SUBCHAPTER H—OCEAN DUMPING

PART 220—GENERAL

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

SOURCE: 42 FR 2468, Jan. 11, 1977, unless otherwise noted.

§ 220.1 Purpose and scope.

(a) *General.* This subchapter H establishes procedures and criteria for the issuance of permits by EPA pursuant to section 102 of the Act. This subchapter H also establishes the criteria to be applied by the Corps of Engineers in its review of activities involving the transportation of dredged material for the purpose of dumping it in ocean waters pursuant to section 103 of the Act. Except as may be authorized by a permit issued pursuant to this subchapter H, or pursuant to section 103 of the Act, and subject to other applicable regulations promulgated pursuant to section 108 of the Act:

(1) No person shall transport from the United States any material for the purpose of dumping it into ocean waters;

(2) In the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location any material for the purpose of dumping it into ocean waters; and

(3) No person shall dump any material transported from a location outside the United States:

(i) Into the territorial sea of the United States; or

(ii) Into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

(b) *Relationship to international agreements.* In accordance with section 102(a) of the Act, the regulations and criteria included in this subchapter H apply the standards and criteria binding upon the United States under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter to the extent that application of such standards and criteria do not relax the requirements of the Act.

(c) *Exclusions*—(1) *Fish wastes.* This subchapter H does not apply to, and no permit hereunder shall be required for, the transportation for the purpose of dumping or the dumping in ocean waters of fish wastes unless such dumping occurs in:

(i) Harbors or other protected or enclosed coastal waters; or

(ii) Any other location where the Administrator finds that such dumping may reasonably be anticipated to endanger health, the environment or ecological systems.

(2) *Fisheries resources.* This subchapter H does not apply to, and no permit hereunder shall be required for, the placement or deposit of oyster shells or other materials for the purpose of developing, maintaining or harvesting fisheries resources; provided, such placement or deposit is regulated under or is a part of an authorized State or Federal program certified to EPA by the agency authorized to enforce the regulation, or to administer the program, as the case may be; and provided further, that the National Oceanic and Atmospheric Administration, the U.S. Coast Guard, and the U.S. Army Corps of Engineers concur in such placement or deposit as it may affect their responsibilities and such concurrence is evidenced by letters of concurrence from these agencies.

(3) *Vessel propulsion and fixed structures.* This subchapter H does not apply to, and no permit hereunder shall be required for:

(i) Routine discharges of effluent incidental to the propulsion of vessels or the operation of motor-driven equipment on vessels; or

(ii) Construction of any fixed structure or artificial island, or the intentional placement of any device in ocean waters or on or in the submerged

land beneath such waters, for a purpose other than disposal when such construction or such placement is otherwise regulated by Federal or State law or made pursuant to an authorized Federal or State program certified to EPA by the agency authorized to enforce the regulations or to administer the program, as the case may be.

(4) *Emergency to safeguard life at sea.* This subchapter H does not apply to, and no permit hereunder shall be required for, the dumping of material into ocean waters from a vessel or aircraft in an emergency to safeguard life at sea to the extent that the person owning or operating such vessel or aircraft files timely reports required by § 224.2(b).

§ 220.2 Definitions.

As used in this subchapter H:

(a) *Act* means the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1401);

(b) *FWPCA* means the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251);

(c) *Ocean* or *ocean waters* means those waters of the open seas lying seaward of the baseline from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639); this definition includes the waters of the territorial sea, the contiguous zone and the oceans as defined in section 502 of the FWPCA.

(d) *Material* means matter of any kind or description, including, but not limited to, dredged material, solid waste, incinerator residue, garbage, sewage, sewage sludge, munitions, radiological, chemical, and biological warfare agents, radioactive materials, chemicals, biological and laboratory waste, wreck or discarded equipment, rock, sand, excavation debris, industrial, municipal, agricultural, and other waste, but such term does not mean sewage from vessels within the meaning of section 312 of the FWPCA. Oil within the meaning of section 311 of the FWPCA shall constitute ''material'' for purposes of this subchapter H only to the extent that it is taken on board a vessel or aircraft for the primary purpose of dumping.

(e) *Dumping* means a disposition of material: *Provided,* That it does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the FWPCA, under the provisions of section 13 of the River and Harbor Act of 1899, as amended (33 U.S.C. 407), or under the provisions of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011), nor does it mean a routine discharge of effluent incidental to the propulsion of, or operation of motor-driven equipment on, vessels: *Provided further,* That it does not mean the construction of any fixed structure or artificial island nor the intentional placement of any device in ocean waters or on or in the submerged land beneath such waters, for a purpose other than disposal, when such construction or such placement is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program; And provided further, That it does not include the deposit of oyster shells, or other materials when such deposit is made for the purpose of developing, maintaining, or harvesting fisheries resources and is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program.

(f) *Sewage Treatment Works* means municipal or domestic waste treatment facilities of any type which are publicly owned or regulated to the extent that feasible compliance schedules are determined by the availability of funding provided by Federal, State, or local governments.

(g) *Criteria* means the criteria set forth in part 227 of this subchapter H.

(h) *Dredged Material Permit* means a permit issued by the Corps of Engineers under section 103 of the Act (see 33 CFR 209.120) and any Federal projects reviewed under section 103(e) of the Act (see 33 CFR 209.145).

(i) Unless the context otherwise requires, all other terms shall have the meanings assigned to them by the Act.

§ 220.3 Categories of permits.

This § 220.3 provides for the issuance of general, special, emergency, and research permits for ocean dumping under section 102 of the Act.

(a) *General permits.* General permits may be issued for the dumping of certain materials which will have a minimal adverse environmental impact and are generally disposed of in small quantities, or for specific classes of materials that must be disposed of in emergency situations. General permits may be issued on application of an interested person in accordance with the procedures of part 221 or may be issued without such application whenever the Administrator determines that issuance of a general permit is necessary or appropriate.

(b) *Special permits.* Special permits may be issued for the dumping of materials which satisfy the Criteria and shall specify an expiration date no later than three years from the date of issue.

(c) *Emergency permits.* For any of the materials listed in §227.6, except as trace contaminants, after consultation with the Department of State with respect to the need to consult with parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter that are likely to be affected by the dumping, emergency permits may be issued to dump such materials where there is demonstrated to exist an emergency requiring the dumping of such materials, which poses an unacceptable risk relating to human health and admits of no other feasible solution. As used herein, ''emergency'' refers to situations requiring action with a marked degree of urgency, but is not limited in its application to circumstances requiring immediate action. Emergency permits may be issued for other materials, except those prohibited by §227.5, without consultation with the Department of State when the Administrator determines that there exists an emergency requiring the dumping of such materials which poses an unacceptable risk to human health and admits of no other feasible solution.

(d) [Reserved]

(e) *Research permits.* Research permits may be issued for the dumping of any materials, other than materials specified in §227.5 or for any of the materials listed in §227.6 except as trace contaminants, unless subject to the exclusion of §227.6(g), into the ocean as part of a research project when it is determined that the scientific merit of the proposed project outweighs the potential environmental or other damage that may result from the dumping. Research permits shall specify an expiration date no later than 18 months from the date of issue.

(f) *Permits for incineration at sea.* Permits for incineration of wastes at sea will be issued only as research permits until specific criteria to regulate this type of disposal are promulgated, except in those cases where studies on the waste, the incineration method and vessel, and the site have been conducted and the site has been designated for incineration at sea in accordance with the procedures of §228.4(b) of this chapter. In all other respects the requirements of parts 220 through 228 apply.

[42 FR 2468, Jan. 11, 1977; 43 FR 1071, Jan. 6, 1978; 73 FR 74986, Dec. 10, 2008]

§ 220.4 Authorities to issue permits.

(a) *Determination by Administrator.* The Administrator, or such other EPA employee as he may from time to time designate in writing, shall issue, deny, modify, revoke, suspend, impose conditions on, initiate and carry out enforcement activities and take any and all other actions necessary or proper and permitted by law with respect to general, special, emergency, or research permits.

(b) *Authority delegated to Regional Administrators.* Regional Administrators, or such other EPA employees as they may from time to time designate in writing, are delegated the authority to issue, deny, modify, revoke, suspend, impose conditions on, initiate and carry out enforcement activities, and take any and all other actions necessary or proper and permitted by law with respect to special permits for:

(1) The dumping of material in those portions of the territorial sea which are subject to the jurisdiction of any State within their respective Regions, and in those portions of the contiguous zone immediately adjacent to such parts of the territorial sea; and in the oceans with respect to approved waste disposal sites designated pursuant to part 228 of this subchapter H, and

(2) Where transportation for dumping is to originate in one Region and dumping is to occur at a location within another Region's jurisdiction conferred by order of the Administrator, the Region in which transportation is to originate shall be responsible for review of the application and shall prepare the technical evaluation of the need for dumping and alternatives to ocean dumping. The Region having jurisdiction over the proposed dump site shall take all other actions required by this subchapter H with respect to the permit application, including without limitation, determining to issue or deny the permit, specifying the conditions to be imposed, and giving public notice. If both Regions do not concur in the disposition of the permit application, the Administrator will make the final decision on all issues with respect to the permit application, including without limitation, issuance or denial of the permit and the conditions to be imposed.

(c) *Review of Corps of Engineers Dredged Material Permits.* Regional Administrators have the authority to review, to approve or to disapprove or to propose conditions upon Dredged Material Permits for ocean dumping of dredged material at locations within the respective Regional jurisdictions. Regional jurisdiction to act under this paragraph (c) of § 220.4 is determined by the Administrator in accordance with § 228.4(e).

[42 FR 2468, Jan. 11, 1977, as amended at 73 FR 74986, Dec. 10, 2008]

PART 221—APPLICATIONS FOR OCEAN DUMPING PERMITS UNDER SECTION 102 OF THE ACT

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

SOURCE: 42 FR 2470, Jan. 11, 1977, unless otherwise noted.

§ 221.1 Applications for permits.

Applications for general, special, emergency, and research permits under section 102 of the Act may be filed with the Administrator or the appropriate Regional Administrator, as the case may be, authorized by § 220.4 of this chapter to act on the application. Applications shall be made in writing and shall contain, in addition to any other material which may be required, the following:

(a) Name and address of applicant;

(b) Name of the person or firm transporting the material for dumping, the name of the person(s) or firm(s) producing or processing all materials to be transported for dumping, and the name or other identification, and usual location, of the conveyance to be used in the transportation and dumping of the material to be dumped, including information on the transporting vessel's communications and navigation equipment;

(c) Adequate physical and chemical description of material to be dumped, including results of tests necessary to apply the Criteria, and the number, size, and physical configuration of any containers to be dumped;

(d) Quantity of material to be dumped;

(e) Proposed dates and times of disposal;

(f) Proposed dump site, and in the event such proposed dump site is not a dump site designated in this subchapter H, detailed physical, chemical and biological information relating to the proposed dump site and sufficient to support its designation as a site according to the procedures of part 228 of this subchapter H;

(g) Proposed method of releasing the material at the dump site and means by which the disposal rate can be controlled and modified as required;

(h) Identification of the specific process or activity giving rise to the production of the material;

(i) Description of the manner in which the type of material proposed to be dumped has been previously disposed of by or on behalf of the person(s) or firm(s) producing such material;

(j) A statement of the need for the proposed dumping and an evaluation of short and long term alternative means

of disposal, treatment or recycle of the material. Means of disposal shall include without limitation, landfill, well injection, incineration, spread of material over open ground; biological, chemical or physical treatment; recovery and recycle of material within the plant or at other plants which may use the material, and storage. The statement shall also include an analysis of the availability and environmental impact of such alternatives; and

(k) An assessment of the anticipated environmental impact of the proposed dumping, including without limitation, the relative duration of the effect of the proposed dumping on the marine environment, navigation, living and non-living marine resource exploitation, scientific study, recreation and other uses of the ocean.

[42 FR 2470, Jan. 11, 1977, as amended at 73 FR 74986, Dec. 10, 2008]

§ 221.2 Other information.

In the event the Administrator, Regional Administrator, or a person designated by either to review permit applications, determines that additional information is needed in order to apply the Criteria, he shall so advise the applicant in writing. All additional information requested pursuant to this § 221.2 shall be deemed part of the application and for purposes of applying the time limitation of § 222.1, the application will not be considered complete until such information has been filed.

§ 221.3 Applicant.

Any person may apply for a permit under this subchapter H even though the proposed dumping may be carried on by a permittee who is not the applicant; provided however, that the Administrator or the Regional Administrator, as the case may be, may, in his discretion, require that an application be filed by the person or firm producing or processing the material proposed to be dumped. Issuance of a permit will not excuse the permittee from any civil or criminal liability which may attach by virtue of his having transported or dumped materials in violation of the terms or conditions of a permit, notwithstanding that the permittee may not have been the applicant.

§ 221.4 Adequacy of information in application.

No permit issued under this subchapter H will be valid for the transportation or dumping of any material which is not accurately and adequately described in the application. No permittee shall be relieved of any liability which may arise as a result of the transportation or dumping of material which does not conform to information provided in the application solely by virtue of the fact that such information was furnished by an applicant other than the permittee.

§ 221.5 Processing fees.

(a) A processing fee of $1,000 will be charged in connection with each application for a permit for dumping in an existing dump site designated in this subchapter H.

(b) A processing fee of an additional $3,000 will be charged in connection with each application for a permit for dumping in a dump site other than a dump site designated in this subchapter H.

(c) Notwithstanding any other provision of this § 221.5, no agency or instrumentality of the United States or of a State or local government will be required to pay the processing fees specified in paragraphs (a) and (b) of this section.

PART 222—ACTION ON OCEAN DUMPING PERMIT APPLICATIONS UNDER SECTION 102 OF THE ACT

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

SOURCE: 42 FR 2471, Jan. 11, 1977, unless otherwise noted.

§ 222.1 General.

Decisions as to the issuance, denial, or imposition of conditions on general, special, emergency, and research permits under section 102 of the Act will be made by application of the criteria of parts 227 and 228 of this chapter. Final action on any application for a permit will, to the extent practicable, be taken within 180 days from the date a complete application is filed.

[73 FR 74986, Dec. 10, 2008]

§ 222.2 Tentative determinations.

(a) Within 30 days of the receipt of his initial application, an applicant shall be issued notification of whether his application is complete and what, if any, additional information is required. No such notification shall be deemed to foreclose the Administrator or the Regional Administrator, as the case may be, from requiring additional information at any time pursuant to § 221.2.

(b) Within 30 days after receipt of a completed permit application, the Administrator or the Regional Administrator, as the case may be, shall publish notice of such application including a tentative determination with respect to issuance or denial of the permit. If such tentative determination is to issue the permit, the following additional tentative determinations will be made:

(1) Proposed time limitations, if any;

(2) Proposed rate of discharge from the barge or vessel transporting the waste;

(3) Proposed dumping site; and

(4) A brief description of any other proposed conditions determined to be appropriate for inclusion in the permit in question.

§ 222.3 Notice of applications.

(a) *Contents.* Notice of every complete application for a general, special, emergency and research permit shall, in addition to any other material, include the following:

(1) A summary of the information included in the permit application;

(2) Any tentative determinations made pursuant to paragraph (b) of § 222.2;

(3) A brief description of the procedures set forth in § 222.5 for requesting a public hearing on the application including specification of the date by which requests for a public hearing must be filed;

(4) A brief statement of the factors considered in reaching the tentative determination with respect to the permit and, in the case of a tentative determination to issue the permit, the reasons for the choice of the particular permit conditions selected; and

(5) The location at which interested persons may obtain further information on the proposed dumping, including copies of any relevant documents.

(b) *Publication*—(1)(1) *Special and research permits.* Notice of every complete application for special and research permits shall be given by:

(i) Publication in a daily newspaper of general circulation in the State in closest proximity to the proposed dump site; and

(ii) Publication in a daily newspaper of general circulation in the city in which is located the office of the Administrator or the Regional Administrator, as the case may be, giving notice of the permit application.

(2) *General permits.* Notice of every complete application for a general permit or notice of action proposed to be taken by the Administrator to issue a general permit, without an application, shall be given by publication in the FEDERAL REGISTER.

(3) *Emergency permits.* Notice of every complete application for an emergency permit shall be given by publication in accordance with paragraphs (b)(1)(i) and (ii) of this section; *Provided, however,* That no such notice and no tentative determination in accordance with § 222.2 shall be required in any case in which the Administrator determines:

(i) That an emergency, as defined in paragraph (c) of § 220.3 exists;

(ii) That the emergency poses an unacceptable risk relating to human health;

(iii) That the emergency admits of no other feasible solution; and

(iv) That the public interest requires the issuance of an emergency permit as soon as possible.

Notice of any determination made by the Administrator pursuant to this paragraph (b)(3) shall be given as soon as practicable after the issuance of the emergency permit by publication in accordance with paragraphs (b)(1)(i) and (ii) and with paragraphs (a), (c) through (i) of this section.

(c) *Copies of notice sent to specific persons.* In addition to the publication of notice required by paragraph (b) of this section, copies of such notice will be mailed by the Administrator or the Regional Administrator, as the case may be, to any person, group or Federal, State or local agency upon request. Any such request may be a standing request for copies of such notices and shall be submitted in writing to the Administrator or to any Regional Administrator and shall relate to all or any class of permit applications which may be acted upon by the Administrator or such Regional Administrator, as the case may be.

(d) *Copies of notice sent to States.* In addition to the publication of notice required by paragraph (b) of this section, copies of such notice will be mailed to the State water pollution control agency and to the State agency responsible for carrying out the Coastal Zone Management Act, if such agency exists, for each coastal State within 500 miles of the proposed dumping site.

(e) *Copies of notice sent to Corps of Engineers.* In addition to the publication of notice required by paragraph (b) of this section, copies of such notice will be mailed to the office of the appropriate District Engineer of the U.S. Army Corps of Engineers for purposes of section 106(c) of the Act, (pertaining to navigation, harbor approaches, and artificial islands on the outer continental shelf).

(f) *Copies of notice sent to Coast Guard.* In addition to the publication of notice required by paragraph (b) of this section, copies of such notice will be sent to the appropriate district office of the U.S. Coast Guard for review and possible suggestion of additional conditions to be included in the permit to facilitate surveillance and enforcement.

(g) *Fish and Wildlife Coordination Act.* The Fish and Wildlife Coordination Act, Reorganization Plan No. 4 of 1970, and the Act require that the Administrator or the Regional Administrator, as the case may be, consult with appropriate regional officials of the Departments of Commerce and Interior, the Regional Director of the NMFS-NOAA, and the agency exercising administrative jurisdiction over the fish and wildlife resources of the States subject to any dumping prior to the issuance of a permit under this subchapter H. Copies of the notice shall be sent to the persons noted in paragraph (g) of this section.

(h) *Copies of notice sent to Food and Drug Administration.* In addition to the publication of notice required by paragraph (b) of this section, copies of such notice will be mailed to Food and Drug Administration, Shellfish Sanitation Branch (HF–417), 200 C Street SW., Washington, DC 20204.

(i) *Failure to give certain notices.* Failure to send copies of any public notice in accordance with paragraphs (c) through (h) of this section shall not invalidate any notice given pursuant to this section nor shall such failure invalidate any subsequent administrative proceeding.

(j) *Failure of consulted agency to respond.* Unless advice to the contrary is received from the appropriate Federal or State agency within 30 days of the date copies of any public notice were dispatched to such agency, such agency will be deemed to have no objection to the issuance of the permit identified in the public notice.

[42 FR 2471, Jan. 11, 1977, as amended at 73 FR 74986, Dec. 10, 2008]

§ 222.4 Initiation of hearings.

(a) In the case of any permit application for which public notice in advance of permit issuance is required in accordance with paragraph (b) of § 222.3, any person may, within 30 days of the date on which all provisions of paragraph (b) of § 222.3 have been complied with, request a public hearing to consider the issuance or denial of, or the conditions to be imposed upon, such permit. Any such request for a public hearing shall be in writing, shall identify the person requesting the hearing, shall state with particularity any objections to the issuance or denial of, or to the conditions to be imposed upon, the proposed permit, and shall state

the issues which are proposed to be raised by such person for consideration at a hearing.

(b) Whenever (1) a written request satisfying the requirements of paragraph (a) of this section has been received and the Administrator or Regional Administrator, as the case may be, determines that such request presents genuine issues, or (2) the Administrator or Regional Administrator, as the case may be, determines in his discretion that a public hearing is necessary or appropriate, the Administrator or the Regional Administrator, as the case may be, will set a time and place for a public hearing in accordance with § 222.5, and will give notice of such hearing by publication in accordance with § 222.3.

(c) In the event the Administrator or the Regional Administrator, as the case may be, determines that a request filed pursuant to paragraph (a) of this section does not comply with the requirements of such paragraph (a) of this section or that such request does not present substantial issues of public interest, he shall advise, in writing, the person requesting the hearing of his determination.

§ 222.5 Time and place of hearings.

Hearings shall be held in the State in closest proximity to the proposed dump site, whenever practicable, and shall be set for the earliest practicable date no less than 30 days after the receipt of an appropriate request for a hearing or a determination by the Administrator or the Regional Administrator, as the case may be, to hold such a hearing without such a request.

§ 222.6 Presiding Officer.

A hearing convened pursuant to this subchapter H shall be conducted by a Presiding Officer. The Administrator or Regional Administrator, as the case may be, may designate a Presiding Officer. For adjudicatory hearings held pursuant to § 222.11, the Presiding Officer shall be an EPA employee who has had no prior connection with the permit application in question, including without limitation, the performance of investigative or prosecuting functions or any other functions, and who is not employed in the Enforcement Division or any Regional enforcement office.

[42 FR 2471, Jan. 11, 1977; 42 FR 6583, Feb. 3, 1977]

§ 222.7 Conduct of public hearing.

The Presiding Officer shall be responsible for the expeditious conduct of the hearing. The hearing shall be an informal public hearing, not an adversary proceeding, and shall be conducted so as to allow the presentation of public comments. When the Presiding Officer determines that it is necessary or appropriate, he shall cause a suitable record, which may include a verbatim transcript, of the proceedings to be made. Any person may appear at a public hearing convened pursuant to § 222.5 whether or not he requested the hearing, and may be represented by counsel or any other authorized representative. The Presiding Officer is authorized to set forth reasonable restrictions on the nature or amount of documentary material or testimony presented at a public hearing, giving due regard to the relevancy of any such information, and to the avoidance of undue repetitiveness of information presented.

§ 222.8 Recommendations of Presiding Officer.

Within 30 days following the adjournment of a public hearing convened pursuant to § 222.5, or within such additional period as the Administrator or the Regional Administrator, as the case may be, may grant to the Presiding Officer for good cause shown, and after full consideration of the comments received at the hearing, the Presiding Officer will prepare and forward to the Administrator or to the Regional Administrator, as the case may be, written recommendations relating to the issuance or denial of, or conditions to be imposed upon, the proposed permit and the record of the hearing, if any. Such recommendations shall contain a brief statement of the basis for the recommendations including a description of evidence relied upon. Copies of the Presiding Officer's recommendations shall be provided to any interested person on request, without charge. Copies of the record will be

provided in accordance with 40 CFR Part 2.

[42 FR 2471, Jan. 11, 1977; 42 FR 6583, Feb. 3, 1977]

§ 222.9 Issuance of permits.

(a) Within 30 days following receipt of the Presiding Officer's recommendations or, where no hearing has been held, following the close of the 30-day period for requesting a hearing as provided in § 222.4, the Administrator or the Regional Administrator, as the case may be, shall make a determination with respect to the issuance, denial, or imposition of conditions on, any permit applied for under this Subchapter H and shall give notice to the applicant and to all persons who registered their attendance at the hearing by providing their name and mailing address, if any, by mailing a letter stating the determination and stating the basis therefor in terms of the Criteria.

(b) Any determination to issue or deny any permit after a hearing held pursuant to § 222.7 shall take effect no sooner than:

(1) 10 days after notice of such determination is given if no request for an adjudicatory hearing is filed in accordance with § 222.10(a); or

(2) 20 days after notice of such determination is given if a request for an adjudicatory hearing is filed in accordance with paragraph (a) of § 222.10 and the Administrator or the Regional Administrator, as the case may be, denies such request in accordance with paragraph (c) of § 222.10; or

(3) The date on which a final determination has been made following an adjudicatory hearing held pursuant to § 222.11.

(c) The Administrator or Regional Administrator, as the case may be, may extend the term of a previously issued permit pending the conclusion of the proceedings held pursuant to §§ 222.7 through 222.9.

(d) A copy of each permit issued shall be sent to the appropriate District Office of the U.S. Coast Guard.

§ 222.10 Appeal to adjudicatory hearing.

(a) Within 10 days following the receipt of notice of the issuance or denial of any permit pursuant to § 222.9 after a hearing held pursuant to § 222.7, any interested person who participated in such hearing may request that an adjudicatory hearing be held pursuant to § 222.11 for the purpose of reviewing such determination, or any part thereof. Any such request for an adjudicatory hearing shall be filed with the Administrator or the Regional Administrator, as the case may be, and shall be in writing, shall identify the person requesting the adjudicatory hearing and shall state with particularity the objections to the determination, the basis therefor and the modification requested.

(b) Whenever a written request satisfying the requirements of paragraph (a) of this section has been received and the Administrator or Regional Administrator, as the case may be, determines that an adjudicatory hearing is warranted, the Administrator or the Regional Administrator, as the case may be, will set a time and place for an adjudicatory hearing in accordance with § 222.5, and will give notice of such hearing by publication in accordance with § 222.3.

(c) Prior to the conclusion of the adjudicatory hearing and appeal process, the Administrator or the Regional Administrator, as the case may be, in his discretion may extend the duration of a previously issued permit until a final determination has been made pursuant to § 222.11 or § 222.12.

(d) In the event the Administrator or the Regional Administrator, as the case may be, determines that a request filed pursuant to paragraph (a) of this section does not comply with the requirements of such paragraph (a) of this section or that such request does not present substantial issues of public interest, he shall advise, in writing, the person requesting the adjudicatory hearing of his determination.

(e) Any person requesting an adjudicatory hearing or requesting admission as a party to an adjudicatory hearing shall state in his written request, and shall by filing such request consent, that he and his employees and agents shall submit themselves to direct and cross-examination at any such hearing and to the taking of an oath administered by the Presiding Officer.

§ 222.11 Conduct of adjudicatory hearings.

(a) *Parties.* Any interested person may at a reasonable time prior to the commencement of the hearing submit to the Presiding Officer a request to be admitted as a party. Such request shall be in writing and shall set forth the information which would be required to be submitted by such person if he were requesting an adjudicatory hearing. Any such request to be admitted as a party which satisfies the requirements of this paragraph (a) shall be granted and all parties shall be informed at the commencement of the adjudicatory hearing of the parties involved. Any party may be represented by counsel or other authorized representative. EPA staff representing the Administrator or Regional Administrator who took action with respect to the permit application shall be deemed a party.

(b) *Filing and service.* (1) An original and two (2) copies of all documents or papers required or permitted to be filed shall be filed with the Presiding Officer.

(2) Copies of all documents and papers filed with the Presiding Officer shall be served upon all other parties to the adjudicatory hearing.

(c) *Consolidation.* The Administrator, or the Regional Administrator in the case of a hearing arising within his Region and for which he has been delegated authority hereunder, may, in his discretion, order consolidation of any adjudicatory hearings held pursuant to this section whenever he determines that consolidation will expedite or simplify the consideration of the issues presented. The Administrator may, in his discretion, order consolidation and designate one Region to be responsible for the conduct of any hearings held pursuant to this section which arise in different Regions whenever he determines that consolidation will expedite or simplify the consideration of the issues presented.

(d) *Pre-hearing conference.* The Presiding Officer may hold one or more prehearing conferences and may issue a prehearing order which may include without limitation, requirements with respect to any or all of the following:

(1) Stipulations and admissions;

(2) Disputed issues of fact;

(3) Disputed issues of law;

(4) Admissibility of any evidence;

(5) Hearing procedures including submission of oral or written direct testimony, conduct of cross-examination, and the opportunity for oral arguments;

(6) Any other matter which may expedite the hearing or aid in disposition of any issues raised therein.

(e) *Adjudicatory hearing procedures.* (1) The burden of going forward with the evidence shall:

(i) In the case of any adjudicatory hearing held pursuant to § 222.10(b)(1), be on the person filing a request under § 222.10(a) as to each issue raised by the request; and

(ii) In the case of any adjudicatory hearing held pursuant to § 223.2 or pursuant to part 226, be on the Environmental Protection Agency.

(2) The Presiding Officer shall have the duty to conduct a fair and impartial hearing, to take action to avoid unnecessary delay in the disposition of proceedings, and to maintain order. He shall have all powers necessary or appropriate to that end, including without limitation, the following:

(i) To administer oaths and affirmations;

(ii) To rule upon offers of proof and receive relevant evidence;

(iii) To regulate the course of the hearing and the conduct of the parties and their counsel;

(iv) To consider and rule upon all procedural and other motions appropriate to the proceedings; and

(v) To take any action authorized by these regulations and in conformance with law.

(3) Parties shall have the right to cross-examine a witness who appears at an adjudicatory hearing to the extent that such cross-examination is necessary or appropriate for a full disclosure of the facts. In multi-party proceedings the Presiding Officer may limit cross-examination to one party on each side if he is satisfied that the cross-examination by one party will adequately protect the interests of other parties.

(4) When a party will not be unfairly prejudiced thereby, the Presiding Officer may order all or part of the evidence to be submitted in written form.

(5) Rulings of the Presiding Officer on the admissibility of evidence, the propriety of cross-examination, and other procedural matters, shall be final and shall appear in the record.

(6) Interlocutory appeals may not be taken.

(7) Parties shall be presumed to have taken exception to an adverse ruling.

(8) The proceedings of all hearings shall be recorded by such means as the Presiding Officer may determine. The original transcript of the hearing shall be a part of the record and the sole official transcript. Copies of the transcript shall be available from the Environmental Protection Agency in accordance with 40 CFR part 2.

(9) The rules of evidence shall not apply.

(f) *Decision after adjudicatory hearing.* (1) Within 30 days after the conclusion of the adjudicatory hearing, or within such additional period as the Administrator or the Regional Administrator, as the case may be, may grant to the Presiding Officer for good cause shown, the Presiding Officer shall submit to the Administrator or the Regional Administrator, as the case may be, proposed findings of fact and conclusions of law, his recommendation with respect to any and all issues raised at the hearing, and the record of the hearing. Such findings, conclusions and recommendations shall contain a brief statement of the basis for the recommendations. Copies of the Presiding Officer's proposed findings of fact, conclusions of law and recommendations shall be provided to all parties to the adjudicatory hearing on request, without charge.

(2) Within 20 days following submission of the Presiding Officer's proposed findings of fact, conclusions of law and recommendations, any party may submit written exceptions, no more than 30 pages in length, to such proposed findings, conclusions and recommendations and within 30 days following the submission of the Presiding Officer's proposed findings, conclusions and recommendations any party may file written comments, no more than 30 pages in length, on another party's exceptions. Within 45 days following the submission of the Presiding Officer's proposed findings, conclusions and recommendations, the Administrator or the Regional Administrator, as the case may be, shall make a determination with respect to all issues raised at such hearing and shall affirm, reverse or modify the previous or proposed determination, as the case may be. Notice of such determination shall set forth the determination for each such issue, shall briefly state the basis therefor and shall be given by mail to all parties to the adjudicatory hearing.

§ 222.12 Appeal to Administrator.

(a)(1) The Administrator delegates to the Environmental Appeals Board authority to issue final decisions in appeals filed under this part. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion to referred to the Administrator, all parties shall be so notified and the rules in this section referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(2) Within 10 days following receipt of the determination of the Regional Administrator pursuant to paragraph (f)(2) of § 222.11, any party to an adjudicatory hearing held in accordance with § 222.11 may appeal such determination to the Environmental Appeals Board by filing a written notice of appeal, or the Environmental Appeals Board may, on its own initiative, review any prior determination.

(b) The notice of appeal shall be no more than 40 pages in length and shall contain:

(1) The name and address of the person filing the notice of appeal;

(2) A concise statement of the facts on which the person relies and appropriate citations to the record of the adjudicatory hearing;

(3) A concise statement of the legal basis on which the person relies;

(4) A concise statement setting forth the action which the person proposes

that the Environmental Appeals Board take; and

(5) A certificate of service of the notice of appeal on all other parties to the adjudicatory hearing.

(c) The effective date of any determination made pursuant to paragraph (f)(2) of §222.11 may be stayed by the Environmental Appeals Board pending final determination by it pursuant to this section upon the filing of a notice of appeal which satisfies the requirements of paragraph (b) of this section or upon initiation by the Environmental Appeals Board of review of any determination in the absence of such notice of appeal.

(d) Within 20 days following the filing of a notice of appeal in accordance with this section, any party to the adjudicatory hearing may file a written memorandum, no more than 40 pages in length, in response thereto.

(e) Within 45 days following the filing of a notice of appeal in accordance with this section, the Environmental Appeals Board shall render its final determination with respect to all issues raised in the appeal to the Environmental Appeals Board and shall affirm, reverse, or modify the previous determination and briefly state the basis for its determination.

(f) In accordance with 5 U.S.C. section 704, the filing of an appeal to the Environmental Appeals Board pursuant to this section shall be a prerequisite to judicial review of any determination to issue or impose conditions upon any permit, or to modify, revoke or suspend any permit, or to take any other enforcement action, under this subchapter H.

[42 FR 2471, Jan. 11, 1977, as amended at 57 FR 5346, Feb. 13, 1992]

§222.13 Computation of time.

In computing any period of time prescribed or allowed in this part, except unless otherwise provided, the day on which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or a legal holiday in which the Environmental Protection Agency is not open for business, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. Intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less.

PART 223—CONTENTS OF PERMITS; REVISION, REVOCATION OR LIMITATION OF OCEAN DUMPING PERMITS UNDER SECTION 104(d) OF THE ACT

Subpart A—Contents of Ocean Dumping Permits Issued Under Section 102 of the Act

Sec.

Subpart B—Procedures for Revision, Revocation or Limitation of Ocean Dumping Permits Under Section 104(d) of the Act

AUTHORITY: Secs. 102, 104, 107, 108, Marine Protection Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1412, 1414, 1417, 1418)

SOURCE: 42 FR 60702, Nov. 28, 1977, unless otherwise noted.

Subpart A—Contents of Ocean Dumping Permits Issued Under Section 102 of the Act

§223.1 Contents of special, emergency, general, and research permits; posting requirements.

(a) All special, emergency and research permits shall be displayed on the vessel engaged in dumping and shall include the following:

(1) Name of permittee;

(2) Means of conveyance and methods and procedures for release of the materials to be dumped;

(3) The port through or from which such material will be transported for dumping;

(4) A description of relevant physical and chemical properties of the materials to be dumped;

(5) The quantity of the material to be dumped expressed in tons;

(6) The disposal site;

(7) The times at which the permitted dumping may occur and the effective date and expiration date of the permit;

(8) Special provisions which, after consultation with the Coast Guard, are deemed necessary for monitoring or surveillance of the transportation or dumping;

(9) Such monitoring relevant to the assessment of the impact of permitted dumping activities on the marine environment at the disposal site as the Administrator or Regional Administrator, as the case may be, determine to be necessary or appropriate; and

(10) Any other terms and conditions determined by the Administrator, or Regional Administrator, as the case may be, to be necessary or appropriate, including, without limitation, release procedures and requirements for the continued investigation or development of alternatives to ocean dumping.

(b) General permits shall contain such terms and conditions as the Administrator deems necessary or appropriate.

(c) [Reserved]

[42 FR 60702, Nov. 28, 1977, as amended at 73 FR 74986, Dec. 10, 2008]

Subpart B—Procedures for Revision, Revocation or Limitation of Ocean Dumping Permits Under Section 104(d) of the Act

§ 223.2 Scope of these rules.

(a) These rules of practice shall govern all proceedings under section 104(d) of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1414(d)), to revise, revoke or limit the terms and conditions of any permit issued pursuant to section 102 of the Act. Section 104(d) provides that ''the Administrator * * * may limit or deny the issuance of permits, or he may alter or revoke partially or entirely the terms of permits issued by him under this title, for the transportation for dumping, or for the dumping, or both of specified materials or classes of materials, where he finds that such materials cannot be dumped consistently with the criteria and other factors required to be applied in evaluating the permit application.''

(b) In the absence of specific provisions in these rules, and where appropriate, questions arising at any stage of the proceedings shall be resolved at the discretion of the Presiding Officer, the Regional Administrator, or the Administrator, as appropriate.

§ 223.3 Preliminary determination; notice.

(a) *General.* Any general, special, emergency, or research permit issued pursuant to section 102 of the Act shall be subject to revision, revocation or limitation, in whole or in part, as the result of a determination by the Administrator or Regional Administrator that:

(1) The cumulative impact of the permittee's dumping activities or the aggregate impact of all dumping activities at the dump site designated in the permit should be categorized as Impact Category I, as defined in § 228.10(c)(1) of this subchapter; or

(2) There has been a change in circumstances relating to the management of the disposal site designated in the permit; or

(3) The dumping authorized by the permit would violate applicable water quality standards; or

(4) The dumping authorized by the permit can no longer be carried out consistent with the criteria set forth in parts 227 and 228.

(b) *Preliminary determination.* Whenever any person authorized by the Administrator or Regional Administrator to (1) periodically review permits pursuant to section 104(d) of the Act or (2) otherwise assess the need for revision, revocation or limitation of a permit makes any of the determinations listed in paragraph (a) of this section with respect to a permit issued pursuant to section 102 of the Act, and additionally determines that revision, revocation or limitation of such permit is warranted, the Administrator or Regional Administrator, as the case may be, shall provide notification of such proposed revision, revocation or limitation to the permittee named in the permit, if any, the public, and any cognizant Federal/

State agencies pursuant to paragraph (c) of this section.

(c) *Form of notification.* Notice of any proposed revision, revocation or limitation of a permit shall be sent to the permittee by certified mail, return receipt requested, and shall be published and otherwise disseminated in the manner described in § 222.3 (b) through (h).

(d) *Contents of notice.* The notice of any proposed revision, revocation or limitation of a permit issued pursuant to paragraph (b) of this section shall include, in addition to any other materials, the following:

(1) A brief description of the contents of the permit, as set forth in § 223.1;

(2) A description of the proposed revision, revocation, or limitation;

(3) A statement of the reason for such proposed revision, revocation, or limitation; and

(4) A statement that within thirty (30) days of the date of dissemination of the notice, any person may request a public hearing on the proposed revision, revocation or limitation.

[42 FR 60702, Nov. 28, 1977, as amended at 73 FR 74986, Dec. 10, 2008]

§ 223.4 Request for, scheduling and conduct of public hearing; determination.

(a) *Request for hearing.* Within thirty (30) days of the date of the dissemination of any notice required by § 223.2(b), any person may request the Administrator or Regional Administrator, as appropriate, to hold a public hearing on the proposed revision, revocation or limitation by submitting a written request containing the following:

(1) Identification of the person requesting the hearing and his interest in the proceeding;

(2) A statement of any objections to the proposed revision, revocation or limitation or to any facts or reasons identified as supporting such revision, revocation or limitation; and

(3) A statement of the issues which such person proposes to raise for consideration at such hearing.

(b) *Grant or denial of hearing; notification.* Whenever (1) a written request satisfying the requirements of paragraph (a) of this section has been received, and the Administrator or Regional Administrator, as appropriate, determines that such request presents genuine issues, or (2) the Administrator or Regional Administrator, as the case may be, determines in his discretion that a public hearing is necessary or appropriate, the Administrator or Regional Administrator, as the case may be, will set a time and place for a public hearing in accordance with paragraph (c) of this section and will give notice of such hearing by publication in accordance with § 223.3(c). In the event the Administrator or the Regional Administrator, as the case may be, determines that a request filed pursuant to paragraph (a) of this section does not comply with the requirements of paragraph (a) or that such request does not present genuine issues, he shall advise, in writing, the person requesting the hearing of his determination.

(c) *Time and place of hearing.* Any hearing authorized pursuant to this Section by the Administrator or Regional Administrator, as the case may be, shall be held in the city in which the Environmental Protection Agency Regional Office which issued the permit is located, whenever practicable, and shall be set for the earliest practicable date, but in no event less than thirty (30) days after the receipt of an appropriate request for a hearing or a determination by the Administrator or the Regional Administrator, as the case may be, to hold such a hearing without such a request.

(d) *Presiding Officer.* Any hearing convened pursuant to this part shall be conducted by a Presiding Officer, who shall be either a Regional Judicial Officer or a person having the qualifications of the members of the Environmental Appeals Board (described in 40 CFR 1.25(e)) if assigned by the Administrator or the qualifications of a Regional Judicial Officer if assigned by the Regional Administrator, as appropriate. Such person shall be an attorney who is a permanent or temporary employee of the Agency, who is not employed by the Region's or Headquarter's Water Programs Division, Surveillance and Analysis Division, or Enforcement Division, and who has had no connection with the preparation or

presentation of evidence for any hearing in which he participates as Judicial Officer.

(e) *Conduct of the public hearing.* The Presiding Officer shall be responsible for the expeditious conduct of the hearing. The hearing shall be an informal public hearing, not an adversary proceeding, and shall be conducted so as to allow the presentation of public comments. When the Presiding Officer determines that it is necessary or appropriate, he shall cause a suitable record, which may include a verbatim transcript, of the proceedings to be made. Any person may appear at a public hearing convened pursuant to this section whether or not he requested the hearing, and may be represented by counsel or any other authorized representative. The Presiding Officer is authorized to set forth reasonable restrictions on the nature or amount of documentary material or testimony presented at a public hearing, giving due regard to the relevancy of any such information, and to the avoidance of undue repetitiveness of information presented.

(f) *Recommendations of Presiding Officer.* Within 30 days following the adjournment of a public hearing convened pursuant to this section or within such additional period as the Administrator or the Regional Administrator, as the case may be, may grant to the Presiding Officer for good cause shown, and after full consideration of the comments received at the hearing, the Presiding Officer will prepare and forward to the Administrator or to the Regional Administrator, as the case may be, written recommendations relating to the revision, revocation or limitation of the permit and the record of the hearing, if any. Such recommendations shall contain a brief statement of the basis therefor, including a description of evidence relied upon (1) to support any finding made pursuant to § 223.3(a); (2) to justify any proposed revision, revocation or limitation of the permit; and (3) to justify any proposed revision, revocation or limitation which differs from that set forth in the notice issued pursuant to § 223.3(b). Copies of the Presiding Officer's recommendations shall be provided to any interested person on request, without charge. Copies of the record will be provided in accordance with 40 CFR part 2.

(g) *Determination of the Administrator or Regional Administrator.* Upon receipt of the Presiding Officer's recommendations or, where no hearing has been held, upon termination of the thirty (30)-day period for requesting a hearing provided in paragraph (a) of this section, the Administrator or the Regional Administrator, as the case may be, shall make a determination with respect to the modification, revocation or suspension of the permit. Such determination shall include a description of the permit revision, revocation or limitation, the basis therefor, and the effective date. A copy of such determination shall be mailed to the permittee and each person who registered his attendance at the hearing by providing his name and mailing address.

