demonstrate that it has the authority to implement sections 3004 (f) and (g) and (h)(3) of RCRA, and receive authorization to do so. A thorough discussion of the conditions under which such authorization can take place can be found in 50 FR 28728 *et seq.*, July 15, 1985, 51 FR 40618 *et seq.*, Nov. 7, 1986, and 52 FR 25783 *et seq.*, July 8, 1987. In addition, where jurisdiction for UIC and RCRA do not reside in the same State agency, EPA will require a Memorandum of Understanding between the two entities, clearly outlining responsibility for granting exemptions.

C. Summary of the Land Disposal Restrictions Framework

1. Regulatory Framework

On November 7, 1986, EPA promulgated a final rule (51 FR 40572) establishing the regulatory framework for implementing the land disposal restrictions. Corrections to the November 7, 1986, final rule were included in a June 4, 1987, **Federal Register** notice (52 FR 21010) to clarify the Agency's approach to regulating restricted wastes. Some changes to the framework were also made in the July 8, 1987, rulemaking on the California list wastes (52 FR 25760). Rules which specifically address disposal of hazardous waste through injection wells

were proposed on August 27, 1987 (52 FR 32446).

By each deadline, according to a schedule established either in the statute under sections 3004 (d), (e), or (f) (or promulgated on May 28, 1986 (51 FR 19300), for section 3004(g) wastes), the Agency intends to promulgate the applicable treatment standards for each hazardous waste. Restricted wastes may be land disposed in a Subtitle C facility if they meet the applicable treatment standards.

After the effective dates of the prohibitions, wastes that do not comply with the applicable treatment standards will be prohibited from continued disposal in injection wells unless a petition has been approved under Subpart C of Part 148 demonstrating that continued management of those hazardous wastes in the injection well is protective of human health and the environment for as long as the waste remains hazardous. Also, § 148.4 provides that EPA may, on a case-by-case basis, grant an extension to the effective date according to the procedures outlined in § 268.5. An extension may not exceed one year, and the Administrator may not renew an extension more than once.

2. Applicability

Land disposal is defined as including, but not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, underground mine or cave, and concrete vault or bunker.

The land disposal restrictions apply prospectively to the affected wastes. In other words, hazardous wastes placed into land disposal units after the effective date of a statutory or regulatory prohibition are subject to the restrictions, but wastes land-disposed prior to the applicable effective date are not required to be removed or exhumed for treatment. Similarly, the restrictions on storage of affected hazardous wastes apply only to wastes placed in storage after the effective date of an applicable land disposal restriction. If, however, wastes subject to the land disposal restrictions are removed from either a storage unit or land disposal unit after the effective date, such wastes would be subject to the restrictions and treatment standards.

The provisions of the land disposal restrictions apply to wastes produced by all generators of over 100 kilograms of hazardous waste (or greater than 1 kg of acute hazardous waste) in a calendar month; however, wastes produced by generators of less than 100 kilograms of

hazardous waste (or less than 1 kg of acute hazardous waste) per calendar month are exempt from the land disposal prohibitions.

The land disposal restrictions apply to both interim status and permitted facilities. All permitted facilities are subject to the restrictions regardless of existing permit conditions. The regulations at 40 CFR 270.4(a) have been amended so that compliance with a RCRA permit (including permits-by-rule under § 270.60(b)) no longer constitutes compliance with Subtitle C as a whole.

3. Development of Section 3004(m) Treatment Standards

In the November 7, 1986, rulemaking, EPA promulgated a technology-based approach to setting treatment standards under section 3004(m). These treatment standards are based on the performance of the best demonstrated available technology (BDAT) identified for the hazardous constituents.

In developing the treatment standards, EPA first characterizes the wastes and establishes treatability groups for wastes having similar physical and chemical properties, and thus, similar treatability characteristics. Once the treatability groups are established, EPA collects and analyzes data on identified technologies used to treat the wastes in each treatability group.

EPA identifies those technologies that are "demonstrated" by full-scale operation. The demonstrated technologies are then evaluated to determine whether they may be considered "available". To be considered "available", the Agency determines whether the demonstrated technologies: (1) Are commercially available, (2) do not present a clear increase in risk to human health and the environment when compared to land disposal of the untreated wastes into a RCRA subtitle C facility, and (3) substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.

As explained in the November 7, 1986, final rule, the Agency evaluates the risks associated with treatment technologies and land disposal technologies (51 FR 40589). Based on a comparative risk assessment, those technologies that are found to present greater total risk than land disposal of untreated wastes into a RCRA Subtitle C facility are considered "unavailable" as a basis for establishing BDAT levels.

In modeling the risk of underground injection, the Agency intends to follow the same general approach as the one applied to surface land disposal units. However, the Agency does not believe the portion of the modeling done to date for predicting waste fate and transport is appropriate for underground injection. Such models must be capable of simulating flow in deep, pressurized systems at high temperatures through highly mineralized connate waters. Accordingly, the Agency intends to use a model specifically designed to simulate such conditions.

The risk analyses done to date use assumptions which are appropriate for modeling fate and transport in unconfined systems from surface land disposal units. This analysis has not resulted in situations where the risks of alternate treatment technologies are greater than those associated with surface land disposal of untreated hazardous waste. However, preliminary studies suggest that, at least for certain wastes, land disposal by injection poses total risks which may be less than the risks for treatment technologies which have been used to set BDAT levels with respect to surface land disposal facilities.

