



## Habitat Conservation and Restoration Priority Issue Team

### **Beneficial Use of Dredged Sediment & the Federal Standard: Issues of Concern and Recommendations for Action by the Alliance Management Team**

2 August 2010

#### **Introduction**

During initial workshops and forums, the Habitat Conservation and Restoration Team (HCRT) of the Gulf of Mexico Alliance (GOMA) identified the implementation of the “Federal Standard” as a major impediment to the beneficial use of significant quantities of dredged sediments. Based on these concerns, the HCRT hosted a two-day workshop in October, 2009 (see Appendix A for the workshop agenda), that focused on the US Army Corps of Engineers’ (USACE) implementation of the Federal Standard and other factors limiting beneficial use, and what legislative, policy and programmatic efforts might be undertaken by the HCRT, working through the GOMA Alliance Management Team (AMT), to increase the amount of dredged sediment used beneficially in the Gulf of Mexico coastal area. The HCRT had the opportunity in June 2010 to further discuss these issues with the Improve Sediment Management Team of the Louisiana-Mississippi Gulf Coast Ecosystem Restoration Working Group, which is pursuing the goals of the Obama Administration’s *Roadmap for Restoring Ecosystem Resiliency and Sustainability*. These workshops allowed the HCRT to refine its concerns and develop recommendations to address an overall set of issues, including implementation of the Federal Standard, that appear to be hindering the widespread beneficial use of dredged sediment across the Gulf coastal area. This report presents these concerns and frames a set of recommendations for action that the HCRT have determined are beyond its authority, and that thus requiring guidance and leadership action.

***NOTE: Information in this document may not reflect the opinions of USACE personnel, as it pertains to the role of, and need for revision to, the Federal Standard in governing beneficial use. The State leads of the HCRT are aware that the USACE is preparing a formal response to an earlier version of this report prepared for the joint meeting with the Roadmap Improve Sediment Management Team, which will reiterate the USACE’s position that the Federal Standard is satisfactory and non-negotiable. The State leads of the HCRT respectfully disagree, because of the reasons described herein, and acknowledge that this document represents their positions only.***

## **Summary of HCRT Recommendations for AMT Action**

*To address the issues outlined in this document beyond the recognized capabilities of the staff and resources of the Priority Issue Team, the HCRT is making the following recommendations to the AMT:*

- The AMT request that the Alliance States' Congressional delegations support additional funding to the USACE Districts for maintenance dredging, including but not limited to
  - appropriation to the full level of authorization for §145, §1135, §204 and §207 programs (recognizing it will then be necessary for the states to identify beneficial use opportunities and available cost-shares), and
  - real increases in Operations & Maintenance funding to USACE districts with specific funding allocations to support beneficial use as an integral part of new and previously authorized projects' base plans.
- The AMT request that the Alliance States' Congressional delegations support existing or new legislation to direct the Harbor Maintenance Trust Fund (HMTF) to its intended purpose; and that the legislation contain, or be amended to contain, specific language requiring dedicated application of HMTF monies to increase beneficial use.
- The AMT communicate a formal request to the Administration that as CEQ revises the *Proposed National Objectives, Principles and Standards for Water and Related Resources Implementation Studies* based on agency and public comments, they ensure that the language contained therein be retained and strengthened as much as possible that establishes as planning standards
  - the protection and restoration of natural ecosystems and the environment while encouraging sustainable economic development and
  - the accounting for ecosystem services.
- The AMT communicate a formal request to the Administration that it redefine *Environmentally Acceptable* and *Cost Effective* under the Federal Standard to account for the environmental considerations of beneficial use. If the Administration is unwilling to do so, the AMT should recommend to the Alliance States' Congressional delegations that legislation be proposed to accomplish such a revision.
- The AMT communicate a formal request to the Administration that it revise the Federal Standard rule to add the Coastal Zone Management Act as equal to the Clean Water Act in stature within the list of federal legislation that must be considered when calculating the "Federal Standard" for any given dredging project. If the Administration is unwilling to do so, the AMT should recommend to the Alliance States' Congressional delegations that legislation be proposed to accomplish such a revision.
- The AMT discuss reconsideration of the Industry Capability Act with the Alliance States' Congressional delegations so that USACE dredges can be used for dedicated dredging for beneficial use and/or regular maintenance dredging.
- The AMT discuss reconsideration of the Jones Act with the Alliance States' Congressional delegations in order to increase competition and lower the costs of dredging and beneficial use.
- The AMT express support to the Administration for the findings of the Government Accounting Office (GAO) 2010 report on the USACE's budgeting process, and recommend increasing transparency in beneficial use decision-making both by the USACE and OMB.