[42 FR 60702, Nov. 28, 1977, as amended at 57 FR 5346, Feb. 13, 1992]

§ 223.5 Request for, scheduling and conduct of adjudicatory hearing; determination.

Within ten (10) days following the receipt of the Administrator's or Regional Administrator's determination issued pursuant to § 223.4(g), any person who participated in the public hearing held pursuant to § 223.4 may request that an adjudicatory hearing be held for the purpose of reviewing such determination or any part thereof. Such request shall be submitted and disposed of, and any adjudicatory hearing convened shall be conducted in accordance with the procedures set forth in §§ 222.10 (a), (b), (d), and (e) and 222.11.

PART 224—RECORDS AND REPORTS REQUIRED OF OCEAN DUMPING PERMITTEES UNDER SECTION 102 OF THE ACT

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

§ 224.1 Records of permittees.

Each permittee named in a special, emergency or research permit under section 102 of the Act and each person

availing himself of the privilege conferred by a general permit, shall maintain complete records of the following information, which will be available for inspection by the Administrator, Regional Administrator, the Commandant of the U.S. Coast Guard, or their respective designees:

(a) The physical and chemical characteristics of the material dumped pursuant to the permit;

(b) The precise times and locations of dumping;

(c) Any other information required as a condition of a permit by the Administrator or the Regional Administrator, as the case may be.

[42 FR 2474, Jan. 11, 1977, as amended at 73 FR 74986, Dec. 10, 2008]

§ 224.2 Reports.

(a) *Periodic reports.* Information required to be recorded pursuant to § 224.1 shall be reported to the Administrator or the Regional Administrator, as the case may be, for the periods indicated within 30 days of the expiration of such periods:

(1) For each six-month period, if any, following the effective date of the permit;

(2) For any other period of less than six months ending on the expiration date of the permit; and

(3) As otherwise required in the conditions of the permit.

(b) *Reports of emergency dumping.* If material is dumped without a permit pursuant to paragraph (c)(4) of § 220.1, the owner or operator of the vessel or aircraft from which such dumping occurs shall as soon as feasible inform the Administrator, Regional Administrator, or the nearest Coast Guard district of the incident by radio, telephone, or telegraph and shall within 10 days file a written report with the Administrator or Regional Administrator containing the information required under § 224.1 and a complete description of the circumstances under which the dumping occurred. Such description shall explain how human life at sea was in danger and how the emergency dumping reduced that danger. If the material dumped included containers, the vessel owner or operator shall immediately request the U.S. Coast Guard to publish in the local Notice to Mariners the dumping location, the type of containers, and whether the contents are toxic or explosive. Notification shall also be given to the Food and Drug Administration, Shellfish Sanitation Branch, Washington, DC 20204, as soon as possible.

[42 FR 2474, Jan. 11, 1977]

PART 225—CORPS OF ENGINEERS DREDGED MATERIAL PERMITS

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

SOURCE: 42 FR 2475, Jan. 11, 1977, unless otherwise noted.

§ 225.1 General.

Applications and authorizations for Dredged Material Permits under section 103 of the Act for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated by the U.S. Army Corps of Engineers in accordance with the criteria set forth in part 227 and processed in accordance with 33 CFR 209.120 with special attention to § 209.120(g)(17) and 33 CFR 209.145.

§ 225.2 Review of Dredged Material Permits.

(a) The District Engineer shall send a copy of the public notice to the appropriate Regional Administrator, and set forth in writing all of the following information:

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

(2) A statement as to whether the site has been designated for use by the Administrator pursuant to section 102(c) of the Act;

(3) If the proposed disposal site has not been designated by the Administrator, a statement of the basis for the proposed determination why no previously designated site is feasible and a description of the characteristics of the proposed disposal site necessary for its designation pursuant to part 228 of this subchapter H;

(4) The known historical uses of the proposed disposal site;

(5) Existence and documented effects of other authorized dumpings that have been made in the dumping area (e.g., heavy metal background reading and organic carbon content);

(6) An estimate of the length of time during which disposal will continue at the proposed site;

(7) Characteristics and composition of the dredged material; and

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

(b) The Regional Administrator will within 15 days of the date the public notice and other information required to be submitted by paragraph (a) of §225.2 are received by him, review the information submitted and request from the District Engineer any additional information he deems necessary or appropriate to evaluate the proposed dumping.

(c) Using the information submitted by the District Engineer, and any other information available to him, the Regional Administrator will within 15 days after receipt of all requested information, make an independent evaluation of the proposed dumping in accordance with the criteria and respond to the District Engineer pursuant to paragraph (d) or (e) of this section. The Regional Administrator may request an extension of this 15 day period to 30 days from the District Engineer.

(d) When the Regional Administrator determines that the proposed dumping will comply with the criteria, he will so inform the District Engineer in writing.

(e) When the Regional Administrator determines that the proposed dumping will not comply with the criteria he shall so inform the District Engineer in writing. In such cases, no Dredged Material Permit for such dumping shall be issued unless and until the provisions of §225.3 are followed and the Administrator grants a waiver of the criteria pursuant to §225.4.

§225.3 Procedure for invoking economic impact.

(a) When a District Engineer's determination to issue a Dredged Material Permit for the dumping of dredged material into ocean waters has been rejected by a Regional Administrator upon application of the Criteria, the District Engineer may determine whether, under section 103(d) of the Act, there is an economically feasible alternative method or site available other than the proposed dumping in ocean waters. If the District Engineer makes any such preliminary determination that there is no economically feasible alternative method or site available, he shall so advise the Regional Administrator setting forth his reasons for such determination and shall submit a report of such determination to the Chief of Engineers in accordance with 33 CFR 209.120 and 209.145.

(b) If the decision of the Chief of Engineers is that ocean dumping at the designated site is required because of the unavailability of feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator of the Criteria or of the critical site designation in accordance with §225.4.

§225.4 Waiver by Administrator.

The Administrator shall grant the requested waiver unless within 30 days of his receipt of the notice, certificate and request in accordance with paragraph (b) of §225.3 he determines in accordance with this section that the proposed dumping will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Notice of the Administrator's final determination under this section shall be given to the Secretary of the Army.

PART 227—CRITERIA FOR THE EVALUATION OF PERMIT APPLICATIONS FOR OCEAN DUMPING OF MATERIALS

Subpart A—General

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

SOURCE: 42 FR 2476, Jan. 11, 1977, unless otherwise noted.

Subpart A—General

§ 227.1 Applicability.

(a) Section 102 of the Act requires that criteria for the issuance of ocean disposal permits be promulgated after consideration of the environmental effect of the proposed dumping operation, the need for ocean dumping, alternatives to ocean dumping, and the effect of the proposed action on esthetic, recreational and economic values and on other uses of the ocean. These parts 227 and 228 of this subchapter H together constitute the criteria established pursuant to section 102 of the Act. The decision of the Administrator, Regional Administrator or the District Engineer, as the case may be, to issue or deny a permit and to impose specific conditions on any permit issued will be based on an evaluation of the permit application pursuant to the criteria set forth in this part 227 and upon the requirements for disposal site management pursuant to the criteria set forth in part 228 of this subchapter H.

(b) With respect to the criteria to be used in evaluating disposal of dredged materials, this section and subparts C, D, E, and G apply in their entirety. To determine whether the proposed dumping of dredged material complies with subpart B, only §§ 227.4, 227.5, 227.6, 227.9, 227.10 and 227.13 apply. An applicant for a permit to dump dredged material must comply with all of subparts C, D, E, G and applicable sections of B, to be deemed to have met the EPA criteria for dredged material dumping promulgated pursuant to section 102(a) of the Act. If, in any case, the Chief of Engineers finds that, in the disposition of dredged material, there is no economically feasible method or site available other than a dumping site, the utilization of which would result in noncompliance with the criteria established pursuant to subpart B relating to the effects of dumping or with the restrictions established pursuant to section 102(c) of the Act relating to critical areas, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator pursuant to part 225.

(c) The Criteria of this part 227 are established pursuant to section 102 of

the Act and apply to the evaluation of proposed dumping of materials under title I of the Act. The Criteria of this part 227 deal with the evaluation of proposed dumping of materials on a case-by-case basis from information supplied by the applicant or otherwise available to EPA or the Corps of Engineers concerning the characteristics of the waste and other considerations relating to the proposed dumping.

(d) After consideration of the provisions of §§ 227.28 and 227.29, no permit will be issued when the dumping would result in a violation of applicable water quality standards.

§ 227.2 Materials which satisfy the environmental impact criteria of subpart B.

(a) If the applicant satisfactorily demonstrates that the material proposed for ocean dumping satisfies the environmental impact criteria set forth in subpart B, a permit for ocean dumping will be issued unless:

(1) There is no need for the dumping, and alternative means of disposal are available, as determined in accordance with the criteria set forth in subpart C; or

(2) There are unacceptable adverse effects on esthetic, recreational or economic values as determined in accordance with the criteria set forth in subpart D; or

(3) There are unacceptable adverse effects on other uses of the ocean as determined in accordance with the criteria set forth in subpart E.

(b) If the material proposed for ocean dumping satisfies the environmental impact criteria set forth in subpart B, but the Administrator or the Regional Administrator, as the case may be, determines that any one of the considerations set forth in paragraph (a)(1), (2) or (3) of this section applies, he or she, as the case may be, will deny the permit application.

[42 FR 2476, Jan. 11, 1977, as amended at 73 FR 74986, Dec. 10, 2008]

§ 227.3 Materials which do not satisfy the environmental impact criteria set forth in subpart B.

If the material proposed for ocean dumping does not satisfy the environmental impact criteria of subpart B of this part, the Administrator or the Regional Administrator, as the case may be, will deny the permit application.

[73 FR 74987, Dec. 10, 2008]

Subpart B—Environmental Impact

§ 227.4 Criteria for evaluating environmental impact.

This subpart B sets specific environmental impact prohibitions, limits, and conditions for the dumping of materials into ocean waters. If the applicable prohibitions, limits, and conditions are satisfied, it is the determination of EPA that the proposed disposal will not unduly degrade or endanger the marine environment and that the disposal will present:

(a) No unacceptable adverse effects on human health and no significant damage to the resources of the marine environment;

(b) No unacceptable adverse effect on the marine ecosystem;

(c) No unacceptable adverse persistent or permanent effects due to the dumping of the particular volumes or concentrations of these materials; and

(d) No unacceptable adverse effect on the ocean for other uses as a result of direct environmental impact.

§ 227.5 Prohibited materials.

The ocean dumping of the following materials will not be approved by EPA or the Corps of Engineers under any circumstances:

(a) High-level radioactive wastes as defined in § 227.30;

(b) Materials in whatever form (including without limitation, solids, liquids, semi-liquids, gases or organisms) produced or used for radiological, chemical or biological warfare;

(c) Materials insufficiently described by the applicant in terms of their compositions and properties to permit application of the environmental impact criteria of this subpart B;

(d) Persistent inert synthetic or natural materials which may float or remain in suspension in the ocean in such a manner that they may interfere materially with fishing, navigation, or other legitimate uses of the ocean.

§ 227.6 Constituents prohibited as other than trace contaminants.

(a) Subject to the exclusions of paragraphs (f), (g) and (h) of this section, the ocean dumping, or transportation for dumping, of materials containing the following constituents as other than trace contaminants will not be approved on other than an emergency basis:

(1) Organohalogen compounds;

(2) Mercury and mercury compounds;

(3) Cadmium and cadmium compounds;

(4) Oil of any kind or in any form, including but not limited to petroleum, oil sludge, oil refuse, crude oil, fuel oil, heavy diesel oil, lubricating oils, hydraulic fluids, and any mixtures containing these, transported for the purpose of dumping insofar as these are not regulated under the FWPCA;

(5) Known carcinogens, mutagens, or teratogens or materials suspected to be carcinogens, mutagens, or teratogens by responsible scientific opinion.

(b) These constituents will be considered to be present as trace contaminants only when they are present in materials otherwise acceptable for ocean dumping in such forms and amounts in liquid, suspended particulate, and solid phases that the dumping of the materials will not cause significant undesirable effects, including the possibility of danger associated with their bioaccumulation in marine organisms.

(c) The potential for significant undesirable effects due to the presence of these constituents shall be determined by application of results of bioassays on liquid, suspended particulate, and solid phases of wastes according to procedures acceptable to EPA, and for dredged material, acceptable to EPA and the Corps of Engineers. Materials shall be deemed environmentally acceptable for ocean dumping only when the following conditions are met:

(1) The liquid phase does not contain any of these constituents in concentrations which will exceed applicable marine water quality criteria after allowance for initial mixing; provided that mercury concentrations in the disposal site, after allowance for initial mixing, may exceed the average normal ambient concentrations of mercury in ocean waters at or near the dumping site which would be present in the absence of dumping, by not more than 50 percent; and

(2) Bioassay results on the suspended particulate phase of the waste do not indicate occurrence of significant mortality or significant adverse sublethal effects due to the dumping of wastes containing the constituents listed in paragraph (a) of this section. These bioassays shall be conducted with appropriate sensitive marine organisms as defined in § 227.27(c) using procedures for suspended particulate phase bioassays approved by EPA, or, for dredged material, approved by EPA and the Corps of Engineers. Procedures approved for bioassays under this section will require exposure of organisms for a sufficient period of time and under appropriate conditions to provide reasonable assurance, based on consideration of the statistical significance of effects at the 95 percent confidence level, that, when the materials are dumped, no significant undesirable effects will occur due to chronic toxicity of the constituents listed in paragraph (a) of this section; and

(3) Bioassay results on the solid phase of the wastes do not indicate occurrence of significant mortality or significant adverse sublethal effects due to the dumping of wastes containing the constituents listed in paragraph (a) of this section. These bioassays shall be conducted with appropriate sensitive benthic marine organisms using benthic bioassay procedures approved by EPA, or, for dredged material, approved by EPA and the Corps of Engineers. Procedures approved for bioassays under this section will require exposure of organisms for a sufficient period of time to provide reasonable assurance, based on considerations of statistical significance of effects at the 95 percent confidence level, that, when the materials are dumped, no significant undesirable effects will occur due either to chronic toxicity or to bioaccumulation of the constituents listed in paragraph (a) of this section; and

(4) For persistent organohalogens not included in the applicable marine water quality criteria, bioassay results on the liquid phase of the waste show

that such compounds are not present in concentrations large enough to cause significant undesirable effects due either to chronic toxicity or to bioaccumulation in marine organisms after allowance for initial mixing.

(d) When the Administrator, Regional Administrator or District Engineer, as the case may be, has reasonable cause to believe that a material proposed for ocean dumping contains compounds identified as carcinogens, mutagens, or teratogens for which criteria have not been included in the applicable marine water quality criteria, he may require special studies to be done prior to issuance of a permit to determine the impact of disposal on human health and/or marine ecosystems. Such studies must provide information comparable to that required under paragraph (c)(3) of this section.

(e) The criteria stated in paragraphs (c)(2) and (3) of this section are mandatory. The availability of acceptable procedures was announced in the FEDERAL REGISTER in 1991 and 1996.

(f) The prohibitions and limitations of this section do not apply to the constituents identified in paragraph (a) of this section when the applicant can demonstrate that such constituents are (1) present in the material only as chemical compounds or forms (e.g., inert insoluble solid materials) nontoxic to marine life and non-bioaccumulative in the marine environment upon disposal and thereafter, or (2) present in the material only as chemical compounds or forms which, at the time of dumping and thereafter, will be rapidly rendered non-toxic to marine life and non-bioaccumulative in the marine environment by chemical or biological degradation in the sea; provided they will not make edible marine organisms unpalatable; or will not endanger human health or that of domestic animals, fish, shellfish, or wildlife.

(g) The prohibitions and limitations of this section do not apply to the constituents identified in paragraph (a) of this section for the granting of research permits if the substances are rapidly rendered harmless by physical, chemical or biological processes in the sea; provided they will not make edible marine organisms unpalatable and will not endanger human health or that of domestic animals.

(h) The prohibitions and limitations of this section do not apply to the constituents identified in paragraph (a) of this section for the granting of permits for the transport of these substances for the purpose of incineration at sea if the applicant can demonstrate that the stack emissions consist of substances which are rapidly rendered harmless by physical, chemical or biological processes in the sea. Incinerator operations shall comply with requirements which will be established on a case-by-case basis.

[42 FR 2476, Jan. 11, 1977; 43 FR 1071, Jan. 6, 1978, as amended at 59 FR 26572, May 20, 1994; 59 FR 52652, Oct. 18, 1994; 73 FR 74987, Dec. 10, 2008]

§ 227.7 Limits established for specific wastes or waste constituents.

Materials containing the following constituents must meet the additional limitations specified in this section to be deemed acceptable for ocean dumping:

(a) Liquid waste constituents immiscible with or slightly soluble in seawater, such as benzene, xylene, carbon disulfide and toluene, may be dumped only when they are present in the waste in concentrations below their solubility limits in seawater. This provision does not apply to materials which may interact with ocean water to form insoluble materials;

(b) Radioactive materials, other than those prohibited by § 227.5, must be contained in accordance with the provisions of § 227.11 to prevent their direct dispersion or dilution in ocean waters;

(c) Wastes containing living organisms may not be dumped if the organisms present would endanger human health or that of domestic animals, fish, shellfish and wildlife by:

(1) Extending the range of biological pests, viruses, pathogenic microorganisms or other agents capable of infesting, infecting or extensively and permanently altering the normal populations of organisms;

(2) Degrading uninfected areas; or

(3) Introducing viable species not indigenous to an area.

(d) In the dumping of wastes of highly acidic or alkaline nature into the ocean, consideration shall be given to:

(1) The effects of any change in acidity or alkalinity of the water at the disposal site; and

(2) The potential for synergistic effects or for the formation of toxic compounds at or near the disposal site. Allowance may be made in the permit conditions for the capability of ocean waters to neutralize acid or alkaline wastes; provided, however, that dumping conditions must be such that the average total alkalinity or total acidity of the ocean water after allowance for initial mixing, as defined in § 227.29, may be changed, based on stoichiometric calculations, by no more than 10 percent during all dumping operations at a site to neutralize acid or alkaline wastes.

(e) Wastes containing biodegradable constituents, or constituents which consume oxygen in any fashion, may be dumped in the ocean only under conditions in which the dissolved oxygen after allowance for initial mixing, as defined in § 227.29, will not be depressed by more than 25 percent below the normally anticipated ambient conditions in the disposal area at the time of dumping.

§ 227.8 Limitations on the disposal rates of toxic wastes.

No wastes will be deemed acceptable for ocean dumping unless such wastes can be dumped so as not to exceed the limiting permissible concentration as defined in § 227.27; *Provided,* That this § 227.8 does not apply to those wastes for which specific criteria are established in § 227.11 or § 227.12. Total quantities of wastes dumped at a site may be limited as described in § 228.8.

§ 227.9 Limitations on quantities of waste materials.

Substances which may damage the ocean environment due to the quantities in which they are dumped, or which may seriously reduce amenities, may be dumped only when the quantities to be dumped at a single time and place are controlled to prevent long-term damage to the environment or to amenities.

§ 227.10 Hazards to fishing, navigation, shorelines or beaches.

(a) Wastes which may present a serious obstacle to fishing or navigation may be dumped only at disposal sites and under conditions which will insure no unacceptable interference with fishing or navigation.

(b) Wastes which may present a hazard to shorelines or beaches may be dumped only at sites and under conditions which will insure no unacceptable danger to shorelines or beaches.

§ 227.11 Containerized wastes.

(a) Wastes containerized solely for transport to the dumping site and expected to rupture or leak on impact or shortly thereafter must meet the appropriate requirements of §§ 227.6, 227.7, 227.8, 227.9, and 227.10.

(b) Other containerized wastes will be approved for dumping only under the following conditions:

(1) The materials to be disposed of decay, decompose or radiodecay to environmentally innocuous materials within the life expectancy of the containers and/or their inert matrix; and

(2) Materials to be dumped are present in such quantities and are of such nature that only short-term localized adverse effects will occur should the containers rupture at any time; and

(3) Containers are dumped at depths and locations where they will cause no threat to navigation, fishing, shorelines, or beaches.

§ 227.12 Insoluble wastes.

(a) Solid wastes consisting of inert natural minerals or materials compatible with the ocean environment may be generally approved for ocean dumping provided they are insoluble above the applicable trace or limiting permissible concentrations and are rapidly and completely settleable, and they are of a particle size and density that they would be deposited or rapidly dispersed without damage to benthic, demersal, or pelagic biota.

(b) Persistent inert synthetic or natural materials which may float or remain in suspension in the ocean as prohibited in paragraph (d) of § 227.5 may be dumped in the ocean only when they have been processed in such a fashion

that they will sink to the bottom and remain in place.

§ 227.13 Dredged materials.

(a) Dredged materials are bottom sediments or materials that have been dredged or excavated from the navigable waters of the United States, and their disposal into ocean waters is regulated by the U.S. Army Corps of Engineers using the criteria of applicable sections of parts 227 and 228. Dredged material consists primarily of natural sediments or materials which may be contaminated by municipal or industrial wastes or by runoff from terrestrial sources such as agricultural lands.

(b) Dredged material which meets the criteria set forth in the following paragraphs (b)(1), (2), or (3) of this section is environmentally acceptable for ocean dumping without further testing under this section:

(1) Dredged material is composed predominantly of sand, gravel, rock, or any other naturally occurring bottom material with particle sizes larger than silt, and the material is found in areas of high current or wave energy such as streams with large bed loads or coastal areas with shifting bars and channels; or

(2) Dredged material is for beach nourishment or restoration and is composed predominantly of sand, gravel or shell with particle sizes compatible with material on the receiving beaches; or

(3) *When:* (i) The material proposed for dumping is substantially the same as the substrate at the proposed disposal site; and

(ii) The site from which the material proposed for dumping is to be taken is far removed from known existing and historical sources of pollution so as to provide reasonable assurance that such material has not been contaminated by such pollution.

(c) When dredged material proposed for ocean dumping does not meet the criteria of paragraph (b) of this section, further testing of the liquid, suspended particulate, and solid phases, as defined in § 227.32, is required. Based on the results of such testing, dredged material can be considered to be environmentally acceptable for ocean dumping only under the following conditions:

(1) The material is in compliance with the requirements of § 227.6; and

(2)(i) All major constituents of the liquid phase are in compliance with the applicable marine water quality criteria after allowance for initial mixing; or

(ii) When the liquid phase contains major constituents not included in the applicable marine water quality criteria, or there is reason to suspect synergistic effects of certain contaminants, bioassays on the liquid phase of the dredged material show that it can be discharged so as not to exceed the limiting permissible concentration as defined in paragraph (a) of § 227.27; and

(3) Bioassays on the suspended particulate and solid phases show that it can be discharged so as not to exceed the limiting permissible concentration as defined in paragraph (b) of § 227.27.

(d) For the purposes of paragraph (c)(2) of this section, major constituents to be analyzed in the liquid phase are those deemed critical by the District Engineer, after evaluating and considering any comments received from the Regional Administrator, and considering known sources of discharges in the area.

Subpart C—Need for Ocean Dumping

§ 227.14 Criteria for evaluating the need for ocean dumping and alternatives to ocean dumping.

This subpart C states the basis on which an evaluation will be made of the need for ocean dumping, and alternatives to ocean dumping. The nature of these factors does not permit the promulgation of specific quantitative criteria of each permit application. These factors will therefore be evaluated if applicable for each proposed dumping on an individual basis using the guidelines specified in this subpart C.

§ 227.15 Factors considered.

The need for dumping will be determined by evaluation of the following factors:

(a) Degree of treatment useful and feasible for the waste to be dumped,

and whether or not the waste material has been or will be treated to this degree before dumping;

(b) Raw materials and manufacturing or other processes resulting in the waste, and whether or not these materials or processes are essential to the provision of the applicant's goods or services, or if other less polluting materials or processes could be used;

(c) The relative environmental risks, impact and cost for ocean dumping as opposed to other feasible alternatives including but not limited to:

(1) Land fill;

(2) Well injection;

(3) Incineration;

(4) Spread of material over open ground;

(5) Recycling of material for reuse;

(6) Additional biological, chemical, or physical treatment of intermediate or final waste streams;

(7) Storage.

(d) Irreversible or irretrievable consequences of the use of alternatives to ocean dumping.

§ 227.16 Basis for determination of need for ocean dumping.

(a) A need for ocean dumping will be considered to have been demonstrated when a thorough evaluation of the factors listed in § 227.15 has been made, and the Administrator, Regional Administrator or District Engineer, as the case may be, has determined that the following conditions exist where applicable:

(1) There are no practicable improvements which can be made in process technology or in overall waste treatment to reduce the adverse impacts of the waste on the total environment;

(2) There are no practicable alternative locations and methods of disposal or recycling available, including without limitation, storage until treatment facilities are completed, which have less adverse environmental impact or potential risk to other parts of the environment than ocean dumping.

(b) For purposes of paragraph (a) of this section, waste treatment or improvements in processes and alternative methods of disposal are practicable when they are available at reasonable incremental cost and energy expenditures, which need not be competitive with the costs of ocean dumping, taking into account the environmental benefits derived from such activity, including the relative adverse environmental impacts associated with the use of alternatives to ocean dumping.

(c) The duration of permits issued under subchapter H and other terms and conditions imposed in those permits shall be determined after taking into account the factors set forth in this section. Notwithstanding compliance with subparts B, D, and E of this part 227 permittees may, on the basis of the need for and alternatives to ocean dumping, be required to terminate all ocean dumping by a specified date, to phase out all ocean dumping over a specified period or periods, to continue research and development of alternative methods of disposal and make periodic reports of such research and development in order to provide additional information for periodic review of the need for and alternatives to ocean dumping, or to take such other action as the Administrator, the Regional Administrator, or District Engineer, as the case may be, determines to be necessary or appropriate.

Subpart D—Impact of the Proposed Dumping on Esthetic, Recreational and Economic Values

§ 227.17 Basis for determination.

(a) The impact of dumping on esthetic, recreational and economic values will be evaluated on an individual basis using the following considerations:

(1) Potential for affecting recreational use and values of ocean waters, inshore waters, beaches, or shorelines;

(2) Potential for affecting the recreational and commercial values of living marine resources.

(b) For all proposed dumping, full consideration will be given to such nonquantifiable aspects of esthetic, recreational and economic impact as:

(1) Responsible public concern for the consequences of the proposed dumping;

(2) Consequences of not authorizing the dumping including without limitation, the impact on esthetic, recreational and economic values with respect to the municipalities and industries involved.

§ 227.18 Factors considered.

The assessment of the potential for impacts on esthetic, recreational and economic values will be based on an evaluation of the appropriate characteristics of the material to be dumped, allowing for conservative rates of dilution, dispersion, and biochemical degradation during movement of the materials from a disposal site to an area of significant recreational or commercial value. The following specific factors will be considered in making such an assessment:

(a) Nature and extent of present and potential recreational and commercial use of areas which might be affected by the proposed dumping;

(b) Existing water quality, and nature and extent of disposal activities, in the areas which might be affected by the proposed dumping;

(c) Applicable water quality standards;

(d) Visible characteristics of the materials (e.g., color, suspended particulates) which result in an unacceptable estetic nuisance in recreational areas;

(e) Presence in the material of pathogenic organisms which may cause a public health hazard either directly or through contamination of fisheries or shellfisheries;

(f) Presence in the material of toxic chemical constituents released in volumes which may affect humans directly;

(g) Presence in the material of chemical constituents which may be bioaccumulated or persistent and may have an adverse effect on humans directly or through food chain interactions;

(h) Presence in the material of any constituents which might significantly affect living marine resources of recreational or commercial value.

§ 227.19 Assessment of impact.

An overall assessment of the proposed dumping and possible alternative methods of disposal or recycling will be made based on the effect on esthetic, recreational and economic values based on the factors set forth in this subpart D, including where applicable, enhancement of these values, and the results of the assessment will be expressed, where possible, on a quantitative basis, such as percentage of a resource lost, reduction in use days of recreational areas, or dollars lost in commercial fishery profits or the profitability of other commercial enterprises.

Subpart E—Impact of the Proposed Dumping on Other Uses of the Ocean

§ 227.20 Basis for determination.

(a) Based on current state of the art, consideration must be given to any possible long-range effects of even the most innocuous substances when dumped in the ocean on a continuing basis. Such a consideration is made in evaluating the relationship of each proposed disposal activity in relationship to its potential for long-range impact on other uses of the ocean.

(b) An evaluation will be made on an individual basis for each proposed dumping of material of the potential for effects on uses of the ocean for purposes other than material disposal. The factors to be considered in this evaluation include those stated in subpart D, but the evaluation of this subpart E will be based on the impact of the proposed dumping on specific uses of the ocean rather than on overall esthetic, recreational and economic values.

§ 227.21 Uses considered.

An appraisal will be made of the nature and extent of existing and potential uses of the disposal site itself and of any areas which might reasonably be expected to be affected by the proposed dumping, and a quantitative and qualitative evaluation made, where feasible, of the impact of the proposed dumping on each use. The uses considered shall include, but not be limited to:

(a) Commercial fishing in open ocean areas;

(b) Commercial fishing in coastal areas;

(c) Commercial fishing in estuarine areas;

(d) Recreational fishing in open ocean areas;
(e) Recreational fishing in coastal areas;
(f) Recreational fishing in estuarine areas;
(g) Recreational use of shorelines and beaches;
(h) Commercial navigation;
(i) Recreational navigation;
(j) Actual or anticipated exploitation of living marine resources;
(k) Actual or anticipated exploitation of non-living resources, including without limitation, sand and gravel places and other mineral deposits, oil and gas exploration and development and offshore marine terminal or other structure development; and
(l) Scientific research and study.

§ 227.22 Assessment of impact.

The assessment of impact on other uses of the ocean will consider both temporary and long-range effects within the state of the art, but particular emphasis will be placed on any irreversible or irretrievable commitment of resources that would result from the proposed dumping.

Subpart F [Reserved]

Subpart G—Definitions

§ 227.27 Limiting permissible concentration (LPC).

(a) The limiting permissible concentration of the liquid phase of a material is:
(1) That concentration of a constituent which, after allowance for initial mixing as provided in § 227.29, does not exceed applicable marine water quality criteria; or, when there are no applicable marine water quality criteria,
(2) That concentration of waste or dredged material in the receiving water which, after allowance for initial mixing, as specified in § 227.29, will not exceed a toxicity threshold defined as 0.01 of a concentration shown to be acutely toxic to appropriate sensitive marine organisms in a bioassay carried out in accordance with approved EPA procedures.
(3) When there is reasonable scientific evidence on a specific waste material to justify the use of an application factor other than 0.01 as specified in paragraph (a)(2) of this section, such alternative application factor shall be used in calculating the LPC.

(b) The limiting permissible concentration of the suspended particulate and solid phases of a material means that concentration which will not cause unreasonable acute or chronic toxicity or other sublethal adverse effects based on bioassay results using appropriate sensitive marine organisms in the case of the suspended particulate phase, or appropriate sensitive benthic marine organisms in the case of the solid phase; and which will not cause accumulation of toxic materials in the human food chain. Suspended particulate phase bioaccumulation testing is not required. These bioassays are to be conducted in accordance with procedures approved by EPA, or, in the case of dredged material, approved by EPA and the Corps of Engineers.

(c) *Appropriate sensitive marine organisms* means at least one species each representative of phytoplankton or zooplankton, crustacean or mollusk, and fish species chosen from among the most sensitive species documented in the scientific literature or accepted by EPA as being reliable test organisms to determine the anticipated impact of the wastes on the ecosystem at the disposal site. Bioassays, except on phytoplankton or zooplankton, shall be run for a minimum of 96 hours under temperature, salinity, and dissolved oxygen conditions representing the extremes of environmental stress at the disposal site. Bioassays on phytoplankton or zooplankton may be run for shorter periods of time as appropriate for the organisms tested at the discretion of EPA, or EPA and the Corps of Engineers, as the case may be.

(d) *Appropriate sensitive benthic marine organisms* means two or more species that together represent filter-feeding, deposit-feeding, and burrowing characteristics. These organisms shall be chosen from among the species that are most sensitive for each type they represent, and that are documented in the scientific literature and accepted by EPA as being reliable test organisms to

determine the anticipated impact on the site.

[42 FR 2476, Jan. 11, 1977; 43 FR 1071, Jan. 6, 1978, as amended at 59 FR 26572, May 20, 1994; 59 FR 52652, Oct. 18, 1994; 61 FR 51203, Sept. 30, 1996; 65 FR 47325, Aug. 2, 2000; 73 FR 74987, Dec. 10, 2008]

§ 227.28 Release zone.

The release zone is the area swept out by the locus of points constantly 100 meters from the perimeter of the conveyance engaged in dumping activities, beginning at the first moment in which dumping is scheduled to occur and ending at the last moment in which dumping is scheduled to occur. No release zone shall exceed the total surface area of the dumpsite.

§ 227.29 Initial mixing.

(a) Initial mixing is defined to be that dispersion or diffusion of liquid, suspended particulate, and solid phases of a waste which occurs within four hours after dumping. The limiting permissible concentration shall not be exceeded beyond the boundaries of the disposal site during initial mixing, and shall not be exceeded at any point in the marine environment after initial mixing. The maximum concentration of the liquid, suspended particulate, and solid phases of a dumped material after initial mixing shall be estimated by one of these methods, in order of preference:

(1) When field data on the proposed dumping are adequate to predict initial dispersion and diffusion of the waste, these shall be used, if necessary, in conjunction with an appropriate mathematical model acceptable to EPA or the District Engineer, as appropriate.

(2) When field data on the dispersion and diffusion of a waste of characteristics similar to that proposed for discharge are available, these shall be used in conjunction with an appropriate mathematical model acceptable to EPA or the District Engineer, as appropriate.

(3) When no field data are available, theoretical oceanic turbulent diffusion relationships may be applied to known characteristics of the waste and the disposal site.

(b) When no other means of estimation are feasible.

(1) The liquid and suspended particulate phases of the dumped waste may be assumed to be evenly distributed after four hours over a column of water bounded on the surface by the release zone and extending to the ocean floor, thermocline, or halocline if one exists, or to a depth of 20 meters, whichever is shallower, and

(2) The solid phase of a dumped waste may be assumed to settle rapidly to the ocean bottom and to be distributed evenly over the ocean bottom in an area equal to that of the release zone as defined in § 227.28.

(c) When there is reasonable scientific evidence to demonstrate that other methods of estimating a reasonable allowance for initial mixing are appropriate for a specific material, such methods may be used with the concurrence of EPA after appropriate scientific review.

§ 227.30 High-level radioactive waste.

High-level radioactive waste means the aqueous waste resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated waste from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels or irradiated fuel from nuclear power reactors.

§ 227.31 Applicable marine water quality criteria.

Applicable marine water quality criteria means the criteria given for marine waters in the EPA publication ''Quality Criteria for Water'' as published in 1976 and amended by subsequent supplements or additions.

§ 227.32 Liquid, suspended particulate, and solid phases of a material.

(a) For the purposes of these regulations, the liquid phase of a material, subject to the exclusions of paragraph (b) of this section, is the supernatant remaining after one hour undisturbed settling, after centrifugation and filtration through a 0.45 micron filter. The suspended particulate phase is the supernatant as obtained above prior to centrifugation and filtration. The solid phase includes all material settling to the bottom in one hour. Settling shall

be conducted according to procedures approved by EPA.

(b) For dredged material, other material containing large proportions of insoluble matter, materials which may interact with ocean water to form insoluble matter or new toxic compounds, or materials which may release toxic compounds upon deposition, the Administrator, Regional Administrator, or the District Engineer, as the case may be, may require that the separation of liquid, suspended particulate, and solid phases of the material be performed upon a mixture of the waste with ocean water rather than on the material itself. In such cases the following procedures shall be used:

(1) For dredged material, the liquid phase is considered to be the centrifuged and 0.45 micron filtered supernatant remaining after one hour undisturbed settling of the mixture resulting from a vigorous 30-minute agitation of one part bottom sediment from the dredging site with four parts water (vol/vol) collected from the dredging site or from the disposal site, as appropriate for the type of dredging operation. The suspended particulate phase is the supernatant as obtained above prior to centrifugation and filtration. The solid phase is considered to be all material settling to the bottom within one hour. Settling shall be conducted by procedures approved by EPA and the Corps of Engineers.

(2) For other materials, the proportion of ocean water used shall be the minimum amount necessary to produce the anticipated effect (e.g., complete neutralization of an acid or alkaline waste) based on guidance provided by EPA on particular cases, or in accordance with approved EPA procedures. For such materials the liquid phase is the filtered and centrifuged supernatant resulting from the mixture after 30 minutes of vigorous shaking followed by undisturbed settling for one hour. The suspended particulate phase is the supernatant as obtained above prior to centrifugation and filtration. The solid phase is the insoluble material settling to the bottom in that period.

PART 228—CRITERIA FOR THE MANAGEMENT OF DISPOSAL SITES FOR OCEAN DUMPING

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

SOURCE: 42 FR 2482, Jan. 11, 1977, unless otherwise noted.

§ 228.1 Applicability.

The criteria of this part 228 are established pursuant to section 102 of the Act and apply to the evaluation of proposed ocean dumping under title I of the Act. The criteria of this part 228 deal with the evaluation of the proposed dumping of material in ocean waters in relation to continuing requirements for effective management of ocean disposal sites to prevent unreasonable degradation of the marine environment from all wastes being dumped in the ocean. This part 228 is applicable to dredged material disposal sites only as specified in §§ 228.4(e), 228.9, and 228.12.

§ 228.2 Definitions.

(a) The term *disposal site* means a finally approved and precise geographical area within which ocean dumping of wastes is permitted under conditions specified in permits issued under sections 102 and 103 of the Act. Such sites are identified by boundaries established by coordinates of latitude and longitude for each corner, or by coordinates of latitude and longitude for

the center point and a radius in nautical miles from that point. Boundary coordinates shall be identified as precisely as is warranted by the accuracy with which the site can be located with existing navigational aids or by the implantation of transponders, buoys or other means of marking the site.

(b) The term *baseline* or *trend assessment* survey means the planned sampling or measurement of parameters at set stations or in set areas in and near disposal sites for a period of time sufficient to provide synoptic data for determining water quality, benthic, or biological conditions as a result of ocean disposal operations. The minimum requirements for such surveys are given in § 228.13.

(c) The term *disposal site evaluation study* means the collection, analysis, and interpretation of all pertinent information available concerning an existing disposal site, including but not limited to, data and information from trend assessment surveys, monitoring surveys, special purpose surveys of other Federal agencies, public data archives, and social and economic studies and records of affected areas.

(d) The term *disposal site designation study* means the collection, analysis and interpretation of all available pertinent data and information on a proposed disposal site prior to use, including but not limited to, that from baseline surveys, special purpose surveys of other Federal agencies, public data archives, and social and economic studies and records of areas which would be affected by use of the proposed site.

(e) The term *management authority* means the EPA organizational entity assigned responsibility for implementing the management functions identified in § 228.3.

(f) *Statistical significance* shall mean the statistical significance determined by using appropriate standard techniques of multivariate analysis with results interpreted at the 95 percent confidence level and based on data relating species which are present in sufficient numbers at control areas to permit a valid statistical comparison with the areas being tested.

(g) *Valuable commercial and recreational species* shall mean those species for which catch statistics are compiled on a routine basis by the Federal or State agency responsible for compiling such statistics for the general geographical area impacted, or which are under current study by such Federal or State agencies for potential development for commercial or recreational use.

(h) *Normal ambient value* means that concentration of a chemical species reasonably anticipated to be present in the water column, sediments, or biota in the absence of disposal activities at the disposal site in question.

[42 FR 2482, Jan. 11, 1977, as amended at 73 FR 74987, Dec. 10, 2008]

§ 228.3 Disposal site management responsibilities.

(a) Management of a site consists of regulating times, rates, and methods of disposal and quantities and types of materials disposed of; developing and maintaining effective ambient monitoring programs for the site; conducting disposal site evaluation and designation studies; and recommending modifications in site use and/or designation (e.g., termination of use of the site for general use or for disposal of specific wastes).

(b) Each site, upon final designation, will be assigned to either an EPA Regional office or to EPA Headquarters for management. These designations will be consistent with the delegation of authority in § 220.4 of this chapter. The designated management authority is fully responsible for all aspects of the management of sites within the general requirements specified in § 220.4 and this chapter. Specific requirements for meeting the management responsibilities assigned to the designated management authority for each site are outlined in §§ 228.5 and 228.6.

[42 FR 2482, Jan. 11, 1977, as amended at 59 FR 61129, Nov. 29, 1994; 73 FR 74987, Dec. 10, 2008]

§ 228.4 Procedures for designation of sites.

(a) *General Permits.* Geographical areas or regions within which materials may be dumped under a general permit will be published as part of the promulgation of each general permit.

(b) *Special permits.* Areas where ocean dumping is permitted subject to the

specific conditions of individual special permits, will be designated by promulgation in this part 228, and such designation will be made based on environmental studies of each site, regions adjacent to the site, and on historical knowledge of the impact of waste disposal on areas similar to such sites in physical, chemical, and biological characteristics. All studies for the evaluation and potential selection of dumping sites will be conducted in accordance with the requirements of §§ 228.5 and 228.6. The Administrator may, from time to time, designate specific locations for temporary use for disposal of small amounts of materials under a special permit only without disposal site designation studies when such materials satisfy the Criteria and the Administrator determines that the quantities to be disposed of at such sites will not result in significant impact on the environment. Such designations will be done by promulgation in this part 228, and will be for a specified period of time and for specified quantities of materials.

(c) *Emergency Permits.* Dumping sites for materials disposed of under an emergency permit will be specified by the Administrator as a permit condition and will be based on an individual appraisal of the characteristics of the waste and the safest means for its disposal.

(d) *Research Permits.* Dumping sites for research permits will be determined by the nature of the proposed study. Dumping sites will be specified by the Administrator as a permit condition.

(e) *Dredged Material Permits.* (1) Areas where ocean dumping of dredged material is permitted subject to the specific conditions of Dredged Material permits issued by the U.S. Army Corps of Engineers will be designated by EPA promulgation in this part 228, and such designation will be made based on environmental studies of each site, regions adjacent to the site, and on historical knowledge of the impact of dredged material disposal on areas similar to such sites in physical, chemical, and biological characteristics. All studies for the evaluation and potential selection of dredged material disposal sites will be conducted in accordance with the appropriate requirements of §§ 228.5 and 228.6, except that:

(i) Baseline or trend assessment requirements may be developed on a case-by-case basis from the results of research, including that now in progress by the Corps of Engineers.

(ii) An environmental impact assessment for all sites within a particular geographic area may be prepared based on complete disposal site designation or evaluation studies on a typical site or sites in that area. In such cases, sufficient studies to demonstrate the generic similarity of all sites within such a geographic area will be conducted.

(2) In those cases where a recommended disposal site has not been designated by the Administrator, or where it is not feasible to utilize a recommended disposal site that has been designated by the Administrator, the District Engineer shall, in consultation with EPA, select a site in accordance with the requirements of §§ 228.5 and 228.6(a). Concurrence by EPA in permits issued for the use of such site for the dumping of dredged material at the site will constitute EPA approval of the use of the site for dredged material disposal only.

