

# 33 CFR Part 320

## General Regulatory Policies

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

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### Section 320.1 - Purpose and scope.

#### *(a) Regulatory approach of the Corps of Engineers.*

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

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

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

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

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

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

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

- (1) Dams or dikes in navigable waters of the United States ([Part 321](#));
- (2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States ([Part 322](#));
- (3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States ([Part 322](#));
- (4) Construction of artificial islands, installations, and other devices on the outer continental shelf ([Part 322](#));
- (5) Discharges of dredged or fill material into waters of the United States ([Part 323](#));
- (6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters ([Part 324](#)); and
- (7) Nationwide general permits for certain categories of activities (Part 330).

(c) **Forms of authorization.** DA permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of individual applications and general permits that authorize a category or categories of activities in specific geographical regions or nationwide. The term "general permit" as used in these regulations (33 CFR Parts 320-330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits which are issued by the Chief of Engineers through publication in the **Federal Register** and are applicable throughout the nation. The nationwide permits are found in 33 CFR Part 330. If an activity is covered by a general permit, an application for a DA permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a DA permit. In certain cases pre-notification may be required before initiating construction. (See 33 CFR 330.7)

(d) **General instructions.** General policies for evaluating permit applications are found in this part. Special policies that relate to particular activities are found in Parts 321 through 324. The

procedures for processing individual permits and general permits are contained in [33 CFR Part 325](#). The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. "Navigable waters of the United States" are defined in 33 CFR Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899. "Waters of the United States" are defined in 33 CFR Part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act.

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## **Section 320.2 - Authorities to issue permits.**

**(a)** Section 9 of the Rivers and Harbors Act, approved March 3, 1899 (33 U.S.C. 401) (hereinafter referred to as section 9), prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit (See 33 CFR Part 321.) Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (49 U.S.C. 1155g(6)(A)). A DA permit pursuant to section 404 of the Clean Water Act is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways. (See 33 CFR Part 323.)

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

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

(see Section 320.4(o) of this Part).

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

**(e) Section 14 of the Rivers and Harbors Act** approved March 3, 1899, (33 U.S.C. 408), provides that the Secretary of the Army, on the recommendation of the Chief of Engineers, may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

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

**(g) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972**, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for the purpose of disposal in the ocean where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of the EPA in consultation with the Secretary of the Army and published in 40 CFR Parts 220-229. However, similar to the EPA Administrator's limiting authority cited in paragraph (f) of this section, the Administrator can prevent the issuance of a permit under this authority if he finds that the disposal of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas. (See 33 CFR Part 324).

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### **Section 320.3 - Related laws.**

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

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

(c) **Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972**, as amended (16 U.S.C. 1432), authorizes the Secretary of Commerce, after consultation with other interested federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters, of the Great Lakes and their connecting waters, or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

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

(e) **The Fish and Wildlife Act of 1956** (16 U.S.C. 742a, et seq.), the Migratory Marine Game-Fish Act (16 U.S.C. 760c-760g), the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) and other acts express the will of Congress to protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization

Plan No. 4, any federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, and with the head of the appropriate state agency exercising administration over the wildlife resources of the affected state.

**(f) The Federal Power Act of 1920** (16 U.S.C. 791a et seq.), as amended, authorizes the Federal Energy Regulatory Agency (FERC) to issue licenses for the construction and the operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydro-power project. However, where such structures will affect the navigable capacity of any navigable water of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a DA recommendation to FERC for the inclusion of appropriate provisions in the FERC license rather than the issuance of a separate DA permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constituting construction and the operation and maintenance of physical structures licensed by FERC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of disposal in ocean waters, section 404 or section 103 will be applicable.

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

**(h) The Interstate Land Sales Full Disclosure Act** (15 U.S.C. 1701 et seq.) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires DA authorization, the property report is required by Housing and Urban Development regulation to state whether or not a permit for the development has been applied for, issued, or denied by the Corps of Engineers under section 10 or section 404. The property report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

**(i) The Endangered Species Act** (16 U.S.C. 1531 et seq.) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act requires that federal agencies, in consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, use their authorities in furtherance of

its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized, funded, or carried out by the Agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical. (See 50 CFR Part 17 and 50 CFR Part 402.) **(j) The Deepwater Port Act of 1974** (33 U.S.C. 1501 et seq.) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for section 10, section 404 and section 103 permits which may also be required pursuant to the authorities listed in section 320.2 and the policies specified in section 320.4 of this Part. **(k) The Marine Mammal Protection Act of 1972** (16 U.S.C. 1361 et seq.) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act. **(l) Section 7(a) of the Wild and Scenic Rivers Act** (16 U.S.C. 1278 et seq.) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.

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

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

**(o) The National Fishing Enhancement Act of 1984** (Pub. L. 98-623) provides for the

development of a National Artificial Reef Plan to promote and facilitate responsible and effective efforts to establish artificial reefs. The Act establishes procedures to be followed by the Corps in issuing DA permits for artificial reefs. The Act also establishes the liability of the permittee and the United States. The Act further creates a civil penalty for violation of any provision of a permit issued for an artificial reef.

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## **Section 320.4 - General policies for evaluating permit applications.**

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

### ***(a) Public Interest Review.***

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

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

- (i)** The relative extent of the public and private need for the proposed structure or work;
- (ii)** Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- (iii)** The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

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

***(b)Effect on wetlands.***

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

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

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

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

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

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

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

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

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

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

**(3)** Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area. In addition, the district engineer may undertake, where appropriate, reviews of particular wetland areas in consultation with the Regional Director of the U. S. Fish

and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate state agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) of this section or because of provisions of paragraph (b)(3), of this section unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR Part 230. 10(a) (1), (2), (3)).

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

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

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

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

controls or policies. Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

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

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

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

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

(3) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(4) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized federal project, the applicant should be apprised in writing of the fact and of the possibility that a federal project which may be constructed in the vicinity of the proposed work might necessitate its removal

or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the Rivers and Harbors Act of 1899 or by section 404 of the Clean Water Act which may be caused by, or result from, future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes, and no claims or right to compensation will accrue from any such damage.

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

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

*(h) Activities affecting coastal zones.* Applications for DA permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency and Indian tribe applicants for DA permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved state coastal zone management programs.

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

*(j) Other Federal, state, or local requirements.*

(1) Processing of an application for a DA permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the DA permit will normally not be delayed pending action by another Federal, state or local agency (See 33 CFR 325.2 (d)(4)). However, where the required Federal, state and/or local authorization and/or certification has been denied for activities which also

require a Department of the Army permit before final action has been taken on the Army permit application, the district engineer will, after considering the likelihood of subsequent approval of the other authorization and/or certification and the time and effort remaining to complete processing the Army permit application, either immediately deny the Army permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, he will conclude by either denying the permit as contrary to the public interest, or denying it without prejudice indicating that except for the other Federal, state or local denial the Army permit could, under appropriate conditions, be issued. Denial without prejudice means that there is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state and/or local agency on a previously denied authorization and/or certification. Even if official certification and/or authorization is not required by state or federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

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

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

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

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

appropriate Federal or state agency. (See 33 CFR 325.2(e).)

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

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

**(l) Floodplain management.**

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

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

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

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

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

**(2)** Although a particular alteration to a floodplain may constitute a minor change, the cumulative impact of such changes may result in a significant degradation of floodplain values and functions and in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order 11988, district engineers, as part of their public interest review, should avoid to the extent practicable, long and short term significant adverse impacts associated with the occupancy and modification of floodplains, as well as the direct and indirect support of floodplain development whenever there is a practicable alternative. For those activities which in the public interest must occur in or impact upon floodplains, the district engineer shall ensure, to the maximum extent practicable, that the impacts of potential flooding on human health, safety, and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains are restored and preserved.

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

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

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

**(o) Navigation.**

(1) Section 11 of the Rivers and Harbors Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on 27 May 1970 (33 CFR 209.150) which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to 27 May 1970 do not require specific authorization.

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

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

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

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

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

**(r) Mitigation.** [FOOTNOTE 1: This is a general statement of mitigation policy which applies to all Corps of Engineers regulatory authorities covered by these regulations (33 CFR Parts 320-330). It is not a substitute for the mitigation requirements necessary to ensure that a permit action under section 404 of the Clean Water Act complies with the section 404(b)(1) Guidelines. There is currently an interagency Working Group formed to develop guidance on implementing mitigation requirements of the Guidelines.]

**(1)** Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses will be avoided to the extent practicable. Compensation may occur on-site or at an off-site location. Mitigation requirements generally fall into three categories.

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

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

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

**(2)** All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. District engineers will require all forms of mitigation, including

compensatory mitigation, only as provided in paragraphs (r)(1) (i) through (iii) of this section. Additional mitigation may be added at the applicants' request.

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# 33 CFR Part 321

## Permits for Dams and Dikes in Navigable Waters of the United States

- [§ 321.1](#) - General
- [§ 321.2](#) - Definitions
- [§ 321.3](#) - Special Policies and Procedures

**AUTHORITY:** 33 U.S.C. 401.

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### Section 321.1 - General.

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

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### Section 321.2 - Definitions.

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

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

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

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### Section 321.3 - Special policies and procedures.

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

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

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

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

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# 33 CFR 322

## Permits for Structures or Work in or Affecting Navigable Waters of the United States

- [§ 322.1](#) - General
- [§ 322.2](#) - Definitions
- [§ 322.3](#) - Activities requiring permits
- [§ 322.4](#) - Activities not requiring permits
- [§ 322.5](#) - Special policies

**AUTHORITY:** 33 U.S.C. 403

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### **Section 322.1 - General.**

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) (hereinafter referred to as section 10). See 33 CFR 320.2(b). Certain structures or work in or affecting navigable waters of the United States are also regulated under other authorities of the DA. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A DA permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for DA permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

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### **Section 322.2 - Definitions.**

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

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

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

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

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

(e) The term "**individual permit**" means a DA authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR Part 325, and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320.

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

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

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

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

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### **Section 322.3 - Activities requiring permits.**

(a) **General.** DA permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States except as otherwise provided in <322.4 below. Certain activities specified in 33 CFR Part 330 are permitted by that regulation ("nationwide general permits"). Other activities may be authorized by district or division

engineers on a regional basis ("regional general permits"). If an activity is not exempted by Section 322.4 of this part or authorized by a general permit, an individual Section 10 permit will be required for the proposed activity. Structures or work are in navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) of this section, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity. For purposes of a Section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

**(b) Outer continental shelf.** DA permits are required for the construction of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf, pursuant to Section 4(f) of the Outer Continental Shelf Lands Act as amended. (See 33 CFR 320.2(b).)

**(c) Activities of Federal agencies.**

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

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

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

### **Section 322.4 - Activities not requiring permits.**

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

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

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### **Section 322.5 - Special policies.**

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

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

(b) **Artificial Reefs.**

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

- (i) the enhancement of fishery resources to the maximum extent practicable;
- (ii) the facilitation of access and utilization by United States recreational and commercial fishermen;
- (iii) the minimization of conflicts among competing uses of the navigable waters or waters overlying the outer continental shelf and of the resources in such waters;
- (iv) the minimization of environmental risks and risks to personal health and property;
- (v) generally accepted principles of international law; and
- (vi) the prevention of any unreasonable obstructions to navigation. If the

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

(2) In addition, the district engineer will consider the National Artificial Reef Plan developed pursuant to Section 204 of the National Fishing Enhancement Act of 1984, and if he decides to issue the permit, will notify the Secretary of Commerce of any need to deviate from that plan. (3) The district engineer will comply with all coordination provisions required by a written agreement between the DOD and the Federal agencies relative to artificial reefs. In addition, if the district engineer decides that further consultation beyond the normal public commenting process is required to evaluate fully the proposed artificial reef, he may initiate such consultation with any Federal agency, state or local government, or other interested party. (4) The district engineer will issue a permit for the proposed artificial reef only if the applicant demonstrates, to the district engineer's satisfaction, that the title to the artificial reef construction material is unambiguous, that responsibility for maintenance of the reef is clearly established, and that he has the financial ability to assume liability for all damages that may arise with respect to the proposed artificial reef. A demonstration of financial responsibility might include evidence of insurance, sponsorship, or available assets.

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

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

(iii) any person who has transferred title to artificial reef construction materials to a person to whom a permit is issued in accordance with these regulations shall not be liable for damages arising from the use of such materials in an artificial reef, if such materials meet applicable requirements of the plan published under Section 204 of the National Artificial Reef Plan, and are not otherwise defective at the time title is transferred.

***(c) Non-Federal dredging for navigation.***

(1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging access channels to docks and berthing facilities or deepening such channels to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, state, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal

activities which are not so coordinated will be individually evaluated in accordance with these regulations. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will be accorded to the fullest extent possible to both Federal and non-Federal operations. Permits for non-Federal dredging operations will normally contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

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

*(d) Structures for small boats.*

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

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

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

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

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

**(h) Facilities at the borders of the United States.**

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

**(2)** Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural gas to or from a foreign country, must be made to the Secretary of Energy. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), as amended by Executive Order 12038, February 3,

1978, and 18 CFR Parts 32 and 153).

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

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

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

*(i) Power transmission lines.*

(1) Permits under Section 10 of the Rivers and Harbors Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Department of Energy under the Federal Power Act of 1920. If an application is received for a permit for lines which are part of such a water power project, the applicant will be instructed to submit the application to the Department of Energy. If the lines are not part of such a water power project, the application will be processed in accordance with the procedures of these regulations.

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

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Nominal System Voltage, kV	Minimum Additional Clearance (ft.) Above Clearance Required for Bridges
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750-765	45

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

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

***(j) Seaplane operations.***

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) District engineers may grant permits for the erection of structures within an

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

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# 33 CFR Part 323

## Permits for Discharges of Dredged or Fill Material Into Waters of the United States

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**AUTHORITY:** 33 U.S.C. 1344.

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### **Section 323.1 - General.**

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

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### **Section 323.2 Definitions.**

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

- (a) The term "**waters of the United States**" and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR Part 328.

(b) The term "**lake**" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

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

(d)

(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material 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 from a contained land or water disposal area; and
- (iii) 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.

(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 Section 404 program.
- (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.

(3) Section 404 authorization is not required for the following:

- (i) any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States,

which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) incidental movement of dredged material occurring during normal dredging operations, as defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at section 328.3 of this Chapter.

(iii) those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, *provided* that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later than August 25, 1994. This provision does not apply to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), e.g., mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision *provided* that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking Section 404 authorization for such excavation activity. In no event can the grandfather period under this paragraph extend beyond August 25, 1996.

(iv) certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by otherwise subject to regulation under Section 404. See 33 CFR 323.4 for discharges that do not require permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

[**Note:** Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.]

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

(e) The term "**fill material**" means any material used for the primary purpose of

replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. See Section 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(f) The term "**discharge of fill material**" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See Section 323.4 for the definition of these terms). See Section 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

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

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

- (1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or
- (2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330.)

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### **Section 323.3 - Discharge requiring permits.**

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

United States.

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

**(c) Pilings**

**(1)** Placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

**(2)** Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in part 329 of this chapter, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see part 322 of this chapter).

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## **Section 323.4 - Discharges not requiring permits.**

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

**(1)**

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

**(ii)** To fall under this exemption, the activities specified in paragraph (a)(1)(i)

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

**(iii)**

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

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

**(C)**

**(1) Minor Drainage means:**

**(i)** The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

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

**(iii)** The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in

accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs (a)(1)(iii)(C)(1) (ii) and (iii) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.)

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

**(2)** Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

**(D)** Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it

for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

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

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

**(3)** Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption. **(4)** Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins. **(5)** Any activity with respect to which a state has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4)(B) and (C). **(6)** Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR Part

233.22(i), and shall also include the following baseline provisions:

- (i)** Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;
- (ii)** All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;
- (iii)** The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;
- (iv)** The fill shall be properly stabilized and maintained during and following construction to prevent erosion;
- (v)** Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;
- (vi)** In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;
- (vii)** The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;
- (viii)** Borrow material shall be taken from upland sources whenever feasible;
- (ix)** The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;
- (x)** Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;
- (xi)** The discharge shall not be located in the proximity of a public water supply intake;
- (xii)** The discharge shall not occur in areas of concentrated shellfish production;
- (xiii)** The discharge shall not occur in a component of the National Wild and Scenic River System;
- (xiv)** The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and
- (xv)** All temporary fills shall be removed in their entirety and the area restored to its original elevation.

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

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)-(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

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

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### **Section 323.5 - Program transfer to states.**

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

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### **Section 323.6 - Special policies and procedures.**

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 404 permits. The district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b)(1) of the CWA. (see 40 CFR Part 230.) Subject to consideration of any economic impact on navigation and anchorage pursuant to section 404(b)(2), a permit will be denied if the

discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be contrary to the public interest.

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

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# 33 CFR Part 324

## Permits for Ocean Dumping of Dredged Material

- [§ 324.1](#) - General
- [§ 324.2](#) - Definitions
- [§ 324.3](#) - Activities requiring permits
- [§ 324.4](#) - Special procedures

**AUTHORITY:** 33 U.S.C. 1413.

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### Section 324.1 - General.

This regulation prescribes in addition to the general policies of [33 CFR Part 320](#) and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army (DA) permits to authorize the transportation of dredged material by vessel or other vehicle for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require DA permits under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) for the dredging in navigable waters of the United States. Applicants for DA permits under this Part should also refer to [33 CFR Part 322](#) to satisfy the requirements of Section 10.

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### Section 324.2 - Definitions.

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

- The term "**ocean waters**" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606: TIAS 5639).
- The term "**dredged material**" means any material excavated or dredged from navigable waters of the United States.
- The term "**transport**" or "**transportation**" refers to the conveyance and related handling of dredged material by a vessel or other vehicle.

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## Section 324.3 - Activities requiring permits.

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

*(b) Activities of Federal agencies.*

(1) The transportation of dredged material for the purpose of disposal in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers is subject to the procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under these regulations. Division and district engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the transportation of dredged material for disposal in ocean waters are regulated by 33 CFR 209.145.

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

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## 324.4 Special procedures.

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

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

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

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

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

(2) If the district engineer determines that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be not contrary to the public interest, he will so advise the Regional Administrator setting forth his reasons for such determination. If the Regional Administrator has not removed his objection within 15 days, the district engineer will submit a report of his determination to the Chief of Engineers for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain the analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

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

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# 33 CFR Part 325

## Processing of Department of the Army Permits

- [§ 325.1](#) - Applications for permits
- [§ 325.2](#) - Processing of applications
- [§ 325.3](#) - Public notice
- [§ 325.4](#) - Conditioning of permits
- [§ 325.5](#) - Forms of permits
- [§ 325.6](#) - Duration of permits
- [§ 325.7](#) - Modification, suspension, or revocation of permits
- [§ 325.8](#) - Authority to issue or deny permits
- [§ 325.9](#) - Authority to determine jurisdiction
- [§ 325.10](#) - Publicity
- [Appendix A](#) - Permit Form and Special Conditions
- [Appendix B](#) - NEPA Regulation
- [Appendix C](#) - Historic Properties Regulation

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

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### Section 325.1 - Applications for permits.

- a. **General.** The processing procedures of this Part apply to any Department of the Army (DA) permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324, 327 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for DA permits.
- b. **Pre-application consultation for major applications.** The district staff element having responsibility for administering, processing, and enforcing federal laws and regulations relating to the Corps of Engineers regulatory program shall be available to advise potential applicants of studies or other information foreseeably required for later federal action. The district engineer will establish local procedures and policies including

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

- c. **Application form.** Applicants for all individual DA permits must use the standard application form (ENG Form 4345, OMB Approval No. OMB 49-R0420). Local variations of the application form for purposes of facilitating coordination with federal, state and local agencies may be used. The appropriate form may be obtained from the district office having jurisdiction over the waters in which the activity is proposed to be located. Certain activities have been authorized by general permits and do not require submission of an application form but may require a separate notification.
- d. **Content of application.**
  1. The application must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice (detailed engineering plans and specifications are not required); the location, purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made. See Section 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms but may request specific information on a case-by-case basis.