- The AMT request to the Assistant Secretary of the Army (Civil Works) that the USACE make significant efforts to standardize and formalize the planning and implementation of dredging and beneficial use decisions among the USACE Divisions and Districts.
- The AMT recommend the establishment of a Gulf of Mexico Regional Dredge Team to the National Dredge Team at their quarterly meeting on Monday, 20 September 2010, to ensure proper stakeholder involvement in beneficial use decision-making.
- The AMT request to the to the Assistant Secretary of the Army (Civil Works) that the USACE adopt Regional Sediment Management (RSM) Programs in all Gulf of Mexico District offices, coordinated with corresponding efforts by each of the five Gulf States, to establish the technical underpinnings for a policy shift towards a watershed approach for allocating dredged sediment resources. This request should be followed by specific Congressional appropriations to fund, develop, and implement RSM plans.
- The state and federal members of the AMT request that personnel within their host agencies examine their procedures for conducting local permitting/consistency determinations for federal dredging projects, to identify opportunities for early issue coordination that address natural resource concerns upfront while ensuring beneficial use opportunities are not missed due to unnecessary time delays..
- The AMT recommend the Administration and the USACE in cooperation with the Gulf states review federal projects for beneficial use opportunities and request that these projects undergo reevaluation to incorporate beneficial use as a component of all base plans.

## Specific Issues and Recommendations

### **Issue #1: Lack of funding is the primary cause of low levels of beneficial use by Corps Districts.**

As outlined in EPA (2007), there are several sources of federal funding in addition to the regular annual appropriations to the USACE for Operations & Maintenance of navigation channels that can provide for the beneficial use of dredged sediment. These include

- §145 of the Water Resources Development Act of 1976 (P.L. 94-587), covering the placement of sand dredged during maintenance activities on adjacent beaches;
- §1135 of the Water Resources Development Act of 1986 (P.L. 99-662), covering the “... modification of structures and operations ...” to improve the environment around water resource projects where the environment has been degraded by project activities;
- §204 of the Water Resources Development Act of 1992 (P.L. 102-580), which allows the Corps “to carry out projects for the protection, restoration, and creation of aquatic and ecologically related habitats, including wetlands, in connection with dredging for construction, operation, or maintenance ...”; and
- §207 of the Water Resources Development Act of 1996 (P.L. 104-303), allowing for the placement of dredged sediment via methods that are not the least-cost option when the Corps determines incremental costs are reasonable in relation to environmental benefits.

Although multiple options thus exist for funding beneficial use projects, actual appropriations for the programs described above have historically been much lower than the authorizations allow. For example, while §204 of WRDA 1992 is authorized at \$15 million per year, actual appropriations for the past four federal fiscal years (FYs; as described in [http://cfpub.epa.gov/fedfund/program.cfm?prog\\_num=107](http://cfpub.epa.gov/fedfund/program.cfm?prog_num=107)) have been

- FY 2007        \$2.75 million,
- FY 2008        \$5.3 million,
- FY 2009        \$3.8 million, and
- FY 2010        \$7.75 million.

