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Department of Defense

Department of the Army, Corps of
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33 CFR Part 323

Environmental Protection Agency

40 CFR Part 232
Further Revisions to the Clean Water Act
Regulatory Definition of "Discharge of
Dredged Material"; Proposed Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 323

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 232

[FRL-6852-1]

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material"

AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are publishing a proposed rule that would amend our Clean Water Act (CWA) section 404 regulations defining the term "discharge of dredged material." Today's proposal is intended to identify types of activities that are likely to result in a discharge of dredged material subject to CWA section 404. The proposal would enhance protection of the Nation's aquatic resources, including wetlands, by amending the regulations to establish a rebuttable presumption that mechanized landclearing, ditching, channelization,

in-stream mining, or other mechanized excavation activity in waters of the United States result in more than incidental fallback, and thus involve a regulable discharge of dredged material.

DATES: Written comments must be submitted by October 16, 2000.

ADDRESSES: Written comments and enclosures should be mailed or hand-delivered to: Office of the Chief of Engineers, ATTN CECW-OR (3 F73), Further Revisions to Definition of Discharge of Dredged Material, 441 G Street, NW., Washington, DC 20314-1000. Comments may also be submitted electronically to: CECWOR@HQ02.USACE.Army.Mil.

Electronic comments must be submitted as a Word Perfect, Word, or ASCII file, and avoid the use of special characters or any form of encryption.

We request that commenters submit any references cited in their comments. We also request that commenters submit an original and 2 copies of their written comments and enclosures. Commenters that want receipt of their comments acknowledged should include a self-addressed, stamped envelope. All comments must be postmarked, delivered by hand, or provided by e-mail. No facsimiles (faxes) will be accepted.

A copy of the supporting documents for this proposed rule is available for review at the U.S. Army Corps of Engineers, located at 441 G Street, NW., Room 3F73, Washington, DC 20314-1000. For access to docket materials,

call (202) 761-4598 between 9 a.m. and 3:30 p.m. for an appointment.

FOR FURTHER INFORMATION CONTACT: For information on the proposed rule, contact either Mr. Mike Smith, U.S. Army Corps of Engineers, ATTN CECW-OR (3F73), 441 G Street, NW., Washington, DC 20314-1000, phone: (202) 761-4598, or Mr. John Lishman, U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds (4502F), 1200 Pennsylvania Avenue N.W., Washington, DC 20460, phone: (202) 260-9180.

SUPPLEMENTARY INFORMATION:

I. Potentially Regulated Entities

Persons or entities that discharge material dredged or excavated from waters of the U.S. could be regulated by today's proposed rule. The CWA generally prohibits the discharge of pollutants into waters of the U.S. without a permit issued by EPA or a State approved by EPA under section 402 of the Act, or, in the case of dredged or fill material, by the Corps or an approved State under section 404 of the Act. Today's proposal addresses the CWA section 404 program's definition of "discharge of dredged material," which is important for determining whether a particular discharge is subject to regulation under CWA section 404. Today's proposal identifies types of activities that are likely to result in a discharge of dredged material subject to CWA section 404. Examples of entities potentially regulated include:

| Category | Examples of potentially regulated entities |
|--|--|
| State/Tribal governments or instrumentalities | State/Tribal agencies or instrumentalities that discharge dredged material into waters of the U.S. |
| Local governments or instrumentalities | Local governments or instrumentalities that discharge dredged material into waters of the U.S. |
| Federal government agencies or instrumentalities | Federal government agencies or instrumentalities that discharge dredged material into waters of the U.S. |
| Industrial, commercial, or agricultural entities | Industrial, commercial, or agricultural entities that discharge dredged material into waters of the U.S. |
| Land developers and landowners | Land developers and landowners that discharge dredged material into waters of the U.S. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to be regulated by this action. This table lists the types of entities that we are now aware of that could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization or its activities are regulated by this action, you should carefully examine EPA's applicability criteria in section 230.2 of Title 40 of the Code of Federal

Regulations, the Corps regulations at part 323 of Title 33 of the Code of Federal Regulations, and the preamble discussion in Section III of today's proposal. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Plain Language

In compliance with President Clinton's June 1, 1998, Executive

Memorandum on Plain Language in government writing, this preamble is written using plain language. Thus, the use of "we" in this action refers to EPA and the U.S. Army Corps of Engineers (Corps), and the use of "you" refers to the reader.

B. Litigation Involving Previous Rulemaking

Section 404 of the CWA authorizes the Corps (or a State with an approved section 404 permitting program) to issue permits for the discharge of dredged or fill material into waters of the U.S. Two

States (New Jersey and Michigan) have assumed the CWA section 404 permitting program. On August 25, 1993 (58 FR 45008), we issued a regulation (the "Tulloch rule") that defined the term "discharge of dredged material" as including "any addition, including any redeposit, 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 that destroys or degrades waters of the United States." The American Mining Congress and several other trade associations challenged the revised definition of the term "discharge of dredged material," and on January 23, 1997, the U.S. District Court for the District of Columbia ruled that the regulation exceeded our authority under the CWA because it impermissibly regulated "incidental fallback" of dredged material and enjoined us from applying or enforcing the regulation. That ruling was affirmed on June 19, 1998, by the U.S. Court of Appeals for the District of Columbia Circuit. *American Mining Congress v. United States Army Corps of Engineers*, 951 F.Supp. 267 (D.D.C. 1997) ("AMC"); *aff'd sub nom. National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1339 (D.C.Cir. 1998) ("NMA"). Because that decision addresses the definition of the "discharge of dredged material," it does not affect, nor would today's proposal alter, the requirements governing discharges of fill material.