(See Section 325.1(e)).

2. All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.
3. If the activity would involve dredging in navigable waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.
4. If the activity would include the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters the application must include the source of the material; the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. Certification under Section 401 of the Clean Water Act is required for such discharges into waters of the United States.
5. If the activity would include the construction of a filled area or pile or float-supported platform the project description must include the use of, and specific structures to be erected on, the fill or platform.
6. If the activity would involve the construction of an impoundment structure, the applicant may be required to demonstrate that the structure complies with established state dam safety criteria or that the structure has been designed by qualified persons and, in appropriate cases, independently reviewed (and modified as the review would indicate) by similarly qualified persons. No specific design criteria are to be prescribed nor is an independent detailed engineering review to be made by the district engineer.
7. Signature on application. The application must be signed by the person who desires to undertake the proposed activity (i.e. the applicant) or by a duly authorized agent. When the applicant is represented by an agent, that information will be included in the space provided on the application or by a separate written statement. The signature of the applicant or the agent will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action. An application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area and each owner submits a statement designating the same agent.

8. If the activity would involve the construction or placement of an artificial reef, as defined in 33 CFR 322.2(g), in the navigable waters of the United States or in the waters overlying the outer continental shelf, the application must include provisions for siting, constructing, monitoring, and managing the artificial reef.
  9. Complete application. An application will be determined to be complete when sufficient information is received to issue a public notice (See 33 CFR 325.1(d) and 325.3(a).) The issuance of a public notice will not be delayed to obtain information necessary to evaluate an application.
- e. **Additional information.** In addition to the information indicated in paragraph (d) of this section, the applicant will be required to furnish only such additional information as the district engineer deems essential to make a public interest determination including, where applicable, a determination of compliance with the section 404(b)(1) guidelines or ocean dumping criteria. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.
- f. **Fees.** Fees are required for permits under section 404 of the Clean Water Act, Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and Sections 9 and 10 of the Rivers and Harbors Act of 1899. A fee of \$100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A \$10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be not contrary to the public interest. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of federal, state or local governments will not be required to pay any fee in connection with permits.

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## Section 325.2 - Processing of applications.

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

information necessary for further processing.

2. Within 15 days of receipt of an application the district engineer will either determine that the application is complete (see 33 CFR 325.1(d)(9) and issue a public notice as described in Section 325.3 of this Part, unless specifically exempted by other provisions of this regulation or that it is incomplete and notify the applicant of the information necessary for a complete application. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.
3. The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process. The district engineer should not delay processing of the application unless the applicant requests a reasonable delay, normally not to exceed 30 days, to provide additional information or comments.
4. The district engineer will follow Appendix B of 33 CFR Part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.
5. The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR Part 327.
6. After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a statement of findings (SOF) or, where an EIS

has been prepared, a record of decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j) (2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit. In accordance with the authorities specified in Section 325.8 of this Part, the district engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final EIS or environmental assessment, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in a format prescribed by the Chief of Engineers. District and division engineers will notify the applicant and interested federal and state agencies that the application has been forwarded to higher headquarters. The district or division engineer may, at his option, disclose his recommendation to the news media and other interested parties, with the caution that it is only a recommendation and not a final decision. Such disclosure is encouraged in permit cases which have become controversial and have been the subject of stories in the media or have generated strong public interest. In those cases where the application is forwarded for decision in the format prescribed by the Chief of Engineers, the report will serve as the SOF or ROD. District engineers will generally combine the SOF, environmental assessment, and findings of no significant impact (FONSI), 404(b)(1) guideline analysis, and/or the criteria for dumping of dredged material in ocean waters into a single document.

7. If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward the permit to the applicant for signature accepting the conditions of the permit. The permit is not valid until signed by the issuing official. Letters of permission require only the signature of the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document.
8. The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees.

This list will be distributed to all persons who may have an interest in any of the public notices listed.

9. Copies of permits will be furnished to other agencies in appropriate cases as follows:
    - i. If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, DC 20390 Attention, Code NS12, and to the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852.
    - ii. If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Defense Mapping Agency, Hydrographic Center and National Ocean Service as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.
    - iii. If the activity involves the erection of an aerial transmission line, submerged cable, or submerged pipeline across a navigable water of the United States, to the Charting and Geodetic Services N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852.
    - iv. If the activity is listed in paragraphs (a)(9) (i), (ii), or (iii) of this section, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.
- b. Procedures for particular types of permit situation.**
1. **Section 401 Water Quality Certification.** If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.
    - i. The public notice for such activity, which will contain a statement on certification requirements (see paragraph 325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to Section 401(a)(2). If EPA determines another state's waters may be affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to

violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR Part 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state, EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

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

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

- i. If the applicant is a federal agency, and the application involves a federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of federal activities. The federal agency applicant shall be responsible for complying with the CZM Act's directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved

CZM Programs. (See 15 CFR Part 930.) If the state coastal zone agency objects to the proposed federal activity on the basis of its inconsistency with the state's approved CZM Program, the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the CZM Act for resolving such disagreements.

- ii. If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved state CZM Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.
  - iii. If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands, and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.
3. **Historic Properties.** If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historic Preservation Act implementing regulations.
  4. **Activities Associated with Federal Projects.** If the proposed activity would consist of the dredging of an access channel and/or berthing facility associated with an authorized federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the federal project to the maximum extent feasible. Separate notice, hearing, and environmental documentation will not be required for activities so included and

coordinated, and the public notice issued by the district engineer for these federal and associated non-federal activities will be the notice of intent to issue permits for those included non-federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the federal project unless special considerations applicable to the proposed activity are identified. (See Section 322.5(c).)

5. **Endangered Species.** Applications will be reviewed for the potential impact on threatened or endangered species pursuant to section 7 of the Endangered Species Act as amended. The district engineer will include a statement in the public notice of his current knowledge of endangered species based on his initial review of the application (see 33 CFR 325.2(a)(2)). If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds the proposed activity may affect an endangered or threatened species or their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity, pursuant to section 7(c) of the Act. References, definitions, and consultation procedures are found in 50 CFR Part 402.
- c. **Reserved**
- d. **Timing of processing of applications.** The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:
1. The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with paragraph 325.1.(d) of this Part.
  2. The comment period on the public notice should be for a reasonable period of time within which interested parties may express their views concerning the permit. The comment period should not be more than 30 days nor less than 15 days from the date of the notice. Before designating comment periods less than 30 days, the district engineer will consider: (i) Whether the proposal is routine or noncontroversial, (ii) mail time and need for comments from remote areas, (iii) comments from similar proposals, and (iv) the need for a site visit. After considering the length of the original comment period, paragraphs d(2)(i) through d(2)(iv) above, and other pertinent factors, the district engineer may extend the comment period up to an additional 30 days if warranted.
  3. District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or procedures required by law (see below), (ii) the case must be referred to higher authority (see ^F^Z325.8 of this Part), (iii) the comment period is extended, (iv) a timely submittal of information or comments is not received from the applicant,

(v) the processing is suspended at the request of the applicant, or (vi) information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete application. Certain laws (e.g., the Clean Water Act, the CZM Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other federal agency certifications, public hearings, environmental impact statements, consultation, special studies, and testing which may prevent district engineers from being able to decide certain applications within 60 days.

4. Once the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision on the DA permit application. Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the DA permit. In unusual cases the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the DA permit while deferring his final decision.
  5. The applicant will be given a reasonable time, not to exceed 30 days, to respond to requests of the district engineer. The district engineer may make such requests by certified letter and clearly inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate. If additional time is requested, the district engineer will either grant the time, make a final decision, or consider the application as withdrawn.
  6. The time requirements in these regulations are in terms of calendar days rather than in terms of working days.
- e. **Alternative procedures.** Division and district engineers are authorized to use alternative procedures as follows:
1. **Letters of permission.** Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife

Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice. The letter of permission will not be used to authorize the transportation of dredged material for the purpose of dumping it in ocean waters. Letters of permission may be used:

- i. In those cases subject to Section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.
  - ii. In those cases subject to section 404 of the Clean Water Act after:
    - A. The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures;
    - B. The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and
    - C. A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.
2. **Regional permits.** Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is contrary to the public interest provided the procedures of Section 325.7 of this Part are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.
3. **Joint procedures.** Division and district engineers are authorized and encouraged to develop joint procedures with states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the procedures in paragraphs (a)(1) through (a)(5) of this section provided that the substantive requirements of those

sections are maintained. Division and district engineers are also encouraged to develop management techniques such as joint agency review meetings to expedite the decision-making process. However, in doing so, the applicant's rights to a full public interest review and independent decision by the district or division engineer must be strictly observed.

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

### **Section 325.3 - Public notice.**

- a. **General.** The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include the following items of information:
  1. Applicable statutory authority or authorities;
  2. The name and address of the applicant;
  3. The name or title, address and telephone number of the Corps employee from whom additional information concerning the application may be obtained;
  4. The location of the proposed activity;
  5. A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills or pile or float-supported platforms, and a description of the type, composition, and quantity of materials to be discharged or disposed of in the ocean;
  6. A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

7. If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;
8. A list of other government authorizations obtained or requested by the applicant, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;
9. If appropriate, a statement that the activity is a categorical exclusion for purposes of NEPA (see paragraph 7 of Appendix B to 33 CFR Part 230);
10. A statement of the district engineer's current knowledge on historic properties;
11. A statement of the district engineer's current knowledge on endangered species (see section 325.2 (b)(5));
12. A statement(s) on evaluation factors (see section 325.3(c));
13. Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest;
14. The comment period based on section 325.2(d)(2);
15. A statement that any person may request, in writing, within the comment period specified in the notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing;
16. For non-federal applications in states with an approved CZM Plan, a statement on compliance with the approved Plan; and
17. In addition, for section 103 (ocean dumping) activities:
  - i. The specific location of the proposed disposal site and its physical boundaries;
  - ii. ) A statement as to whether the proposed disposal site has been designated for use by the Administrator, EPA, pursuant to section 102(c) of the Act;
  - iii. If the proposed disposal site has not been designated by the Administrator, EPA, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;
  - iv. A brief description of known dredged material discharges at the proposed disposal site;
  - v. Existence and documented effects of other authorized disposals that have been made in the disposal area (e.g., heavy metal background reading and organic carbon content);



Parts 220 to 229), as appropriate. (See 33 CFR Parts 323 and 324).

3. In cases involving construction of artificial islands, installations and other devices on outer continental shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement:

"The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

### **Distribution of public notices.**

1. Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian Tribes or tribal representatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and areawide clearing houses as prescribed by OMB Circular A-95, to local news media and to any other interested party. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, U.S. Coast Guard.
2. In addition to the general distribution of public notices cited above, notices will be sent to other addressees in appropriate cases as follows:
  - i. If the activity would involve structures or dredging along the shores of the seas or Great Lakes, to the Coastal Engineering Research Center, Washington, DC 20016.
  - ii. If the activity would involve construction of fixed structures or artificial islands on the outer continental shelf or in the territorial seas, to the Assistant Secretary of Defense (Manpower, Installations, and Logistics (ASD(MI&L))), Washington, D.C. 20310; the Director, Defense Mapping Agency (Hydrographic Center) Washington, DC 20390, Attention, Code NS12; and the Charting and Geodetic Services, N/CG222, National Ocean Service NOAA, Rockville, Maryland 20852, and to affected military installations and activities.
  - iii. If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

- iv. If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.
  - v. If the activity would be in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, D.C. 20230 and to the appropriate District Director of Customs as Resident Representative, Foreign-Trade Zones Board.
3. It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project. A copy of the public notice with the list of the addresses to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the district engineer may request its comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constituent or himself, the district engineer will inform the member of Congress of the final decision.
  4. District engineers will update public notice mailing lists at least once every two years.
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#### **Section 325.4 - Conditioning of permits.**

- a. District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.
  1. Legal requirements which may be satisfied by means of Corps permit conditions include compliance with the 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state Section 401 water quality certifications.
  2. Where appropriate, the district engineer may take into account the existence of controls imposed under other federal, state, or local programs which would achieve the objective of the desired condition, or the existence of an enforceable agreement between the applicant and another party concerned with the resource in question, in determining whether a proposal complies with the 404(b)(1) guidelines, ocean dumping criteria, and other applicable statutes, and is not contrary to the public interest. In such cases, the Department of the Army permit will be conditioned to state that material changes in, or a failure to implement and enforce such program or agreement, will be grounds for modifying, suspending, or revoking the permit.
  3. Such conditions may be accomplished on-site, or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably

likely to occur, and of importance to the human or aquatic environment.

- b. District engineers are authorized to add special conditions, exclusive of paragraph (a) of this section, at the applicant's request or to clarify the permit application.
  - c. If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.
  - d. Bonds. If the district engineer has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.
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## **Section 325.5 - Forms of permits.**

### **a. General discussion.**

1. DA permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, DA Permit (Appendix A).
2. The general conditions included in ENG Form 1721 are normally applicable to all permits; however, some conditions may not apply to certain permits and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest in accordance with Section 325.4 of this Part.

### **b. Individual permits.**

1. **Standard permits.** A standard permit is one which has been processed through the public interest review procedures, including public notice and receipt of comments, described throughout this Part. The standard individual permit shall be issued using ENG Form 1721.
2. **Letters of permission.** A letter of permission will be issued where procedures of paragraph 325.2(e)(1) have been followed. It will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority, any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the relevant general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

### **c. General permits.**

1. **Regional permits.** Regional permits are a type of general permit. They may be issued by a division or district engineer after compliance with the other procedures of this regulation. If the public interest so requires, the issuing

authority may condition the regional permit to require a case-by-case reporting and acknowledgment system. However, no separate applications or other authorization documents will be required.

2. **Nationwide permits.** Nationwide permits are a type of general permit and represent DA authorizations that have been issued by the regulation (33 CFR Part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit.
  3. **Programmatic permits.** Programmatic permits are a type of general permit founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program.
- d. **Section 9 permits.** Permits for structures in interstate navigable waters of the United States under Section 9 of the Rivers and Harbors Act of 1899 will be drafted at DA level.

### **Section 325.6 - Duration of permits.**

- a. **General.** DA permits may authorize both the work and the resulting use. Permits continue in effect until they automatically expire or are modified, suspended, or revoked.
- b. **Structures.** Permits for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the permit will be of limited duration with a definite expiration date.
- c. **Works.** Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with a permit of indefinite duration under paragraph (b) of this section will specify time limits for completing the work or activity. The permit may also specify a date by which the work must be started, normally within one year from the date of issuance. The date will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. Permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters will specify a completion date for the disposal not to exceed three years from the date of permit issuance.
- d. **Extensions of time.** An authorization or construction period will automatically expire if the permittee fails to request and receive an extension of time. Extensions of time may be granted by the district engineer. The permittee must request the extension and explain the basis of the request, which will be granted unless the district engineer determines that an extension would be contrary to the public interest. Requests for extensions will be processed in accordance with the regular procedures of Section 325.2 of this Part, including issuance of a public notice, except that such processing is not required where the district engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued.
- e. **Maintenance dredging.** If the authorized work includes periodic maintenance dredging, an expiration date for the authorization of that maintenance dredging will be included in

the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Parts 320 to 325. In such cases, the district engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of this regulation and 33 CFR Parts 320 to 324. If the permittee desires to continue maintenance dredging beyond the expiration date, he must request a new permit. The permittee should be advised to apply for the new permit six months prior to the time he wishes to do the maintenance work.

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### **Section 325.7 - Modification, suspension, or revocation of permits.**

- a. **General.** The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with Section 325.2 of this Part, and not as modifications under this section.
- b. **Modification.** Upon request by the permittee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms or conditions of the permit. In such cases, the district engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish. In the event a mutual agreement cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted but the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within

that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR Part 326. The district engineer shall consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest in the term, condition, or feature being modified prior to permit issuance.

- c. **Suspension.** The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/or a public hearing to present information in this matter. If a hearing is requested, the procedures prescribed in 33 CFR Part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested), the district engineer will take action to reinstate, modify, or revoke the permit.
- d. **Revocation.** Following completion of the suspension procedures in paragraph (c) of this section, if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.
- e. **Regional permits.** The issuing official may, by following the procedures of this section, revoke regional permits for individual activities, categories of activities, or geographic areas. Where groups of permittees are involved, such as for categories of activities or geographic areas, the informal discussions provided in paragraph (b) of this section may be waived and any written notification may be made through the general public notice procedures of this regulation. If a regional permit is revoked, any permittee may then apply for an individual permit which shall be processed in accordance with these regulations.

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## **Section 325.8 - Authority to issue or deny permits.**

- a. **General.** Except as otherwise provided in this regulation, the Secretary of the Army, subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for dams or dikes in intrastate waters of the United States pursuant to Section 9 of the Rivers and Harbors Act of 1899; for construction or other work in or affecting navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899; for the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Clean Water Act; or for the transportation of dredged material for the purpose of disposing of it into ocean waters pursuant to Section

103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits in interstate navigable waters of the United States pursuant to Section 9 of the Rivers and Harbors Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

- b. **District engineer's authority.** District engineers are authorized to issue or deny permits in accordance with these regulations pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases not required to be referred to higher authority (see below). It is essential to the legality of a permit that it contain the name of the district engineer as the issuing officer. However, the permit need not be signed by the district engineer in person but may be signed for and in behalf of him by whomever he designates. In cases where permits are denied for reasons other than navigation or failure to obtain required local, state, or other federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision. District engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state, or other federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation except in all cases required to be referred to higher authority (see below). District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with Section 325.4 of this Part, except for those conditions which may have been imposed by higher authority, and to modify, suspend and revoke permits according to the procedures of Section 325.7 of this Part. District engineers will refer the following applications to the division engineer for resolution:
1. When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;
  2. When the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed;
  3. When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;
  4. When higher authority requests the application be forwarded for decision; or
  5. When the district engineer is precluded by law or procedures required by law from taking final action on the application (e.g. Section 9 of the Rivers and Harbors Act of 1899, or territorial sea baseline changes).
- c. **Division engineer's authority.** Division engineers will review and evaluate all permit applications referred by district engineers. Division engineers may authorize the issuance or denial of permits pursuant to Section 10 of the Rivers and Harbors Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions in accordance with Section 325.4 of this Part in all cases not required to be referred to the Chief of Engineers. Division engineers will refer the following applications to the Chief of Engineers for resolution:

1. When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;
  2. When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;
  3. When higher authority requests the application be forwarded for decision; or
  4. When the division engineer is precluded by law or procedures required by law from taking final action on the application.
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### **Section 325.9 - Authority to determine jurisdiction.**

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

- a. When a determination of navigability is made pursuant to 33 CFR 329.14 (division engineers have this authority); or
  - b. When EPA makes a Section 404 jurisdiction determination under its authority.
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### **Section 325.10 - Publicity.**

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

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## **Appendix A - Permit Form and Special Conditions**

### **A. PERMIT FORM**

#### **DEPARTMENT OF THE ARMY PERMIT**

Permittee \_\_\_\_\_

Permit No. \_\_\_\_\_

Issuing Office \_\_\_\_\_

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

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

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

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

**Permit Conditions:**

**General Conditions:**

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

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

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

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

the  
permit to this office to validate the transfer of this authorization.