This result could pose a dilemma for the Agency. Specifically, it could lead to situations in which practices which are manifestly safer might be banned while more risky practices would be allowed to continue. For example, if injection were found to be safer than any of the forms of treatment available for a given waste stream, BDAT would not be established for injected waste; BDAT would be available for surface land disposal, however. Thus, the waste could continue to be land disposed in surface units, provided that the waste were treated—a process which the Agency's own analyses would have shown to pose a greater risk than injection. Injection of this waste stream, on the other hand, would be prohibited (unless the site could make a no-migration demonstration under § 148.20).

In light of this, the Agency is reconsidering the role of risk in determining the availability of BDAT. The Agency intends to publish a Notice of Data Availability which outlines the results of the comparative risk analyses. At that time, or in an earlier notice, EPA may propose an alternative framework for consideration of risk in establishing BDAT.

The performance data on the demonstrated available technologies are evaluated to determine whether the data are representative of well-designed and well-operated treatment systems. Only data from well-designed and operated

systems are included in determining BDAT. Such performance data are then statistically analyzed to determine the performance level representative of treatment by the candidate technology. EPA may set the treatment standards as either a specific technology or as a performance level of treatment monitored by measuring the concentration level of the hazardous constituents in the waste or treatment residual, or an extract of the waste or treatment residual. When possible, EPA would prefer to set a treatment standard as a performance level, allowing the regulated community greatest flexibility in meeting the treatment standard. When treatment standards are set as performance levels, the regulated community may use any technology (not otherwise prohibited, e.g., dilution) to treat the waste to meet the treatment standard, and is not limited to only those technologies which have been considered in determining BDAT.

In the final rule prohibiting land disposal of solvents and dioxins by means other than injection (52 FR 40593, November 7, 1986), EPA promulgated regulations requiring the regulated community to use the Toxicity Characteristic Leaching Procedure (TCLP) (Part 268 Appendix I) when developing the extract from the waste or treatment residual. This extract must be analyzed to determine whether the concentrations of hazardous constituents meet the applicable treatment standards (which are expressed in Table CCWE at § 268.41 as constituent levels in the TCLP extract). The TCLP has only been promulgated for monitoring compliance with the treatment standards established for the F001-F005 spent solvent wastes and the F020-F023 and F026-F028 dioxin contaminated wastes treatment standards, and will only be used when the treatment standards are expressed as concentration of hazardous constituents in a waste (or treatment residual) extract.

4. Determination of Alternative Capacity and Ban Effective Dates

a. Establishing Effective Dates. The manner in which effective dates are established differs according to what sections of the statute govern particular wastes. Solvents, dioxins, and California list wastes, which are covered under sections 3004 (d), (e), and (f), are subject to the so-called "hard hammer". Under this statutory scheme, the waste is automatically banned upon the statutory deadline, regardless of whether the Agency acts to set BDAT or fails to prohibit disposal of such wastes

(although the Agency may, under section 3004(h)(2), provide variances for up to 2 years based on lack of alternate capacity). The statutory deadline prohibiting land disposal of these wastes by injection is August 8, 1988.

Scheduled wastes, covered under section 3004(g), are initially subject to a "soft hammer". Under this approach, the Agency must establish a schedule by which any hazardous wastes not covered under sections 3004 (d), (e), or (f), are banned. The statute mandates that these scheduled wastes be addressed in three stages: August 8, 1988; June 8, 1989; and May 8, 1990. It further states that the wastes should be placed in one of these "thirds" based on their intrinsic hazard and volume. High-volume, highly hazardous wastes are placed in the first third; wastes with relatively lower hazards or which are produced in lower volumes are placed in the later thirds. Unlike the wastes subject to the "hard hammer", there is no immediate statutory ban in cases where the Agency fails to take action. If EPA fails to set BDAT or otherwise establish prohibition dates for the first two-thirds by the 8/8/88 or 6/8/89 deadlines, respectively, the wastes in the first two "thirds" are not banned by the statute from land disposal until May 8, 1990, unless EPA issues regulations establishing an earlier effective date for the ban. If these wastes were to be managed in a landfill or surface impoundment, the units would have to comply with the requirements of section 3004(o) during the period the facilities were not subject to a ban.

b. Effective Dates Based on National Capacity Determinations. The Agency has the authority to grant national variances (for up to a two-year maximum) from the statutory effective date based upon a lack of adequate alternative capacity. To make this determination, EPA considers, on a nationwide basis, both the physical capacity of alternative treatment technologies (permitted and interim status facilities that are expected to be on-line by the effective date) and the quantity of restricted wastes generated. If adequate capacity is available, the restriction on land disposal of that waste goes into effect upon the statutory deadline. If there is a significant shortage of national capacity, EPA may set an alternative effective date based on the earliest date on which capacity for treatment that is protective of human health and the environment will be available.

During the period of the national variance, the waste is not subject to the land disposal prohibitions.

c. Case-by-Case Extensions. The Agency will consider granting up to a one-year extension (renewable only once) of a ban effective date on a case-by-case basis to an applicant who applies for such an extension. The applicant must demonstrate (among other things stated in § 268.5(a)(1)) that a good faith effort has been made to locate and contract with treatment, recovery, or disposal facilities nationwide to manage his wastes, and that he has entered into a binding contractual commitment to construct or otherwise provide alternative capacity that cannot reasonably be made available by the applicable effective date due to circumstances beyond his control. During the period of the extension, the waste is not subject to the land disposal prohibitions.