The NMA court described incidental fallback as returning "* * * dredged material virtually to the spot from which it came" (145 F.3d at 1403), as well as occurring "when redeposit takes place in substantially the same spot as the initial removal." 145 F.3d at 1401. The court concluded that incidental fallback is not an "addition" of a pollutant, and that, therefore, our assertion of authority to regulate any redeposit of dredged material exceeded our authority under the CWA: "We hold only that by asserting jurisdiction over 'any redeposit,' including incidental fallback, the Tulloch rule outruns the Corps's statutory authority." 145 F.3d at 1405 (emphasis in original).

Information from our District and Regional offices and the States, included in the administrative record, indicates that since the District Court decision, upwards of 20,000 acres of wetlands were subject to ditching and more than 150 miles of streams channelized without undergoing section 404 environmental review or mitigation. Losses on this scale carry the potential

for increased flooding or runoff and harm to downstream property, pollution of streams and rivers, degradation of water quality, and loss of aquatic habitat. In comparison, wetlands activities taking place under section 404 permitting are subject to careful review in order to avoid and minimize impacts, and unavoidable losses are subject to mitigation in order to compensate for the loss of wetlands functions and values. In fiscal year 1999, approximately 21,500 acres of permitted wetlands losses took place, but these were offset by approximately 46,000 acres of compensatory mitigation.

The losses due to ditching and stream channelization reflect best available estimates using information from EPA Regional offices, Corps District Offices, and the States. Given that the activities causing such losses take place without review under the CWA section 404 permit program and are not systematically reported or tracked, we believe that these numbers are likely to be under-estimates. We invite the public to submit further relevant information, which should be sent to the address specified in the ADDRESSES section of this preamble.

C. Rulemaking To Respond to NMA Decision

On May 10, 1999, we issued a final rule modifying our definition of "discharge of dredged material" in order to respond to the Court of Appeals' holding in NMA, and to ensure compliance with the District Court's injunction (64 FR 25120). That rule made those changes necessary to conform the regulations to the Court's decision, primarily by modifying the definition of "discharge of dredged material" to expressly exclude regulation of "incidental fallback." As explained in the preamble to that rulemaking, our determination of whether a particular redeposit of dredged material in waters of the U.S. requires a section 404 permit would be done on a case-by-case basis, consistent with our CWA authorities and governing case law.

The preamble to our May 10, 1999, rulemaking stated that we would be undertaking additional notice and comment rulemaking in furtherance of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The NMA Court did not find that all redeposits are unregulable, and recognized that redeposits at various distances from the point of removal are properly the subject of regulation under the CWA. The Court also noted that the CWA "sets out no bright line between

incidental fallback on the one hand and regulable redeposits on the other" and that "a reasoned attempt to draw such a line would merit considerable deference." (145 F.3d at 1405).

Since the NMA decision, there has been confusion around the country as to what activities are likely to result in regulable discharges of dredged material. Today's proposal would establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. will result in regulable discharges of dredged material. Based on our experience with dredging and excavation activities, including the administrative record underlying the Tulloch rule, and as explained further in section III.B. of today's preamble, the nature of these activities and the types of equipment used will by their very nature produce discharges of dredged material unless specialized and sophisticated techniques and equipment are used to ensure that only incidental fallback will result.

The agencies are concerned that without this additional rulemaking, unregulated discharges consisting of more than incidental fallback may continue to occur and result in large-scale destruction of wetlands and degradation of many miles of streams and other waters of the U.S. Such wetlands loss and water body degradation have the potential to result in increased flooding or runoff, harm to downstream people and property, pollution of lakes, rivers and streams, destruction of commercial fisheries, closures of shellfish beds, diminution and degradation of drinking water supplies, and loss of wildlife habitat. This proposed rulemaking will assist in implementing the CWA's express mandate to regulate the discharge of dredged material and to serve Congress's intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This proposal also will help in achieving greater consistency in the application of section 404 of the CWA.

D. Overview of Relevant Case Law

As the NMA Court and other judicial decisions recognize, the redeposit of dredged material "some distance" from the point of removal—including the distance from a ditch to the edge of a ditch—constitutes a regulable redeposit. NMA, 145 F.3d at 1407 (redeposit at "some distance" from the point of removal is within the "pre-Tulloch core"); *United States v. Deaton*, No. 98-2256 (4th Cir. 2000) slip op. at 6-10

(upholding regulation of sidecasting); *United States v. M.C.C. of Florida*, 722 F.2d 1501 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part on remand, 848 F.2d 1133 (11th Cir. 1988) (redeposit of river bottom sediments on adjacent sea grass beds is an "addition").

Indeed, because dredged material by definition is material that is dredged or excavated from waters of the U.S. (see, 33 CFR 323.2(c); 40 CFR 232.2), the discharge of dredged material is by its very nature a redeposit of such material. As the Fifth Circuit observed in *Avoyelles*: "No one has argued here that the materials must come from an external source in order to constitute a discharge necessitating a Section 404 permit, nor would we expect them to, since Section 404 refers to 'dredged' or 'fill' material. * * * '[D]redged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." 715 F.2d at 924 n. 43. See also, *Deaton*, at 12. Likewise, *Avoyelles* recognized with respect to mechanized landclearing that "the term 'discharge' covers the redepositing of materials taken from the wetlands" *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 at 923 (5th Cir. 1983); and for backfilling of trenches with the excavated material (*United States v. Mango*, 997 F. Supp. 264, 285 (N.D.N.Y. 1998), affirmed in part, reversed in part on other grounds, 199 F.3d 85 (2d Cir. 1999); *Iroquois Gas Transmission System v. FERC*, 145 F.3d 398, 402 (2nd Cir. 1998); see, *Slinger Drainage Inc.*, CWA Appeal No. 98-10 (EPA Environmental Appeals Board (EAB) decision holding that backfilling by a Hoes trenching machine is a regulable discharge of dredged material, not incidental fallback); see also, *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of minerals is an "addition of a pollutant" under the CWA subject to EPA's section 402 regulatory authority).