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

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

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

**Further Information:**

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

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

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

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

2. Limits of this authorization.

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

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

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

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

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

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

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

the public interest.

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

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

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

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

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

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

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

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

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR

325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will

be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures

by contract or otherwise and bill you for the cost.

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

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

\_\_\_\_\_  
(Permittee)

\_\_\_\_\_  
(Date)

This permit becomes effective when the Federal official, designated to act

for  
the Secretary of the Army, has signed below.

\_\_\_\_\_  
(District Engineer)

\_\_\_\_\_  
(Date)

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

\_\_\_\_\_  
(Transferee)

\_\_\_\_\_  
(Date)

## **B. SPECIAL CONDITIONS.**

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

1. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.
2. You must have a copy of this permit available on the vessel used for the authorized transportation and disposal of dredged material.
3. You must advise this office in writing, at least two weeks before you start maintenance dredging activities under the authority of this permit.
4. You must install and maintain, at your expense, any safety lights and signals prescribed by the United States Coast Guard (USCG), through regulations or otherwise, on your authorized facilities. The USCG may be reached at the following address and telephone number:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

National Ocean Service (NOS) has been notified of this authorization. You must notify NOS and this office in writing, at least two weeks before you

begin work and upon completion of the activity authorized by this permit. Your notification of completion must include a drawing which certifies the location and configuration of the completed activity (a certified permit drawing may be used). Notifications to NOS will be sent to the following address:

The Director  
National Ocean Service (N/CG 222)  
Rockville, Maryland 20852

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

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

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## **Appendix B - NEPA Implementation**

### **Procedures for the Regulatory Program**

1. [Introduction](#)
2. [General](#)
3. [Development of Information Data](#)
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18. [Record Of Decision](#)
19. [Predecision Referrals by Other Agencies](#)
20. [Review of Other Agencies' EISs](#)
21. [Monitoring](#)

1. **Introduction.** In keeping with the Executive Order 12291 and 40 CFR 1500.2, where interpretive problems arise in implementing this regulation, and consideration of all other factors do not give a clear indication of a reasonable interpretation, the interpretation (consistent with the spirit and intent of NEPA) which results in the least paperwork and delay will be used. Specific examples of ways to reduce paperwork in the NEPA process are found at 40 CFR 1500.4. Maximum advantage of these recommendations should be taken.
2. **General.** This appendix sets forth the implementing procedures for the Corps regulatory program. For additional guidance see the Corps NEPA regulation 33 CFR Part 230 and for general policy guidance, see the CEQ regulations 40 CFR 1500-1508.
3. **Development of Information and Data.** See 40 CFR 1506.5. The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). See also 40 CFR 1502.22 regarding incomplete or unavailable information.
4. **Elimination of Duplication with State and Local Procedures.** See 40 CFR 1506.2.
5. **Public Involvement.** Several paragraphs of this appendix (paragraphs 7, 8, 11, 13 and 19) provide information on the requirements for district engineers to make available to the public certain environmental documents in accordance with 40 CFR 1506.6.

## 6. Categorical Exclusions

- a. **General.** Even though EA or EIS is not legally mandated for any Federal action falling within one of the "categorical exclusions" that fact does not exempt any Federal action from procedural or substantive compliance with any other Federal law. For example, the Endangered Species Act, the Clean Water Act etc., is always mandatory, even for actions not requiring an EA or EIS. The following activities are not considered to be major Federal actions significantly affecting the quality of the human environment and are therefore categorically excluded from NEPA documentation:
  1. Fixed or floating small private piers, small docks, boat hoists and boathouses.
  2. Minority utility distribution and collection lines including irrigation;
  3. Minor maintenance dredging using existing disposal sites;
  4. Boat launching ramps;
  5. All applications which qualify as letters of permission (as described at 33 CFR 325.5(b)(2)).
- b. **Extraordinary Circumstances.** District engineers should be alert for extraordinary circumstances where normally excluded actions could have substantial environmental effects and thus require an EA or EIS. For a period of one year from the effective date of these regulations, district engineers should maintain an information list on the type and number of categorical exclusion actions which, due to extraordinary circumstances, triggered the need for an EA/FONSI or EIS. If the district engineer determines that a categorical exclusion should be modified, the information will be furnished to the division engineer who will review and analyze the actions and circumstances to determine if there is a basis for recommending a modification to the list of categorical exclusions. HQUSACE (CECW-OR) will review recommended changes for Corps-wide consistency and revise the list accordingly.

## 7. EA/FONSI Document. (See 40 CFR 1508.9 and 1508.13 for definitions)

- a. **Environmental Assessment (EA) and Findings of No Significant Impact (FONSI).** The EA should normally be combined with other required documents (EA/404(b)(1)/ SOF/FONSI). "EA" as used throughout this Appendix normally refers to this combined document. The district engineer should complete an EA as soon as practicable after all relevant information is available (i.e. after the comment period for the public notice of the permit application has expired) and when the EA is a separate document it must be completed prior to the completion of the statement of finding (SOF). When the EA confirms that the impact of the applicant's proposal is not significant and there are no "unresolved conflicts

concerning alternative uses of available resources" (section 102(2)(E) of NEPA), and the proposed activity is a water dependent" activity as defined in 40 CFR 230.10(a)(3), the EA need not include a discussion on alternatives. In all other cases where the district engineer determines that there are unresolved conflicts concerning alternatives uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or deny the permit. Modifications are limited to those project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the "no action" alternative (i.e. no activity requiring a Corps permit). The combined document should not exceed 15 pages and shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required. The district engineer may delegate the signing of the NEPA document. Should the EA demonstrate that an EIS is necessary, the district engineer shall follow the procedures outlined in paragraph 8 of this Appendix. In those cases where it is obvious an EIS is required, an EA is not required. However, the district engineer should document his reasons for requiring an EIS.

b. Scope of Analysis.

1. In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a large project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring the DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.
2. The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a federal action. These are cases where the environmental consequences are essentially products of the Corps permit action. Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:
  - i. Whether or not the regulated activity compromises "merely a link" in a corridor type project (e.g. a transportation or utility transmission project).
  - ii. Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

- iii. The extent to which the entire project will be within Corps jurisdiction.
- iv. The extent of cumulative control and responsibility.
  - A. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. There are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement action).
  - B. In determining whether sufficient cumulative involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 et. seq.), the National Historic Preservation Act of 1966 (U.S.C. 470 et seq.), The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), Executive Order 11990, Protection of Wetlands, (42 U.S.C. 4321 91977), and other environmental review laws and executive orders.
  - C. The district engineer should also refer to paragraphs 8(b) and 8(c) of this appendix for guidance on determining whether it should be the lead or cooperating agency in these situations. These factors will be added to or modified through guidance as additional field experience develops.
- 3. **Examples.** If a non-Federal oil refinery, electric generating plant, or industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity.

Similarly, if an applicant seeks a DA permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement

would extend to the portions of the project to be located on the permitted fill. However, the NEPA review would be extended to the entire project, including portions outside waters of the United States, only if sufficient Federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project. In any case, once the scope of analysis has been defined, the NEPA analysis for that action should include direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute. The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies.

For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the Federal action, i.e., the specific activity requiring a DA permit and any other portion of the project that is within the control or responsibility of the Corps of Engineers (or other Federal agencies).

For example, a 50-mile electrical transmission cable crossing a 1 1/4 mile wide river that is a navigable water of the United States requires a DA permit. Neither the origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control of the Corps of Engineers. Those matters would not be included in the scope of analysis which, in this case, would address the impacts of the specific cable crossing.

Conversely, for those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404 regulatory jurisdiction. To use the same example, if 30 miles of the 50-mile transmission line crossed wetlands or other "waters of the United States," the scope of analysis should reflect impacts on the whole 50-mile transmission line.

For those activities that require a DA permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredge material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of analysis to include the upland portions of the facility.

In all cases, the scope of analysis used for analyzing both impacts and

alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.

## 8. Environmental Impact Statement -- General

- a. **Determination of Lead and Cooperating Agencies.** When the district engineer determines that an EIS is required, he will contact all appropriate Federal agencies to determine their respective role(s), i.e., that of lead agency or cooperating agency.
- b. **Corps as Lead Agency.** When the Corps is lead agency, it will be responsible for managing the EIS process, including those portion which come under the jurisdiction of other Federal agencies. The district engineer is authorized to require the applicant to furnish appropriate information as discusses in paragraph 3 of this appendix. It is permissible for the Corps to reimburse, under agreement, staff support from other Federal agencies beyond the immediate jurisdiction of those agencies.
- c. **Corps as Cooperating Agency.** If another agency is the lead agency as set forth by the CEQ regulations (40 CFR 1501.4 and 1501.6(a) and 1508.16), the district engineer will coordinate with that agency as a cooperating agency under 40 CFR 1501.6(b) and 1508.5 to insure that agency's resulting EIS may be adopted by the Corps for purposes of exercising its regulatory authority. As a cooperating agency the Corps will be responsible to the lead agency for providing environmental information which is directly related to the regulatory matter involved and which is required for the preparation of an EIS. This in no way shall be construed as lessening the district engineer's ability to request the applicant to furnish appropriate information as discussed in paragraph 3 of this appendix. responsibility, the district engineer should, in accordance with 40 CFR 1501.6(b)(4), "make available staff support at the lead agency's request" to enhance the latter's interdisciplinary capability provided the request pertains to the Corps regulatory action covered by the EIS, to the extent this is practicable. Beyond this, Corps staff support will generally be made available to the lead agency to the extent practicable within it own responsibility and available resources. Any assistance to a lead agency beyond this will normally be by written agreement with the lead agency providing for the Corps expenses on a cost reimbursable basis. If the district engineer believes a public hearing should be held and another agency is lead agency, the district engineer should request such a hearing and provide his reasoning for the request. The district engineer should suggest a joint hearing and offer to take an active part in the hearing and ensure coverage of the Corps concerns.
- d. **Scope of Analysis.** See paragraph 7b.
- e. **Scoping Process.** Refer to 40 CFR 1501.7 and 33 CFR 230.12.
- f. **Contracting.** See 40 CFR 1506.5.

1. The district engineer may prepare an EIS, or may obtain information needed to prepare an EIS, either with his own staff or by contract. In choosing a contractor who reports directly to the district engineer, the procedures of 40 CFR 1506.5(c) will be followed.
2. Information required for an EIS also may be furnished by the applicant or a consultant employed by the applicant. Where this approach is followed, the district engineer will:
  - i. advise the applicant and/or his consultant of the Corps information requirements, and
  - ii. (ii) meet with the applicant and/or his consultant from time to time and provide him with the district engineer's views regarding adequacy of the data that are being developed (including how the district engineer will view such data in light of any possible conflicts of interest).

The applicant and/or his consultant may accept or reject the district engineer's guidance. The district engineer, however, may after specifying the information in contention, require the applicant to resubmit any previously submitted data which the district engineer considers inadequate or inaccurate. In all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy, as required by 40 CFR 1506.5(a).

- g. **Change in EIS Determination.** If it is determined that an EIS is not required after a notice of intent has been published, the district engineer shall terminate the EIS preparation and withdraw the notice of intent. The district engineer shall notify in writing the appropriate division engineer; HQUSACE (CECW-OR); the appropriate EPA regional administrator, the Director, Office of Federal Activities the determination.
- h. **Time Limits.** For regulatory actions, the district engineer will follow 33 CFR 230.17(a) unless unusual delays caused by applicant inaction or compliance with other statutes require longer time frames for EIS preparation. At the outset of the EIS effort, schedule milestones will be developed and made available to the applicant and the public. If the milestone dates are not met the district engineer will notify the applicant and explain the reason for delay.

## 9. Organization and Content of Draft EISs

- a. **General.** This section gives detailed information for preparing draft EISs. When the Corps is the lead agency, this draft EIS format and these procedures will be followed. When the Corps is one of the joint lead agencies, the joint lead agencies will mutually decide which agency's format and procedures will be followed.

## b. Format

### 1. Cover Sheet.

- a. Ref. 40 CFR 1502.11.
- b. The "person at the agency who can supply further information" (40 CFR 1502.11(c)) is the project manager handling that permit application.
- c. The cover sheet should identify the EIS as a Corps permit action and state the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction.

2. **Summary.** In addition to the requirements of 40 CFR 1502.12, action stating the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction. It shall also summarize the purpose and need for the proposed action and shall briefly state the beneficial/adverse impacts of the proposed action.

### 3. Table of Contents.

4. **Purpose and Need.** See 40 CFR 1502.13. If the scope of analysis for the NEPA document (see paragraph 7b) covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, "The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.") If the scope of analysis covers a more extensive project, only part of which may require a DA permit, then the underlying purpose and need for the entire project should be stated. (For example, "The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.") Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, "to construct an electric generating plant"). However, whenever the NEPA document's scope of analysis renders it appropriate, the Corps also should consider and express that activity's underlying purpose and need from a public interest electric energy"). Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.

5. **Alternatives.** See 40 CFR 1502.14. The Corps is neither an opponent nor a proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the "applicant's preferred alternative" in the final EIS. Decision options available to the district engineer, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or conditions or deny the permit.

- a. Only reasonable alternatives need be considered in detail, as specified in 40 CFR 1502.14(a). Reasonable alternatives must be those that are feasible and such feasibility must focus on the accomplishment of the underlying purpose and need (of the applicant or the public) that would be satisfied by the proposed Federal action (permit issuance). The alternatives analysis should be thorough enough to use for both the public interest review and the 404(b)(1) guidelines (40 CFR part 230) where applicable. Those alternatives that are unavailable to the applicant, whether or not they require Federal action (permits), should normally be included in the analysis of the no-Federal-action (denial) alternative. Such alternatives and objective evaluation of the public interest and a fully informed decision regarding the permit application.
  - b. The "no-action" alternative is one which results in no construction requiring a Corps permit. It may be brought by (1) the applicant electing to modify his proposal to eliminate work under the jurisdiction of the Corps or (2) by the denial of the permit. District engineers, when evaluating this alternative, should discuss, when appropriate, the consequences of other likely uses of a project site, should the permit be denied.
  - c. The EIS should discuss geographic alternatives, e.g., changes in location and other site specific variables, and functional alternatives, e.g., project substitutes and design modifications.
  - d. The Corps shall not prepare a cost-benefit analysis for projects requiring a Corps permit. 40 CFR 1502.23 states that the weighing of the various alternatives need not be displayed in a cost-benefit analysis and "cost-benefit analysis should not be when there are important qualitative considerations." The EIS should, however, indicate any cost considerations that are likely to be relevant to a decision.
  - e. Mitigation is defined in 40 CFR 1508.20, and Federal action agencies are directed in 40 CFR 1502.14 to include appropriate mitigation measures. Guidance on the conditioning of permits to extent of mitigation conditions are dependent on the results of the public interest review in 33 CFR 320.4.
6. **Environmental Consequences.** See Ref. 40 CFR 1502.16.
  7. **List of Preparers.** See Ref. 40 CFR 1502.17.
  8. **Public Involvement.** This section should list the dates and nature of all public notices, scoping meetings and public hearings and include a list of all parties notified.
  9. **Appendices.** See 40 CFR 1502.18. Appendices should be used to the

maximum extent practicable to minimize the length of the main text of the EIS. Appendices normally should not be circulated with every copy of the EIS, but appropriate appendices should be provided routinely to parties with special interest and expertise in the particular subject.

10. **Index.** The Index of an EIS, at the end of the document, should be designed to provide for easy reference to items discussed in the main text of the EIS.
  
10. **Notice of Intent.** The district engineer shall follow the guidance in 33 CFR part 230, Appendix C in preparing a notice of intent to prepare a draft EIS for publication in the Federal Register.
  
11. **Public Hearing.** If a public hearing is to be held pursuant to analyzed by the draft EIS should be considered at the public hearing. The district engineer should make the draft EIS available to the public at least 15 days in advance of the hearing. If a hearing request is received from another agency having jurisdiction as provided in 40 CFR 1506.6(c)(2), the district engineer should coordinate a joint hearing with that agency whenever appropriate.
  
12. **Organization and Content of Final EIS.** The organization and content of the final EIS including the abbreviated final EIS procedures shall follow the guidance in 33 CFR 230.14(a).
  
13. **Comments Received on the Final EIS.** For permit cases to be decided at the district level, the district engineer should consider all incoming comments and provide responses when substantive issues are raised which have not been addressed in the final EIS. For permit cases decided at higher authority, the district engineer shall forward the final EIS comment letters together with appropriate responses to higher authority along with the case. In the case of a letter recommending a referral under 40 CFR part 1504, the district engineer will follow the guidance in paragraph 19 of this appendix.
  
14. **EIS Supplement.** See 33 CFR 230.13(b).
  
15. **Filing Requirements.** See 40 CFR 1506.9. Five (5) copies of EISs shall be sent to Director, Office of Federal Activities (A-104), Environmental Protection Agency, 401 M Street SW., Washington, DC a notice of availability of the draft or final EISs in the Federal Register. Generally, this notice appears on Friday of each week. At the same time

they are mailed to EPA for filing, one copy of each draft or final EIS, or EIS supplement should be mailed to HQUSACE (CECW-OR) WASH DC 20314-1000.

16. **Timing.** 40 CFR 1506.10 describes the timing of an agency action when an EIS is involved.
17. **Expedited Filing.** 40 CFR 1506.10 provides information on allowable time reductions and time extensions associated with the EIS process. The district engineer will provide the necessary information and facts to HQUSACE (CECW-RE) WASH DC 20314-1000 (with copy to CECW-OR) for consultation with EPA for a reduction in the prescribed review periods.
18. **Record of Decision.** In those cases involving an EIS, the statement of findings will be called the record of decision and shall incorporate the requirements of 40 CFR 1505.2. The record of decision is not to be included when filing a final EIS and may not be signed until 30 days after the notice of availability of the final EIS is published in the Federal Register. To avoid duplication, the record of decision may reference the EIS.
19. **Predecision Referrals by Other Agencies.** See 40 CFR part 1504. The decisionmaker should notify any potential referring Federal position of a potential referring agency. (This pertains to a NEPA referral, not a 404(q) referral under the Clean Water Act. The procedures for a 404(q) referral are outlined in the 404(q) Memoranda of Agreement. The potential referring agency will then have 25 calendar days to refer the case to CEQ under 40 CFR part 1504. Referrals will be transmitted through division to CECW-RE for further guidance with an information copy to CECW-OR.
20. **Review of Other Agencies' EISs.** District engineers should provide comments directly to the requesting agency specifically related to the Corps jurisdiction by law or special expertise as defined in 40 CFR 1508.15 and 1508.26 and identified in Appendix II of CEQ regulations (49 FR 49750, December 21, 1984). If the district engineer determines that another agency's draft EIS which involves a Corps permit action is inadequate with respect to the Corps permit action, the district engineer should attempt to resolve the differences concerning the Corps permit action prior to the filing of the final EIS by the other agency. If the district engineer finds that the final EIS is inadequate with respect to the Corps permit action, the district engineer should incorporate the other agency's final EIS or a portion thereof and prepare an appropriate and adequate NEPA document to address the Corps involvement with the proposed action. See 33 CFR 230.21 for guidance. The agency which prepared information to that contained in the EIS in order for the Corps to have all relevant information available for a sound decision on the

permit.