During the two-day HCRT workshop in October 2009, Corps personnel stated their belief that the Federal Standard does not result in any impediments to the beneficial use of dredged sediments **if** funding is available. However,

- there is a significant backlog in maintenance dredging due to limitations in available funding (e.g. USACE staff indicated no increase in the Operations & Maintenance budget for 30 years beyond provisions for inflation);
- individual Districts have the leeway to internally determine priority in applying available funds to dredging activities; and
- USACE staff acknowledged that if provided additional Operations & Maintenance funds, the priority will be to extend the list of projects dredged in the absence of explicit requirements to the contrary, and not necessarily to increase beneficial use.

There has been much discussion of the Harbor Maintenance Trust Fund (HMTF), authorized in WRDA 1986, which through taxes collected on freight tonnage was intended to maintain navigation and ports infrastructure but are instead being at least partially used to balance Federal deficits. GAO (2008) reported that in 2007, collections for the HMTF exceeded Congressional appropriations from the fund by more than \$506 million. One important caveat of the GAO (2008) report was that while acknowledging that the Corps and stakeholders have emphasized the need for application of HMTF monies to national navigation and port infrastructure, it also mentioned that at the time the report was issued "... the Corps [had] not yet completed cost estimates or time frames for addressing the backlog ..."

The navigation industry has created the Harbor Maintenance Trust Fund Fairness Coalition to push for greater appropriations from the fund to address navigation needs, and at the time of the writing of this report there are two Congressional bills pending to dedicate HMTF monies to navigation and port infrastructure needs (H.R. 3447 and S. 3213; note that S. 3213 co-sponsored by Senators Hutchison, Landrieu, Shelby and Vitter).

As part of its strategy towards solving this issue, the HCRT will request an update from the USACE Districts across the Gulf of Mexico (i.e. Galveston, New Orleans, Mobile and Jacksonville) on their efforts to estimate the maintenance backlog in Gulf regional harbors, navigation channels and ports, as described in the GAO (2008) report.

***To address Issue #1 beyond the recognized capabilities of the staff and resources of the Priority Issue Team, the HCRT is making the following recommendations to the Alliance Management Team.***

- **The AMT request that the Alliance States' Congressional delegations support additional funding to the USACE Districts for maintenance dredging, including but not limited to**
  - **appropriation to the full level of authorization for §145, §1135, §204 and §207 programs (recognizing it will then be necessary for the states to identify beneficial use opportunities and available cost-shares), and**
  - **real increases in Operations & Maintenance funding to USACE districts with specific funding allocations to support beneficial use as an integral part of new and previously authorized projects' base plans.**
- **The AMT request that the Alliance States' Congressional delegations support existing or new legislation to direct the Harbor Maintenance Trust Fund (HMTF) to its intended purpose; and that the legislation contain, or be amended to contain, specific language requiring dedicated application of HMTF monies to increase beneficial use.**

**Issue #2: Consideration of the environmental benefits of beneficial use is not accounted for in “government estimate” calculation determinations prepared for maintenance dredging projects.**

When preparing the “government estimate” for maintenance dredging there is NO “benefit/cost” calculation as the requirement under the FS is to identify the least cost alternative. Benefit/Cost calculations are only required for new projects or for existing projects subject to re-authorization or otherwise subject to NEPA considerations (e.g. when a value engineering study is requested). However,

- traditional analyses for project alternatives promoting the beneficial use of dredged sediments have focused on the additional cost of handling the sediments;
- significant federal programs governing activities within the Gulf of Mexico coastal area have little impact on benefit/cost analyses due to the ability of the USACE to ignore ecological impacts in the name of mission fidelity; and
- the present state of the science regarding the monetization of environmental benefits of the beneficial use of dredged sediments limits the application of that information to a B/C analysis. Such analyses should factor in storm protection services as well as those that sustain wildlife and fisheries functions.

Draft guidelines for federal guidance on implementing water resource projects (CEQ, 2009) propose establishing as a standard for planning the incorporation of accounting for ecosystem services into the definition of a project base plan.

