Supplemental Material for Part I:

REGULATORY STRUCTURE OF THE 404 PROGRAM
Part II

Department of Defense

Corps of Engineers, Department of the Army

Regulatory Programs of the Corps of Engineers
Environmental Impact Statement

We have determined that this action does not constitute a major federal action significantly affecting the quality of the human environment. Appropriate environmental documentation is prepared for all permit decisions. We prepared an environmental assessment for each of the nationwide permits in Part 330. We determined that, considering the potential impacts, required conditions, discretionary authority, and best management practices, none would require preparation of an environmental impact statement.

Public Comment

We received nearly 400 public comments which covered the full range of views. On balance, the comments were favorable, but there were many strong criticisms that the regulations were too slanted towards environmental protection on the one hand and too slanted towards economic development on the other. We also held two public hearings on proposed nationwide permits, transcripts of which are on file in the Office of the Chief of Engineers. We convened a task force of experienced field and headquarters regulatory and legal personnel to review all comments, and synthesized them into major issues. Significant changes are as indicated below.

Part 320—General Regulatory Policies

Section 320.1(a): This new section discussing Corps of Engineers approach to its regulatory authorities received generally favorable support and has been adopted as proposed.

Section 320.1(b): Types of activities regulated. In the proposed regulations, we changed the definition of our Section 10 authority to add the term "physical" to the historic "course, condition, location or physical capacity". This was based on the judicial opinion in National Wildlife Federation v. Alexander, 613 F 2d 1054 (DC CIRC Dec 7, 79). (An incorrect cite was given in the preamble to the proposed regulations.) Since several other judicial opinions conflict and the case cited above is under appeal, we have decided not to change the regulations at this time. The word "physical" has been deleted throughout these final regulations. We also changed the language referring to outer continental shelf jurisdiction to conform to language in recent amendments to the Outer Continental Shelf Lands Act.

Section 320.3(a): This revision recognizes that Federal applicants now require state water quality certifications per revisions to Section 401 of the CWA.

Section 320.3(b): Recognition of the status of Indian tribes has been added for Coastal Zone Management Act (CZMA) consistency requirements.

Section 320.3(n): A new section has been added to recognize Corps of Engineers responsibility to review for impacts on navigational applications to EPA for point source discharge permits under Section 402 of the Clean Water Act.

Section 320.4(a): The public interest review. This is the heart of our evaluation process. It involves a weighing and balancing of all factors affecting the public interest. Many comments expressed concern that the policy statements in paragraph (b) through (o) are too broad and are subject to too wide a range of interpretation. We recognize that concern and are developing specific guidance on how each of the factors may affect the public interest balancing process based on specific citations of law, Executive policy and policies of the Corps and other Federal agencies. We have changed § 320.4(a)(2)(ii) to conform to CEQ-NEPA regulations that alternatives to proposed actions need not be investigated when there are no unresolved conflicts as to resource use. We have also made a technical change. The analysis of cumulative impacts previously required by § 320.4(a)(2)(iv) has been incorporated in § 320.4(a)(1). The potential for cumulative impacts will be considered in the evaluation of the impact on each public interest factor rather than in a separate cumulative impact analysis which may overlook potential cumulative effects of one or more of the factors.

Several comments questioned the relationship between our public interest review and the Environmental Protection Agency Guidelines for the Specification of Disposal Sites for Dredged or Fill Material. The guidelines (40 CFR Part 230) were published in the Federal Register on December 24, 1990 pursuant to Section 404(b)(1) of the CWA. The guidelines and the public interest review go hand-in-hand. Once all aspects of the public interest have been considered, if a project does not conform to the guidelines, the permit would be denied.

Section 320.4(p): The statement on mitigation of fish and wildlife impacts has been deleted from this section as it is now incorporated in the policy for conditioning permits expressed in 33 CFR 325.4.

Section 320.4(f): Some comments were concerned that permits may be issued
without compliance with the regulations of Federal law such as water quality certification and coastal zone consistency. That is not the case. Those requirements are covered in 33 CFR Part 323. Section 320.4(i) deals with only those requirements established by local or state laws or Federal laws administered by other Federal agencies.

Section 320.4(i) and (m): Extensive comments were received on both the floodplain management and water conservation policies. However, after considering all the points of view, we have retained the policies. The floodplain policy is consistent with Executive Order 11868. With addition of language from Section 101(g) of the CWA, the water conservation policy is consistent with Federal policy. It does not infringe on the primary authority of the states to allocate water rights.

Section 320.4(n): A section has been added to recognize the national importance of energy conservation and development.

Section 320.4(o): A section has been added on navigation policy. Previously, 33 CFR Part 326 addressed Corps authority to establish harbor lines and was used as a basis for navigation policy. However, with the rescission of that part, there is a need to express navigation policy elsewhere. We also had to retain in our regulations the provision which authorizes all activities which took place shoreward of a harbor line prior to 27 May 1970, the date on which harbor lines were changed from permit authorization lines to navigational guidance lines.

Part 321—Dams and Dikes

There were no significant objections to a minor wording change to exclude weirs from Section 9 coverage and to provide an expedited decision process by processing applications concurrently with the applicant obtaining the necessary approval from either the Congress or the State Legislature.

Part 322—Structures and Work

Section 322.2(f): A provision has been added to allow general permits to be issued to avoid unnecessary duplication of the regulatory control exercised by another agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.

Section 323.2(a)(f): The term "physical capacity" has been reverted to "navigable capacity" in the definition of Section 10 authority. See the discussion for § 320.1(b) above.

Section 322.4: Nationwide permits have been moved to Part 330.

Section 322.5(f): In the proposed rules, we specifically requested comments on our long standing policy of limiting our review of structures on the Outer Continental Shelf (OCS) under lease from the Department of Interior (DOI). About 10 years ago, we adopted a policy of limiting our review to navigation and national security because the DOI does a comprehensive review during its leasing procedures. There were extensive comments on both sides of the issue. Based on all the comments and in order to be responsive to Executive Order 12291, we have maintained our policy of limited review. The DOI concurred in this policy.

Section 322.5(g): We have changed this section to be consistent with the discussion under § 320.1(b) above.

Appendix A: The appendixes to Parts 322, 323, and 324 and Appendixes B and D-H to Part 325 have been deleted. They deal with Internal Corps of Engineers operations and interagency agreements. They need not be incorporated in the Code of Federal Regulations. Also, we are sensitive to reducing the volume of these regulations. The interagency agreements have recently been revised and copies are available to the public.

Part 323—Discharges of Dredged and Fill Material

Section 323.2(a): In the proposed rules, we consolidated former categories 1, 2, and 3 of waters of the United States into one category. Some concerns were raised about this change. While we believe it would be a change only in form and not in substance, we did not make the change as proposed. This was to be consistent with EPA's definition found in 40 CFR Part 125.

Section 323.2(c): We received many comments on the changes to the definition of wetlands. In addition to a Corps field task force, we convened an interagency meeting to review potential improvements to the definition. Both groups, after extensive deliberation, did not provide any improvement on a technical basis. We have therefore, decided not to change the definition at this time.

Section 323.2(e) and (f): These sections were modified to combine the terms natural lake and impoundment into one term, lake. Many people commented that impoundments should not be given the same status in the review process as natural lakes. However, we believe that the evaluation of the public interest should be based on what the impacts actually are and not on whether the area in question is natural or man-made.

Section 323.2(h): The footnote for this section was changed to delete the requirement for the district engineer to notify the regional administrator of EPA when the median rather than the average annual flow is used to determine the headwaters of a stream. EPA and others expressed concern that EPA should be kept informed of these determinations. However, we view no cases in the past where EPA has objected to such determinations. In the interests of reducing paperwork, we have deleted the notification requirement. District engineers, however, should notify EPA if EPA is known to have an interest in the area in question.

Section 323.2(a): A provision has been added to allow general permits to be issued to avoid unnecessary duplication of the regulatory control of another agency as discussed for 322.2(f), above.

Section 323.4: The nationwide permits which previously appeared in this section have been moved to Part 330. A new section has been added to describe the legislative exemptions to the program under Sections 404(f) and (j) of the CWA. The wording of § 323.4(a)(1)(i) and § 323.4(a)(1)(ii)(c)(i)(iv) have been changed slightly to recognize irrigation as a normal farming practice and to change the time for removal of stream blockages, to one year from the date of discovery, respectively. EPA has concurred with these changes and will take the next convenient opportunity to amend its regulations at 40 CFR Part 330 to coincide with these modifications.

Section 323.5: A new section has been added to note the authority of EPA to transfer Section 404 programs to the states and Army support of program transfer. Many comments urged a more extensive discussion of procedural steps which the Corps intends to follow in a transfer process. However, we did not include such a discussion. EPA has published at 40 CFR Part 123 extensive transfer regulations. As we have not yet had the opportunity to discuss these with any states who have an interest in program transfer, we have not developed any transfer procedures.

Section 323.8(b): This section formerly § 323.5(b), has been modified to be consistent with current agreements between the Corps and EPA which reflect EPA authority to veto disposal site specifications under Section 404(c) of the CWA.

Part 324—Ocean Disposal

Section 324.3(b)(2): This section was modified to note the requirement that Federal agencies must obtain Section 404 water quality certifications from the appropriate state or interstate agency to
dispose of dredged material within the territorial sea.

Part 325—Permit Processing

Section 325.1(b): This is a new provision for pre-application consultation based on regulations of the Council on Environmental Quality for agency procedural compliance with the National Environmental Policy Act (NEPA). Other Corps procedures and policies for compliance with CEQ's NEPA regulations in its regulatory programs are now found in Appendix B to 33 CFR Part 230; a number of changes and deletions have been made throughout Part 325 to reflect this.

Section 325.1(d): Many people commented that we required too much or too little information in support of an application. In deciding what should be required, we have tried to achieve a balance among various considerations such as clarity of plans for review by technical and non-technical people, costs of developing data and its utility in the review process, and to severely limit requests for additional information once an application is considered complete. Section 325.1(d)(2): This new section would avoid piecemeal applications for work associated with the same project. Comments on this addition were very favorable.

Section 325.1(d)(3): This new section on dam safety drew extensive comment, some saying we did not go far enough, others saying that we have only duplicated existing state requirements. The intent of this section is that the district engineer must be reasonably assured that proper design standards are met. These may be done through evidence of an already established state review, design or review by appropriately qualified persons, or other reasonable means.

Section 325.1(e): This new section limits the additional information requested of an applicant to that which is essential for the district engineer's decision process.

Section 325.1(f) Fees: This was § 325.1(g) in the proposed rules. It was renumbered because the former Section 325.1(f), signature of application, was moved to § 325.1(d)(7) for format purposes. The fee for letters of permission (LOP) has been deleted on the basis that LOP's are minor and do not generate benefits to the permittee significant enough to warrant payment of a fee.

Section 325.2(a)(1) and (2): These sections were revised to reflect the requirement of Section 404(a) of the CWA that public notices be issued within 15 days of a completed application and a stipulation in a law suit involving ocean dumping, respectively.

Section 325.2(a)(3): The term "Findings of Fact" has been changed to "Statement of Findings" in this section and throughout these regulations to more properly reflect the nature of the document. This section also allows the district and division engineers to divulge recommendations on applications forwarded for higher authority decision.

Section 325.2(b): This section concerning distribution of copies of permits has been moved from former § 325.2(b)(5).

Section 325.2(b): The provision for issuing joint notices with water quality certifying agencies has been moved and consolidated with other joint notice and processing authorities stated in 33 CFR 325.1(a)(5), 325.2(a)(6), and § 325.2(e).

Section 325.2(b)(1) has been expanded and clarified to describe procedures where more than one state is involved in the water quality certification process. Section 325.2(b)(1)(i) has been reworded for clarification.

Section 325.2(b)(2) has been expanded to cover coastal zone certification procedures where Indian lands are involved.

Section 325.2(b)(5) refers to endangered species review (proposed to be in § 325.2(e). The former § 325.2(b)(5) has been moved to Section 325.2(a)(6) for format purposes.

Section 325.2(b)(8) has been deleted. The provision is a requirement of the Freedom of Information Act and need not be repeated in this regulation.

Section 325.2(d) has been revised to reduce processing time goals in accordance with comments received in response to proposed rules. Subparagraph 4 is added to clarify that decisions will normally not be deferred pending action on other agency authorizations.

Section 325.2(e) has been added to specify alternative processing procedures available to division and district engineers. These include letters of permission, regional permits, joint procedures with other Federal, state, and local agencies and expedited review processes such as joint agency review meetings.

Section 325.2(f)(4): The authority to approve emergency processing procedures has been delegated from the Assistant Secretary of the Army to the division engineers. Many people asked for a more explicit description of emergency procedures. However, since it is impossible to determine ahead of time the nature of emergencies, division engineers are relied upon to use good judgment in establishing emergency procedures. Normally, such procedures would include expedited coordination with state and Federal agencies with an interest in any resources involved.

Section 325.3(a)(9) deletes the requirement for a statement concerning a preliminary determination of the need for and/or availability of an environmental impact statement and adds a notice of categorical exclusion, if appropriate, in accordance with Appendix B to 33 CFR Part 230.

Section 325.3(j): The requirement which was added in the proposed rules for periodic purging of the public notice mailing list and the authority to publish notices in the local newspaper have been deleted from the final regulation. District engineers are still expected to take these actions as appropriate, but they are within the scope of normal public involvement principles and need not be expressed in the CFR.

Section 325.3(d) has been deleted from the regulation. It is an internal requirement which has been added to our internal reports system.

Section 325.4: The former section on environmental impact statements has been moved to Appendix B of 33 CFR Part 230. A new section on permit conditioning has been added. We received many comments on this section. It has been rewritten to incorporate many of those comments and to clarify the intent. The authority for bonding was moved from Part 328 of the proposed rules as it is related more to permit conditioning than to enforcement.

Section 325.5(c): This section has been revised to conform to new Section 325.2(e) on alternative processing and evaluation procedures.

Section 325.6(c) and (d): These sections have been rewritten to clarify the difference between the expiration of a permit itself and the expiration of an authorized construction period. Specification of a starting time for permitted activities is now optional. The term "renovation" is no longer in use and has been deleted. Ocean dumping permits are limited to three years based on a stipulation agreed to in a law suit.

Section 325.7(b) and (k) have been revised to give permittees who are notified of suspension proceedings an opportunity to have an informal meeting as well as an opportunity of a public hearing.

Section 325.7(d) has been modified to delegate permit revocation authority from the Chief of Engineers to the authority who made the decision on the original permit.

Section 325.8(b) and (c) have been revised to conform to Memoranda of Agreement reached with other Federal agencies pursuant to Section 404(q) of...
the CWA and to authorize district engineers to deny certain permits without issuing a public notice where other required authorizations have been denied or where the activity will clearly interfere with navigation.

Section 325.9 has been revoked and reserved. The former section on supervision and enforcement has been moved to Part 325, except subparagraph (e) on bond conditions, which has been renumbered as § 325.4.