Courts have similarly recognized that sidecasting (the piling of excavated dirt on the edge of a ditch or elsewhere in a wetland or other water of the U.S.) has long been a discharge regulated under CWA section 404. *NMA*, 145 F.3d at 1407 (D.C. Cir. 1998) (noting that the Corps has always regulated "sidecasting"); see also, 58 FR 45,008, 45,013 (Aug. 25, 1993) (noting that

sidecasting has "always been regulated under Section 404.").

The most recent judicial decision reaffirming that sidecasting is a regulable discharge of a pollutant subject to CWA section 404 is *United States v. Deaton*, No. 98-2256 (4th Cir. 2000). That case involved use of a backhoe, a front-end track loader, and a bulldozer to dig a 1,240 foot ditch that intersected non-tidal wetlands in an effort to drain them, with the contractor piling the excavated dirt on either side of the ditch. The government filed a civil complaint alleging that the Deatons had violated the CWA by discharging the material excavated from the ditch into a wetland without a CWA section 404 permit.

Subsequent to the filing of that complaint, however, the Fourth Circuit issued a decision in another case, *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), in which a divided panel considered, among other issues, whether sidecasting was a regulable discharge. One judge concluded that sidecasting did not constitute the discharge of a pollutant under the CWA, one judge concluded that it did, and one judge concurred in the judgment without reaching the sidecasting question. After the *Wilson* decision was issued, the District Court in the *Deaton* case entered an order on June 23, 1998, noting that although it agreed with the judge in *Wilson* who concluded that sidecasting is a regulable discharge (see *Wilson*, 133 F.3d at 266-75 (op. of Payne, J.)), the Court predicted that the Fourth Circuit would adopt the reasoning of the judge who concluded that it is not (see *Wilson*, 133 F.3d at 258-60 (op. of Niemeyer, J.)). Following an order granting summary judgment for the Deatons, the government appealed to the Fourth Circuit.

On appeal, a unanimous panel of the Fourth Circuit reversed the District Court decision, holding that sidecasting is the discharge of a pollutant that violates the CWA when conducted without a permit. In the *Deaton* case, the defendants sought to use the *NMA* decision to argue that "[b]ecause sidecasting results in no net increase in the amount of material present in the wetland * * * it does not involve the 'addition' (or discharge) of a pollutant." *Deaton* at 12. The Fourth Circuit, however, specifically rejected this argument, determining that:

Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity

transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a type of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before. See 33 U.S.C. sections 1362 (6), (12). Thus, * * * sidecasting adds a pollutant that was not present before. *Deaton* at 12-13.

In reaching this conclusion, the Fourth Circuit also found that the adverse effects of redeposits:

[a]re no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same. Surely Congress would not have used the word "addition" (in "addition of any pollutant") to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland. In reaching this conclusion, our understanding of the word "addition" is the same as that of nearly every other circuit to consider the question. *Deaton* at 16 (citations omitted).

Backfilling, which involves the placement of a substantial amount of excavated material back into the trench, ditch or hole from which it was excavated, has also been found to be a regulable discharge by the courts. For example, backfilling occurs when a trench is dug in a wetland and the dredged material is then pushed back into the trench from which it came. Such substantial redeposits of dredged material into the removal site have been found to constitute regulable discharges under CWA section 404. *United States v. Mango*, 997 F. Supp. 264, 285 (N.D.N.Y. 1998), affirmed in part, reversed in part on other grounds, 199 F.3d 85 (2d Cir. 1999) (backfilling into ditch is properly subject to section 404); see, *Iroquois Gas Transmission System v. FERC*, 145 F.3d 398 at 402 (2nd Cir. 1998); see also, *Slinger Drainage Inc.*, CWA Appeal No. 98-10 (EPA EAB decision holding that near simultaneous cutting of trench and backfilling by a Hoes trenching machine is a regulable discharge of dredged material, and not incidental fallback). Similarly, when a bulldozer blade pushes wetland soils and vegetation and redeposits these materials into piles in a water of the U.S., a regulable discharge occurs. *Avoyelles*, supra. Such a discharge may

result even when material is temporarily stockpiled. *United States v. Bay-Houston Towing Company*, No. 98-73252 (E.D. Mich. 2000) at 8-9 (peat harvesting that involves spreading of sidecast bog material for future harvest for a period of time varying from a few hours to a few days or more is more than mere "incidental fallback"); see also, *United States v. Bay-Houston Towing Company*, 33 F.Supp.2d 596, 606-607 (E.D. Mich. 1999) (denial of motion for summary judgment).

III. Today's Proposed Rule

A. Summary

In order to enhance environmental protection and help ensure that regulable discharges are subject to section 404 in a manner consistent with the *NMA* and other judicial decisions, we have undertaken today's proposed rulemaking. Today's proposed rule would modify our definition of "discharge of dredged material" by establishing a rebuttable presumption that regulable discharges result from certain types of activities in waters of the U.S. In particular, the proposal would apply the rebuttable presumption to mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S., including wetlands. This would be done by adding a new paragraph (2) to the definition of "discharge of dredged material" in the Corps' regulations at 33 CFR 323.2(d) and in the EPA regulations at 40 CFR 232.2.