(3) Sites designated for the ocean dumping of dredged material in accordance with the procedures of paragraph (e) (1) or (2) of this section shall be used only for the ocean dumping of dredged material under permits issued by the U.S. Army Corps of Engineers.

[42 FR 2482, Jan. 11, 1977, as amended at 73 FR 74987, Dec. 10, 2008]

§ 228.5 General criteria for the selection of sites.

(a) The dumping of materials into the ocean will be permitted only at sites or in areas selected to minimize the interference of disposal activities with other activities in the marine environment, particularly avoiding areas of existing fisheries or shellfisheries, and regions of heavy commercial or recreational navigation.

(b) Locations and boundaries of disposal sites will be so chosen that temporary perturbations in water quality or other environmental conditions during initial mixing caused by disposal operations anywhere within the site

can be expected to be reduced to normal ambient seawater levels or to undetectable contaminant concentrations or effects before reaching any beach, shoreline, marine sanctuary, or known geographically limited fishery or shellfishery.

(c) [Reserved]

(d) The sizes of ocean disposal sites will be limited in order to localize for identification and control any immediate adverse impacts and permit the implementation of effective monitoring and surveilance programs to prevent adverse long-range impacts. The size, configuration, and location of any disposal site will be determined as a part of the disposal site evaluation or designation study.

(e) EPA will, wherever feasible, designate ocean dumping sites beyond the edge of the continental shelf and other such sites that have been historically used.

[42 FR 2482, Jan. 11, 1977, as amended at 73 FR 74987, Dec. 10, 2008]

§ 228.6 Specific criteria for site selection.

(a) In the selection of disposal sites, in addition to other necessary or appropriate factors determined by the Administrator, the following factors will be considered:

(1) Geographical position, depth of water, bottom topography and distance from coast;

(2) Location in relation to breeding, spawning, nursery, feeding, or passage areas of living resources in adult or juvenile phases;

(3) Location in relation to beaches and other amenity areas;

(4) Types and quantities of wastes proposed to be disposed of, and proposed methods of release, including methods of packing the waste, if any;

(5) Feasibility of surveillance and monitoring;

(6) Dispersal, horizontal transport and vertical mixing characteristics of the area, including prevailing current direction and velocity, if any;

(7) Existence and effects of current and previous discharges and dumping in the area (including cumulative effects);

(8) Interference with shipping, fishing, recreation, mineral extraction, desalination, fish and shellfish culture, areas of special scientific importance and other legitimate uses of the ocean;

(9) The existing water quality and ecology of the site as determined by available data or by trend assessment or baseline surveys;

(10) Potentiality for the development or recruitment of nuisance species in the disposal site;

(11) Existence at or in close proximity to the site of any significant natural or cultural features of historical importance.

(b) The results of a disposal site evaluation and/or designation study based on the criteria stated in paragraphs (b)(1) through (11) of this section will be presented in support of the site designation promulgation as an environmental assessment of the impact of the use of the site for disposal, and will be used in the preparation of an environmental impact statement for each site where such a statement is required by EPA policy. By publication of a notice in accordance with this part 228, an environmental impact statement, in draft form, will be made available for public comment not later than the time of publication of the site designation as proposed rulemaking, and a final EIS will be made available at the time of final rulemaking.

§ 228.7 Regulation of disposal site use.

Where necessary, disposal site use will be regulated by setting limitations on times of dumping and rates of discharge, and establishing a disposal site monitoring program.

§ 228.8 Limitations on times and rates of disposal.

Limitations as to time for and rates of dumping may be stated as part of the promulgation of site designation. The times and the quantities of permitted material disposal will be regulated by the EPA management authority so that the limits for the site as specified in the site designation are not exceeded. This will be accomplished by the denial of permits for the disposal of some materials, by the imposition of appropriate conditions on other permits and, if necessary, the designation of new disposal sites under the procedures of § 228.4. In no case may the

total volume of material disposed of at any site under special permits cause the concentration of the total materials or any constituent of any of the materials being disposed of at the site to exceed limits specified in the site designation.

[73 FR 74987, Dec. 10, 2008]

§ 228.9 Disposal site monitoring.

(a) The monitoring program, if deemed necessary by the Regional Administrator or the District Engineer, as appropriate, may include baseline or trend assessment surveys by EPA, NOAA, other Federal agencies, or contractors, special studies by permittees, and the analysis and interpretation of data from remote or automatic sampling and/or sensing devices. The primary purpose of the monitoring program is to evaluate the impact of disposal on the marine environment by referencing the monitoring results to a set of baseline conditions. When disposal sites are being used on a continuing basis, such programs may consist of the following components:

(1) Trend assessment surveys conducted at intervals frequent enough to assess the extent and trends of environmental impact. Until survey data or other information are adequate to show that changes in frequency or scope are necessary or desirable, trend assessment and baseline surveys should generally conform to the applicable requirements of § 228.13. These surveys shall be the responsibility of the Federal government.

(2) Special studies conducted by the permittee to identify immediate and short-term impacts of disposal operations.

(b) These surveys may be supplemented, where feasible and useful, by data collected from the use of automatic sampling buoys, satellites or in situ platforms, and from experimental programs.

(c) EPA will require the full participation of permittees, and encourage the full participation of other Federal and State and local agencies in the development and implementation of disposal site monitoring programs. The monitoring and research programs presently supported by permittees may be incorporated into the overall monitoring program insofar as feasible.

§ 228.10 Evaluating disposal impact.

(a) Impact of the disposal at each site designated under section 102 of the Act will be evaluated periodically and a report will be submitted as appropriate as part of the Annual Report to Congress. Such reports will be prepared by or under the direction of the EPA management authority for a specific site and will be based on an evaluation of all data available from baseline and trend assessment surveys, monitoring surveys, and other data pertinent to conditions at and near a site.

(b) The following types of effects, in addition to other necessary or appropriate considerations, will be considered in determining to what extent the marine environment has been impacted by materials disposed of at an ocean disposal site:

(1) Movement of materials into estuaries or marine sanctuaries, or onto oceanfront beaches, or shorelines;

(2) Movement of materials toward productive fishery or shellfishery areas;

(3) Absence from the disposal site of pollution-sensitive biota characteristic of the general area;

(4) Progressive, non-seasonal, changes in water quality or sediment composition at the disposal site, when these changes are attributable to materials disposed of at the site;

(5) Progressive, non-seasonal, changes in composition or numbers of pelagic, demersal, or benthic biota at or near the disposal site, when these changes can be attributed to the effects of materials disposed of at the site;

(6) Accumulation of material constituents (including without limitation, human pathogens) in marine biota at or near the site.

(c) The determination of the overall severity of disposal at the site on the marine environment, including without limitation, the disposal site and adjacent areas, will be based on the evaluation of the entire body of pertinent data using appropriate methods of data analysis for the quantity and type of data available. Impacts will be categorized according to the overall condition of the environment of the disposal

site and adjacent areas based on the determination by the EPA management authority assessing the nature and extent of the effects identified in paragraph (b) of this section in addition to other necessary or appropriate considerations. The following categories shall be used:

(1) *Impact Category I:* The effects of activities at the disposal site shall be categorized in Impact Category I when one or more of the following conditions is present and can reasonably be attributed to ocean dumping activities;

(i) There is identifiable progressive movement or accumulation, in detectable concentrations above normal ambient values, of any waste or waste constituent from the disposal site within 12 nautical miles of any shoreline, marine sanctuary designated under title III of the Act, or critical area designated under section 102(c) of the Act; or

(ii) The biota, sediments, or water column of the disposal site, or of any area outside the disposal site where any waste or waste constituent from the disposal site is present in detectable concentrations above normal ambient values, are adversely affected by the toxicity of such waste or waste constituent to the extent that there are statistically significant decreases in the populations of valuable commercial or recreational species, or of specific species of biota essential to the propagation of such species, within the disposal site and such other area as compared to populations of the same organisms in comparable locations outside such site and area; or

(iii) Solid waste material disposed of at the site has accumulated at the site or in areas adjacent to it, to such an extent that major uses of the site or of adjacent areas are significantly impaired and the Federal or State agency responsible for regulating such uses certifies that such significant impairment has occurred and states in its certificate the basis for its determination of such impairment; or

(iv) There are adverse effects on the taste or odor of valuable commercial or recreational species as a result of disposal activities; or

(v) When any toxic waste, toxic waste constituent, or toxic byproduct of waste interaction, is consistently identified in toxic concentrations above normal ambient values outside the disposal site more than 4 hours after disposal.

(2) *Impact Category II:* The effects of activities at the disposal site which are not categorized in Impact Category I shall be categorized in Impact Category II.

§ 228.11 Modification in disposal site use.

(a) Modifications in disposal site use which involve the withdrawal of designated disposal sites from use or permanent changes in the total specified quantities or types of wastes permitted to be discharged to a specific disposal site will be made through promulgation of an amendment to the disposal site designation set forth in this part 228 and will be based on the results of the analyses of impact described in § 228.10 or upon changed circumstances concerning use of the site.

(b) Modifications in disposal site use promulgated pursuant to paragraph (a) of this section shall not automatically modify conditions of any outstanding permit issued pursuant to this subchapter H, and provided further that unless the EPA management authority for such site modifies, revokes or suspends such permit or any of the terms or conditions of such permit in accordance with the provisions of § 232.2 based on the results of impact analyses as described in § 228.10 or upon changed circumstances concerning use of the site, such permit will remain in force until its expiration date.

(c) When the EPA management authority determines that activities at a disposal site have placed the site in Impact Category I, the Administrator or the Regional Administrator, as the case may be, shall place such limitations on the use of the site as are necessary to reduce the impacts to acceptable levels.

(d) The determination of the Administrator as to whether to terminate or limit use of a disposal site will be based on the impact of disposal at the site itself and on the Criteria.

[42 FR 2482, Jan. 11, 1977; 43 FR 1071, Jan. 6, 1978]

§ 228.12 [Reserved]

§ 228.13 Guidelines for ocean disposal site baseline or trend assessment surveys under section 102 of the Act.

The purpose of a baseline or trend assessment survey is to determine the physical, chemical, geological, and biological structure of a proposed or existing disposal site at the time of the survey. A baseline or trend assessment survey is to be regarded as a comprehensive synoptic and representative picture of existing conditions; each such survey is to be planned as part of a continual monitoring program through which changes in conditions at a disposal site can be documented and assessed. Surveys will be planned in coordination with the ongoing programs of NOAA and other Federal, State, local, or private agencies with missions in the marine environment. The field survey data collection phase of a disposal site evaluation or designation study shall be planned and conducted to obtain a body of information both representative of the site at the time of study and obtained by techniques reproducible in precision and accuracy in future studies. A full plan of study which will provide a record of sampling, analytical, and data reduction procedures must be developed, documented and approved by the EPA management authority. Plans for all surveys which will produce information to be used in the preparation of environmental impact statements will be approved by the Administrator or his designee. This plan of study also shall be incorporated as an appendix into a technical report on the study, together with notations describing deviations from the plan required in actual operations. Relative emphasis on individual aspects of the environment at each site will depend on the type of wastes disposed of at the site and the manner in which such wastes are likely to affect the local environment, but no major feature of the disposal site may be neglected. The observations made and the data obtained are to be based on the information necessary to evaluate the site for ocean dumping. The parameters measured will be those indicative, either directly or indirectly, of the immediate and long-term impact of pollutants on the environment at the disposal site and adjacent land or water areas. An initial disposal site evaluation or designation study should provide an immediate baseline appraisal of a particular site, but it should also be regarded as the first of a series of studies to be continued as long as the site is used for waste disposal.

(a) *Timing.* Baseline or trend assessment surveys will be conducted with due regard for climatic and seasonal impact on stratification and other conditions in the upper layers of the water column. Where a choice of season is feasible, trend assessment surveys should be made during those months when pollutant accumulation within disposal sites is likely to be most severe, or when pollutant impact within disposal sites is likely to be most noticeable.

(1) Where disposal sites are near large riverine inflows to the ocean, surveys will be done with due regard for the seasonal variation in river flow. In some cases several surveys at various river flows may be necessary before a site can be approved.

(2) When initial surveys show that seasonal variation is not significant and surveys at greater than seasonable intervals are adequate for characterizing a site, resurveys shall be carried out in climatic conditions as similar to those of the original surveys as possible, particularly in depths less than 200 meters.

(b) *Duration.* The actual duration of a field survey will depend upon the size and depth of the site, weather conditions during the survey, and the types of data to be collected. For example, for a survey of an area of 100 square miles on the continental shelf, including an average dump site and the region contiguous to it, an on-site operation would be scheduled for completion within one week of weather suitable for on-site operations. More on-site operating time may be scheduled for larger or highly complex sites.

(c) *Numbers and locations of sampling stations.* The numbers and locations of sampling stations will depend in part on the local bathymetry with minimum numbers of stations per site

fixed as specified in the following sections. Where the bottom is smooth or evenly sloping, stations for water column measurements and benthic sampling and collections, other than trawls, shall be spaced throughout the survey area in a manner planned to provide maximum coverage of both the disposal site and contiguous control areas, considering known water movement characteristics. Where there are major irregularities in the bottom topography, such as canyons or gullies, or in the nature of the bottom, sampling stations for sediments and benthic communities shall be spaced to provide representative sampling of the major different features.

Sampling shall be done within the dump site itself and in the contiguous area. Sufficient control stations outside a disposal site shall be occupied to characterize the control area environment at least as well as the disposal site itself. Where there are known persistent currents, sampling in contiguous areas shall include at least two stations downcurrent of the dump site, and at least two stations upcurrent of the site.

(d) *Measurements in the water column at and near the dump site*—(1) *Water quality parameters measured.* These shall include the major indicators of water quality, particularly those likely to be affected by the waste proposed to be dumped. Specifically included at all stations are measurements of temperature, dissolved oxygen, salinity, suspended solids, turbidity, total organic carbon, pH, inorganic nutrients, and chlorophyll *a*.

(i) At one station near the center of the disposal site, samples of the water column shall be taken for the analysis of the following parameters: Mercury, cadmium, copper, chromium, zinc, lead, arsenic, selenium, vanadium, beryllium, nickel, pesticides, petroleum hydrocarbons, and persistent organohalogens. These samples shall be preserved for subsequent analysis by or under the direct supervision of EPA laboratories in accordance with the approved plan of study.

(ii) These parameters are the basic requirements for all sites. For the evaluation of any specific disposal site additional measurements may be required, depending on the present or intended use of the site. Additional parameters may be selected based on the materials likely to be in wastes dumped at the site, and on parameters likely to be affected by constituents of such wastes. Analysis for other constituents characteristic of wastes discharged to a particular disposal site, or of the impact of such wastes on water quality, will be included in accordance with the approved plan of study.

(2) *Water quality sampling requirements.* The number of samples collected from the water column should be sufficient to identify representative changes throughout the water column such as to avoid short-term impact due to disposal activities. The following key locations should be considered in selecting water column depths for sampling:

(i) Surface, below interference from surface waves;

(ii) Middle of the surface layer;

(iii) Bottom of the surface layer;

(iv) Middle of the thermocline or halocline, or both if present;

(v) Near the top of the stable layer beneath a thermocline or halocline;

(vi) Near the middle of a stable layer;

(vii) As near the bottom as feasible;

(viii) Near the center of any zone showing pronounced biological activity or lack thereof.

In very shallow waters where only a few of these would be pertinent, as a minimum, surface, mid-depth and bottom samples shall be taken, with samples at additional depths being added as indicated by local conditions. At disposal sites far enough away from the influence of major river inflows, ocean or coastal currents, or other features which might cause local perturbations in water chemistry, a minimum of 5 water chemistry stations should be occupied within the boundaries of a site. Additional stations should be added when the area to be covered in the survey is more than 20 square miles or when local perturbations in water chemistry may be expected because of the presence of one of the features mentioned above. In zones where such impacts are likely, stations shall be distributed so that at least 3 stations are occupied in the transition from one stable regime to another. Each water

column chemistry station shall be replicated a minimum of 2 times during a survey except in waters over 200 meters deep.

(3) *Water column biota.* Sampling stations for the biota in the water column shall be as near as feasible to stations used for water quality; in addition at least two night-time stations in the disposal site and contiguous area are required. At each station vertical or oblique tows with appropriately-meshed nets shall be used to assess the microzooplankton, the nekton, and the macrozooplankton, Towing times and distances shall be sufficient to obtain representative samples of organisms near water quality stations. Organisms shall be sorted and identified to taxonomic levels necessary to identify dominant organisms, sensitive or indicator organisms, and organism diversity. Tissue samples of representative species shall be analyzed for pesticides, persistent organohalogens, and heavy metals. Discrete water samples shall also be used to quantitatively assess the phytoplankton at each station.

These requirements are the minimum necessary in all cases. Where there are discontinuities present, such as thermoclines, haloclines, convergences, or upwelling, additional tows shall be made in each water mass as appropriate.

(e) *Measurements of the benthic region*—(1) *Bottom sampling.* Samples of the bottom shall be taken for both sediment composition and structure, and to determine the nature and numbers of benthic biota.

(i) At each station sampling may consist of core samples, grab samples, dredge samples, trawls, and bottom photography or television, where available and feasible, depending on the nature of the bottom and the type of disposal site. Each type of sampling shall be replicated sufficiently to obtain a representative set of samples. The minimum numbers of replicates of successful samples at each continental shelf station for each type of device mentioned above are as follows:

Cores	3.
Grabs	5.
Dredge	3.
Trawl	20-min. tow.

Lesser numbers of replicates may be allowed in water deeper than 200 meters, at those sites where pollution impacts on the bottom are unlikely in the judgment of the EPA management authority.

(ii) Selection of bottom stations will be based to a large extent on the bottom topography and hydrography as determined by the bathymetric survey. On the continental shelf, where the bottom has no significant discontinuities, a bottom station density of at least three times the water column stations is recommended, depending on the type of site being evaluated. Where there are significant differences in bottom topography, additional stations shall be occupied near the discontinuity and on each side of it. Beyond the continental shelf, lesser densities may be used.

(2) *Bathymetric survey.* Sufficient tracklines shall be run to develop complete bottom coverage of bathymetry with reasonable assurance of accurate coverage of bottom topography, with trackline direction and spacing as close as available control allows. The site itself is to be developed at the greatest density possible, with data to be collected to a suitable distance about the site as is required to identify major changes in bathymetry which might affect the site. Specifications for each bathymetric survey will vary, depending on control, bottom complexity, depths, equipment, and map scale required. In most cases, a bathymetric map at a scale of 1:25,000 to 1:10,000 will be required, with a minimum of 1–5 meter contour interval except in very flat areas. When the foregoing bathymetric detail is available from recent surveys of the disposal site, bathymetry during a baseline or trend assessment survey may be limited to sonar profiles of bathymetry on transects between sampling stations.

(3) *Nature of bottom.* The size distribution of sediments, mineral character and chemical quality of the bottom will be determined to a depth appropriate for the type of bottom. The following parameters will be measured at all stations: Particle size distribution, major mineral constituents, texture, settling rate, and organic carbon.

(i) At several stations near the center of the disposal site, samples of sediments shall be taken for the analysis of the following parameters: Mercury, cadmium, copper, chromium, zinc, lead, arsenic, selenium, vanadium, beryllium, nickel, pesticides, persistent organohalogens, and petroleum hydrocarbons. These samples shall be preserved for subsequent analysis by or under the direct supervision of EPA laboratories in accordance with the approved plan of study.

(ii) These parameters are the basic requirements for all sites. For the evaluation of any specific disposal site additional measurements may be required, depending on the present or intended use of the site. Additional parameters may be selected based on the materials likely to be in wastes dumped at the site, and on parameters likely to be affected by constituents of such wastes. Such additional parameters will be selected by the EPA management authority.

(4) *Benthic biota*. This shall consist of a quantitative and qualitative evaluation of benthic communities including macroinfauna and macroepifauna, meiobenthos, and microbenthos, and should include an appraisal, based on existing information, of the sensitivity of indigenous species to the waste proposed to be discharged. Organisms, shall be sorted, and identified to taxonomic levels necessary to identify dominant organisms, sensitive or indicator organisms, and organism diversity. Tissue samples of the following types of organisms shall be analyzed for persistent organohalogens, pesticides, and heavy metals:

(i) A predominant species of demersal fish;

(ii) The most abundant macroinfaunal species; and

(iii) A dominant epifaunal species, with particular preference for a species of economic importance.

(f) *Other measurements*—(1) *Hydrodynamic features*. The direction and speed of water movement shall be characterized at levels appropriate for the site and type of waste to be dumped. Where depths and climatic conditions are great enough for a thermocline or halocline to exist, the relationship of water movement to such a feature shall be characterized.

(i) *Current measurements*. When current meters are used as the primary source of hydrodynamic data, at least 4 current meter stations with at least 3 meters at depths appropriate for the observed or expected discontinuities in the water column should be operated for as long as possible during the survey. Where feasible, current meters should be deployed at the initiation of the survey and recovered after its completion. Stations should be at least a mile apart, and should be placed along the long axis of the dumping site. For dumping sites more than 10 miles along the long axis, one current meter station every 5 miles should be operated. Where there are discontinuities in surface layers, e.g., due to land runoff, stations should be operated in each water mass.

(ii) *Water mass movement*. Acceptable methods include: dye, drogues, surface drifters, side scan sonar, bottom drifters, and bottom photography or television. When such techniques are the primary source of hydrodynamic data, coverage should be such that all significant hydrodynamic features likely to affect waste movement are measured.

(2) *Sea state*. Observations of sea state and of standard meteorological parameters shall be made at 8-hour intervals.

(3) *Surface phenomena*. Observations shall be made of oil slicks, floating materials, and other visible evidence of pollution; and, where possible, collections of floating materials shall be made.

(g) *Survey procedures and techniques*. Techniques and procedures used for sampling and analysis shall represent the state-of-the-art in oceanographic survey and analytical practice. Survey plans shall specify the methods to be used and will be subject to approval by EPA.

(h) *Quality assurance*. The EPA management authority may require that certain samples be submitted on a routine basis to EPA laboratories for analysis as well as being analyzed by the surveyor, and that EPA personnel participate in some field surveys.

§ 228.14 [Reserved]

§ 228.15 Dumping sites designated on a final basis.

(a)(1) The sites identified in this section are approved for dumping the indicated materials. Designation of these sites was based on environmental studies conducted in accordance with the provisions of this part 228, and the sites listed in this section have been found to meet the site designation criteria of §§ 228.5 and 228.6.

(2) Unless otherwise specifically noted, site management authority for each site set forth in this section is delegated to the EPA Regional office under which the site entry is listed.

(3) Unless otherwise specifically noted, all ocean dumping site coordinates are based upon the North American Datum of 1927.

(b) Region I Final Dredged Material Sites.

(1) Portland, Maine, Dredged Material Disposal Site.

(i) *Location:* 43°33′36″ N., 70°02′42″ W.; 43°33′36″ N., 70°01′18″ W.; 43°34′36″ N., 70°02′42″ W.; 43°34′36″ N., 70°01′18″ W.

(ii) *Size:* One square nautical mile.

(iii) *Depth:* 50 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(2) Massachusetts Bay Disposal Site.

(i) *Location:* Two overlapping circles: Center of existing MBDS: 42°25.1′ N, 70°35.0′ W, 1 nautical mile radius; Center of temporary expansion: 42°26.417′ N, 70°35.373′ W, 0.75 nautical mile radius (NAD 1983).

(ii) *Size:* 4.60 sq. nautical miles.

(iii) *Depth:* Range from 70 to 91 meters.

(iv) *Exclusive Use:* Dredged material.

(v) *Period of Use:* Continuing.

(vi) *Restriction:* Disposal shall be limited to dredged material which meets the requirements of the MPRSA and its accompanying regulations. Disposal-and-capping is prohibited at the MBDS until its efficacy can be effectively demonstrated. The temporary expansion of the MBDS shall be used solely for the disposal of suitable dredged material generated during the Boston Harbor Deep Draft Navigation Project using the berm-building method devised and tested by the U.S. Army Corps of Engineers. The temporary expansion will automatically close upon completion of the Boston Harbor Deep Draft Navigation Project.

(3) Rhode Island Sound Disposal Site (RISDS).

(i) *Location:* Corner Coordinates (NAD 1983): 41°14′21″ N, 71°23′29″ W; 41°14′21″ N, 71°22′09″ W; 41°13′21″ N, 71°23′29″ W; 41°13′21″ N, 71°22′09″ W.

(ii) *Size:* One square nautical mile.

(iii) *Depth:* Ranges from 115 to 128 feet (35 to 39 meters).

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(4) Central Long Island Sound Dredged Material Disposal Site (CLDS).

(i) *Location:* Corner Coordinates (NAD 1983) 41°9.5′ N., 72°54.4′ W.; 41°9.5′ N., 72°51.5′ W.; 41°08.4′ N., 72°54.4′ W.; 41°08.4′ N., 72°51.5′ W.

(ii) *Size:* A 1.1 by 2.2 nautical mile rectangular area, about 2.42 square nautical miles in size.

(iii) *Depth:* Ranges from 56 to 77 feet (17 to 23.5 meters).

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* The designation in this paragraph (b)(4) sets forth conditions for the use of the Central Long Island Sound (CLDS), Western Long Island Sound (WLDS) and Eastern Long Island Sound (ELDS) Dredged Material Disposal Sites. These conditions apply to all disposal subject to the MPRSA, namely, all federal projects and non-federal projects greater than 25,000 cubic yards. All references to ''permittees'' shall be deemed to include the U.S. Army Corps of Engineers (USACE) when it is authorizing its own dredged material disposal from a USACE dredging project. The conditions for this designation are as follows:

(A) Disposal shall be limited to dredged material from Long Island Sound and vicinity.

(B) Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(C) Disposal of dredged material at the designated sites pursuant to the designation in this paragraph (b)(4) shall be allowed if, after full consideration of recommendations provided by the Long Island Sound Regional Dredging Team (LIS RDT) if the members of the LIS RDT reach consensus, or provided by the LIS RDT's member agencies if no consensus is achieved, the USACE finds (and EPA does not object to such finding), based on a fully documented analysis, that for a given dredging project:

(*1*) There are no practicable alternatives (as defined in 40 CFR 227.16(b)) to open-water disposal in Long Island Sound. Any available practicable alternative to open-water disposal will be fully utilized for the maximum volume of dredged material practicable;

(*2*) Determinations relating to paragraph (b)(4)(vi)(C)(*1*) of this section will recognize that, consistent with 40 CFR 227.16(b), a practicable alternative to open-water disposal may add reasonable incremental costs. Disposal of dredged material at the designated sites pursuant to this paragraph (b)(4) shall not be allowed to the extent that a practicable alternative is available.

(*3*) The following standards for different dredged material types have been appropriately considered:

(*i*) *Unsuitable material.* Disposal shall be limited to dredged sediments that comply with the Ocean Dumping Regulations.

(*ii*) *Suitable sandy material.* Suitable coarse-grained material, which generally may include up to 20 percent fines when used for direct beach placement, or up to 40 percent fines when used for nearshore bar/berm nourishment, should be used for beach or nearshore bar/berm nourishment or other beneficial use whenever practicable. If no other alternative is determined to be practicable, suitable course-grained material may be placed at the designated sites.

(*iii*) *Suitable fine-grained material.* This material has typically greater than 20 to 40 percent fine content and, therefore, is not typically considered appropriate for beach or nearshore placement, but has been determined to be suitable for open-water placement by testing and analysis. Materials dredged from upper river channels in the Connecticut, Housatonic and Thames Rivers should, whenever possible, be disposed of at existing Confined Open Water sites, on-shore, or through in-river placement. Other beneficial uses such as marsh creation, should be examined and used whenever practicable. If no other alternative is determined to be practicable, suitable fine-grained material may be placed at the designated sites.

(D) *Source reduction.* Efforts to control sediment entering waterways can reduce the need for maintenance dredging of harbor features and facilities by reducing shoaling rates. Federal, state and local agencies tasked with regulating discharges into the watershed should continue to exercise their authorities under various statues and regulations in a continuing effort to reduce the flow of sediments into state waterways and harbors.

(E) There is established a Long Island Sound Dredging Steering Committee (Steering Committee), consisting of high-level representatives from the states of Connecticut and New York, EPA, USACE, and, as appropriate, other federal and state agencies. The Steering Committee will provide policy-level direction to the Long Island Sound Regional Dredging Team (LIS RDT) and facilitate high-level collaboration among the agencies critical to promoting the development and use of beneficial alternatives for dredged material. State participation on the LIS RDT and Steering Committee is voluntary. The Steering Committee is charged with: Establishing a baseline for the volume and percentage of dredged material being beneficially used and placed at the open-water sites; establishing a reasonable and practicable series of stepped objectives, including timeframes, to increase the percentage of beneficially used material while reducing the percentage and amount being disposed in open water, and while recognizing that the amounts of dredged material generated by the dredging program will naturally

fluctuate from year to year; and developing accurate methods to track the placement of dredged material, with due consideration for annual fluctuations. The stepped objectives should incorporate an adaptive management approach while aiming for continuous improvement. When tracking progress the Steering Committee should recognize that exceptional circumstances may result in delays in meeting an objective. Exceptional circumstances should be infrequent, irregular, and unpredictable. It is expected that each of the member agencies will commit the necessary resources to support the LIS RDT and Steering Committee's work, including the collection of data necessary to support establishing the baseline and tracking and reporting on the future disposition of dredged material. The Steering Committee may utilize the LIS RDT, as appropriate, to carry out the tasks assigned to it. The Steering Committee, with the support of the LIS RDT, will guide a concerted effort to encourage greater use of beneficial use alternatives, including piloting alternatives, identifying possible resources, and eliminating regulatory barriers, as appropriate.

(F) The goal of the Long Island Sound Regional Dredging Team (LIS RDT), working in cooperation with, and support of, the Steering Committee, is to reduce or eliminate wherever practicable the open-water disposal of dredged material. The LIS RDT's purpose, geographic scope, membership, organization, and procedures are provided as follows:

(*1*) *Purpose*. The LIS RDT will:

(*i*) Review dredging projects and make recommendations as described in paragraph (vi)(C) above. The LIS RDT will report to the USACE on its review of dredging projects within 30 days of receipt of project information. Project proponents should consult with the LIS RDT early in the development of those projects to ensure that alternatives to open-water placement are fully considered.

(*ii*) Assist the Steering Committee in: Establishing a baseline for the volume and percentage of dredged material being beneficially used and placed at the open water sites; establishing a reasonable and practicable series of stepped objectives, including timeframes, to increase the percentage of beneficially used material while reducing the percentage and amount being disposed in open water, recognizing that the volume of dredged material generated by the dredging program will naturally fluctuate from year to year; and developing accurate methods to track and report on the placement of dredged material, with due consideration for annual fluctuations.

(*iii*) In coordination with the Steering Committee, serve as a forum for: Continuing exploration of new beneficial use alternatives to open-water disposal; matching the availability of beneficial use alternatives with dredging projects; exploring cost-sharing opportunities; and promoting opportunities for beneficial use of clean, parent marine sediments often generated in the development of CAD cells.

(*iv*) Assist the USACE and EPA in continuing long-term efforts to monitor dredging impacts in Long Island Sound, including supporting the USACE's DAMOS (Disposal Area Monitoring System) program and related efforts to study the long-term effects of open-water placement of dredged material.

(*2*) *Geographic scope*. The geographic scope of the LIS RDT includes all of Long Island Sound and adjacent waters landward of the seaward boundary of the territorial sea (three-mile limit) or, in other words, from Throgs Neck to a line three miles seaward of the baseline across western Block Island Sound.

(*3*) *Membership*. The LIS RDT shall be comprised of representatives from the states of Connecticut and New York, EPA, USACE, and, as appropriate, other federal and state agencies. As previously noted, state participation on the LIS RDT is voluntary.

(*4*) *Organization and procedures*. Specific details regarding structure (e.g., chair, committees, working groups) and process shall be determined by the LIS RDT and may be revised as necessary to best accomplish the team's purpose.

(G) If the volume of open-water disposal of dredged material, as measured in 2026, has not declined or been maintained over the prior ten years, then

any party may petition EPA to conduct a rulemaking to amend the restrictions on the use of the sites.

(H) Disposal shall be limited to dredged sediments that comply with the Ocean Dumping Regulations.

(I) Disposal of dredged material at the designated sites pursuant to the designation in this paragraph (b)(4) shall not be allowed for any materials subject to a waiver under 33 U.S.C. 1413(d) unless, for any project where a waiver is sought, the New England or New York District of the USACE provides notification, by certified mail at least thirty (30) days before making the waiver request, to the Governors of the states of Connecticut and New York and the North Atlantic Division of the USACE that it will be requesting a waiver.

(J) Transportation of dredged material to the sites shall only be allowed when weather and sea conditions will not interfere with safe transportation and will not create risk of spillage, leak or other loss of dredged material in transit. No disposal trips shall be initiated when the National Weather Service has issued a gale warning for local waters during the time period necessary to complete dumping operations.

(K) Nothing in the designation in this paragraph (b)(4) or elsewhere precludes the EPA from exercising its statutory authority to designate other ocean disposal sites, not subject to the restrictions in paragraph (b)(4)(vi), or taking any subsequent action to modify the site designation in paragraph (b)(4), provided that the EPA makes any such designation or takes such subsequent action through a separate rulemaking in accordance with all applicable legal requirements. Nothing in this designation shall be interpreted to restrict the EPA's authorities under the MPRSA or the implementing regulations or to amend the implementing regulations.

(5) Western Long Island Sound Dredged Material Disposal Site (WLDS).

(i) *Location:* Corner Coordinates (NAD 1983) 41°00.1′ N., 73°29.8′ W.; 41°00.1′ N., 73°28.1′ W.; 40°58.9′ N., 73°29.8′ W.; 40°58.9′ N., 73°28.1′ W.

(ii) *Size:* A 1.2 by 1.3 nautical mile rectangular area, about 1.56 square nautical miles in size.

(iii) *Depth:* Ranges from 79 to 118 feet (24 to 36 meters).

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* See 40 CFR 228.15(b)(4)(vi).

(6) Eastern Long Island Sound Dredged Material Disposal Site (ELDS).

(i) *Location:* Corner Coordinates (NAD83) 41°15.81′ N., 72°05.23′ W.; 41°16.81′ N., 72°05.23′ W.; 41°16.81′ N., 72°07.22′ W.; 41°15.97′ N., 72°07.22′ W.; 41°15.81′ N., 72°06.58′ W.

(ii) *Size:* A 1 x 1.5 nautical mile irregularly-shaped polygon, with an area of 1.3 square nautical miles (nmi^2) due to the exclusion of bedrock areas. North-central bedrock area corner coordinates (NAD83) are: 41°16.34′ N., 72°05.89′ W.; 41°16.81′ N., 72°05.89′ W.; 41°16.81′ N., 72°06.44′ W.; 41°16.22′ N., 72°06.11′ W.

(iii) *Depth:* Ranges from 59 to 100 feet (18 m to 30 m).

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* See paragraphs (b)(4)(vi)(A) through (N) of this section.

(c) Region I Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(d) Region II Final Dredged Material Sites.

(1) Fire Island Inlet, Long Island, New York Dredged Material Disposal Site.

(i) *Location:* 40°36′49″ N., 73°23′50″ W.; 40°37′12″ N., 73°21′30″ W.; 40°36′41″ N., 73°21′20″ W.; 40°36′10″ N., 73°23′40″ W.

(ii) *Size:* Approximately 1.09 square nautical miles.

(iii) *Depth:* Ranges from 7 to 10 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Fire Island Inlet, Long Island, New York.

(2) Jones Inlet, Long Island, New York Dredged Material Disposal Site.

(i) *Location:* 40°34′32″ N., 73°39′14″ W.; 40°34′32″ N., 73°37′06″ W.; 40°33′48″ N., 73°37′06″ W.; 40°33′48″ N., 73°39′14″ W.

(ii) *Size:* Approximately 1.19 square nautical miles.

(iii) *Depth:* Ranges from 7 to 10 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Jones Island Inlet, Long Island, New York.

(3) East Rockaway Inlet, Long Island NY Dredged Material Disposal Site.

(i) *Location:* 40°34′36″ N., 73°49′00″ W.; 40°35′06″ N., 73°47′06″ W.; 40°34′10″ N., 73°48′6″ W.; 40°34′12″ N., 73°47′17″ W.

(ii) *Size:* Approximately 0.81 square nautical miles.

(iii) *Depth:* Ranges from 6 to 9 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from East Rockaway Inlet, Long Island, New York.

(4) Rockaway Inlet, Long Island, New York Dredged Material Disposal Site.

(i) *Location:* 40°32′30″ N., 73°55′00″ W.; 40°32′30″ N., 73°54′00W″; 40°32′00″ N., 73°54′00″ W.; 40°32′00″ N., 73°55′00″ W.

(ii) *Size:* Approximately 0.38 square nautical miles.

(iii) *Depth:* Ranges from 8 to 11 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Rockaway Inlet, Long Island, New York.

(5) Shark River, New Jersey Dredged Material Disposal Site.

(i) *Location:* 40°12′48″ N., 73°59′45″ W.; 40°12′44″ N., 73°59′06″ W.; 40°11′36″ N., 73°59′28″ W.; 40°11′42″ N., 74°00′12″ W.

(ii) *Size:* Approximately 0.6 square nautical miles.

(iii) *Depth:* Approximately 12 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Shark River Inlet, New Jersey.

(6) Historical Area Remediation Site (HARS) Designation/Mud Dump Site Termination.

(i) Status of Former Mud Dump Site: The Mud Dump Site, designated as an Impact Category I site on May 4, 1984, is terminated.

(ii) Location: (A) The HARS (which includes the 2.2 square nautical mile area of the former Mud Dump Site) is a 15.7 square nautical mile area located approximately 3.5 nautical miles east of Highlands, New Jersey and 7.7 nautical miles south of Rockaway, Long Island. The HARS consists of a Primary Remediation Area (PRA), a Buffer Zone, and a No Discharge Zone. The HARS is bounded by the following coordinates:

Point	Latitude DMS	Longitude DMS	Latitude DDM	Longitude DDM
A	40°25′39″ N	73°53′55″ W	40°25.65′ N	73°53.92′ W.
M	40°25′39″ N	73°48′58″ W	40°25.65′ N	73°48.97″ W.
P	40°21′19″ N	73°48′57″ W	40°21.32′ N	73°48.95′ W.
R	40°21′19″ N	73°52′30″ W	40°21.32′ N	73°52.50′ W.
S	40°21′52″ N	73°53′55″ W	40°21.87′ N	73°53.92′ W.
V	40°21′52″ N	73°52′30″ W	40°21.87′ N	73°52.50′ W.

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

(B) The PRA, is a 9.0 square nautical mile area to be remediated with at least a 1 meter cap of the Material for Remediation. The PRA is bounded by the following coordinates:

Point	Latitude DMS	Longitude DMS	Latitude DDM	Longitude DDM
B	40°25′23″ N	73°53′34″ W	40°25.38′ N	73°53.57′ W.
D	40°25′22″ N	73°52′08″ W	40°25.37′ N	73°52.13′ W.
F	40°23′13″ N	73°52′09″ W	40°23.22′ N	73°52.15″ W.

Point	Latitude DMS	Longitude DMS	Latitude DDM	Longitude DDM
G	40°23′13″ N	73°51′28″ W	40°23.22′ N	73°51.47′ W.
H	40°22′41″ N	73°51′28″ W	40°22.68′ N	73°51.47′ W.
I	40°22′41″ N	73°50′43″ W	40°22.68′ N	73°50.72′ W.
L	40°25′22″ N	73°50′44″ W	40°25.37′ N	73°50.73′ W.
N	40°25′22″ N	73°49′19″ W	40°25.37′ N	73°49.32′ W.
O	40°21′35″ N	73°49′19″ W	40°21.58′ N	73°49.32′ W.
Q	40°21′36″ N	73°52′08″ W	40°21.60′ N	73°52.13′ W.
T	40°22′08″ N	73°52′08″ W	40°22.13′ N	73°52.13′ W.
U	40°22′08″ N	73°53′34″ W	40°22.13′ N	73°53.57′ W.

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

(iii) Size: 15.7 square nautical miles.

(iv) Depth: Ranges from 12 to 42 meters.

(v) Restrictions on Use:

(A) The site will be managed so as to reduce impacts within the PRA to acceptable levels in accordance with 40 CFR 228.11(c). Use of the site will be restricted to dredged material suitable for use as the Material for Remediation. This material shall be selected so as to ensure it will not cause significant undesirable effects including through bioaccumulation or unacceptable toxicity, in accordance with 40 CFR 227.6.

(B) Placement of Material for Remediation will be limited to the PRA. Placement of Material for Remediation within the PRA is not allowed in a 0.27 nautical mile radius around the following coordinates due to the presence of shipwrecks: 40°25.30′ W, 73°52.80′ N; 40°25.27′ W, 73°52.13′ N; 40°25.07′ W, 73°50.05′ N; 40°22.46′ W, 73°53.27′ N.

(C) No placement of material may take place within the Buffer Zone, although this zone may receive material that incidentally spreads out of the PRA. The Buffer Zone is an approximately 5.7 square nautical mile area (0.27 nautical mile wide band around the PRA), which is bounded by the following coordinates:

Point	Latitude DMS	Longitude DMS	Latitude DDM	Longitude DDM
A	40°25′39″ N	73°53′55″ W	40°25.65′ N	73°53.92′ W.
B	40°25′23″ N	73°53′34″ W	40°25.38′ N	73°53.57′ W.
C	40°25′39″ N	73°51′48″ W	40°25.65′ N	73°51.80′ W.
D	40°25′22″ N	73°52′08″ W	40°25.37′ N	73°52.13′ W.
E	40°23′48″ N	73°51′48″ W	40°23.80′ N	73°51.80′ W.
F	40°23′13″ N	73°52′09″ W	40°23.22′ N	73°52.15′ W.
G	40°23′13″ N	73°51′28″ W	40°23.22′ N	73°51.47′ W.
H	40°22′41″ N	73°51′28″ W	40°22.68′ N	73°51.47′ W.
I	40°22′41″ N	73°50′43″ W	40°22.68′ N	73°50.72′ W.
J	40°23′48″ N	73°51′06″ W	40°23.80′ N	73°51.10′ W.
K	40°25′39″ N	73°51′06″ W	40°25.65′ N	73°51.10′ W.
L	40°25′22″ N	73°50′44″ W	40°25.37′ N	73°50.73′ W.
M	40°25′39″ N	73°48′58″ W	40°25.65′ N	73°48.97′ W.
N	40°25′22″ N	73°49′19″ W	40°25.37′ N	73°49.32′ W.
O	40°21′35″ N	73°49′19″ W	40°21.58′ N	73°49.32′ W.
P	40°21′19″ N	73°48′57″ W	40°21.32′ N	73°48.95′ W.
Q	40°21′36″ N	73°52′08″ W	40°21.60′ N	73°52.13′ W.
R	40°21′19″ N	73°52′30″ W	40°21.32′ N	73°52.50′ W.
S	40°21′52″ N	73°53′55″ W	40°21.87′ N	73°53.92′ W.
T	40°22′08″ N	73°52′08″ W	40°22.13′ N	73°52.13′ W.
U	40°22′08″ N	73°53′34″ W	40°22.13′ N	73°53.57′ W.
V	40°21′52″ N	73°52′30″ W	40°21.87′ N	73°52.50′ W.