21. **Monitoring.** Monitoring compliance with permit requirements should be carried out in accordance with 33 CFR 230.15 and with 33 CFR part 325.
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## **Appendix C - Procedures for the Protection of Historic Properties**

**AUTHORITY: 33 U.S.C. 401 et seq., 33 U.S.C. 1344, 33 U.S.C. 1413**

1. [Definitions](#)
2. [General Policy](#)
3. [Initial Review](#)
4. [Public Notice](#)
5. [Investigations](#)
6. [Eligibility Determinations](#)
7. [Assessing Effects](#)
8. [Consultation](#)
9. [ACHP Review and Comment](#)
10. [District Engineer Decision](#)
11. [Historic Properties Discovered During Construction](#)
12. [General Permits](#)
13. [Nationwide Permits](#)
14. [Emergency Permits](#)
15. [Criteria of Effect and Adverse Effect](#)

### **1. Definitions.**

- a. **"Designated historic property"** is a historic property listed in the National Register of Historic Places (National Register) or which has been determined eligible for listing in the National Register pursuant to 36 CFR Part 63. A historic property that, in both the opinion of the SHPO and the district engineer, appears to meet the criteria for inclusion in the National Register will be treated as a "designated historic property."

- b. **"Historic property"** is a property which has historical importance to any person or group. This term includes the types of districts, sites, buildings, structures or objects eligible for inclusion, but not necessarily listed, on the National Register.
- c. **"Certified local government"** is a local government certified in accordance with Section 101(c)(1) of the NHPA (See 36 CFR Part 61).
- d. The term **"criteria for inclusion in the National Register"** refers to the criteria published by the Department of Interior at 36 CFR 60.4.
- e. An **"effect"** on a "designated historic property" occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on "designated historic properties" includes indirect effects of the undertaking. The criteria for effect and adverse effect are described in Paragraph 15 of this Appendix.
- f. The term **"undertaking"** as used in this Appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334.
- g. **Permit area.**
  - 1. The term **"permit area"** as used in this appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the "permit area":
    - i. Such activity would not occur but for the authorization of the work or structures within the waters of the United States;
    - ii. Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and
    - iii. Such activity must be directly associated (first order impact) with the work or structures to be authorized.
  - 2. For example, consider an application for a permit to construct a pier and dredge an access channel so that an industry may be established and operated on an upland area.
    - i. Assume that the industry requires the access channel and the pier and that without such channel and pier the project would not be feasible. Clearly then, the industrial site, even though upland, would be within the "permit area." It would not be established "but for" the access channel and pier; it also is integrally related to the

work and structure to be authorized; and finally it is directly associated with the work and structure to be authorized. Similarly, all three tests are satisfied for the dredged material disposal site and it too is in the "permit area" even if located on uplands.

- ii. Consider further that the industry, if established, would cause local agencies to extend water and sewer lines to service the area of the industrial site. Assume that the extension would not itself involve the waters of the United States and is not solely the result of the industrial facility. The extensions would not be within the "permit area" because they would not be directly associated with the work or structure to be authorized.
  - iii. Now consider that the industry, if established, would require increased housing for its employees, but that a private developer would develop the housing. Again, even if the housing would not be developed but for the authorized work and structure, the housing would not be within the permit area because it would not be directly associated with or integrally related to the work or structure to be authorized.
3. Consider a different example. This time an industry will be established that requires no access to the navigable waters for its operation. The plans for the facility, however, call for a recreational pier with an access channel. The pier and channel will be used for the company-owned yacht and employee recreation. In the example, the industrial site is not included within the permit area. Only areas of dredging, dredged material disposal, and pier construction would be within the permit area.
4. Lastly, consider a linear crossing of the waters of the United States; for example, by a transmission line, pipeline, or highway.
  - i. Such projects almost always can be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States. Corps authorization is sought because it is less expensive or more convenient for the applicant to do so than to avoid affecting the waters of the United States. Thus the "but for" test is not met by the entire project right-of-way. The "same undertaking" and "integral relationship" tests are met, but this is not sufficient to make the whole right-of-way part of the permit area. Typically, however, some portion of the right-of-way, approaching the crossing, would not occur in its given configuration "but for" the authorized activity. This portion of the right-of-way, whose location is determined by the location of the crossing, meets all three tests and hence is part of the permit area.
  - ii. Accordingly, in the case of the linear crossing, the permit area shall extend in either direction from the crossing to that point at

which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated. Such a point may often coincide with the physical feature of the waterbody to be crossed, for example, a bluff, the limit of the flood plain, a vegetational change, etc., or with a jurisdictional feature associated with the waterbody, for example, a zoning change, easement limit, etc., although such features should not be controlling in selecting the limits of the permit area.

## 2. **General Policy.**

This Appendix establishes the procedures to be followed by the U.S. Army Corps of Engineers (Corps) to fulfill the requirements set forth in the National Historic Preservation Act (NHPA), other applicable historic preservation laws, and Presidential directives as they relate to the regulatory program of the Corps of Engineers (33 CFR Parts 320-334).

- a. The district engineer will take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S. Pursuant to Section 110(f) of the NHPA, the district engineer, where the undertaking that is the subject of a permit action may directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.
- b. In addition to the requirements of the NHPA, all historic properties are subject to consideration under the National Environmental Policy Act, (33 CFR Part 325, Appendix B), and the Corps' public interest review requirements contained in 33 CFR 320.4. Therefore, historic properties will be included as a factor in the district engineer's decision on a permit application.
- c. In processing a permit application, the district engineer will generally accept for Federal or Federally assisted projects the Federal agency's or Federal lead agency's compliance with the requirements of the NHPA.
- d. If a permit application requires the preparation of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, the draft EIS will contain the information required by paragraph 9.a. below. Furthermore, the SHPO and the ACHP will be given the opportunity to participate in the scoping process and to comment on the Draft and Final EIS.
- e. During pre-application consultations with a prospective applicant the district engineer will encourage the consideration of historic properties at the earliest practical time in the planning process.
- f. This Appendix is organized to follow the Corps standard permit process and to indicate how historic property considerations are to be addressed during the processing and evaluating of permit applications. The procedures of this

Appendix are not intended to diminish the full consideration of historic properties in the Corps regulatory program. Rather, this Appendix is intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program. The Corps will make every effort to provide information on historic properties and the effects of proposed undertakings on them to the public by the public notice within the time constraints required by the Clean Water Act. Within the time constraints of applicable laws, executive orders, and regulations, the Corps will provide the maximum coordination and comment opportunities to interested parties especially the SHPO and ACHP. The Corps will discuss with and encourage the applicant to avoid or minimize effects on historic properties. In reaching its decisions on permits, the Corps will adhere to the goals of the NHPA and other applicable laws dealing with historic properties.

### **3. Initial Review.**

- a. Upon receipt of a completed permit application, the district engineer will consult district files and records, the latest published version(s) of the National Register, lists of properties determined eligible, and other appropriate sources of information to determine if there are any designated historic properties which may be affected by the proposed undertaking. The district engineer will also consult with other appropriate sources of information for knowledge of undesignated historic properties which may be affected by the proposed undertaking. The district engineer will establish procedures (e.g., telephone calls) to obtain supplemental information from the SHPO and other appropriate sources. Such procedures shall be accomplished within the time limits specified in this Appendix and 33 CFR Part 325.
- b. In certain instances, the nature, scope, and magnitude of the work, and/or structures to be permitted may be such that there is little likelihood that a historic property exists or may be affected. Where the district engineer determines that such a situation exists, he will include a statement to this effect in the public notice. Three such situations are:
  1. Areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the permit area may be presumed to have been lost unless specific information indicates the presence of such a property (e.g., a shipwreck).
  2. Areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such a property.
  3. Certain types of work or structures that are of such limited nature and

scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the affected area.

- c. If, when using the pre-application procedures of 33 CFR 325.1(b), the district engineer believes that a designated historic property may be affected, he will inform the prospective applicant for consideration during project planning of the potential applicability of the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716). The district engineer will also inform the prospective applicant that the Corps will consider any effects on historic properties in accordance with this Appendix.
- d. At the earliest practical time the district engineer will discuss with the applicant measures or alternatives to avoid or minimize effects on historic properties.

#### **4. Public Notice.**

- a. a. Except as specified in subparagraph 4.c., the district engineer's current knowledge of the presence or absence of historic properties and the effects of the undertaking upon these properties will be included in the public notice. The public notice will be sent to the SHPO, the regional office of the National Park Service (NPS), certified local governments (see paragraph 1.c.) and Indian tribes, and interested citizens. If there are designated historic properties which reasonably may be affected by the undertaking or if there are undesignated historic properties within the affected area which the district engineer reasonably expects to be affected by the undertaking and which he believes meet the criteria for inclusion in the National Register, the public notice will also be sent to the ACHP.
- b. During permit evaluation for newly designated historic properties or undesignated historic properties which reasonably may be affected by the undertaking and which have been newly identified through the public interest review process, the district engineer will immediately inform the applicant, the SHPO, the appropriate certified local government and the ACHP of the district engineer's current knowledge of the effects of the undertaking upon these properties. Commencing from the date of the district engineer's letter, these entities will be given 30 days to submit their comments.
- c. Locational and sensitive information related to archeological sites is excluded from the Freedom of Information Act (Section 304 of the NHPA and Section 9 of ARPA). If the district engineer or the Secretary of the Interior determine that the disclosure of information to the public relating to the location or character of sensitive historic resources may create a substantial risk of harm, theft, or destruction to such resources or to the area or place where such resources are located, then the district engineer will not include such information in the public notice nor otherwise make it available to the public. Therefore, the district engineer will furnish such information to the ACHP and the SHPO by separate

notice.

## 5. Investigations.

- a. When initial review, additional submissions by the applicant, or response to the public notice indicates the existence of a potentially eligible property, the district engineer shall examine the pertinent evidence to determine the need for further investigation. The evidence must set forth specific reasons for the need to further investigate within the permit area and may consist of:
  1. Specific information concerning properties which may be eligible for inclusion in the National Register and which are known to exist in the vicinity of the project; and
  2. Specific information concerning known sensitive areas which are likely to yield resources eligible for inclusion in the National Register, particularly where such sensitive area determinations are based upon data collected from other, similar areas within the general vicinity.
- b. Where the scope and type of work proposed by the applicant or the evidence presented leads the district engineer to conclude that the chance of disturbance by the undertaking to any potentially eligible historic property is too remote to justify further investigation, he shall so advise the reporting party and the SHPO.
- c. If the district engineer's review indicates that an investigation for the presence of potentially eligible historic properties on the upland locations of the permit area (see paragraph 1.g.) is justified, the district engineer will conduct or cause to be conducted such an investigation. Additionally, if the notification indicates that a potentially eligible historic property may exist within waters of the U. S., the district engineer will conduct or cause to be conducted an investigation to determine whether this property may be eligible for inclusion in the National Register. Comments or information of a general nature will not be considered as sufficient evidence to warrant an investigation.
- d. In addition to any investigations conducted in accordance with paragraph 6.a. above, the district engineer may conduct or cause to be conducted additional investigations which the district engineer determines are essential to reach the public interest decision. As part of any site visit, Corps personnel will examine the permit area for the presence of potentially eligible historic properties. The Corps will notify the SHPO, if any evidence is found which indicates the presence of potentially eligible historic properties.
- e. As determined by the district engineer, investigations may consist of any of the following: further consultations with the SHPO, the State Archeologist, local governments, Indian tribes, local historical and archeological societies, university archeologists, and others with knowledge and expertise in the identification of historical, archeological, cultural and scientific resources; field examinations; and

archeological testing. In most cases, the district engineer will require, in accordance with 33 CFR 325.1(e), that the applicant conduct the investigation at his expense and usually by third party contract.

- f. The Corps of Engineers' responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within waters of the U. S. that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties is limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.

## **6. Eligibility determinations.**

- a. For a historic property within waters of the U. S. that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:
  1. treat the historic property as a "designated historic property," if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or
  2. treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register; or
  3. request a determination of eligibility from the Keeper of the National Register in accordance with applicable National Park Service regulations and notify the applicant, if the SHPO and the district engineer disagree or the ACHP or the Secretary of the Interior so request. If the Keeper of the National Register determines that the resources are not eligible for listing in the National Register or fails to respond within 45 days of receipt of the request, the district engineer may proceed to conclude his action on the permit application.
- b. For a historic property outside of waters of the U. S. that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:
  1. treat the historic property as a "designated historic property," if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or
  2. treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register;

or

3. treat the historic property as not eligible unless the Keeper of the National Register determines it is eligible for or lists it on the National Register. (See paragraph 6.c. below.)
- c. If the district engineer and the SHPO do not agree pursuant to paragraph 6.b.(1) and the SHPO notifies the district engineer that it is nominating a potentially eligible historic property for the National Register that may be affected by the undertaking, the district engineer will wait a reasonable period of time for that determination to be made before concluding his action on the permit. Such a reasonable period of time would normally be 30 days for the SHPO to nominate the historic property plus 45 days for the Keeper of the National Register to make such determination. The district engineer will encourage the applicant to cooperate with the SHPO in obtaining the information necessary to nominate the historic property.

## 7. Assessing Effects.

- a. **Applying the Criteria of Effect and Adverse Effect.** During the public notice comment period or within 30 days after the determination or discovery of a designated history property the district engineer will coordinate with the SHPO and determine if there is an effect and if so, assess the effect. (See Paragraph 15.)
- b. **No Effect.** If the SHPO concurs with the district engineer's determination of no effect or fails to respond within 15 days of the district engineer's notice to the SHPO of a no effect determination, then the district engineer may proceed with the final decision.
- c. **No Adverse Effect.** If the district engineer, based on his coordination with the SHPO (see paragraph 7.a.), determines that an effect is not adverse, the district engineer will notify the ACHP and request the comments of the ACHP. The district engineer's notice will include a description of both the project and the designated historic property; both the district engineer's and the SHPO's views, as well as any views of affected local governments, Indian tribes, Federal agencies, and the public, on the no adverse effect determination; and a description of the efforts to identify historic properties and solicit the views of those above. The district engineer may conclude the permit decision if the ACHP does not object to the district engineer's determination or if the district engineer accepts any conditions requested by the ACHP for a no adverse effect determination, or the ACHP fails to respond within 30 days of the district engineer's notice to the ACHP. If the ACHP objects or the district engineer does not accept the conditions proposed by the ACHP, then the effect shall be considered as adverse.
- d. **Adverse Effect.** If an adverse effect on designated historic properties is found, the district engineer will notify the ACHP and coordinate with the SHPO to seek ways to avoid or reduce effects on designated historic properties. Either the

district engineer or the SHPO may request the ACHP to participate. At its discretion, the ACHP may participate without such a request. The district engineer, the SHPO or the ACHP may state that further coordination will not be productive. The district engineer shall then request the ACHP's comments in accordance with paragraph 9.

8. **Consultation.** At any time during permit processing, the district engineer may consult with the involved parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed activity. The district engineer will terminate any consultation immediately upon determining that further consultation is not productive and will immediately notify the consulting parties. If the consultation results in a mutual agreement among the SHPO, ACHP, applicant and the district engineer regarding the treatment of designated historic properties, then the district engineer may formalize that agreement either through permit conditioning or by signing a Memorandum of Agreement (MOA) with these parties. Such MOA will constitute the comments of the ACHP and the SHPO, and the district engineer may proceed with the permit decision. Consultation shall not continue beyond the comment period provided in paragraph 9.b.

9. **ACHP Review and Comment.**

a. If:

- i. the district engineer determines that coordination with the SHPO is unproductive; or
- ii. the ACHP, within the appropriate comment period, requests additional information in order to provide its comments; or
- iii. the ACHP objects to any agreed resolution of impacts on designated historic properties;

the district engineer, normally within 30 days, shall provide the ACHP with:

1. a project description, including, as appropriate, photographs, maps, drawings, and specifications (such as, dimensions of structures, fills, or excavations; types of materials and quantity of material);
2. a listing and description of the designated historic properties that will be affected, including the reports from any surveys or investigations;
3. a description of the anticipated adverse effects of the undertaking on the designated historic properties and of the proposed mitigation measures and alternatives considered, if any; and
4. the views of any commenting parties regarding designated historic

properties.

In developing this information, the district engineer may coordinate with the applicant, the SHPO, and any appropriate Indian tribe or certified local government. Copies of the above information also should be forwarded to the applicant, the SHPO, and any appropriate Indian tribe or certified local government. The district engineer will not delay his decision but will consider any comments these parties may wish to provide.

- b. b. The district engineer will provide the ACHP 60 days from the date of the district engineer's letter forwarding the information in paragraph 9.a., to provide its comments. If the ACHP does not comment by the end of this comment period, the district engineer will complete processing of the permit application. When the permit decision is otherwise delayed as provided in 33 CFR 325.2(d)(3) & (4), the district engineer will provide additional time for the ACHP to comment consistent with, but not extending beyond that delay.

#### **10. District Engineer Decision.**

- a. In making the public interest decision on a permit application, in accordance with 33 CFR 320.4, the district engineer shall weigh all factors, including the effects of the undertaking on historic properties and any comments of the ACHP and the SHPO, and any views of other interested parties. The district engineer will add permit conditions to avoid or reduce effects on historic properties which he determines are necessary in accordance with 33 CFR 325.4. In reaching his determination, the district engineer will consider the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716).
- b. If the district engineer concludes that permitting the activity would result in the irrevocable loss of important scientific, prehistoric, historical, or archeological data, the district engineer, in accordance with the Archeological and Historic Preservation Act of 1974, will advise the Secretary of the Interior (by notifying the National Park Service (NPS)) of the extent to which the data may be lost if the undertaking is permitted, any plans to mitigate such loss that will be implemented, and the permit conditions that will be included to ensure that any required mitigation occurs.

- 11. Historic Properties Discovered During Construction.** After the permit has been issued, if the district engineer finds or is notified that the permit area contains a previously unknown potentially eligible historic property which he reasonably expects will be affected by the undertaking, he shall immediately inform the Department of the Interior Departmental Consulting Archeologist and the regional office of the NPS of the current knowledge of the potentially eligible historic property and the expected effects, if any, of the undertaking on that property. The district engineer will seek voluntary avoidance of

construction activities that could affect the historic property pending a recommendation from the National Park Service pursuant to the Archeological and Historic Preservation Act of 1974. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the district engineer may modify, suspend or revoke a permit in accordance with 33 CFR 325.7.

**12. Regional General Permits.** Potential impacts on historic properties will be considered in development and evaluation of general permits. However, many of the specific procedures contained in this appendix are not normally applicable to general permits. In developing general permits, the district engineer will seek the views of the SHPO and, the ACHP and other organizations and/or individuals with expertise or interest in historic properties. Where designated historic properties are reasonably likely to be affected, general permits shall be conditioned to protect such properties or to limit the applicability of the permit coverage.

**13. Nationwide General Permit.**

- a. The criteria at paragraph 15 of this Appendix will be used for determining compliance with the nationwide permit condition at 33 CFR 330.5(b)(9) regarding the effect on designated historic properties. When making this determination the district engineer may consult with the SHPO, the ACHP or other interest parties.
- b. If the district engineer is notified of a potentially eligible historic property in accordance with nationwide permit regulations and conditions, he will immediately notify the SHPO. If the district engineer believes that the potentially eligible historic property meets the criteria for inclusion in the National Register and that it may be affected by the proposed undertaking then he may suspend authorization of the nationwide permit until he provides the ACHP and the SHPO the opportunity to comment in accordance with the provisions of this Appendix. Once these provisions have been satisfied, the district engineer may notify the general permittee that the activity is authorized including any special activity specific conditions identified or that an individual permit is required.

**14. Emergency Procedures.** The procedures for processing permits in emergency situations are described at 33 CFR 325.2(e)(4). In an emergency situation the district engineer will make every reasonable effort to receive comments from the SHPO and the ACHP, when the proposed undertaking can reasonably be expected to affect a potentially eligible or designated historic property and will comply with the provisions of this Appendix to the extent time and the emergency situation allows.