Section 325.11 on district engineer case reports to higher authority has been deleted. It is an internal requirement of the Corps and need not be expressed in the CFR.

Appendix A. The permit form has been revised as indicated in the proposed regulations. There were no significant comments on this appendix.

1. The term "Federal Water Pollution Control Act (38 Stat. 816, PL 92-500)" has been changed to "Clean Water Act (33 U.S.C. 1344)" to reflect the new law citation.

2. The last clause of general condition "y" has been deleted and set forth as a new condition "j"; "That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein." This change is to eliminate any suggestion that this provision relates to property rights.

3. General conditions "j" and "k" have been combined into a new condition "k"; "That this permit may be modified, suspended or revoked in whole or in part pursuant to the policies and procedures prescribed in 33 CFR 325.7." This change eliminates present inconsistencies between the two conditions and the regulation provisions. It also avoids the necessity to revise the existing conditions in the future as the suspension, modification, and revocation procedures change in the regulations through rulemaking procedures.

4. General condition "o" has been revised to delete the start time dates pursuant to the change to § 325.9(c).

5. New general condition "u" has been added as a special condition: "That if the permittee, during prosecution of the work authorized herein, encounters a previously unidentified archeological or cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer." This notification will enable the district engineer to notify the appropriate authorities as required by historic preservation laws.

6. The last phrase of condition "b" under "Discharges of dredged or fill material into waters of the United States" relating to toxic pollutants has been changed from "in to other than trace quantities" to "in toxic amounts" to agree with the language of Section 101(a)(3) of the CWA.

7. Condition "c" under "Discharges of Dredged or Fill Material into Waters of the United States" pertaining to wild and scenic rivers has been deleted as its original inclusion as a permit condition was inappropriate.

Appendix B has been revoked and reserved. The 1907 Memorandum of Understanding with Department of Interior has been terminated. New agreements have been reached with five Federal agencies, under Section 404(g) of the Clean Water Act.

Appendix C. Procedures for the Protection of Cultural Resources, is being reviewed yet not yet complete for publication. The interim procedures adopted on April 5, 1980, 40 FR 98, pgs. 22112, et seq. still apply.

Part 325—Enforcement

Comments on this part were generally related to concerns that increased authority given to district engineers in determining the disposition of an enforcement case would result in greater risk to environmental quality. However, the changes are actually related only to program management. Most violations are minor, many of them resulting from lack of public understanding of Federal jurisdiction. This regulation has been advised to allow district engineers to recognize those cases and not require lengthy paperwork and processing procedures on all of them. The staff resources thereby made available would allow the district engineer to take more vigorous enforcement action and conduct greater coordination with interested parties on those cases which are potentially significant. The changes provide a focus on the substance of the violation and the need for enforcement action. It is expected that in significant cases, there will be full coordination with interested parties to develop appropriate protective or remedial measures. The full public interest balancing process has been deleted from this Part 325 but remains in the after-the-fact evaluation phase of 33 CFR Part 325 thereby eliminating the duplication of that evaluation required in the previous regulations.

Section 323.3(d) has been added to provide for cases which are not suitable for legal action and where the responsible party refuses to apply for after-the-fact authorization. The district engineer may now proceed on his own initiative giving due consideration in the processing requirements and the public interest review to the extent of information furnished by the responsible party.

Section 323.5: The former section dealing with processing after-the-fact permit applications has been deleted. The processing requirements are contained in Part 325. Section 325.9 on supervision and enforcement has been moved to this section as it more directly related to this part than to Part 325.

Part 327—Public Hearings

The public hearing regulation has been changed to make the public hearing policies consistent under all Corps of Engineers regulatory authorities. As a standard, we adopted the policies and criteria previously applicable to Section 404 only. This part also combines the hearing file with the complete administrative record of the permit action. All the information previously required for the public hearing file was also required to be in the administrative record. This duplication has been eliminated. The requirement for a verbatim hearing transcript has been retained. The mandatory requirement for district counsel to be present at all hearings as a legal adviser to the presiding officer (§ 327.5) has been changed to a discretionary decision; the district engineer may wish to informally resolve a hearing request (§ 327.4); and § 327.5 provides that the district engineer may also appoint an appropriately qualified person other than the district deputy engineer to be a hearing officer. The intent of these changes is to provide greater flexibility in responding to requests for public hearings.

Part 328—Harbor Lines

This part has been revoked and reserved. The Corps policy on harbor lines and their impact on the public interest review process is now found at 33 CFR 320.40. That subparagraph also retains the authorization for activities constructed aboreward of harbor lines prior to 27 May 1970.

Part 329—Definition of Navigable Waters of the United States

Based on a court decision (Lehlo Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978) the shoreward limit of navigable waters of the United States (frequently referred to as "Section 10 waters") in coastal areas is the mean high water line on both the Atlantic and Pacific coasts (formerly the mean higher high water was used on the Pacific coast). Therefore, Part 329 has been amended to
Part 330—Nationwide Permits

Combining the nationwide permits previously found in 33 CFR 322.4 (Section 10 nationwide permits) and 33 CFR 323.4 (Section 404 nationwide permits) received very favorable response. Extensive comment was received on some aspects of the nationwide permit program and on specific nationwide permits. We conducted public hearings in Washington, DC and in St. Paul, Minnesota of obtain additional public comment. Comments from all sources ranged from strongly supportive to strongly opposed because the program was either too broad or too restrictive. We prepared environmental assessments for all proposed nationwide permits, and Section 404(b)(1) evaluations for Section 404 actions. The Chief of Engineers then reached the decision expressed by a Statement of Findings (SOF) that each of the nationwide permits contained in Part 330 is in the public interest. The decisions were based on the policies expressed in 33 CFR Part 320 and include consideration of the Clean Water Act Sections 101(b), 101(f), 404(e), and 404(c) and Executive Order 12291 which superseded E.O. 12044.

The major areas of concern are as follows:

1. Compliance with the specific language of Section 404(e) of the CWA. That section provides that nationwide permits may be issued for categories of activities which are similar in nature and which have individually and cumulatively minor environmental impacts. The concern was that some of the nationwide permits, particularly the ones for discharges into certain waters (§ 320.4) exceeded the Section 404(e) authority because the activities covered were considered by the respondent to not be minor and similar in nature. However, those permits and others were in effect at the time Congress adopted Section 404(e). The legislative history clearly shows Congress' intent to endorse the program in effect at the time and to encourage its expansion. Therefore, we consider that categories of activities may be based on similarities in time (§ 330.3), location (§ 330.4) and type of work (§ 330.5).

2. State certification under Section 401 of the CWA. In the proposed rules, we stated that we assumed all states would want to waive certification requirements except for § 305.5(a)(18), run-off from upland disposal areas. Several states responded with concerns that the nationwide permits did not take

into account local and state needs. As a result, the regional conditioning authority discussed below was added to address any special concerns states may have. Even so, the States of Wisconsin took action to formally deny certification of certain nationwide permits. These permits have been so noted in the regulations.

3. Coastal Zone Management. Under the Coastal Zone Management Act, a state must determine if the proposed activity is consistent with its approved state coastal zone management plan. We noted in the proposed rules that the nationwide permits would comply with state coastal zone programs. A few states replied that they would need more detailed information to make a consistency determination. However, the nature of nationwide permits must be general to account for wide variations from region to region. We appreciate the concern expressed and have adopted the regional conditioning authority to deal with those concerns.

4. Reporting on nationwide permits. In the preamble to the proposed rules, we specifically sought comments on the need for a reporting procedure as a prerequisite for working under a nationwide permit. Reaction was great and sharply mixed. What appeared to be good for one region was not practicable for another. Some of the nationwide permits have automatic procedures whereby the Corps is informed of the activities, and others were consensus "no reporting" situations. The ones in between were difficult to handle in a uniform national fashion. Therefore, we have designed the regional conditioning authority to provide for reporting on a regional basis where the division toxicologist determines there is an appropriate need.

5. Discretionary Authority/Regional Conditioning. The discretionary authority in the proposed rules generated many comments. One major concern was the removal of discretionary authority from district engineers to the Chief of Engineers. Some people supported that concept. However, most believed that the Chief is too far removed from the local level and that the administrative process of seeking the Chief's approval would be inefficient and would thereby unduly influence a district engineer to avoid seeking discretionary authority. On the other hand, some commenters pointed out and experience has shown a need to improve the consistency of interpretation of Corps jurisdiction and policy. Accordingly, we have vested discretionary authority on a case-by-case basis with the division engineer who is closer to the problem and can provide necessary consistency. However, in order to override a nationwide permit for a entire category or geographic region, approval must be obtained from the Chief of Engineers. The nationwide permits published today go into effect immediately. Should additional regional conditions be found to be appropriate, they may be added at any time and appropriately announce to concerned parties. Work done between now and the effective date of any regional conditions would not be subject to those conditions. We considered deferring publication of the nationwide permits until the division engineers had an opportunity to develop regional conditions. However, the benefits to the regulated public and to the government administrative efforts stemming from immediate implementation appear to far outweigh any risk to public resources which may result while regional conditions are being considered. Note also that previously exercised discretionary authority under nationwide permits issued on 19 July 1977 expires four months from the date of these regulations. However, it may be reinstated after appropriate procedures have been followed.

6. Section 330.3(a): The nationwide permit for activities occurring before phase-in dates was issued with the July 1977 regulations. Those activities remain authorized. The section is included here to retain in the regulation that these activities have been authorized.

7. Section 330.4: The nationwide permits for activities occurring in certain waters drew the most comments. Some urged that we broaden the categories of water, others believed that this permit exceeds the authority of Section 404(e). Areas above the headwaters and isolated waters have never been regulated on a case-by-case basis (except for lakes greater than 10 acres) and it was clearly within the scope of the CWA to retain the nationwide permits existing at the time the legislation was enacted. Fills in the areas involved, including the expansion to include lakes of greater than 10 acres, are not usually a threat to water quality of the surface tributary system. In addition, case-by-case regulation of such areas is a more appropriate role for the states based on Sections 101(b) and 101(f) of the CWA. If there are areas where adequate state regulation is not present and there is a threat to the principles of the CWA, division engineers may assert discretionary authority as appropriate. The two nationwide permits found in § 330.4(a) (1) and (2) consolidate the four nationwide permits previously found at
33 CFR § 322.4-2(a). Conditions (b)(2) was modified to comply with the Endangered Species Act.

8. Section 330.5. The section describes specific nationwide permits 1 through 25. A few generated no comments but most had strong supporters and strong opponents. We attempted to incorporate all the concerns into the permit conditions, but as a result of the widely divergent views, found the task impossible. While we recognize many of the concerns raised about protection of resources, we believe that we have minimized any significant risk through the conditions and the discretionary authority, including regional conditioning. As noted above, the requirements of the regulations have been followed and it has been found that each of these nationwide permits is in the public interest.

a. Section 330.5(a)(1): This is an expansion of an existing nationwide permit previously found at 33 CFR 322.4(a). Only navigable aids installed by the Coast Guard were included. This revision expands the coverage to all aids and regulatory markers regulated by the Coast Guard. This permit avoids dual Federal regulatory control.

b. Section 330.5(a)(2): This is a reauthorization of the nationwide permit for structures in artificial canals previously found at 33 CFR 322.4(b).

c. Section 330.5(a)(3): This is reauthorization of the nationwide permit previously found at 33 CFR 322.4(c). The term fill material has been added. Normally, fill for repair and maintenance is exempt from regulation by Section 404(f)(1)(A). However, there are conditions in Section 404(f)(2) under which the exemption may not apply. In those cases, the nationwide permit would be operable.

d. Section 330.5(a)(4): Fish and wildlife harvesting activities are added to this existing nationwide permit previously found at 33 CFR 322.4(d). Such activities are or can be adequately regulated through other Federal, State and local fishing and hunting regulatory programs or they are so minor in impact as not to require any individual review.

e. Section 330.5(a)(5): This is a reauthorization of the nationwide permit for water testing devices previously found at 33 CFR 322.4(e).

f. Section 330.5(a)(6): This is a reauthorization and expansion of the nationwide permit for survey activities previously found at 33 CFR 322.4(f). Seismic operations are added to avoid unnecessary delays for geophysical survey activities.

g. Section 330.5(a)(7) is a new nationwide permit to avoid duplicating the regulatory control exercised by EPA under its Section 402 permitting authority. The public concern with impacts of outfall structures is generally related to what comes out of the pipe rather than to the pipe itself. Some expressed concern that EPA's scope of review is not broad enough to encompass occasionally significant environmental concerns. We believe it is. However, as an additional safeguard, discretionary authority is available should the need arise.

h. Section 330.5(a)(8) is a new nationwide permit to avoid duplicating regulatory control exercised on the Outer Continental Shelf by the Department of Interior, Bureau of Land Management and Geological Survey.

i. Section 330.5(a)(9) is a new nationwide permit to avoid duplicating controls exercised by the U.S. Coast Guard over vessel anchorage and fleeting areas. There were many concerns expressed about fleeting areas in the upper Mississippi. However, only one fleeting area has been designated by the Coast Guard and it is located in the lower Mississippi near New Orleans.

j. Section 330.5(a)(10) is a new nationwide permit to avoid unnecessary Federal control over private mooring buoys.

k. Section 330.5(a)(11) is a new nationwide permit to avoid unnecessary Federal control over temporary markers and buoys.

l. Section 330.5(a)(12) is an expansion of an existing nationwide permit for utility line crossings previously found at 33 CFR 322.4-3(a)(1). It now also includes low voltage associated outfall or intake structure.

m. Section 330.5(a)(13) is an expansion of an existing Section 404 nationwide permit for bank stabilization previously found at 33 CFR 322.4-3(a)(1). It now includes Section 10 authorization and some additional conditions.

n. Section 330.5(a)(14) is a reauthorization of an existing nationwide permit for minor road crossings previously found at 33 CFR 322.4-3(a)(3).

o. Section 330.5(a)(15) is an expansion of an existing nationwide permit previously found at 33 CFR 322.4-3(a)(4) for some bridge-associated fills in tidal waters where those fills are regulated by the U.S. Coast Guard as part of the bridge permit. The expansion to include non-tidal waters reduces dual Federal regulatory control for bridges crossing tidal and non-tidal navigable waters of the United States.

p. Section 330.5(a)(16) is a new nationwide permit to recognize that the return water from dredged material placed hydraulically on upland sites is administratively a 404 discharge but need not be regulated on an individual basis as long as the water quality concerns are protected through the Section 401 certification procedure. Reducing regulatory duplication on upland disposal should encourage such disposal and avoid the confusion now existing on why hydraulic disposal on the upland needs a 404 permit while non-hydraulic disposal does not.

q. Section 330.5(a)(17) is a new nationwide permit to avoid duplicating the regulatory control exercised by the Department of Energy, Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920 for small hydropower projects. Some people were concerned that FERC review might not fully reflect the principles of the Clean Water Act. We disagree. However, the safeguard of discretionary authority is still available.

t. Sections 330.5(a)(18) and (19) are new nationwide permits for very small dredging and filling activities. We had imposed a limit of five cubic yards in the proposed rules. However, we were persuaded by the comments that increasing the limit to ten cubic yards is reasonable.