In addition, today's proposal would remove existing paragraph 3(iii) from the Corps' regulations at 33 CFR 323.2(d) and the counterpart EPA regulation at 40 CFR 232.2. That paragraph contains a "grandfather" provision for certain activities to be completed by August 24, 1995, and further provides the grandfather provision may not extend beyond August 25, 1996. Because the provision is now outdated, it would be deleted by today's proposal.

B. Rebuttable Presumption of Discharge

We believe the proposed approach is reasonable because it recognizes that, as a general matter, the activities in a manner typically are conducted in a manner that results in the redeposit of dredged material that constitutes the addition of pollutants to waters of the U.S.. The CWA broadly prohibits the discharge, without a permit, of any pollutant into "navigable waters." See 33 U.S.C. 1311(a). The Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable

waters from any point source." 33 U.S.C. 1362(12). The definition of pollutant specifically includes "dredge spoil" that has been "discharged into water." 33 U.S.C. 1362(6). As the court in *Deaton* noted, "It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before. See 33 U.S.C. 1362(6), (12)." *Deaton*, at 12. "In deciding to classify dredged spoil as a pollutant, Congress determined that plain dirt, once excavated from waters of the U.S., could not be redeposited into those waters without causing harm to the environment." *Deaton*, at 13.

Activities that would be subject to the rebuttable presumption typically use mechanized equipment that redeposits dredged material in a manner and amount that is different from, or greater than, incidental fallback. For example, during mechanized landclearing, implements are scraped along the surface or pushed into the ground and then moved through the soil, usually by bulldozers or loaders. The machinery used in mechanized landclearing normally scrapes, picks up, moves, or otherwise displaces debris and soil. Brushrakes, rootrakes, chunkrakes, disc harrows, root plows, rippers, bulldozer plows, and many types of shearing blades are examples of the type of equipment used in mechanized landclearing. Brushrake tines scrape below the ground level to gather and stockpile slash and loose rock. Chunkrakes have bowl shaped blades frequently up to two feet or more in diameter, which cut into the ground and fluff the soil. Disc harrows knock down, chop and partially bury weeds, brush, and small saplings by using concave discs, two feet or more in diameter with sharp scalloped edges. Rootrakes remove roots and stumps by use of a fork-like blade pushed through the soil. Tractor-mounted shearing blades, which can weigh up to several thousand pounds, move large amounts of debris, soil, and roots when dragged along the surface of the ground. Rippers and deep plows are pulled along below the soil surface to break up hard pans or other stiff subsoil. The arm which attaches them to the bulldozer or loader also drags through the ground, moving soil aside. Where the disc, tine, or rake scrapes or penetrates the ground, soil is displaced in front of the machine and come to rest in a new location.

Use of equipment such as bulldozers and graders in mechanized landclearing typically moves substantial amounts of soil beyond the spot of removal and within waters of the U.S. For example, when a bulldozer is operated in a wetland, wetland soils are pushed along by the blade of the bulldozer and are redeposited at various points beyond the spot of removal. When mechanized equipment, such as graders or bulldozers, are used to level or grade a wetland, wetland soils are pushed by the blades and redeposited elsewhere in the wetland. These are regulable discharges of dredged material. *Avoyelles*, supra.

Other types of mechanized landclearing equipment can substantially disturb and relocate soil and sediments. Tree pushers and tree splitters, for instance, normally uproot trees and redistribute soil. A tree pusher uses a bar mounted to the front of a bulldozer or loader while a tree splitter uses a V-shaped blade which is usually about 18 to 20 feet in length. A tree pusher or tree splitter knocks the tree down and in so doing rips the roots out of the ground. Any roots remaining are then typically removed from the ground by the bulldozer's blade.

We also recognize that not all equipment used to remove trees disturbs root systems, or otherwise causes a discharge of dredged material. Some tree shears or tree pinchers, for example, cut vegetation above the ground while leaving the soils and roots intact, and, as recognized by the existing regulations (33 CFR 323.2(d)(2)(ii) and 40 CFR 232.2), this does not result in a discharge of dredged material.

During excavation, material in either a solid or semi-solid form is removed from the waters of the U.S., and, unless highly specialized techniques are used, is typically redeposited in areas of waters of the U.S. beyond the excavation site. Most ditching and channelization activities use mechanized equipment of some type such as backhoes, bulldozers, dippers, or bucket dredges. A backhoe, a hoe-type or pull-type shovel attached to the back of a front loader, shovels and then lifts soil or sediments from waters of the U.S. It is often used during the construction of ditches or for stream channelization projects. A dipper and bucket dredge operate at the end of a boom attached to a crane or other vehicle. Buckets are suspended from a cable and dippers are fixed directly to the boom. Typically a crane drops the bucket into the soil or through the water column to the bottom. The bucket is filled with soil or sediments and lifted from the water or off the ground and

dropped or sidecast on adjacent mounds or placed directly into vehicles and moved to another disposal site.

Bucket dredging for ditching and channelization projects typically is done with a deadline or other equipment of this kind. They operate by dropping the bucket into the soil or sediment and then dragging it through the soil or sediment until it is filled. In many stream channelization projects, bulldozers push sediments, including cobble, gravel, and sand, from a particular place in the stream to another location. The bulldozer blade is lowered into the bottom of the stream and moved forward, which pushes sediment to another location in the stream or to an upland area. Because of the soil movement and relocation of material, the use of bulldozers, deadlines, and backhoes, or other equipment of this kind will almost always result in discharges to waters of the U.S. For example, when a deadline or backhoe gathers dredged material, it displaces and redeposits soils and sediments to various distances from the initial excavation point. This type of displacement and redeposition also occurs as a bulldozer pushes sediments during a stream channelization project.