5. Exemption for Treatment in Surface Impoundments

Wastes that would otherwise be prohibited from one or more methods of land disposal may be treated in a surface impoundment that meets certain technological requirements (§ 268.4(a)(3)) as long as treatment residuals that fail to meet the applicable treatment standard or prohibition level are removed within one year of entry into the impoundment and are not placed into any other surface impoundment. The owner or operator of such an impoundment must certify to the Regional Administrator that the technical requirements have been met and must also submit a copy of the waste analysis plan that has been modified to provide for testing treatment residuals in accordance with § 268.4.

As promulgated in the California list final rule (52 FR 25760), evaporation of hazardous constituents as the principal means of treatment is not considered treatment for the purposes of this exemption (§ 268.4(b)).

6. Dilution Prohibition

As established in the November 7, 1986, rule, and modified in the July 8, 1987, rule, dilution is prohibited as a substitute for adequate treatment. This includes dilution to achieve compliance with a treatment standard or compliance level, as well as dilution to circumvent the effective date of a prohibition, to otherwise avoid or circumvent a land disposal prohibition (§ 268.3). However, dilution is permitted as a necessary part of the treatment process.

7. Storage Prohibition

Storage of restricted wastes is prohibited except where storage is solely for the purpose of accumulating such quantities of wastes as are

necessary to facilitate proper treatment, recovery, or disposal (§ 268.50). RCRA-permitted treatment, storage, and disposal facilities may store restricted wastes for as long as needed, provided such storage is solely for this purpose. However, if the facility stores a restricted waste for more than one year, it bears the burden of proof that such storage was solely for this purpose (no notification of storage exceeding one year is required). For storage of less than one year, EPA bears the burden of proof that such storage was not for the sole purpose of accumulating such quantities of wastes as are necessary to facilitate proper treatment, recovery, or disposal. This statutory prohibition on storage does not apply to RCRA wastes which meet the treatment standard, wastes which have been granted a variance or an extension to the effective date, and stored wastes which are the subject of a "no-migration" exemption under § 148.20.

8. Variance from the Treatment Standard

EPA established the variance from the treatment standard to account for those wastes which are unable to be treated to meet the applicable treatment standards, even if well-designed and well-operated systems are used (§ 268.44). Petitions must demonstrate (among other things) that the waste is significantly different from the wastes evaluated by EPA in setting the treatment standard and that the waste cannot be treated in compliance with the applicable treatment standard. This variance procedure could establish a new waste treatability group and corresponding BDAT treatment standard that would apply to all wastes meeting the criteria of the new waste treatability group.

9. "No-Migration" Exemption

Proposed § 148.20 (52 FR 32451 *et seq.*) outlined in detail the Agency's plan for implementing the no-migration provisions of RCRA with respect to injected wastes. Briefly, a petitioner would be required, through modeling, to demonstrate there would be no migration of hazardous constituents from the injection zone for as long as the waste remained hazardous. This demonstration could be made in one of two ways. The operator could demonstrate, using flow and transport models, that the site conditions are such that injected fluids would not migrate vertically out of the injection zone or migrate within the injection zone to a point of discharge for a period of ten thousand years. Alternatively, an owner

or operator could show that the waste is transformed, due to geochemical processes, for example, in such a manner that it would become nonhazardous at the edge of the injection zone. In keeping with existing policy, the Agency proposed to use established health-based standards, such as Maximum Contaminant Levels (MCLs), to define hazardous levels. A demonstration based on geochemical modeling could not rely on attenuative mechanisms occurring outside the injection zone.

Also, an owner or operator would have to certify that the well was in compliance with the proposed new area of review, corrective action, and mechanical integrity requirements of Part 146 as proposed on August 27, 1987 (52 FR 32457 *et seq.*).

II. Summary of Today's Proposal—California List Wastes

A. Background

This section of today's proposal outlines the Agency's approach for determining effective dates implementing the ban on injection of California list wastes pursuant to section 3004(f) of RCRA. On December 11, 1986, the Agency proposed to codify the statutory levels for California list wastes as set forth in section 3004(d) of RCRA. The Agency also requested comment on lowering levels for metals based on Extraction Procedure (EP) toxicity characteristics where they exist, and on other factors for metals not covered by the EP toxicity characteristic.

EPA promulgated the land disposal restrictions final rule applicable to land disposal facilities other than injection wells for some California list wastes on July 8, 1987 (52 FR 25760). This rule promulgated treatment standards and corresponding effective dates for the California list hazardous wastes containing polychlorinated biphenyls (PCBs) and most halogenated organic compounds (HOCs), and codified the statutory prohibition levels on certain corrosive wastes.

The California list final rule integrated a number of TSCA requirements into the RCRA framework. This ensures that where inconsistencies exist between TSCA and RCRA standards, the more stringent regulations govern.

The final rule established treatment standards as methodologies for PCBs and HOCs (except dilute HOC wastewaters). All liquid and nonliquid hazardous wastes containing HOCs (listed in Appendix III of Part 268) in total concentration greater than or equal to 1000 mg/1, except dilute HOC

wastewaters (i.e., primarily water mixtures containing HOCs in concentrations greater than or equal to 1000 mg/1 but less than 10,000 mg/1), must be incinerated in accordance with the requirements of Part 264 Subpart O or Part 265 Subpart O. However, with respect to surface land disposal, EPA determined that there is a nationwide lack of incineration capacity, and therefore granted a 2-year variance from the treatment standard. Dilute HOC wastewaters need not be incinerated, but they must be treated to below the 1000 mg/1 prohibition level prior to being land disposed by means other than injection. Dilute HOC wastewaters were not granted a variance and were prohibited from land disposal by means other than injection as of July 8, 1987.