u. Section 330.5(a)(20) is a new nationwide permit to avoid regulatory delays associated with oil and hazardous substances containment and cleanup operations.

v. Section 330.5(a)(21) is a new nationwide permit to avoid duplicating the regulatory control exercised by the Department of the Interior under the Surface Mining Control and Reclamation Act of 1977. The provision for an advance review by the Corps would afford the Corps an opportunity to insure that the activity needing a Corps permit would have minimal impacts and thus qualify for the nationwide permit.

w. Section 330.5(a)(22) is a new nationwide permit for work associated with removal of wrecked vessels and navigational obstructions.

x. Section 330.5(a)(23) is a new nationwide permit to reduce duplication of effort and unnecessary paperwork concerning activities of other Federal agencies which would have only minimal individual or cumulative environmental impact. Some concerns were raised that other Federal agencies are not as aware of CWA principles as is the Corps of Engineers. We disagree, but have reserved discretionary authority should the need arise. The conditions specified in the proposed rules have been consolidated and the notification requirement has been moved from the district engineer to the Chief of Engineers in accordance with CEQ categorical exclusion procedures.
w. Section 330.5(q)(24) is a new nationwide permit to avoid duplications with state-administered Section 404 permit programs. Administration of the Section 404 program in waters which are navigable waters of the United States based solely on historical commercial use may be transferred to qualified states pursuant to Section 404(g) of the CWA. However, the Corps retains Section 10 permitting authority in these waters. Thus the discharge of dredged or fill material in such waters would require both a Corps Section 10 permit and State Section 404 permit. Since both EPA and the Corps have adequate control over the state 404 programs to protect the federal interest, a nationwide permit to satisfy the Section 10 jurisdictional authority would avoid paperwork, duplications, and delays. Other activities not involving the discharge of dredged and fill material in such waters would continue to be subject to Section 10.

x. Section 330.5(q)(25) is a new nationwide permit for placement of concrete into tightly sealed forms. This would address the situation where poured concrete used as a structural member would require a Section 404 permit whereas a structural member made of steel or wood but serving the same purpose does not require a Section 404 permit. The concrete structure itself would still require a Section 10 permit if located in navigable waters of the United States. This nationwide permit was announced in the Federal Register of May 15, 1981 and was discussed at our public hearings.

y. Section 330.8: A 5-year expiration date is added pursuant to Section 404(e) of the CWA.

Note 1
The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

Note 2
One purpose of these regulations is to bring up to dateall policies which affect the Corps regulatory programs. All policy guidance issued prior to January 1, 1981 is hereby terminated. Since that time we have issued guidance letters with specific expiration dates.

List of Subjects
33 CFR Part 320
Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.
33 CFR Part 321
Dams, Intergovernmental relations, Navigation, Waterways.
33 CFR Part 322
33 CFR Part 323
Navigation, Water pollution control, Waterways.
33 CFR Part 324
Water pollution control.
33 CFR Part 325
Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.
33 CFR Part 326
33 CFR Part 327
33 CFR Part 329
Waterways.
33 CFR Part 330
Navigation, Water pollution control, Waterways.

For the reasons set forth in the preamble, Chapter II of Title 33 of the Code of Federal Regulations is amended by revising Parts 320, 321, 322, 323, 324, 325, 326, 327, and 328, removing and reserving Part 328 and adding a new part 330 to read as set forth below.

Dated: July 26, 1982.
Robert T. Gay III,
Brigadier General, USA, Acting Director of Civil Works.

PART 320—GENERAL REGULATORY POLICIES

Sec. 320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related laws.
320.4 General policies for evaluating permit applications.

§ 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 evolved from one that protects navigation only to one that considers the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest balancing process" or the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources. It is a dynamic program that varies the weight given to a specific public interest factor in light of the importance of other such factors in a particular situation.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been given 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 320 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 believes that applicants are not necessarily due a favorable decision but they are due a timely one. 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. Use of general permits, joint processing procedures, interagency review coordination and authority transfers (where authorized by law) are encouraged to reduce duplications.

(b) Types of activities regulated. This regulation and the regulations 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 permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal laws applicable to the review of each activity that requires a Department of the Army permit and the general policies that are applicable to the review of all activities that require Department of the Army permits. Parts 321-324 address the various types of activities that require Department of
the Army permits, including special policies and procedures applicable to those activities, as follows:

(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 the 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 these activities (Part 330).

c) Forms of authorization.

Department of the Army permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of an individual application for a Department of the Army permit and general permits that authorize the performance of a category or categories of activities in a specific geographical region 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 issued by the Chief of Engineers through publication in the Federal Register and 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 Department of the Army 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 Department of the Army Permit.

d) General instructions.

The procedures for processing all individual permits and regional general permits are contained in 33 CFR Part 325. However, before reviewing those procedures, a person wanting to do work that requires a Department of the Army permit should review the general and special policies that relate to the particular activity as outlined in this Part 320 and Parts 321 through 324. 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 323. These are waters that are navigable in the traditional sense where permits are required for certain work or structures. "Waters of the United States" are defined in 33 CFR 323.2(a). 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.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the River and Harbor 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. Section 9 also pertains to bridges and causeways by the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways transferred to the Secretary of Transportation under the Department of Transportation Act of October 21, 1966 (40 U.S.C. 1155(g)(A)). (See also 33 CFR Part 324.) A Department of the Army 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 River and Harbor Act approved March 3, 1899 (33 U.S.C. 408) (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 excavation 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 the navigable waters of the United States was extended to artificial islands, installations, and other devices located on the outer continental shelf by Section 4(e) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See also 33 CFR Part 322.)

(c) Section 11 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no pier, wharves, bulkheads or other works may be extended or deposited 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 § 320.4(e) of this Part.)

(d) Section 13 of the River and Harbor 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, respectively (33 U.S.C. 1342 and 1345). (See 40 CFR Parts 124 and 125.)

(e) Section 14 of the River and Harbor 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 as specified disposal sites. See 33 CFR Part 323. The selection and use of disposal sites will be in accordance with
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 the 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 also 15 CFR Part 830.)

(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 or 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 conservatorship, aesthetic, or scientific 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 3 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 policy 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 230.)

(e) The Fish and Wildlife Act of 1956 (16 U.S.C. 772et seq.), the Migratory Bird Treaty Act (16 U.S.C. 700–708g) and 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 and personnel concerning fish and wildlife and wildlife resources from the Secretary of Commerce to the Secretary of the Interior. The environmental policies and functions of the Fish and Wildlife Service shall be transferred to the Fish and Wildlife Service of the Department of the Interior. The provisions of the Migratory Bird Treaty Act shall be transferred and coordinated under the Fish and Wildlife Service of the Department of the Interior. Except for the provisions of section 7 of the Migratory Bird Treaty Act, the provisions of the Fish and Wildlife Coordination Act shall be transferred and coordinated under the Fish and Wildlife Service of the Department of the Interior.

(f) The Federal Power Act of 1920 (16 U.S.C. 791a et seq.), as amended, authorizes the Department of Energy (DOE) to issue licenses for the construction, 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 waters of the United States (as defined in 16 U.S.C. 798), 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 recommendation to the DOE for the inclusion of appropriate conditions in the DOE license rather than the issuance of separate Department of the Army permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the DOE 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

§ 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.
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. 489 et seq.), which amends the Act of June 27, 1906. By this Act Federal construction on Federal or Federally funded 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 rule or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires Department of the Army 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 US 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 also 50 CFR Parts 17 and 402.)

(jj) 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 §320.2 and the policies specified in §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 designated, 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 and other Department of Army 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 many 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 US Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

§320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321–324.

(a) Public interest review. (1) The decision whether to issue a permit will be based on an evaluation of the probable impact 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 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 the 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, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in 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 beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited.

(b) Effect on wetlands. (1) Some wetlands are vital areas that 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 by Federal, state, or local agencies, additional guidance on wetlands considerations is stated in Executive Order 11990, dated 24 May 1977.

(2) Wetlands are 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 prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and

(vii) Wetlands which through natural water filtration processes serve significant and necessary water purification functions.

(3) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the 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 reviews of particular wetland areas in consultation with the appropriate Regional Director of the 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) or of this section 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 resulting in evaluating whether a particular alteration is necessary, the district engineer shall consider whether the proposed activity is dependent on being located in, or in close proximity to the aquatic environment and whether practicable alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and the availability of practicable alternative sites.

(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 given great weight.

(c) Fish and wildlife. In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(c) of this part) Corps of Engineers officials 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. They will give great weight to these views on fish and wildlife considerations in evaluating the application.

(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. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 402 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 permits covered by this regulation 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, registered historic places and natural 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) Effect 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 low tide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and United States v. California, 381 U.S. 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, D.C. 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) Interference with adjacent properties or water resource projects. Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) Because a landowner has the general right to protect his 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 affect wetland values, or otherwise appear not to be in the public interest, the district engineer will 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.

(2) 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.

(3) 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 River and Harbor 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.

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

(b) Activities affecting coastal zones. Applications for Department of the Army 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 interests of national security. Federal agency and Indian tribe applicants for Department of the Army 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 Department of the Army 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 Department of the Army permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the Department of the Army 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 certification and/or authorization has been denied for activities which also require a Department of Army permit before final action has been taken on the Army permit, the Army permit will be denied without prejudice to the right of the applicant to reinstate processing of the application if subsequent approval is received from the appropriate Federal, state and/or local agency. 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) Where officially adopted Federal, state, regional, local or tribal land-use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition to the other national factors of the public interest identified in § 320.4(a) of this part.

(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 Part 320-324, and the applicable statutes have been followed and considered, 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 Sanitaries 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) The district engineers are encouraged to develop joint procedures with those states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for Department of the Army permits may be processed jointly with the state or other Federal applications to an independent conclusion and decision by the district engineer and 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 the 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 structure complies with established state dam safety criteria or has 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.

(i) 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 value (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 requirement of Executive Order 11988, district engineers, as part of their public interest review, should avoid to the extent practicable 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 and 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 practicable alternatives, the district engineer may 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. Full consideration will be given to water conservation as a factor in the public interest review including opportunities to reduce demand and improve efficiency in order to minimize new water supply requirements. This policy is subject to Congressional policy stated in Sec. 101(g) of the Clean Water Act 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 is a major national objective. District engineers will give great weight to energy needs as a factor in the public interest review and will give high priority to permit actions involving energy projects.

(o) Navigation. (1) Section 11 of the River and Harbor Act of 1899 authorizes 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 May 27, 1970 (33 CFR 205.150) 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 May 27, 1970 do not require specific authorization.

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

(3) Navigation in all navigable waters of the United States continues to be a primary concern of the Federal government and shall be given great weight in the public interest balancing process.

(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.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec. 321.1 General.

321.1 General. This regulation prescribes, in addition to the general policies of 33 CFR Part 320
and procedures of 33 CFR Part 322, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). See 33 CFR 322.2(a). Dams and dikes in navigable waters of the United States also require Department of the Army permits under Section 4 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of Section 404.

§ 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 323 for a more complete definition of this term.

(b) The term "dike or dam" means an impedance 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 which is regulated pursuant to Section 10 of the River and Harbor Act of 1899 (see 33 CFR Part 322).

§ 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 Secretary of the Army will decide whether Department of the Army authorization for a dike or dam in a 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 Secretary of the Army, through the Chief of Engineers.
(b) Processing a Department of the Army 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 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.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES
Sec.
322.1 General.
322.2 Definitions.
322.3 Activities requiring permits.
322.4 Reserved.
322.5 Special policies.

§ 322.1 General.
This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 322 those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor 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 Department of the Army. 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 102 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A Department of the Army 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 Department of the Army 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.

§ 322.2 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 323 for a more complete definition of this term.
(b) The term "structure" shall include, without limitation, any pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, 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 Department of the Army 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 325 and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR 320.
(f) The term "general permit" means a Department of the Army authorization that is issued on a nationwide ("nationwide permits") or regional ("regional permits") basis for a category or categories of activities where:
(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).

§ 322.3 Activities requiring permits.
(a) General. Department of the Army 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 these regulations. Activities that were commenced or completed shoreward of established Federal labor lines before May 27, 1970 (see 33 CFR 320.4(r)) also 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 19, 1972, a Section 404 permit is required (see 33 CFR Part 323).

(1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR Part 323. 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 the navigable capacity of the waterbody. 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.

(2) Pursuant to Section 154 of the Water Resource Development Act of 1976 (Pub. L. 94–587), Department of the Army permits will not be 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. Section 154 applies only to the construction of a single pier or wharf and not to marinas. Furthermore, Section 154 is not applicable to any pier or wharf that would cause an unacceptable impact on navigation.

(b) Outer continental shelf. Department of the Army permits will also be required for the construction of artificial islands, installations, and other devices on the outer continental shelf pursuant to Section 4(e) 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 subparagraph, activities of the type described in paragraphs (a) and (b), of this section, done by or on behalf of any Federal agency, other than any 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, 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 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 and the Chief of Engineers in Section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States. 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 is limited by the extent of the statutory language involved.

(3) The policy provisions set out in 33 CFR 320.4(f) 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 Water Act.

§ 322.4 [Reserved]

§ 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. Department of the Army 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) [Reserved]

(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, therefore, be accorded to the fullest extent possible to both Federal and non-Federal operations. Furthermore, 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, maintenance 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 in the ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) Structures for small boats. (1) As a matter of policy, 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. Corps of Engineers officials will also encourage cooperative or group use facilities in lieu of individual proprietor 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 § 322.3, above, when those structures 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 River and Harbor Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of their 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 Part 330). 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 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 Bureau of Land Management, 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. (1) 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.

(2) The proponent of canal work should submit the application for a permit, including 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, to the district engineer before commencing any form of work. If construction of the canal in such a manner as to result in an effect on the course, location, condition, or capacity of the navigable waters of the United States has already taken place without a permit, the district engineer will proceed in accordance with 33 CFR Part 326. Where the construction of the canal would result in an effect on the course, location, condition, or capacity of navigable waters of the United States, an application for a Section 10 permit should be made at the earliest stage of planning. Where the district engineer becomes aware that the canal construction has already begun, he will advise the proponent in writing of the need for a permit to the extent that the construction will result in an effect on the course, location, condition, or capacity of navigable waters of the United States. He will also ask the proponent if he intends to undertake such work and will request the immediate submission of the plans and permit application if it is so intended. The district engineer will advise the proponent that any work is done at the risk that, if a permit is required, it may not be issued, and that the existence of partially completed excavation work will not be bowed favorably in evaluation of the permit application.

(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 transportation or importation of natural gas to or from a foreign country, must be made to the Secretary of Energy.


(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 transportation of persons or things, or both, to or from a foreign country; 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 seawage to or from a foreign country; and monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country. (Executive Order 11423, August 16, 1966).