The mechanized equipment used for excavation and channelization activities typically results in suspension and distribution of material into the water column where it raises turbidity levels and may release contaminants into the water column. The result is that toxics, metals and other pollutants that were buried in sediment, held by anaerobic soils, or taken up by submerged aquatic vegetation, can be released and distributed in the water column and become available to fish and other aquatic life and degrade water quality. In addition, the dredged material suspended in the water column can be carried far downstream from the excavation point by river, stream, ditch, or wetland current before it settles out.

Wetlands perform a vital role in the hydrologic cycle by trapping sediment and toxic and nontoxic pollutants before discharging the water to rivers, streams or other water bodies. *Deaton* at 13; *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985) at 133–135; Office of Technology Assessment, U.S. Congress. 1984. *Wetlands: Their Use and Regulation*, at 48–50 (hereafter referred to as “OTA”). Over time, many of these pollutants decompose, degrade or are absorbed by wetland vegetation. *Deaton* at 13; OTA Report at 48–49. A number of conditions allow wetland soils to immobilize trace and toxic metals, including an anaerobic reducing environment, neutral pH levels, and the

presence of organic matter. W.J. Mitsch and J.G. Gosselink. 1986. *Wetlands*, at chapter 5. Gambrel, R.P. 1994. “Trace and Toxic Metals in Wetlands: A Review.” *Journal of Environmental Quality* 23: 883–891, 883. Anaerobic conditions occur when wetland soils are saturated by water. This is also true of lake, river, and stream bottoms. As available dissolved oxygen is consumed by microbial respiration in the soil, microbes use oxidized materials that offer alternate electron acceptors, such as nitrate, ferric iron, manganic manganese, and sulfate sulfur. This helps immobilize metals in wetland soils. Anaerobic bacterial action can also treat some toxics. For example, mercury can, under anaerobic conditions, be mediated in a wetland by sulfate reducing bacteria. C.H. Driscoll, J. Holsapple, C.L. Schofield and R. Munson. 1998. “The Chemistry and Transport of Mercury in a Small Wetland in the Adirondack Region of New York, USA.” *Biogeochemistry* 40: 137–146. (For an additional discussion of factors affecting bioavailability of contaminants in sediment, see, U.S. Army Corps of Engineers, Waterways Experiment Station. 1991.

Miscellaneous Paper D-91-2, Assessing Bioaccumulation in Aquatic Organisms Exposed to Contaminated Sediments).

Wetland plants help attenuate the flow of surface waters and cause metal-contaminated particles to settle into sediment. The rhizomes and roots of the plants stabilize the wetland bottom, helping to transform it into a sink for toxics and contaminated sediment. A.S. Mungur, R.B.E. Shutes, D.M. Revitt and M.A. House. 1995. “An Assessment of Metal Removal from Highway Runoff by a Natural Wetland.” *Water Science Technology* Vol. 32, No. 3, 169–175. Water soluble metals, in particular, are easily dissolved into water and are readily taken up by wetland vegetation. Gambrel at 884–885.

When a wetland system is disrupted by activities such as excavation and the dredged material is redeposited, the bonds that held toxics, heavy metals, and other pollutants can be broken, and pollutants can become mobile. “When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released.” *Deaton* at 13–14; OTA Report at 49 (“Natural or manmade alterations of the wetland caused by * * * dredging and the like, could mobilize large quantities of toxic materials.”) Using a backhoe to dig a ditch and redeposit dredged material in a wetland, for example, can resuspend pollutants, such as toxics and heavy metals, that

were held by the wetland soils in anaerobic conditions. Resuspending sediment creates turbidity, and suspended particles can settle out in new sites in the wetland or in downstream receiving waters. When sediment is resuspended it becomes biologically available again—fish and other organisms can ingest the sediment and heavy metals, toxics, pesticides, and other pollutants that were formerly trapped by the wetland. Pollutants that were formerly immobilized in wetland soils will be circulating in the food chain. Moreover, pollutants in sediment can become quite mobile when resuspended in water and break off from the sediment once the sediment is resuspended in water. U.S. Army Corps of Engineers, Waterways Experiment Station at 24–25.

The longer the sediment is resuspended in water, the greater the opportunity for formerly trapped pollutants, such as PCBs, to break away from the sediment and enter into the water column. F.A. DiGiano, C.T. Miller and J. Yoon. 1993. “Predicting Release of PCBs at Point of Dredging.” *Journal of Environmental Engineering* Vol. 119, No. 1 72–87, 86. The finer particles stay suspended in water much longer than heavier particles of sediment. In addition, such finer particles have a particular affinity for contaminants (e.g., toxics). U.S. Army Corps of Engineers, Waterways Experiment Station, supra, at 23. Ingestion of metals, toxics, pesticides, and other such pollutants can be extremely harmful to wildlife and humans, sometimes even in small concentrations. U.S. Environmental Protection Agency. 1998. *National Sediment Quality Survey* (EPA 823-R-97-006).

When excavation and redeposit of dredged material suspends toxics, metals, dirt and other pollutants in the water column, suspended pollutants can be carried downstream by river, stream, ditch, or wetland current. When dredged material is excavated and redeposited in a wetland, pollutants that were previously buried or covered over can become exposed. When exposed to waterflow from the wetland, the newly exposed pollutants may be carried down the ditch and transported to new receiving waters or to other parts of the wetland. Similarly, when lakes, rivers, or streams are excavated and dredged material redeposited, toxics, metals and other pollutants that were buried in sediment and held by anaerobic soils are released to the water column and become available to fish and other aquatic life. The suspension and distribution of toxics and other pollutants in the water column degrades

water quality. Increased turbidity can also harm aquatic life, smothering fish nurseries, mussels and benthic life and killing submerged aquatic vegetation. The current can carry suspended sediment and dissolved pollutants downstream. This is particularly true for smaller particles of sediment and dissolved chemicals and other pollutants.

