

(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.

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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

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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

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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

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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

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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.

232.1 Purpose and scope of this part.

232.2 Definitions.

232.3 Activities not requiring permits.

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.