Liquid hazardous wastes containing PCBs at concentrations greater than or equal to 50 ppm must be treated in accordance with existing TSCA thermal treatment regulations at 40 CFR Part 761. For PCB concentrations greater than or equal to 50 ppm but less than 500 ppm, incineration in accordance with the technical requirements of 40 CFR 761.70 or burning in high efficiency boilers in accordance with the technical requirements of 40 CFR 761.60 is required. For PCB concentrations greater than or equal to 500 ppm, incineration in accordance with the technical requirements of 40 CFR 761.70 is required. Thermal treatment for PCBs must also be in compliance with applicable regulations in Parts 264, 265, and 266. No variance to the effective date (7/8/87) was granted for land disposal of PCBs equal to or greater than 50 ppm by means other than injection.

No prohibition levels, treatment standards, or effective dates were established for the California list liquid hazardous wastes containing metals or free cyanides. A notice of data availability and request for comment which outlines the Agency's findings with respect to establishing more stringent prohibition levels was published August 12, 1987 (52 FR 29992).

B. Determination of Treatability Groups, Establishment of Best Demonstrated Available Technology (BDAT), and Effective Dates

1. Free Cyanides and Metals

In the August 12, 1987, Notice of Data Availability, the Agency presented technologies which are applicable to the treatment of California list metal and cyanide wastes (52 FR 29998 *et seq.*). The Agency also presented data that indicates that the existing technologies can achieve the EP regulatory levels or analogous levels for these wastes. A

rulemaking to lower the prohibition levels and/or establish BDAT technology or treatment standards for the California list metal and cyanide wastes, however, has not been finalized.

The Agency believes that it is still possible to make capacity determinations, however, even in the absence of established BDAT standards or statutory ban levels. Moreover, EPA believes that the earlier the Agency signals to the concerned community its intentions regarding capacity variances, the more information it will have when making final determinations.

In order to accomplish this, the Agency will assess whether capacity variances are necessary based on waste quantities resulting from both the statutory ban concentrations, and the lower concentrations suggested on August 12, 1987. This can be accomplished by determining the quantity of waste generated in each treatability group for each proposed ban concentration and comparing it to the national capacity of the various treatment methods appropriate to that group.

As indicated in the August 12, 1987, notice, the data available on both quantities of waste generated and capacity of treatment are limited. The Agency has relied principally on the 1981 RIA mail survey (Ref. 1) and a recent analysis of that survey to refine the information on treatment capacity (Ref. 2). In addition, the Agency just completed an updated survey of both treatment capacity and quantities of waste disposed of in injection wells (Ref. 3). Additional data on treatment capacities and waste volumes generated were available from a survey conducted by Tischler and Kocurek for the Chemical Manufacturers Association (Ref. 4).

The Agency believes the information used in these determinations to be accurate. However, some uncertainty remains. Although these reports are based on recent discussions with state regulatory agencies, EPA Regional Offices, and owners and operators of facilities with injection wells, it was in a few cases difficult to determine whether the data provided referred to volume of waste generated, or volume injected, or if indeed there is a difference. In addition, in some instances, concentration data were not always available, and therefore some wastes which were lower in concentration than either the statutory or suggested ban levels could have been included in the analysis. Nevertheless, the Agency believes the values obtained to be sufficiently accurate to assess capacity.

a. Effective Dates Based on Statutory Ban Levels. The primary treatment methods used for metals other than hexavalent chromium are chemical precipitation and chemical fixation. Other technologies exist, such as ion exchange and high temperature metals recovery, but they are generally better suited to more concentrated waste streams than those which are disposed of by injection (52 FR 29999). Moreover, the availability of these treatments are limited, and would still warrant capacity variances.

There are 243,200,000 gallons of these wastes disposed of by injection each year (excluding chromium-containing wastes). The Agency's best data show a commercial capacity of 4,710,000 gallons for fixation, and 163,440,000 gallons for chemical precipitation (Ref. 2). An additional 8,440,000,000 gallons of metal bearing wastes are disposed of in surface land disposal units (52 FR 30000). The Agency has determined that there is little on-site treatment capacity available to handle injected waste streams (Ref. 3).

Although EPA anticipates that on-site capacity will increase when the minimum technology requirements of section 3005(j)(1) go into effect on November 8, 1988, it will not be sufficient to accommodate the volumes currently injected. Most, if not all, of this capacity will be used to handle waste currently land disposed in surface units. In addition, EPA believes the volume of wastes resulting from cleanup activities required under section 3004(u) of RCRA will be significant. In most cases, these wastes will be handled on-site, further limiting the amount of on-site treatment capacity available.

The most appropriate and generally available treatment method for chromium VI is chemical reduction to the tri-valent state. It is important to note that further treatment is necessary to remove the chromium III from solution. Current information shows a commercial capacity for chromium reduction of 35,000,000 gallons. There are currently 105,115,000 gallons of chromium VI waste injected each year. On-site capacity appears to be very small, and will not be substantially increased, in all likelihood, for several years. Any increased capacity that does become available as a result of surface impoundments complying with section 3005(j)(1) is expected to be used by surface land disposal units.

Accordingly, EPA is proposing to grant a variance and ban the injection of metal bearing wastes at the levels specified in the statute at section 3004(d)(2)(B) on August 8, 1990.

Cyanide oxidation, which chemically destroys free cyanides found in solution, is the most appropriate and generally available treatment for wastes containing free cyanides. In cases where the cyanide is complexed with a metal ion, oxidation will not work and the waste must first be treated using chemical precipitation. The above discussion demonstrated that the available capacity to treat using chemical precipitation is inadequate, so this discussion will focus on cyanide oxidation.