Furthermore, when dredged material is sidecast, stockpiled, backfilled, or otherwise redeposited, the chemical bonds, that held pollutants in anaerobic wetland soils or lake, river, or stream bottoms, may be broken, releasing these pollutants. See, *Wilson*, 133 F.3d at 273-74 (op. of Payne, J.) (describing how sidecasting dredged material threatens to release pollutants contained in sub-surface soil). See also, *Gambrel* at 883-884. When soils become oxidized, pH levels become acidic, and many metals, particularly inorganic compounds, change to more mobile forms and may become bioavailable to aquatic organisms. In addition, sediment containing metal complexes with large molecular-weight organic material will also become more mobile as organic matter is lost over time while sitting in the sidecast or other redeposited pile of dredged material. See, *Gambrel* at 888. Furthermore, discharging dredged spoil into a wetland during excavation "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." 40 CFR 230.41(b).

When dredged material is redeposited, it is exposed to aerobic conditions, pH levels become acidic, microbial action changes, and, over time, its organic matter decomposes. In other words, the conditions which optimize the retention of trace and toxic metals by wetland soils—an anaerobic reducing environment, neutral pH levels, microbial action, and organic matter—are destroyed and toxics, heavy metals and other pollutants become available for transport. Thus, toxics, heavy metals, pesticides and other pollutants that were formerly trapped by wetland soils can become available to the aquatic environment.

Finally, the impacts resulting from redeposit of dredged material are not limited to contaminated material alone. "Indeed, several seemingly benign substances like rock, sand, cellar dirt, and biological materials are specifically designated as pollutants under the Clean Water Act. Congress had good reason to be concerned about the reintroduction of these materials into

the waters of the United States, including the wetlands that are a part of those waters." *Deaton* at 13 (citation omitted). "Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life." *Deaton* at 15. Such suspension and distribution of even clean material in the water column can adversely affect water quality and aquatic life due to increases in turbidity. U.S. Environmental Protection Agency, 1999. Protocol for Developing Sediment TMDLs, First Edition (EPA 841-B-99-004) at 2-1. Where currents are flowing, such as in streams and rivers, redeposited material can be transported downstream away from the point of excavation before settling on the bottom. Excavation and redeposit of material can also result in vertical redistribution of sediment layers by relocating underlying soil or sediments upwards to the top layer. This can produce polluting effects due to physical alteration of aquatic habitat, such as changes to the waterbody's substrate or its grain size distribution.

Persons proposing to conduct activities subject to today's proposal may rebut the presumption that a regulable discharge of dredged material would occur by showing that the activity is planned and conducted so as to result only in incidental fallback. As we discussed in the May 10, 1999, rulemaking, incidental fallback "returns dredged material virtually to the spot from which it came." *NMA*, 145 F.3d at 1403; see also, *NMA*, 145 F.3d at 1401 (incidental fallback occurs "when redeposit takes place in substantially the same spot as the initial removal);" see also, *AMC*, 951 F. Supp. at 270 (incidental fallback is "the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed.")

However, as we discussed in section II of today's preamble, the exclusion for incidental fallback does not alter the well-settled doctrine, recognized in *NMA*, that many redeposits of dredged material in waters of the U.S. constitute a discharge of dredged material and therefore require a section 404 permit. See, 145 F.3d at 1405, n. 6 (recognizing that "a redeposit could be an addition to [a] new location and thus a discharge"). Deciding whether the presumption of discharge is rebutted will involve an evaluation based on the particular facts of each case. Persons planning to engage in mechanized landclearing, ditching, channelization,

in-stream mining, or other mechanized excavation activity in waters of the U.S. who believe they can rebut the presumption that a regulable redeposit would occur should be prepared to show, if requested by the permitting authority, that any redeposits of dredged material in waters of the U.S. consist only of incidental fallback, and that no regulable discharges of dredged material have occurred. In evaluating such a claim, the permitting authority will consider the nature of the equipment and its method of operation and whether redeposited material is suspended in the water column so as to release contaminants or increase turbidity, as well as whether downstream transportation and relocation of redeposited dredged material results.

Section 404(f)(1) of the Act, added in 1977, exempts certain specified discharges from the section 404 permit requirement, even though they would typically be in the form of small volume redeposits. However, section 404(f)(2) further provides for their regulation when "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." The language of section 404(f)(2) and its legislative history show a Congressional concern that discharges incidental to the types of activities specified in section 404(f)(2) should not escape regulation under section 404. As a result, when a redeposit is incidental to the types of activities specified in section 404(f)(2), it will be subject to particularly careful scrutiny by the agencies.

Today's proposal would state our expectation that, absent a demonstration to the contrary, the activities addressed in the proposed rule typically will result in more than incidental fallback and thus result in regulable redeposits of dredged material. It would not, however, establish a new formal process or new record keeping requirements, and section 404 permitting and application requirements would continue to apply only to regulable discharges and not to incidental fallback. Current practice is to respond to requests for initial determinations regarding how or whether certain activities in waters of the U.S. are regulated. For example, interested parties may provide information to the Corps regarding the potential applicability of a nationwide permit in order to determine whether they should file an individual permit application. Parties also may provide the Corps

information regarding the potential applicability of the section 404(f) exemptions in order to determine whether they should file a permit application. Similarly, under today's proposal, project proponents could provide available information in advance to show the project is designed to result in only incidental fallback in order to determine if the presumption of a regulable discharge is rebutted. Such information might include field notes and still or video photography showing that the project as executed results only in incidental fallback.