(5) A Department of the Army permit under Section 10 of the River and Harbor 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 Department of the Army authorizations under Section 404 of the Clean Water Act or under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, 83
§ 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 Department of the Army 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 (33 U.S.C. 1344) (hereinafter referred to as Section 404). See 38 CFR 323.2(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 River and Harbor 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 River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A Department of the Army 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 Department of the Army 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.

§ 323.2 Definitions.

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

(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 tides;

(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 the

The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.
interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travels 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 purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section.

(6) The territorial sea;

(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.

(b) 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 commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) 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 not support, a prevalence of vegetation typical of design for use in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) 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.”

(e) 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.

(f) The term “ordinary high water mark” means 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.

(g) The term “high tide line” is the line used in Sec. 404 determinations and means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water above the maximum height reached by a rising tide. The mark may be determined 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 gates, or other suitable means that delineate the general height reached by a rising tide. The terms include 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.

(h) The term “headwaters” means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second.2 The District engineer 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.

(i) The term “dredged material” means material that is excavated or dredged from waters of the United States.

(j) The term “discharge of dredged material” means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a covered land or water disposal area. 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) are not included within this term and 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 of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(k) 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.

(1) The term “discharge of fill material” means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill material is necessary to 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, 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.

(m) 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 regulation and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(n) The term “general permit” means a Department of the Army authorization that is issued on a nationwide (“nationwide permits”) or regional (“regional permits”) 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
§ 323.3 Discharges requiring permits.

(a) General. Except as provided in § 323.4 below, Department of the Army 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 § 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 230.145), 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.

§ 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:

(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)(ii) 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. 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 loses or involves 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 tillage 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) Minor Drainage means:

(1) 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);

(2) 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)(i) and (ii) 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.
of water storage and recharge
capabilities, or the overburden of
natural water filtration capacities do not
constitute polluting. Polluting 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 irrigation
facilities in the waters of the U.S. are
included within the exemption unless
the discharges have the effect of
bringing these waters into a use to
which they were not previously subject
and the flow or circulation may be
impaired or reach reduced of such
waters.
(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 209(b)(4) of 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 must be
applied to satisfy the provision shall
include those detailed BMPs described
in the state’s approved program
description pursuant to the requirements
of 40 CFR 123.4(h)(4), 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
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 reduction 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)–(8) of this
section contains any toxic pollutant
listed under section 307 of CWA such
discharge shall be subject to any
applicable toxic effluent standard or
prohibition, and shall require a 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)–(8) 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 and the flow for
circulation of waters of the United
States may be impaired or the reach of
such waters reduced. Where the
proposed discharge will result in
detectable discernible alterations to
flow or circulation, the presumption is
that flow or circulation may be impaired
by such alteration.
(d) Federal projects which qualify
under the criteria contained in Section
404(f) of CWA (Federal projects
authorized by Congress where an EIS
has been submitted to Congress prior to
authorization or an appropriation) are
exempt from Section 404 permit
requirements, but may be subject to
other state or Federal requirements.
§ 323.5 Program transfer to states.
Section 404(h) of the Clean Water Act
allows the Administrator of the
Environmental Protection Agency to
transfer administration of the Section
404 permit program for discharges into
certain waters of the United States to

4For example, a permit will be required for the
conversion of a cypress swamp to some other use or
the conversion of a wetland from agricultural 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
effect such conversion. A discharge which elevates
the bottom of waters of the United States without
converting it to any land or body to reduce the reach of,
but may alter the flow or circulation of, waters of the
United States.
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 tidal flow of the tide shoreward to the high tide line, including wetlands adjacent thereto). See 40 CFR Part 123 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved, 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.

§ 324.3 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. Applications for permits for the discharge of dredged or fill material into waters of the United States will be reviewed in accordance with guidelines promulgated by the Administrator, EPA, under authority of Section 404(b) of the Clean Water Act. (See 40 CFR Part 230.) If the EPA guidelines alone prohibit the designation of a proposed disposal site, the economic impact on navigation and anchorage of the failure to authorize the use of the proposed disposal site will also be considered in evaluating whether or not the proposed disposal is in 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.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec. 324.1 General.

324.2 Definitions.
324.3 Activities requiring permits.
324.4 Special procedures.

Authority: 33 USC 1423.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 323, 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 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 Sanitaries Act of 1972, as amended (33 USC 1413) (hereinafter referred to as Section 103). See 33 CFR 320.2(b). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require Department of the Army permits under Section 10 of the River and Harbor Act of 1899 (33 USC 403) for the dredging in navigable waters of the United States. Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

For the purpose of this regulation, the following terms are defined:
(a) 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 6530).
(b) The term "dredged material" means any material excavated or dredged from navigable waters of the United States.
(c) The term "transport" or "transportation" refers to the carriage and related handling of dredged material by a vessel or other vehicle.

§ 324.3 Activities requiring permits.

(a) General. Department of the Army 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 are 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 320.145.

(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 required to comply with the substantive and procedural state, interstate, and local water quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Clean Water Act and the Marine Protection, Research and Sanitaries Act of 1972, as amended, and related laws in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 12088, dated October 16, 1978.) They are not required, however, 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.

§ 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 damage or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, criteria established by the Administrator, EPA, pursuant to Section 102 of the Marine Protection, Research and Sanitaries Act of 1972, as amended, shall be applied including an
evaluation of the need for the ocean dumping and including the availability of alternatives to ocean dumping. 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. See 40 CFR Parts 220 to 223.

(c) EPA review. If the Regional Administrator, EPA, advises the district engineer that the proposed dumping will comply with the criteria, the district engineer shall complete his evaluation of the Section 103 application under this regulation and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the district engineer that the proposed dumping will not comply with the criteria, the district engineer will proceed as follows.

(1) The district engineer shall 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 shall evaluate them in accordance with 33 CFR Parts 320, 322, 323, 325 and this regulation, as appropriate.

(2) If the district engineer makes a determination that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be in the public interest, he shall so advise the Regional Administrator of his intent to issue the permit setting forth his reasons for such determination.

(d) EPA objection. If the Regional Administrator advises, within 15 days of the notice of the intent to issue, that he will commence procedures specified by Section 103(c) of the Marine Protection, Research, and Sanctuaries Act of 1972 to prohibit designation of the disposal site, the case will be forwarded to the Chief of Engineers for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain, in addition to the analysis required by 33 CFR 325.11, an analysis of whether or not other economically feasible methods or sites are available to dispose of the dredged material.

(e) Chief of Engineers review. The Chief of Engineers will 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.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec. 325.1 Applications for permits.
325.2 Processing of application.
325.3 Public notice.
325.4 Conditioning of Permits.
325.5 Forms of authorization.
325.6 Duration of authorization.
325.7 Modification, suspension, or revocation of authorizations.
325.9 Authority to issue or deny authorizations.

§ 325.1 Applications for permits.

(a) General. The processing procedures of this regulation (Part 325) apply to any Department of the Army permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for Department of the Army 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 permit applicants to contact the district engineer or the 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 applicant may begin to assess the viability of some of the more obvious alternatives in the permit application. The district engineer will endeavor at this stage, to provide the applicant with all helpful information necessary in pursing 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 Department of the Army permit and which would 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 permit 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 applicant or his consultants so as to assure that the 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). The actual development of the scope of data required in cases requiring an EIS should be the product of the formal "scoping" process discussed in 33 CFR Part 230.

(c) Application form. Any person proposing to undertake any activity requiring Department of the Army authorization as specified in 33 CFR Parts 321-324 (except activities already authorized by general permit) must apply for a permit to the district engineer in charge of the district where the proposed activity is to be performed. Applications for permits must be prepared utilizing the prescribed application form (ENG Form 4345, OMB Approval No. OMB 4090-R0420). The form may be obtained from the district engineer having jurisdiction over the waters in which the proposed activity will be located. Local variations of the application form for purposes of facilitating coordination with state and local agencies may be used.

(d) Content of application. (1) Generally, the application must include a complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not expected to submit detailed engineering plans and specifications); the location, purpose and intended use of 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 also Section 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms and will limit requests for additional information to those cases where the specific information is essential to complete an evaluation of the proposal's impact on the public interest.

(2) All activities which the applicant plans to undertake which are reasonably related to the same project and for which a Department of the Army 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 in 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) Signatures on application. The application must be signed by the person who desires to undertake the proposed activity or by a duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses 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.

(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 assist in the evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(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 River and Harbor 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 fee shall be paid 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 in the public interest. At that time, the district engineer will furnish the applicant two copies of the unsigned permit for his signature. He will also notify the applicant of the required fee and will request that any check or money order be made payable to the Treasurer of the United States. The permit will then be issued upon receipt of the application fee and the two signed permit copies. 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.

§ 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 all information required in accordance with Sec. 325.1(d) of this part, the district engineer will issue a public notice as described in Sec. 325.3 of this part unless specifically exempted by other provisions of this regulation. 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 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. At the earliest practicable time, the applicant must be given the opportunity to furnish the district engineer his proposed resolution or rebuttal to all objections from other Government
agencies and other substantive adverse comments before final decision will be made on the application. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so.

(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 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 232.

(8) 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 in waters of the United States (40 CFR Part 223) 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 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 § 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 the 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.

(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 two copies of the draft permit to the applicant for signature accepting the conditions of the permit. The applicant will return both signed copies to the issuing official who then will sign and date the permit and return one copy to the permittee. The permit is not valid until signed by the issuing official.

Letters of permission will be issued in letter form (signed by the issuing official only). 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, D.C. 20390 Attention, Code NS12 and to the Director, National Ocean Survey, NOAA, Department of Commerce, 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 Director, National Marine Fisheries Service, Washington, D.C. 20320.

(iii) If the activity involves the dredging or filling of ocean waters within the territorial waters of the United States, to the Director, Office of Marine Fisheries, National Marine Fisheries Service, Washington, D.C. 20320.

(iv) If the activity involves the erection of an aerial transmission line across a navigable water of the United States, to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, reference C322.

(b) Procedures for particular types of permit situations. (1) 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.

(2) The public notice for such activity, which will contain a statement on certification requirements (see Sec. 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 does determine 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 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. 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. The request for certification must be made in accordance with the regulations of the certifying agency. 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) 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 Management Act (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 Coastal Zone Management Act's directive for ensuring that Federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved Coastal Zone Management 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 Coastal Zone Management 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 Coastal Zone Management 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 Coastal Zone Management 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 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 Coastal Zone Management 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 shall check with the certifying agency at the end of the allotted period of time before determining that a waiver has occurred.

(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 CZMP 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) 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 Historical Preservation Act counterpart implementing regulations.

(4) If the proposed activity would consist of 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 involved 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 Sec. 322.6(C)).

(5) Applications will be reviewed for the potential impact on threatened or endangered species pursuant to Section 7 of the Endangered Species Act as amended. 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 that proposed activity may jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service by including a statement to this effect in the public notice (or will amend any previous notice as appropriate). 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 33 CFR Part 306 and 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 §325.1(d) of this part.

(2) The comment period of the public notice should not extend beyond 30 days from the date of the notice. However, if circumstances warrant, the district engineer may extend the comment period up to an additional 30 days.

(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 Sec. 325.8 of this part), (iii) the comment period is extended, (iv) a timely rebuttal or resolution of objections 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 Coastal Zone Management 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 public comment period has closed (or, at the latest, on the ninetieth day following the public notice) and 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 Army 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 Army permit. In an unusual case, 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 Army permit while deferring his final decision.

(5) If the applicant fails to respond within 45 days to any request or inquiry of the district engineer, the district engineer may request the applicant by certified letter that his application will be considered as having been withdrawn unless the applicant responds thereto within thirty days of the date of the letter.

(e) Alternative procedures. Division and district engineers are authorized to use alternative procedures as follows:

(1) Letters of permission. In those cases subject to Section 10 of the River and Harbor Act of 1899 in which, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impact on environmental values, and should encounter no appreciable opposition, the district engineer may omit the publishing of a public notice and authorize the work by a letter of permission. However, he will coordinate the proposal with all concerned fish and wildlife agencies, Federal and state, as required by the Fish and Wildlife Coordination Act. The letter of permission will not used to authorize the discharge of dredged or fill material into waters of the United States nor the transportation of dredged material for purposes of dumping it in ocean waters. The letter of permission form is specified in § 325.5 of this part.

(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 no longer in the public interest provided the procedures of Sec. 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 submitted for the procedures in paragraphs (e)(1) through (5) of this section provided that the substantive requirements of these 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.

§ 325.3 Public notice.

(a) General. The public 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 provide 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 sea 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 authorities 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 the National Environmental Policy Act (see paragraph 7 of Appendix B to 33 CFR Part 230);
(10) A statement on endangered species (see Sec. 322.2(b)(5));
(11) A statement(s) on evaluation factors (see Sec. 323.3(b));
(12) 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;
(13) A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing, within which interested parties may express their views concerning the permit application;
(14) 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;
(15) For non-Federal applications in states with an approved Coastal Zone Management Plan, a statement on compliance with the approved Plan; and
(16) In addition, for Section 305 (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 discharges that have been made in the disposal area (e.g., heavy metal background reading and organic carbon content);
(vi) An estimate of the length of time during which disposal would continue at the proposed site; and
(vii) Information on the characteristics and composition of the dredged material.
(b) Evaluation factors. A paragraph describing the various evaluation factors on which decisions shall be included in every public notice.
(1) Except as provided in paragraph (b)(3) of this section, the following will be included:
The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposals must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economic, aesthetic, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety production and, in general, the needs and welfare of the people.
(2) If the activity would involve 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 public notice shall also indicate that the evaluation of the impact on the public interest will include application of the guidelines promulgated by the Administrator, EPA under authority of Section 404(b) of the Clean Water Act (40 CFR Part 220) or of the criteria established under authority of Section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 229), as appropriate. (See also 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.”
(c) 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 area-wide clearing houses as prescribed by OMB Circular A-87, 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
§ 325.4 Conditioning of permits.

(a) General. The decision of whether to issue a permit is based on the public interest review described in 33 CFR 320.4. In order to protect the public interest, projects may require modifications or conditions different from what the applicant proposes.

(b) Division and district engineers are authorized to modify or add conditions to proposals when:

(1) they are necessary to meet a legal requirement,
(2) they serve to meet a public interest objective, or
(3) they will avoid or mitigate adverse impacts on fish and wildlife resources.

(c) Division and district engineers may modify or condition proposals to meet one of the objectives of 325.4(b) of this section when:

(1) there are no local, state or other Federal programs or policies to achieve the objective of the desired condition, and

(2) an agreement, enforceable at law, between the applicant and the party(ies) concerned with the resource use is not practicable.

(d) Division and district engineers will ensure that any modifications or conditions imposed on an applicant's proposal are:

(1) directly related to the impacts of the proposal; and

(2) commensurate in scope and degree with the impacts of concern; and

(3) reasonably enforceable.

(e) 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.

§ 325.5 Forms of permits.

(a) General discussion. (1) Department of the Army permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, Department of the Army Permit (Appendix A). 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 § 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 when procedures of Section 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 general conditions form 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 as defined in 33 CFR 322.7(f) and 33 CFR 322.21n. 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 acknowledgement 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 Department of the Army 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.