There are currently 169,200,000 gallons of cyanide-bearing waste injected annually. An additional 690,000,000 gallons is disposed of in surface disposal units. The current capacity to treat using cyanide oxidation is 63,720,000 gallons (Ref. 2).

Based on the above analysis, the Agency is proposing to grant a variance from the statutory ban date and instead ban injection of such cyanide-bearing wastes (at any concentration greater than that specified in section 3004(d) of RCRA) on August 8, 1990.

b. Effective Date Based on Suggested Ban Levels. The estimated volume of wastes injected at concentrations above the levels suggested on August 12, 1987 (52 FR 29998), for these constituents is as follows:

Metals (specified in RCRA, section 3004(d)(2)(B), excluding chromium)
300,000,000 GPY
Chromium—342,000,000 GPY
Cyanides—1,357,000,000 GPY

Since the treatment capacities would still be inadequate to handle the volume of wastes at these concentrations in any of the categories, the Agency is proposing to grant 2 year variances from the statutory ban date at the levels suggested on 8/12/87. The ban would go into effect on August 8, 1990.

2. Corrosives

The Agency has not proposed nor assessed a particular treatment technology for neutralizing corrosive wastes. Instead, the Agency suggested that any treatment which raised the pH to above 2 or rendered the waste non-liquid would make the waste eligible for land disposal (52 FR 25768, July 8, 1987).

As indicated in section (II)(C) of this preamble, the Agency believes that the high volumes of corrosives generated and disposed of in injection wells pose significant problems, beyond strict capacity driven concerns.

There are specific technical problems associated with treatment of corrosives that uniquely affect the disposal of the treated waste in injection wells. When the pH of a waste is raised, formations

may become plugged with precipitates or suspended solids which form both in the waste stream and as a result of reactions with the highly mineralized formation waters. Thus, in many instances, the treated waste would plug the formation and therefore could not be injected for long. In these instances, the operator would have to find alternative capacity for both the treatment residual and the neutralized waste stream. Such capacity could be in the form of releases to surface water, subtitle D facilities, or other alternatives.

Thus, the Agency believes that given the extremely large volumes of corrosive waste injected, a variance is justified. Current estimates indicate that 1,014,100,000 gallons of corrosive waste are injected annually. The EPA believes that the full two year variance permissible under section 3004(h)(2) of RCRA will be necessary to develop capacity adequate to handle such quantities of waste. Accordingly, the Agency is proposing to ban disposal, by injection, of corrosives having a pH less than 2 on August 8, 1990. The Agency specifically solicits comment on whether capacity exists of which EPA is currently unaware, or on whether other data may exist which is relevant to this determination.

3. Polychlorinated Biphenyls (PCBs)

At this time, information available to the Agency indicates that only 25,000 gallons per year of PCB-containing waste are injected. The Agency found that adequate capacity, in the form of boilers and other methods, existed (see 52 FR 25775, July 8, 1987). Restricting these wastes from injection should not place a significant demand on available treatment capacity and the Agency is proposing that the ban prohibiting injection of PCB-containing wastes at concentrations greater than or equal to 50 ppm apply on August 8, 1988.

4. Halogenated Organic Compounds (HOCs)

On July 8, 1987, the Agency stated that HOC containing-wastes subject to the California list restriction were defined by those HOCs listed in 40 CFR Part 268, Appendix III. Further, with respect to surface land disposal, EPA granted a two-year variance for HOCs at concentrations equal to or above 10,000 mg/l. The Agency specified incineration as BDAT for such wastes, and noted that there was not adequate capacity. Recent information suggests that cement kilns may add substantially to the available incineration capacity. The Agency is not aware of any HOCs being injected at concentrations above 10,000

ppm, but would review the data to determine whether a variance from the ban on injection would be warranted if any were.

The Agency specified wastewater treatment as BDAT for dilute HOC wastewaters that are at concentrations between 1,000 and 10,000 mg/l (HOCs below 1,000 mg/l are not subject to California List prohibitions). On August 27, 1987, the Agency indicated that 85,000,000 gallons of dilute HOC wastewaters above the statutory concentration levels (1,000 mg/l) are injected annually (52 FR 32451). Since then, the Agency has updated the data base on which these figures were based (Ref. 3). Currently there are 319,096,000 gallons of dilute HOC-containing wastewaters injected each year at concentrations above 1,000 mg/l. The Agency has found previously that appropriate wastewater treatment capacity was inadequate (see 51 FR 40607 *et seq.*, November 7, 1986, and 52 FR 32450, August 27, 1987) and still believes that to be the case. Accordingly, EPA proposes to grant a two year capacity variance and impose the prohibition on injection of dilute HOC wastewaters at concentrations greater than or equal to 1,000 mg/l (and less than 10,000 mg/l) on August 8, 1990.

C. Considerations Relative to High Volume Wastes

In the June 11, 1987, Notice of Data Availability, the Agency noted that tank capacity not regulated under RCRA could be installed relatively easily, and that treatment of corrosive wastes could be accomplished with relative ease (52 FR 22359). The Agency also noted that large volume waste streams could pose significant capacity problems. Several commenters to that proposal pointed out that injection wells posed unique problems, due both to the quantity of waste handled and, in the case of corrosives, operational problems specific to injection wells. The Agency believes the comments have merit.