As part of its strategy towards solving this issue, the HCRT will continue collaborating with other relevant GOMA Priority Issue Teams to:

- develop a list of the ecosystem services that need to be valued in a beneficial use analysis of benefits and costs,
- implement a strategy for developing defensible ecosystem services valuations to support B/C arguments, and
- fund and implement one or more ecosystem service valuation demonstration projects that will illustrate the potential for environmental benefits to be incorporated into B/C calculations.

***To address Issue #2 beyond the recognized capabilities of the staff and resources of the Priority Issue Team, the HCRT is making the following recommendations to the Alliance Management Team.***

- **The AMT communicate a formal request to the Administration that as CEQ revises the *Proposed National Objectives, Principles and Standards for Water and Related Resources Implementation Studies* based on agency and public comments, they ensure that the language contained therein be retained and strengthened as much as possible that establishes as planning standards**
  - **the protection and restoration of natural ecosystems and the environment while encouraging sustainable economic development and**

- the accounting for ecosystem services.
- **The AMT communicate a formal request to the Administration that it redefine *Environmentally Acceptable* and *Cost Effective* under the Federal Standard to account for the environmental considerations of beneficial use. If the Administration is unwilling to do so, the AMT should recommend to the Alliance States' Congressional delegations that legislation be proposed to accomplish such a revision.**
- **The AMT communicate a formal request to the Administration that it revise the Federal Standard rule to add the Coastal Zone Management Act as equal to the Clean Water Act in stature within the list of federal legislation that must be considered when calculating the “Federal Standard” for any given dredging project. If the Administration is unwilling to do so, the AMT should recommend to the Alliance States' Congressional delegations that legislation be proposed to accomplish such a revision.**

*See Appendix B for proposed revisions to the Federal Standard.*

**Issue #3: Restrictions in the fleet of available dredges (numbers of dredges, types of dredges, capacity of dredges, and capability of dredges) inflates the cost in dredging activities.**

A significant limitation to the amount of dredging that can be accomplished is that not all available dredges in the U.S. or international fleets can be applied to Gulf coastal area dredging. Specifically,

- the Foreign Dredge Act of 1906, Shipping Act of 1916 and 1920 Merchant Marine Act (Jones Act) prevent foreign-owned dredges from operating in the United States;
- Congressional passage of the Industry Capability Act forced the idling of Corps-owned dredges into the reserve fleet; and
- resulting costs for maintenance dredging are artificially inflated due to a lack of competition, and the total potential amount of dredging is likewise reduced.

Additionally, outside of the above noted issues, there are also limitations in the application of existing dredge technologies in conducting beneficial use. Questions concerning the availability and capabilities of the dredging fleet need to be raised. Further, the need for incentives to enhance dredging fleet capabilities should be explored. Any incentives program would need to include tracking mechanism to insure a return on any investment made in new technologies and capabilities.

As part of its strategy towards solving this issue,

- the HCRT will evaluate how the capacity of the US dredging fleet has changed since the passage of the Industry Capability Act (ICA) and the expressed claims that the premise of the ICA was never realized by industry demobilization of capacity and movement into foreign markets.
- the HCRT will pursue a conversation with the dredging industry to explore limitations in new dredging capacity and capabilities, including the development of new technologies, techniques and incentives to facilitate beneficial use.

*To address Issue #3 beyond the recognized capabilities of the staff and resources of the Priority Issue Team, the HCRT is making the following recommendation to the Alliance Management Team.*

- **The AMT discuss reconsideration of the Industry Capability Act with the Alliance States' Congressional delegations so that USACE dredges can be used for dedicated dredging for beneficial use and/or regular maintenance dredging.**
- **The AMT discuss reconsideration of the Jones Act with the Alliance States' Congressional delegations in order to increase competition and lower the costs of dredging and beneficial use.**

**Issue #4: Considerations for beneficial use of dredged sediments do not appear to be consistent across the northern Gulf of Mexico.**

USACE policy documents provide general instruction to Districts on how to consider options for the handling of dredged sediments. However,

- due to limited specificity in USACE guidance documents, there appears to be much flexibility at the District-level for considerations for beneficial use of dredged sediments and procedures for coordination with federal, state and local partners;
- there is inconsistent record keeping of beneficial use between Districts rooted in varying practices, applications, and/or interpretations of the Federal Standard which fuels disagreements by partner organizations with District decisions; and
- the lack of documentation and analyses of beneficial use applications leaves a deficit of information about the benefits gained.