In response to the *NMA* decision, we amended our regulations on May 10, 1999, to make clear that the term "discharge of dredged material" does not include "incidental fallback." This would continue to be the case under the proposal. Under the current regulations, the determination of whether an activity results in a regulable discharge of dredged material or non-regulable "incidental fallback" is made on a case-by-case basis. This also would continue to be the case under today's proposal. We expect the economic effects of today's proposal to be small. It would not alter or enlarge section 404 program jurisdiction and therefore would not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the proposed rule would identify what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Under the proposal, project proponents may rebut the presumption of discharge, if requested by the permitting authority, by demonstrating the activity was designed and conducted to avoid regulable discharges. They also may ask the permitting authority for an advance determination on whether the presumption of a regulable discharge is rebutted for their project. Because the proposal would not change program jurisdiction, continues to provide that incidental fallback is not subject to regulation, and does not establish new procedures or record keeping requirements, we believe that the economic effects of today's proposal would be small.

IV. Other Federal Statutory and Regulatory Authorities

Other relevant Federal statutory and regulatory authorities include section 10 of the Rivers and Harbors Act of 1899, as well as section 402 of the CWA. Those authorities are unaffected by the *NMA* decision, and nothing in today's

proposal is intended to alter their potential applicability to activities addressed by today's proposal.

Section 10 of the Rivers and Harbors Act generally requires a permit from the Corps "for structures and/or work in or affecting navigable waters of the United States." 33 CFR 322.3(a). "Navigable waters of the United States" generally consist of the territorial sea, tidal waters, other waters used (now or in the past), or reasonably susceptible to use, in carrying goods in interstate commerce (see 33 CFR part 329 for a complete definition of "navigable waters of the United States."). In contrast, the CWA's geographic reach extends to the maximum extent allowable under the Commerce Clause, reflecting a Congressional intent that it "be given the broadest possible constitutional interpretation." S. Rept. 1236, 92d Cong., 2d Sess. 144 (1972) (see 33 CFR 328.3 and 40 CFR 230.3(s) for a complete definition of waters of the U.S. which are subject to the CWA). However, because section 10 applies to structures or work in or affecting "navigable waters of the United States," activities such as ditching or channelization work in "navigable waters of the United States," or affecting their navigable capacity, is subject to regulation under section 10 of the Rivers and Harbors Act regardless of whether they result in a "discharge of dredged material." For further information on potential applicability of section 10 of the Rivers and Harbor Act, project proponents should contact their local Corps District office. Addresses and telephone numbers for Corps District offices can be obtained from the Corps Regulatory Homepage at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm>. If you do not have access to the Internet, telephone numbers for Corps District offices can be obtained by calling the National Wetlands helpline at 800-832-7828.

Storm water discharges resulting from construction activities are subject to regulation under the CWA section 402 (National Pollutant Discharge Elimination System or "NPDES") permitting program. On November 16, 1990, EPA promulgated "Phase I" storm water regulations (55 FR 47990) which require, among other things, NPDES permits for storm water discharges into a municipal separate storm water sewer system (MS4) or waters of the U.S. when associated with construction activity disturbing at least five acres of land. This requirement also applies to discharges from construction sites that are less than five acres if they are part of a larger common plan of development or sale disturbing a total of five acres or

greater. These Phase I requirements are currently in effect.

On December 8, 1999, EPA promulgated additional ("Phase II") revisions to the storm water permitting regulations (64 FR 68721) that, among other things, require an NPDES permit for storm water discharges into a MS4 or waters of the U.S. when associated with construction site activities disturbing land equal to or greater than one acre and less than five acres, unless waived by the NPDES permitting authority. Construction activity disturbing less than one acre would also require a permit if part of a larger common plan of development or sale disturbing a total of one acre or greater, or if individually designated for permit coverage by the NPDES permitting authority. NPDES permitting authorities may waive the Phase II construction activity requirements where little or no rainfall is expected during the period of construction or when analysis indicates that controls on construction site discharges are not needed to protect water quality. Waivers are not available for construction activity subject to the phase I requirements (e.g., disturbing five acres or greater). EPA expects the storm water permitting requirements for Phase II construction activity to be implemented through general permits similar to those in place for Phase I. NPDES permitting authorities will issue these general permits on or before December 9, 2002. Regulated construction operators must apply for permit coverage within 90 days of general permit issuance. Further information regarding the storm water permitting regulations may be obtained from EPA's website at <http://www.epa.gov/owm/sw/about/index.htm>.

V. Administrative Requirements

A. Paperwork Reduction Act

This action does not impose any new information collection burden or alter or establish new record keeping or reporting requirements. Thus, this action is not subject to the Paperwork Reduction Act.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

C. Executive Order 13132 (Federalism)

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires us to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, we may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or we consult with State and local officials early in the process of developing the proposed regulation. We also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule does not have federalism implications. As explained in section III, the proposal would not alter or enlarge section 404 program jurisdiction and therefore would not affect a discharger's (including State dischargers) obligation to obtain a section 404 permit for any discharge of

dredged material into waters of the U.S. Rather, the proposed rule would identify what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

D. Regulatory Flexibility Act (RFA) as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. As explained in section III, the proposal would not alter or enlarge section 404 program jurisdiction and therefore would not change any discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the proposed rule would identify what types of activities are likely to give rise to an obligation to obtain such a permit under the existing regulatory program. Moreover, we also do not anticipate that the information-sharing contemplated for seeking to rebut the presumption under today's proposal would result in significant costs.