After further analysis, the Agency is convinced that high volume waste streams do indeed pose significant problems. For example, EPA investigated several factors which might complicate treatment of high-volume waste streams: the availability of tanks of sufficient size and of material capable of withstanding the high temperatures associated with some reactions, the need to handle large volumes of residuals, and the difficulty involved in obtaining needed permits (both State and Federal) were seen to limit availability (Ref. 4). The Agency also investigated the limits that transportation might impose on the

availability of treatment (Refs. 3 and 4). This analysis indicated that the availability of transportation could pose a serious impediment to making commercial treatment accessible. The problem is particularly acute in view of the fact that most of the available treatment was located at substantial distances from areas where the majority of hazardous waste is injected (Ref. 4).

To transport the 4.8 billion gallons of injected solvents, California list metals, cyanides, and corrosives that are injected each year would require over 240,000 rail cars per year (approximately 657 per day) or 960,000 tank trucks per year (approximately 109 truck loads every hour for 365 days each year) (Ref. 5). These problems are compounded since only 17% of the currently known available treatment capacity is in the Gulf Coast area, while 65.3% of these hazardous wastes are generated in the Gulf States (Ref. 4). Considering the inevitable logistical difficulties involved in moving this volume of waste, it is highly unlikely that the transportation industry would be able to meet the vastly increased demand that would result from immediately effective prohibitions. Until such time as the transportation industry could meet this demand, adequate alternative treatment capacity would effectively be unavailable. Primary adjustment would be at individual injection facilities, many of which would need to acquire adequate space and facilities to accommodate more than 63 trucks a day (Ref. 4). Treatment facilities would also have to develop the capability to deal with additional traffic. The Agency solicits comments on the impact these transportation problems have on the availability of adequate treatment capacity for injected hazardous waste.

III. Summary of Today's Proposal—First Third of the Scheduled Waste

A. Background

EPA has estimated that approximately 261 million gallons of the generated First Thirds wastes with identified treatment standards and methods are injected every year. The Agency based this estimate on an ongoing survey that is updating the Hazardous Waste Injection Well Database (HWIWD). As treatment standards and methods are specified for the remaining First Thirds wastes, this volume will get larger. It must be noted that the data were collected at the point of generation. The actual volume of fluid containing First Thirds constituents that is injected annually is much greater than 261 million gallons due to preinjection mixing with other hazardous and

nonhazardous wastes. The EPA is using the smaller volume because section 3004(g) requirements are applicable at the point of generation.

B. Determination of Treatability Groups and Establishment of Best Demonstrated Available Technology

The 261 million gallons of injected First Thirds waste with identified BDAT treatment standards can be delineated as follows:

RCRA waste code	Volume injected (gallons/year)
K016.....	98,640,000
K019.....	91,000
K030.....	45,000
K049.....	6,000
K050.....	55,000
K051.....	51,000
K052.....	45,000
K062.....	148,676,000
K071.....	45,000
K104.....	12,924,000
Total.....	¹ 260,978,000

¹ See reference 3.

A very small amount (less than 1/10 of 1%) of the above total may have been double-counted due to incomplete data on certain facilities which inject waste streams containing more than one waste subject to § 3004(g) restrictions. In some cases where more than one RCRA waste code was contained in a single stream, the total volume of the waste stream was attributed to each waste code.

It is important to note that this proposal would set effective dates for K019 wastes which had been listed with the Second Thirds. The Agency expects to propose BDAT for K019 wastes shortly; when finalized, the effective date of the prohibition for this waste would likely be moved from 6/8/90 to an earlier date. Accordingly, this proposal addresses K019 wastes.

EPA's framework for the determination of BDAT was promulgated on November 7, 1986 (51 FR 40572 *et seq.*). Following this framework, EPA has identified treatment methods which the Agency intends to propose as BDAT for about half of the 50 First Thirds wastes in the near future. At that time, concentration standards (or methods) of the regulated constituents in each of the wastes will also be proposed. For the purpose of today's capacity determinations, however, such concentration standards are unnecessary. The treatment methods which EPA expects to propose as BDAT which address injected wastes are outlined below:

Treatment train	Affected RCRA wastes	Capacity required to treat injected wastes (gallons per year)
Chromium Reduction→ Chemical Precipitation→ Vacuum Filtration.	K062	148,676,000
Solvent Extraction→ Steam Stripping→ Activated Carbon Adsorption.	K104	12,924,000
Sulfide Precipitation→ Filtration.	K071	45,000
Incineration→ Metals Stabilization.	K016, K019, ... K030, K049, ... K050, K051, ... K052	99,333,000
Total		260,978,000

¹ See reference 3.

C. Capacity Currently Available and Effective Dates

All of the above methods expected to be proposed as BDAT involve two or more treatment steps. Consequently, the available capacity for each treatment train has been calculated as the lowest available volume for any single treatment step in the treatment train under consideration.

The following effective dates for the ban on land disposal of certain hazardous wastes by deep well injection are being proposed today:

1. K062. EPA has estimated that approximately 230,000,000 gallons of surface disposed K062 waste will require treatment (Ref. 6) and that such capacity will exist by 8/8/88 due to retrofitting of surface facilities. As noted, much of this available capacity will be used either by wastes from surface facilities or wastes resulting from corrective actions. Thus, the Agency believes there will not be adequate capacity for the additional 148 million gallons of injected K062 waste. This determination is supported by the 1981 RIA Mail Survey which indicates an available capacity of only 10,000 gallons for filtration, an integral part of the K062 treatment train. Available treatment is further limited by the lack of sufficient chemical precipitation treatment capacity. The Agency thus proposes to grant a two-year national capacity variance from the statutory ban effective date for injected K062 waste, thereby allowing injection of this waste until August 8, 1990.