**15. Criteria of Effect and Adverse Effect.**

- a. An undertaking has an effect on a designated historic property when the undertaking may alter characteristics of the property that qualified the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered.
- b. An undertaking is considered to have an adverse effect when the effect on a designated historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on designated historic properties include, but are not limited to:
  - 1. Physical destruction, damage, or alteration of all or part of the property;
  - 2. Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;
  - 3. Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
  - 4. Neglect of a property resulting in its deterioration or destruction; and
  - 5. Transfer, lease, or sale of the property.
- c. Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of this appendix:
  - 1. When the designated historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;
  - 2. When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected designated historic properties through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings", or
  - 3. When the undertaking is limited to the transfer, lease, or sale of a designated historic property, and adequate restrictions or conditions are included to ensure preservation of the property's important historic features.

[RETURN HOME](#)

# 33 CFR Part 326

## Enforcement

- [§ 326.1](#) - Purpose
- [§ 326.2](#) - Policy
- [§ 326.3](#) - Unauthorized activities
- [§ 326.4](#) - Supervision of authorized activities
- [§ 326.5](#) - Legal action
- [§ 326.6](#) - Class I Administrative Penalties

**AUTHORITY:** 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 33 U.S.C. 2101.

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### Section 326.1 - Purpose

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

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### Section 326.2 - Policy

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

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### Section 326.3 - Unauthorized activities

- a. **Surveillance.** To detect unauthorized activities requiring permits, district engineers

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

- b. **Initial investigation.** District engineers should take steps to investigate suspected violations in a timely manner. The scheduling of investigations will reflect the nature and location of the suspected violations, the anticipated impacts, and the most effective use of inspection resources available to the district engineer. These investigations should confirm whether a violation exists, and if so, will identify the extent of the violation and the parties responsible.
- c. **Formal notifications to parties responsible for violations.** Once the district engineer has determined that a violation exists, he should take appropriate steps to notify the responsible parties.
  1. If the violation involves a project that is not complete, the district engineer's notification should be in the form of a cease and desist order prohibiting any further work pending resolution of the violation in accordance with the procedures contained in this part. See paragraph (4) below for exception to this procedure.
  2. If the violation involves a completed project, a cease and desist order should not be necessary. However, the district engineer should still notify the responsible parties of the violation.
  3. All notifications, pursuant to paragraphs 1-2 above, should identify the relevant statutory authorities, indicate potential enforcement consequences, and direct the responsible parties to submit any additional information that the district engineer may need at that time to determine what course of action he should pursue in resolving the violation; further information may be requested, as needed, in the future.
  4. In situations which would, if a violation were not involved, qualify for emergency procedures pursuant to 33 CFR Part 325.2(e)(4), the district engineer may decide it would not be appropriate to direct that the unauthorized work be stopped. Therefore, in such situations, the district engineer may, at his discretion, allow the work to continue, subject to appropriate limitations and conditions as he may prescribe, while the violation is being resolved in accordance with the procedures contained in this part.
  5. When an unauthorized activity requiring a permit has been undertaken by American Indians (including Alaskan natives, Eskimos, and Aleuts, but not including Native Hawaiians) on reservation lands or in pursuit of specific treaty rights, the district engineer should use appropriate means to coordinate proposed directives and orders with the Assistant Chief Counsel for Indian Affairs (DAEN-CCI).

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

**d. Initial corrective measures.**

1. The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the unauthorized, completed work, solicit the views of the Environmental Protection Agency; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service, and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. In determining what initial corrective measures are required, the district engineer should consider whether serious jeopardy to life, property, or important public resources (see 33 CFR Part 320.4) may be reasonably anticipated to occur during the period required for the ultimate resolution of the violation. In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work. In unusual cases where initial corrective measures substantially eliminate all current and future detrimental impacts resulting from the unauthorized work, further enforcement actions should normally be unnecessary. For all other cases, the district engineer's order should normally specify that compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.
2. An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-fact permit application is prohibited or considered not appropriate pursuant to 326.3(e)(1) (iii)-(iv) below. However, such orders will be issued only when the district engineer has reached an independent determination that such measures are necessary and appropriate.
3. It will not be necessary to issue a Corps permit in connection with initial corrective measures undertaken at the direction of the district engineer.

**e. After-the-fact permit applications.**

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



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

- b. **Inspection limitations.** Section 326.4 does not establish a non-discretionary duty to inspect permitted activities for safety, sound engineering practices, or interference with other permitted or unpermitted structures or uses in the area. Further, the regulations implementing the Corps regulatory program do not establish a non-discretionary duty to inspect permitted activities for any other purpose.
- c. **Inspection expenses.** The expenses incurred in connection with the inspection of permitted activities will normally be paid by the Federal Government unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may condition permits to require permittees to pay inspection expenses pursuant to the authority contained in Section 9701 of Pub L. 97-258 (33 U.S.C. 9701). The collection and disposition of inspection expense funds obtained from applicants will be administered in accordance with the relevant Corps regulations governing such funds.
- d. **Non-compliance.** If a district engineer determines that a permittee has violated the terms or conditions of the permit and that the violation is sufficiently serious to require an enforcement action, then he should, unless at his discretion he deems it inappropriate:
  - 1. First contact the permittee;
  - 2. request corrected plans reflecting actual work, if needed; and
  - 3. attempt to resolve the violation. Resolution of the violation may take the form of the permitted project being voluntarily brought into compliance or of a permit modification (33 CFR 325.7(b)).

If a mutually agreeable solution cannot be reached, a written order requiring compliance should normally be issued and delivered by personal service. Issuance of an order is not, however, a prerequisite to legal action. If an order is issued, it will specify a time period of not more than 30 days for bringing the permitted project into compliance, and a copy will be sent to the appropriate state official pursuant to section 404(s)(2) of the Clean Water Act. If the permittee fails to comply with the order within the specified period of time, the district engineer may consider using the suspension/revocation procedures in 33 CFR 325.7(c) and/or he may recommend legal action in accordance with Section 326.5.

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## Section 326.5 - Legal Action

- a. **General.** For cases the district engineer determines to be appropriate, he will recommend

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

- b. **Preparation of case.** If the district engineer determines that legal action is appropriate, he will prepare a litigation report or such other documentation that he and the local U.S. Attorney have mutually agreed to, which contains an analysis of the information obtained during his investigation of the violation or during the processing of a permit application and a recommendation of appropriate legal action. The litigation report or alternative documentation will also recommend what, if any, restoration or mitigative measures are required and will provide the rationale for any such recommendation.
- c. **Referral to the local U.S. Attorney.** Except as provided in paragraph (d) of this section, district engineers are authorized to refer cases directly to the U.S. Attorney. Because of the unique legal system in the Trust Territories, all cases over which the Department of Justice has no authority will be referred to the Attorney General for the trust Territories. Information copies of all letters of referral shall be forwarded to the appropriate division counsel, the Office, Chief of Engineers, ATTN: DAEN-CCK, the Office of the Assistant Secretary of the Army (Civil Works), and the Chief of the Environmental Defense Section, Lands and Natural Resources Division, U.S. Department of Justice.
- d. **Referral to the Office, Chief of Engineers.** District engineers will forward litigation reports with recommendations through division offices to the Office, Chief of Engineers, ATTN: DAEN-CCK, for all cases that qualify under the following criteria:
  1. Significant precedential or controversial questions of law or fact;
  2. Requests for elevation to the Washington level by the Department of Justice;
  3. Violations of section 9 of the Rivers and Harbors Act of 1899;
  4. Violations of section 103 the Marine Protection, Research and Sanctuaries Act of 1972;
  5. All cases involving violations by American Indians (original of litigation report to DAEN-CCI with copy to DAEN-CCK) on reservation lands or in pursuit of specific treaty rights;
  6. All cases involving violations by officials acting on behalf of foreign governments; and
  7. Cases requiring action pursuant to paragraph (e) of this section.
- e. **Legal option not available.** In cases where the local U.S. Attorney declines to take legal action, it would be appropriate for the district engineer to close the enforcement case record unless he believes that the case warrants special attention. In that situation, he is encouraged to forward a litigation report to the Office, Chief of Engineers, ATTN:

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

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## **Section 326.6 - Class I Administrative Penalties**

### **a. Introduction.**

1. This subpart sets forth procedures for initiation and administration of Class I administrative penalty orders under Section 309 (g) of the Clean Water Act, and Section 205 of the National Fishing Enhancement Act. Section 309 (g)(2)(A) specifies that Class I civil penalties may not exceed \$10,000 per violation, except that the maximum amount of any Class I civil penalty shall not exceed \$25,000. The National Fishing Enhancement Act, Section 205 (e), provides that penalties for violations of permits issued in accordance with that Act shall not exceed \$10,000 for each violation.
2. These procedures supplement the existing enforcement procedures at Sections 326.1 through 326.5. However, as a matter of Corps enforcement discretion once the Corps decides to proceed with an administrative penalty under these procedures it shall not subsequently pursue judicial action pursuant to section 326.5. Therefore, an administrative penalty should not be pursued if a subsequent judicial action for civil penalties is desired. An administrative civil penalty may be pursued in conjunction with a compliance order; request for restoration and/or request for mitigation issued under section 326.4.
3. **Definitions.** For the purposes of this section of the regulation:
  - i. **"Corps"** means the Secretary of the Army, acting through the U.S. Army Corps of Engineers, with respect to the matters covered by this regulation.
  - ii. **"Interested person outside the Corps"** includes the permittee, any person who filed written comments on the proposed penalty order, and any other person not employed by the Corps with an interest in the subject of proposed penalty order, and any attorney of record for those persons.
  - iii. **"Interested Corps staff"** means those Corps employees, whether temporary or permanent, who may investigate, litigate, or present evidence, arguments, or the position of the Corps in the hearing or who participated in the preparation, investigation or deliberations concerning the proposed penalty order, including any employee, contractor, or consultant who may be called as a witness.
  - iv. **"Permittee"** means the person to whom the Corps issued a permit under

Section 404 of the Clean Water Act, (or Section 10 of the Rivers and Harbors Act for an Artificial Reef) the conditions and limitations of which permit have allegedly been violated.

- v. **"Presiding Officer"** means a member of Corps Counsel staff or any other qualified person designated by the District Engineer (DE), to hold a hearing on a proposed administrative civil penalty order [hereinafter referred to as "proposed order"] in accordance with the rules set forth in this regulation and to make such recommendations to the DE as prescribed in this regulation.
- vi. **"Ex parte communication"** means any communication, written or oral, relating to the merits of the proceeding, between the Presiding Officer and an interested person outside the Corps or the interested Corps staff, which was not originally filed or stated in the administrative record or in the hearing. Such communication is not an "ex parte communication" if all parties have received prior written notice of the proposed communication and have been given the opportunity to participate herein.

**b. Initiation of Action.**

1. If the DE or a delegatee of the DE finds that a recipient of a Department of the Army permit [hereinafter referred to as "the permittee"] has violated any permit condition or limitation contained in that permit, the DE is authorized to prepare and process a proposed order in accordance with these procedures. The proposed order shall specify the amount of the penalty which the permittee may be assessed and shall describe with reasonable specificity the nature of the violation.
2. The permittee will be provided actual notice, in writing, of the DE's proposal to issue an administrative civil penalty and will be advised of the right to request a hearing and to present evidence on the alleged violation. Notice to the permittee will be provided by certified mail, return receipt requested, or other notice, at the discretion of the DE when he determines justice so requires. This notice will be accompanied by a copy of the proposed order, and will include the following information:
  - i. A description of the alleged violation and copies of the applicable law and regulations;
  - ii. An explanation of the authority to initiate the proceeding;
  - iii. An explanation, in general terms, of the procedure for assessing civil penalties, including opportunities for public participation;
  - iv. A statement of the amount of the penalty that is proposed and a statement of the maximum amount of the penalty which the DE is authorized to assess for the violations alleged;
  - v. A statement that the permittee may within 30 calendar days of receipt of

the notice provided under this subparagraph, request a hearing prior to issuance of any final order. Further, that the permittee must request a hearing within 30 calendar days of receipt of the notice provided under this subparagraph in order to be entitled to receive such a hearing;

vi. The name and address of the person to whom the permittee must send a request for hearing;

vii. Notification that the DE may issue the final order on or after 30 calendar days following receipt of the notice provided under these rules, if the permittee does not request a hearing; and

viii. An explanation that any final order issued under this subpart shall become effective 30 calendar days following its issuance unless a petition to set aside the order and to hold a hearing is filed by a person who commented on the proposed order and such petition is granted or an appeal is taken under Section 309 (g) (8) of the Clean Water Act.

3. At the same time that actual notice is provided to the permittee, the DE shall give public notice of the proposed order, and provide reasonable opportunity for public comment on the proposed order, prior to issuing a final order assessing an administrative civil penalty. Procedures for giving public notice and providing the opportunity for public comment are contained in section 326.6 (c).

4. At the same time that actual notice is provided to the permittee, the DE shall provide actual notice, in writing, to the appropriate state agency for the state in which the violation occurred. Procedures for providing actual notice to and consulting with the appropriate state agency are contained in section 326.6 (d).

**c. Public Notice and Comment.**

1. At the same time the permittee and the appropriate state agency are provided actual notice, the DE shall provide public notice of and a reasonable opportunity to comment on the DE's proposal to issue an administrative civil penalty against the permittee.

2. A 30 day public comment period shall be provided. Any person may submit written comments on the proposed administrative penalty order. The DE shall include all written comments in an administrative record relating to the proposed order. Any person who comments on a proposed order shall be given notice of any hearing held on the proposed order. Such persons shall have a reasonable opportunity to be heard and to present evidence in such hearings.

3. If no hearing is requested by the permittee, any person who has submitted comments on the proposed order shall be given notice by the DE of any final order issued, and will be given 30 calendar days in which to petition the DE to set aside the order and to provide a hearing on the penalty. The DE shall set aside the order and provide a hearing in accordance with these rules if the evidence presented by the commenter in support of the commenter's petition for a hearing

is material and was not considered when the order was issued. If the DE denies a hearing, the DE shall provide notice to the commenter filing the petition for the hearing, together with the reasons for the denial. Notice of the denial and the reasons for the denial shall be published in the Federal Register by the DE.

4. The DE shall give public notice by mailing a copy of the information listed in subparagraph (5) to:
  - i. any person who requests notice;
  - ii. other persons on a mailing list developed to include some or all of the following sources:
    - A. persons who request in writing to be on the list;
    - B. persons on "area lists" developed from lists of participants in past similar proceedings in that area, including hearings or other actions related to section 404 permit issuance as required by section 325.3 (d) (1).

The DE may update the mailing list from time to time by requesting written indication of continued interest from those listed. The DE may delete from the list the name of any person who fails to respond to such a request.

5. All public notices under this subpart shall contain at a minimum the information provided to the permittee as described in section 326.6 (b) (2) and:
  - i. A statement of the opportunity to submit written comments on the proposed order and the deadline for submission of such comments;
  - ii. Any procedures through which the public may comment on or participate in proceedings to reach a final decision on the order;
  - iii. The location of the administrative record referenced in section 326.6 (e), the times at which the administrative record will be available for public inspection, and a statement that all information submitted by the permittee and persons commenting on the proposed order is available as part of the administrative record, subject to provisions of law restricting the public disclosure of confidential information.

**d. State Consultation.**

1. At the same time that the permittee is provided actual notice, the DE shall send the appropriate state agency written notice of proposal to issue an administrative civil penalty order. This notice will include the same information required pursuant to section 326.6 (c) (5).
2. For the purposes of this regulation, the appropriate State agency will be the agency administering the 401 certification program, unless another state agency is

agreed to by the District and the respective state through formal/informal agreement with the state.

3. The appropriate state agency will be provided the same opportunity to comment on the proposed order and participate in any hearing that is provided pursuant to section 326.6 (c).

**e. Availability of the Administrative Record.**

1. At any time after the public notice of a proposed penalty order is given under section 326.6 (c), the DE shall make available the administrative record at reasonable times for inspection and copying by any interested person, subject to provisions of law restricting the public disclosure of confidential information. Any person requesting copies of the administrative record or portions of the administrative record may be required by the DE to pay reasonable charges for reproducing the information requested.
2. The administrative record shall include the following:
  - i. Documentation relied on by the DE to support the violations alleged in the proposed penalty order with a summary of violations, if a summary has been prepared;
  - ii. Proposed penalty order or assessment notice;
  - iii. Public notice of the proposed order with evidence of notice to the permittee and to the public;
  - iv. Comments by the permittee and/or the public on the proposed penalty order, including any requests for a hearing;
  - v. All orders or notices of the Presiding Officer;
  - vi. Subpoenas issued, if any, for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with any hearings;
  - vii. All submittals or responses of any persons or comments to the proceeding, including exhibits, if any;
  - viii. A complete and accurate record or transcription of any hearing;
  - ix. The recommended decision of the Presiding Officer and final decision and/or order of the Corps issued by the DE; and
  - x. Any other appropriate documents related to the administrative proceeding;
- f. **Counsel.** A permittee may be represented at all stages of the proceeding by counsel. After receiving notification that a permittee or any other party or commenter is represented by counsel, the Presiding Officer and DE shall direct all further communications to that counsel.

**g. Opportunity for Hearing.**

1. The permittee may request a hearing and may provide written comments on the proposed administrative penalty order at any time within 30 calendar days after receipt of the notice set forth in section 326.6 (b) (2). The permittee must request the hearing in writing, specifying in summary form the factual and legal issues which are in dispute and the specific factual and legal grounds for the permittee's defense.
2. The permittee waives the right to a hearing to present evidence on the alleged violation or violations if the permittee does not submit the request for the hearing to the official designated in the notice of the proposed order within 30 calendar days of receipt of the notice. The DE shall determine the date of receipt of notice by permittee's signed and dated return receipt or such other evidence that constitutes proof of actual notice on a certain date.
3. The DE shall promptly schedule requested hearings and provide reasonable notice of the hearing schedule to all participants, except that no hearing shall be scheduled prior to the end of the thirty day public comment period provided in section 326.6 (c) (2). The DE may grant any delays or continuances necessary or desirable to resolve the case fairly.
4. The hearing shall be held at the district office or a location chosen by the DE, except the permittee may request in writing upon a showing of good cause that the hearing be held at an alternative location. Action on such request is at the discretion of the DE.

**h. Hearing.**

1. Hearings shall afford permittees with an opportunity to present evidence on alleged violations and shall be informal, adjudicatory hearings and shall not be subject to section 554 or 556 of the Administrative Procedure Act. Permittees may present evidence either orally or in written form in accordance with the hearing procedures specified in section 326.6 (i).
2. The DE shall give written notice of any hearing to be held under these rules to any person who commented on the proposed administrative penalty order under section 326.6 (c). This notice shall specify a reasonable time prior to the hearing within which the commenter may request an opportunity to be heard and to present oral evidence or to make comments in writing in any such hearing. The notice shall require that any such request specify the facts or issues which the commenter wishes to address. Any commenter who files comments pursuant to section 326.6 (c) (2) shall have a right to be heard and to present evidence at the hearing in conformance with these procedures.
3. The DE shall select a member of the Corps counsel staff or other qualified person to serve as Presiding Officer of the hearing. The Presiding Officer shall exercise no other responsibility, direct or supervisory, for the investigation or prosecution of any case before him. The Presiding Officer shall conduct hearings as specified

by these rules and make a recommended decision to the DE.