(d) Section 9 permits. Permits for structures under Section 9 of the River and Harbor Act of 1899 will be drafted at Department of the Army level.

§ 325.6 Duration of permits.

(a) General. Department of the Army 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 waterfront 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
§ 325.7 Modification, suspension or revocation of authorization.

(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 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 § 325.2 of this part, and not as modifications under this paragraph.

(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 by the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modifications 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 325.

(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 of 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 ten 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 district engineer 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.
§ 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 dredged or fill material in 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 Sanctoriaries Act of 1972, as amended. The authority to issue or deny permits pursuant to Section 9 of the River and Harbor 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 permits pursuant to Section 10 of the River and Harbor Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctories 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 § 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 § 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;
5. When the district engineer is precluded by law or procedures required by law from taking final action on the application (e.g., Section 404(c) of the Clean Water Act, Section 9 of the River and Harbor 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 River and Harbor Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctories Act of 1972, as amended; and the inclusion of conditions in accordance with § 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;
4. When the division engineer is precluded by law or procedures required by law from taking final action on the application.

§ 325.9 [Reserved.]

§ 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.

Appendix A—Permit Form

<table>
<thead>
<tr>
<th>Application No.</th>
<th>Name of Applicant</th>
<th>Effective Date</th>
<th>Expiration Date (If applicable)</th>
</tr>
</thead>
</table>

DEPARTMENT OF THE ARMY Permit

Referring to written request dated for a permit to:

1. Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the River and Harbor Act of March 3, 1899 (33 U.S.C. 403);
2. Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (80 Stat. 816, Pub. L. 92-500);
3. Transport dredged material for the purpose of disposal in ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctories Act of 1972 (86 Stat. 1052; Pub. L. 92-552);

(Here insert the full name and address of the permittee.)

is hereby authorized by the Secretary of the Army:

(Here describe the proposed structure or activity, and its intended use. In the case of an application for a fill permit, describe the structures, if any proposed to be erected on the fill. In the case of an application for the discharge of dredged or fill material into waters of the United States or the transportation for discharge in ocean waters of dredged material, describe the type and quantity of material to be discharged.)

in

(Here to be named the ocean, river, harbor, or waterway concerned.)

at

(Here to be named the nearest well-known locality—preferably a town or city and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings, give file number or other definite
identification marks). Subject to the following conditions:

I. General conditions: (a) That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions 1 or 3, herein, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

(b) That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or a navigable or offshore area consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards, and management practices established pursuant to the Clean Water Act of 1972 (Pub. L. 92-500; 96 Stat. 818), the Marine Protection, Research and Sanitation Act of 1972 (Pub. L. 92-532; 86 Stat. 1652), or pursuant to applicable State and local law.

(c) That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 18 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards to ensure compliance with such standards at least 12 months prior to the effective date of such standards.

(d) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

(e) That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein, as a matter so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

(f) That the permittee agrees that it will prosecute the construction or work authorized herein, as a matter so as to minimize any degradation of water quality.

(g) That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

(h) That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.

(i) That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not preempt any injury to property or interference of rights or any impairment of Federal, state, or local laws or regulations.

(j) That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

(k) That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.

(l) That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked in whole or in part, and the Government may, in addition, institute appropriate legal proceedings.

(m) That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

(n) That the permittee shall notify the District Engineer of the time the activity authorized herein will be commenced, as far in advance of the time of commencement as practicable, at which the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

(o) That if the activity authorized herein is not completed on or before [ ] day of [ ], 19[—], (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or extended, shall automatically expire.

(p) That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may be required by the Congress or other agencies of the Federal Government.

(q) That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition 1 hereof, he shall restore the property to a condition satisfactory to the District Engineer.

(r) That if the recording of this permit is possible under applicable state or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

(s) That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

(t) That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of, or in the event of, death or the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of, or in the event of, death or

(u) That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. Special Conditions: Here list conditions relating specifically to the proposed structure or work authorized by this permit. The following Special Conditions will be applicable when appropriate:

1. Structures In or Affecting Navigable Waters of the United States

(a) That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

(b) That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

(c) That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

(d) That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

(e) Structures for Small Boats: That the permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash.
wast and the permittee shall not hold the United States liable for any such damage.

Maintenance Dredging

(a) That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for two years from the date of issuance of this permit (ten years unless otherwise indicated);
(b) That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

Discharges of Dredged or Fill Material Into Waters of the United States

(a) That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR Part 228;
(b) That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.
(c) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and
Disposal of Dredged Material Into Ocean Waters

(a) That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctions Act of 1972, published in 40 CFR Parts 220-228.
(b) That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature. Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

Permittee: ____________________________
(District Engineer) _______________________
(Date) _________________________________

By authority of the Secretary of the Army:

Transferee hereby agrees to comply with the terms and conditions of this permit.

Transferee: ____________________________
(Date) _________________________________

Appendix B [Reserved]

PART 326—ENFORCEMENT, SUPERVISION AND INSPECTION

Sec. 326.1 Purpose.
326.2 Discovery of unauthorized activity.
326.3 Administrative action.
326.4 Legal action.
326.5 Supervision and enforcement of authorized activities.


§ 326.1 Purpose.

This regulation prescribes the policy, practice, and procedures to be followed by the Corps of Engineers in connection with activities requiring Department of the Army permits that are performed without prior authorization; and supervision and inspection of authorized activities.

§ 326.2 Discovery of unauthorized activity.

(a) When the district engineer becomes aware of any unauthorized activity that is in progress, including a violation of the terms and conditions of an authorized activity, he shall immediately issue an order prohibiting further work to all persons responsible for and/or involved in the performance of the activity and may order interim protective work. If the unauthorized activity has been completed, he will advise the responsible party of his discovery.
(b) Where the unauthorized activity involves an American Indian (including Alaskan natives, Eskimos, and Aleuts) or takes place on reservation land, district engineers will coordinate proposed cease and desist order with the Assistant Chief Counsel for Indian Affairs (DAEN-CCI).

§ 326.3 Administrative action.

(a) Initial investigation. Immediately upon discovery of an unauthorized activity, the district engineer shall commence an investigation to ascertain the facts surrounding the activity. In making this investigation, the district engineer should, in appropriate cases, depending upon the potential impacts of the completed work solicit the views of the Regional Administrator of the Environmental Protection Agency, the Regional Director of the U.S. Fish and Wildlife Service, and the Regional Director of the National Marine Fisheries Service, and other Federal, state, and/or local agencies. He shall also request the persons involved in the unauthorized activity to provide appropriate information on the activity to assist him in his evaluation and in determining the course of action to be taken.

(b) Remedial work. (1) The district engineer shall determine whether as a result of the unauthorized activity, life, property or important public resources are in serious jeopardy and would require expeditious measures for protection. Such measures may range from minor modification of the existing work to complete restoration of the area involved. Important public resources are identified in 33 CFR 320.4. If the district engineer determines that immediate remedial work is required, he shall issue an appropriate order describing the work, conditions and time limits required to provide satisfactory protection of the resource.

(2) Voluntary restoration by the responsible party or the party's own initiative shall be allowed if legal action is not otherwise necessary. However, district engineers will advise the responsible party of the option of an after-the-fact application for a permit to retain the unauthorized work. No permit will be required when complete and satisfactory restoration is accomplished.

(c) Acceptance of an after-the-fact application. Upon completion of appropriate remedial work, if any, the district engineer shall accept an application for an after-the-fact permit for all unauthorized activities unless:

(1) Civil action to enforce an order issued pursuant to § 326.2 or § 326.3(b) of this part is required;
(2) Criminal action is appropriate (see § 326.4a(1) of this part);
(3) State local, or other federal authorization or certification has been denied, or a state or local enforcement action is pending. In the above situations, the District Engineer may accept an after-the-fact permit application provided he believes it would be in the public interest and he obtains approval of the next higher authority.

(4) In some cases, a violation of the Clean Water Act may be of such a nature that it is appropriate to seek a civil penalty as provided for in the Act. These cases include knowing, flagrant, repeated or substantial impact violations.

(d) If the responsible party fails to submit an application as noted in paragraph (c) of this section within a reasonable time period, the district engineer may proceed on his own initiative with a determination of whether the activity is in the public interest. The determination will be made in accordance with appropriate procedures described in 33 CFR Parts 320 through 325.

§ 326.4 Legal action.

(a) Criminal or civil action. District engineers shall be guided by the following policies in recommending appropriate legal action:

1This section refers to state or local authorizations required as a matter of Federal law before a Sec. 404 permit may be issued. Examples are Sec. 401 Water Quality Certification and Sec. 332 Coastal Zone Management Consistency Determinations.

2In such cases, the District Engineer may, in his discretion, recommend to the United States Attorney that a complaint be filed. An after-the-fact application should not be accepted until the enforcement action is completely resolved. This exception to the general rule of accepting after-the-fact applications should be used on a limited basis, only for those cases which merit special treatment.
(1) Criminal action. Criminal action is considered appropriate when the facts surrounding an unauthorized activity reveal the necessity for punitive action and/or when deterrence of future unauthorized activities in the area is considered essential to the establishment or maintenance of a viable regulatory program.

(2) Civil action. Civil action is considered appropriate when the evaluation of the unauthorized activity reveals that (i) enforcement of an order issued pursuant to § 328.3 or § 328.3(b) of this Part is required; (ii) after the procedures in § 328.3(c) of this Part have been completed, the unauthorized activity would be in the public interest if altered or modified but attempts to secure voluntary alteration or modification have failed such that a judicial order is necessary, or (iii) after the procedures in § 328.3(c) of this Part have been completed, a civil penalty under Section 309 of the Clean Water Act is warranted.

(b) Preparation of case. If the district engineer determines to recommend legal action he shall prepare a litigation report which shall contain an analysis of the data and information obtained during the investigation and a recommendation of appropriate civil and/or criminal action. In those cases where the analysis of the facts developed during the investigation and/or the after-the-fact application evaluation leads to the preliminary conclusion to recommend that removal of the unauthorized activity is in the public interest, the district engineer shall also recommend restoration of the area to its original or comparable condition.

(c) Referral to local U.S. Attorney. Except as provided in paragraph (d) of this section, district engineers are authorized to refer the following cases to the Department of Justice (DOJ) in accordance with procedures established by DOJ: Information copies of all letters of referral which go directly to a U.S. Attorney shall be forwarded to the Chief of Engineers, ATTN: DAEN-CCK, for transmittal to the Chief, Pollution Control Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530.

(1) Unauthorized structures or work in or affecting navigable waters of the United States that fall exclusively within the purview of Section 10 of the River and Harbor Act of 1899 (see 33 CFR Part 322) for which a criminal fine or penalty under Section 12 of that Act (33 U.S.C. 406) is recommended.

(2) Civil action involving small unauthorized structures, such as piers, which the district engineer determines are either (i) not in the public interest and recommends that they be removed, or (ii) would be in the public interest if altered or modified but attempts to secure voluntary alteration or modification have failed such that the district engineer recommends that a judicial order is necessary.

(3) Violations of Section 301 of the Clean Water Act involving the unauthorized discharge of dredged or fill material into the waters of the United States where the district engineer recommends, with the concurrence of the Regional Administrator, civil and/or criminal action pursuant to Section 309 of the Clean Water Act.

(4) Cases for which a temporary restraining order and/or preliminary injunction is appropriate following noncompliance with a cease and desist order.

(d) Referral to Office, Chief of Engineers. District engineers shall prepare and forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN-CCK, for cases not identified in paragraph (c) of this section which civil and/or criminal action is considered appropriate, including cases involving:

(1) Significant questions of law or fact;
(2) Discharges of dredged or fill material into waters of the United States that are not interstate waters or navigable waters of the United States, or part of a surface tributary system to these waters;
(3) Recommendations for substantial or complete restoration;
(4) Violations of Section 9 of the River and Harbor Act of 1899; and

(e) All cases involving American Indians, including unauthorized activities on reservation lands.

§ 328.5 Supervision and enforcement of authorized activities.

(a) Inspection and monitoring. District engineers will assure that authorized activities are conducted and executed in conformance with approved plans and other conditions of the permits. Appropriate inspections should be made on timely occasions during performance of the activity and appropriate notices and instructions given permits to insure that they do not depart from the approved plans. Reevaluation of a permit to assure compliance with its purposes and conditions will be carried out as provided in 33 CFR Part 325.7. If there are approved material departures from the authorized plans, the district engineer will require the permittee to furnish corrected plans showing the activity as actually performed.

(b) Non-compliance. Where the district engineer determines that there has been non-compliance with the terms or conditions of a permit, he should first contact the permittee and attempt to resolve the problem. If a mutually agreeable resolution cannot be reached, a written demand for compliance will be made. If the permittee has not agreed to comply within 5 days of receipt of the demand, the district engineer will issue an immediately effective notice of suspension in accordance with 33 CFR Part 325.7(c) and consider initiation of appropriate legal action (§ 328.4 of this Part).

(c) Surveillance. For purposes of inspection of permitted activities and for surveillance of the waters of the United States for enforcement of the permit authorities the district engineer will use all means at his disposal. All Corps of Engineers employees will be instructed to observe and report all unauthorized activities in waters of the United States. The assistance of members of the public and personnel of other interested Federal, state and local agencies to observe and report such activities will be encouraged. To facilitate this surveillance, the district engineer will, in appropriate cases, require a copy of ENC Form 4336 to be posted conspicuously at the site of authorized activities and will make available to all interested persons information on the scope of authorized activities and the conditions prescribed in the authorization. Surveillance in ocean waters will be accomplished primarily by the Coast Guard pursuant to Section 107(c) of the Marine Protection, Research and Sanitary Act of 1972, as amended.

(d) Inspection expenses. The expenses incurred in connection with the inspection of permitted activity in waters of the United States usually will be paid by the Federal Government in accordance with the provisions of Section 6 of the River and Harbor Act of 3 March 1905 (33 U.S.C. 417) unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may require the permittee to bear the expense of inspections in accordance with the conditions of his permit; however, the permittee will not be required or permitted to pay the United States for the cost of

(1) At the end of each month the amount chargeable for the cost of...
inspection pertaining to the permit will be collected from the permittee and will be taken up on the statement of accountability and deposited in a designated depository to the credit of the Treasurer of the United States, on account of reimbursement of the appropriation from which the expenses of the inspection were paid.

(2) If the district engineer considers such a procedure necessary to insure the United States against loss through possible failure of the permittee to supply the necessary funds in accordance with paragraph (d)(1) of this section he may require the permittee to keep on deposit with the district engineer at all times an amount equal to the estimated cost of inspection and supervision for the ensuing month, such deposit preferably being in the form of a certified check, payable to the order of Treasurer of the United States. Certified check so deposited will be carried in a special deposit account (guaranty for inspection expenses) and upon completion of the work under the permit the funds will be returned to the permittee provided he has paid the actual cost of inspection.

(3) On completion of work under a permit and the payment of expenses by the permittee without protest, the account will be closed, and outstanding deposits returned to the permittee. If the account is protested by the permittee, it will be referred to the division engineer for approval before it is closed and before any deposits are returned to the permittee.