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

(D) No placement or incidental spread of the material is allowed within the No Discharge Zone, an approximately 1.0 square nautical mile area, bounded by the following coordinates:

Point	Latitude DMS	Longitude DMS	Latitude DDM	Longitude DDM
C	40°25′39″ N	73°51′48″ W	40°25.65′ N	73°51.80′ W.
E	40°23′48″ N	73°51′48″ W	40°23.80′ N	73°51.80′ W.
J	40°23′48″ N	73°51′06″ W	40°23.80′ N	73°51.10′ W.
K	40°25′39″ N	73°51′06″ W	40°25.65′ N	73°51.10′ W.

DMS = Degrees, Minutes, Seconds.
DDM = Degrees, Decimal Minutes.

(E) HARS-specific Polychlorinated Biphenyl (PCB) Tissue Criterion: Total PCB bioaccumulation worm test results for dredged material approved for placement at the HARS as Material for Remediation shall not exceed the HARS-specific PCB tissue criterion of 113 ppb. This HARS-specific PCB tissue criterion will be applied to the arithmetic mean concentration reported for the analyses of the worm tissue replicates exposed to the tested sediments, without the use of statistical confidence limits.

(vi) Period of Use: Continuing use until EPA determines that the PRA has been sufficiently capped with at least 1 meter of the Material for Remediation. At that time, EPA will undertake any necessary rulemaking to de-designate the HARS.

(7) Manasquan, New Jersey Dredged Material Disposal Site.

(i) *Location:* 40°06′36″ N., 74°01′34″ W.; 40°06′19″ N., 74°01′39″ W.; 40°06′18″ N., 74°01′53″ W.; 40°06′41″ N., 74°01′51″ W.

(ii) *Size:* Approximately 0.11 square nautical miles.

(iii) *Depth:* Approximately 18 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Manasquan Inlet, New Jersey.

(8) Absecon Inlet, NJ Dredged Material Disposal Site.

(i) *Location:* 39°20′39″ N., 74°18′43″ W.; 39°20′30″ N., 74°18′25″ W.; 39°20′03″ N., 74°18′43″ W.; 39°20′12″ N., 74°19′01″ W.

(ii) *Size:* Approximately 0.28 square nautical miles.

(iii) *Depth:* Approximately 17 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Absecon Inlet, New Jersey.

(9) Cold Spring Inlet, NJ Dredged Material Disposal Site.

(i) *Location:* 38°55′52″ N., 74°53′04″ W.; 38°55′37″ N., 74°52′55″ W.; 38°55′23″ N., 74°53′27″ W.; 38°55′36″ N., 74°53′36″ W.

(ii) *Size:* Approximately 0.13 square nautical miles.

(iii) *Depth:* Approximately 9 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Cold Spring Inlet, New Jersey.

(10) San Juan Harbor, PR, Dredged Material Site.

(i) *Location:* 18°30′10″ N., 66°09′31″ W.; 18°30′10″ N., 66°08′29″ W.; 18°31′10″ N., 66°08′29″ W.; 18°31′10″ N., 66°09′31″ W.

(ii) *Size:* 0.98 square nautical mile.

(iii) *Depth:* Ranges from 200 to 400 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(11) Arecibo Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 18°31′00″ N., 66°43′47″ W.; 18°31′00″ N., 66°42′45″ W.; 18°30′00″ N., 66°42′45″ W.; 18°30′00″ N., 66°43′47″ W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 101 to 417 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(12) Mayaguez Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 18°15′30″ N., 67°16′13″ W.; 18°15′30″ N., 67°15′11″ W.; 18°14′30″ N., 67°15′11″ W.; 18°14′30″ N., 67°16′13″ W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 351 to 384 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(13) Ponce Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 17°54′00″ N., 66°37′43″ W.; 17°54′00″ N., 66°36′41″ W.; 17°53′00″ N., 66°36′41″ W.; 17°53′00″ N., 66°37′43″ W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 329 to 457 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(14) Yabucoa Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 18°03′42″ N., 65°42′49″ W.; 18°03′42″ N., 65°41′47″ W.; 18°02′42″ N., 65°41′47″ W.; 18°02′42″ N., 65°42′49″ W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 549 to 914 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(e) Region II Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(f) Region III Final Dredged Material Sites.

(1) Dam Neck, Virginia, Dredged Material Disposal Site.

(i) *Location:* 36°51′24.1″ N., 75°54′41.4″ W.; 36°51′24.1″ N., 75°53′02.9″ W.; 36°50′52.0″ N., 75°52′49.0″ W.; 36°46′27.4″ N., 75°51′39.2″ W.; 36°46′27.5″ N., 75°54′19.0″ W.; 36°50′05.0″ N., 75°54′19.0″ W.

(ii) *Size:* 8 square nautical miles.

(iii) *Depth:* Averages 11 meters.

(iv) *Primary Use:* Dredged Material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the mouth of Chesapeake Bay.

(2) Norfolk, VA, Dredged Material Disposal Site.

(i) *Location:* Center point: Latitude—36°59′00″ N., Longitude—75°39′00″ W.

(ii) *Size:* Circular with a radius of 7.4 kilometers (4 nautical miles).

(iii) *Depth:* Ranges from 13.1 to 26 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Site shall be limited to suitable dredged material which passed the criteria for ocean dumping.

(g) Region III Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(h) Region IV Final Dredged Material Sites.

(1) Morehead City, NC Dredged Material Disposal Site.

(i) *Location:* 34°38′30″ N., 76°45′0″ W.; 34°38′30″ N., 76°41′42″ W.; 34°38′09″ N., 76°41′0″ W.; 34°36′0″ N., 76°41′0″ W.; 34°36′0″ N., 76°45′0″ W.

(ii) *Size:* 8 square nautical miles.

(iii) *Depth:* Average 12.0 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Morehead City Harbor, North Carolina area. All material disposed must satisfy the requirements of the ocean dumping regulations.

(2) Wilmington, NC Dredged Material Disposal Site.

(i) *Location:* 33°49′30″ N., 78°03′06″ W.; 33°48′18″ N., 78°01′39″ W.; 33°47′19″ N., 78°02′48″ W.; 33°48′30″ N., 78°04′16″ W.

(ii) *Size:* 2.3 square nautical miles.

(iii) *Depth:* Averages 13 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to the dredged material from Wilmington Harbor area.

(3) Georgetown Harbor; Georgetown, South Carolina: Ocean Dredged Material Disposal Site.

(i) *Location:* 33°11′18″ N., 79°07′20″ W.; 33°11′18″ N., 79°05′23″ W.; 33°10′38″ N., 79°05′24″ W.; 33°10′38″ N., 79°07′21″ W.

(ii) *Size:* 1 square nautical mile.

(iii) *Depth:* 6 to 11 meter range.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to suitable dredged material from the greater Georgetown, South Carolina, area.

(4) [Reserved]

(5) Charleston, SC, Ocean Dredged Material Disposal Site.

(i) *Location:* 32°36.280′ N., 79°43.662′ W.; 32°37.646′ N., 79°46.576′ W.; 32°39.943′ N., 79°45.068′ W.; 32°38.579′ N., 79°42.152′ W.

(ii) *Size:* Approximately 7.4 square nautical miles in size.

(iii) *Depth:* Ranges from approximately 30 to 45 feet (9 to 13.5 meters).

(iv) *Primary use:* Dredged material from the Charleston Harbor deepening project.

(v) Period of Use: Continued use.

(vi) *Restrictions:* (A) Disposal shall be limited to dredged material from the Charleston, South Carolina, area;

(B) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13;

(C) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(D) Monitoring, as specified in the SMMP, is required.

(6) Savannah, GA Dredged Material Disposal Site.

(i) *Location:* 31°55′53″ N., 80°44′20″ W.; 31°57′55″ N., 80°46′48″ W.; 31°57′55″ N., 80°44′20″ W.; 31°55′53″ N., 80°46′48″ W.

(ii) *Size:* 4.26 square nautical miles.

(iii) *Depth:* Averages 11.4 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Savannah Harbor area.

(7) Brunswick Harbor, Brunswick, Georgia Ocean Dredged Material Disposal Site.

(i) *Location:* 31°02′35″ N., 81°17′40″ W.; 31°02′35″ N., 81°16′30″ W.; 31°00′30″ N., 81°16′30″ W.; 31°00′30″ N., 81°17′42″ W.

(ii) *Size:* Approximately 2 square nautical miles.

(iii) *Depth:* Average 9 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Brunswick, Georgia, vicinity.

(8) Fernandina Beach, FL Dredged Material Disposal Site.

(i) *Location:* 30°33′00″ N., 81°16′52″ W.; 30°31′00″ N., 81°16′52″ W.; 30°31′00″ N., 81°19′08″ W.; 30°33′00″ N., 81°19′08″ W.

(ii) *Size:* Four square nautical miles.

(iii) *Depth:* Average 16 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing Use.

(vi) *Restriction:* Disposal shall be limited to dredged material which meets the criteria given in the Ocean Dumping Regulations in 40 CFR part 227.

(9) Jacksonville, FL Dredged Material Site.

(i) *Location:* 30° 21.514′ N., 81° 18.555′ W.; 30° 21.514′ N, 81° 17.422′ W.; 30° 20.515′ N., 81° 17.422′ W.; 30° 20.515′ N, 81° 17.012′ W.; 30° 17.829′ N., 81° 17.012′ W.; 30° 17.829′ N, 81° 18.555′ W.

(ii) *Size:* Approximately 3.68 nautical miles long and 1.34 nautical miles wide (4.56 square nautical miles); 3,861 acres (1,562 hectares).

(iii) *Depth:* Ranges from approximately 28 to 61 feet (9 to 19 meters).

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* (A) Disposal shall be limited to dredged material from the Jacksonville, Florida, area;

(B) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13;

(C) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(D) Monitoring, as specified in the SMMP, is required.

(10) Canaveral Harbor, FL, Dredged Material Dumpsite.

(i) *Location:* 28°20′15″ N., 80°31′11″ W.; 28°18′51″ N., 80°29′15″ W.; 28°17′13″ N., 80°30′53″ W.; 28°18′36″ N., 80°32′45″ W.

Center coordinates: 28°18′44″ N., 80°31′00″ W. (NAD 27).

(ii) *Size:* 4 square nautical miles.

(iii) *Depth:* Range 47 to 55 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to suitable dredged material from the greater Canaveral, Florida, vicinity.

(11) Fort Pierce Harbor, FL, Fort Pierce, FL, Ocean Dredged material Disposal Site.

(i) Location: 27°28′00″ N., 80°12′33″ W.; 27°28′00″ N., 80°11′27″ W.; 27°27′00″ N., 80°11′27″ W.; and 27°27′00″ N., 80°12′33″ W.

(ii) *Size:* 1 square nautical mile.

(iii) *Depth:* Average range 40 to 54 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Fort Pierce Harbor vicinity. All dredged material consisting of greater than 10% fine grained material (grain size of less than 0.047mm) by weight shall be limited to that part of the site east of 80°12′00″ W. and south of 27°27′20″ N.

(12) Pensacola Nearshore, FL Dredged Material Disposal Site.

(i) *Location:* 30°17′24″ N., 87°18′30″ W.; 30°17′00″ N., 87°19′50″ W.; 30°15′36″ N., 87°17′48″ W.; 30°15′15″ N., 87°19′18″ W.

(ii) *Size:* 2.48 square nautical miles.

(iii) *Depth:* Averages 11 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged materials which are shown to be predominantly sand (defined by a median grain size greater than 0.125 mm and a composition of less than 10% fines) and meet the Ocean Dumping Criteria.

(13) Pensacola, Florida Ocean Dredged Material Disposal Site, i.e. the Pensacola (Offshore) Ocean Dredged Material Disposal Site.

(i) *Location:* 30°08′50″ N., 87°19′30″ W.; 30°08′50″ N., 87°16′30″ W.; 30°07′05″″ N., 87°16′30″ W.; 30°07′05″ N., 87°19′30″ W.

(ii) *Size:* Approximately 6 square statute miles.

(iii) *Depth:* Ranges from 65 to 80 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal is restricted to predominantly fine-grained dredged material from the greater Pensacola, Florida area that meets the Ocean Dumping Criteria but is not suitable for beach nourishment or disposal at the existing EPA designated Pensacola (Nearshore) ODMDS (§ 228.15(h)(11)). The Pensacola (Nearshore) ODMDS is restricted to suitable dredged material with a median grain size of >0.125 mm and a composition of <10% fines.

(14) Mobile, Alabama Dredged Material Disposal Site.

(i) *Location:* 30°10′00″ N., 88°07′42″ W.; 30°10′24″ N., 88°05′12″ W.; 30°09′24″ N., 88°04′42″ W.; 30°08′30″ N., 88°05′12″ W.; 30°08′30″ N., 88°08′12″ W.

(ii) *Size:* 4.8 square nautical miles.

(iii) *Depth:* Average 14 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged materials which meet the Ocean Dumping Criteria.

(15) Pascagoula, MS, Ocean Dredged Material Dumpsite.

(i) *Location:* 30°12′06″ N., 88°44′30″ W.; 30°11′42″ N., 88°33′24″ W.; 30°08′30″ N., 88°37′00″ W.; and 30°08′18″ N., 88°41′54″ W. Center coordinates: 30°10′09″ N., 88°39′12″ W.

(ii) *Size:* 18.5 square nautical miles.

(iii) *Depth:* Average 46 feet, range 38–52 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to suitable material from the Mississippi Sound and vicinity.

(16) Gulfport, Mississippi Dredged Material Disposal Site—Eastern Site

(i) *Location:* 30°11′10″ N., 88°58′24″ W.; 30°11′12″ N., 88°57′30″ W.; 30°07′36″ N., 88°54′24″ W.; 30°07′24″ N., 88°54′48″ W.

(ii) *Size:* 2.47 square nautical miles.

(iii) *Depth:* 9.1 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to materials which meet the Ocean Dumping Criteria.

(17) Gulfport, MS Dredged Material Disposal Site—Western Site.

(i) *Location:* 30°12′00″ N., 89°00′30″ W.; 30°12′00″ N., 88°59′30″ W.; 30°11′00″ N., 89°00′00″ W.; 30°07′00″ N., 88°56′30″ W.; 30°06′36″ N., 88°57′00″ W.; 30°10′30″ N., 89°00′36″ W.

(ii) *Size:* 5.2 square nautical miles.

(iii) *Depth:* 8.2 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) Disposal shall be limited to dredged material which meets the Ocean Dumping Criteria.

(18) Tampa, Florida; Ocean Dredged Material Disposal Site _____ Region IV.

(i) Location: 27°32′27″ N.; 83°06′02″ W; 27°32′27″ N.; 83°03′46″ W.; 27°30′27″ N.; 83°06′02″ W.; 27°30′27″ N.; 83°03′46″ W.

(ii) Size: Approximately 4 square nautical miles.

(iii) Depth: Approximately 22 meters.

(iv) Primary use: Dredged material.

(v) Period of use: Continuing use.

(vi) Restriction: Disposal shall be limited to suitable dredged material

from the greater Tampa, Florida vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(19) Miami, Florida; Ocean Dredged Material Disposal Site.

(i) Location: 25°45′30″ N.; 80°03′54″ W.; 25°45′30″ N.; 80°02′50″ W.; 25°44′30″ N.; 80°03′54″ W.; 25°44′30″ N.; 80°02′50″ W.

Center coordinates are 25°45′00″ N and 80°03′22″ W.

(ii) Size: Approximately 1 square nautical mile.

(iii) Depth: Ranges from 130 to 240 meters.

(iv) Primary use: Dredged material.

(v) Period of use: Continuing use.

(vi) Restriction: Disposal shall be limited to suitable dredged material from the greater Miami, Florida vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(20) New Wilmington, NC; Ocean Dredged Material Disposal Site.

(i) Location:

33°46′ N	78°02.5′ W.
33°46′ N	78°01′ W.
33°41′ N	78°01′ W.
33°41′ N	78°04′ W.

(ii) Size: Approximately 9.4 square nautical miles.

(iii) Depth: Ranges from 35–52 feet.

(iv) Primary use: Dredged material.

(v) Period of use: Continuing use.

(vi) Restriction: Disposal shall be limited to suitable dredged material from the greater Wilmington, North Carolina vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(21) Palm Beach Harbor, FL Ocean Dredged Material Disposal Site.

(i) Location (NAD83): 26°47′30″ N., 79°57′09″ W.; 26°47′30″ N., 79°56′02″ W.; 26°46′30″ N., 79°57′09″ W.; 26°46′30″ N., 79°56′02″ W. Center coordinates are 26°47′00″ N and 79°56′35″ W.

(ii) Size: Approximately 1 square nautical mile.

(iii) Depth: Ranges from 525 to 625 feet.

(iv) Primary use: Dredged material.

(v) Period of use: Continuing use.

(vi) Restriction: Disposal shall be limited to suitable dredged material. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(22) Port Everglades Harbor, FL Ocean Dredged Material Disposal Site.

(i) Location (NAD83): 26°07′30″ N., 80°02′00″ W.; 26°07′30″ N., 80°01′00″ W.; 26°06′30″ N., 80°02′00″ W.; 26°06′30″ N., 80°01′00″ W. Center coordinates are 26°07′00″ N and 80°01′30″ W.

(ii) Size: Approximately 1 square nautical mile.

(iii) Depth: Ranges from 640 to 705 feet.

(iv) Primary use: Dredged material.

(v) Period of use: Continuing use.

(vi) Restriction: Disposal shall be limited to suitable dredged material. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(23) Port Royal, SC; Ocean Dredged Material Disposal Site.

(i) Location (NAD83): 32°05.00′ N., 80°36.47′ W.; 32°05.00′ N., 80°35.30′ W.; 32°04.00′ N., 80°35.30′ W.; 32°04.00′ N., 80°36.47′ W.

(ii) Size: Approximately 1.0 square nautical miles.

(iii) Depth: Averages 36 feet.

(iv) Primary use: Dredged material.

(v) Period of use: Continuing use.

(vi) Restriction: Disposal shall be limited to suitable dredged material from the greater Port Royal, South Carolina, vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(i) Region IV Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(j) Region VI Final Dredged Material Sites.

(1) [Reserved]

(2) Southwest Pass—Mississippi River, LA.

(i) *Location:* 28°54′12″ N., 89°27′15″ W.; 28°54′12″ N., 89°26′00″ W.; 28°51′00″ N., 89°27′15″ W.; 28°51′00″ N., 89°26′00″ W.

(ii) *Size:* 3.44 square nautical miles.

(iii) *Depth:* Ranges from 2.7 to 32.2 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from the

vicinity of the Southwest Pass Channel.

(3) Barataria Bay Waterway, LA.

(i) *Location:* 29°16′10″ N., 89°56′20″ W.; 29°14′19″ N., 89°53′16″ W.; 29°14′00″ N., 89°53′36″ W.; 29°16′29″ N., 89°55′59″ W.

(ii) *Size:* 1.4 square nautical miles.

(iii) *Depth:* Ranges from 8–20 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the vicinity of Barataria Bay Waterway.

(4) [Reserved]

(5) Calcasieu, LA Dredged Material Site 1.

(i) *Location:* 29°45′39″ N., 93°19′36″ W.; 29°42′42″ N., 93°19′06″ W.; 29°42′36″ N., 93°19′48″ W.; 29°44′42″ N., 93°20′12″ W.; 29°44′42″ N., 93°20′24″ W.; 29°45′27″ N., 93°20′33″ W.

(ii) *Size:* 1.76 square nautical miles.

(iii) *Depth:* Ranges from 2 to 8 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the vicinity of the Calcasieu River and Pass Project.

(6) Calcasieu, LA Dredged Material Site 2.

(i) *Location:* 29°44′31″ N., 93°20′43″ W.; 29°39′45″ N., 93°19′56″ W.; 29°39′34″ N., 93°20′46″ W.; 29°44′25″ N., 93°21′33″ W.

(ii) *Size:* 3.53 square nautical miles.

(iii) *Depth:* Ranges from 2 to 11 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the vicinity of the Calcasieu River and Pass Project.

(7) Calcasieu, LA Dredged Material Site 3.

(i) *Location:* 29°37′50″ N., 93°19′37″ W.; 29°37′25″ N., 93°19′33″ W.; 29°33′55″ N., 93°16′23″ W.; 29°33′49″ N., 93°16′25″ W.; 29°30′59″ N., 93°13′51″ W.; 29°29′10″ N., 93°13′49″ W.; 29°29′05″ N., 93°14′23″ W.; 29°30′49″ N., 93°14′25″ W.; 29°37′26″ N., 93°20′24″ W.; 29°37′44″ N., 93°20′27″ W.

(ii) *Size:* 5.88 square nautical miles.

(iii) *Depth:* Ranges from 11 to 14 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use: Continuing use.*

(vi) *Restriction:* Disposal shall be limited to dredged material from the vicinity of the Calcasieu River and Pass Project.

(8) Sabine-Neches, TX Dredged Material Site 1.

(i) *Location:* 29°28′03″ N., 93°41′14″ W.; 29°26′11″ N., 93°41′14″ W.; 29°26′11″ N., 93°44′11″ W.

(ii) *Size:* 2.4 square nautical miles.

(iii) *Depth:* Ranges from 11–13 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Sabine-Neches area.

(9) Sabine-Neches, TX Dredged Material Site 2.

(i) *Location:* 29°30′41″ N., 93°43′49″ W.; 29°28′42″ N., 93°41′33″ W.; 29°28′42″ N., 93°44′49″ W.; 29°30′08″ N., 93°46′27″ W.

(ii) *Size:* 4.2 square nautical miles.

(iii) *Depth:* Ranges from 9–13 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use: Continuing use.*

(vi) *Restriction:* Disposal shall be limited to dredged material from the Sabine-Neches area.

(10) Sabine-Neches, TX Dredged Material Site 3.

(i) *Location:* 29°34′24″ N., 93°48′13″ W.; 29°32′47″ N., 93°46′16″ W.; 29°32′06″ N., 93°46′29″ W.; 29°31′42″ N., 93°48′16″ W.; 29°32′59″ N., 93°49′48″ W.

(ii) *Size:* 4.7 square nautical miles.

(iii) *Depth:* 10 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Sabine-Neches area.

(11) Sabine-Neches, TX, Dredged Material Site 4.

(i) *Location:* 29°38′09″ N., 93°49′23″ W.; 29°35′53″ N., 93°48′18″ W.; 29°35′06″ N., 93°50′24″ W.; 29°36′37″ N., 93°51′09″ W.; 29°37′00″ N., 93°50′06″ W.; 29°37′46″ N., 93°50′26″ W.

(ii) *Size:* 4.2 square nautical miles.

(iii) *Depth:* Ranges from 5–9 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Sabine-Neches area.

(12) Galveston, TX Dredged Material Site.

(i) *Location:* 29°18′00″ N., 94°39′30″ W; 29°15′54″ N., 94°37′06″ W.; 29°14′24″ N., 94°3′8′42″ W.; 29°16′54″ N., 94°41′30″ W.

(ii) *Size:* 6.6 square nautical miles.

(iii) *Depth:* Ranges from 10 to 15.5 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Houston-Galveston, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(13) Freeport Harbor, TX, New Work (45 Foot Project).

(i) *Location:* 28°50″51″ N., 95°13′54″ W.; 28°51′44″ N., 95°14′49″ W.; 28°50′15″ N., 95°16′40″ W.; 28°49′22″ N., 95°15′45″ W.

(ii) *Size:* 2.64 square nautical miles.

(iii) *Depth:* 54 to 61 feet.

(iv) *Primary Use:* Construction (new work) dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Freeport, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(14) Freeport Harbor, TX, Maintenance (45 Foot Project).

(i) *Location:* 28°54′00″ N., 95°15′49″ W.; 28°53′28″ N., 95°15′16″ W.; 28°52′00″ N., 95°16′59″ W.; 28°52′32″ N., 95°17′32″ W.

(ii) *Size:* 1.53 square nautical miles.

(iii) *Depth:* 31 to 38 feet.

(iv) *Primary use:* Maintenance dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Freeport, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(15) Matagorda Ship Channel, TX.

(i) *Location:* 28°23′48″ N., 96°18′00″ W.; 28°23′21″ N., 96°18′31″ W.; 28°22′43″ N., 96°17′52″ W.; 28°23′11″ N., 96°17′22″ W.

(ii) *Size:* 0.56 square nautical mile.

(iii) *Depth:* Ranges from 25–40 feet.

(iv) *Primary Use:* Dredged Material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Matagorda, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(16) Corpus Christi New Work ODMDS, Corpus Christi, Texas.

(i) *Location:* 27°47′42″ N., 97°00′12″ W.; 27°47′15″ N., 96°59′25″ W.; 27°46′17″ N., 97°01′12″ W.; 27°45′49″ N., 97°00′25″ W.

(ii) *Size:* 1.4 square miles.

(iii) *Depth:* Ranges from 45–55 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Corpus Christi, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(17) Corpus Christi Ship Channel, TX.

(i) *Location:* 27°49′10″ N., 97°01′09″ W.; 27°48′42″ N., 97°00′21″ W.; 27°48′06″ N., 97°00′48″ W.; 27°48′33″ N., 97°01′36″ W.

(ii) *Size:* 0.63 square nautical mile.

(iii) *Depth:* Ranges from 35 to 50 feet.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Corpus Christi, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(18) Port Mansfield, TX.

(i) *Location:* 26°34′24″ N., 97°15′15″ W.; 26°34′26″ N., 97°14′17″ W.; 26°33′57″ N., 97°14′17″ W.; 26°33′55″ N., 97°15′15″ W.

(ii) *Size:* 0.42 Square nautical miles.

(iii) *Depth:* Ranges from 35–50 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Port Mansfield, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(19) Brazos Island Harbor, TX.

(i) *Location:* 26°04′32″ N., 97°07′26″ W.; 26°04′32″ N., 97°06′30″ W.; 26°04′02″ N., 97°06′30″ W.; 26°04′02″ N., 97°07′26″ W.

(ii) *Size:* 0.42 square nautical miles.

(iii) *Depth:* Ranges from 55 to 65 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Brownsville, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(20) Brazos Island Harbor (42-Foot Project), TX.

(i) *Location:* 26°04′47″ N., 97°05′07″ W.; 26°05′16″ N., 97°05′04″ W.; 26°05′10″ N., 97°04′06″ W.; 26°04′42″ N., 97°04′09″ W.

(ii) *Size:* 0.42 square nautical miles.

(iii) *Depth: Ranges from 60–67 feet*.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Brownsville, Texas vicinity. Disposal shall comply with conditions set forth in the most recent approved Site Management and Monitoring Plan.

(21) Atchafalaya River and Bayous Chene, Boeuf, and Black, LA

(i) *Location (NAD83):* 9E20′59.92″ N, 91E23′33.23″ W, 29E20′43.94″ N, 91E23′09.73″ W, 29E08′15.46″ N, 91E34′51.02″ W, and 29E07′59.43″ N, 91E34′27.51″ W; thence to point of beginning.

(ii) *Size:* 9.14 square miles.

(iii) *Depth:* Average water depth of 16 feet.

(iv) *Primary Use:* Dredge material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restriction:* Disposal shall be limited to dredged material from the bar channel of the Atchafalaya River and Bayous Chene, Boeuf, and Black, Louisiana.

(22) Sabine-Neches, TX Dredged Material Site A.

(i) *Location (NAD83):* 29°24′47″ N., 93°43′29″ W.; 29°24′47″ N., 93°41′08″ W.; 29°22′48″ N., 93°41′09″ W.; 29°22′49″ N., 93°43′29″ W.; thence to point of beginning.

(ii) *Size:* approximately 5.3 square miles.

(iii) *Depth:* Ranges from 44 to 46 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from the Sabine-Neches 13.2 mile Extension Channel that complies with EPA's Ocean Dumping Regulations. Dredged material that does not meet the criteria set forth in 40 CFR part 227 shall not be placed at the site. Disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed periodically, at least every 10 years.

(23) Sabine-Neches, TX Dredged Material Site B.

(i) *Location (NAD83):* 29°21′59″ N., 93°43′29″ W.; 29°21′59″ N., 93°41′08″ W.; 29°20′00″ N., 93°41′09″ W.; 29°20′00″ N., 93°43′29″ W.; thence to point of beginning.

(ii) *Size:* approximately 5.3 square miles.

(iii) *Depth:* Ranges from 44 to 46 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from the Sabine-Neches 13.2 mile Extension Channel that complies with EPA's Ocean Dumping Regulations. Dredged material that does not meet the criteria set forth in 40 CFR part 227 shall not be placed at the site. Disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed periodically, at least every 10 years.

(24) Sabine-Neches, TX Dredged Material Site C.

(i) *Location (NAD83):* 29°19′11″ N., 93°43′29″ W.; 29°19′11″ N, 93°41′09″ W.; 29°17′12″ N., 93°41′09″ W.; 29°17′12″ N., 93°43′29″ W.; thence to point of beginning.

(ii) *Size:* approximately 5.3 square miles.

(iii) *Depth:* Ranges from 44 to 46 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from the

Sabine-Neches 13.2 mile Extension Channel that complies with EPA's Ocean Dumping Regulations. Dredged material that does not meet the criteria set forth in 40 CFR part 227 shall not be placed at the site. Disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed periodically, at least every 10 years.

(25) Sabine-Neches, TX Dredged Material Site D.

(i) *Location (NAD83):* 29°16′22″ N., 93°43′29″ W.; 29°16′22″ N., 93°41′10″ W.; 29°14′24″ N., 93°41′10″ W.; 29°14′24″ N., 93°43′29″ W.; thence to point of beginning.

(ii) *Size:* approximately 5.3 square miles.

(iii) *Depth:* Ranges from 44 to 46 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from the Sabine-Neches 13.2 mile Extension Channel that complies with EPA's Ocean Dumping Regulations. Dredged material that does not meet the criteria set forth in 40 CFR part 227 shall not be placed at the site. Disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed periodically, at least every 10 years.

(26) Atchafalaya River and Bayous Chene, Boeuf, and Black, LA (ODMDS-West)

(i) *Location (NAD83):* 29°22′06″ N, 91°27′38″ W; 29°20′30″ N, 91°25′13″ W; 29°09′16″ N, 91°35′12″ W; 29°10′52″ N, 91°37′33″ W; thence to point of beginning.

(ii) *Size:* 48 square miles.

(iii) *Depth:* Ranges from 4 to 23 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from the Atchafalaya River Bar channel that complies with EPA's Ocean Dumping Regulations. Dredged material that does not meet the criteria set forth in 40 CFR part 227 shall not be placed at the site. Disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed periodically, at least every 10 years.

(k) Region VI Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(l) Region IX Final Dredged Material Sites.

(1) San Diego, CA (LA–5).

(i) *Location:* Center coordinates of the site are: 32°36.83′ North Latitude and 117°20.67′ West Latitude (North American Datum from 1927), with a radius of 3,000 feet (910 meters).

(ii) *Size:* 0.77 square nautical miles.

(iii) *Depth:* 460 to 660 feet (145 to 200 meters).

(iv) *Primary Use:* Ocean dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged materials that comply with EPA's Ocean Dumping Regulations and Corps Permitting Regulations.

(2) Los Angeles/Long Beach, CA (LA–2).

(i) *Location:* 33°37.10′ North Latitude by 118°17.40′ West Longitude (North American Datum from 1983), with a radius of 3,000 feet (910 meters).

(ii) *Size:* 0.77 square nautical miles.

(iii) *Depth:* 380 to 1060 feet (110 to 320 meters).

(iv) *Primary use:* Ocean dredged material disposal.

(v) *Period of use:* Continuing use, subject to submission of a revised Consistency Determination to the California Coastal Commission after 5 years of site management and monitoring.

(vi) *Restrictions:* Disposal shall be limited to dredged sediments that comply with EPA's Ocean Dumping Regulations.

(3) San Francisco Deepwater Ocean Site (SF-DODS) Ocean Dredged Material Disposal Site—Region IX.

(i) *Location:* Center coordinates of the oval-shaped site are: 37°39.0′ North latitude by 123°29.0′ West longitude (North American Datum from 1983), with length (north-south axis) and width (west-east axis) dimensions of approximately 4 nautical miles (7.5 kilometers) and 2.5 nautical miles (4.5 kilometers), respectively.

(ii) *Size:* 6.5 square nautical miles (22 square kilometers).

(iii) *Depth:* 8,200 to 9,840 feet (2,500 to 3,000 meters).

(iv) *Use Restricted to Disposal of:* Dredged materials.

(v) *Period of Use:* Continuing use over 50 years from date of site designation, subject to restrictions and provisions set forth below.

(vi) *Restrictions/provisions:* The remainder of this §228.15(l)(3) (hereinafter referred to as ''this section'') constitutes the required Site Management and Monitoring Plan (SMMP) for the SF-DODS. This SMMP shall be supplemented by a Site Management and Monitoring Plan Implementation Manual (SMMP Implementation Manual) containing more detailed operational guidance. The SMMP Implementation Manual may be periodically revised as necessary; proposed revisions to the SMMP Implementation Manual shall be made following opportunity for public review and comment. Adherence to the provisions of the most current SMMP Implementation Manual, including mandatory permit conditions, site monitoring activities, and any other condition(s) EPA or the Corps have required as part of the project authorization or permit, is a requirement for use of the SF-DODS. SF-DODS use shall be subject to the following restrictions and provisions:

(vii) *Type and capacity of disposed materials.* Site disposal capacity is 4.8 million cubic yards of suitable dredged material per year for the remaining period of site designation. This limit is based on considerations in the regional Long Term Management Strategy for the placement of dredged material within the San Francisco Bay region, and on monitoring of site use since the SF-DODS was designated in 1994.

(viii) *Permit/project conditions.* Paragraph (l)(3)(viii)(A) of this section sets forth requirements for inclusion in permits to use the SF-DODS, and in all Army Corps of Engineers federal project authorizations. Paragraph (l)(3)(viii)(B) of this section describes additional project-specific conditions that will be required of disposal permits and operations as appropriate. Paragraph (l)(3)(viii)(C) of this section describes how alternative permit conditions may be authorized by EPA and the Corps of Engineers. All references to ''permittees'' shall be deemed to include the Army Corps of Engineers when implementing a federal dredging project.

(A) *Mandatory conditions.* All permits or federal project authorizations authorizing use of the SF-DODS shall include the following conditions, unless approval for an alternative permit condition is sought and granted pursuant to paragraph (l)(3)(viii)(C) of this section:

(*1*) Transportation of dredged material to the SF-DODS shall only be allowed when weather and sea state conditions will not interfere with safe transportation and will not create risk of spillage, leak or other loss of dredged material in transit to the SF-DODS. No disposal trips shall be initiated when the National Weather Service has issued a gale warning for local waters during the time period necessary to complete dumping operations, or when wave heights are 16 feet or greater. The permittee must consult the most current version of the SMMP Implementation Manual for additional restrictions and/or clarifications regarding other sea state parameters, including, but not limited to wave period.

(*2*) All vessels used for dredged material transportation and disposal must be loaded to no more than 80 percent by volume of the vessel. Before any disposal vessel departs for the SF-DODS, an independent quality control inspector must certify in writing that the vessel meets the conditions and requirements of a certification checklist that contains all of the substantive elements found in the example contained in the most current SMMP Implementation Manual. For the purposes of paragraph (l)(3)(viii) of this section, ''independent'' means not an employee of the permittee or dredging contractor; however, the Corps of Engineers may provide inspectors for Corps of Engineers dredged material disposal projects.

(*3*) Dredged material shall not be leaked or spilled from disposal vessels during transit to the SF-DODS.

(*4*) Disposal vessels in transit to and from the SF-DODS should remain at

least three nautical miles from the Farallon Islands whenever possible. Closer approaches should occur only in situations where the designated vessel traffic lane enters the area encompassed by the 3-mile limit, and where safety may be compromised by staying outside of the 3-mile limit. In no case may disposal vessels leave the designated vessel traffic lane.

(*5*) When dredged material is discharged within the SF-DODS, no portion of the vessel from which the materials are to be released (e.g., hopper dredge or towed barge) can be further than 1,900 feet (600 meters) from the center of the target area at 37°39′ N, 123°29′ W.

(*6*) No more than one disposal vessel may be present within the permissible dumping target area referred to in paragraph (l)(3)(viii)(A)(5) of this section at any time.

(*7*) Disposal vessels shall use an appropriate navigation system capable of indicating the position of the vessel carrying dredged material (for example, a hopper dredged vessel or towed barge) with a minimum accuracy and precision of 100 feet during all disposal operations. The system must also indicate the opening and closing of the doors of the vessel carrying the dredged material. If the positioning system fails, all disposal operations must cease until the navigational capabilities are restored. The back-up navigation system, with all the capabilities listed in this condition, must be in place on the vessel carrying the dredged material.

(*8*) The permittee shall maintain daily records of the amount of material dredged and loaded into barges for disposal, the times that disposal vessel depart for, arrive at and return from the SF-DODS, the exact locations and times of disposal, and the volumes of material disposed at the SF-DODS during each vessel trip. The permittee shall further record wind and sea state observations at intervals to be established in the permit.

(*9*) For each disposal vessel trip, the permittee shall maintain a computer printout from a Global Positioning System or other acceptable navigation system showing transit routes and disposal coordinates, including the time and position of the disposal vessel when dumping was commenced and completed.

(*10*) An independent quality control inspector (as defined in paragraph (l)(3)(viii)(A)(*2*)) of this section shall observe all dredging and disposal operations. The inspector shall verify the information required in paragraphs (l)(3)(viii)(A)(*8*) and (*9*) of this section. The inspector shall promptly inform permittees of any inaccuracies or discrepancies concerning this information and shall prepare summary reports, which summarize all such inaccuracies and discrepancies, from time to time as shall be specified in permits. Such summary reports shall be sent by the permittee to the District Engineer and the Regional Administrator within a time interval that shall be specified in the permit.

(*11*) The permittee shall report any anticipated or actual permit violations to the District Engineer and the Regional Administrator within 24 hours of discovering such violation. If any anticipated or actual permit violations occur within the Gulf of the Farallones or the Monterey Bay National Marine Sanctuaries, the permittee must also report any such violation to the respective Sanctuary Manager within 24 hours. In addition, the permittee shall prepare and submit reports, certified accurate by the independent quality control inspector, on a frequency that shall be specified in permits, to the District Engineer and the Regional Administrator setting forth the information required by Mandatory Conditions in paragraphs (l)(3)(viii)(A)(*8*) and (*9*) of this section.

(*12*) Permittees, and the Corps in its Civil Works projects, must make arrangements for independent observers to be present on disposal vessels for the purpose of conducting shipboard surveys of seabirds and marine mammals. Observers shall employ standardized monitoring protocols, as referenced in the most current SMMP Implementation Manual. At a minimum, permittees shall ensure that independent observers are present on at least one disposal trip during each calendar month that disposal occurs, AND on average at least once every 25 vessel trips to the SF-DODS.

(*13*) At the completion of short-term dredging projects, at least annually for ongoing projects, and at any other time or interval requested by the District Engineer or Regional Administrator, permittees shall prepare and submit to the District Engineer and Regional Administrator a report that includes complete records of all dredging, transport and disposal activities, such as navigation logs, disposal coordinates, scow certification checklists, and other information required by permit conditions. Electronic data submittals may be required to conform to a format specified by the agencies. Permittees shall include a report indicating whether any dredged material was dredged outside the areas authorized for dredging or was dredged deeper than authorized for dredging by their permits.

(B) *Project-specific conditions.* Permits or federal project authorizations authorizing use of the SF-DODS may include the following conditions, if EPA determines these conditions are necessary to facilitate safe use of the SF-DODS, the prevention of potential harm to the environment or accurate monitoring of site use:

(*1*) Permittees may be required to limit the speed of disposal vessels in transit to the SF-DODS to a rate that is safe under the circumstances and will prevent the spillage of dredged materials.

(*2*) Permittees may be required to use automated data logging systems for recording navigation and disposal coordinates and/or load levels throughout disposal trips when such systems are feasible and represent an improvement over manual recording methodologies.

(*3*) Any other conditions that EPA or the Corps of Engineers determine to be necessary or appropriate to facilitate compliance with the requirements of the MPRSA and this section may be included in site use permits.

(C) *Alternative permit/project conditions.* Alternatives to the permit conditions specified in paragraph (l)(3)(viii) of this section in a permit or federal project authorization may be authorized if the permittee demonstrates to the District Engineer and the Regional Administrator that the alternative conditions are sufficient to accomplish the specific intended purpose of the permit condition in issue and further demonstrates that the waiver will not increase the risk of harm to the environment, the health or safety of persons, nor will impede monitoring of compliance with the MPRSA, regulations promulgated under the MPRSA, or any permit issued under the MPRSA.

(ix) *Site monitoring.* Data shall be collected in accordance with a three-tiered site monitoring program which consists of three interdependent types of monitoring for each tier: Physical, chemical and biological. In addition, periodic confirmatory monitoring concerning potential site contamination shall be performed. Specific guidance for site monitoring tasks required by this paragraph shall be described in a Site Management and Monitoring Implementation Manual (SMMP Implementation Manual) developed by EPA. The SMMP Implementation Manual shall be reviewed periodically and any necessary revisions to the Manual will be issued for public review under an EPA Public Notice.

(A) *Tier 1 monitoring activities.* Tier 1 monitoring activities shall consist of the following:

(*1*) *Physical monitoring.* Tier 1 Physical Monitoring shall consist of a physical survey to map the area on the seafloor within and in the vicinity of the disposal site where dredged material has been deposited (the footprint). Such a survey shall use appropriate technology (for example, sediment profile photography) to determine the areal extent and thickness of the disposed dredged material, and to determine if any dredged material has deposited outside of the disposal site boundary.

(*2*) *Chemical monitoring.* Tier 1 Chemical Monitoring shall consist of collecting, processing, and preserving boxcore samples of sediments so that such sediments could be subjected to sediment chemistry analysis in the appropriate tier. Samples shall be collected within the dredged material footprint, outside of the dredged material footprint, and outside of the disposal site boundaries. Samples within the footprint shall be subjected to

chemical analysis in annual Tier 1 activity. Samples from outside of the footprint and outside of the disposal site boundaries shall be archived and analyzed only when the criteria requiring Tier 2 as specified in paragraph (l)(3)(x) of this section are met. A sufficient number of samples shall be collected so that the potential for adverse impacts due to elevated chemistry can be assessed with an appropriate time-series or ordinal technique.

(*3*) *Biological monitoring.* Tier 1 Biological Monitoring shall have two components: Monitoring of pelagic communities and monitoring of benthic communities.