2. K104. EPA has estimated that about 30 million gallons of surface disposed K104 waste will require treatment and that such treatment capacity is not available and will not become available

in the near future (Ref. 6). An additional 13 million gallons of deep well injected K104 will require treatment. Based on the analysis performed for surface disposal, such capacity is not available. Consequently we are proposing to grant a two-year national capacity variance from the statutory ban effective date and ban injection of K104 wastes on August 8, 1990.

3. K071. EPA has estimated that about 8 million gallons of surface disposed K071 will require chemical treatment annually and that no commercial treatment facilities currently manage this waste (Ref. 6). As noted above, the 1981 RIA Mail Survey indicates only 10,000 gallons of available capacity for filtration, a step in the treatment train for K071. Consequently we are proposing to grant a two-year national capacity variance from the statutory ban effective date and ban the injection of K071 wastes on August 8, 1990.

4. K016, K019, K030, K049-K052. EPA has estimated that about 170 million gallons of surface disposed K016, K019, K030, and K049-K052 wastes will require fluidized bed or rotary kiln incineration treatment annually (Ref. 6). The Agency determined for the Solvents and Dioxins Rule (51 FR 40572) that there is not enough commercial fluidized bed or rotary kiln incineration capacity for wastes. The latest data available to the Agency suggests that on-site incineration capacity for facilities that generate these wastes is inadequate. The RIA survey indicates that only 22 million gallons of alternative capacity exist for incineration. Again, cement kilns may substantially increase the capacity available, but the Agency does not believe such capacity is available now. The Agency is proposing today, therefore, to grant a two-year national capacity variance and ban these wastes from injection on August 8, 1990. For dilute waste streams with less than 1% organics, wastewater treatment would be more amenable. As noted, the Agency has determined that such capacity is inadequate, and therefore is proposing a capacity variance for such wastes.

IV. Regulatory Requirements

A. Regulatory Impact Analysis

Executive Order 12291 requires EPA to assess the effect of contemplated Agency actions during the development of regulations. Such an assessment consists of a quantification of the potential benefits and costs of the rule, as well as a description of any beneficial or adverse effects that cannot be quantified in monetary terms. In addition, Executive Order 12291 requires

that regulatory agencies prepare an analysis of the regulatory impact of major rules. Major rules are defined as those likely to result in:

1. An annual cost to the economy of \$100 million or more; or
2. A major increase in costs or prices for consumers or individual industries; or
3. Significant adverse effects on competition, employment, investment, innovation or international trade.

The Agency has performed an analysis of the proposed regulation to assess the economic effect of associated compliance costs for the California list and the First Thirds List wastes (Refs. 7 and 8). Total compliance costs of the proposed regulation are estimated at \$41.9 million for both lists of wastes, or \$11.8 million annualized. Alternate treatment costs are estimated to total \$36 million (\$11.44 million annualized) and petition costs are estimated to be \$5.9 million (\$0.42 million annualized). These costs indicate that the proposal does not constitute a major rule under Executive Order 12291.

B. Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). This analysis is unnecessary, however, if the agency's administrator certifies that the rule will not have significant economic effect on a substantial number of small entities.

Owners and operators of hazardous waste injection wells are generally major chemical, petrochemical and other manufacturing companies. The Agency is not aware of any small entities that would be affected by this rule. Section 148.1(c)(3) of the proposed regulatory framework for this rule exempts any small quantity generator, as defined in § 261.5, from the underground injection prohibitions proposed in that framework. The Administrator certifies that this rule will not have significant economic effects on a substantial number of small businesses. As a result of this finding EPA has not prepared a formal Regulatory Flexibility Analysis.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget

(OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request document for both the California list and First Thirds wastes has been prepared by EPA (ICR No. 0370.05) and a copy may be obtained from Eric Strassler, Information Policy Branch, EPA, 401 M Street SW. (PM-223), Washington, DC 20460 or by calling (202) 382-2738.

Submit comments on these requirements to EPA and: Office of Information and Regulatory Affairs, OMB, 726 Jackson Place NW., Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements.

V. References

(1) National Survey of Hazardous Waste Generators and Treatment, Storage and Disposal Facilities Regulated Under RCRA in 1981; Office of Solid Waste, U.S. EPA, April, 1984.

(2) Tank Treatment Capacity—An Analysis of the RIA Mail Survey, Vol. I, Radian Corporation, November 1986.

(3) Findings on Class I Hazardous Wells Affected by the Land Ban Rules; Temple, Barker and Sloane, December, 1987.

(4) Evaluation of Availability of Alternate Treatment and Disposal Capacity for Injected Hazardous Wastes; Tischler/Kocurek for the Chemical Manufacturers Association, October 1987.

(5) Comments of the Chemical Manufacturers Association on EPA's Proposed Rule Regarding Hazardous Waste Disposal Injection Restrictions; Chemical Manufacturers Association, October 1987.

(6) Background Document for First Third Wastes to Support 40 CFR Part 268 Land Disposal Restrictions, Proposed Rule, First Third Waste Volumes, Characteristics, and Required and Available Treatment Capacity; U.S. EPA, OSW, December 1987. (Preliminary Document)

(7) Regulatory Impact Analysis of Proposed Hazardous Waste Disposal Restrictions for Class I Injection of California List Wastes, EPA Report, Contract No. 68-03-3348; Cadmus Group, Inc., October 1987.