(e) Where the unauthorized activity is determined not to be in the public interest, the notification of the denial of the permit will prescribe any corrective actions to be taken in connection with the work already accomplished, including restoration of those areas subject to denial, and establish a reasonable period of time for the applicant to complete such actions. The district engineer, after denial of the permit, will again consider whether to recommend civil and/or criminal action in accordance with §325.4 of this Part.

(f) If the applicant declines to accept the proposed permit conditions, or fails to take corrective action prescribed in the notification of denial, or if the district engineer recommends legal action after denying the permit, the matter will be referred to the Chief of Engineers, Attn.: DAIEN-CCIK, with recommendations for appropriate action.

(g) Division and District Engineers are authorized and encouraged to develop joint surveillance and inspection procedures with other Federal, state, and local agencies with similar regulatory responsibilities and with other Federal, state and local agencies having special interest or expertise in the Corps regulatory program. However, any decision to initiate legal action or to require any restoration or other remedial work under Corps of Engineers authority remains the independent responsibility of the Division or district engineer.

PART 327—PUBLIC HEARINGS

Sec. 327.1 Purpose. 327.2 Applicability. 327.3 Definitions. 327.4 General policies. 327.5 Presiding officer. 327.6 Legal adviser. 327.7 Representation. 327.8 Conduct of hearings. 327.9 Filing of transcript of the public hearing. 327.10 Powers of the presiding officer. 327.11 Public notice. Authority: 33 U.S.C. 1344; 33 U.S.C. 1413

§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 Department of the Army permit action or Federal project as defined in § 327.3 of this Part below 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 Sanitaries Act (MPRSA), as amended (33 U.S.C. 1413).

§327.2 Applicability.

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

§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 Department of the Army permit action, or Federal project, and which affords to the public the 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 permit pursuant to Section 9 or 10 of the River and Harbor Act of 1899, Section 404 of the Clean Water Act, or Section 103 of the MPRSA, as amended, or the modification or revocation of any Department of the Army 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. See 33 CFR 209.145. (This regulation supersedes all references to public meetings in 33 CFR 209.145).

§327.4 General policies.

(a) A public hearing will be held in connection with the consideration of a Department of the Army 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 Department of the Army permit application or on a Federal project, that a public hearing be held to consider the material matters in issue in the permit application or 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 §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.

(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.

§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 such 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.

§ 327.8 Legal advisor.

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.

§ 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.

§ 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 any 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 be 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.

§ 327.9 Filing of 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 his decision or recommendation to higher authority as to such permit action or Federal project.

§ 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.

§ 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 published in newspapers of general circulation.

(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.

PART 328 [RESERVED]

PART 329—DEFINITION OF NAVIGATION WATERS OF THE UNITED STATES

Sec. 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.
§ 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 Part 323.

§ 329.2 Applicability.

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

§ 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 the Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 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.

§ 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.

§ 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 § 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 terms 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 "intrastate commerce" hereinafter includes "foreign commerce" as well.)

§ 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.

§ 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 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 § 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 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 improvements 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 more 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.

§ 320.9 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 § 320.8(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.

§ 320.10 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" or 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.

§ 320.11 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.

(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.

§ 320.12 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 coast line. Wider zones of three leagues (nine nautical miles) are recognized off the coast of Texas and the Gulf coast of Florida and for other special regulatory powers such as those exercised over the outer continental shelf.

(1) Coast line defined. Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the coast line from which the distance of three geographic miles is measured. The line has significance for both domestic and international law (in which it is termed the "baseline"), and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the line may have to be drawn to 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.

§ 320.13 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
§ 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:

§ 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 § 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 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 —— to ——. 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.

§ 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.

PART 330—NATIONWIDE PERMITS

Sec.

330.1 General.

330.2 Definitions.

330.3 Nationwide permits for activities occurring before certain dates.

330.4 Nationwide permits for discharges into certain waters.

330.5 Nationwide permits for specific activities.

330.6 Management practices.

330.7 Discretionary authority.

330.8 Expiration of nationwide permits.


§ 330.1 General.

The purpose of this regulation is to describe the Department of the Army's nationwide permit program and to list all current nationwide permits which have been issued by publication herein. The two types of general permits are referred to as "nationwide permits" and "regional permits." A nationwide permit is a form of general permit which authorizes a category of activities throughout the nation that authority for general permits to be issued by district engineers on a regional basis is contained in 33 CFR Part 325. Copies of regional permits can be obtained from the appropriate district engineer. Nationwide permits are designed to allow the work to occur with little, if any, delay or paperwork. However, the nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Just because a condition cannot be met does not necessarily mean the activity cannot be authorized but rather that the activity will have to be authorized by an individual or regional permit. Additionally, district engineers have the discretion, under situations and procedures described herein, to override the nationwide permit coverage and require an individual or regional permit. The nationwide permits are issued to satisfy the requirements of both Section 10 of the River and Harbor Act of 1899
and Section 404 of the Clean Water Act unless otherwise stated. These nationwide permits apply only to Department of the Army regulatory programs (other Federal agency, state and local authorizations may be required for the activity).

§ 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321-329 are applicable to the terms used in this part.

(b) Discretionary authority means the authority delegated to division engineers in § 330.7 of this Part to override provisions of nationwide permits to add regional conditions or to require individual permit applications.

§ 330.3 Nationwide permits for activities occurring before certain dates.

The following activities are permitted by a nationwide permit which was issued on 19 July 1977 and need not be further permitted:

(a) Discharges of dredged or fill material in waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended Section 404 jurisdiction to all waters of the United States. These phase-in dates are: 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.

(b) Structures or work completed before 16 December 1968 or in waterbodies over which the District Engineer was not asserting jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation.

§ 330.4 Nationwide permits for discharges into certain waters.

(a) Authorized discharges. Discharges of dredge or fill material into the following waters of the United States are hereby permitted provided the conditions listed in paragraph (b) of this section are met:

(1) Non-tidal rivers, streams and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(2) Other non-tidal waters of the United States (see 33 CFR 323.2(a)(3)) that are not part of a surface tributary system to interstate waters or navigable waters of the United States.\(^1\)

(b) Conditions. The following special conditions must be satisfied in order for the nationwide permit identified in paragraph (a) of this section to be valid:

(1) That the discharge will not be located in the proximity of a public water supply intake;

(2) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species. In the case of Federal agencies, it is the agencies' responsibility to review its activities to determine if the action "may affect" any listed species or critical habitat. If so, the Federal agency must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service;

(3) That the discharge will consist of suitable material free from toxic pollutants in toxic amounts;

(4) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution;

(5) That the discharge will not occur in a component of the National Wild and Scenic River System.

(6) That the best management practices listed in § 330.5 of this Part should be followed to the maximum extent practicable.

§ 330.5 Nationwide permits for specific activities.

(a) Authorized activities. The following activities are hereby permitted provided the conditions specified in this paragraph and listed in paragraph (b) of this section are met:

(1) 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 (33 CFR Part 60, Subchapter C).

(2) 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 322.4(g)).

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill of any artificially serviceable structure or fill constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Maintenance dredging is not authorized by this nationwide permit.

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, clam and oyster digging.

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures.

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes.

(7) Outfall structures and associated intake structures where the effluent from the outfall has been permitted under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the individual and cumulative adverse environmental effects of the structure itself are minimal.

(b) Structures for the exploration, production, and transport of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Bureau of Land Management, provided those structures are not placed within the limits of any designated shipping safety fairway or traffic separation scheme where such limits have not been designated or where changes are anticipated, District Engineers will consider recommending the discretionary authority provided by § 330.7 of this Part, and further subject to the provisions of the fairway regulations in 33 CFR 209.135.

(8) Structures placed within anchorage or fleeting areas to facilitate mooring of vessels where such areas have been established by the US Coast Guard.

(10) Non-commercial, single-boat, mooring buoys.

(11) Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 90 days after its use has been

\(^1\) The State of Wisconsin has denied water quality certification pursuant to Section 401 of the Clean Water Act for certain waters within these two Nationwide Permit Categories. Discharges of dredged or fill material into those specified waters are not authorized under these two nationwide permits.

A list of the specific waters may be obtained from the St. Paul District Engineer, 1135 U.S. Post Office & Customhouse, St. Paul, MN 55101.
The crossing will require a permit from the US Coast Guard if located in navigable waters of the United States (see 33 U.S.C. 301). Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4).

(15) Fill placed 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 fill has been authorized by the US Coast Guard under Section 9 of the River and Harbor Act of 1899 as part of the bridge permit. Causeway and approach fills are not included in this nationwide permit and will require an Individual or regional Section 404 permit.

(16) Return water from a contained dredged material disposal area provided the State has issued a certification under Section 4 of the Clean Water Act (see 33 CFR 323.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States.

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Department of Energy under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Department of Energy (see 18 CFR 4.61); and the individual and cumulative adverse effects on the environment are minimal.

(18) Discharges of dredged or fill material into waters of the United States that do not exceed ten cubic yards as part of a single and complete project provided no material is placed in wetlands.

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project.

(20) Structures, work and discharges for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action.

(21) Structures, work, and discharges 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; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal.

(22) Minor work or temporary structures required for the removal of wrecked, abandoned, or disabled vessels or the removal of obstructions to navigation.

(23) Activities, work, and discharges 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 CBQ 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: DAEW-CWO-N) has furnished notice of the agency or department's application for the categorical exclusion and concurs with that determination.

(24) Any activity permitted by a state administering its own permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)-(1) shall be permitted pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403). Those activities which do not involve a Section 404 state permit are not included in this nationwide permit but many will be exempted by Sec. 154 of Pub. L. 94-587. (See 33 CFR 322.2(a)(1)).

(25) Discharge of concrete into tightly

*District Engineers are authorized, where regional conditions indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit.
sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction.

(b) Conditions. The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That any discharge of dredged or fill material will not occur in the proximity of a public water supply intake;

(2) That any discharge of dredged or fill material will not occur in areas of concentrated shellfish production unless the discharge is directly related to a shellfish harvesting activity authorized by paragraph (a)(4) of this section.

(3) That the activity will not jeopardize a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species. In the case of Federal agencies, it is the agencies' responsibility to review its activities to determine if the action "may affect" any listed species or critical habitat. If so, the Federal agency must consult with the Fish and Wildlife Service and/or National Marine Fisheries Service;

(4) That the activity will not significantly disrupt the movement of those species of aquatic life indigenous to the waterbody (unless the primary purpose of the fill is to impound waters);

(5) That any discharge of dredged or fill material will consist of suitable material free from toxic pollutants (See Section 307 of Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized will be properly maintained;

(7) That the activity will not occur in a component of the National Wild and Scenic River System; and

(8) That the activity will not cause an unacceptable interference with navigation.

(9) That the best management practices listed in § 330.6 of this Part should be followed to the maximum extent practicable.

§ 330.6 Management practices.

(a) In addition to the conditions specified in §§ 330.4 and 330.5 of this Part, the following management practices should be followed, to the maximum extent practicable, in the discharge of dredged or fill material under nationwide permits in order to minimize the adverse effects of these discharges on the aquatic environment. Failure to comply with these practices may be cause for the district engineer to recommend or the division engineer to take discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.7 of this Part.

(1) Discharges of dredged or fill material into waters of the United States shall be avoided or minimized through the use of other practical alternatives.

(2) Discharges in spawning areas during spawning seasons shall be avoided.

(3) Discharges shall not restrict or impede the movement of aquatic species indigenous to the waters or 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).

(4) If the discharge creates an impairment 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.

(5) Discharge in wetlands areas shall be avoided.

(6) Heavy equipment working in wetlands shall be placed on mats.

(7) Discharges into breeding areas for migratory waterfowl shall be avoided.

(8) All temporary fills shall be removed in their entirety.

§ 330.7 Discretionary Authority.

Division engineers on their own initiative or upon recommendation of the district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to § 404(b)(1). (40 CFR Part 230)

(a) Regional conditions. Division engineers are authorized to modify nationwide permits by adding conditions applicable to certain activities or specific geographic areas within their divisions. In developing regional conditions, division and district engineers will follow standard permit processing procedures as prescribed in 33 CFR Part 325 applying the evaluation criteria of 33 CFR Part 320 and appropriate parts of 33 CFR Parts 321, 322, 323, and 324. A copy of the Statement of Findings will be forwarded to the Office of the Chief of Engineers, ATTN: DAEN–CWO–N. Division and district engineers will take appropriate measures to inform the public at large of the additional conditions.

(b) Individual permits. In nationwide permit cases where additional regional conditions may not be sufficient or where there is not sufficient time to develop regional conditions under paragraph (a) of this section, the division engineer may require individual permit applications on a case-by-case basis. Where time is of the essence, the district engineer may telephonically recommend that the division engineer assert discretionary authority to require an individual permit application for a specific activity. If the division engineer concurs, he may verbally authorize the district engineer to implement that authority. Both actions will be followed by written confirmation with copy to the Chief of Engineers (DAEN–CWO–N). Additionally, after notice and opportunity for public hearing, division engineers may recommend to the Chief of Engineers that individual permit applications be required for categories of activities, or in a specific geographic area. The division engineer will announce the decision to persons affected by the action. The district engineer will then regulate the activity or activities by processing an application(s) for individual permit(s) pursuant to 33 CFR Part 325.

(c) Discretionary authority which has been exercised under nationwide permits issued on or before July 1977 expires four months from the effective date of this regulation. Such authority may be extended or reinstated after appropriate procedures of this regulation and 33 CFR Parts 320 through 325 have been followed.

§ 330.8 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits at least every five years. Based on this review, which will include public notice and opportunity for public hearing through publication in the Federal Register, he will either modify, reissue (extend) or revoke the permits. If a nationwide permit is not modified or reissued within five years of publication in the Federal Register, it automatically expires and becomes null and void.

[FR Doc. 82–19968 Filed 7–21–82, 8:45 am]
BILLING CODE 3710–90–M
Part V

Department of Defense

Corps of Engineers, Department of the Army

33 CFR Parts 320, 323, 325, and 330
Final Regulations for Controlling Certain Activities in Waters of the United States
DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 323, 325, and 330

Final Regulations for Controlling Certain Activities in Waters of the United States

AGENCY: Army Corps of Engineers. DOD.

ACTION: Final rule.

SUMMARY: The Department of the Army is amending the Corps of Engineers permit regulations for controlling certain activities in the waters of the United States. This final rule is published to comply with requirements of a settlement agreement reached in Natural Wildlife Federation v. Marsh, No. 82-3632 (D.D.C. December 22, 1982). These changes include several policy and procedural changes and modifications to certain nationwide permits. The major effect of this rule is to establish reporting requirements and procedures.