(*i*) *Pelagic communities.* Tier 1 Biological Monitoring shall include regional surveys of seabirds, marine mammals and mid-water column fish populations appropriate for evaluating how these populations might be affected by disposal site use. A combination of annual regional and periodic (random) shipboard surveys of seabirds and marine mammals will be used. The regional survey designs for each category of biota shall be similar to that used for the regional characterization studies referenced in the Final Environmental Impact Statement for Designation of a Deep Water Ocean Dredged Material Disposal Site off San Francisco, California (August 1993) with appropriate realignments to accommodate transects within and in the vicinity of the SF-DODS. The periodic shipboard surveys shall be performed from vessels involved in dredged material disposal operations at the SF-DODS as specified in permit conditions imposed pursuant to paragraph (l)(3)(viii)(A)(12) of this section. The minimum number of surveys must be sufficient to characterize the disposal operations for each project, and, as practicable, provide seasonal data for an assessment of the potential for adverse impacts for the one-year period. An appropriate time-series (ordinal), and community analysis shall be performed using data collected during the current year and previous years.

(*ii*) *Benthic communities.* Tier 1 Biological Monitoring shall include collection and preservation of boxcore samples of benthic communities so that such samples could be analyzed as a Tier 2 activity.

(*4*) *Annual reporting.* The results of the annual Tier 1 studies shall be compiled in an annual report which will be available for public review.

(*B*) *Tier 2 monitoring activities.* Tier 2 monitoring activities shall consist of the following:

(*1*) *Physical monitoring.* Tier 2 Physical Monitoring shall consist of oceanographic studies conducted to validate and/or improve the models used to predict the dispersion in the water column and deposition of dredged material on the seafloor at the SF-DODS. The appropriate physical oceanographic studies may include: The collection of additional current meter data, deployment of sediment traps, and deployment of surface and subsurface drifters.

(*2*) *Chemical monitoring.* Tier 2 Chemical Monitoring shall consist of performing sediment chemistry analysis on samples collected and preserved in Tier 1 from outside of the footprint and outside of the disposal site boundaries.

(*3*) *Biological monitoring.* Tier 2 Biological Monitoring shall involve monitoring of pelagic communities and monitoring of benthic communities.

(*i*) *Pelagic communities.* Tier 2 Biological Monitoring for pelagic communities shall include supplemental surveys of similar type to those in Tier 1, or other surveys as appropriate.

(*ii*) *Benthic communities.* Tier 2 Biological Monitoring for benthic communities shall include a comparison of the benthic community within the dredged material footprint to benthic communities in adjacent areas outside of the dredged material footprint. An appropriate time-series (ordinal) and community analysis shall be performed using data collected during the current year and previous years to determine whether there are adverse changes in the benthic populations outside of the disposal site which may endanger the marine environment.

(*4*) *Annual reporting.* The results of any required Tier 2 studies shall be compiled in an annual report which will be available for public review.

(C) *Tier 3 monitoring activities.* Tier 3 monitoring activities shall consist of the following:

(*1*) *Physical monitoring.* Tier 3 physical monitoring shall consist of advanced oceanographic studies to study the dispersion of dredged material in the water column and the deposition of dredged material on the seafloor in the vicinity of the SF-DODS. Such physical monitoring may include additional, intensified studies involving the collection of additional current meter data, deployment of sediment traps, and deployment of surface and subsurface drifters. Such studies may include additional sampling stations, greater frequency of sampling, more advanced sampling methodologies or equipment, or other additional increased study measures compared to similar studies conducted in Tier 1 or 2.

(*2*) *Chemical monitoring.* Tier 3 Chemical Monitoring shall consist of analysis of tissues of appropriate field-collected benthic and/or epifaunal organisms to determine bioaccumulation of contaminants that may be associated with dredged materials deposited at the SF-DODS. Sampling and analysis shall be designed and implemented to determine whether the SF-DODS is a source of adverse bioaccumulation in the tissues of benthic species collected at or outside the SF-DODS, compared to adjacent unimpacted areas, which may endanger the marine environment. Appropriate sampling methodologies for these tests will be determined and the appropriate analyses will involve the assessment of benthic body burdens of contaminants and correlation with comparison of the benthic communities inside and outside of the sediment footprint.

(*3*) *Biological monitoring.* Tier 3 biological monitoring shall have two components: monitoring of pelagic communities and monitoring of benthic communities.

(*i*) *Pelagic communities.* Tier 3 Biological Monitoring shall include advanced studies of seabirds, marine mammals and mid-water column fish to evaluate how these populations might be affected by disposal site use. Such studies may include additional sampling stations, greater frequency of sampling, more advanced sampling methodologies or equipment, or other additional increased study measures compared to similar studies conducted in Tier 1 or 2. Studies may include evaluation of sub-lethal changes in the health of pelagic organisms, such as the development of lesions, tumors, developmental abnormality, decreased fecundity or other adverse sub-lethal effect.

(*ii*) *Benthic communities.* Tier 3 Biological Monitoring shall include advanced studies of benthic communities to evaluate how these populations might be affected by disposal site use. Such studies may include additional sampling stations, greater frequency of sampling, more advanced sampling methodologies or equipment, or other additional increased study measures compared to similar studies conducted in Tier 2. Studies may include evaluation of sub-lethal changes in the health of benthic organisms, such as the development of lesions, tumors, developmental abnormality, decreased fecundity or other adverse sub-lethal effect.

(*4*) *Reporting.* The results of any required Tier 3 studies shall be compiled in a report which will be available for public review.

(D) *Periodic confirmatory monitoring.* At least once every three years, the following confirmatory monitoring activities will be conducted and results compiled in a report which will be available for public review: Samples of sediments taken from the dredged material footprint shall be subjected to bioassay testing using one or more appropriate sensitive marine species consistent with applicable ocean disposal testing guidance (''Green Book'' or related Regional Implementation Agreements), as determined by the Regional Administrator, to confirm whether contaminated sediments are being deposited at the SF-DODS despite extensive pre-disposal testing. In addition, near-surface arrays of appropriate filter-feeding organisms (such as mussels) shall be deployed in at least three locations in and around the disposal site for at least one month during active site use, to confirm whether substantial bioaccumulation of contaminants may be associated with exposure to suspended sediment plumes from multiple disposal events. One array must be deployed outside the influence of any expected plumes to serve as a baseline reference.

(x) *Site management actions.* Once disposal operations at the site begin, the three-tier monitoring program described in paragraphs (l)(3)(ix) (A) through (C) of this section shall be implemented on an annual basis, through December 31, 1998, independent of the actual volumes disposed at the site. Thereafter, the Regional Administrator may establish a minimum annual disposal volume (not to exceed 10 percent of the designated site capacity at any time) below which this monitoring program need not be fully implemented. The Regional Administrator shall promptly review monitoring reports for the SF-DODS along with any other information available to the Regional Administrator concerning site monitoring activities. If the information gathered from monitoring at a given monitoring tier is not sufficient for the Regional Administrator to base reasonable conclusions as to whether disposal at the SF-DODS might be endangering the marine ecosystem, then the Regional Administrator shall require intensified monitoring at a higher tier. If monitoring at a given tier establishes that disposal at the SF-DODS is endangering the marine ecosystem, then the Regional Administrator shall require modification, suspension or termination of site use.

(A) *Selection of site monitoring tiers—*(*1*) *Physical monitoring.* Physical monitoring shall remain limited to Tier 1 monitoring when Tier 1 monitoring establishes that no significant amount of dredged material has been deposited or transported outside of the site boundaries. Tier 2 monitoring shall be employed when Tier 1 monitoring is insufficient to conclude that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)(*4*) of this section has not been deposited or transported outside of the site boundaries.

(*2*) *Chemical monitoring.* (*i*) Chemical monitoring shall remain limited to Tier 1 Chemical Monitoring when the results of Physical Monitoring indicate that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)(*4*) of this section has not been deposited or transported off-site, and Tier 1 Chemical Monitoring establishes that dredged sediments deposited at the disposal site do not contain levels of chemical contaminants that are significantly elevated above the range of chemical contaminant levels in dredged sediments that the Regional Administrator and the District Engineer found to be suitable for disposal at the SF-DODS pursuant to 40 CFR part 227.

(*ii*) Tier 2 monitoring shall be employed when the results of Physical Monitoring indicate that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)(*4*) of this section has been deposited off-site, and Tier 1 Chemical Monitoring is insufficient to establish that dredged sediments deposited at the disposal site do not contain levels of chemical contaminants that are significantly elevated above the range of chemical contaminant levels in dredged sediments that the Regional Administrator and the District Engineer found to be suitable for disposal at the SF-DODS pursuant to 40 CFR part 227.

The Regional Administrator may employ Tier 2 monitoring when available evidence indicates that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)(*4*) of this section has been deposited near the SF-DODS site boundary.

(*iii*) Tier 3 monitoring shall be employed within and outside the dredged material footprint when Tier 2 Chemical Monitoring is insufficient to establish that dredged sediments deposited at the disposal site do not contain levels of chemical contaminants that are significantly elevated above the range of chemical contaminant levels in dredged sediments that the Regional Administrator and the District Engineer found to be suitable for disposal at the SF-DODS pursuant to 40 CFR part 227.

(*3*) *Biological monitoring.* (*i*) *Pelagic communities.* Biological monitoring for pelagic communities shall remain limited to Tier 1 monitoring when Tier 1 monitoring establishes that disposal at the SF-DODS has not endangered the monitored pelagic communities. When Tier 1 monitoring is insufficient to make reasonable conclusions whether disposal at the site has endangered the monitored pelagic communities, then Tier 2 monitoring of pelagic communities shall be employed. When Tier 2

monitoring is insufficient to make reasonable conclusions whether disposal at the site has endangered the monitored pelagic communities, then Tier 3 monitoring of pelagic communities shall be employed.

(*ii*) *Benthic communities.* Biological monitoring for benthic communities shall remain limited to Tier 1 monitoring when physical monitoring establishes that a significant amount of dredged material has not been deposited outside of the site boundaries. If physical monitoring indicates that a significant amount of dredged material has been deposited or transported outside of the site boundaries, then Tier 2 analysis of benthic communities shall be performed. If Chemical Monitoring establishes that there is significant bioaccumulation of contaminants in organisms sampled from within or outside the dredged material footprint, then Tier 3 Biological Monitoring of the disposal site shall be employed. Tier 3 Biological Monitoring may replace Tier 3 Chemical Monitoring if observed biological effects are established as surrogate indicators for bioaccumulation of chemical contaminants in sampled organisms.

(*4*) *Definition of significant dredged material accumulation.* For purposes of this paragraph (l)(3)(x)(A) of this section, dredged material accumulation on the ocean bottom to a thickness of five centimeters shall be considered to be a significant amount of dredged material. The Regional Administrator may determine that a lesser amount of accumulation is significant if available evidence indicates that a lesser amount of off-site accumulation could endanger marine resources.

(B) *Modification, suspension or termination of site use.* (*1*) If the results of site monitoring or other information indicate that any of the following are occurring as a result of disposal at the SF-DODS, then the Regional Administrator shall modify, suspend, or terminate site use overall, or for individual projects as appropriate:

(*i*) Exceedance of Federal marine water quality criteria within the SF-DODS following initial mixing as defined in 40 CFR 227.29(a) or beyond the site boundary at any time;

(*ii*) Placement or movement of significant quantities of disposed material outside of site boundaries near or toward significant biological resource areas or marine sanctuaries;

(*iii*) Endangerment of the marine environment related to potentially significant adverse changes in the structure of the benthic community outside the disposal site boundary;

(*iv*) Endangerment to the health, welfare, or livelihood of persons or to the environment related to potentially significant adverse bioaccumulation in organisms collected from the disposal site or areas adjacent to the site boundary compared to the reference site;

(*v*) Endangerment to the health, welfare, or livelihood of persons related to potentially significant adverse impacts upon commercial or recreational fisheries resources near the site; or

(*vi*) Endangerment to the health, welfare, or livelihood of persons or to the environment related to any other potentially significant adverse environmental impacts.

(*2*) The Regional Administrator shall modify site use, rather than suspend or terminate site use, when site use modification will be sufficient to eliminate the adverse environmental impacts referred to in paragraphs (l)(3)(x)(B)(*1*) (*i*) or (*ii*) of this section or the endangerment to human health, welfare or livelihood to the environment referred to in paragraphs (l)(3)(x)(B)(*1*) (*iii*) through (*vi*) of this section. Notwithstanding the provisions of any permit or federal project authorization authorizing site use, the Regional Administrator shall order, following opportunity for public comment, any of the following modifications to site use that he or she deems necessary to eliminate the adverse environmental effect or endangerment to human health, welfare, or livelihood or to the environment:

(*i*) Change or additional restrictions upon the permissible times, rates and total volume of disposal of dredged material at the SF-DODS;

(*ii*) Change or additional restrictions upon the method of disposal or transportation of dredged materials for disposal; or

(*iii*) Change or additional limitations upon the type or quality of dredged materials according to chemical, physical, bioassay toxicity, or bioaccumulation characteristics.

(*3*) The Regional Administrator shall suspend site use when site use suspension is both necessary and sufficient to eliminate any adverse environmental effect or endangerment to human health, welfare, or livelihood or to the environment referred to in paragraph (l)(3)(x)(B)(*1*) of this section. Notwithstanding the provisions of any permit or federal project authorization authorizing site use, the Regional Administrator shall order, following opportunity for public comment, site use suspension until an appropriate management action is identified or for a time period that will eliminate the adverse environmental effect or endangerment to human health, welfare, or livelihood or to the environment.

(*4*) Notwithstanding the provisions of any permit or federal project authorization authorizing site use, the Regional Administrator shall order, following opportunity for public comment, site use permanently terminated if this is the only means for eliminating the adverse environmental impacts referred to in paragraphs (l)(3)(x)(B)(*1*) (*i*) or (*ii*) of this section or the endangerment to human health, welfare or livelihood to the environment referred to in paragraphs (l)(3)(x)(B)(*1*) (*iii*) through (*vi*) of this section.

(4) Channel Bar Site, San Francisco, CA (SF–8).

(i) *Location:* 37°44′55″ N., 122°37′18″ W; 37°45′45″ N., 122°34′24″ W.; 37°44′24″ N., 122°37′06″ W.; 37°45′15″ N., 122°34′12″ W.

(ii) *Size:* 4,572 × 914 meters.

(iii) *Depth:* Ranges from 11 to 14.3 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to material from required dredging operations at the entrance of the San Francisco main ship channel which is composed primarily of sand having grain sizes compatible with naturally occurring sediments at the disposal site and containing approximately 5 percent of particles having grain sizes finer than that normally attributed to very fine sand (.075 millimeters). Other dredged materials meeting the requirements of 40 CFR 227.13 but having smaller grain sizes may be dumped at this site only upon completion of an appropriate case-by-case evaluation of the impact of such material on the site which demonstrates that such impact will be acceptable.

(5) Hilo, HI.

(i) *Location:* (center point): Latitude—19°48′30″ N.; Longitude—154°58′30″ W.

(ii) *Size:* Circular with a radius of 920 meters.

(iii) *Depth:* Ranges from 330 to 340 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(6) Kahului, HI.

(i) *Location:* (center point): Latitude—21°04′42″ N.; Longitude—156°29′00″ W.

(ii) *Size:* Circular with a radius of 920 meters.

(iii) *Depth:* Ranges from 345 to 365 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(7) South Oahu, HI.

(i) *Location:* (center point): Latitude—21°15′10″ N.; Longitude—157°56′50″ W.

(ii) *Size:* 2 kilometers wide and 2.6 kilometers long.

(iii) *Depth:* Ranges from 400 to 475 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(8) Nawiliwili, HI.

(i) *Location:* (centerpoint): Latitude—21°55′00″ N. Longitude—159°17′00″ W.

(ii) *Size:* Circular with a radius of 920 meters.

(iii) *Depth:* Ranges from 840 to 1,120 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(9) Port Allen, HI.

(i) *Location:* (center point) Latitude—21°50′00″ N. Longitude—159°35′00″ W.

(ii) *Size:* Circular with a radius of 920 meters.

(iii) *Depth:* Ranges from 1,460 to 1,610 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(10) Humboldt Open Ocean Disposal Site (HOODS) Ocean Dredged Material Disposal Site—Region IX.

(i) *Location:* The coordinates of the corners of the square site are: 40°48′25″ North latitude (N) by 124°16′22″ West longitude (W); 40°49′03″ N by 124°17′22″ W; 40°47′38″ N by 124°17′22″ N; and 40°48′17″ N by 124°18′12″ W (North American Datum from 1983).

(ii) *Size:* 1 square nautical mile (3 square kilometers).

(iii) *Depth:* Water depths within the area range between approximately 160 to 180 feet (49 to 55 meters).

(iv) *Use Restricted to Disposal of:* Dredged materials.

(v) *Period of Use:* Continuing use over 50 years from date of site designation, subject to restrictions and provisions set forth in paragraph (l)(10)(vi) of this section.

(vi) *Restrictions/Provisions:* Site management and monitoring activities shall be implemented during the period of site use and in accordance with the Site Management and Monitoring Plan (SMMP) for the HOODS as incorporated in the Final EIS, and summarized in Section D of this final rule. All disposal activities shall be terminated if monitoring, as described in the SMMP, is not implemented. The SMMP may be periodically revised as necessary; proposed substantive revisions to the SMMP shall be made following opportunity for public review and comment.

(11) Newport Beach, CA, (LA–3) Ocean Dredged Material Disposal Site—Region IX.

(i) *Location:* Center coordinates of the circle-shaped site are: 33°31′00″ North Latitude by 117°53′30″ West Longitude (North American Datum from 1983), with a radius of 3,000 feet (915 meters).

(ii) *Size:* 0.77 square nautical miles.

(iii) *Depth:* 1,500 to 1,675 feet (460 to 510 meters).

(iv) *Use Restricted to Disposal of:* Dredged materials.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged materials that comply with EPA's Ocean Dumping Regulations.

(12) Guam Deep Ocean Disposal Site (G–DODS)—Region IX.

(i) *Location:* Center coordinates of the circle-shaped site are: 13°35.500′ North Latitude by 144°28.733′ East Longitude (North American Datum from 1983), with an overall diameter of 3 nautical miles (5.6 kilometers).

(ii) *Size:* 7.1 square nautical miles (24.3 square kilometers) overall site.

(iii) *Depth:* 8,790 feet (2,680 meters).

(iv) *Use Restricted to Disposal of:* Suitable dredged materials.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to a maximum of 1 million cubic yards (764,555 cubic meters) per calendar year of dredged materials that comply with EPA's Ocean Dumping Regulations; disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed at least every 10 years.

(m) Region IX Final Other Wastes Sites.

(1) Fish Processing Waste Disposal Site, American Samoa.

(i) *Location:* 14°24.00′ South latitude by 170°38.30′ West longitude (1.5 nautical mile radius).

(ii) *Size:* 7.07 square nautical miles.

(iii) *Depth:* 1,502 fathoms (2,746 meters or 9,012 feet).

(iv) *Primary Use:* Disposal of fish processing wastes.

(v) *Period of Use:* Continued use.

(vi) *Restriction:* Disposal shall be limited to dissolved air flotation (DAF) sludge, presswater, and precooker water produced as a result of fish processing operations at fish canneries generated in American Samoa.

(2) [Reserved]

(n) Region X Final Dredged Material Sites.

(1) Chetco, OR, Dredged Material Site.

(i) *Location:* 42°01′55″ N., 124°16′37″ W.; 42°01′55″ N., 124°16′13″ W.; 42°01′37″ N.,

124°16′13″ W.; and 42°01′37″ N., 124°16′37″ W. (NAD83)

(ii) *Size:* 0.09 square nautical mile.

(iii) *Depth:* 21 meters (average).

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material determined to be suitable for unconfined disposal from the Chetco Estuary and River and adjacent areas.

(2) Coos Bay, OR Dredged Material Site E.

(i) *Location:* 43°21′59″ N., 124°22′45″ W.;43°21′48″ N., 124°21′59″ W.; 43°21′35″ N., 124°22′05″ W.; 43°21′46″ N., 124°22′51″ W.

(ii) *Size:* 0.13 square nautical mile.

(iii) *Depth:* Averages 17 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material in the Coos Bay area of type 1, as defined in the site designation final EIS.

(3) Coos Bay, OR Dredged Material Site F

(i) *Location:* 43°22′54.8887″ N., 124°19′28.9905″ W.; 43°21′32.8735″ N., 124°20′37.7373″ W.; 43°22′51.4004″ N., 124°23′32.4318″ W.; 43°23′58.4014″ N., 124°22′35.4308″ W. (NAD 83).

(ii) *Size:* 4.45 kilometers long and 2.45 kilometers wide.

(iii) *Depth:* Ranges from 6 to 51 meters.

(iv) *Primary Use:* Dredged material determined to be suitable for ocean disposal.

(v) *Period of Use:* Continuing Use.

(vi) *Restriction:* Disposal shall be limited to dredged material determined to be suitable for unconfined disposal; Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP); Monitoring, as specified in the SMMP, is required.

(4) Coos Bay, OR Dredged Material Site H

(i) *Location:* 43°23′53″ N., 124°22′48″ W.; 43°23′42″ N., 124°23′01″ W.; 43°24′16″ N., 124°23′26″ W.; 43°24′05″ N., 124°23′38″ W.

(ii) *Size:* 0.13 square nautical mile.

(iii) *Depth:* Averages 55 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material in the Coos Bay area of type 2 and 3, as defined in the site designation final EIS.

(5) Coquille River Entrance, OR.

(i) *Location:* 43°08′26″ N., 124°26′44″ W.; 43°08′3″ N., 124°26′08″ W.; 43°08′13″ N., 124°27′00″ W.; 43°07′50″ N., 124°26′23″ W.

Centroid: 43°08′08″ N., 124°26′34″ W.

(ii) *Size:* 0.17 square nautical miles.

(iii) *Depth:* 18.3 meters.

(iv) *Period of Use:* Continuing use.

(v) *Restrictions:* Disposal shall be limited to dredged material from the Coquille Estuary and River and adjacent areas.

(6) Rogue River, OR—Dredged Material Site

(i) *Location:* 42°24′15.40″ N, 124°26′52.39″ W; 42°24′03.40″ N, 124°26′39.39″ W; 42°23′39.40″ N, 124°27′17.40″ W; 42°23′51.40″ N, 124°27′30.40″ W (NAD 83)

(ii) *Size:* Approximately 1.1 kilometers long and 0.4 kilometers wide

(iii) *Depth:* Ranges from approximately 15 to 27 meters

(iv) *Primary Use:* Dredged material

(v) *Period of Use:* Continuing Use

(vi) *Restrictions:* (A) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13, from the Rogue River navigation channel and adjacent areas;

(B) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(C) Monitoring, as specified in the SMMP, is required.

(7) Umpqua River, OR—North and South Dredged Material Disposal Sites.

(i) North Umpqua River Site.

(A) *Location:* 43°41′23.09″ N, 124°14′20.28″ W; 43°41′25.86″ N, 124°12′54.61″ W; 43°40′43.62″ N, 124°14′17.85″ W; 43°40′46.37″ N, 124°12′52.74″ W.

(B) *Size:* Approximately 1.92 kilometers long and 1.22 kilometers wide, with a drop zone which is defined as a 500-foot setback inscribed within all sides of the site boundary, reducing the permissible disposal area to a zone 5,300 feet long by 3,000 feet wide.

(C) *Depth:* Ranges from approximately 9 to 37 meters.

(D) *Primary Use:* Dredged material.

(E) *Period of Use:* Continuing Use.

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined

to be suitable for ocean disposal according to 40 CFR 227.13, from the Umpqua River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

(ii) South Umpqua River Site.

(A) *Location:* 43°39′32.31″ N, 124°14′35.60″ W; 43°39′35.23″ N, 124°13′11.01″ W; 43°38′53.08″ N, 124°14′32.94″ W; 43°38′55.82″ N, 124°13′08.36″ W.

(B) *Size:* Approximately 1.92 kilometers long and 1.22 kilometers wide, with a drop zone which is defined as a 500-foot setback inscribed within all sides of the site boundary, reducing the permissible disposal area to a zone 5,300 feet long by 3,000 feet wide.

(C) *Depth:* Ranges from approximately 9 to 37 meters.

(D) *Primary Use:* Dredged material.

(E) *Period of Use:* Continuing Use.

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13, from the Umpqua River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

(8) Mouth of the Columbia River, OR/WA Dredged Material Shallow Water site.

(i) *Location:* Overall Site Coordinates: 46°15′31.64″ N, 124°05′09.72″ W; 46°14′17.66″ N, 124°07′14.54″ W; 46°15′02.87″ N, 124°08′11.47″ W; 46°15′52.77″ N, 124°05′42.92″ W. Drop Zone: 46°15′35.36″ N, 124°05′15.55″ W; 46°14′31.07″ N, 124°07′03.25″ W; 46°14′58.83″ N, 124°07′36.89″ W; 46°15′42.38″ N, 124°05′26.65″ W (All NAD 83)

(ii) *Size:* 3.05 kilometers long and 0.32 to 1.10 kilometers wide or 1.4 square nautical mile.

(iii) *Depth:* Ranges from 14 to 23 meters.

(iv) *Primary Use:* Dredged Material determined to be suitable for ocean disposal.

(v) *Period of Use:* Continuing Use.

(vi) *Restriction:* Disposal shall be limited to dredged material determined to be suitable for unconfined disposal; Site use shall be consistent with the ability of the site to disperse disposed material into the littoral zone.

(9) Mouth of the Columbia River, OR/WA Dredged Material Deep Water site.

(i) *Location:* Overall Site Coordinates: 46°11′03.03″ N, 124°10′01.30″ W; 46°13′09.78″ N, 124°12′39.67″ W; 46°10′40.88″ N, 124°16′46.48″ W; 46°08′34.22″ N, 124°14′08.07″ W (which includes a 3,000-foot buffer); Site Placement Area: 46°11′06.00″ N, 124°11′05.99″ W; 46°12′28.01″ N, 124°12′48.48″ W; 46°10′37.96″ N, 124°15′50.91″ W; 46°09′15.99″ N, 124°14′08.40″ W (All NAD, 83).

(ii) *Size:* 7.01 kilometers long by 5.18 kilometers wide or 10.5 square nautical mile.

(iii) *Depth:* Ranges from 58 to 91 meters.

(iv) *Primary Use:* Dredged material determined to be suitable for ocean disposal.

(v) *Period of Use:* Continuing Use or until placed material has mounded to an average height of 40 feet within the placement area (*see* restriction 4 below).

(vi) *Restrictions:* Disposal shall be limited to dredged material determined to be suitable for unconfined disposal; Site use shall be consistent with the ability of the site to retain disposed material on-site; Direct disposal of dredged material into the identified buffer zone is prohibited; and The Corps and/or EPA shall undertake specific re-evaluation of site capacity once the site is used and an average mound height of 30 feet has accumulated throughout the placement area. This evaluation will either confirm the original 40-foot height restriction, or recommend a more technically appropriate one.

(10) Grays Harbor Eight Mile Site.

(i) *Location:* Circle with a 0.40 mile radius around a central coordinate at 46°57′ N., 124°20.06′ W.

(ii) *Size:* 0.5 square nautical miles.

(iii) *Depth:* 42–49 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of Use:* One time use over multiple years. Designation of the site

is anticipated within five years following completion of disposal and monitoring activities.

(vi) *Restrictions:* Disposal shall be limited to dredged material from initial construction of the Grays Harbor navigation project. Post-disposal monitoring will determine the need and extent of closure requirements.

(11) Grays Harbor Southwest Navigation Site.

(i) *Location:* 46°52.94′ N., 124°13.81′ W; 46°52.17′ N., 124°12.96′ W.; 46°51.15′ N., 124°14.19′ W.; 46°51.92′ N., 124°14.95′ W.

(ii) *Size:* 1.25 square nautical miles.

(iii) *Depth:* 30–37 meters (average).

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material determined to be suitable for unconfined disposal from Grays Harbor estuary and adjacent areas. Additional discharge restrictions will be contained in the EPA/Corps management plan for the site.

(12) Nome, AK—East Site.

(i) *Location:* 64°29′54″ N., 165°24′41″ W.; 64°29′45″ N., 165°23′27″ W.; 64°28′57″ N., 165°23′29″ W.; 64°29′07″ N., 165°24′25″.

(ii) *Size:* 0.37 square nautical mile.

(iii) *Depth:* Ranges from 1 to 12 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Nome, Alaska, and adjacent areas. Use will be coordinated with the City of Nome prior to dredging.

(13) Nome, AK—West Site.

(i) *Location:* 64°30′04″ N., 165°25′52″ W.; 64°29′18″ N., 165°26′04″ W.; 64°29′13″ N., 165°25′22″ W.; 64°29′54″ N., 165°24′45″ W.

(ii) *Size:* 0.30 nautical miles.

(iii) *Depth:* Ranges from 1 to 11 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Nome, Alaska, and adjacent areas. Use will be coordinated with the City of Nome prior to dredging. Preference will be given to placing any material in the inner third of the site to supplement littoral drift, as needed.

(14) Siuslaw River, OR—North and South Dredged Material Disposal Sites.

(i) North Siuslaw River Site.

(A) *Location:*

44°01′31.03″ N, 124°10′12.92″ W,
44°01′49.39″ N, 124°10′02.85″ W,
44°01′31.97″ N, 124°09′01.86″ W,
44°01′13.45″ N, 124°09′11.41″ W.

(B) *Size:* Approximately 1.5 kilometers long and 0.6 kilometers wide.

(C) *Depth:* Ranges from approximately 9 to 35 meters.

(D) *Primary Use:* Dredged material.

(E) *Period of Use:* Continuing Use.

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13 from the Siuslaw River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

(ii) South Siuslaw River Site.

(A) *Location:*

44°00′46.72″ N, 124°10′26.55″ W,
44°01′06.41″ N, 124°10′24.45″ W,
44°01′04.12″ N, 124°09′43.52″ W,
44°00′44.45″ N, 124°09′45.63″ W.

(B) *Size:* Approximately 0.9 kilometers long and 0.6 kilometers wide.

(C) *Depth:* Ranges from approximately 24 to 38 meters.

(D) *Primary Use:* Dredged material.

(E) *Period of Use:* Continuing Use.

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13, from the Siuslaw River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

(15) Yaquina Bay, OR—North and South Ocean Dredged Material Disposal Sites

(i) North Site.

(A) *Location (NAD 83):* 44°38′17.98″ N, 124°07′25.95″ W; 44°38′12.86″ N, 124°06′31.10″ W; 44°37′14.33″ N, 124°07′37.57″ W; 44°37′09.22″ N, 124°06′42.73″ W.

(B) *Size:* Approximately 1.07 nautical miles long and 0.66 nautical miles wide

(0.71 square nautical miles); 597 acres (242 hectares)

(C) *Depth:* Ranges from approximately 112 to 152 feet (34 to 46 meters)

(D) *Primary Use:* Dredged material

(E) *Period of Use:* Continuing use

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13 from the Yaquina Bay and River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

(ii) South Site.

(A) *Location (NAD 83):* 44°36′04.50″ N, 124°07′52.66″ W; 44°35′59.39″ N, 124°06′57.84″ W; 44°35′00.85″ N, 124°08′04.27″ W; 44°34′55.75″ N, 124°07′09.47″ W.

(B) *Size:* Approximately 1.07 nautical miles long and 0.66 nautical miles wide (0.71 square nautical miles); 597 acres (242 hectares)

(C) *Depth:* Ranges from approximately 112 to 152 feet (34 to 46 meters)

(D) *Primary Use:* Dredged material

(E) *Period of Use:* Continuing use

(F) *Restrictions:* (*1*) Disposal shall be limited to dredged material determined to be suitable for ocean disposal according to 40 CFR 227.13, from the Yaquina Bay and River navigation channel and adjacent areas;

(*2*) Disposal shall be managed by the restrictions and requirements contained in the currently-approved Site Management and Monitoring Plan (SMMP);

(*3*) Monitoring, as specified in the SMMP, is required.

(o) Region X Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

[59 FR 61130, Nov. 29, 1994]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §228.15, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

EFFECTIVE DATE NOTE: At 83 FR 29710, June 26, 2018, §228.15 was amended by removing and reserving paragraph (n)(10), effective Sept. 24, 2018.

PART 229—GENERAL PERMITS

Sec.

AUTHORITY: 33 U.S.C. 1412 and 1418.

SOURCE: 42 FR 2489, Jan. 11, 1977, unless otherwise noted.

§229.1 Burial at sea.

(a) All persons subject to title I of the Act are hereby granted a general permit to transport human remains from the United States and all persons owning or operating a vessel or aircraft registered in the United States or flying the United States flag and all departments, agencies, or instrumentalities of the United States are hereby granted a general permit to transport human remains from any location for the purpose of burial at sea and to bury such remains at sea subject to the following conditions:

(1) Except as herein otherwise provided, human remains shall be prepared for burial at sea and shall be buried in accordance with accepted practices and requirements as may be deemed appropriate and desirable by the United States Navy, United States Coast Guard, or civil authority charged with the responsibility for making such arrangements;

(2) Burial at sea of human remains which are not cremated shall take place no closer than 3 nautical miles from land and in water no less than one hundred fathoms (six hundred feet) deep and in no less than three hundred fathoms (eighteen hundred feet) from (i) 27°30′00″ to 31°00′00″ North Latitude off St. Augustine and Cape Canaveral, Florida; (ii) 82°20′00″ to 84°00′00″ West Longitude off Dry Tortugas, Florida; and (iii) 87°15′00″ to 89°50′00″ West Longitude off the Mississippi River Delta, Louisiana, to Pensacola, Florida. All necessary measures shall be taken to ensure that the remains sink to the bottom rapidly and permanently; and

(3) Cremated remains shall be buried in or on ocean waters without regard to the depth limitations specified in paragraph (a)(2) of this section provided that such burial shall take place no closer than 3 nautical miles from land.

(b) For purposes of this section and §§ 229.2 and 229.3, *land* means that portion of the baseline from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone, which is in closest proximity to the proposed disposal site.

(c) Flowers and wreaths consisting of materials which are readily decomposable in the marine environment may be disposed of under the general permit set forth in this section at the site at which disposal of human remains is authorized.

(d) All burials conducted under this general permit shall be reported within 30 days to the Regional Administrator of the Region from which the vessel carrying the remains departed.

§ 229.2 Transport of target vessels.

(a) The U.S. Navy is hereby granted a general permit to transport vessels from the United States or from any other location for the purpose of sinking such vessels in ocean waters in testing ordnance and providing related data subject to the following conditions:

(1) Such vessels may be sunk at times determined by the appropriate Navy official;

(2) Necessary measures shall be taken to insure that the vessel sinks to the bottom rapidly and permanently, and that marine navigation is not otherwise impaired by the sunk vessel;

(3) All such vessel sinkings shall be conducted in water at least 1,000 fathoms (6,000 feet) deep and at least 50 nautical miles from land, as defined in § 229.1(b); and

(4) Before sinking, appropriate measures shall be taken by qualified personnel at a Navy or other certified facility to remove to the maximum extent practicable all materials which may degrade the marine environment, including without limitation (i) emptying of all fuel tanks and fuel lines to the lowest point practicable, flushing of such tanks and lines with water, and again emptying such tanks and lines to the lowest point practicable so that such tanks and lines are essentially free of petroleum, and (ii) removing from the hulls other pollutants and all readily detachable material capable of creating debris or contributing to chemical pollution.

(b) An annual report will be made to the Administrator of the Environmental Protection Agency setting forth the name of each vessel used as a target vessel, its approximate tonnage, and the location and date of sinking.

§ 229.3 Transportation and disposal of vessels.

(a) All persons subject to title I of the Act are hereby granted a general permit to transport vessels from the United States, and all departments, agencies, or instrumentalities of the United States are hereby granted a general permit to transport vessels from any location for the purpose of disposal in the ocean subject to the following conditions:

(1) Except in emergency situations, as determined by the U.S. Army Corps of Engineers and/or the U.S. Coast Guard, the person desiring to dispose of a vessel under this general permit shall, no later than 1 month prior to the proposed disposal date, provide the following information in writing to the EPA Regional Administrator for the Region in which the proposed disposal will take place:

(i) A statement detailing the need for the disposal of the vessel;

(ii) Type and description of vessel to be disposed of and type of cargo normally carried;

(iii) Detailed description of the proposed disposal procedures;

(iv) Information on the potential effect of the vessel disposal on the marine environment; and

(v) Documentation of an adequate evaluation of alternatives to ocean disposal (*i.e.*, scrap, salvage, and reclamation).

(2) Transportation for the purpose of ocean disposal may be accomplished under the supervision of the District Commander of the U.S. Coast Guard or his designee.

(3) Except in emergency situations, as determined by the U.S. Army Corps of Engineers and/or the District Commander of the U.S. Coast Guard, appropriate measures shall be taken, prior to

disposal, by qualified personnel to remove to the maximum extent practicable all materials which may degrade the marine environment, including without limitation (i) emptying of all fuel lines and fuel tanks to the lowest point practicable, flushing of such lines and tanks with water, and again emptying such lines and tanks to the lowest point practicable so that such lines and tanks are essentially free of petroleum, and (ii) removing from the hulls other pollutants and all readily detachable material capable of creating debris or contributing to chemical pollution.

(4) Except in emergency situations, as determined by the U.S. Army Corps of Engineers and/or the U.S. Coast Guard, the dumper shall, no later than 10 days prior to the proposed disposal date, notify the EPA Regional Administrator and the District Commander of the U.S. Coast Guard that the vessel has been cleaned and is available for inspection; the vessel may be transported for dumping only after EPA and the Coast Guard agree that the requirements of paragraph (a)(3) of this section have been met.

(5) Disposal of these vessels shall take place in a site designated on current nautical charts for the disposal of wrecks or no closer than 22 kilometers (12 miles) from the nearest land and in water no less than 50 fathoms (300 feet) deep, and all necessary measures shall be taken to insure that the vessels sink to the bottom rapidly and that marine navigation is not otherwise impaired.

(6) Disposal shall not take place in established shipping lanes unless at a designated wreck site, nor in a designated marine sanctuary, nor in a location where the hulk may present a hazard to commercial trawling or national defense (see 33 CFR part 205).

(7) Except in emergency situations, as determined by the U.S. Army Corps of Engineers and/or the U.S. Coast Guard, disposal of these vessels shall be performed during daylight hours only.

(8) Except in emergency situations, as determined by the U.S. Army Corps of Engineers and/or the District Commander of the U.S. Coast Guard, the Captain-of-the-Port (COTP), U.S. Coast Guard, and the EPA Regional Administrator shall be notified forty-eight (48) hours in advance of the proposed disposal. In addition, the COTP and the EPA Regional Administrator shall be notified by telephone at least twelve (12) hours in advance of the vessel's departure from port with such details as the proposed departure time and place, disposal site location, estimated time of arrival on site, and the name and communication capability of the towing vessel. Schedule changes are to be reported to the COTP as rapidly as possible.

(9) The National Ocean Survey, NOAA, 6010 Executive Blvd., Rockville, MD 20852, shall be notified in writing, within 1 week, of the exact coordinates of the disposal site so that it may be marked on appropriate charts.

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

Subpart A—General

Sec.

Subpart B—Compliance With the Guidelines

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

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

AUTHORITY: 33 U.S.C. 1251 *et seq.*

SOURCE: 45 FR 85344, Dec. 24, 1980, unless otherwise noted.

Subpart A—General

§ 230.1 Purpose and policy.

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

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

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

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

§ 230.2 Applicability.

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

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

(2) The civil works program of the U.S. Army Corps of Engineers (see 33 CFR 209.145 and section 150 of Pub. L.

94–587, Water Resources Development Act of 1976);

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

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

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

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

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

§ 230.3 Definitions.

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

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

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

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

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

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

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

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

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

(i) The term *permitting authority* means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program approved by EPA under section 404(g) and section 404(h) or his delegated representative.

(j) The term *pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock,

sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the Act reflects that ''radioactive materials'' as included within the definition of ''pollutant'' in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term ''pollutant'', are radium and accelerator produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

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

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

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

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

(o) The term *waters of the United States* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term ''waters of the United States'' means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils

with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (o), the following definitions apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes

or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

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

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated

when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Applicability date.* This paragraph (o) is applicable beginning on February 6, 2020.

[45 FR 85344, Dec. 24, 1980, as amended at 58 FR 45037, Aug. 25, 1993; 80 FR 37115, June 29, 2015; 83 FR 5208, Feb. 6, 2018]

§ 230.4 Organization.

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

§ 230.5 General procedures to be followed.

In evaluating whether a particular discharge site may be specified, the

permitting authority should use these Guidelines in the following sequence:

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 230.6 Adaptability.

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

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

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

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

§230.7 General permits.

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

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

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

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

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

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

(2) The evaluation shall include a precise description of the activities to be permitted under the General permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single General permit based on subparts C through F of the Guidelines. Allowable differences between activities which will be regulated under the same General permit shall be specified. Activities otherwise similar in nature may differ in environmental impact due to their location in or near ecologically sensitive areas, areas with unique chemical or physical characteristics, areas containing concentrations of toxic substances, or areas regulated for specific human uses or by specific land or water management plans (e.g., areas regulated under an approved Coastal Zone Management Plan). If there are specific geographic areas

within the purview of a proposed General permit (called a draft General permit under a State 404 program), which are more appropriately regulated by individual permit due to the considerations cited in this paragraph, they shall be clearly delineated in the evaluation and excluded from the permit. In addition, the permitting authority may require an individual permit for any proposed activity under a General permit where the nature or location of the activity makes an individual permit more appropriate.

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

Subpart B—Compliance With the Guidelines

§ 230.10 Restrictions on discharge.

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

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

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

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

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

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

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

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

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

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is

less complete than that contemplated under this subsection, it must be supplemented accordingly.

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

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

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

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

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

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

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

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

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

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

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

§ 230.11 Factual determinations.

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

(a) *Physical substrate determinations.* Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, on the characteristics of the substrate at the proposed disposal site. Consideration shall be given to the similarity in particle size, shape, and degree of compaction of the material proposed for discharge and the material constituting the substrate at the disposal site, and any potential changes in substrate elevation and bottom contours, including changes outside of the disposal site which may occur as a result

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

(b) *Water circulation, fluctuation, and salinity determinations.* Determine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows, and normal water fluctuation. Consideration shall be given to water chemistry, salinity, clarity, color, odor, taste, dissolved gas levels, temperature, nutrients, and eutrophication plus other appropriate characteristics. Consideration shall also be given to the potential diversion or obstruction of flow, alterations of bottom contours, or other significant changes in the hydrologic regime. Additional consideration of the possible loss of environmental values (§§ 230.23 through 230.25) and actions to minimize impacts (subpart H), shall be used in making these determinations. Potential significant effects on the current patterns, water circulation, normal water fluctuation and salinity shall be evaluated on the basis of the proposed method, volume, location, and rate of discharge.

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

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

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

(f) *Proposed disposal site determinations.* (1) Each disposal site shall be specified through the application of these Guidelines. The mixing zone shall be confined to the smallest practicable zone within each specified disposal site that is consistent with the type of dispersion determined to be appropriate by the application of these Guidelines. In a few special cases under unique environmental conditions, where there is adequate justification to show that

widespread dispersion by natural means will result in no significantly adverse environmental effects, the discharged material may be intended to be spread naturally in a very thin layer over a large area of the substrate rather than be contained within the disposal site.