4. The Presiding Officer shall consider each case on the basis of the evidence presented, and must have no prior connection with the case. The Presiding Officer is solely responsible for the recommended decision in each case.
5. Ex Parte Communications:
  - i. No interested person outside the Corps or member of the interested Corps staff shall make, or knowingly cause to be made, any ex parte communication on the merits of the proceeding.
  - ii. The Presiding Officer shall not make, or knowingly cause to be made, any ex parte communication on the proceeding to any interested person outside the Corps or to any member of the interested Corps staff.
  - iii. The DE may replace the Presiding Officer in any proceeding in which it is demonstrated to the DE's satisfaction that the Presiding Officer has engaged in prohibited ex parte communications to the prejudice of any participant.
  - iv. Whenever an ex parte communication in violation of this section is received by the Presiding Officer or made known to the Presiding Officer, the Presiding Officer shall immediately notify all participants in the proceeding of the circumstances and substance of the communication and may require the person who made the communication or caused it to be made, or the party whose representative made the communication or caused it to be made, to the extent consistent with justice and the policies of the Clean Water Act, to show cause why that person or party's claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.
  - v. The prohibitions of this paragraph apply upon designation of the Presiding Officer and terminate on the date of final action or the final order.

**i. Hearing Procedures.**

1. The Presiding Officer shall conduct a fair and impartial proceeding in which the participants are given a reasonable opportunity to present evidence.
2. The Presiding Officer may subpoena witnesses and issue subpoenas for documents pursuant to the provisions of the Clean Water Act.
3. The Presiding Officer shall provide interested parties a reasonable opportunity to be heard and to present evidence. Interested parties include the permittee, any person who filed a request to participate under 33 CFR 326.6 (c), and any other person attending the hearing. The Presiding Officer may establish reasonable time limits for oral testimony.
4. The permittee may not challenge the permit condition or limitation which is the

subject matter of the administrative penalty order.

5. Prior to the commencement of the hearing, the DE shall provide to the Presiding Officer the complete administrative record as of that date. During the hearing, the DE, or an authorized representative of the DE may summarize the basis for the proposed administrative order. Thereafter, the administrative record shall be admitted into evidence and the Presiding Officer shall maintain the administrative record of the proceedings and shall include in that record all documentary evidence, written statements, correspondence, the record of hearing, and any other relevant matter.
6. The Presiding Officer shall cause a tape recording, written transcript or other permanent, verbatim record of the hearing to be made, which shall be included in the administrative record, and shall, upon written request, be made available, for inspection or copying, to the permittee or any person, subject to provisions of law restricting the public disclosure of confidential information. Any person making a request may be required to pay reasonable charges for copies of the administrative record or portions thereof.
7. In receiving evidence, the Presiding Officer is not bound by strict rules of evidence. The Presiding Officer may determine the weight to be accorded the evidence.
8. The permittee has the right to examine, and to respond to the administrative record. The permittee may offer into evidence, in written form or through oral testimony, a response to the administrative record including, any facts, statements, explanations, documents, testimony, or other exculpatory items which bear on any appropriate issues. The Presiding Officer may question the permittee and require the authentication of any written exhibit or statement. The Presiding Officer may exclude any repetitive or irrelevant matter.
9. At the close of the permittee's presentation of evidence, the Presiding Officer should allow the introduction of rebuttal evidence. The Presiding Officer may allow the permittee to respond to any such rebuttal evidence submitted and to cross-examine any witness.
10. The Presiding Officer may take official notice of matters that are not reasonably in dispute and are commonly known in the community or are ascertainable from readily available sources of known accuracy. Prior to taking official notice of a matter, the Presiding Officer shall give the Corps and the permittee an opportunity to show why such notice should not be taken. In any case in which official notice is taken, the Presiding Officer shall place a written statement of the matters as to which such notice was taken in the record, including the basis for such notice and a statement that the Corps or permittee consented to such notice being taken or a summary of the objections of the Corps or the permittee.
11. After all evidence has been presented, any participant may present argument on any relevant issue, subject to reasonable time limitations set at the discretion of

the Presiding Officer.

12. The hearing record shall remain open for a period of 10 business days from the date of the hearing so that the permittee or any person who has submitted comments on the proposed order may examine and submit responses for the record.
13. At the close of this 10 business day period, the Presiding Officer may allow the introduction of rebuttal evidence. The Presiding Officer may hold the record open for an additional ten business days to allow the presentation of such rebuttal evidence.

**j. The Decision.**

1. Within a reasonable time following the close of the hearing and receipt of any statements following the hearing and after consultation with the state pursuant to section 326.6 (d), the Presiding Officer shall forward a recommended decision accompanied by a written statement of reasons to the DE. The decision shall recommend that the DE withdraw, issue, or modify and issue the proposed order as a final order. The recommended decision shall be based on a preponderance of the evidence in the administrative record. If the Presiding Officer finds that there is not a preponderance of evidence in the record to support the penalty or the amount of the penalty in a proposed order, the Presiding Officer may recommend that the order be withdrawn or modified and then issued on terms that are supported by a preponderance of evidence on the record. The Presiding Officer also shall make the complete administrative record available to the DE for review.
2. The Presiding Officer's recommended decision to the DE shall become part of the administrative record and shall be made available to the parties to the proceeding at the time the DE's decision is released pursuant to section 326.6 (j) (5). The Presiding Officer's recommended decision shall not become part of the administrative record until the DE's final decision is issued, and shall not be made available to the permittee or public prior to that time.
3. The rules applicable to Presiding Officers under section 326.6 (h) (5) regarding ex parte communications are also applicable to the DE and to any person who advises the DE on the decision or the order, except that communications between the DE and the Presiding Officer do not constitute ex parte communications, nor do communications between the DE and his staff prior to issuance of the proposed order.
4. The DE may request additional information on specified issues from the participants, in whatever form the DE designates, giving all participants a fair opportunity to be heard on such additional matters. The DE shall include this additional information in the administrative record.
5. Within a reasonable time following receipt of the Presiding Officer's recommended decision, the DE shall withdraw, issue, or modify and issue the proposed order as a final order. The DE's decision shall be based on a

preponderance of the evidence in the administrative record, shall consider the penalty factors set out in Section 309 (g) (3) of the CWA, shall be in writing, shall include a clear and concise statement of reasons for the decision, and shall include any final order assessing a penalty. The DE's decision, once issued, shall constitute final Corps action for purposes of judicial review.

6. The DE shall issue the final order by sending the order, or written notice of its withdrawal, to the permittee by certified mail. Issuance of the order under this subparagraph constitutes final Corps action for purposes of judicial review.
7. The DE shall provide written notice of the issuance, modification and issuance, or withdrawal of the proposed order to every person who submitted written comments on the proposed order.
8. The notice shall include a statement of the right to judicial review and of the procedures and deadlines for obtaining judicial review. The notice shall also note the right of a commenter to petition for a hearing pursuant to 33 CFR 326.6 (c)(3) if no hearing was previously held.

**k. Effective Date of Order.**

1. Any final order issued under this subpart shall become effective 30 calendar days following its issuance unless an appeal is taken pursuant to Section 309 (g) (8) of the Clean Water Act, or in the case where no hearing was held prior to the final order, and a petition for hearing is filed by a prior commenter.
2. If a petition for hearing is received within 30 days after the final order is issued, the DE shall:
  - i. Review the evidence presented by the petitioner.
  - ii. If the evidence is material and was not considered in the issuance of the order, the DE shall immediately set aside the final order and schedule a hearing. In that case, a hearing will be held, a new recommendation will be made by the Presiding Officer to the DE and a new final decision issued by the DE.
  - iii. If the DE denies a hearing under this subparagraph, the DE shall provide to the petitioner, and publish in the Federal Register, notice of, and the reasons for, such denial.

**1. Judicial Review.**

1. Any permittee against whom a final order assessing a civil penalty under these regulations or any person who provided written comments on a proposed order may obtain judicial review of the final order.
2. In order to obtain judicial review, the permittee or commenter must file a notice of appeal in the United States District Court for either the District of Columbia, or the district in which the violation was alleged to have occurred, within 30

calendar days after the date of issuance of the final order.

3. Simultaneously with the filing of the notice of appeal, the permittee or commenter must send a copy of such notice by certified mail to the DE and the Attorney General.

# 33 CFR Part 327

## Public Hearings

- [§ 327.1](#) - Purpose
- [§ 327.2](#) - Applicability
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- [§ 327.6](#) - Legal adviser
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- [§ 327.9](#) - Filing of transcript of the public hearing
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- [§ 327.11](#) - Public notice

**AUTHORITY:** 33 U.S.C. 1344; 33 U.S.C. 1413.

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### **Section 327.1 - Purpose.**

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

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### **Section 327.2 - Applicability.**

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

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### **Section 327.3 - Definitions.**

- a. **Public hearing** means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action, or Federal project, and which affords the public an opportunity to present their views, opinions, and information on such permit actions or Federal projects.
  - b. **Permit action**, as used herein means the evaluation of and decision on an application for a DA permit pursuant to sections 9 or 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, or section 103 of the MPRSA, as amended, or the modification, suspension or revocation of any DA permit (see 33 CFR 325.7).
  - c. **Federal project** means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to section 404 of the Clean Water Act, or section 103 of the MPRSA.
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#### **Section 327.4 - General policies.**

- a. A public hearing will be held in connection with the consideration of a DA permit application or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project. In addition, a public hearing may be held when it is proposed to modify or revoke a permit. (See 33 CFR 325.7).
  - b. Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a DA permit application or on a Federal project, that a public hearing be held to consider the material matters at issue in the permit application or with respect to Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, he shall promptly set a time and place for the public hearing, and give due notice thereof, as prescribed in Section 327.11 of this Part. Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing, and communicate his reasons therefor to all requesting parties. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.
  - c. In case of doubt, a public hearing shall be held. HQDA has the discretionary power to require hearings in any case.
  - d. In fixing the time and place for a hearing, the convenience and necessity of the interested public will be duly considered.
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### **Section 327.5 - Presiding officer.**

- a. The district engineer, in whose district a matter arises, shall normally serve as the presiding officer. When the district engineer is unable to serve, he may designate the deputy district engineer or other qualified person as presiding officer. In cases of unusual interest, the Chief of Engineers or the division engineer may appoint such person as he deems appropriate to serve as the presiding officer.
  - b. The presiding officer shall include in the administrative record of the permit action the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to or in support of the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The administrative record shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.
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### **Section 327.6 - Legal adviser.**

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

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### **Section 327.7 - Representation.**

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

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### **Section 327.8 - Conduct of hearings.**

- a. The presiding officer shall make an opening statement outlining the purpose of the hearing and prescribing the general procedures to be followed.
- b. Hearings shall be conducted by the presiding officer in an orderly but expeditious manner. Any person shall be permitted to submit oral or written statements concerning the subject matter of the hearing, to call witnesses who may present oral or written statements, and to present recommendations as to an appropriate decision. Any person may present written statements for the hearing record prior to the time the hearing record is closed to public submissions, and may present proposed findings and recommendations. The presiding officer shall afford participants a reasonable opportunity for rebuttal.
- c. The presiding officer shall have discretion to establish reasonable limits upon the time allowed for statements of witnesses, for arguments of parties or their counsel or

representatives, and upon the number of rebuttals.

- d. Cross-examination of witnesses shall not be permitted.
- e. All public hearings shall be reported verbatim. Copies of the transcripts of proceedings may be purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate district engineer.
- f. All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the presiding officer for reasons of redundancy, be received in evidence and shall constitute a part of the record.
- g. The presiding officer shall allow a period of not less than 10 days after the close of the public hearing for submission of written comments.
- h. In appropriate cases, the district engineer may participate in joint public hearings with other Federal or state agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or state agency allows a cross-examination in its public hearing, the district engineer may still participate in the joint public hearing but shall not require cross examination as a part of his participation.

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### **Section 327.9 - Filing of the transcript of the public hearing.**

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

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### **Section 327.10 - Authority of the presiding officer.**

Presiding officers shall have the following authority:

- a. To regulate the course of the hearing including the order of all sessions and the scheduling thereof, after any initial session, and the recessing, reconvening, and adjournment thereof; and

- b. To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.
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### **Section 327.11 - Public notice.**

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

# 33 CFR Part 328

## Definition of Waters of the United States

- [§ 328.1](#) - Purpose
- [§ 328.2](#) - General scope
- [§ 328.3](#) - Definitions
- [§ 328.4](#) - Limits of jurisdiction
- [§ 328.5](#) - Changes in limits of waters of the United States

**AUTHORITY:** 33 U.S.C. 1344.

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### **Section 328.1 - Purpose.**

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by Section 404 of the Clean Water Act includes "navigable waters" which is defined at Section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320-330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

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### **Section 328.2 - General scope.**

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

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### **Section 328.3 - Definitions.**

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

- a. The term "**waters of the United States**" means
1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  2. All interstate waters including interstate wetlands;
  3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
    - i. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
    - ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    - iii. Which are used or could be used for industrial purpose by industries in interstate commerce;
  4. All impoundments of waters otherwise defined as waters of the United States under the definition;
  5. Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
  6. The territorial seas;
  7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.
  8. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.
- b. The term "**wetlands**" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- c. The term "**adjacent**" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river

berms, beach dunes and the like are "adjacent wetlands."

- d. The term "**high tide line**" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.
- e. The term "**ordinary high water mark**" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.
- f. The term "**tidal waters**" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

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#### **Section 328.4 - Limits of jurisdiction.**

- a. **Territorial Seas.** The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)
  - b. **Tidal Waters of the United States.** The landward limits of jurisdiction in tidal waters:
    - 1. Extends to the high tide line, or
    - 2. When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.
  - c. **Non-Tidal Waters of the United States.** The limits of jurisdiction in non-tidal waters:
    - 1. In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or
    - 2. When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.
    - 3. When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.
-

## **Section 328.5 - Changes in limits of waters of the United States.**

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

# 33 CFR Part 329

## Definition of Navigable Waters of the US

- [§ 329.1](#) - Purpose
- [§ 329.2](#) - Applicability
- [§ 329.3](#) - General policies
- [§ 329.4](#) - General definitions
- [§ 329.5](#) - General scope of determination
- [§ 329.6](#) - Interstate or foreign commerce
- [§ 329.7](#) - Intrastate or interstate nature of waterway
- [§ 329.8](#) - Improved or natural conditions of the waterbody
- [§ 329.9](#) - Time at which commerce exists or determination is made
- [§ 329.10](#) - Existence of obstructions
- [§ 329.11](#) - Geographic and jurisdictional limits of rivers and lakes
- [§ 329.12](#) - Geographic and jurisdictional limits of oceanic and tidal waters
- [§ 329.13](#) - Geographic limits: shifting boundaries
- [§ 329.14](#) - Determination of navigability
- [§ 329.15](#) - Inquiries regarding determinations
- [§ 329.16](#) - Use and maintenance of lists of determinations

**AUTHORITY:** 33 U.S.C. 401 et seq.

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### Section 329.1 - Purpose

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to

authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 and 328.

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### **Section 329.2 - Applicability**

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

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### **Section 329.3 - General policies**

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

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### **Section 329.4 - General definition**

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

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### **Section 329.5 General scope of determination**

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

- a. Past, present, or potential presence of interstate or foreign commerce;
  - b. Physical capabilities for use by commerce as in paragraph (a) of this section; and
  - c. Defined geographic limits of the waterbody.
- 

### **Section 329.6 - Interstate or foreign commerce**

- a. Nature of commerce: type, means, and extent of use. The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of

use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in Section 329.9 of this Part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

- b. Nature of commerce: interstate and intrastate. Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

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### **Section 329.7 - Intrastate or interstate nature of waterway**

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

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### **Section 329.8 - Improved or natural conditions of the waterbody**

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

- a. **Existing improvements: artificial waterbodies.**
  1. An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable

where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

2. The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (see paragraph 329.12(b) of this Part).
  3. Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does not become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.
- b. **Non-existing improvements, past or potential.** A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

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## Section 329.9 - Time at which commerce exists or determination is made

- a. **Past use.** A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in paragraph 329.8(b) of this Part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

- b. **Future or potential use.** Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.
- 

### **Section 329.10 - Existence of obstructions**

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

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### **Section 329.11 - Geographic and jurisdictional limits of rivers and lakes**

- a. **Jurisdiction over entire bed.** Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.
  - 1. The "**ordinary high water mark**" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.
  - 2. **Ownership** of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.
- b. **Upper limit of navigability.** The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

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## Section 329.12 -

### Geographic and jurisdictional limits of oceanic and tidal waters

- a. **Ocean and coastal waters.** The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).
  1. **Baseline defined.** Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.
  2. **Shoreward limit of jurisdiction.** Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.
- b. **Bays and estuaries.** Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

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## Section 329.13 - Geographic limits: shifting boundaries

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

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## Section 329.14 - Determination of navigability

- a. **Effect on determinations.** Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.
- b. **Procedures of determination.** A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.
- c. **Suggested format** of report of findings:
  1. Name of waterbody:
  2. Tributary to:
  3. Physical characteristics:
    - i. Type: (river, bay, slough, estuary, etc.)
    - ii. Length:
    - iii. Approximate discharge volumes: Maximum, Minimum, Mean:
    - iv. Fall per mile:
    - v. Extent of tidal influence:
    - vi. Range between ordinary high and ordinary low water:
    - vii. Description of improvements to navigation not listed in paragraph (c)(5) of this section:
  4. Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:
  5. Authorized projects:
    - i. Nature, condition and location of any improvements made under projects authorized by Congress:

- ii. Description of projects authorized but not constructed:
    - iii. List of known survey documents or reports describing the waterbody:
  - 6. Past or present interstate commerce:
    - i. General types, extent, and period in time:
    - ii. Documentation if necessary:
  - 7. Potential use for interstate commerce, if applicable:
    - i. If in natural condition:
    - ii. If improved:
  - 8. Nature of jurisdiction known to have been exercised by Federal agencies if any:
  - 9. State or Federal court decisions relating to navigability of the waterbody, if any:
  - 10. Remarks:
  - 11. Finding of navigability (with date) and recommendation for determination:
- 

### **Section 329.15 - Inquiries regarding determinations**

- a. Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an emergency determination, district engineers may act in reliance on a finding prepared as in Section 329.14 of this Part. The report of findings should then be forwarded to the division engineer on an expedited basis.
- b. Where determinations have been made by the division engineer, inquiries regarding the navigability of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that (River) (Bay) (Lake, etc.) is a navigable water of the United States from mile to mile. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

- c. Specific inquiries regarding the jurisdiction of the Corps of Engineers can be answered only after a determination whether

1. the waters are navigable waters of the United States or
  2. if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.
- 

### **Section 329.16 - Use and maintenance of lists of determinations.**

- a. Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.
- b. It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.
- c. Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

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# NATIONWIDE PERMIT PROGRAM

- [§ 330.1](#) - Purpose and policy.
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- [§ 330.5](#) - Issuing, modifying, suspending, or revoking nationwide permits and authorizations.
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- [Appendix C](#) - Nationwide Permit Conditions
- 1996 Re-Issuance of the Nationwide Permits - Nationwide Permits and Conditions

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

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## Sec. 330.1 Purpose and policy.

- Purpose.** This Part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.
- Nationwide permits.** Nationwide permits (NWP) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts. The NWP are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWP or modifications to or reissuance of existing NWP will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.
- Terms and conditions.** An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider unauthorized any activity requiring Corps

authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR Part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general permit. After considering whether a violation was knowing or intentional, and other indications of the need for a penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact authorization under an NWP, if all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

d. **Discretionary Authority.** District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP. This discretionary authority may be used by district and division engineers only to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act Section 404(b)(1) Guidelines or for any factor of the public interest. Because of the nature of most activities authorized by NWP, district and division engineers will not have to review every such activity to decide whether to exercise discretionary authority. The terms and conditions of certain NWPs require the DE to review the proposed activity before the NWP authorizes its construction. However, the DE has the discretionary authority to review any activity authorized by NWP to determine whether the activity complies with the NWP. If the DE finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit. Discretionary authority is also discussed at 33 CFR(e) and 330.5.

e. **Notifications.**

1. In most cases, permittees may proceed with activities authorized by NWPs without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 30-day period. The 30-day period starts on the date of receipt of the notification in the Corps district office and ends 30 calendar days later regardless of weekends or holidays. If the DE notifies the prospective permittee that the notification is incomplete, a new 30-day period will commence upon receipt of the revised notification. The prospective permittee may not proceed with the proposed activity before expiration of the 30-day period unless otherwise notified by the DE. If the DE fails to act within the 30-day period, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.
2. The DE will review the notification and may add activity-specific conditions to ensure that the activity complies with the terms and conditions of the NWP and

that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.