EFFECTIVE DATE: October 5, 1984.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson or Mr. Bernie Goode, Regulatory Branch, (202) 727-0190

SUPPLEMENTARY INFORMATION: In December of 1982, 16 environmental organizations filed suit against the Department of the Army and the U.S. Environmental Protection Agency (NWF v. Marsh) over several provisions of the Corps of Engineers interim final regulations published on July 22, 1982 (47 FR 31794). Nine industrial groups intervened in support of the Army and EPA. On February 16, 1984, the court approved a settlement agreement between the plaintiffs and defendants whereby the Army agreed to publish regulations proposing several policy and procedural changes and modifications to certain nationwide permits. The settlement agreement was endorsed by the Army, EPA, the Department of Justice, the 16 environmental organizations, and two industrial groups. The Army believes the settlement agreement strikes a reasonable balance between environmental protection and an effective and responsive regulatory program. The settlement agreement did not commit the Army to promulgate any particular final regulations. All comments received on the March 29, 1984, proposed regulations were evaluated and considered in promulgating these final regulations.

Environmental Documentation

We have determined that this action does not constitute a major federal action significantly affecting the quality of the human environment. Appropriate environmental documentation is prepared for all permit decisions. Environmental assessments for each of the nationwide permits issued today are available from the Corps of Engineers. We determined that, considering the potential impacts, required conditions, discretionary authority and best management practices, none would require preparation of an environmental impact statement.

Public Comments

We received over 150 comments on the March 29, 1984, proposed regulations (49 FR 12695), which comments covered a full range of views. We also received nearly 200 comments on the July 22, 1982, interim final regulations (47 FR 31794) and nearly 500 comments on the May 12, 1983, proposed regulations (48 FR 21468). The comments on the 1982 and the 1983 regulations which pertained to provisions of the March 29, 1984, regulations were also considered in the development of these final regulations. The comments on the 1982 and the 1983 regulations which do not pertain to the provisions of the March 29, 1984, proposal will be considered during the development of those final regulations. The March 29, 1984, proposals were adopted as published except for changes in § 330.4(b), 320.5(a), 320.5(a)(17), and 330.5(a)(26). A new § 330.5(c) has been added. See discussion below.

Part 320—General Regulatory Policies

Section 320.4(a)(1)

In accordance with the proposal, this paragraph clarifies the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines. If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. A number of commenters were concerned that this section now shifts the "burden of proof" with respect to the public interest from the applicant to the Corps. As a practical matter, both the current wording and the wording being adopted by this change describe the same public interest balancing process. The district engineer may issue a permit when he has determined, after weighing the benefits and detriments of a proposal, that the activity requesting a permit will not be harmful to the public interest. The responsibility for weighing the benefits of a proposed activity against the detriments has always been, and remains vested in the Corps of Engineers.

Section 320.4(b)(4)

In accordance with the proposal, this paragraph states that the district engineer will apply the 404(b)(1) guidelines (30 CFR 320.10(a)(1), (2),(3)) in evaluating whether a particular discharge of dredged or fill material into waters of the United States shall be permitted.

Section 320.4(c)

In accordance with the proposal, the last sentence of this paragraph states that district engineers will give "full consideration" to the views of federal and state fish and wildlife agencies in permit decisions. Many commenters misunderstood the intent of this change. They believed that the effect of changing the wording from "great weight" to "full consideration" placed unwarranted significance on these resource agency views. Some suggested this amounted to a veto power for federal and state agencies that was beyond the scope of section 404. Other commenters saw the change as having just the opposite effect (i.e., weakening the degree of consideration given to resource agency comments). The intent and the probable effect of the change in modifiers have largely been misinterpreted. The basis for making the change to "full consideration" was to reflect the statutory language of the Fish and Wildlife Coordination Act; this term is also consistent with the National Environmental Policy Act and other legal authority.

Section 320.4(g)

In accordance with the proposal, this paragraph recognizes the right to reasonable private use of property as a factor in the public interest review. Comments on this paragraph covered a broad range of views, some supporting the change, others feeling that this change adversely impacts individual property rights. The expectations and wishes of a private property owner have been generally considered in the processing of permit applications, even though these rights were not hitherto explicitly listed as a factor in the Corps public interest review. These expectations may not prevail when public interest considerations lead to denial or conditioning of a permit.
engineer will normally consider the
decisions of state, local, and tribal
governments on land use matters to be
conclusive as to this factor in the public
interest review. Many commenters
interpreted this change to mean that the
Corps would automatically base its
permit decisions on existing or planned
zoning or land use designations, or on
the permit decisions of a state, local or
tribal government rather than its current
objectional public interest review. This
interpretation is not correct. Land use is
one of several factors considered by the
Corps in the public interest review (33
CFR 323.4(a)). The intent of this
paragraph is to recognize that the
primary responsibility for addressing
this factor (i.e., local zoning and/or land
use matters) rests with state, local and
tribal governments. When a state, local,
or tribal government gives its zoning or
other land use approval for a particular
project, this will be considered
conclusive for this factor. However, the
Corps will continue to perform a
thorough, objective evaluation of each
application in full compliance with
applicable regulations and laws.

Part 323—Permits for Discharges of
Dredged or Fill Material Into Waters
of the United States

Section 323.4(a)(3)

In accordance with the proposal, this
paragraph clarifies the types of
appurtenant structures to irrigation
facilities for which the discharges
associated with such structures are
exempt from the provisions of these
regulations unless otherwise regulated
under paragraphs (b) and (c) of this
section. The comments on this
paragraph of the proposal were
reviewed by EPA and the following
discussion was prepared by that agency
in light of its responsibility to interpret
section 404(f).

While a number of commenters
supported the language of this
paragraph as written, others suggested
revisions which, as discussed below,
EPA does not believe are necessary.

Several commenters requested the
restoration of the sentence from the 1982
regulations implementing the 404(f)
irrigation ditch exemption which stated
that the exemption did not include
discharges which had the effect of
bringing waters of the United States into
a use to which they were not previously
subject or where the flow or circulation
of such waters may be impaired or their
reach reduced. The commenters were
concerned that this deletion would
widen the scope of the exemption.

However, the removal of this sentence
has no effect on the scope of the
exemption. The sentence was deleted
from § 323.4(a)(3) simply because it
duplicated § 323.4(c), which already
applied a comparable limitation to all
the section 404(f) exemptions, including
the irrigation ditch exemption, in
accordance with the requirements of
section 404(f)(2).

Two commenters requested a size
limitation to prevent serious fish and
wildlife losses from damming of a stream
to take all its water for irrigation
under this exemption. EPA does not
believe that such a size limitation is
necessary in light of the safeguards
provided by section 404(f)(2). as
reflected in § 323.4(c). Furthermore,
while the list of types of facilities in the
revised regulations is not all-inclusive,
as one commenter correctly noted, it is
intended to give a general indication of
the scale and nature of associated
facilities which are "appurtenant and
functionally related to irrigation
ditches." Thus, discharges associated
with major dams and diversion projects
and other large-scale facilities which are
not subsidiary to irrigation ditches are
clearly not included in the exemption.

One commenter suggested revising the
phrase "functionally related to irrigation
ditches" to read "directly related to
irrigation structures." We have
retained the word "functionally"
because EPA believes it more clearly
expresses the intent of this exemption.
The word "ditches" has been retained
because that is the statutory language.

Several commenters suggested
additional changes or clarifications to
the section 404(f) regulations,
particularly to the exemption for
drainage ditches. EPA and Army will
take those comments under
consideration if changes to these
provisions are proposed in the future.

Section 323.4(a)

In accordance with the proposal, this
paragraph states that district engineers
will deny permits for discharges which
fail to comply with the 404(b)(1)
guidelines, unless the economic impact
on navigation and anchorage
necessitates permit issuance pursuant to
section 404(b)(2) of the Clean Water Act.

The majority of commenters
supported this clarification of the role of
the 404(b)(1) guidelines in the public
interest review process. One commenter
recommended that the provision state
that compliance with the guidelines
should be a prerequisite to the issuance
of 404 permits and that the additional
factors of the public interest review
would be a separate basis for denial but
could not be used to offset an
unfavorable finding under the
guidelines. This, in fact, required by
the revisions to this paragraph. Although
no 404 permit can be issued unless
compliance with the 404(b)(1) guidelines
is demonstrated (i.e., compliance is a
prerequisite to issuance), the 404(b)(1)
evaluation is conducted simultaneously
with the public interest review set forth
in 33 CFR 320.4(a). Therefore, we believe
the proposed language already reflects
our intent.

Part 325—Permit Processing

Section 325.3(b)

In accordance with the proposal, this
paragraph clarifies the public notice
procedures for any new general permit,
or for the modification or reissuance of
existing general permits. Public notices
will contain a statement of availability
of information confirming that the
activities to be covered by the proposed
general permit comply with general
permit requirements. Existing
paragraphs (b) and (c) have been
renumbered (b) and (d). The majority of
commenters supported adoption of this
paragraph as proposed. One commenter
requested that language be incorporated
to require all items enumerated in
§ 325.3(a) through (e) be included in
the public notice. Some of the listed
information requirements are not
applicable to general permits. We
believe that the adopted regulations
require that all information necessary
to provide a clear understanding of a
proposal be included in the public
notice.

Section 325.4

In accordance with the proposal, this
section clarifies the district engineer's
authority to condition permits and to
identify those circumstances wherein he
will deny permits if conditions which
are necessary to protect the public
interest cannot be reasonably
implemented or enforced, or cannot
otherwise be required. This section also
provides that under certain conditions
off-site mitigation may be required.
Some commenters questioned the basis
for requiring the incorporation of 401
water quality certification conditions in
Corps permits. Section 401(d) of the
Clean Water Act requires that such
conditions become conditions of any
federal permit or license. Most
commenters supported these changes.

Part 330—Nationwide Permits

Section 330.4

In accordance with the proposal, the
former § 330.4 has been replaced with a
new section discussing public notice
requirements for nationwide permits.
The nationwide permits formerly found
in this section have been consolidated and placed in § 330.5(a)(28). This change was supported by most commenters. Some confusion was expressed concerning the district engineer's role in the public notice process. District engineers are required to issue public notices of the final issuance of nationwide permits by the Chief of Engineers on a local basis concurrently with publication in the Federal Register, including any regional conditions which have been adopted by the division engineer.

Section 330.5

In accordance with the proposal, the introductory text of this section and § 330.4(a)(7), (17), (21), and (23) have been modified and § 330.4(a)(28) has been added. Over 100 individual comments were received in response to the proposed changes in this section. The majority of these comments addressed the Nationwide permit at paragraph (a)(28). However, many were concerned about other changes or revisions to this section. These comments are discussed below.

Sections 330.5(a)(7), (17), (21)

These Nationwide permits have been modified to include reference to new § 330.7. Some commenters questioned how the district engineer and the resource agencies would be notified of proposed activities under these permits. The existing notification procedures required by the National Pollutant Discharge Elimination System (NPDES) program, Federal Energy Regulatory Commission (FERC) licensing process, and Title V of the Surface Mining Act respectively provide notice to the Corps and resource agencies so that their concerns, if any, can be forwarded to the district engineer for his action pursuant to the requirements of § 330.7(b)(2). Section 330.7(c)(5) requires notification to EPA and the state water quality agencies since the surface mining process does not affect this notification. An additional notification beyond these procedures is not necessary. In § 330.5(a)(17), the proposal has been changed to substitute "Federal Energy Regulatory Commission" for "Department of Energy" to more accurately identify the agency which licenses small hydro power projects.

Section 330.5(c)(28)

This Nationwide permit has been modified to require that the Chief of Engineers solicit comments through a Federal Register notice on another agency's categorical exclusions prior to authorizing them under this permit. Several commenters questioned whether previously authorized categorical exclusions could also be subjected to these provisions and, if so, the new procedure would be redundant, costly, and could result in significant delays of some projects. The categorical exclusions which have already been authorized by the Chief of Engineers are not subject to the requirements of this paragraph unless modifications or additions are proposed in the future. Federal Highway/Urban Mass Transportation Agency exclusions (23 CFR 771-11A, October 30, 1980) and the U.S. Coast Guard exclusions published May 10, 1980 (45 FR 30513) are the only exclusions previously authorized. Future consideration of agency categorical exclusions for purposes of this Nationwide permit will be subject to the provisions of these regulations.

Section 330.5(c)(28)

This Nationwide permit modifies the headwaters and isolated waters permits previously found at § 330.4(a)(1) and (2). Many commenters raised questions concerning the definition of the term "loss or substantial adverse modification" and indicated that there was a need for a definition of that term. The "loss" portion of this term generally included all discharges of dredged or fill material which result in an area no longer being a water of the U.S. The "substantial adverse modification" portion of this term does not refer to all effects on the aquatic system, but rather only to modifications that are substantial and adverse. Generally, a substantial adverse modification occurs when a discharge eliminates the principal available functions of a water of the United States (including wetlands) even though the discharge does not convert the water to dry land. The Corps will monitor the use of this term to determine if further guidance is necessary.

A number of commenters expressed concern with the acreage limitation, explaining that wetland areas and open water areas vary greatly in value; thus, the modification of a 10-acre area in some locations might not create more than minimal adverse environmental impacts, while the loss of 1 acre in another location could be very significant in terms of environmental impacts. It is for exactly these reasons that the provisions for notification and evaluation fees were developed, and the provisions for exercising discretionary authority were provided in § 330.5. The Corps is aware of the gradations in values associated with widely differing areas and believes that the regulations being adopted by this rule provide an appropriate mechanism to fully evaluate these areas and to assure conformance of any proposed activity with general permit criteria.

Minor word changes have been made in this paragraph to clarify the exclusion of activities from this permit. In addition, the reference to 33 CFR §330.5(c)(3) has been deleted to correct a previous error which included this reference to 1980 proposed language which was not adopted.

Section 330.5(c)

A significant number of commenters expressed concern about the impact of these regulations on ongoing projects and supported the inclusion of a "grandfathering" provision to prevent inequitable impacts on previously authorized projects. In adopting these regulations, we considered how to avoid retroactive applications of these regulations which would frustrate the expectations of permittees who justifiably relied on the previous permits modified and reissued herein. Yet we were also mindful of the need to achieve the goals of these regulations. We determined that an equitable transition procedure was necessary to prevent the injustice of imposing new regulatory obligations upon permittees who had adhered to and justifiably relied upon the previous regulations.

In § 330.5(c), we set out the procedures to "grandfather" discharges previously authorized by the Nationwide permits (§ 330.4(a)(1) and (2) of the July 22, 1982, Interim Final Regulation) modified and reissued at § 330.5(a)(28). Section 330.5(c) includes three ways discharges may continue under these previously authorized conditions for 18 months from the effective date of these regulations. First, the discharge may continue if it was commenced or under contract to commence by the effective date of these regulations. Second, the discharge may continue if the permittee had received written authorization by March 20, 1984, from the Corps stating the specific discharge was authorized by the previous Nationwide permit modified and reissued herein at § 330.5(a)(28) and has obtained by the effective date of these regulations all federal, state or local permits or approvals required for the specific discharge to begin. Permittees discharging under the two "grandfathering" criteria above must provide documents demonstrating compliance within 60 days of the effective date of these regulations. Third, district engineers may "grandfather" other discharges not meeting the two grandfathering criteria above after determining the discharge...
complies with the 404(b)(1) guidelines. To be eligible for such "grandfathering," permittees must demonstrate to the district engineer within 60 days of the effective date of these regulations, investments made toward the discharge in reliance on the previous authorization of the nationwide permits modified and reissued at § 330.5(s)(22) which cannot be modified to comply with these regulations without causing substantial loss to the permittees. The previous authorization under any of these three criteria for grandfaothering discharges continues for 18 months from the effective date of these regulations. After 18 months, any new or remaining discharges must meet the terms of these regulations. Discharges previously authorized by the nationwide permits modified and reissued at § 330.5(s)(7), (17) and (21) continue to be authorized by these permits.