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

(i) Depth of water at the disposal site;

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

(iii) Degree of turbulence;

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

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

(vi) Rate of discharge;

(vii) Ambient concentration of constituents of interest;

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

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

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

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

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

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

(2) Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff from residential or commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S. Activities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which should be considered in evaluating the impact of creating those fast lands.

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

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

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

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

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

(i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative

does not have other significant adverse environmental consequences; or

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

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

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

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

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

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

[45 FR 85344, Dec. 24, 1980, as amended at 73 FR 19687, Apr. 10, 2008]

§230.20 Substrate.

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

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

§230.21 Suspended particulates/turbidity.

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

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in greatly elevated levels of suspended particulates in the water column for varying lengths of time. These new levels may reduce light penetration and lower the rate of photosynthesis and the primary productivity of an aquatic area if they last long enough. Sight-dependent species may suffer reduced feeding ability leading to limited growth and lowered resistance to disease if high levels of suspended particulates persist. The biological and the chemical content of the suspended material may react with the dissolved oxygen in the water, which

can result in oxygen depletion. Toxic metals and organics, pathogens, and viruses absorbed or adsorbed to fine-grained particulates in the material may become biologically available to organisms either in the water column or on the substrate. Significant increases in suspended particulate levels create turbid plumes which are highly visible and aesthetically displeasing. The extent and persistence of these adverse impacts caused by discharges depend upon the relative increase in suspended particulates above the amount occurring naturally, the duration of the higher levels, the current patterns, water level, and fluctuations present when such discharges occur, the volume, rate, and duration of the discharge, particulate deposition, and the seasonal timing of the discharge.

§ 230.22 Water.

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

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

§ 230.23 Current patterns and water circulation.

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

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

§ 230.24 Normal water fluctuations.

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

(b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. Such water level modifications may change salinity patterns, alter erosion or sedimentation rates, aggravate water temperature extremes, and upset the nutrient and dissolved

oxygen balance of the aquatic ecosystem. In addition, these modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas.

§ 230.25 Salinity gradients.

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

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

NOTE: Possible actions to minimize adverse impacts regarding site characteristics can be found in subpart H.

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

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

§ 230.30 Threatened and endangered species.

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

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

(1) Covering or otherwise directly killing species;

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

(3) Facilitating incompatible activities.

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

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

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

(b) Possible loss of values: The discharge of dredged or fill material can variously affect populations of fish, crustaceans, mollusks and other food web organisms through the release of contaminants which adversely affect adults, juveniles, larvae, or eggs, or result in the establishment or proliferation of an undesirable competitive species of plant or animal at the expense of the desired resident species. Suspended particulates settling on attached or buried eggs can smother the eggs by limiting or sealing off their exposure to oxygenated water. Discharge of dredged and fill material may result in the debilitation or death of sedentary organisms by smothering, exposure to chemical contaminants in dissolved or suspended form, exposure to high levels of suspended particulates, reduction in food supply, or alteration of the substrate upon which they are dependent. Mollusks are particularly sensitive to the discharge of material during periods of reproduction and growth and development due primarily to their limited mobility. They can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals. The discharge of dredged or fill material can redirect, delay, or stop the reproductive and feeding movements of some species of fish and crustacea, thus preventing their aggregation in accustomed places such as spawning or nursery grounds and potentially leading to reduced populations. Reduction of detrital feeding species or other representatives of lower trophic levels can impair the flow of energy from primary consumers to higher trophic levels. The reduction or potential elimination of food chain organism populations decreases the overall productivity and nutrient export capability of the ecosystem.

§ 230.32 Other wildlife.

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

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

NOTE: Possible actions to minimize adverse impacts regarding characteristics of biological components of the aquatic ecosystem can be found in subpart H.

Subpart E—Potential Impacts on Special Aquatic Sites

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

§ 230.40 Sanctuaries and refuges.

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

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

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

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

(3) Create the need for frequent maintenance activity;

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

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

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

§ 230.41 Wetlands.

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

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

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

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

§ 230.42 Mud flats.

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

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

§ 230.43 Vegetated shallows.

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

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

§ 230.44 Coral reefs.

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

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

§ 230.45 Riffle and pool complexes.

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

(b) Possible loss of values: Discharge of dredged or fill material can eliminate riffle and pool areas by displacement, hydrologic modification, or sedimentation. Activities which affect riffle and pool areas and especially riffle/pool ratios, may reduce the aeration and filtration capabilities at the discharge site and downstream, may reduce stream habitat diversity, and may

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

NOTE: Possible actions to minimize adverse impacts on site or material characteristics can be found in subpart H.

Subpart F—Potential Effects on Human Use Characteristics

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

§ 230.50 Municipal and private water supplies.

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

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

§ 230.51 Recreational and commercial fisheries.

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

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

§ 230.52 Water-related recreation.

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

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

of habitat, and the aesthetic qualities of sight, taste, odor, and color.

§ 230.53 Aesthetics.

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

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

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

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

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

NOTE: Possible actions to minimize adverse impacts regarding site or material characteristics can be found in subpart H.

Subpart G—Evaluation and Testing

§ 230.60 General evaluation of dredged or fill material.

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

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

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

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

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

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

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

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

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

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

(d) Even if the §230.60(b) evaluation (previous tests, the presence of polluting industries and information about their discharge or runoff into waters of the U.S., bioinventories, etc.) leads to the conclusion that there is a high probability that the material proposed for discharge is a carrier of contaminants, testing may not be necessary if constraints are available to reduce contamination to acceptable levels within the disposal site and to prevent contaminants from being transported beyond the boundaries of the disposal site, if such constraints are acceptable to the permitting authority and the Regional Administrator, and if the potential discharger is willing and able to implement such constraints. However, even if tests are not performed, the permitting authority must still determine the probable impact of the operation on the receiving aquatic ecosystem. Any decision not to test must be explained in the determinations made under §230.11.

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

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

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

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

(1) *Evaluation of chemical-biological interactive effects.* Dredged or fill material may be excluded from the evaluation procedures specified in paragraphs

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

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

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

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

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

(c) Procedure for comparison of sites.

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

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

(d) Physical tests and evaluation. The effect of a discharge of dredged or fill material on physical substrate characteristics at the disposal site, as well as on the water circulation, fluctuation, salinity, and suspended particulates content there, is important in making factual determinations in

§ 230.11. Where information on such effects is not otherwise available to make these factual determinations, the permitting authority shall require appropriate physical tests and evaluations as are justified and deemed necessary. Such tests may include sieve tests, settleability tests, compaction tests, mixing zone and suspended particulate plume determinations, and site assessments of water flow, circulation, and salinity characteristics.

Subpart H—Actions To Minimize Adverse Effects

NOTE: There are many actions which can be undertaken in response to § 203.10(d) to minimize the adverse effects of discharges of dredged or fill material. Some of these, grouped by type of activity, are listed in this subpart. Additional criteria for compensation measures are provided in subpart J of this part.

§ 230.70 Actions concerning the location of the discharge.

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

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

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

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

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

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

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

§ 230.71 Actions concerning the material to be discharged.

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

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

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

(c) Adding treatment substances to the discharge material;

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

§ 230.72 Actions controlling the material after discharge.

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

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

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

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

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

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

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

§ 230.73 Actions affecting the method of dispersion.

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

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

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

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

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

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

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

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

§ 230.74 Actions related to technology.

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

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

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

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

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

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

§ 230.75 Actions affecting plant and animal populations.

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

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

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

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

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

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

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

[45 FR 85344, Dec. 24, 1980, as amended at 73 FR 19687, Apr. 10, 2008]

§ 230.76 Actions affecting human use.

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

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

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

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

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

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

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

§ 230.77 Other actions.

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

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

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

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

Subpart I—Planning To Shorten Permit Processing Time

§ 230.80 Advanced identification of disposal areas.

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

(1) Possible future disposal sites, including existing disposal sites and nonsensitive areas; or

(2) Areas generally unsuitable for disposal site specification;

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

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

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

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

Subpart J—Compensatory Mitigation for Losses of Aquatic Resources

SOURCE: 73 FR 19687, Apr. 10, 2008, unless otherwise noted.

§ 230.91 Purpose and general considerations.

(a) *Purpose.* (1) The purpose of this subpart is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344). This subpart implements section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108–136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation. This subpart is intended to further clarify mitigation requirements established under the Corps and EPA regulations at 33 CFR part 320 and this part, respectively.

(2) This subpart has been jointly developed by the Secretary of the Army, acting through the Chief of Engineers, and the Administrator of the Environmental Protection Agency. From time to time guidance on interpreting and implementing this subpart may be prepared jointly by EPA and the Corps at the national or regional level. No modifications to the basic application, meaning, or intent of this subpart will be made without further joint rulemaking by the Secretary of the Army, acting through the Chief of Engineers and the Administrator of the Environmental Protection Agency, pursuant to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(b) *Applicability.* This subpart does not alter the circumstances under which compensatory mitigation is required or the definition of ''waters of the United States,'' which is provided at § 230.3(s). Use of resources as compensatory mitigation that are not otherwise subject to regulation under section 404 of the Clean Water Act does not in and of itself make them subject to such regulation.

(c) *Sequencing.* (1) Nothing in this section affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of this part.

(2) Pursuant to these requirements, the district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.

(3) Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options.

(d) *Accounting for regional variations.* Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects.

(e) *Relationship to other guidance documents.* (1) This subpart applies instead of the ''Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks,'' which was issued on November 28, 1995, the ''Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water

Act and Section 10 of the Rivers and Harbors Act,'' which was issued on November 7, 2000, and Regulatory Guidance Letter 02–02, ''Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899'' which was issued on December 24, 2002. These guidance documents are no longer to be used as compensatory mitigation policy in the Corps Regulatory Program.

(2) In addition, this subpart also applies instead of the provisions relating to the amount, type, and location of compensatory mitigation projects, including the use of preservation, in the February 6, 1990, Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. All other provisions of this MOA remain in effect.

§ 230.92 Definitions.

For the purposes of this subpart, the following terms are defined:

Adaptive management means the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to optimize performance. It includes the selection of appropriate measures that will ensure that the aquatic resource functions are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems.

Advance credits means any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. Advance credit sales require an approved in-lieu fee program instrument that meets all applicable requirements including a specific allocation of advance credits, by service area where applicable. The instrument must also contain a schedule for fulfillment of advance credit sales.

Buffer means an upland, wetland, and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.

Compensatory mitigation means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Compensatory mitigation project means compensatory mitigation implemented by the permittee as a requirement of a DA permit (*i.e.*, permittee-responsible mitigation), or by a mitigation bank or an in-lieu fee program.

Condition means the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region.

Credit means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of aquatic functions is based on the resources restored, established, enhanced, or preserved.

DA means Department of the Army.

Days means calendar days.

Debit means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site. The measure of aquatic functions is based on the resources impacted by the authorized activity.

Enhancement means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but

may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Establishment (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.

Fulfillment of advance credit sales of an in-lieu fee program means application of credits released in accordance with a credit release schedule in an approved mitigation project plan to satisfy the mitigation requirements represented by the advance credits. Only after any advance credit sales within a service area have been fulfilled through the application of released credits from an in-lieu fee project (in accordance with the credit release schedule for an approved mitigation project plan), may additional released credits from that project be sold or transferred to permittees. When advance credits are fulfilled, an equal number of new advance credits is restored to the program sponsor for sale or transfer to permit applicants.

Functional capacity means the degree to which an area of aquatic resource performs a specific function.

Functions means the physical, chemical, and biological processes that occur in ecosystems.

Impact means adverse effect.

In-kind means a resource of a similar structural and functional type to the impacted resource.

In-lieu fee program means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

In-lieu fee program instrument means the legal document for the establishment, operation, and use of an in-lieu fee program.

Instrument means mitigation banking instrument or in-lieu fee program instrument.

Interagency Review Team (IRT) means an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program.

Mitigation bank means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.

Mitigation banking instrument means the legal document for the establishment, operation, and use of a mitigation bank.

Off-site means an area that is neither located on the same parcel of land as the impact site, nor on a parcel of land contiguous to the parcel containing the impact site.

On-site means an area located on the same parcel of land as the impact site, or on a parcel of land contiguous to the impact site.

Out-of-kind means a resource of a different structural and functional type from the impacted resource.

Performance standards are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.

Permittee-responsible mitigation means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

Preservation means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Reference aquatic resources are a set of aquatic resources that represent the full range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.

Rehabilitation means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Release of credits means a determination by the district engineer, in consultation with the IRT, that credits associated with an approved mitigation plan are available for sale or transfer, or in the case of an in-lieu fee program, for fulfillment of advance credit sales. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon approval of the mitigation plan, with additional credits released as milestones specified in the credit release schedule are achieved.

Restoration means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riparian areas are lands adjacent to streams, rivers, lakes, and estuarine-marine shorelines. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality.

Service area means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument.

Services mean the benefits that human populations receive from functions that occur in ecosystems.

Sponsor means any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program.

Standard permit means a standard, individual permit issued under the authority of section 404 of the Clean Water Act.

Temporal loss is the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the permitted impacts, the district engineer may determine that compensation for temporal loss is not necessary, unless the resource has a long development time.

Watershed means a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean.

Watershed approach means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed

and offset losses of aquatic resource functions and services caused by activities authorized by DA permits. The watershed approach may involve consideration of landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements for DA permits.

Watershed plan means a plan developed by federal, tribal, state, and/or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, establishment, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans.

§ 230.93 General compensatory mitigation requirements.

(a) *General considerations.* (1) The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. In many cases, the environmentally preferable compensatory mitigation may be provided through mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success. Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.

(2) Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation.

(3) Compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. All compensatory mitigation projects must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Type and location of compensatory mitigation.* (1) When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where

it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

(2) *Mitigation bank credits.* When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis.

(3) *In-lieu fee program credits.* Where permitted impacts are located within the service area of an approved in-lieu fee program, and the sponsor has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Where permitted impacts are not located in the service area of an approved mitigation bank, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts, in-lieu fee mitigation, if available, is generally preferable to permittee-responsible mitigation. In-lieu fee projects typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. They also devote significant resources to identifying and addressing high-priority resource needs on a watershed scale, as reflected in their compensation planning framework. For these reasons, the district engineer should give preference to in-lieu fee program credits over permittee-responsible mitigation, where these considerations are applicable. However, as with the preference for mitigation bank credits, these same considerations may be used to override this preference where appropriate. Additionally, in cases where permittee-responsible mitigation is likely to successfully meet performance standards before advance credits secured from an in-lieu fee program are fulfilled, the

district engineer should also give consideration to this factor in deciding between in-lieu fee mitigation and permittee-responsible mitigation.

(4) *Permittee-responsible mitigation under a watershed approach.* Where permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option. Where practicable and likely to be successful and sustainable, the resource type and location for the required permittee-responsible compensatory mitigation should be determined using the principles of a watershed approach as outlined in paragraph (c) of this section.

(5) *Permittee-responsible mitigation through on-site and in-kind mitigation.* In cases where a watershed approach is not practicable, the district engineer should consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

(6) *Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.* If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (b)(5) of this section, the district engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, the district engineer should require that this alternative compensatory mitigation be provided.

(c) *Watershed approach to compensatory mitigation.* (1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable. Where a watershed plan is available, the district engineer will determine whether the plan is appropriate for use in the watershed approach for compensatory mitigation. In cases where the district engineer determines that an appropriate watershed plan is available, the watershed approach should be based on that plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

(2) *Considerations.* (i) A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Compensatory mitigation requirements determined through the watershed approach should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected aquatic resource.

(ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and may lead to siting of such mitigation away from the project area. However, consideration should also be

given to functions and services (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted impacts.

(iii) A watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and off-site compensatory mitigation.

(iv) A watershed approach to compensatory mitigation should include, to the extent practicable, inventories of historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects, mitigation banks, or in-lieu fee programs. Planning efforts should identify and prioritize aquatic resource restoration, establishment, and enhancement activities, and preservation of existing aquatic resources that are important for maintaining or improving ecological functions of the watershed. The identification and prioritization of resource needs should be as specific as possible, to enhance the usefulness of the approach in determining compensatory mitigation requirements.

(v) A watershed approach is not appropriate in areas where watershed boundaries do not exist, such as marine areas. In such cases, an appropriate spatial scale should be used to replace lost functions and services within the same ecological system (e.g., reef complex, littoral drift cell).

(3) *Information Needs.* (i) In the absence of a watershed plan determined by the district engineer under paragraph (c)(1) of this section to be appropriate for use in the watershed approach, the district engineer will use a watershed approach based on analysis of information regarding watershed conditions and needs, including potential sites for aquatic resource restoration activities and priorities for aquatic resource restoration and preservation. Such information includes: Current trends in habitat loss or conversion; cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species; site conditions that favor or hinder the success of compensatory mitigation projects; and chronic environmental problems such as flooding or poor water quality.

(ii) This information may be available from sources such as wetland maps; soil surveys; U.S. Geological Survey topographic and hydrologic maps; aerial photographs; information on rare, endangered and threatened species and critical habitat; local ecological reports or studies; and other information sources that could be used to identify locations for suitable compensatory mitigation projects in the watershed.

(iii) The level of information and analysis needed to support a watershed approach must be commensurate with the scope and scale of the proposed impacts requiring a DA permit, as well as the functions lost as a result of those impacts.

(4) *Watershed Scale.* The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by DA permits. The district engineer should consider relevant environmental factors and appropriate locally-developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities.

(d) *Site selection.* (1) The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions. In determining the ecological suitability of the compensatory mitigation project site, the district engineer must consider, to the extent practicable, the following factors:

(i) Hydrological conditions, soil characteristics, and other physical and chemical characteristics;

(ii) Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions;

(iii) The size and location of the compensatory mitigation site relative to hydrologic sources (including the

availability of water rights) and other ecological features;

(iv) Compatibility with adjacent land uses and watershed management plans;

(v) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for federally- or state-listed threatened and endangered species; and

(vi) Other relevant factors including, but not limited to, development trends, anticipated land use changes, habitat status and trends, the relative locations of the impact and mitigation sites in the stream network, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality goals, floodplain management goals, and the relative potential for chemical contamination of the aquatic resources.

(2) District engineers may require on-site, off-site, or a combination of on-site and off-site compensatory mitigation to replace permitted losses of aquatic resource functions and services.

(3) Applicants should propose compensation sites adjacent to existing aquatic resources or where aquatic resources previously existed.

(e) *Mitigation type.* (1) In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site. For example, tidal wetland compensatory mitigation projects are most likely to compensate for unavoidable impacts to tidal wetlands, while perennial stream compensatory mitigation projects are most likely to compensate for unavoidable impacts to perennial streams. Thus, except as provided in paragraph (e)(2) of this section, the required compensatory mitigation shall be of a similar type to the affected aquatic resource.

(2) If the district engineer determines, using the watershed approach in accordance with paragraph (c) of this section that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation. The basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action.

(3) For difficult-to-replace resources (e.g., bogs, fens, springs, streams, Atlantic white cedar swamps) if further avoidance and minimization is not practicable, the required compensation should be provided, if practicable, through in-kind rehabilitation, enhancement, or preservation since there is greater certainty that these methods of compensation will successfully offset permitted impacts.

(f) *Amount of compensatory mitigation.* (1) If the district engineer determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.

(2) The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required replacement ratio must be documented in the administrative record for the permit action.

(3) If an in-lieu fee program will be used to provide the required compensatory mitigation, and the appropriate number and resource type of released

credits are not available, the district engineer must require sufficient compensation to account for the risk and uncertainty associated with in-lieu fee projects that have not been implemented before the permitted impacts have occurred.

(g) *Use of mitigation banks and in-lieu fee programs.* Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits, in accordance with the preference hierarchy in paragraph (b) of this section. Mitigation banks and in-lieu fee programs may also be used to satisfy requirements arising out of an enforcement action, such as supplemental environmental projects.

(h) *Preservation.* (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met:

(i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed;

(ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available;

(iii) Preservation is determined by the district engineer to be appropriate and practicable;

(iv) The resources are under threat of destruction or adverse modifications; and

(v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

(2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.

(i) *Buffers.* District engineers may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. Buffers may also provide habitat or corridors necessary for the ecological functioning of aquatic resources. If buffers are required by the district engineer as part of the compensatory mitigation project, compensatory mitigation credit will be provided for those buffers.

(j) *Relationship to other federal, tribal, state, and local programs.* (1) Compensatory mitigation projects for DA permits may also be used to satisfy the environmental requirements of other programs, such as tribal, state, or local wetlands regulatory programs, other federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations:

(i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit.

(ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects, including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.

(2) Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities

authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project.

(3) Compensatory mitigation projects may also be used to provide compensatory mitigation under the Endangered Species Act or for Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of this section.

(k) *Permit conditions.* (1) The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4 and 330.6(a)). The special conditions must be enforceable.

(2) For an individual permit that requires permittee-responsible mitigation, the special conditions must:

(i) Identify the party responsible for providing the compensatory mitigation;

(ii) Incorporate, by reference, the final mitigation plan approved by the district engineer;

(iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and

(iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan.

(3) For a general permit activity that requires permittee-responsible compensatory mitigation, the special conditions must describe the compensatory mitigation proposal, which may be either conceptual or detailed. The general permit verification must also include a special condition that states that the permittee cannot commence work in waters of the United States until the district engineer approves the final mitigation plan, unless the district engineer determines that such a special condition is not practicable and not necessary to ensure timely completion of the required compensatory mitigation. To the extent appropriate and practicable, special conditions of the general permit verification should also address the requirements of paragraph (k)(2) of this section.

(4) If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the special conditions must indicate whether a mitigation bank or in-lieu fee program will be used, and specify the number and resource type of credits the permittee is required to secure. In the case of an individual permit, the special condition must also identify the specific mitigation bank or in-lieu fee program that will be used. For general permit verifications, the special conditions may either identify the specific mitigation bank or in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide the required compensatory mitigation must be approved by the district engineer before the credits are secured.

(l) *Party responsible for compensatory mitigation.* (1) For permittee-responsible mitigation, the special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(2) For mitigation banks and in-lieu fee programs, the instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project(s). The instrument must also contain a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor and the district engineer has received the documentation described in paragraph (l)(3) of this section.

(3) If use of a mitigation bank or in-lieu fee program is approved by the district engineer to provide part or all of the required compensatory mitigation for a DA permit, the permittee retains

responsibility for providing the compensatory mitigation until the appropriate number and resource type of credits have been secured from a sponsor and the district engineer has received documentation that confirms that the sponsor has accepted the responsibility for providing the required compensatory mitigation. This documentation may consist of a letter or form signed by the sponsor, with the permit number and a statement indicating the number and resource type of credits that have been secured from the sponsor. Copies of this documentation will be retained in the administrative records for both the permit and the instrument. If the sponsor fails to provide the required compensatory mitigation, the district engineer may pursue measures against the sponsor to ensure compliance.

(m) *Timing.* Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

(n) *Financial assurances.* (1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for either the DA permit or the instrument. In determining the assurance amount, the district engineer shall consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring.

(3) If financial assurances are required, the DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity.

(4) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(5) A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated.

(6) Financial assurances shall be payable at the direction of the district engineer to his designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall

be deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's instructions.

(o) *Compliance with applicable law.* The compensatory mitigation project must comply with all applicable federal, state, and local laws. The DA permit, mitigation banking instrument, or in-lieu fee program instrument must not require participation by the Corps or any other federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.

§ 230.94 Planning and documentation.

(a) *Pre-application consultations.* Potential applicants for standard permits are encouraged to participate in pre-application meetings with the Corps and appropriate agencies to discuss potential mitigation requirements and information needs.

(b) *Public review and comment.* (1) For an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address, to the extent that such information is provided in the mitigation statement required by 33 CFR 325.1(d)(7), the proposed avoidance and minimization and the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts. The notice shall not include information that the district engineer and the permittee believe should be kept confidential for business purposes, such as the exact location of a proposed mitigation site that has not yet been secured. The permittee must clearly identify any information being claimed as confidential in the mitigation statement when submitted. In such cases, the notice must still provide enough information to enable the public to provide meaningful comment on the proposed mitigation.

(2) For individual permits, district engineers must consider any timely comments and recommendations from other federal agencies; tribal, state, or local governments; and the public.

(3) For activities authorized by letters of permission or general permits, the review and approval process for compensatory mitigation proposals and plans must be conducted in accordance with the terms and conditions of those permits and applicable regulations including the applicable provisions of this part.

(c) *Mitigation plan.* (1) *Preparation and Approval.* (i) For individual permits, the permittee must prepare a draft mitigation plan and submit it to the district engineer for review. After addressing any comments provided by the district engineer, the permittee must prepare a final mitigation plan, which must be approved by the district engineer prior to issuing the individual permit. The approved final mitigation plan must be incorporated into the individual permit by reference. The final mitigation plan must include the items described in paragraphs (c)(2) through (c)(14) of this section, but the level of detail of the mitigation plan should be commensurate with the scale and scope of the impacts. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and the name of the specific mitigation bank or in-lieu fee program to be used.

(ii) For general permits, if compensatory mitigation is required, the district engineer may approve a conceptual or detailed compensatory mitigation plan to meet required time frames for general permit verifications, but a

final mitigation plan incorporating the elements in paragraphs (c)(2) through (c)(14) of this section, at a level of detail commensurate with the scale and scope of the impacts, must be approved by the district engineer before the permittee commences work in waters of the United States. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and either the name of the specific mitigation bank or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee program will be used (contingent upon approval by the district engineer).

(iii) Mitigation banks and in-lieu fee programs must prepare a mitigation plan including the items in paragraphs (c)(2) through (c)(14) of this section for each separate compensatory mitigation project site. For mitigation banks and in-lieu fee programs, the preparation and approval process for mitigation plans is described in § 230.98.

(2) *Objectives.* A description of the resource type(s) and amount(s) that will be provided, the method of compensation (*i.e.*, restoration, establishment, enhancement, and/or preservation), and the manner in which the resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, physiographic province, or other geographic area of interest.

(3) *Site selection.* A description of the factors considered during the site selection process. This should include consideration of watershed needs, onsite alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site. (See § 230.93(d).)

(4) *Site protection instrument.* A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see § 230.97(a)).

(5) *Baseline information.* A description of the ecological characteristics of the proposed compensatory mitigation project site and, in the case of an application for a DA permit, the impact site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site. A prospective permittee planning to secure credits from an approved mitigation bank or in-lieu fee program only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu fee project site.

(6) *Determination of credits.* A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See § 230.93(f).)

(i) For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity.

(ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.

(7) *Mitigation work plan.* Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species;

the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For stream compensatory mitigation projects, the mitigation work plan may also include other relevant information, such as planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings.

(8) *Maintenance plan.* A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.

(9) *Performance standards.* Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. (See § 230.95.)

(10) *Monitoring requirements.* A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included. (See § 230.96.)

(11) *Long-term management plan.* A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. (See § 230.97(d).)

(12) *Adaptive management plan.* A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. (See § 230.97(c).)

(13) *Financial assurances.* A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards (see § 230.93(n)).

(14) *Other information.* The district engineer may require additional information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.

§ 230.95 Ecological performance standards.

(a) The approved mitigation plan must contain performance standards that will be used to assess whether the project is achieving its objectives. Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres).

(b) Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish performance standards will help ensure that those performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.

§ 230.96 Monitoring.

(a) *General.* (1) Monitoring the compensatory mitigation project site is necessary to determine if the project is meeting its performance standards, and to determine if measures are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. The submission of monitoring reports to assess the development and condition of the compensatory mitigation project is required, but the content and level of detail for those monitoring reports must be commensurate with the scale and scope of the compensatory mitigation project, as well as the compensatory mitigation project type. The mitigation plan must address the monitoring requirements for the compensatory mitigation project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the district engineer, and the party responsible for submitting those monitoring reports to the district engineer.

(2) The district engineer may conduct site inspections on a regular basis (e.g., annually) during the monitoring period to evaluate mitigation site performance.

(b) *Monitoring period.* The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation and/or adaptive management is required.

(c) *Monitoring reports.* (1) The district engineer must determine the information to be included in monitoring reports. This information must be sufficient for the district engineer to determine how the compensatory mitigation project is progressing towards meeting its performance standards, and may include plans (such as as-built plans), maps, and photographs to illustrate site conditions. Monitoring reports may also include the results of functional, condition, or other assessments used to provide quantitative or qualitative measures of the functions provided by the compensatory mitigation project site.

(2) The permittee or sponsor is responsible for submitting monitoring reports in accordance with the special conditions of the DA permit or the terms of the instrument. Failure to submit monitoring reports in a timely manner may result in compliance action by the district engineer.

(3) Monitoring reports must be provided by the district engineer to interested federal, tribal, state, and local resource agencies, and the public, upon request.

§ 230.97 Management.

(a) *Site protection.* (1) The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. When approving a method for long-term protection of non-government property other than transfer of title, the district engineer shall consider relevant legal constraints on the use of conservation easements and/or restrictive covenants

in determining whether such mechanisms provide sufficient site protection. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or nonprofit resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections.

(2) The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.

(3) The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.

(4) For compensatory mitigation projects on public lands, where Federal facility management plans or integrated natural resources management plans are used to provide long-term protection, and changes in statute, regulation, or agency needs or mission results in an incompatible use on public lands originally set aside for compensatory mitigation, the public agency authorizing the incompatible use is responsible for providing alternative compensatory mitigation that is acceptable to the district engineer for any loss in functions resulting from the incompatible use.

(5) A real estate instrument, management plan, or other long-term protection mechanism used for site protection of permittee-responsible mitigation must be approved by the district engineer in advance of, or concurrent with, the activity causing the authorized impacts.

(b) *Sustainability.* Compensatory mitigation projects shall be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance. This includes the provision of long-term financing mechanisms where necessary. Where needed, the acquisition and protection of water rights must be secured and documented in the permit conditions or instrument.

(c) *Adaptive management.* (1) If the compensatory mitigation project cannot be constructed in accordance with the approved mitigation plans, the permittee or sponsor must notify the district engineer. A significant modification of the compensatory mitigation project requires approval from the district engineer.

(2) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the district engineer as soon as possible. The district engineer will evaluate and pursue measures to address deficiencies in the compensatory mitigation project. The district engineer will consider whether the compensatory mitigation project is providing ecological benefits comparable to the original objectives of the compensatory mitigation project.

(3) The district engineer, in consultation with the responsible party (and other federal, tribal, state, and local agencies, as appropriate), will determine the appropriate measures. The measures may include site modifications, design changes, revisions to maintenance requirements, and revised

monitoring requirements. The measures must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives.

(4) Performance standards may be revised in accordance with adaptive management to account for measures taken to address deficiencies in the compensatory mitigation project. Performance standards may also be revised to reflect changes in management strategies and objectives if the new standards provide for ecological benefits that are comparable or superior to the approved compensatory mitigation project. No other revisions to performance standards will be allowed except in the case of natural disasters.

(d) *Long-term management.* (1) The permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project. The permit conditions or instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or instrument, as long as the future transfer of long-term management responsibility is approved by the district engineer.

(2) A long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.

(3) Any provisions necessary for long-term financing must be addressed in the original permit or instrument. The district engineer may require provisions to address inflationary adjustments and other contingencies, as appropriate. Appropriate long-term financing mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site.

(4) For permittee-responsible mitigation, any long-term financing mechanisms must be approved in advance of the activity causing the authorized impacts.

§ 230.98 Mitigation banks and in-lieu fee programs.

(a) *General considerations.* (1) All mitigation banks and in-lieu fee programs must have an approved instrument signed by the sponsor and the district engineer prior to being used to provide compensatory mitigation for DA permits.

(2) To the maximum extent practicable, mitigation banks and in-lieu fee project sites must be planned and designed to be self-sustaining over time, but some active management and maintenance may be required to ensure their long-term viability and sustainability. Examples of acceptable management activities include maintaining fire dependent habitat communities in the absence of natural fire and controlling invasive exotic plant species.

(3) All mitigation banks and in-lieu fee programs must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Interagency Review Team.* (1) The district engineer will establish an Interagency Review Team (IRT) to review documentation for the establishment and management of mitigation banks and in-lieu fee programs. The district engineer or his designated representative serves as Chair of the IRT. In cases where a mitigation bank or in-lieu fee program is proposed to satisfy the requirements of another federal, tribal, state, or local program, in addition to compensatory mitigation requirements of DA permits, it may be appropriate for the administering agency to serve as co-Chair of the IRT.

(2) In addition to the Corps, representatives from the U.S. Environmental Protection Agency, U.S. Fish

and Wildlife Service, NOAA Fisheries, the Natural Resources Conservation Service, and other federal agencies, as appropriate, may participate in the IRT. The IRT may also include representatives from tribal, state, and local regulatory and resource agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the establishment, operation, or use of the mitigation bank or in-lieu fee program. The district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank or in-lieu fee program on the IRT, but retains final authority over its composition.

(3) The primary role of the IRT is to facilitate the establishment of mitigation banks or in-lieu fee programs through the development of mitigation banking or in-lieu fee program instruments. The IRT will review the prospectus, instrument, and other appropriate documents and provide comments to the district engineer. The district engineer and the IRT should use a watershed approach to the extent practicable in reviewing proposed mitigation banks and in-lieu fee programs. Members of the IRT may also sign the instrument, if they so choose. By signing the instrument, the IRT members indicate their agreement with the terms of the instrument. As an alternative, a member of the IRT may submit a letter expressing concurrence with the instrument. The IRT will also advise the district engineer in assessing monitoring reports, recommending remedial or adaptive management measures, approving credit releases, and approving modifications to an instrument. In order to ensure timely processing of instruments and other documentation, comments from IRT members must be received by the district engineer within the time limits specified in this section. Comments received after these deadlines will only be considered at the discretion of the district engineer to the extent that doing so does not jeopardize the deadlines for district engineer action.

(4) The district engineer will give full consideration to any timely comments and advice of the IRT. The district engineer alone retains final authority for approval of the instrument in cases where the mitigation bank or in-lieu fee program is used to satisfy compensatory mitigation requirements of DA permits.

(5) *MOAs with other agencies.* The district engineer and members of the IRT may enter into a memorandum of agreement (MOA) with any other federal, state or local government agency to perform all or some of the IRT review functions described in this section. Such MOAs must include provisions for appropriate federal oversight of the review process. The district engineer retains sole authority for final approval of instruments and other documentation required under this section.

(c) *Compensation planning framework for in-lieu fee programs.* (1) The approved instrument for an in-lieu fee program must include a compensation planning framework that will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities. The compensation planning framework must support a watershed approach to compensatory mitigation. All specific projects used to provide compensation for DA permits must be consistent with the approved compensation planning framework. Modifications to the framework must be approved as a significant modification to the instrument by the district engineer, after consultation with the IRT.

(2) The compensation planning framework must contain the following elements:

(i) The geographic service area(s), including a watershed-based rationale for the delineation of each service area;

(ii) A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats;

(iii) An analysis of historic aquatic resource loss in the service area(s);

(iv) An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation;

(v) A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations

of aquatic resources the program will seek to provide;

(vi) A prioritization strategy for selecting and implementing compensatory mitigation activities;

(vii) An explanation of how any preservation objectives identified in paragraph (c)(2)(v) of this section and addressed in the prioritization strategy in paragraph (c)(2)(vi) satisfy the criteria for use of preservation in § 230.93(h);

(viii) A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities;

(ix) A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;

(x) A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this section, including a process for revising the planning framework as necessary; and

(xi) Any other information deemed necessary for effective compensation planning by the district engineer.

(3) The level of detail necessary for the compensation planning framework is at the discretion of the district engineer, and will take into account the characteristics of the service area(s) and the scope of the program. As part of the in-lieu fee program instrument, the compensation planning framework will be reviewed by the IRT, and will be a major factor in the district engineer's decision on whether to approve the instrument.

(d) *Review process.* (1) The sponsor is responsible for preparing all documentation associated with establishment of the mitigation bank or in-lieu fee program, including the prospectus, instrument, and other appropriate documents, such as mitigation plans for a mitigation bank. The prospectus provides an overview of the proposed mitigation bank or in-lieu fee program and serves as the basis for public and initial IRT comment. For a mitigation bank, the mitigation plan, as described in § 230.94(c), provides detailed plans and specifications for the mitigation bank site. For in-lieu fee programs, mitigation plans will be prepared as in-lieu fee project sites are identified after the instrument has been approved and the in-lieu fee program becomes operational. The instrument provides the authorization for the mitigation bank or in-lieu fee program to provide credits to be used as compensatory mitigation for DA permits.

(2) *Prospectus.* The prospectus must provide a summary of the information regarding the proposed mitigation bank or in-lieu fee program, at a sufficient level of detail to support informed public and IRT comment. The review process begins when the sponsor submits a complete prospectus to the district engineer. For modifications of approved instruments, submittal of a new prospectus is not required; instead, the sponsor must submit a written request for an instrument modification accompanied by appropriate documentation. The district engineer must notify the sponsor within 30 days whether or not a submitted prospectus is complete. A complete prospectus includes the following information:

(i) The objectives of the proposed mitigation bank or in-lieu fee program.

(ii) How the mitigation bank or in-lieu fee program will be established and operated.

(iii) The proposed service area.

(iv) The general need for and technical feasibility of the proposed mitigation bank or in-lieu fee program.

(v) The proposed ownership arrangements and long-term management strategy for the mitigation bank or in-lieu fee project sites.

(vi) The qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor.

(vii) For a proposed mitigation bank, the prospectus must also address:

(A) The ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and

(B) Assurance of sufficient water rights to support the long-term sustainability of the mitigation bank.

(viii) For a proposed in-lieu fee program, the prospectus must also include:

(A) The compensation planning framework (see paragraph (c) of this section); and

(B) A description of the in-lieu fee program account required by paragraph (i) of this section.

(3) *Preliminary review of prospectus.* Prior to submitting a prospectus, the sponsor may elect to submit a draft prospectus to the district engineer for comment and consultation. The district engineer will provide copies of the draft prospectus to the IRT and will provide comments back to the sponsor within 30 days. Any comments from IRT members will also be forwarded to the sponsor. This preliminary review is optional but is strongly recommended. It is intended to identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process.

(4) *Public review and comment.* Within 30 days of receipt of a complete prospectus or an instrument modification request that will be processed in accordance with paragraph (g)(1) of this section, the district engineer will provide public notice of the proposed mitigation bank or in-lieu fee program, in accordance with the public notice procedures at 33 CFR 325.3. The public notice must, at a minimum, include a summary of the prospectus and indicate that the full prospectus is available to the public for review upon request. For modifications of approved instruments, the public notice must instead summarize, and make available to the public upon request, whatever documentation is appropriate for the modification (e.g., a new or revised mitigation plan). The comment period for public notice will be 30 days, unless the district engineer determines that a longer comment period is appropriate. The district engineer will notify the sponsor if the comment period is extended beyond 30 days, including an explanation of why the longer comment period is necessary. Copies of all comments received in response to the public notice must be distributed to the other IRT members and to the sponsor within 15 days of the close of the public comment period. The district engineer and IRT members may also provide comments to the sponsor at this time, and copies of any such comments will also be distributed to all IRT members. If the construction of a mitigation bank or an in-lieu fee program project requires a DA permit, the public notice requirement may be satisfied through the public notice provisions of the permit processing procedures, provided all of the relevant information is provided.

(5) *Initial evaluation.* (i) After the end of the comment period, the district engineer will review the comments received in response to the public notice, and make a written initial evaluation as to the potential of the proposed mitigation bank or in-lieu fee program to provide compensatory mitigation for activities authorized by DA permits. This initial evaluation letter must be provided to the sponsor within 30 days of the end of the public notice comment period.

(ii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program has potential for providing appropriate compensatory mitigation for activities authorized by DA permits, the initial evaluation letter will inform the sponsor that he/she may proceed with preparation of the draft instrument (see paragraph (d)(6) of this section).

(iii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program does not have potential for providing appropriate compensatory mitigation for DA permits, the initial evaluation letter must discuss the reasons for that determination. The sponsor may revise the prospectus to address the district engineer's concerns, and submit the revised prospectus to the district engineer. If the sponsor submits a revised prospectus, a revised public notice will be issued in accordance with paragraph (d)(4) of this section.

(iv) This initial evaluation procedure does not apply to proposed modifications of approved instruments.

(6) *Draft instrument.* (i) After considering comments from the district engineer, the IRT, and the public, if the

sponsor chooses to proceed with establishment of the mitigation bank or in-lieu fee program, he must prepare a draft instrument and submit it to the district engineer. In the case of an instrument modification, the sponsor must prepare a draft amendment (e.g., a specific instrument provision, a new or modified mitigation plan), and submit it to the district engineer. The district engineer must notify the sponsor within 30 days of receipt, whether the draft instrument or amendment is complete. If the draft instrument or amendment is incomplete, the district engineer will request from the sponsor the information necessary to make the draft instrument or amendment complete. Once any additional information is submitted, the district engineer must notify the sponsor as soon as he determines that the draft instrument or amendment is complete. The draft instrument must be based on the prospectus and must describe in detail the physical and legal characteristics of the mitigation bank or in-lieu fee program and how it will be established and operated.

(ii) For mitigation banks and in-lieu fee programs, the draft instrument must include the following information:

(A) A description of the proposed geographic service area of the mitigation bank or in-lieu fee program. The service area is the watershed, ecoregion, physiographic province, and/or other geographic area within which the mitigation bank or in-lieu fee program is authorized to provide compensatory mitigation required by DA permits. The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area. For example, in urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC) watershed or a smaller watershed may be an appropriate service area. In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area. Delineation of the service area must also consider any locally-developed standards and criteria that may be applicable. The economic viability of the mitigation bank or in-lieu fee program may also be considered in determining the size of the service area. The basis for the proposed service area must be documented in the instrument. An in-lieu fee program or umbrella mitigation banking instrument may have multiple service areas governed by its instrument (e.g., each watershed within a State or Corps district may be a separate service area under the instrument); however, all impacts and compensatory mitigation must be accounted for by service area;

(B) Accounting procedures;

(C) A provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor once a permittee secures credits from the sponsor;

(D) Default and closure provisions;

(E) Reporting protocols; and

(F) Any other information deemed necessary by the district engineer.

(iii) For a mitigation bank, a complete draft instrument must include the following additional information:

(A) Mitigation plans that include all applicable items listed in §230.94(c)(2) through (14); and

(B) A credit release schedule, which is tied to achievement of specific milestones. All credit releases must be approved by the district engineer, in consultation with the IRT, based on a determination that required milestones have been achieved. The district engineer, in consultation with the IRT, may modify the credit release schedule, including reducing the number of available credits or suspending credit sales or transfers altogether, where necessary to ensure that all credits sales or transfers remain tied to compensatory mitigation projects with a high likelihood of meeting performance standards;

(iv) For an in-lieu fee program, a complete draft instrument must include the following additional information:

(A) The compensation planning framework (see paragraph (c) of this section);

(B) Specification of the initial allocation of advance credits (see paragraph (n) of this section) and a draft fee schedule for these credits, by service area, including an explanation of the

basis for the allocation and draft fee schedule;

(C) A methodology for determining future project-specific credits and fees; and

(D) A description of the in-lieu fee program account required by paragraph (i) of this section.