3. For some NWP's involving discharges into wetlands, the notification must include a wetland delineation. The DE will review the notification and determine if the individual and cumulative adverse environmental effects are more than minimal. If the adverse effects are more than minimal the DE will notify the prospective permittee that an individual permit is required or that the prospective permittee may propose measures to mitigate the loss of special aquatic sites, including wetlands, to reduce the adverse impacts to minimal. The prospective permittee may elect to propose mitigation with the original notification. The DE will consider that proposed mitigation when deciding if the impacts are minimal. The DE shall add activity-specific conditions to ensure that the mitigation will be accomplished. If sufficient mitigation cannot be developed to reduce the adverse environmental effects to the minimal level, the DE will not allow authorization under the NWP and will instruct the prospective permittee on procedures to seek authorization under an individual permit.
- f. **Individual Applications.** DEs should review all incoming applications for individual permits for possible eligibility under regional general permits or NWP's. If the activity complies with the terms and conditions of one or more NWP, he should verify the authorization and so notify the applicant. If the DE determines that the activity could comply after reasonable project modifications and/or activity-specific conditions, he should notify the applicant of such modifications and conditions. If such modifications and conditions are accepted by the applicant, verbally or in writing, the DE will verify the authorization with the modifications and conditions in accordance with 33 CFR 330.6(a). However, the DE will proceed with processing the application as an individual permit and take the appropriate action within 15 calendar days of receipt, in accordance with 33 CFR 325.2(a)(2), unless the applicant indicates that he will accept the modifications or conditions.
- g. **Authority.** NWP's can be issued to satisfy the permit requirements of Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, Section 103 of the Marine Protection, Research, and Sanctuaries Act, or some combination thereof. The applicable authority will be indicated at the end of each NWP. NWP's and their conditions previously published at 33 CFR 330.5 and 330.6 will remain in effect until they expire or are modified or revoked in accordance with the procedures of this Part.

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## Sec. 330.2 Definitions.

- a. The definitions found in 33 CFR Parts 320-329 are applicable to the terms used in this Part.
- b. **Nationwide permit** refers to a type of general permit which authorizes activities on a nationwide basis unless specifically limited. (Another type of general permit is a "regional permit" which is issued by division or district engineers on a regional basis in

accordance with 33 CFR Part 325). (See 33 CFR 322.2(f) and 323.2(h) for the definition of a general permit.)

- c. **Authorization** means that specific activities that qualify for an NWP may proceed, provided that the terms and conditions of the NWP are met. After determining that the activity complies with all applicable terms and conditions, the prospective permittee may assume an authorization under an NWP. This assumption is subject to the DE's authority to determine if an activity complies with the terms and conditions of an NWP. If requested by the permittee in writing, the DE will verify in writing that the permittee's proposed activity complies with the terms and conditions of the NWP. A written verification may contain activity-specific conditions and regional conditions which a permittee must satisfy for the authorization to be valid.
- d. **Headwaters** means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means. For streams that are dry for long periods of the year, DEs may establish the point where headwaters begin as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.
- e. **Isolated waters** means those non-tidal waters of the United States that are: **(1)** Not part of a surface tributary system to interstate or navigable waters of the United States; and **(2)** Not adjacent to such tributary waterbodies.
- f. **Filled area** means the area within jurisdictional waters which is eliminated or covered as a direct result of the discharge (i.e., the area actually covered by the discharged material). It does not include areas excavated nor areas impacted as an indirect effect of the fill.
- g. **Discretionary authority** means the authority described in sections (d) and 330.4(e) which the Chief of Engineers delegates to division or district engineers to modify an NWP authorization by adding conditions, to suspend an NWP authorization, or to revoke an NWP authorization and thus require individual permit authorization.
- h. **Terms and conditions.** The "*terms*" of an NWP are the limitations and provisions included in the description of the NWP itself. The "*conditions*" of NWPs are additional provisions which place restrictions or limitations on all of the NWPs. These are published with the NWPs. Other conditions may be imposed by district or division engineers on a geographic, category-of-activity, or activity-specific basis (See 33 CFR 330.4(e)).
- i. **Single and complete project** means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, the cumulative total of all filled areas should be the basis for deciding whether or not the project will be covered by an NWP. For linear projects, the "single and complete project" (i.e. single and

complete crossing) will apply to each crossing of a separate water of the United States (i.e. single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

- j. *Special aquatic sites* means wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, sanctuaries, and refuges as defined at 40 CFR 230.40 thru 230.45.
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### **Sec. 330.3 Activities occurring before certain dates.**

The following activities were permitted by NWP's issued on July 19, 1977, and, unless the activities are modified, they do not require further permitting:

- a. Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which extended Section 404 jurisdiction to all waters of the United States. The phase-in dates were: after July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. (Section 404)
  - b. Structures or work completed before December 18, 1968, or in waterbodies over which the DE had not asserted jurisdiction at the time the activity occurred, provided in both instances, there is no interference with navigation. Activities completed shoreward of applicable Federal Harbor lines before May 27, 1970 do not require specific authorization. (Section 10)
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### **Sec. 330.4 Conditions, limitations, and restrictions.**

- a. **General.** A prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur. Some conditions identify a "threshold" that, if met, requires additional procedures or provisions contained in other paragraphs in this section. It is important to remember that the NWP's only authorize activities from the perspective of the Corps regulatory authorities and that other Federal, state, and local permits, approvals, or authorizations may also be required.
- b. **Further information.**
  - 1. DEs have authority to determine if an activity complies with the terms and conditions of an NWP.
  - 2. NWP's do not obviate the need to obtain other Federal, state, or local permits,

approvals, or authorizations required by law.

3. NWP's do not grant any property rights or exclusive privileges.
4. NWP's do not authorize any injury to the property or rights of others.
5. NWP's do not authorize interference with any existing or proposed Federal project.

**c. State 401 water quality certification.**

1. State 401 water quality certification pursuant to Section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWP's authorizing activities which may result in a discharge into waters of the United States.
2. If, prior to the issuance or reissuance of such NWP's, a state issues a 401 water quality certification which includes special conditions, the division engineer will make these special conditions regional conditions of the NWP for activities which may result in a discharge into waters of United States in that state, unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case, the conditioned 401 water quality certification will be considered a denial of the certification (see paragraph (c)(3) of this section).
3. If a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification or waives its right to do so. State denial of 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. That NWP continues to authorize activities which could not reasonably be expected to result in discharges into waters of the United States.
4. DEs will take appropriate measures to inform the public of which activities, waterbodies, or regions require an individual 401 water quality certification before authorization by NWP.
5. The DE will not require or process an individual permit application for an activity which may result in a discharge and otherwise qualifies for an NWP solely on the basis that the 401 water quality certification has been denied for that NWP. However, the district or division engineer may consider water quality, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit.
6. In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification. For NWP's for which a state has denied the 401 water quality certification, the DE will determine a reasonable period of time after

receipt of the request for an activity-specific 401 water quality certification (generally 60 days), upon the expiration of which the DE will presume state waiver of the certification for the individual activity covered by the NWP's. However, the DE and the state may negotiate for additional for the 401 water quality certification, but in no event shall the period exceed one (1) year (see 33 CFR 325.2(b)(1)(ii)). Upon receipt of an individual 401 water quality certification, or if the prospective permittee demonstrates to the DE state waiver of such certification, the proposed work can be authorized under the NWP. For NWPs requiring a 30-day predischage notification the district engineer will immediately begin, and complete, his review prior to the state action on the individual section 401 water quality certification. If a state issues a conditioned individual 401 water quality certification for an individual activity, the DE will include those conditions as activity-specific conditions of the NWP.

7. Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation of the NWP authorization as outlined in Section 330.5. Otherwise, such attempted state withdrawal is not effective and the Corps will consider the state certification to be valid for the NWP authorizations until such time as the NWP is modified or reissued.

**d. Coastal zone management consistency determination.**

1. Section 307(c)(1) of the Coastal Zone Management Act (CZMA) requires the Corps to provide a consistency determination and receive state agreement prior to the issuance, reissuance, or expansion of activities authorized by an NWP that authorizes activities within a state with a Federally-approved Coastal Management Program when activities that would occur within, or outside, that state's coastal zone will affect land or water uses or natural resources of the state's coastal zone.
2. If, prior to the issuance, reissuance, or expansion of activities authorized by an NWP, a state indicates that additional conditions are necessary for the state to agree with the Corps consistency determination, the division engineer will make such conditions regional conditions for the NWP in that state, unless he determines that the conditions do not comply with the provisions of 33 CFR 325.4 or believes for some other specific reason it would be inappropriate to include the conditions. In this case, the state's failure to agree with the Corps consistency determination without the conditions will be considered to be a disagreement with the Corps consistency determination.
3. When a state has disagreed with the Corps consistency determination, authorization for all such activities occurring within or outside the state's coastal zone that affect land or water uses or natural resources of the state's coastal zone is denied without prejudice until the prospective permittee furnishes the DE an individual consistency certification pursuant to Section 307(c)(3) of the CZMA

and demonstrates that the state has concurred in it (either on an individual or generic basis), or that concurrence should be presumed (see paragraph (d)(6) of this Section).

4. DEs will take appropriate measures, such as public notices, to inform the public of which activities, waterbodies, or regions require prospective permittees to make an individual consistency determination and seek concurrence from the state.
5. DEs will not require or process an individual permit application for an activity otherwise qualifying for an NWP solely on the basis that the activity has not received CZMA consistency agreement from the state. However, the district or division engineer may consider that factor, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit application.
6. In instances where a state has disagreed with the Corps consistency determination for activities under a particular NWP, permittees must furnish the DE with an individual consistency concurrence or a copy of the consistency certification provided to the state for concurrence. If a state fails to act on a permittee's consistency certification within six months after receipt by the state, concurrence will be presumed. Upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP. For NWPs requiring a 30-day predischARGE notification the DE will immediately begin, and may complete, his review prior to the state action on the individual consistency certification. If a state indicates that individual conditions are necessary for consistency with the state's Federally-approved coastal management program for that individual activity, the DE will include those conditions as activity-specific conditions of the NWP unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case the DE will consider the conditioned concurrence as a nonconcurrence unless the permittee chooses to comply voluntarily with all the conditions in the conditioned concurrence.
7. Where a state, after agreeing with the Corps consistency determination, subsequently attempts to reverse its agreement for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation as outlined in 33 CFR 330.5. Otherwise, such attempted reversal is not effective and the Corps will consider the state CZMA consistency agreement to be valid for the NWP authorization until such time as the NWP is modified or reissued.
8. Federal activities must be consistent with a state's Federally-approved coastal management program to the maximum extent practicable. Federal agencies should follow their own procedures and the Department of Commerce regulations appearing at 15 CFR Part 930 to meet the requirements of the CZMA. Therefore, the provisions of 33 CFR 330.4(d)(1)-(7) do not apply to Federal activities. Indian

tribes doing work on Indian Reservation lands shall be treated in the same manner as Federal applicants.

- e. **Discretionary authority.** The Corps reserves the right (i.e., discretion) to modify, suspend, or revoke NWP authorizations. Modification means the imposition of additional or revised terms or conditions on the authorization. Suspension means the temporary cancellation of the authorization while a decision is made to either modify, revoke, or reinstate the authorization. Revocation means the cancellation of the authorization. The procedures for modifying, suspending, or revoking NWP authorizations are detailed in Section 330.5.
1. A division engineer may assert discretionary authority by modifying, suspending, or revoking NWP authorizations for a specific geographic area, class of activity, or class of waters within his division, including on a statewide basis, whenever he determines sufficient concerns for the environment under the Section 404(b)(1) Guidelines or any other factor of the public interest so requires, or if he otherwise determines that the NWP would result in more than minimal adverse environmental effects either individually or cumulatively.
  2. A DE may assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires. Whenever the DE determines that a proposed specific activity covered by an NWP would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be contrary to the public interest, he must either modify the NWP authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by NWP and provide instructions on how to seek authorization under a regional general or individual permit.
  3. The division or district engineer will restore authorization under the NWPs at any time he determines that his reason for asserting discretionary authority has been satisfied by a condition, project modification, or new information.
  4. When the Chief of Engineers modifies or reissues an NWP, division engineers must use the procedures of Section 330.5 to reassert discretionary authority to reinstate regional conditions or revocation of NWP authorizations for specific geographic areas, class of activities, or class of waters. Division engineers will update existing documentation for each NWP. Upon modification or reissuance of NWPs, previous activity-specific conditions or revocations of NWP authorization will remain in effect unless the DE specifically removes the activity-specific conditions or revocations.
- f. **Endangered Species.** No activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species.

1. Federal agencies should follow their own procedures for complying with the requirements of the ESA.
  2. Non-federal permittees shall notify the DE if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. In such cases, the prospective permittee will not begin work under authority of the NWP until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. If the DE determines that the activity may affect any Federally listed species or critical habitat, the DE must initiate Section 7 consultation in accordance with the ESA. In such cases, the DE may:
    - i. Initiate Section 7 consultation and then, upon completion, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or
    - ii. Prior to or concurrent with Section 7 consultation, assert discretionary authority (see 33 CFR 330.4(e)) and require an individual permit (see 33 CFR 330.5(d)).
  3. Prospective permittees are encouraged to obtain information on the location of threatened or endangered species and their critical habitats from the U.S. Fish and Wildlife Service, Endangered Species Office, and the National Marine Fisheries Service.
- g. **Historic Properties.** No activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provisions of 33 CFR Part 325, Appendix C.
1. Federal permittees should follow their own procedures for compliance with the requirements of the National Historic Preservation Act and other Federal historic preservation laws.
  2. Non-federal permittees will notify the DE if the activity may affect historic properties which the National Park Service has listed, determined eligible for listing, or which the prospective permittee has reason to believe may be eligible for listing, on the National Register of Historic Places. In such cases, the prospective permittee will not begin the proposed activity until notified by the DE that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. If a property in the permit area of the activity is determined to be an historic property in accordance with 33 CFR Part 325, Appendix C, the DE will take into account the effects on such properties in accordance with 33 CFR Part 325, Appendix C. In such cases, the district engineer may:
    - i. After complying with the requirements of 33 CFR Part 325, Appendix C, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or

- ii. Prior to or concurrent with complying with the requirements of 33 CFR Part 325, Appendix C, he may assert discretionary authority (see 33 CFR 330.4(e)) and instruct the prospective permittee of procedures to seek authorization under a regional general permit or an individual permit. (See 33 CFR 330.5(d)).
  3. The permittee shall immediately notify the DE if, before or during prosecution of the work authorized, he encounters an historic property that has not been listed or determined eligible for listing on the National Register, but which the prospective permittee has reason to believe may be eligible for listing on the National Register.
  4. Prospective permittees are encouraged to obtain information on the location of historic properties from the State Historic Preservation Officer and the National Register of Historic Places.
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### **Sec. 330.5 Issuing, modifying, suspending, or revoking nationwide permits and authorizations.**

- a. **General.** This section sets forth the procedures for issuing and reissuing NWP's and for modifying, suspending, or revoking NWP's and authorizations under NWP's.
- b. **Chief of Engineers.**
  1. Anyone may, at any time, suggest to the Chief of Engineers, (ATTN: CECW-OR), any new NWP's or conditions for issuance, or changes to existing NWP's, which he believes to be appropriate for consideration. From time-to-time new NWP's and revocations of or modifications to existing NWP's will be evaluated by the Chief of Engineers following the procedures specified in this section. Within five years of issuance of the NWP's, the Chief of Engineers will review the NWP's and propose modification, revocation, or reissuance.
  2. Public Notice.
    - i. Upon proposed issuance of new NWP's or modification, suspension, revocation, or reissuance of existing NWP's, the Chief of Engineers will publish a document seeking public comments, including the opportunity to request a public hearing. This document will also state that the information supporting the Corps' provisional determination that proposed activities comply with the requirements for issuance under general permit authority is available at the Office of the Chief of Engineers and at all district offices. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.
    - ii. Concurrent with the Chief of Engineers' notification of proposed, modified, reissued, or revoked NWP's, DEs will notify the known interested public by a notice issued at the district level. The notice will

include proposed regional conditions or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters, if any, developed by the division engineer.

3. Documentation. The Chief of Engineers will prepare appropriate NEPA documents and, if applicable, Section 404(b)(1) Guidelines compliance analyses for proposed NWPs. Documentation for existing NWPs will be modified to reflect any changes in these permits and to reflect the Chief of Engineers' evaluation of the use of the permit since the last issuance. Copies of all comments received on the document will be included in the administrative record. The Chief of Engineers will consider these comments in making his decision on the NWPs, and will prepare a statement of findings outlining his views regarding each NWP and discussing how substantive comments were considered. The Chief of Engineers will also determine the need to hold a public hearing for the proposed NWPs.
4. Effective Dates. The Chief of Engineers will advise the public of the effective date of any issuance, modification, or revocation of an NWP.

**c. Division Engineer.**

1. A division engineer may use his discretionary authority to modify, suspend, or revoke NWP authorizations for any specific geographic area, class of activities, or class of waters within his division, including on a statewide basis, by issuing a public notice or notifying the individuals involved. The notice will state his concerns regarding the environment or the other relevant factors of the public interest. Before using his discretionary authority to modify or revoke such NWP authorizations, division engineers will:
  - i. Give an opportunity for interested parties to express their views on the proposed action (the DE will publish and circulate a notice to the known interested public to solicit comments and provide the opportunity to request a public hearing);
  - ii. Consider fully the views of affected parties;
  - iii. Prepare supplemental documentation for any modifications or revocations that may result through assertion of discretionary authority. Such documentation will include comments received on the district public notices and a statement of findings showing how substantive comments were considered;
  - iv. Provide, if appropriate, a grandfathering period as specified in Section 330.6(b) for those who have commenced work or are under contract to commence in reliance on the NWP authorization; and
  - v. Notify affected parties of the modification, suspension, or revocation, including the effective date (the DE will publish and circulate a notice to the known interested public and to anyone who commented on the proposed action).

2. The modification, suspension, or revocation of authorizations under an NWP by the division engineer will become effective by issuance of public notice or a notification to the individuals involved.
3. A copy of all regional conditions imposed by division engineers on activities authorized by NWPs will be forwarded to the Office of the Chief of Engineers, ATTN: CECW-OR.