Section 330.7

In accordance with the proposal, this new section establishes procedures to be followed by district and division engineers upon receipt of pre-discharge notifications. Many of the comments received addressed specific portions of this section and are discussed in the following paragraphs; however, a large majority of responses stated that 20 days is inadequate to carry out the required notifications, reviews, and decisions required by this section. It is not intended that a "full public interest review" type evaluation be completed during this period, but rather that activities which do not meet the criteria for coverage by the nationwide permits might be identified and the proper action taken to require individual permits, if appropriate. Twenty days has been determined to be a reasonable period in which to make this evaluation and to notify the project sponsor of the need for an individual permit or that they may proceed under the nationwide permit. However, in order to meet this time limit, coordination procedures making the maximum use of telephonic and electronic mail exchanges between the federal and state agencies and the Corps districts will be developed as necessary.

Section 330.7(c)(2)

Two commenters suggested that the proposed paragraph be modified to read "if notified by the district or division engineer that an individual permit will be required ___ __", rather than "__ __ may be required." They considered this change to be necessary to assure that decisions required by the notification procedures will be made within the allowable 20-day period. These commenters believed that use of the word "may" would allow the Corps to notify an applicant in accordance with this paragraph that he could not proceed under the nationwide permit, but would not require the Corps to make any final decision on the need for an individual permit within the 20-day period. This interpretation is not correct. The Corps must, in all but exceptional cases, make a final decision on the need for an individual permit within the 20-day period. The Corps will notify an applicant that an individual permit may be required only when unusual circumstances point to the need for an individual permit yet prevent the Corps from making such a finding without a limited additional time.

Section 330.7(e)(2)

Some commenters were uncertain about the nature of the review process to be followed by district engineers. Upon receipt of notification for a discharge which will cause the loss or substantial adverse modification of 1 or more but less than 10 acres of waters including wetlands above the headwaters or in isolated waters, the district engineer will determine whether the activity is in a "class of discharge" or "category of waters" identified as of particular interest to a resource agency or otherwise would be of interest to those agencies. He will coordinate with those agencies and provide his recommendation to the division engineer.

Section 330.7(d)

Several commenters were concerned that division engineers are required to document any decision authorizing an activity under a nationwide permit that would be contrary to the views of resource agencies, but that division engineers are not specifically required to document a determination to require an individual permit. Division engineers will document all determinations, providing information concerning the basis for requiring individual permits, as well as the final determination. If a decision is made to require an individual permit, the requirements of Parts 330 through 335 of the Corps regulations will be implemented.

Section 330.8

No comments were received on the proposed change. Revisions to this section have been adopted as proposed.

State Certification of Nationwide Permits

In our proposed rulemaking of March 29, 1984 (49 FR 12690), we restated our earlier intention to allow all states to reconsider certification of the nationwide permits (NWPs) pursuant to section 401 of the Clean Water Act. Also, states who approved coastal zone management plans were allowed to reconsider consistency determinations under the Coastal Zone Management Act. Some states have denied 401 certification and/or CZM consistency concurrence for one or more of the five NWPs being reissued today. Accordingly, authorization for any such activities is denied without prejudice in those states pursuant to 33 CFR 330.6(j)(1). Also many states granted conditional water quality certification to one or more of the NWPs and in some states final action on certification/consistency concurrence is still pending and imminent. Concurrently with the publication of those final regulations, district engineers will be issuing public notices for the five NWPs being reissued today. Notices will identify states which have denied certification/CZM consistency concurrence, states which have granted conditional water quality certification for one or more of the five NWPs, and states where certification/consistency concurrence is still pending. Applicants considering a project or activity defined by the NWPs referenced above and located in such a state are advised to check with the district engineer regarding eligibility under the NWPs. In those states which raised concerns, but have not updated their final position on certification/consistency concurrence, we will continue to use their position as taken for the NWPs adopted on July 22, 1982, until the final action has been taken on certification/consistency concurrence or waived in accordance with statutory requirements.

Determination under Executive Order 12291 and the Regulatory Flexibility Act

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

Note 5—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.
List of Subjects

33 CFR Part 320

33 CFR Part 323

33 CFR Part 325

33 CFR Part 330


Robert K. Dawson,
Acting Assistant Secretary of the Army (Civil Works).

Accordingly, the Department of the Army is amending 33 CFR Parts 320, 323, 325, and 330 as set forth below:


PART 320—GENERAL REGULATORY POLICIES

1. Section 320.4 is amended by revising paragraphs (a)(1), (b)(4), (c), (g) introductory text, (g)(1), and (j)(2) to read:

§ 320.4 General policies for evaluating permit applications.

(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.

(b) Evaluation of the probable impacts 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 the 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, cultural values, 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 paragraphs and any other applicable guidelines or criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

(b) .

(4) No permit will be granted which involves the alteration of wetlands, identified as important by paragraph (b)(5) 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 230.10(a) (1), (2), (3)).

(c) Fish and wildlife. In accordance with the Fish and Wildlife Coordination Act (see § 320.3(e) of this part), 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 wetlands 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 considerations in deciding on the issuance, denial, or conditioning of individual or general permits.

(g) Consideration of property ownership. Authorization of work or structures by the Department of the Army 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 navigational servitude and federal regulation for environmental protection.

3. Section 323.4 is amended by revising paragraph (a)(3) to read:

§ 323.4 Discharges not requiring permits.

(a) .

(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, head gates, wing walls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

§ 323.8 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 Clean Water Act (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 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.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

4. Section 325.3 is amended by adding a new paragraph (b) and redesignating paragraphs (b) and (c) as (c) and (d) respectively as follows:

§ 325.3 Public notice.

(b) Public notice for general permits. District engineers will publish a public notice for all proposed regional permits and for significant modifications to, or reissuance of, existing regional permits within their area of jurisdiction. Public notices for statewide regional permits may be issued jointly by the affected Corps districts. The notice will include all applicable information necessary to provide a clear understanding of the proposal. In addition, the notice will state the availability of information at the district offices which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance of general permits. District engineers will publish a public notice for nationwide permits in accordance with 33 CFR 320.4.

(c) Evaluation factors.

(d) Distribution of public notices.

5. Section 325.4 is revised to read:

§ 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 601 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.

(b) 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 these 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 permitee 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.

PART 330—NATIONWIDE PERMITS

6. Section 330.4 is revised to read as follows:

§ 330.4 Public notice.

(a) Chief of Engineers. Upon proposed issuance of new nationwide permits, modification to, or reissuance of, existing nationwide permits, the Chief of Engineers will publish a notice in the Federal Register seeking public comments and including the opportunity for a public hearing. This notice will state the availability of information, at the Office of the Chief of Engineers and at all district offices, which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance under general permit authority. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(b) District engineers. Concurrent with publication in the Federal Register of new or reissued nationwide permits by the Chief of Engineers, district engineers will so notify the interested public within the district by an appropriate notice. The notice will include any applicable regional conditions adopted by the division engineer.

7. Section 330.5 is amended by revising the section heading, the introductory text of paragraph (a), paragraphs (c)(7), (a)(17), (a)(21), and (a)(23) and adding paragraphs (a)(25) and (c) as follows:

§ 330.5 Nationwide permits.

(a) Authorized activities. The following activities, including discharges of dredged or fill material, are hereby permitted provided the discharges listed in paragraph (b) of this section and the notification procedures, where required, of § 330.7 are met. Comment. Because some states have denied water quality certification/coastal zone consistency for some nationwide permits reissued herein and many states have granted conditional water quality certification, applicants should check with the district engineer regarding eligibility under the nationwide permits.

(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.

(7) Outfall structures and associated intake structures where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the district or division engineer makes a determination that the individual and cumulative adverse environmental effects of the structure itself are minimal in accordance with §§ 330.7(c)(2) and (d). Intake structures per se are not included—only those directly associated with an outfall structure are covered by this nationwide permit.

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Federal Energy Regulatory Commission under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Federal Energy Regulatory Commission (see 18 CFR 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal.
in accordance with §§ 330.7 (c)(2) and (d).

(21) Structures, work, and discharges associated with surface coal mining activities permitted 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; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining state (as the case may be) documentation prior to any decision on that application; and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal in accordance with §§ 330.7 (e)(5) and (f)(3) and (d).

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by any federal agency or department where that agency or department has determined, pursuant to the CEQ 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: DAEN—CWO—N) 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 or department's exclusion, the Chief of Engineers will solicit comments through publication in the Federal Register.

(24) Discharges of dredged or fill material into the waters listed in paragraphs (a)(25) (i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of waters, including wetlands, notification of the district engineer is required in accordance with § 330.7 of this section.

(i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are part of a surface tributary system to interstate waters or navigable waters of the United States (i.e., isolated waters).

Grandfathering. (1) Discharges previously authorized by the nationwide permits (§ 330.4(a)(1) and (2) of the July 22, 1982, Interim Final Regulation) modified and reissued at § 330.5(a)(28) continue to be authorized by those nationwide permits for 18 months from the effective date of this regulation if:

(i) The discharge was commenced or under contract to commence by the effective date of this regulation or

(ii) The permittee had

(A) By March 30, 1984, received written confirmation from the Corps stating that the Corps considered the specific discharge in question and determined that no adverse impacts to waters of the United States would result from the discharge; and

(B) By the effective date of this regulation, obtained all necessary pre-discharge approvals or permits required by federal, state or local laws or regulations.

(2) Permitting discharging under paragraph (c)(1) of this section must provide documents demonstrating compliance to the district engineer on or before October 6, 1984. These documents will become a part of the public record. The district engineer will notify such permittees whether they meet the criteria of paragraph (c)(1) of this section within 15 days of receipt of such documents.

(3) If a permittee cannot meet the criteria of paragraph (c)(2), but can otherwise demonstrate to the district engineer on or before October 6, 1984, investments made toward the discharge in reliance on the previous authorizations of the nationwide permits modified and reissued at § 330.5(a)(28) which cannot be modified to comply with 33 CFR Parts 320–330 without substantial loss to the permittee, then the district engineer may grant the discharge to proceed for 18 months from the effective date of this regulation if and when he determines the discharge complies with the section 404(b)(1) guidelines.

(4) After 18 months from the effective date of this regulation, the permittee must follow 33 CFR Parts 320–330 for any new or remaining discharges.

(5) This section shall not apply to existing discharges, which have been or will be authorized by the appropriate district engineer under the existing nationwide permit at § 330.5(a)(28).

8. Sections 330.7 and 330.8 are redesignated as §§ 330.8 and 330.9 respectively, and a new § 330.7 is added to read as follows:

§ 330.7 Notification procedures.

(a) The general permittee shall not begin discharges requiring pre-discharge notification pursuant to the nationwide permit at § 330.5(a)(28):

(1) Until notified by the district engineer that the work may proceed under the nationwide permit 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 may be required; or

(3) Unless 20 days have passed from receipt of the notification by the district engineer and no notice has been received from the district or division engineer.

(b) Notification pursuant to the nationwide permit at § 330.5(a)(28) must be in writing and include the information listed below. Notification is not an admission that the proposed work would result in more than minimal impacts to waters of the United States; it simply allows the district or division engineer to evaluate specific activities for compliance with general permit criteria.

(1) Name, address, and phone number of the general permittee;

(2) Location of the planned work;

(3) Brief description of the proposed work, its purpose, and the approximate size of the waters, including wetlands, which would be lost or substantially adversely modified as a result of the work;

(4) Any specific information required by the nationwide permit and any other information that the permittee believes is appropriate;

(c) District engineer review of notification. Upon receipt of notification, the district engineer will promptly review the general permittee's notification to determine which of the following procedures should be followed:

(1) If the nationwide permit at § 330.5(a)(28) is involved and the district engineer determines either: (i) The proposed activity falls within a class of discharges or will occur in a category of waters which has been previously identified by the Regional Administrator, Environmental Protection Agency; the Regional Director, Fish and Wildlife Service; the Regional Director,
National Marine Fisheries Service; or the heads of the appropriate state natural resource agencies as being of particular interest to those agencies; or (ii) the particular discharge has not been previously identified but he believes it may be of importance to those agencies, he will promptly forward the notification to the division engineer and the head and appropriate staff officials of those agencies to afford those agencies an adequate opportunity before such discharge occurs to consider such notification and express their views, if any, to the district engineer concerning whether individual permits should be required.

(2) If the nationwide permits §§ 330.5(a)(7), (17), or (21) are involved and the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate state natural resource or water quality agencies forward concerns to the district engineer, he will forward those concerns to the division engineer together with a statement of the factors pertinent to a determination of the environmental effects of the proposed discharges, including those set forth in the 404(b)(1) guidelines, and his views on the specific points raised by those agencies.

(3) If the nationwide permit at § 330.5(a)(21) is involved the district engineer will give notice to the Environmental Protection Agency and the appropriate state water quality agency. This notice will include as a minimum the information required by paragraph (b) of this section.

(d) Division engineer review of notification. The division engineer will review all notifications referred to him in accordance with paragraph (c)(1) or (c)(2) of this section. The division engineer will require an individual permit when he determines that an activity does not comply with the terms or conditions of a nationwide permit or does not meet the definition of a general permit (see 33 CFR 322.2(f) and 322.2(n)) including discharges under the nationwide permit at § 330.5(a)(20) which have more than minimal adverse environmental effects on the aquatic environment when viewed either cumulatively or separately. In reaching his decision, he will review factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and will give full consideration to the views, if any, of the federal and state natural resource agencies identified in paragraph (c) of this section. If the division engineer decides that an individual permit is not required, and a federal or appropriate state natural resource agency has indicated in writing that an activity may result in more than minimal adverse environmental impacts, he will prepare a written statement, available to the public on request, which sets forth his response to the specific points raised by the commenting agency. When the division engineer reaches his decision he will notify the district engineer, who will immediately notify the general permittee of the division engineer's decision.

(e) Redesignated § 330.8 is amended by revising the introductory paragraph and adding a new paragraph (d) as follows:

§ 330.8 Discretionary authority.

Except as provided in paragraph (d) of this section, division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to section 404(b)(1). (40 CFR Part 230)

[d] (d) For the nationwide permit found at § 330.5(a)(38), after the applicable provisions of §§ 330.7(a)(1) and (3) have been satisfied, the permittee's right to proceed under the general permit may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 322.7.

FR Doc. 94-38854 Filed 11-11-94; 8:45 am]
BILLING CODE 4310-35-M