(7) *IRT review.* Upon receipt of notification by the district engineer that the draft instrument or amendment is complete, the sponsor must provide the district engineer with a sufficient number of copies of the draft instrument or amendment to distribute to the IRT members. The district engineer will promptly distribute copies of the draft instrument or amendment to the IRT members for a 30 day comment period. The 30-day comment period begins 5 days after the district engineer distributes the copies of the draft instrument or amendment to the IRT. Following the comment period, the district engineer will discuss any comments with the appropriate agencies and with the sponsor. The district engineer will seek to resolve issues using a consensus based approach, to the extent practicable, while still meeting the decision-making time frames specified in this section. Within 90 days of receipt of the complete draft instrument or amendment by the IRT members, the district engineer must notify the sponsor of the status of the IRT review. Specifically, the district engineer must indicate to the sponsor if the draft instrument or amendment is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final instrument or amendment, the district engineer will indicate the nature of those concerns.

(8) *Final instrument.* The sponsor must submit a final instrument to the district engineer for approval, with supporting documentation that explains how the final instrument addresses the comments provided by the IRT. For modifications of approved instruments, the sponsor must submit a final amendment to the district engineer for approval, with supporting documentation that explains how the final amendment addresses the comments provided by the IRT. The final instrument or amendment must be provided directly by the sponsor to all members of the IRT. Within 30 days of receipt of the final instrument or amendment, the district engineer will notify the IRT members whether or not he intends to approve the instrument or amendment. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section within 45 days of receipt of the final instrument or amendment, the district engineer will notify the sponsor of his final decision and, if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. For mitigation banks, the final instrument must contain the information items listed in paragraphs (d)(6)(ii), and (iii) of this section. For in-lieu fee programs, the final instrument must contain the information items listed in paragraphs (d)(6)(ii) and (iv) of this section. For the modification of an approved instrument, the amendment must contain appropriate information, as determined by the district engineer. The final instrument or amendment must be made available to the public upon request.

(e) *Dispute resolution process.* (1) Within 15 days of receipt of the district engineer's notification of intent to approve an instrument or amendment, the Regional Administrator of the U.S. EPA, the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service, and/or other senior officials of agencies represented on the IRT may notify the district engineer and other IRT members by letter if they object to the approval of the proposed final instrument or amendment. This letter must include an explanation of the basis for the objection and, where feasible, offer recommendations for resolving the objections. If the district engineer does not receive any objections within this time period,

he may proceed to final action on the instrument or amendment.

(2) The district engineer must respond to the objection within 30 days of receipt of the letter. The district engineer's response may indicate an intent to disapprove the instrument or amendment as a result of the objection, an intent to approve the instrument or amendment despite the objection, or may provide a modified instrument or amendment that attempts to address the objection. The district engineer's response must be provided to all IRT members.

(3) Within 15 days of receipt of the district engineer's response, if the Regional Administrator or Regional Director is not satisfied with the response he may forward the issue to the Assistant Administrator for Water of the U.S. EPA, the Assistant Secretary for Fish and Wildlife and Parks of the U.S. FWS, or the Undersecretary for Oceans and Atmosphere of NOAA, as appropriate, for review and must notify the district engineer by letter via electronic mail or facsimile machine (with copies to all IRT members) that the issue has been forwarded for Headquarters review. This step is available only to the IRT members representing these three federal agencies, however, other IRT members who do not agree with the district engineer's final decision do not have to sign the instrument or amendment or recognize the mitigation bank or in-lieu fee program for purposes of their own programs and authorities. If an IRT member other than the one filing the original objection has a new objection based on the district engineer's response, he may use the first step in this procedure (paragraph (e)(1) of this section) to provide that objection to the district engineer.

(4) If the issue has not been forwarded to the objecting agency's Headquarters, then the district engineer may proceed with final action on the instrument or amendment. If the issue has been forwarded to the objecting agency's Headquarters, the district engineer must hold in abeyance the final action on the instrument or amendment, pending Headquarters level review described below.

(5) Within 20 days from the date of the letter requesting Headquarters level review, the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, or the Undersecretary for Oceans and Atmosphere must either notify the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that further review will not be requested, or request that the ASA(CW) review the final instrument or amendment.

(6) Within 30 days of receipt of the letter from the objecting agency's Headquarters request for ASA(CW)'s review of the final instrument, the ASA(CW), through the Director of Civil Works, must review the draft instrument or amendment and advise the district engineer on how to proceed with final action on that instrument or amendment. The ASA(CW) must immediately notify the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, and/or the Undersecretary for Oceans and Atmosphere of the final decision.

(7) In cases where the dispute resolution procedure is used, the district engineer must notify the sponsor of his final decision within 150 days of receipt of the final instrument or amendment.

(f) *Extension of deadlines.* (1) The deadlines in paragraphs (d) and (e) of this section may be extended by the district engineer at his sole discretion in cases where:

(i) Compliance with other applicable laws, such as consultation under section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act, is required;

(ii) It is necessary to conduct government-to-government consultation with Indian tribes;

(iii) Timely submittal of information necessary for the review of the proposed mitigation bank or in-lieu fee program or the proposed modification of an approved instrument is not accomplished by the sponsor; or

(iv) Information that is essential to the district engineer's decision cannot be reasonably obtained within the specified time frame.

(2) In such cases, the district engineer must promptly notify the sponsor in writing of the extension and the reason for it. Such extensions shall be for

the minimum time necessary to resolve the issue necessitating the extension.

(g) *Modification of instruments.* (1) *Approval of an amendment to an approved instrument.* Modification of an approved instrument, including the addition and approval of umbrella mitigation bank sites or in-lieu fee project sites or expansions of previously approved mitigation bank or in-lieu fee project sites, must follow the appropriate procedures in paragraph (d) of this section, unless the district engineer determines that the streamlined review process described in paragraph (g)(2) of this section is warranted.

(2) *Streamlined review process.* The streamlined modification review process may be used for the following modifications of instruments: changes reflecting adaptive management of the mitigation bank or in-lieu fee program, credit releases, changes in credit releases and credit release schedules, and changes that the district engineer determines are not significant. If the district engineer determines that the streamlined review process is warranted, he must notify the IRT members and the sponsor of this determination and provide them with copies of the proposed modification. IRT members and the sponsor have 30 days to notify the district engineer if they have concerns with the proposed modification. If IRT members or the sponsor notify the district engineer of such concerns, the district engineer shall attempt to resolve those concerns. Within 60 days of providing the proposed modification to the IRT, the district engineer must notify the IRT members of his intent to approve or disapprove the proposed modification. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section, within 15 days of receipt of this notification, the district engineer will notify the sponsor of his final decision and, if the modification is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will so notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the modification is approved, arrange for it to be signed by the appropriate parties.

(h) *Umbrella mitigation banking instruments.* A single mitigation banking instrument may provide for future authorization of additional mitigation bank sites. As additional sites are selected, they must be included in the mitigation banking instrument as modifications, using the procedures in paragraph (g)(1) of this section. Credit withdrawal from the additional bank sites shall be consistent with paragraph (m) of this section.

(i) *In-lieu fee program account.* (1) The in-lieu fee program sponsor must establish a program account after the instrument is approved by the district engineer, prior to accepting any fees from permittees. If the sponsor accepts funds from entities other than permittees, those funds must be kept in separate accounts. The program account must be established at a financial institution that is a member of the Federal Deposit Insurance Corporation. All interests and earnings accruing to the program account must remain in that account for use by the in-lieu fee program for the purposes of providing compensatory mitigation for DA permits. The program account may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee compensatory mitigation projects, except for a small percentage (as determined by the district engineer in consultation with the IRT and specified in the instrument) that can be used for administrative costs.

(2) The sponsor must submit proposed in-lieu fee projects to the district engineer for funding approval. Disbursements from the program account may only be made upon receipt of written authorization from the district engineer, after the district engineer has consulted with the IRT. The terms of the program account must specify that the district engineer has the authority to direct those funds to alternative compensatory mitigation projects in cases where the sponsor does not provide compensatory mitigation in accordance with the time frame specified in paragraph (n)(4) of this section.

(3) The sponsor must provide annual reports to the district engineer and the

IRT. The annual reports must include the following information:

(i) All income received, disbursements, and interest earned by the program account;

(ii) A list of all permits for which in-lieu fee program funds were accepted. This list shall include: the Corps permit number (or the state permit number if there is no corresponding Corps permit number, in cases of state programmatic general permits or other regional general permits), the service area in which the authorized impacts are located, the amount of authorized impacts, the amount of required compensatory mitigation, the amount paid to the in-lieu fee program, and the date the funds were received from the permittee;

(iii) A description of in-lieu fee program expenditures from the account, such as the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, adaptive management, and administration;

(iv) The balance of advance credits and released credits at the end of the report period for each service area; and

(v) Any other information required by the district engineer.

(4) The district engineer may audit the records pertaining to the program account. All books, accounts, reports, files, and other records relating to the in-lieu fee program account shall be available at reasonable times for inspection and audit by the district engineer.

(j) *In-lieu fee project approval.* (1) As in-lieu fee project sites are identified and secured, the sponsor must submit mitigation plans to the district engineer that include all applicable items listed in §230.94(c)(2) through (14). The mitigation plan must also include a credit release schedule consistent with paragraph (o)(8) of this section that is tied to achievement of specific performance standards. The review and approval of in-lieu fee projects will be conducted in accordance with the procedures in paragraph (g)(1) of this section, as modifications of the in-lieu fee program instrument. This includes compensatory mitigation projects conducted by another party on behalf of the sponsor through requests for proposals and awarding of contracts.

(2) If a DA permit is required for an in-lieu fee project, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined, to ensure that the DA permit accurately reflects all relevant provisions of the approved mitigation plan, such as performance standards.

(k) *Coordination of mitigation banking instruments and DA permit issuance.* In cases where initial establishment of the mitigation bank, or the development of a new project site under an umbrella banking instrument, involves activities requiring DA authorization, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined. This is to ensure that the DA permit accurately reflects all relevant provisions of the final instrument, such as performance standards.

(l) *Project implementation.* (1) The sponsor must have an approved instrument prior to collecting funds from permittees to satisfy compensatory mitigation requirements for DA permits.

(2) Authorization to sell credits to satisfy compensatory mitigation requirements in DA permits is contingent on compliance with all of the terms of the instrument. This includes constructing a mitigation bank or in-lieu fee project in accordance with the mitigation plan approved by the district engineer and incorporated by reference in the instrument. If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with the approved mitigation plan, the district engineer must consult with the sponsor and the IRT to consider modifications to the instrument, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold.

(3) An in-lieu fee program sponsor is responsible for the implementation, long-term management, and any required remediation of the restoration, establishment, enhancement, and/or preservation activities, even though those activities may be conducted by

other parties through requests for proposals or other contracting mechanisms.

(m) *Credit withdrawal from mitigation banks.* The mitigation banking instrument may allow for an initial debiting of a percentage of the total credits projected at mitigation bank maturity, provided the following conditions are satisfied: the mitigation banking instrument and mitigation plan have been approved, the mitigation bank site has been secured, appropriate financial assurances have been established, and any other requirements determined to be necessary by the district engineer have been fulfilled. The mitigation banking instrument must provide a schedule for additional credit releases as appropriate milestones are achieved (see paragraph (o)(8) of this section). Implementation of the approved mitigation plan shall be initiated no later than the first full growing season after the date of the first credit transaction.

(n) *Advance credits for in-lieu fee programs.* (1) The in-lieu fee program instrument may make a limited number of advance credits available to permittees when the instrument is approved. The number of advance credits will be determined by the district engineer, in consultation with the IRT, and will be specified for each service area in the instrument. The number of advance credits will be based on the following considerations:

(i) The compensation planning framework;

(ii) The sponsor's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas; and

(iii) The projected financing necessary to begin planning and implementation of in-lieu fee projects.

(2) To determine the appropriate number of advance credits for a particular service area, the district engineer may require the sponsor to provide confidential supporting information that will not be made available to the general public. Examples of confidential supporting information may include prospective in-lieu fee project sites.

(3) As released credits are produced by in-lieu fee projects, they must be used to fulfill any advance credits that have already been provided within the project service area before any remaining released credits can be sold or transferred to permittees. Once previously provided advance credits have been fulfilled, an equal number of advance credits is re-allocated to the sponsor for sale or transfer to fulfill new mitigation requirements, consistent with the terms of the instrument. The number of advance credits available to the sponsor at any given time to sell or transfer to permittees in a given service area is equal to the number of advance credits specified in the instrument, minus any that have already been provided but not yet fulfilled.

(4) Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, unless the district engineer determines that more or less time is needed to plan and implement an in-lieu fee project. If the district engineer determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations.

(5) The sponsor is responsible for complying with the terms of the in-lieu fee program instrument. If the district engineer determines, as a result of review of annual reports on the operation of the in-lieu fee program (see paragraphs (p)(2) and (q)(1) of this section), that it is not performing in compliance with its instrument, the district engineer will take appropriate action, which may include suspension of credit sales, to ensure compliance with the in-lieu fee program instrument (see paragraph (o)(10) of this section). Permittees that secured credits from the

in-lieu fee program are not responsible for in-lieu fee program compliance.

(o) *Determining credits.* (1) *Units of measure.* The principal units for credits and debits are acres, linear feet, functional assessment units, or other suitable metrics of particular resource types. Functional assessment units or other suitable metrics may be linked to acres or linear feet.

(2) *Assessment.* Where practicable, an appropriate assessment method (e.g., hydrogeomorphic approach to wetlands functional assessment, index of biological integrity) or other suitable metric must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank or in-lieu fee project.

(3) *Credit production.* The number of credits must reflect the difference between pre- and post-compensatory mitigation project site conditions, as determined by a functional or condition assessment or other suitable metric.

(4) *Credit value.* Once a credit is debited (sold or transferred to a permittee), its value cannot change.

(5) *Credit costs.* (i) The cost of compensatory mitigation credits provided by a mitigation bank or in-lieu fee program is determined by the sponsor.

(ii) For in-lieu fee programs, the cost per unit of credit must include the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in that service area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, as well as administration of the in-lieu fee program. The cost per unit credit must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses. The cost per unit of credit must also take into account the resources necessary for the long-term management and protection of the in-lieu fee project. In addition, the cost per unit credit must include financial assurances that are necessary to ensure successful completion of in-lieu fee projects.

(6) *Credits provided by preservation.* These credits should be specified as acres, linear feet, or other suitable metrics of preservation of a particular resource type. In determining the compensatory mitigation requirements for DA permits using mitigation banks or in-lieu fee programs, the district engineer should apply a higher mitigation ratio if the requirements are to be met through the use of preservation credits. In determining this higher ratio, the district engineer must consider the relative importance of both the impacted and the preserved aquatic resources in sustaining watershed functions.

(7) *Credits provided by riparian areas, buffers, and uplands.* These credits should be specified as acres, linear feet, or other suitable metrics of riparian area, buffer, and uplands respectively. Non-aquatic resources can only be used as compensatory mitigation for impacts to aquatic resources authorized by DA permits when those resources are essential to maintaining the ecological viability of adjoining aquatic resources. In determining the compensatory mitigation requirements for DA permits using mitigation banks and in-lieu fee programs, the district engineer may authorize the use of riparian area, buffer, and/or upland credits if he determines that these areas are essential to sustaining aquatic resource functions in the watershed and are the most appropriate compensation for the authorized impacts.

(8) *Credit release schedule.* (i) *General considerations.* Release of credits must be tied to performance based milestones (e.g., construction, planting, establishment of specified plant and animal communities). The credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. When determining the credit release schedule, factors to be considered may include, but are not limited to: The method of providing compensatory mitigation credits (e.g., restoration), the likelihood of success, the nature and amount of work needed to generate the credits, and the aquatic resource type(s) and

function(s) to be provided by the mitigation bank or in-lieu fee project. The district engineer will determine the credit release schedule, including the share to be released only after full achievement of performance standards, after consulting with the IRT. Once released, credits may only be used to satisfy compensatory mitigation requirements of a DA permit if the use of credits for a specific permit has been approved by the district engineer.

(ii) For single-site mitigation banks, the terms of the credit release schedule must be specified in the mitigation banking instrument. The credit release schedule may provide for an initial debiting of a limited number of credits once the instrument is approved and other appropriate milestones are achieved (see paragraph (m) of this section).

(iii) For in-lieu fee projects and umbrella mitigation bank sites, the terms of the credit release schedule must be specified in the approved mitigation plan. When an in-lieu fee project or umbrella mitigation bank site is implemented and is achieving the performance-based milestones specified in the credit release schedule, credits are generated in accordance with the credit release schedule for the approved mitigation plan. If the in-lieu fee project or umbrella mitigation bank site does not achieve those performance-based milestones, the district engineer may modify the credit release schedule, including reducing the number of credits.

(9) *Credit release approval.* Credit releases for mitigation banks and in-lieu fee projects must be approved by the district engineer. In order for credits to be released, the sponsor must submit documentation to the district engineer demonstrating that the appropriate milestones for credit release have been achieved and requesting the release. The district engineer will provide copies of this documentation to the IRT members for review. IRT members must provide any comments to the district engineer within 15 days of receiving this documentation. However, if the district engineer determines that a site visit is necessary, IRT members must provide any comments to the district engineer within 15 days of the site visit. The district engineer must schedule the site visit so that it occurs as soon as it is practicable, but the site visit may be delayed by seasonal considerations that affect the ability of the district engineer and the IRT to assess whether the applicable credit release milestones have been achieved. After full consideration of any comments received, the district engineer will determine whether the milestones have been achieved and the credits can be released. The district engineer shall make a decision within 30 days of the end of that comment period, and notify the sponsor and the IRT.

(10) *Suspension and termination.* If the district engineer determines that the mitigation bank or in-lieu fee program is not meeting performance standards or complying with the terms of the instrument, appropriate action will be taken. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, and terminating the instrument.

(p) *Accounting procedures.* (1) For mitigation banks, the instrument must contain a provision requiring the sponsor to establish and maintain a ledger to account for all credit transactions. Each time an approved credit transaction occurs, the sponsor must notify the district engineer.

(2) For in-lieu fee programs, the instrument must contain a provision requiring the sponsor to establish and maintain an annual report ledger in accordance with paragraph (i)(3) of this section, as well as individual ledgers that track the production of released credits for each in-lieu fee project.

(q) *Reporting.* (1) *Ledger account.* The sponsor must compile an annual ledger report showing the beginning and ending balance of available credits and permitted impacts for each resource type, all additions and subtractions of credits, and any other changes in credit availability (e.g., additional credits released, credit sales suspended). The ledger report must be submitted to the district engineer, who will distribute copies to the IRT members. The ledger report is part of the administrative record for the mitigation bank or in-lieu fee program. The district engineer

will make the ledger report available to the public upon request.

(2) *Monitoring reports.* The sponsor is responsible for monitoring the mitigation bank site or the in-lieu fee project site in accordance with the approved monitoring requirements to determine the level of success and identify problems requiring remedial action or adaptive management measures. Monitoring must be conducted in accordance with the requirements in § 230.96, and at time intervals appropriate for the particular project type and until such time that the district engineer, in consultation with the IRT, has determined that the performance standards have been attained. The instrument must include requirements for periodic monitoring reports to be submitted to the district engineer, who will provide copies to other IRT members.

(3) *Financial assurance and long-term management funding report.* The district engineer may require the sponsor to provide an annual report showing beginning and ending balances, including deposits into and any withdrawals from, the accounts providing funds for financial assurances and long-term management activities. The report should also include information on the amount of required financial assurances and the status of those assurances, including their potential expiration.

(r) *Use of credits.* Except as provided below, all activities authorized by DA permits are eligible, at the discretion of the district engineer, to use mitigation banks or in-lieu fee programs to fulfill compensatory mitigation requirements for DA permits. The district engineer will determine the number and type(s) of credits required to compensate for the authorized impacts. Permit applicants may propose to use a particular mitigation bank or in-lieu fee program to provide the required compensatory mitigation. In such cases, the sponsor must provide the permit applicant with a statement of credit availability. The district engineer must review the permit applicant's compensatory mitigation proposal, and notify the applicant of his determination regarding the acceptability of using that mitigation bank or in-lieu fee program.

(s) *IRT concerns with use of credits.* If, in the view of a member of the IRT, an issued permit or series of issued permits raises concerns about how credits from a particular mitigation bank or in-lieu fee program are being used to satisfy compensatory mitigation requirements (including concerns about whether credit use is consistent with the terms of the instrument), the IRT member may notify the district engineer in writing of the concern. The district engineer shall promptly consult with the IRT to address the concern. Resolution of the concern is at the discretion of the district engineer, consistent with applicable statutes, regulations, and policies regarding compensatory mitigation requirements for DA permits. Nothing in this section limits the authorities designated to IRT agencies under existing statutes or regulations.

(t) *Site protection.* (1) For mitigation bank sites, real estate instruments, management plans, or other long-term mechanisms used for site protection must be finalized before any credits can be released.

(2) For in-lieu fee project sites, real estate instruments, management plans, or other long-term protection mechanisms used for site protection must be finalized before advance credits can become released credits.

(u) *Long-term management.* (1) The legal mechanisms and the party responsible for the long-term management and the protection of the mitigation bank site must be documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation plans. The responsible party should make adequate provisions for the operation, maintenance, and long-term management of the compensatory mitigation project site. The long-term management plan should include a description of long-term management needs and identify the funding mechanism that will be used to meet those needs.

(2) The instrument may contain provisions for the sponsor to transfer long-term management responsibilities to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager.

(3) The instrument or approved mitigation plan must address the financial arrangements and timing of any necessary transfer of long-term management funds to the steward.

(4) Where needed, the acquisition and protection of water rights should be secured and documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation site plan.

(v) *Grandfathering of existing instruments.* (1) *Mitigation banking instruments.* All mitigation banking instruments approved on or after July 9, 2008 must meet the requirements of this part. Mitigation banks approved prior to July 9, 2008 may continue to operate under the terms of their existing instruments. However, any modification to such a mitigation banking instrument on or after July 9, 2008, including authorization of additional sites under an umbrella mitigation banking instrument, expansion of an existing site, or addition of a different type of resource credits (e.g., stream credits to a wetland bank) must be consistent with the terms of this part.

(2) *In-lieu fee program instruments.* All in-lieu fee program instruments approved on or after July 9, 2008 must meet the requirements of this part. In-lieu fee programs operating under instruments approved prior to July 9, 2008 may continue to operate under those instruments for two years after the effective date of this rule, after which time they must meet the requirements of this part, unless the district engineer determines that circumstances warrant an extension of up to three additional years. The district engineer must consult with the IRT before approving such extensions. Any revisions made to the in-lieu-fee program instrument on or after July 9, 2008 must be consistent with the terms of this part. Any approved project for which construction was completed under the terms of a previously approved instrument may continue to operate indefinitely under those terms if the district engineer determines that the project is providing appropriate mitigation substantially consistent with the terms of this part.

PART 231—SECTION 404(C) PROCEDURES

Sec.

AUTHORITY: 33 U.S.C. 1344(c).

SOURCE: 44 FR 58082, Oct. 9, 1979, unless otherwise noted.

§ 231.1 Purpose and scope.

(a) The Regulations of this part include the procedures to be followed by the Environmental Protection agency in prohibiting or withdrawing the specification, or denying, restricting, or withdrawing the use for specification, of any defined area as a disposal site for dredged or fill material pursuant to section 404(c) of the Clean Water Act (''CWA''), 33 U.S.C. 1344(c). The U.S. Army Corps of Engineers or a state with a 404 program which has been approved under section 404(h) may grant permits specifying disposal sites for dredged or fill material by determining that the section 404(b)(1) Guidelines (40 CFR Part 230) allow specification of a particular site to receive dredged or fill material. The Corps may also grant permits by determining that the discharge of dredged or fill material is necessary under the economic impact provision of section 404(b)(2). Under section 404(c), the Administrator may exercise a veto over the specification by the U.S. Army Corps of Engineers or by a state of a site for the discharge of dredged or fill material. The Administrator may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state. The Administrator is authorized to prohibit or otherwise restrict a site whenever he determines that the discharge of dredged or fill material is having or will have an ''unacceptable adverse effect'' on municipal water supplies, shellfish beds and fishery areas (including

spawning and breeding areas), wildlife, or recreational areas. In making this determination, the Administrator will take into account all information available to him, including any written determination of compliance with the section 404(b)(1) Guidelines made in 40 CFR part 230, and will consult with the Chief of Engineers or with the state.

(b) These regulations establish procedures for the following steps:

(1) The Regional Administrator's proposed determinations to prohibit or withdraw the specification of a defined area as a disposal site, or to deny, restrict or withdraw the use of any defined area for the discharge of any particular dredged or fill material;

(2) The Regional Administrator's recommendation to the Administrator for determination as to the specification of a defined area as a disposal site.

(3) The Administrator's final determination to affirm, modify or rescind the recommended determination after consultation with the Chief of Engineers or with the state.

(c) Applicability: The regulations set forth in this part are applicable whenever the Administrator is considering whether the specification of any defined area as a disposal site should be prohibited, denied, restricted, or withdrawn. These regulations apply to all existing, proposed or potential disposal sites for discharges of dredged or fill material into waters of the United States, as defined in 40 CFR 230.2.

§ 231.2 Definitions.

For the purposes of this part, the definitions of terms in 40 CFR 230.2 shall apply. In addition, the term:

(a) *Withdraw specification* means to remove from designation any area already specified as a disposal site by the U.S. Army Corps of Engineers or by a state which has assumed the section 404 program, or any portion of such area.

(b) *Prohibit specification* means to prevent the designation of an area as a present or future disposal site.

(c) *Deny or restrict the use of any defined area for specification* is to deny or restrict the use of any area for the present or future discharge of any dredged or fill material.

(d) *Person* means an individual, corporation, partnership, association, Federal agency, state, municipality, or commission, or political subdivision of a state, or any interstate body.

(e) *Unacceptable adverse effect* means impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 CFR part 230).

(f) *State* means any state agency administering a 404 program which has been approved under section 404(h).

§ 231.3 Procedures for proposed determinations.

(a) If the Regional Administrator has reason to believe after evaluating the information available to him, including any record developed under the section 404 referral process specified in 33 CFR 323.5(b), that an ''unacceptable adverse effect'' could result from the specification or use for specification of a defined area for the disposal of dredged or fill material, he may initiate the following actions:

(1) The Regional Administrator will notify the District Engineer or the state, if the site is covered by an approved state program, the owner of record of the site, and the applicant, if any, in writing that the Regional Administrator intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, whichever the case may be, of any defined area as a disposal site.

(2) If within 15 days of receipt of the Regional Administrator's notice under paragraph (a)(1) of this section, it has not been demonstrated to the satisfaction of the Regional Administrator that no unacceptable adverse effect(s) will occur or the District Engineer or state does not notify the Regional Administrator of his intent to take corrective action to prevent an unacceptable adverse effect satisfactory to the Regional Administrator, the Regional

Administrator shall publish notice of a proposed determination in accordance with the procedures of this section. Where the Regional Administrator has notified the District Engineer under paragraph (a)(1) of this section that he is considering exercising section 404(c) authority with respect to a particular disposal site for which a permit application is pending but for which no permit has been issued, the District Engineer, in accordance with 33 CFR 325.8, shall not issue the permit until final action is taken under this part.

COMMENT: In cases involving a proposed disposal site for which a permit application is pending, it is anticipated that the procedures of the section 404 referral process will normally be exhausted prior to any final decision of whether to initiate a 404(c) proceeding.

(b) Public notice of every proposed determination and notice of all public hearings shall be given by the Regional Administrator. Every public notice shall contain, at a minimum:

(1) An announcement that the Regional Administrator has proposed a determination to prohibit or withdraw specification, or to deny, restrict, or withdraw the use for specification, of an area as a disposal site, including a summary of the facts on which the proposed determination is based;

(2) The location of the existing, proposed or potential disposal site, and a summary of its characteristics;

(3) A summary of information concerning the nature of the proposed discharge, where applicable;

(4) The identity of the permit applicant, if any;

(5) A brief description of the right to, and procedures for requesting, a public hearing; and

(6) The address and telephone number of the office where interested persons may obtain additional information, including copies of the proposed determination; and

(7) Such additional statements, representations, or information as the Regional Administrator considers necessary or proper.

(c) In addition to the information required under paragraph (b) of this section, public notice of a public hearing held under § 231.4 shall contain the following information:

(1) Reference to the date of public notice of the proposed determination;

(2) Date, time and place of the hearing; and

(3) A brief description of the nature and purpose of the hearing including the applicable rules and procedures.

(d) The following procedures for giving public notice of the proposed determination or of a public hearing shall be followed:

(1) Publication at least once in a daily or weekly newspaper of general circulation in the area in which the defined area is located. In addition the Regional Administrator may (i) post a copy of the notice at the principal office of the municipality in which the defined area is located, or if the defined area is not located near a sizeable community, at the principal office of the political subdivision (State, county or local, whichever is appropriate) with general jurisdiction over the area in which the disposal site is located, and (ii) post a copy of the notice at the United States Post Office serving that area.

(2) A copy of the notice shall be mailed to the owner of record of the site, to the permit applicant or permit holder, if any, to the U.S. Fish and Wildlife Service, National Marine Fisheries Service and any other interested Federal and State water pollution control and resource agencies, and to any person who has filed a written request with the Regional Administrator to receive copies of notices relating to section 404(c) determinations;

(3) A copy of the notice shall be mailed to the appropriate District and Division Engineer(s) and state;

(4) The notice will also be published in the FEDERAL REGISTER.

§ 231.4 Public comments and hearings.

(a) The Regional Administrator shall provide a comment period of not less than 30 or more than 60 days following the date of public notice of the proposed determination. During this period any interested persons may submit written comments on the proposed determination. Comments should be directed to whether the proposed determination should become the final determination and corrective action that could be taken to reduce the adverse

impact of the discharge. All such comments shall be considered by the Regional Administrator or his designee in preparing his recommended determination in § 231.5.

(b) Where the Regional Administrator finds a significant degree of public interest in a proposed determination or that it would be otherwise in the public interest to hold a hearing, or if an affected landowner or permit applicant or holder requests a hearing, he or his designee shall hold a public hearing. Public notice of that hearing shall be given as specified in § 231.3(c). No hearing may be held prior to 21 days after the date of the public notice. The hearing may be scheduled either by the Regional Administrator at his own initiative, or in response to a request received during the comment period provided for in paragraph (a) of this section. If no public hearing is held the Regional Administrator shall notify any persons who requested a hearing of the reasons for that decision. Where practicable, hearings shall be conducted in the vicinity of the affected site.

(c) Hearings held under this section shall be conducted by the Regional Administrator, or his designee, in an orderly and expeditious manner. A record of the proceeding shall be made by either tape recording or verbatim transcript.

(d) Any person may appear at the hearing and submit oral or written statements and data and may be represented by counsel or other authorized representative. Any person may present written statements for the hearing file prior to the time the hearing file is closed to public submissions, and may present proposed findings and recommendations. The Regional Administrator or his designee shall afford the participants an opportunity for rebuttal.

(e) The Regional Administrator, or his designee, shall have discretion to establish reasonable limits on the nature, amount or form of presentation of documentary material and oral presentations. No cross examination of any hearing participant shall be permitted, although the Regional Administrator, or his designee, may make appropriate inquiries of any such participant.

(f) The Regional Administrator or his designee shall allow a reasonable time not to exceed 15 days after the close of the public hearing for submission of written comments. After such time has expired, unless such period is extended by the Regional Administrator or his designee for good cause, the hearing file shall be closed to additional public written comments.

(g) No later than the time a public notice of proposed determination is issued, a Record Clerk shall be designated with responsibility for maintaining the administrative record identified in § 231.5(e). Copying of any documents in the record shall be permitted under appropriate arrangements to prevent their loss. The charge for such copies shall be in accordance with the written schedule contained in part 2 of this chapter.

§ 231.5 Recommended determination.

(a) The Regional Administrator or his designee shall, within 30 days after the conclusion of the public hearing (but not before the end of the comment period), or, if no hearing is held, within 15 days after the expiration of the comment period on the public notice of the proposed determination, either withdraw the proposed determination or prepare a recommended determination to prohibit or withdraw specification, or to deny, restrict, or withdraw the use for specification, of the disposal site because the discharge of dredged or fill material at such site would be likely to have an unacceptable adverse effect.

(b) Where a recommended determination is prepared, the Regional Administrator or his designee shall promptly forward the recommended determination and administrative record to the Administrator for review, with a copy of the recommended determination to the Assistant Administrator for Water and Waste Management.

(c) Where the Regional Administrator, or his designee, decides to withdraw the proposed determination, he shall promptly notify the Administrator by mail, with a copy to the Assistant Administrator for Water and Waste Management, who shall have 10 days from receipt of such notice to notify the Regional Administrator of his

intent to review such withdrawal. Copies of the notification shall be sent to all persons who commented on the proposed determination or participated at the hearing. Such persons may submit timely written recommendations concerning review.

(1) If the Administrator does not notify him, the Regional Administrator shall give notice at the withdrawal of the proposed determination as provided in §231.3(d). Such notice shall constitute final agency action.

(2) If the Administrator does decide to review, the Regional Administrator or his designee shall forward the administrative record to the Administrator for a final determination under §231.6. Where there is review of a withdrawal of proposed determination or review of a recommended determination under §231.6, final agency action does not occur until the Administrator makes a final determination.

(d) Any recommended determination under paragraph (b) of this section shall include the following:

(1) A summary of the unacceptable adverse effects that could occur from use of the disposal site for the proposed discharge;

(2) Recommendations regarding a final determination to prohibit, deny, restrict, or withdraw, which shall confirm or modify the proposed determination, with a statement of reasons.

(e) The administrative record shall consist of the following:

(1) A copy of the proposed determination, public notice, written comments on the public notice and written submissions in the hearing file;

(2) A transcript or recording of the public hearing, where a hearing was held;

(3) The recommended determination;

(4) Where possible a copy of the record of the Corps or the state pertaining to the site in question;

(5) Any other information considered by the Regional Administrator or his designee.

§231.6 Administrator's final determinations.

After reviewing the recommendations of the Regional Administrator or his designee, the Administrator shall within 30 days of receipt of the recommendations and administrative record initiate consultation with the Chief of Engineers, the owner of record, and, where applicable, the State and the applicant, if any. They shall have 15 days to notify the Administrator of their intent to take corrective action to prevent an unacceptable adverse effect(s), satisfactory to the Administrator. Within 60 days of receipt of the recommendations and record, the Administrator shall make a final determination affirming, modifying, or rescinding the recommended determination. The final determination shall describe the satisfactory corrective action, if any, make findings, and state the reasons for the final determination. Notice of such final determination shall be published as provided in §231.3, and shall be given to all persons who participated in the public hearing. Notice of the Administrator's final determination shall also be published in the FEDERAL REGISTER. For purposes of judicial review, a final determination constitutes final agency action under section 404(c) of the Act.

§231.7 Emergency procedure.

Where a permit has already been issued, and the Administrator has reason to believe that a discharge under the permit presents an imminent danger of irreparable harm to municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas) wildlife, or recreational areas, and that the public health, interest, or safety requires, the Administrator may ask the Chief of Engineers to suspend the permit under 33 CFR 325.7, or the state, pending completion of proceedings under Part 231. The Administrator may also take appropriate action as authorized under section 504 of the Clean Water Act. If a permit is suspended, the Administrator and Regional Administrator (or his designee) may, where appropriate, shorten the times allowed by these regulations to take particular actions.

§231.8 Extension of time.

The Administrator or the Regional Administrator may, upon a showing of good cause, extend the time requirements in these regulations. Notice of any such extension shall be published

in the FEDERAL REGISTER and, as appropriate, through other forms of notice.

PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

Sec.

AUTHORITY: 33 U.S.C. 1251 *et seq.*

SOURCE: 53 FR 20773, June 6, 1988, unless otherwise noted.

§ 232.1 Purpose and scope of this part.

Part 232 contains definitions applicable to the section 404 program for discharges of dredged or fill material. These definitions apply to both the federally operated program and State administered programs after program approval. This part also describes those activities which are exempted from regulation. Regulations prescribing the substantive environmental criteria for issuance of section 404 permits appear at 40 CFR part 230. Regulations establishing procedures to be followed by the EPA in denying or restricting a disposal site appear at 40 CFR part 231. Regulations containing the procedures and policies used by the Corps in administering the 404 program appear at 33 CFR parts 320–330. Regulations specifying the procedures EPA will follow, and the criteria EPA will apply in approving, monitoring, and withdrawing approval of section 404 State programs appear at 40 CFR part 233.

§ 232.2 Definitions.

Administrator means the Administrator of the Environmental Protection Agency or an authorized representative.

Application means a form for applying for a permit to discharge dredged or fill material into waters of the United States.

Approved program means a State program which has been approved by the Regional Administrator under part 233 of this chapter or which is deemed approved under section 404(h)(3), 33 U.S.C. 1344(h)(3).

Best management practices (BMPs) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States from discharges of dredged or fill material. BMPs include methods, measures, practices, or design and performance standards which facilitate compliance with the section 404(b)(1) Guidelines (40 CFR part 230), effluent limitations or prohibitions under section 307(a), and applicable water quality standards.

Discharge of dredged material. (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(iii) Incidental fallback.

(3) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the U.S. as defined in paragraphs (4) and (5) of this definition; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (4) and (5) of this definition. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in 33 CFR part 329, with proper authorization from the Congress or the Corps pursuant to 33 CFR part 322; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at §232.2(r) of this chapter.

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 40 CFR 232.3 for discharges that do not require permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

NOTE: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (*i.e.*, inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials;'' after the words ''utility lines; and artificial reefs.

(2) In addition, placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce

the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

(i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in 33 CFR part 329, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

(ii) [Reserved]

Dredged material means material that is excavated or dredged from waters of the United States.

Effluent means dredged material or fill material, including return flow from confined sites.

Federal Indian reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Fill material. (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

General permit means a permit authorizing a category of discharges of dredged or fill material under the Act. General permits are permits for categories of discharge which are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

Indian Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Owner or operator means the owner or operator of any activity subject to regulation under the 404 program.

Permit means a written authorization issued by an approved State to implement the requirements of part 233, or by the Corps under 33 CFR parts 320–330. When used in these regulations, ''permit'' includes ''general permit'' as well as individual permit.

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Secretary means the Secretary of the Army acting through the Chief of Engineers.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in this part, which meet the requirements of § 233.60.

State regulated waters means those waters of the United States in which the Corps suspends the issuance of section 404 permits upon approval of a State's section 404 permit program by the Administrator under section 404(h). The program cannot be transferred for those waters which are presently used,

or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line, including wetlands adjacent thereto. All other waters of the United States in a State with an approved program shall be under jurisdiction of the State program, and shall be identified in the program description as required by part 233.

Waters of the United States means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term ''waters of the United States'' means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of

this definition, they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water

mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

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

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means

that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Applicability date.* This definition is applicable beginning on February 6, 2020.

[53 FR 20773, June 6, 1988, as amended at 58 FR 8182, Feb. 11, 1993; 58 FR 45037, Aug. 25, 1993; 64 FR 25123, May 10, 1999; 66 FR 4575, Jan. 17, 2001; 67 FR 31142, May 9, 2002; 73 FR 79645, Dec. 30, 2008; 80 FR 37117, June 29, 2015; 83 FR 5209, Feb. 6, 2018]

§ 232.3 Activities not requiring permits.

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

(a) If any discharge of dredged or fill material resulting from the activities listed in paragraph (c) of this section contains any toxic pollutant listed under section 307 of the Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a section 404 permit.

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

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

(c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

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

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (*i.e.*, ongong) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching

use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

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

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

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. The term ''construction site'' refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

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

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

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

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

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

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

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within the waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

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

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other

movement of those species of aquatic life inhabiting the water body;

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

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

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

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

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

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

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

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

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

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

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

(3)(i) Minor drainage means:

(A) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit;

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

(C) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Act, and which are in established use for the production or rice, cranberries, or other wetland crop species.

NOTE: The provisions of paragraphs (d)(3)(i)(B) and (C) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/nonwetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.

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

(ii) Minor drainage in waters of the United States is limited to drainage

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

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

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

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

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

PART 233—404 STATE PROGRAM REGULATIONS

Subpart A—General

Subpart B—Program Approval

Subpart C—Permit Requirements

Subpart D—Program Operation

Subpart E—Compliance Evaluation and Enforcement

Subpart F—Federal Oversight

Subpart G—Eligible Indian Tribes

AUTHORITY: 33 U.S.C. 1251 *et seq.*

SOURCE: 53 FR 20776, June 1, 1988, unless otherwise noted.

Subpart A—General

§ 233.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow, and the criteria EPA will apply, in approving, reviewing, and withdrawing approval of State programs under section 404 of the Act.

(b) Except as provided in § 232.3, a State program must regulate all discharges of dredged or fill material into waters regulated by the State under section 404(g)–(1). Partial State programs are not approvable under section 404. A State's decision not to assume existing Corps' general permits does not constitute a partial program. The discharges previously authorized by general permit will be regulated by State individual permits. However, in many cases, States other than Indian Tribes will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State which is not an Indian Tribe to regulate activities on Indian lands does not constitute a partial program. The Secretary of the Army acting through the Corps of Engineers will continue to administer the program on Indian lands if a State which is not an Indian Tribe does not seek and have authority to regulate activities on Indian lands.

(c) Nothing in this part precludes a State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope, than required under this part. Where an approved State program has a greater scope than required by Federal law, the additional coverage is not part of the Federally approved program and is not subject to Federal oversight or enforcement.

NOTE: State assumption of the section 404 program is limited to certain waters, as provided in section 404(g)(1). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill material into those waters over which the Secretary retains section 404 jurisdiction.

(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.

[53 FR 20776, June 1, 1988, as amended at 58 FR 8183, Feb. 11, 1993]

§ 233.2 Definitions.

The definitions in parts 230 and 232 as well as the following definitions apply to this part.

Act means the Clean Water Act (33 U.S.C. 1251 *et seq.*).

Corps means the U.S. Army Corps of Engineers.

Federal Indian reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

FWS means the U.S. Fish and Wildlife Service.

Indian Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution.

NMFS means the National Marine Fisheries Service.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe, as defined in this part, which meet the requirements of § 233.60. For purposes of

this part, the word State also includes any interstate agency requesting program approval or administering an approved program.

State Director (*Director*) means the chief administrative officer of any State or interstate agency operating an approved program, or the delegated representative of the Director. If responsibility is divided among two or more State or interstate agencies, Director means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State 404 program or *State program* means a State program which has been approved by EPA under section 404 of the Act to regulate the discharge of dredged or fill material into certain waters as defined in § 232.2(p).

[53 FR 20776, June 1, 1988, as amended at 58 FR 8183, Feb. 11, 1993]

§ 233.3 Confidentiality of information.

(a) Any information submitted to EPA pursuant to these regulations may be claimed as confidential by the submitter at the time of submittal and a final determination as to that claim will be made in accordance with the procedures of 40 CFR part 2 and paragraph (c) of this section.

(b) Any information submitted to the Director may be claimed as confidential in accordance with State law, subject to paragraphs (a) and (c) of this section.