**d. District Engineer.**

1. When deciding whether to exercise his discretionary authority to modify, suspend, or revoke a case specific activity's authorization under an NWP, the DE should consider to the extent relevant and appropriate: changes in circumstances relating to the authorized activity since the NWP itself was issued or since the DE confirmed authorization under the NWP by written verification; the continuing need for, or adequacy of, the specific conditions of the authorization; any significant objections to the authorization not previously considered; progress inspections of individual activities occurring under an NWP; cumulative adverse environmental effects resulting from activities occurring under the NWP; the extent of the permittee's compliance with the terms and conditions of the NWPs; revisions to applicable statutory or regulatory authorities; and, the extent to which asserting discretionary authority would adversely affect plans, investments, and actions the permittee has made or taken in reliance on the permit; and, other concerns for the environment, including the aquatic environment under the Section 404(b)(1) Guidelines, and other relevant factors of the public interest.
2. Procedures.
  - i. When considering whether to modify or revoke a specific authorization under an NWP, whenever practicable, the DE will initially hold informal consultations with the permittee to determine whether special conditions to modify the authorization would be mutually agreeable or to allow the permittee to furnish information which satisfies the DE's concerns. If a mutual agreement is reached, the DE will give the permittee written verification of the authorization, including the special conditions. If the permittee furnishes information which satisfies the DE's concerns, the permittee may proceed. If appropriate, the DE may suspend the NWP authorization while holding informal consultations with the permittee.
  - ii. If the DE's concerns remain after the informal consultation, the DE may suspend a specific authorization under an NWP by notifying the permittee in writing by the most expeditious means available that the authorization has been suspended, stating the reasons for the suspension, and ordering the permittee to stop any activities being done in reliance upon the authorization under the NWP. The permittee will be advised that a decision will be made either to reinstate or revoke the authorization under the NWP; or, if appropriate, that the authorization under the NWP may be modified by mutual agreement. The permittee will also be advised that

within 10 days of receipt of the notice of suspension, he may request a meeting with the DE, or his designated representative, to present information in this matter. After completion of the meeting (or within a reasonable period of time after suspending the authorization if no meeting is requested), the DE will take action to reinstate, modify, or revoke the authorization.

- iii. Following completion of the suspension procedures, if the DE determines that sufficient concerns for the environment, including the aquatic environment under the Section 404(b)(1) Guidelines, or other relevant factors of the public interest so require, he will revoke authorization under the NWP. The DE will provide the permittee a written final decision and instruct him on the procedures to seek authorization under a regional general permit or an individual permit.
3. The DE need not issue a public notice when asserting discretionary authority over a specific activity. The modification, suspension, or revocation will become effective by notification to the prospective permittee.
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## **Sec 330.6 Authorization by nationwide permit.**

### **a. Nationwide permit verification.**

1. Nationwide permittees may, and in some cases must, request from a DE confirmation that an activity complies with the terms and conditions of an NWP. DEs should respond as promptly as practicable to such requests.
2. If the DE decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.
3. If the DE decides that an activity does comply with the terms and conditions of an NWP, he will notify the nationwide permittee.
  - i. The DE may add conditions on a case-by-case basis to clarify compliance with the terms and conditions of an NWP or to ensure that the activity will have only minimal individual and cumulative adverse effects on the environment, and will not be contrary to the public interest.
  - ii. The DE's response will state that the verification is valid for a specific period of time (generally but no more than two years) unless the NWP authorization is modified, suspended, or revoked. The response should also include a statement that the verification will remain valid for the specified period of time, if during that time period, the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, the

response should include a statement that the provisions of 330.6(b) will apply, if during that period of time, the NWP authorization expires, or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP. Finally, the response should include any known expiration date that would occur during the specified period of time. A period of time less than two years may be used if deemed appropriate.

iii. For activities where a state has denied 401 water quality certification and/or did not agree with the Corps consistency determination for an NWP the DE's response will state that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of a state 401 water quality certification and/or CZM consistency concurrence. The response will also indicate the activity is denied without prejudice and cannot be authorized until the requirements of Sections 330.4(c)(3), 330.4(c)(6), 330.4(d)(3), and 330.4(d)(6) are satisfied. The response will also indicate that work may only proceed subject to the terms and conditions of the state 401 water quality certification and/or CZM concurrence.

iv. Once the DE has provided such verification, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the authorization.

4. Expiration of nationwide permits. The Chief of Engineers will periodically review NWPs and their conditions and will decide to either modify, reissue, or revoke the permits. If an NWP is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities which have commenced (i.e. are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.
- b. **Multiple use of nationwide permits.** Two or more different NWPs can be combined to authorize a "single and complete project" as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.
  - c. **Combining nationwide permits with individual permits.** Subject to the following qualifications, portions of a larger project may proceed under the authority of the NWPs while the DE evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the

individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.

1. When a portion of a larger project is authorized to proceed under an NWP, it is with the understanding that its construction will in no way prejudice the decision on the individual permit for the rest of the project. Furthermore, the individual permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by NWP.
  2. NWPs do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the Corps or EPA.
- d. **After-the-fact authorizations.** These authorizations often play an important part in the resolution of violations. In appropriate cases where the activity complies with the terms and conditions of an NWP, the DE can elect to use the NWP for resolution of an after-the-fact permit situation following a consideration of whether the violation being resolved was knowing or intentional and other indications of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the- fact authorization. Use of after-the-fact NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.
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## **Appendix to Part 330 Nationwide Permits and Conditions**

### **APPENDIX A - Index of the Nationwide Permits and Conditions**

- **NATIONWIDE PERMITS**
  1. [Aids to Navigation](#)
  2. [Structures in Artificial Canals](#)
  3. [Maintenance](#)
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- **NATIONWIDE PERMIT CONDITIONS**

- **GENERAL CONDITIONS:**

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2. Proper Maintenance
3. Erosion and Siltation Controls
4. Aquatic Life Movements
5. Equipment
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8. Tribal Rights
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1. Water Supply Intakes
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5. Spawning Areas
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  7. Adverse Impacts From Impoundments
  8. Waterfowl Breeding Areas
  9. Removal of Temporary Fills
- 

## **APPENDIX B - NATIONWIDE PERMITS:**

1. **Aids to Navigation.** The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard. (See 33 CFR Part 66, Chapter I, Subchapter C). (Section 10)
2. **Structures in Artificial Canals.** Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)
3. **Maintenance.** The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the environmental impacts resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced or under contract to commence within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornados, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Sections 10 and 404)

4. **Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.** Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc). This nationwide permit authorizes shellfish seeding provided this activity does not occur in wetlands or vegetated shallows. This nationwide permit does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster. (Sections 10 and 404)
  
5. **Scientific Measurement Devices.** Staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the district engineer in accordance with "Notification" general condition. (Sections 10 and 404)
  
6. **Survey Activities.** Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this nationwide permit; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this nationwide permit. The discharge of drilling muds and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)
  
7. **Outfall Structures.** Activities related to construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), provided that the nationwide permittee notifies the district engineer in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). Intake structures *per se* are not included - only those directly associated with an outfall structure. (Sections 10 and 404)
  
8. **Oil and Gas Structures.** Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). (Where such limits have not been designated, or where changes are anticipated, district engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they

comply with the provisions of the fairway regulations in 33 CFR 322.5(1)). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR Part 334; nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. (Section 10)

9. **Structures in Fleeting and Anchorage Areas.** Structures, buoys, floats, and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)
  
10. **Mooring Buoys.** Non-commercial, single-boat, mooring buoys. (Section 10)
  
11. **Temporary Recreational Structures.** Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)
  
12. **Utility Line Backfill and Bedding.** Discharges of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, however, it does apply to pipes conveying drainage from another area. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side-casting up to 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if in navigable waters of the United States. (See 33 CFR Part 322). (Section 404)
  
13. **Bank Stabilization.** Bank stabilization activities necessary for erosion prevention

provided:

- a. No material is placed in excess of the minimum needed for erosion protection;
- b. The bank stabilization activity is less than 500 feet in length;
- c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;
- d. No material is placed in any special aquatic site, including wetlands;
- e. No material is of the type or is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;
- f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,
- g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the district engineer in accordance with the "Notification" general condition and the district engineer determines the activity complies with the other terms and conditions of the nationwide permit and the adverse environmental impacts are minimal both individually and cumulatively. (Sections 10 and 404)

14. **Road Crossing.** Fills for roads crossing waters of the United States (including wetlands and other special aquatic sites) provided:

- a. The width of the fill is limited to the minimum necessary for the actual crossing;
- b. The fill placed in waters of the United States is limited to a filled area of no more than 1/3 acre. Furthermore, no more than a total of 200 linear feet of the fill for the roadway can occur in special aquatic sites, including wetlands;
- c. The crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and tidal flows, and to prevent the restriction of low flows and the movement of aquatic organisms;
- d. The crossing, including all attendant features, both temporary and permanent, is part of a single and complete project for crossing of a water of the United States; and,
- e. For fills in special aquatic sites, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. The notification must also include a delineation of affected special aquatic sites, including wetlands.

Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). Also, where local circumstances indicate the need, district engineers will define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (Sections 10 and 404)

15. **U.S. Coast Guard Approved Bridges.** Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit. (Section 404)
  
16. **Return Water From Upland Contained Disposal Areas.** Return water from an upland, contained dredged material disposal area. The dredging itself requires a Section 10 permit if located in navigable waters of the United States. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This nationwide permit satisfies the technical requirement for a Section 404 permit for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures. (Section 404)
  
17. **Hydropower Projects.** Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 KW; and the permittee notifies the district engineer in accordance with the "Notification" general condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended; provided the permittee notifies the district engineer in accordance with the "Notification" general condition. (Section 404)
  
18. **Minor Discharges.** Minor discharges of dredged or fill material into all waters of the United States provided:
  - a. The discharge does not exceed 25 cubic yards;
  - b. The discharge will not cause the loss of more than 1/10 acre of a special aquatic site, including wetlands. For the purposes of this nationwide permit, the acreage limitation includes the filled area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are drained so that they would

no longer be a water of the United States as a result of the project;

- c. If the discharge exceeds 10 cubic yards or the discharge is in a special aquatic site, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and
  - d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of stream diversion. (Sections 10 and 404)
19. **Minor Dredging.** Dredging of *no more than 25 cubic yards* below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States as part of a single and complete project. This nationwide permit does not authorize the dredging or degradation through siltation of coral reefs, submerged aquatic vegetation, anadromous fish spawning areas, or wetlands or, the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Section 10)
20. **Oil Spill Cleanup.** Activities required for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, (40 CFR Part 300), provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404)
21. **Surface Coal Mining Activities.** Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)). (Sections 10 and 404)
22. **Removal of Vessels.** Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This nationwide permit does not authorize the removal of vessels listed or determined eligible for listing on the National

Register of Historic Places unless the district engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This nationwide permit does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

23. **Approved Categorical Exclusions.** Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW-OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this nationwide permit. (Sections 10 and 404)

24. **State Administered Section 404 Program.** Any activity permitted by a state administering its own Section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a Section 404 state permit are not included in this nationwide permit, but certain structures will be exempted by Sec. 154 of PL 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)). (Section 10)

25. **Structural Discharge.** Discharges of material such as concrete, sand, rock, etc. into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as piers and docks; and for linear projects, such as bridges, transmission line footings, and walkways. The NWP does not authorize filled structural members that would support buildings, homes, parking areas, storage areas and other such structures. Housepads or other building pads are also not included in this nationwide permit. The structure itself may require a Section 10 permit if located in navigable waters of the United States. (Section 404)

26. **Headwaters and Isolated Waters Discharges.** Discharges of dredged or fill material into headwaters and isolated waters provided:

- a. The discharge does not cause the loss of more than 10 acres of waters of the

United States;

- b. The permittee notifies the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and
- c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.

For the purposes of this nationwide permit, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The ten-acre and one-acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the DE.

**Subdivisions:** For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection (b) of this nationwide permit is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed one (1) acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed ten (10) acres is not authorized by this nationwide permit; unless the DE exempts a particular subdivision or parcel by making a written determination that:

1. the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to [Insert date, 60 days from date of publication in the Federal Register], committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate his investment-backed expectations, or
2. that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26. For purposes of NWP 26, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial or other real estate subdivision, including all parcels and parts thereof. (Section 404)

**27. Wetland and Riparian Restoration and Creation Activities.** Activities in waters of the United States associated with the restoration of altered and degraded non-tidal wetlands and creation of wetlands on private lands in accordance with the terms and conditions of a binding wetland restoration or creation agreement between the landowner and the U.S.

Fish and Wildlife Service (USFWS) or the Soil Conservation Service (SCS); or activities associated with the restoration of altered and degraded non-tidal wetlands, riparian areas and creation of wetlands and riparian areas on U.S. Forest Service and Bureau of Land Management lands, Federal surplus lands (e.g., military lands proposed for disposal), Farmers Home Administration inventory properties, and Resolution Trust Corporation inventory properties that are under Federal control prior to being transferred to the private sector. Such activities include, but are not limited to: Installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage ditches; removal of existing drainage structures; construction of small nesting islands; and other related activities. This nationwide permit applies to restoration projects that serve the purpose of restoring "natural" wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands and "natural" functions of riparian areas. For agreement restoration and creation projects only, this nationwide permit also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its prior condition and use (i.e., prior to restoration under the agreement) within five years after expiration of the limited term wetland restoration or creation agreement, even if the discharge occurs after this nationwide permit expires. The prior condition will be documented in the original agreement, and the determination of return to prior conditions will be made by the Federal agency executing the agreement. Once an area is reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. This nationwide permit does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. (Sections 10 and 404)

28. **Modifications of Existing Marinas.** Reconfigurations of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within waters of the United States are authorized by this nationwide permit. (Section 10)
29. **RESERVED**
30. **RESERVED**
31. **RESERVED**
32. **Completed Enforcement Actions.** Any structure, work or discharge of dredged or fill material undertaken in accordance with, or remaining in place in compliance with, the terms of a final Federal court decision, consent decree, or settlement agreement in an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. (Sections 10 and 404)
33. **Temporary Construction, Access and Dewatering.** Temporary structures and discharges, including cofferdams, necessary for construction activities or access fills or

dewatering of construction sites; provided the associated permanent activity was previously authorized by the Corps of Engineers or the U.S. Coast Guard, or for bridge construction activities not subject to Federal regulation. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials and placed in a manner that will not be eroded by expected high flows. Temporary fill must be entirely removed to upland areas following completion of the construction activity and the affected areas restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a Section 10 permit if located in navigable waters of the United States. (See 33 CFR Part 322). The permittee must notify the district engineer in accordance with the "Notification" general condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize impacts to aquatic resources. The district engineer will add special conditions, where necessary, to ensure that adverse environmental impacts are minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g. construction mats in wetlands where practicable). This nationwide permit does not authorize temporary structures or fill associated with mining activities or the construction of marina basins which have not been authorized by the Corps. (Sections 10 and 404)

34. **CRANBERRY PRODUCTION ACTIVITIES:** Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided:
- a. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, does not exceed 10 acres of waters of the United States, including wetlands;
  - b. The permittee notifies the District Engineer in accordance with the notification procedures; and
  - c. The activity does not result in a net loss of wetland acreage.

This nationwide permit does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this nationwide permit, the cumulative total of 10 acres will be measured over the period that this nationwide permit is valid. (Section 404)

35. **Maintenance Dredging of Existing Basins.** Excavation and removal of accumulated sediment for maintenance of existing marina basins, canals, and boat slips to previously authorized depths or controlling depths for ingress/egress whichever is less provided the dredged material is disposed of at an upland site and proper siltation controls are used. (Section 10)

36. **Boat Ramps.** Activities required for the construction of boat ramps provided:

- a. The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs. (Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);
- b. The boat ramp does not exceed 20 feet in width;
- c. The base material is crushed stone, gravel or other suitable material;
- d. The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and
- e. No material is placed in special aquatic sites, including wetlands.

Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to Section 10 if located in navigable waters of the United States. (Sections 10 and 404)

37. **Emergency Watershed Protection and Rehabilitation.** Work done by or funded by the Soil Conservation Service qualifying as an "exigency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR Part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the district engineer is notified in accordance with the notification general condition. (Also see 33 CFR 330.1(e)). (Sections 10 and 404)

38. **Cleanup of Hazardous and Toxic Waste.** Specific activities required to effect the containment, stabilization or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this nationwide permit. This nationwide permit does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. (Sections 10 and 404)

39. **RESERVED**

40. **Farm Buildings.** Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playa lakes, or vernal pools) that were in agricultural crop

production prior to December 23, 1985 (i.e., farmed wetlands) for foundations and building pads for buildings or agricultural related structures necessary for farming activities. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre (see the "Minimization" Section 404 only condition). (Section 404)

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## APPENDIX C - NATIONWIDE PERMIT CONDITIONS

**GENERAL CONDITIONS:** The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

1. **Navigation.** No activity may cause more than a minimal adverse effect on navigation.
2. **Proper maintenance.** Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.
3. **Erosion and siltation controls.** Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills must be permanently stabilized at the earliest practicable date.
4. **Aquatic life movements.** No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.
5. **Equipment.** Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.
6. **Regional and case-by-case conditions.** The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and any case specific conditions added by the Corps.
7. **Wild and Scenic Rivers.** No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.
8. **Tribal rights.** No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.
9. **Water quality certification.** In certain states, an individual state water quality certification must be obtained or waived (see 33 CFR 330.4(c)).
10. **Coastal zone management.** In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived. (see 33 CFR 330.4(d)).
11. **Endangered Species.** No activity is authorized under any NWP which is likely to

jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the district engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work on the activity until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (see 33 CFR 330.4(f))

12. **Historic properties.** No activity which may affect Historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR 325, Appendix C. The prospective permittee must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).

13. **Notification.**

- a. Where required by the terms of the NWP, the prospective permittee must notify the District Engineer as early as possible and shall not begin the activity:
  1. Until notified by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or
  2. If notified by the District or Division engineer that an individual permit is required; or
  3. Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).
- b. The notification must be in writing and include the following information and any required fees:
  1. Name, address and telephone number of the prospective permittee;
  2. Location of the proposed project;
  3. Brief description of the proposed project; the project's purpose; direct and

indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;

4. Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands; and
5. A statement that the prospective permittee has contacted:
  - i. The USFWS/NMFS regarding the presence of any Federally listed (or proposed for listing) endangered or threatened species or critical habitat in the permit area that may be affected by the proposed project; and any available information provided by those agencies. (The prospective permittee may contact Corps District Offices for USFWS/NMFS agency contacts and lists of critical habitat.)
  - ii. The SHPO regarding the presence of any historic properties in the permit area that may be affected by the proposed project; and the available information, if any, provided by that agency.
- c. The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PDN and must include all of the information required in (b)(1)-(5) of General Condition 13.
- d. In reviewing an activity under the notification procedure, the District Engineer will first determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or will be contrary to the public interest. The prospective permittee may, at his option, submit a proposed mitigation plan with the pre-discharge notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the nationwide permits and the need for mitigation to reduce the project's adverse environmental effects to a minimal level. The district engineer will upon receipt of a notification provide immediately (e.g. facsimile transmission, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the District Engineer if they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the

administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, he will notify the permittee and include any conditions he deems necessary. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either:

1. that the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or
  2. that the project is authorized under the nationwide permit subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level. This mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the DE will expeditiously review the proposed mitigation plan, but will not commence a second 30-day notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.
- e. **Wetlands Delineations:** Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period will not start until the wetland delineation has been completed.
- f. **Mitigation:** Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:
1. To be practicable the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of overall project purposes;
  2. To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.

Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In

addition, mitigation must address impacts and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the nationwide permits (e.g. 5 acres of wetlands cannot be created to change a 6 acre loss of wetlands to a 1 acre loss; however, the 5 created acres can be used to reduce the impacts of the 6 acre loss).

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**SECTION 404 ONLY CONDITIONS:** In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be followed in order for authorization by the nationwide permits to be valid:

1. **Water supply intakes.** No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.
2. **Shellfish production.** No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.
3. **Suitable material.** No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).
4. **Mitigation.** Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensation mitigation plan for the specific regulated activity.
5. **Spawning areas.** Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.
6. **Obstruction of high flows.** To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).
7. **Adverse impacts from impoundments.** If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.
8. **Waterfowl breeding areas.** Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.
9. **Removal of temporary fills.** Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.