We continue to be interested in the potential impacts of the rule on small entities and welcome comments on issues related to such impacts.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. As explained in section III, the proposal would not alter or enlarge section 404 program jurisdiction and therefore would not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the proposed rule would identify what

types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, we have determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

F. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs us to use voluntary consensus standards in our regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, we are not considering the use of any voluntary consensus standards. We welcome comments on this aspect of the proposed rulemaking and specifically, invite the public to identify potential applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

G. Executive Order 13045

Executive Order 13045, entitled Protection of Children From Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives that we considered.

This regulation is not subject to Executive Order 13045 because it is not an economically significant regulatory

action as defined by Executive Order 12866. As explained in section III, the proposal would not alter or enlarge section 404 program jurisdiction and therefore would not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the proposed rule would identify what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Furthermore, it does not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

H. Executive Order 13084

Under Executive Order 13084, we may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance cost incurred by the Tribal governments, or we consult with those governments. If we comply by consulting, Executive Order 13084 requires us to provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of our prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires us to develop an effective process permitting elected officials and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian Tribal governments, nor does it impose significant compliance costs on them. As explained in section III, the proposal would not alter or enlarge section 404 program jurisdiction and therefore would not affect a discharger's obligation to obtain a section 404 permit for any discharge of dredged material into waters of the U.S. Rather, the proposed rule would identify what types of activities are likely to give rise to an obligation to obtain such a permit under the definition of "discharge of dredged material" contained in our existing regulations. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

I. Plain Language

Executive Order 12866 and the President's memorandum of June 1, 1998, require Federal government agencies to write all rules in plain language. We invite your comments on ways to make this proposed rule easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rule clearly stated?
- Does the rule/preamble language contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule/preamble easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

J. Environmental Documentation

As required by the National Environmental Policy Act (NEPA), the Corps prepares appropriate environmental documentation for its activities affecting the quality of the human environment. The Corps has made a preliminary determination that today's proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment, and thus does not require the preparation of an Environmental Impact Statement (EIS). Among the reasons for this conclusion is the fact that the Corps prepares appropriate NEPA documents, when required, covering specific permit situations. The implementation of the procedures prescribed in this proposed regulation would not authorize anyone (e.g., any landowner or permit applicant) to perform any work involving regulated activities in waters of the U.S. without first seeking and obtaining an appropriate permit authorization from the Corps. Accordingly, the Corps expects to prepare an environmental assessment (EA) for the rule.

List of Subjects

33 CFR Part 323

Water pollution control, Waterways.

40 CFR Part 232

Environmental protection, Intergovernmental relations, Water pollution control.

Corps of Engineers

33 CFR Chapter II

Accordingly, as set forth in the preamble 33 CFR part 323 is proposed to be amended as set forth below:

PART 323—[AMENDED]

1. The authority citation for part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Amend § 323.2 as follows:

a. In paragraph (d)(1) introductory text, remove the words “paragraph (d)(2)” and add, in their place, the words “paragraph (d)(3)”.

b. Redesignate paragraphs (d)(2) through (d)(5) as paragraphs (d)(3) through (d)(6), respectively.

c. Add new paragraph (d)(2).

d. In newly redesignated paragraph (d)(4), in the first sentence of paragraph (d)(4)(i) remove each time they appear the words “paragraphs (d)(4) and (d)(5)” and add, in their place, the words “paragraph (d)(5) and (d)(6)”, remove paragraph (d)(4)(iii), and redesignate paragraph (d)(4)(iv) as new paragraph (d)(4)(iii).

The addition reads as follows:

§ 323.2 Definitions.

* * * * *

(d) * * *

(2) A discharge of dredged material shall be presumed to result from

mechanized landclearing, ditching, channelization, instream mining, or other mechanized excavation activity in waters of the United States. This presumption is rebutted if the party proposing such an activity demonstrates that only incidental fallback will result from its activity.

* * * * *

Dated: August 9, 2000.

Joseph W. Westphal,

*Assistant Secretary of the Army (Civil Works),
Department of the Army.*

Environmental Protection Agency

40 CFR Chapter I

Accordingly, as set forth in the preamble 40 CFR part 232 is proposed to be amended as set forth below:

PART 232—[AMENDED]

1. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Amend § 232.2 as follows:

a. In paragraph (1) introductory text of the definition of “Discharge of dredged material”, remove the words “paragraph (2)” and add, in their place, the words “paragraph (3)”.

b. In the definition of “Discharge of dredged material”, redesignate paragraphs (2) through (5) as paragraphs (3) through (6), respectively.

c. In the definition of “Discharge of dredged material”, add new paragraph (2).

d. In the first sentence of newly redesignated paragraph (4)(i) remove each time they appear the words “paragraphs (4) and (5)” and add, in their place, the words “paragraph (5) and (6)”, remove paragraph (4)(iii), and redesignate paragraph (4)(iv) as new paragraph (4)(iii).

The addition reads as follows:

§ 232.2 Definitions.

* * * * *

Discharge of dredged material * * *

(2) A discharge of dredged material shall be presumed to result from mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States. This presumption is rebutted if the party proposing such an activity demonstrates that only incidental fallback will result from its activity.

* * * * *

Dated: August 8, 2000.

Carol M. Browner,

Administrator, Environmental Protection Agency.

[FR Doc. 00-20792 Filed 8-15-00; 8:45 am]

BILLING CODE 6560-50-U