(c) Claims of confidentiality for the following information will be denied:

(1) The name and address of any permit applicant or permittee,

(2) Effluent data,

(3) Permit application, and

(4) Issued permit.

§ 233.4 Conflict of interest.

Any public officer or employee who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision.

Subpart B—Program Approval

§ 233.10 Elements of a program submission.

Any State that seeks to administer a 404 program under this part shall submit to the Regional Administrator at least three copies of the following:

(a) A letter from the Governor of the State requesting program approval.

(b) A complete program description, as set forth in § 233.11.

(c) An Attorney General's statement, as set forth in § 233.12.

(d) A Memorandum of Agreement with the Regional Administrator, as set forth in § 233.13.

(e) A Memorandum of Agreement with the Secretary, as set forth in § 233.14.

(f) Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures.

§ 233.11 Program description.

The program description as required under § 233.10 shall include:

(a) A description of the scope and structure of the State's program. The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria;

(b) A description of the State's permitting, administrative, judicial review, and other applicable procedures;

(c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program;

(d) A description of the funding and manpower which will be available for program administration;

(e) An estimate of the anticipated workload, e.g., number of discharges.

(f) Copies of permit application forms, permit forms, and reporting forms;

(g) A description of the State's compliance evaluation and enforcement

programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA;

(h) A description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.

NOTE: States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps retains authority under section 404(g) of the Act.

(i) A description of the specific best management practices proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

§ 233.12 Attorney General's statement.

(a) Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independence legal counsel), that the laws and regulations of the State, or an interstate compact, provide adequate authority to carry out the program and meet the applicable requirements of this part. This statement shall cite specific statutes and administrative regulations which are lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved, and, where appropriate, judicial decisions which demonstrate adequate authority. The attorney signing the statement required by this section must have authority to represent the State agency in court on all matters pertaining to the State program.

(b) If a State seeks approval of a program covering activities on Indian lands, the statement shall contain an analysis of the State's authority over such activities.

(c) The State Attorney General's statement shall contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful implementation of the State's program.

(d) In those States where more than one agency has responsibility for administering the State program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State, as a whole, has full authority to administer a complete State section 404 program.

§ 233.13 Memorandum of Agreement with Regional Administrator.

(a) Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement executed by the Director and the Regional Administrator. The Memorandum of Agreement shall become effective upon approval of the State program. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible State agencies shall be parties to the Memorandum of Agreement.

(b) The Memorandum of Agreement shall set out the State and Federal responsibilities for program administration and enforcement. These shall include, but not be limited to:

(1) Provisions specifying classes and categories of permit applications for which EPA will waive Federal review (as specified in § 233.51).

(2) Provisions specifying the frequency and content of reports, documents and other information which the State may be required to submit to EPA in addition to the annual report, as well as a provision establishing the submission date for the annual report. The State shall also allow EPA routinely to review State records, reports and files relevant to the administration and enforcement of the approved program.

(3) Provisions addressing EPA and State roles and coordination with respect to compliance monitoring and enforcement activities.

(4) Provisions addressing modification of the Memorandum of Agreement.

§ 233.14 Memorandum of Agreement with the Secretary.

(a) Before a State program is approved under this part, the Director shall enter into a Memorandum of Agreement with the Secretary. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible agencies shall be parties of the Memorandum of Agreement.

(b) The Memorandum of Agreement shall include:

(1) A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.

(2) Procedures whereby the Secretary will, upon program approval, transfer to the State pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.

NOTE: Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue section 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.

(3) An identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director, including support files for permit issuance, compliance reports and records of enforcement actions.

§ 233.15 Procedures for approving State programs.

(a) The 120 day statutory review period shall commence on the date of receipt of a complete State program submission as set out in § 233.10 of this part. EPA shall determine whether the submission is complete within 30 days of receipt of the submission and shall notify the State of its determination. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(b) If EPA determines the State significantly changes its submission during the review period, the statutory review period shall begin again upon the receipt of a revised submission.

(c) The State and EPA may extend the statutory review period by agreement.

(d) Within 10 days of receipt of a complete State section 404 program submission, the Regional Administrator shall provide copies of the State's submission to the Corps, FWS, and NMFS (both Headquarters and appropriate Regional organizations.)

(e) After determining that a State program submission is complete, the Regional Administrator shall publish notice of the State's application in the FEDERAL REGISTER and in enough of the largest newspapers in the State to attract statewide attention. The Regional Administrator shall also mail notice to persons known to be interested in such matters. Existing State, EPA, Corps, FWS, and NMFS mailing lists shall be used as a basis for this mailing. However, failure to mail all such notices shall not be grounds for invalidating approval (or disapproval) of an otherwise acceptable (or unacceptable) program. This notice shall:

(1) Provide for a comment period of not less than 45 days during which interested members of the public may express their views on the State program.

(2) Provide for a public hearing within the State to be held not less than 30 days after notice of hearing is published in the FEDERAL REGISTER;

(3) Indicate where and when the State's submission may be reviewed by the public;

(4) Indicate whom an interested member of the public with questions should contact; and

(5) Briefly outline the fundamental aspects of the State's proposed program and the process for EPA review and decision.

(f) Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and NMFS shall submit to EPA any comments on the State's program.

(g) Within 120 days of receipt of a complete program submission (unless an extension is agreed to by the State), the Regional Administrator shall approve or disapprove the program based on whether the State's program fulfills the requirements of this part and the Act, taking into consideration all comments received. The Regional Administrator shall prepare a responsiveness summary of significant comments received and his response to these comments. The Regional Administrator shall respond individually to comments received from the Corps, FWS, and NMFS.

(h) If the Regional Administrator approves the State's section 404 program, he shall notify the State and the Secretary of the decision and publish notice in the FEDERAL REGISTER. Transfer of the program to the State shall not be considered effective until such notice appears in the FEDERAL REGISTER. The Secretary shall suspend the issuance by the Corps of section 404 permits in State regulated waters on such effective date.

(i) If the Regional Administrator disapproves the State's program based on the State not meeting the requirements of the Act and this part, the Regional Administrator shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State's program which are necessary to obtain approval. If the State resubmits a program submission remedying the identified problem areas, the approval procedure and statutory review period shall begin upon receipt of the revised submission.

§ 233.16 Procedures for revision of State programs.

(a) The State shall keep the Regional Administrator fully informed of any proposed or actual changes to the State's statutory or regulatory authority or any other modifications which are significant to administration of the program.

(b) Any approved program which requires revision because of a modification to this part or to any other applicable Federal statute or regulation shall be revised within one year of the date of promulgation of such regulation, except that if a State must amend or enact a statute in order to make the required revision, the revision shall take place within two years.

(c) States with approved programs shall notify the Regional Administrator whenever they propose to transfer all or part of any program from the approved State agency to any other State agency. The new agency is not authorized to administer the program until approved by the Regional Administrator under paragraph (d) of this section.

(d) Approval of revision of a State program shall be accomplished as follows:

(1) The Director shall submit a modified program description or other documents which the Regional Administrator determines to be necessary to evaluate whether the program complies with the requirements of the Act and this part.

(2) Notice of approval of program changes which are not substantial revisions may be given by letter from the Regional Administrator to the Governor or his designee.

(3) Whenever the Regional Administrator determines that the proposed revision is substantial, he shall publish and circulate notice to those persons known to be interested in such matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS. The Regional Administrator shall approve or disapprove program revisions based on whether the program fulfills the requirements of the Act and this part, and shall publish notice of his decision in the FEDERAL REGISTER. For purposes of this paragraph, substantial revisions include, but are not limited to, revisions that affect the area of jurisdiction, scope of activities regulated, criteria for review of permits, public participation, or enforcement capability.

(4) Substantial program changes shall become effective upon approval by the Regional Administrator and publication of notice in the FEDERAL REGISTER.

(e) Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to a State's program, he may request and the State shall provide a supplemental Attorney General's statement,

program description, or such other documents or information as are necessary to evaluate the program's compliance with the requirements of the Act and this part.

Subpart C—Permit Requirements

§ 233.20 Prohibitions.

No permit shall be issued by the Director in the following circumstances:

(a) When permit does not comply with the requirements of the Act or regulations thereunder, including the section 404(b)(1) Guidelines (part 230 of this chapter).

(b) When the Regional Administrator has objected to issuance of the permit under § 233.50 and the objection has not been resolved.

(c) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under section 404(c) of the Act, or when the discharge would fail to comply with a restriction imposed thereunder.

(d) If the Secretary determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired.

§ 233.21 General permits.

(a) Under section 404(h)(5) of the Act, States may, after program approval, administer and enforce general permits previously issued by the Secretary in State regulated waters.

NOTE: If States intend to assume existing general permits, they must be able to ensure compliance with existing permit conditions an any reporting monitoring, or prenotification requirements.

(b) The Director may issue a general permit for categories of similar activities if he determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the section 404(b)(1) Guidelines.

(c) In addition to the conditions specified in § 233.23, each general permit shall contain:

(1) A specific description of the type(s) of activities which are authorized, including limitations for any single operation. The description shall be detailed enough to ensure that the requirements of paragraph (b) of this section are met. (This paragraph supercedes § 233.23(c)(1) for general permits.)

(2) A precise description of the geographic area to which the general permit applies, including limitations on the type(s) of water where operations may be conducted sufficient to ensure that the requirements of paragraph (b) of this section are met.

(d) Predischarge notification or other reporting requirements may be required by the Director on a permit-by-permit basis as appropriate to ensure that the general permit will comply with the requirement (section 404(e) of the Act) that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

(e) The Director may, without revoking the general permit, require any person authorized under a general permit to apply for an individual permit. This discretionary authority will be based on concerns for the aquatic environment including compliance with paragraph (b) of this section and the 404(b)(1) Guidelines (40 CFR part 230.)

(1) This provision in no way affects the legality of activities undertaken pursuant to the general permit prior to notification by the Director of such requirement.

(2) Once the Director notifies the discharger of his decision to exercise discretionary authority to require an individual permit, the discharger's activity is no longer authorized by the general permit.

§ 233.22 Emergency permits.

(a) Notwithstanding any other provision of this part, the Director may issue a temporary emergency permit for a discharge of dredged or fill material if unacceptable harm to life or severe loss of physical property is likely to occur before a permit could be issued or modified under procedures normally required.

(b) Emergency permits shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of § 233.23.

(1) Any emergency permit shall be limited to the duration of time (typically no more than 90 days) required to complete the authorized emergency action.

(2) The emergency permit shall have a condition requiring appropriate restoration of the site.

(c) The emergency permit may be terminated at any time without process (§ 233.36) if the Director determines that termination is necessary to protect human health or the environment.

(d) The Director shall consult in an expeditious manner, such as by telephone, with the Regional Administrator, the Corps, FWS, and NMFS about issuance of an emergency permit.

(e) The emergency permit may be oral or written. If oral, it must be followed within 5 days by a written emergency permit. A copy of the written permit shall be sent to the Regional Administrator.

(f) Notice of the emergency permit shall be published and public comments solicited in accordance with § 233.32 as soon as possible but no later than 10 days after the issuance date.

§ 233.23 Permit conditions.

(a) For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines, applicable section 303 water quality standards, and applicable section 307 effluent standards and prohibitions.

(b) Section 404 permits shall be effective for a fixed term not to exceed 5 years.

(c) Each 404 permit shall include conditions meeting or implementing the following requirements:

(1) A specific identification and complete description of the authorized activity including name and address of permittee, location and purpose of discharge, type and quantity of material to be discharged. (This subsection is not applicable to general permits).

(2) Only the activities specifically described in the permit are authorized.

(3) The permittee shall comply with all conditions of the permit even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes a violation of the Act as well as of State statute and/or regulation.

(4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit.

(5) The permittee shall inform the Director of any expected or known actual noncompliance.

(6) The permittee shall provide such information to the Director, as the Director requests, to determine compliance status, or whether cause exists for permit modification, revocation or termination.

(7) Monitoring, reporting and recordkeeping requirements as needed to safeguard the aquatic environment. (Such requirements will be determined on a case-by-case basis, but at a minimum shall include monitoring and reporting of any expected leachates, reporting of noncompliance, planned changes or transfer of the permit.)

(8) Inspection and entry. The permittee shall allow the Director, or his authorized representative, upon presentation of proper identification, at reasonable times to:

(i) Enter upon the permittee's premises where a regulated activity is located or where records must be kept under the conditions of the permit,

(ii) Have access to and copy any records that must be kept under the conditions of the permit,

(iii) Inspect operations regulated or required under the permit, and

(iv) Sample or monitor, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

(9) Conditions assuring that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.

Subpart D—Program Operation

§ 233.30 Application for a permit.

(a) Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit a permit application to the Director. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.

(b) A complete application shall include:

(1) Name, address, telephone number of the applicant and name(s) and address(es) of adjoining property owners.

(2) A complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not generally expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; the location and dimensions of adjacent structures; and a list of authorizations required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made.

(3) The application must include a description of the type, composition, source and quantity of the material to be discharged, the method of discharge, and the site and plans for disposal of the dredged or fill material.

(4) A certification that all information contained in the application is true and accurate and acknowledging awareness of penalties for submitting false information.

(5) All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.

(c) In addition to the information indicated in § 233.30(b), the applicant will be required to furnish such additional information as the Director deems appropriate to assist in the evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(d) The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation.

NOTE: EPA encourages States to provide permit applicants guidance regarding the level of detail of information and documentation required under this subsection. This guidance can be provided either through the application form or on an individual basis. EPA also encourages the State to maintain a program to inform potential applicants for permits of the requirements of the State program and of the steps required to obtain permits for activities in State regulated waters.

§ 233.31 Coordination requirements.

(a) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, he shall notify the affected State and the Regional Administrator prior to permit issuance in writing of his failure to accept these recommendations, together with his reasons for so doing. The Regional Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.

(b) State section 404 permits shall be coordinated with Federal and Federal-State water related planning and review processes.

§ 233.32 Public notice.

(a) Applicability.

(1) The Director shall give public notice of the following actions:

(i) Receipt of a permit application.

(ii) Preparation of a draft general permit.

(iii) Consideration of a major modification to an issued permit.

(iv) Scheduling of a public hearing.

(v) Issuance of an emergency permit.

(2) Public notices may describe more than one permit or action.

(b) Timing.

(1) The public notice shall provide a reasonable period of time, normally at least 30 days, within which interested parties may express their views concerning the permit application.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing.

(3) The Regional Administrator may approve a program with shorter public notice timing if the Regional Administrator determines that sufficient public notice is provided for.

(c) The Director shall give public notice by each of the following methods:

(1) By mailing a copy of the notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his rights to receive notice for any classes or categories of permits):

(i) The applicant.

(ii) Any agency with jurisdiction over the activity or the disposal site, whether or not the agency issues a permit.

(iii) Owners of property adjoining the property where the regulated activity will occur.

(iv) All persons who have specifically requested copies of public notices. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.)

(v) Any State whose waters may be affected by the proposed discharge.

(2) In addition, by providing notice in at least one other way (such as advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.

(d) All public notices shall contain at least the following information:

(1) The name and address of the applicant and, if different, the address or location of the activity(ies) regulated by the permit.

(2) The name, address, and telephone number of a person to contact for further information.

(3) A brief description of the comment procedures and procedures to request a public hearing, including deadlines.

(4) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged.

(5) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area.

(6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based.

(7) Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity.

(e) Notice of public hearing shall also contain the following information:

(1) Time, date, and place of hearing.

(2) Reference to the date of any previous public notices relating to the permit.

(3) Brief description of the nature and purpose of the hearing.

§ 233.33 Public hearing.

(a) Any interested person may request a public hearing during the public comment period as specified in § 233.32. Requests shall be in writing and shall state the nature of the issues proposed to be raised at the hearing.

(b) The Director shall hold a public hearing whenever he determines there is a significant degree of public interest in a permit application or a draft general permit. He may also hold a hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the permit application.

(c) At a hearing, any person may submit oral or written statements or data concerning the permit application or draft general permit. The public comment period shall automatically be extended to the close of any public hearing under this section. The presiding

officer may also extend the comment period at the hearing.

(d) All public hearings shall be reported verbatim. Copies of the record of proceedings may be purchased by any person from the Director or the reporter of such hearing. A copy of the transcript (or if none is prepared, a tape of the proceedings) shall be made available for public inspection at an appropriate State office.

§ 233.34 Making a decision on the permit application.

(a) The Director will review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations.

(b) The Director shall consider all comments received in response to the public notice, and public hearing if a hearing is held. All comments, as well as the record of any public hearing, shall be made part of the official record on the application.

(c) After the Director has completed his review of the application and consideration of comments, the Director will determine, in accordance with the record and all applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining his decision and rationale for his decision. The determination shall be dated, signed and included in the official record prior to final action on the application. The official record shall be open to the public.

§ 233.35 Issuance and effective date of permit.

(a) If the Regional Administrator comments on a permit application or draft general permit under § 233.50, the Director shall follow the procedures specified in that section in issuing the permit.

(b) If the Regional Administrator does not comment on a permit application or draft general permit, the Director shall make a final permit decision after the close of the public comment period and shall notify the applicant.

(1) If the decision is to issue a permit, the permit becomes effective when it is signed by the Director and the applicant.

(2) If the decision is to deny the permit, the Director will notify the applicant in writing of the reason(s) for denial.

§ 233.36 Modification, suspension or revocation of permits.

(a) *General.* The Director may reevaluate the circumstances and conditions of a permit either on his own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if he determines that sufficient cause exists. Among the factors to be considered are:

(1) Permittee's noncompliance with any of the terms or conditions of the permit;

(2) Permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at the time;

(3) Information that activities authorized by a general permit are having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits;

(4) Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit;

(5) Any significant information relating to the activity authorized by the permit if such information was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance;

(6) Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards.

(b) *Limitations.* Permit modifications shall be in compliance with § 233.20.

(c) *Procedures.* (1) The Director shall develop procedures to modify, suspend or revoke permits if he determines cause exists for such action (§ 233.36(a)).

Such procedures shall provide opportunity for public comment (§ 233.32), coordination with the Federal review agencies (§ 233.50), and opportunity for public hearing (§ 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened.

(2) Minor modification of permits. The Director may, upon the consent of the permittee, use abbreviated procedures to modify a permit to make the following corrections or allowance for changes in the permitted activity:

(i) Correct typographical errors;

(ii) Require more frequent monitoring or reporting by permittee;

(iii) Allow for a change in ownership or operational control of a project or activity where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director;

(iv) Provide for minor modification of project plans that do not significantly change the character, scope, and/or purpose of the project or result in significant change in environmental impact;

(v) Extend the term of a permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date and does not result in any increase in the amount of dredged or fill material allowed to be discharged.

§ 233.37 Signatures on permit applications and reports.

The application and any required reports must be signed by the person who desires to undertake the proposed activity or by that person's duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

§ 233.38 Continuation of expiring permits.

A Corps 404 permit does not continue in force beyond its expiration date under Federal law if, at that time, a State is the permitting authority. States authorized to administer the 404 Program may continue Corps or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.

§ 233.39 Electronic reporting.

States that choose to receive electronic documents must satisfy the requirements of 40 CFR Part 3—(Electronic reporting) in their state program.

[70 FR 59888, Oct. 13, 2005]

Subpart E—Compliance Evaluation and Enforcement

§ 233.40 Requirements for compliance evaluation programs.

(a) In order to abate violations of the permit program, the State shall maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions.

(b) The Director and State officers engaged in compliance evaluation, upon presentation of proper identification, shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program.

(c) The State program shall provide for inspections to be conducted, samples to be taken and other information to be gathered in a manner that will produce evidence admissible in an enforcement proceeding.

(d) The State shall maintain a program for receiving and ensuring proper consideration of information submitted by the public about violations.

§ 233.41 Requirements for enforcement authority.

(a) Any State agency administering a program shall have authority:

(1) To restrain immediately and effectively any person from engaging in any unauthorized activity;

(2) To sue to enjoin any threatened or continuing violation of any program requirement;

(3) To assess or sue to recover civil penalties and to seek criminal remedies, as follows:

(i) The agency shall have the authority to assess or recover civil penalties for discharges of dredged or fill material without a required permit or in violation of any section 404 permit condition in an amount of at least $5,000 per day of such violation.

(ii) The agency shall have the authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under section 404 in the amount of at least $10,000 per day of such violation.

(iii) The agency shall have the authority to seek criminal fines against any person who knowingly makes false statements, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act, these regulations or the approved State program, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit, in an amount of at least $5,000 for each instance of violation.

(b)(1) The approved maximum civil penalty or criminal fine shall be assessable for each violation and, if the violation is continuous, shall be assessable in that maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.

(c) The civil penalty assessed, sought, or agreed upon by the Director under paragraph (a)(3) of this section shall be appropriate to the violation.

NOTE: To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA may, when authorized by section 309 of the Act, commence separate action for penalties.

(d)(1) The Regional Administrator may approve a State program where the State lacks authority to recover penalties of the levels required under paragraphs (a)(3)(i)–(iii) of this section only if the Regional Administrator determines, after evaluating a record of at least one year for an alternative enforcement program, that the State has an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects.

(2) States whose programs were approved via waiver of monetary penalties shall keep the Regional Administrator informed of all enforcement actions taken under any alternative method approved pursuant to paragraph (d)(1) of this section. The manner of reporting will be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13).

(e) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention of right in any civil or administrative action to obtain remedies specified in paragraph (a)(3) of this section by any citizen having an interest which is or may be adversely affected, or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures;

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(f) *Provision for Tribal criminal enforcement authority.* To the extent that an

Indian Tribe does not assert or is precluded from asserting criminal enforcement authority (§ 233.41(a)(3) (ii) and (iii)), the Federal government will continue to exercise primary criminal enforcement responsibility. The Tribe, with the EPA Region and Corps District(s) with jurisdiction, shall develop a system where the Tribal agency will refer such a violation to the Regional Administrator or the District Engineer(s), as agreed to by the parties, in an appropriate and timely manner. This agreement shall be incorporated into joint or separate Memorandum of Agreement with the EPA Region and the Corps District(s), as appropriate.

[53 FR 20776, June 1, 1988, as amended at 58 FR 8183, Feb. 11, 1993]

Subpart F—Federal Oversight

§ 233.50 Review of and objection to State permits.

(a) The Director shall promptly transmit to the Regional Administrator:

(1) A copy of the public notice for any complete permit applications received by the Director, except those for which permit review has been waived under § 233.51. The State shall supply the Regional Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA.

(2) A copy of a draft general permit whenever the State intends to issue a general permit.

(3) Notice of every significant action taken by the State agency related to the consideration of any permit application except those for which Federal review has been waived or draft general permit.

(4) A copy of every issued permit.

(5) A copy of the Director's response to another State's comments/recommendations, if the Director does not accept these recommendations (§ 233.32(a)).

(b) Unless review has been waived under § 233.51, the Regional Administrator shall provide a copy of each public notice, each draft general permit, and other information needed for review of the application to the Corps, FWS, and NMFS, within 10 days of receipt. These agencies shall notify the Regional Administrator within 15 days of their receipt if they wish to comment on the public notice or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of such receipt. The final decision to comment, object or to require permit conditions shall be made by the Regional Administrator. (These times may be shortened by mutual agreement of the affected Federal agencies and the State.)

(c) If the information provided is inadequate to determine whether the permit application or draft general permit meets the requirements of the Act, these regulations, and the 404(b)(1) Guidelines, the Regional Administrator may, within 30 days of receipt, request the Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record, or other information, including a supplemental application, that the Regional Administrator determines necessary for review.

(d) If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Director's failure to accept the recommendations of an affected State submitted pursuant to § 233.31(a), he shall notify the Director of his intent within 30 days of receipt. If the Director has been so notified, the permit shall not be issued until after the receipt of such comments or 90 days of the Regional Administrator's receipt of the public notice, draft general permit or Director's response (§ 233.31(a)), whichever comes first. The Regional Administrator may notify the Director within 30 days of receipt that there is no comment but that he reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) If the Regional Administrator has given notice to the Director under paragraph (d) of this section, he shall submit to the Director, within 90 days of receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), a written statement of his

comments, objections, or recommendations; the reasons for the comments, objections, or recommendations; and the actions that must be taken by the Director in order to eliminate any objections. Any such objection shall be based on the Regional Administrator's determination that the proposed permit is (1) the subject of an interstate dispute under §233.31(a) and/or (2) outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines. The Regional Administrator shall make available upon request a copy of any comment, objection, or recommendation on a permit application or draft general permit to the permit applicant or to the public.

(f) When the Director has received an EPA objection or requirement for a permit condition to a permit application or draft general permit under this section, he shall not issue the permit unless he has taken the steps required by the Regional Administrator to eliminate the objection.

(g) Within 90 days of receipt by the Director of an objection or requirement for a permit condition by the Regional Administrator, the State or any interested person may request that the Regional Administrator hold a public hearing on the objection or requirement. The Regional Administrator shall conduct a public hearing whenever requested by the State proposing to issue the permit, or if warranted by significant public interest based on requests received.

(h) If a public hearing is held under paragraph (g) of this section, the Regional Administrator shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition, and notify the Director of this decision.

(1) If the Regional Administrator withdraws his objection or requirement for a permit condition, the Director may issue the permit.

(2) If the Regional Administrator does not withdraw the objection or requirement for a permit condition, the Director must issue a permit revised to satisfy the Regional Administrator's objection or requirement for a permit condition or notify EPA of its intent to deny the permit within 30 days of receipt of the Regional Administrator's notification.

(i) If no public hearing is held under paragraph (g) of this section, the Director within 90 days of receipt of the objection or requirement for a permit condition shall either issue the permit revised to satisfy EPA's objections or notify EPA of its intent to deny the permit.

(j) In the event that the Director neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary shall process the permit application.

[53 FR 20776, June 1, 1988; 53 FR 41649, Oct. 24, 1988]

§233.51 Waiver of review.

(a) The MOA with the Regional Administrator shall specify the categories of discharge for which EPA will waive Federal review of State permit applications. After program approval, the MOA may be modified to reflect any additions or deletions of categories of discharge for which EPA will waive review. The Regional Administrator shall consult with the Corps, FWS, and NMFS prior to specifying or modifying such categories.

(b) With the following exceptions, any category of discharge is eligible for consideration for waiver:

(1) Draft general permits;

(2) Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS;

(3) Discharges with reasonable potential for adverse impacts on waters of another State;

(4) Discharges known or suspected to contain toxic pollutants in toxic amounts (section 101(a)(3) of the Act) or hazardous substances in reportable quantities (section 311 of the Act);

(5) Discharges located in proximity of a public water supply intake;

(6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.

(c) The Regional Administrator retains the right to terminate a waiver as to future permit actions at any time by sending the Director written notice of termination.

§ 233.52 Program reporting.

(a) The starting date for the annual period to be covered by reports shall be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13.)

(b) The Director shall submit to the Regional Administrator within 90 days after completion of the annual period, a draft annual report evaluating the State's administration of its program identifying problems the State has encountered in the administration of its program and recommendations for resolving these problems. Items that shall be addressed in the annual report include an assessment of the cumulative impacts of the State's permit program on the integrity of the State regulated waters; identification of areas of particular concern and/or interest within the State; the number and nature of individual and general permits issued, modified, and denied; number of violations identified and number and nature of enforcement actions taken; number of suspected unauthorized activities reported and nature of action taken; an estimate of extent of activities regulated by general permits; and the number of permit applications received but not yet processed.

(c) The State shall make the draft annual report available for public inspection.

(d) Within 60 days of receipt of the draft annual report, the Regional Administrator will complete review of the draft report and transmit comments, questions, and/or requests for additional evaluation and/or information to the Director.

(e) Within 30 days of receipt of the Regional Administrator's comments, the Director will finalize the annual report, incorporating and/or responding to the Regional Administrator's comments, and transmit the final report to the Regional Administrator.

(f) Upon acceptance of the annual report, the Regional Administrator shall publish notice of availability of the final annual report.

§ 233.53 Withdrawal of program approval.

(a) A State with a program approved under this part may voluntarily transfer program responsibilities required by Federal law to the Secretary by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator and the Secretary 180 days notice of the proposed transfer. The State shall also submit a plan for the orderly transfer of all relevant program information not in the possession of the Secretary (such as permits, permit files, reports, permit applications) which are necessary for the Secretary to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator and the Secretary shall evaluate the State's transfer plan and shall identify for the State any additional information needed by the Federal government for program administration.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of transfer in the FEDERAL REGISTER and in a sufficient number of the largest newspapers in the State to provide statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA, Corps and State mailing lists.

(b) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) When the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed, or to implement alternative enforcement methods approved by the Administrator; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 233.13.

(c) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program:

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on the Administrator's initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in subsection (b) of this section. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal review of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing, shall specify the allegations against the State which are to be considered at the hearing, and shall be published in the FEDERAL REGISTER. Within 30 days after publication of the Administrator's order in the FEDERAL REGISTER, the State shall admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program shall have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definition of *Administrative Law Judge*, *Hearing Clerk*, and *Presiding Officer* in 40 CFR 22.03 apply in addition to the following:

(i) *Party* means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) *Person* means the Agency, the State and any individual or organization having an interest in the subject matter of the proceedings.

(iii) *Petitioner* means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* (i) The following provisions of 40 CFR Part 22 [Consolidated Rules of Practice] are applicable to proceedings under this paragraph:

(A) Section 22.02—(use of number/gender);

(B) Section 22.04—(authorities of Presiding Officer);

(C) Section 22.06—(filing/service of rulings and orders);

(D) Section 22.09—(examination of filed documents);

(E) Section 22.19 (a), (b) and (c)—(prehearing conference);

(F) Section 22.22—(evidence);

(G) Section 22.23—(objections/offers of proof);

(H) Section 22.25—(filing the transcript; and

(I) Section 22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) Computation and extension of time.

(*1*) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(*2*) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may

grant an extension of time for the filing of any pleading, document, or motion (*i*) upon timely motion of a party to the proceeding, for good cause shown and after consideration of prejudice to other parties, or (*ii*) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(*3*) The time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator.

(B) Ex parte discussion of proceeding. At no time after the issuance of the order commencing proceedings shall the Administrator, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decisions on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) Intervention—(*1*) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (b)(3)(ii)(C)(*3*) of this section, within ten (10) days after service of the motion for leave to intervene.

(*2*) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is published in the FEDERAL REGISTER.

(*3*) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (*i*) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (*ii*) the movant will be adversely affected by a final order; and (*iii*) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(*4*) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(*D*) Motions—(*1*) *General.* All motions, except those made orally on the record during a hearing, shall (*i*) be in writing; (*ii*) state the grounds therefore with particularity; (*iii*) set forth the relief or order sought; and (*iv*) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(*2*) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or

legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(*3*) *Decision*. The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(*4*) *Record of proceedings*. (*i*) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(*ii*) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 1200 Pennsylvania Ave., NW., Washington, DC 20460;

(*iii*) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involve matters of substance;

(*iv*) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(*v*) A copy of each such submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(*vi*) Every submission shall be accompanied by acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service; and

(*vii*) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(*5*) *Participation by a person not a party*. A person who is not a party may, in the discretion of the Presiding Officer, be permitted to make a limited appearance by making an oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(*6*) *Rights of parties*. (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and prehearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision*. (i) Within 30 days after the filing of proposed findings and conclusions and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties, and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator*. (i) Within 60 days after certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the Act and this part, his decision shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the Act and regulations, he shall list the

deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the state fails to take appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S. 704.

(d) Withdrawal of authorization under this section and the Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions taken by the State prior to withdrawal.

[53 FR 20776, June 1, 1988, as amended at 57 FR 5346, Feb. 13, 1992]

Subpart G—Eligible Indian Tribes

SOURCE: 58 FR 8183, Feb. 11, 1993, unless otherwise noted.

§ 233.60 Requirements for eligibility.

Section 518(e) of the CWA, 33 U.S.C. 1378(e), authorizes the Administrator to treat an Indian Tribe as eligible to apply for the 404 permit program under section 404(g)(1) if it meets the following criteria:

(a) The Indian Tribe is recognized by the Secretary of the Interior.

(b) The Indian Tribe has a governing body carrying out substantial governmental duties and powers.

(c) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the Untied States in trust for the Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction an alienation, or otherwise within the borders of the Indian reservation.

(d) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised, in a manner consistent with the terms and purposes of the Act and applicable regulations, of an effective section 404 dredge and fill permit program.

[58 FR 8183, Feb. 11, 1993, as amended at 59 FR 64345, Dec. 14, 1994]

§ 233.61 Determination of Tribal eligibility.

An Indian Tribe may apply to the Regional Administrator for a determination that it meets the statutory criteria which authorize EPA to treat the Tribe in a manner similar to that in which it treats a State, for purposes of the section 404 program. The application shall be concise and describe how the Indian Tribe will meet each of the requirements of § 233.60. The application should include the following information:

(a) A statement that the Tribe is recognized by the Secretary of the Interior.

(b) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. This Statement should:

(1) Describe the form of the Tribal government.

(2) Describe the types of governmental functions currently performed by the Tribal governing body, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(3) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(c)(1) A map or legal description of the area over which the Indian Tribe asserts regulatory authority pursuant to section 518(e)(2) of the CWA and § 233.60(c);

(2) A statement by the Tribal Attorney General (or equivalent official) which describes the basis for the Tribe's assertion under section 518(e)(2) (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as Tribal constitutions, bylaws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority;

(d) A narrative statement describing the capability of the Indian Tribe to administer an effective 404 permit program. The Statement may include:

(1) A description of the Indian Tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self Determination & Education Act (25 U.S.C. 450 *et seq.*), The Indian Mineral Development Act (25 U.S.C. 2101 *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a).

(2) A list of existing environmental or public health programs administered by the Tribal governing body, and a copy of related Tribal laws, regulations, and policies;

(3) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government.

(4) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and administering a section 404 dredge and fill permit program or plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A description of the technical and administrative abilities of the staff to administer and manage an effective, environmentally sound 404 dredge and fill permit program.

(e) The Administrator may, at his discretion, request further documentation necessary to support a Tribal application.

(f) If the Administrator has previously determined that a Tribe has met the requirements for eligibility or for ''treatment as a State'' for programs authorized under the Safe Drinking Water Act or the Clean Water Act, then that Tribe need only provide additional information unique to the particular statute or program for which the Tribe is seeking additional authorization.

(Approved by the Office of Management and Budget under control number 2040–0140)

[58 FR 8183, Feb. 11, 1993, as amended at 59 FR 64345, Dec. 14, 1994]

§ 233.62 Procedures for processing an Indian Tribe's application.

(a) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to § 233.61 in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(b) The Regional Administrator shall follow the procedures described in § 233.15 in processing a Tribe's request to assume the 404 dredge and fill permit program.

[58 FR 8183, Feb. 11, 1993, as amended at 59 FR 64346, Dec. 14, 1994]

Subpart H—Approved State Programs

§ 233.70 Michigan.

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in Michigan that are not presently used, or susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the Michigan Department of Natural Resources, approved by EPA, pursuant to section 404 of the CWA. Notice of this approval

was published in the FEDERAL REGISTER on October 2, 1984; the effective date of this program is October 16, 1984. This program consists of the following elements, as submitted to EPA in the State's program application.

(a) *Incorporation by reference.* The requirements set forth in the State statutes and regulations cited in this paragraph are hereby incorporated by reference and made a part of the applicable 404 Program under the CWA for the State of Michigan. This incorporation by reference was approved by the Director of the Federal Register on October 16, 1984.

(1) The Great Lakes Submerged Lands Act, MCL 322.701 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.

(2) The Water Resources Commission Act, MCL 323.1 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.

(3) The Goemaere-Anderson Wetland Protection Act, MCL 281.701 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.

(4) The Inland Lakes and Stream Act, MCL 281.951 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.

(5) The Michigan Administrative Procedures Act of 1969, MCL 24–201 *et seq.*

(6) An act concerning the Erection of Dams, MCL 281.131 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.

(7) R 281.811 through R 281.819 inclusive, R 281.821, R 281.823, R 281.824, R 281.832 through R 281.839 inclusive, and R 281.841 through R 281.845 inclusive of the Michigan Administrative Code (1979 ed., 1982 supp.).

(b) *Other Laws.* The following statutes and regulations, although not incorporated by reference, also are part of the approved State-administered program:

(1) Administrative Procedures Act, MCLA 24.201 *et seq.*

(2) Freedom of Information Act, MCLA 15.231 *et seq.*

(3) Open Meetings Act, MCLA 15.261 *et seq.*

(4) Michigan Environmental Protection Act, MCLA 691.1201 *et seq.*

(c) *Memoranda of Agreement.* (1) The Memorandum of Agreement between EPA Region V and the Michigan Department of Natural resources, signed by the EPA Region V Administrator on December 9, 1983.

(2) The Memorandum of Agreement between the U.S. Army Corps of Engineers and the Michigan Department of Natural Resources, signed by the Commander, North Central Division, on March 27, 1984.

(d) *Statement of Legal Authority.* (1) ''Attorney General Certification section 404/State of Michigan'', signed by Attorney General of Michigan, as submitted with the request for approval of ''The State of Michigan 404 Program'', October 26, 1983.

(e) The Program description and any other materials submitted as part of the original application or supplements thereto.

(33 U.S.C. 13344, CWA 404)

[49 FR 38948, Oct. 2, 1984. Redesignated at 53 FR 20776, June 6, 1988. Redesignated at 58 FR 8183, Feb. 11, 1993]

§ 233.71 New Jersey.

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in New Jersey that are not presently used, or susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the New Jersey Department of Environmental Protection and Energy, approved by EPA, pursuant to section 404 of the CWA. The program becomes effective March 2, 1994. This program consists of the following elements, as submitted to EPA in the State's program application:

(a) *Incorporation by reference.* The requirements set forth in the State statutes and regulations cited in paragraph (b) of this section are hereby incorporated by reference and made a part of the applicable 404 Program under the CWA for the State of New Jersey, for incorporation by reference by the Director of the Federal Register in accordance with 552(a) and 1 CFR part 51. Material is incorporated as it exists at 1 p.m. on March 2, 1994 and notice of any change in the material will be published in the FEDERAL REGISTER.

(b) Copies of materials incorporated by reference may be inspected at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal__register/code__of__federal__regulations/ibr__locations.html*. Copies of materials incorporated by reference may be obtained or inspected at the EPA UST Docket, located at 1235 Jefferson Davis Highway, First Floor , Arlington, VA 22202 (telephone number: 703–603–9231), or send mail to Mail Code 5305G, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and at the Library of the Region 2 Regional Office, Federal Office Building, 26 Federal Plaza, New York, NY 10278.

(1) New Jersey Statutory Requirements Applicable to the Freshwater Wetlands Program, 1994.

(2) New Jersey Regulatory Requirements Applicable to the Freshwater Wetlands Program, 1994.

(c) *Other laws*. The following statutes and regulations, although not incorporated by reference, also are part of the approved State-administered program:

(1) Administrative Procedure Act, N.J.S.A. 52:14B–1 *et seq*.

(2) New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1–1.1 *et seq*.

(3) Open Public Meetings Act, N.J.S.A. 10:4–6 *et seq*.

(4) Examination and Copies of Public Records, N.J.S.A. 47:1A–1 *et seq*.

(5) Environmental Rights Act, N.J.S.A. 2A:35A–1 *et seq*.

(6) Department of Environmental Protection (and Energy), N.J.S.A. 13:1D–1 *et seq*.

(7) Water Pollution Control Act, N.J.S.A. 58:10A–1 *et seq*.

(d) *Memoranda of agreement*. The following memoranda of agreement, although not incorporated by reference also are part of the approved State administered program:

(1) The Memorandum of Agreement between EPA Region II and the New Jersey Department of Environmental Protection and Energy, signed by the EPA Region II Acting Regional Administrator on June 15, 1993.

(2) The Memorandum of Agreement between the U.S. Army Corps of Engineers and the New Jersey Department of Environmental Protection and Energy, signed by the Division Engineer on March 4, 1993.

(3) The Memorandum of Agreement between EPA Region II, the New Jersey Department of Environmental Protection and Energy, and the U.S. Fish and Wildlife Service, signed by all parties on December 22, 1993.

(e) *Statement of legal authority*. The following documents, although not incorporated by reference, also are part of the approved State administered program:

(1) Attorney General's Statement, signed by the Attorney General of New Jersey, as submitted with the request for approval of The State of New Jersey's 404 Program.

(2) The program description and any other materials submitted as part of the original application or supplements thereto.

[59 FR 9933, Mar. 2, 1994, as amended at 65 FR 47325, Aug. 2, 2000; 69 FR 18801, Apr. 9, 2004]

PART 238—DEGRADABLE PLASTIC RING CARRIERS

Subpart A—General Provisions

Sec.

Subpart B—Requirement

AUTHORITY: 42 U.S.C. 6914b–1.

SOURCE: 59 FR 9870, Mar. 1, 1994, unless otherwise noted.

Subpart A—General Provisions

§ 238.10 Purpose and applicability.

The purpose of this part is to require that plastic ring carriers be made of degradable materials as described in §§ 238.20 and 238.30. The requirements of this part apply to all processors and importers of plastic ring carriers in the United States as defined in § 238.20.

§ 238.20 Definitions.

For the purpose of this part:

Percent elongation at break means the percent increase in length of the plastic material caused by a tensile load. Percent elongation at break shall be calculated by dividing the extension at the moment of rupture of the specimen by the initial gage length of the specimen and multiplying by 100.

Processor means the persons or entities that produce ring carriers ready for use as beverage carriers.

Ring carrier means any plastic ring carrier device that contains at least one hole greater than 1¾ inches in diameter which is made, used, or designed for the purpose of packaging, transporting, or carrying multipackaged cans or bottles.

Subpart B—Requirement

§ 238.30 Requirement.

(a) No processor or person shall manufacture or import, in bulk, ring carriers intended for use in the United States unless they are designed and manufactured so that the ring carriers degrade to the point of 5 percent elongation at break, when tested in accordance with ASTM D–3826–91, ''Standard Practice for Determining Degradation End Point in Degradable Polyolefins Using a Tensile Test'', after the ring carrier is exposed to, either:

(1) 250 light-hours of UV in accordance with ASTM D–5208–91,'' Standard Practice for Operating Fluorescent Ultraviolet (UV) and Condensation Apparatus for Exposure of Photodegradable Plastics'', using cycle A; or

(2) 35 days, during June and July, to marine conditions in a location below the latitude 26 degrees North, in continental United States waters.

(b) The incorporation by reference of ASTM D–3826–91, ''Standard Practice for Determining Degradation End Point in Degradable Polyolefins Using a Tensile Test'', and ASTM D–5208–91, ''Standard Practice for Operating Fluorescent Ultraviolet (UV) and Condensation Apparatus for Exposure of Photodegradable Plastics,'' was approved by the director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the American Society of Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the Resource Conservation and Recovery Act (RCRA) Docket Information Center, (5305), U.S. Environmental Protection Agency Headquarters, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. These materials are incorporated as they exist on the date of the approval and notice of any change in these materials will be published in the FEDERAL REGISTER.

[59 FR 9870, Mar. 1, 1994, as amended at 65 FR 47325, Aug. 2, 2000; 69 FR 18803, Apr. 9, 2004]