(8) Regulatory Impact Analysis of Proposed Hazardous Waste Disposal Restrictions for Class I Injection of First Thirds List Wastes, EPA Report, Contract No. 68-03-3348; Cadmus Group, Inc., October 1987.

List of Subjects in 40 CFR Part 148

Administrative practice and procedure, Confidential business information, Environmental protection, Hazardous materials, Hazardous materials transportation, Hazardous waste, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal, Water supply, Water pollution control.

Dated: April 18, 1988.

Lee M. Thomas,
Administrator.

Therefore it is proposed that Chapter I of Title 40 be amended as follows:

PART 148—HAZARDOUS WASTE INJECTION RESTRICTIONS

1. The authority citation for Part 148 continues to read as follows:

Authority: Section 3004, Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*

2. Section 148.12 is added to read as follows:

§ 148.12 Waste specific prohibitions—California list wastes.

(a) Effective August 8, 1988, liquid hazardous wastes containing polychlorinated biphenyls at concentrations greater than or equal to

50 ppm are prohibited from underground injection.

(b) Effective August 8, 1990, the hazardous wastes listed in section 3004 (d)(2) of RCRA (the California list), other than those listed in paragraph (a) of this section, are prohibited from underground injection.

(c) The requirements of paragraphs (a) and (b) of this section do not apply:

(1) If the wastes meet or are treated to meet the applicable standards specified in Subpart D of Part 268; or

(2) If an exemption from a prohibition has been granted in response to a petition under Subpart C of this part; or

(3) During the period of extension of the applicable effective date, if an extension is granted under § 148.4 of this part.

3. Section 148.14 is added to read as follows:

§ 148.14 Waste specific prohibitions—First Third wastes.

(a) Effective August 8, 1990, the wastes specified in 40 CFR 261.32 as EPA Hazardous Waste numbers K016, K019, K030, K049, K050, K051, K052, K062, K071, and K104 are prohibited from underground injection.

(b) The requirements of paragraph (a) of this section do not apply:

(1) If the wastes meet or are treated to meet the applicable standards specified in Subpart D of Part 268; or

(2) If an exemption from a prohibition has been granted in response to a petition under Subpart C of this part; or

(3) During the period of extension of the applicable effective date, if an extension is granted under § 148.4 of this part.

[FR Doc. 88-8960 Filed 4-25-88; 8:45 am]

BILLING CODE 5560-50-M

தமிழ்நாடு

Department of Defense

**33 CFR Parts 209, 335, 336, 337, and 338
Discharge of Dredged Material Into
Waters of the U.S. or Ocean Waters;
Operation and Maintenance; Final Rule**

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

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

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

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

ACTION: Final rule.

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

EFFECTIVE DATE: April 26, 1988.**FOR FURTHER INFORMATION CONTACT:** Mr. Dave Mathis or Mr. Joe Wilson, (202) 272-0397.**SUPPLEMENTARY INFORMATION:**

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

Environmental Documentation

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

Determination Under Executive Order 12291 and the Regulatory Flexibility Act

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

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

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

The policy statement in Part 335 indicates that the Corps undertakes

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

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

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

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

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

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

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

Section-by-Section Analysis

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

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

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

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

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

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

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

Section 335.7: Several commenters indicated that the definition of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part 337—Practices and Procedures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General Comments

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

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

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

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

List of Subjects

33 CFR Part 335

Environmental protection, Intergovernmental relations, Navigation, Definitions.

33 CFR Part 336

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

33 CFR Part 337

Administrative practice and procedure.

33 CFR Part 338

Navigation, Environmental protection, Waterways, Natural resources.

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

Dated: April 5, 1988.

Robert W. Page, Sr.,

Assistant Secretary of the Army (Civil Works).

PART 209—[AMENDED]

§ 209.145 [Removed]

1. 33 CFR 209.145 is removed.
2. Parts 335, 336, 337, and 338 are added as set forth below:

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

Sec.

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

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

§ 335.1 Purpose.

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

§ 335.2 Authority.

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

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

§ 335.3 Applicability.

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

§ 335.4 Policy.

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

§ 335.5 Applicable laws.

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

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

§ 335.6 Related laws and Executive Orders.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 335.7 Definitions.

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

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

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

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

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

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

and logistics in light of overall project purposes.

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

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

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

Sec.

336.0 General.

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

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

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

§ 336.0 General.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

determination that the CZMA does not apply.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART 337—PRACTICE AND PROCEDURE

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

§ 337.0 Purpose.

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

§ 337.1 Public notice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) A statement on endangered species.

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

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

whom additional information concerning the project may be obtained.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 337.2 State requirements.

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

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

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

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

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

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

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

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

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

§ 337.4 Memoranda of Agreement (MOA).

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

§ 337.5 General authorizations.

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

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

§ 337.6 Statement of Findings (SOF).

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

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

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

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

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

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

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

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

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

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

§ 337.7 Emergency actions.

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

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

§ 337.8 Reports to higher echelons.

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

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

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

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

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

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

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

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

(1) Justification showing the economic need for dredging.

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

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

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

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

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

§ 337.9 Identification and use of disposal areas.

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

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

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

§ 337.10 Supervision of Federal projects.

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

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

Sec.

338.1 Purpose.

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

Authority: 33 U.S.C. 1344.

§ 338.1 Purpose.

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

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

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

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

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

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

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

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

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

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

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

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

[FR Doc. 88-8928 Filed 4-25-88; 8:45 am]

BILLING CODE 3710-08-M