GAO (2009) described inherent limitations in the ability of decision-makers to evaluate funding requests and trade-offs because the Corps' budgeting process is neither formalized nor transparent. Carrying this idea one step further, the inability to local sponsors on Corps projects and stakeholders in general to follow the decision-making process as Corps project and funding requests proceed through the chain of command from the Districts to Headquarters, and from the Department of Defense to the Office of Management and Budget (OMB), breeds distrust among stakeholders regarding how beneficial use decisions are made.

A specific effort needs to be made to increase the involvement of ports and the navigation industry in beneficial use decision-making, as well as the states, relevant federal agencies, non-government organizations and trade associations and alliances. As part of its strategy towards solving this issue, HCRT is planning to commission a formal case study of dredging and beneficial use decision-making in the Port of Houston, with specific focus on the Interagency Coordination Team (ICT) that was initiated for that program as a model for implementing ICTs across the Gulf of Mexico.

*To address Issue #4 beyond the recognized capabilities of the staff and resources of the Priority Issue Team, the HCRT is making the following recommendations to the Alliance Management Team.*

- **The AMT express support to the Administration for the findings of the Government Accounting Office (GAO) 2010 report on the USACE's budgeting process, and recommend increasing transparency in beneficial use decision-making both by the USACE and OMB.**
- **The AMT request to the Assistant Secretary of the Army (Civil Works) that the USACE make significant efforts to standardize and formalize the planning and implementation of dredging and beneficial use decisions among the USACE Divisions and Districts.**
- **The AMT recommend the establishment of a Gulf of Mexico Regional Dredge Team to the National Dredge Team at their quarterly meeting on Monday, 20 September 2010, to ensure proper stakeholder involvement in beneficial use decision-making.**

**Issue #5: A project-specific emphasis of dredging activities increases budget strain on Gulf coast USACE Districts.**

Decisions on dredging activities and the handling of dredged sediment by USACE Districts, including the definition of the Federal Standard, are largely made on a project-specific basis. This can impact calculations of the cost-effectiveness of the beneficial use of dredged sediment. Specifically,

- project-by-project decision-making on dredging schedules may overlook opportunities to minimize mobilization/demobilization costs; and
- implementing Regional Sediment Management principles and a comprehensive look at sediment handling activities throughout the Gulf coastal area should provide for more efficient planning of dredging activities, which will lower dredging activity costs and allow for more available funds to be used for beneficial placement of dredged sediments.

Draft guidelines for federal guidance on implementing water resource projects (CEQ, 2009) propose establishing the use of a comprehensive watershed approach as a standard for planning. Explicitly, CEQ (2009) describes that “A watershed perspective facilitates evaluation of a more complete range of potential solutions and is more likely to identify the most environmentally preferable, technically sound and economically efficient means to achieve multiple goals over the entire watershed.” A watershed approach for planning dredging and beneficial use from the current project-specific decision-making process requires the development of comprehensive data and tools that may not currently exist. The potential cost-savings for sediment management of multiple projects at the landscape scale promise to impact estimations of the Federal Standard in establishing the base plan, and justify the expense of developing the necessary information and tools.

As part of its strategy towards solving this issue,

- the HCRT will continue development of the Gulf Regional Sediment Management Master Plan to provide guidance to the establishment of local regional sediment management programs; and
- the HCRT will explore its ability to fund the development of regional sediment management plans in the Gulf of Mexico coastal area.

*To address Issue #5 beyond the recognized capabilities of the staff and resources of the Priority Issue Team, the HCRT is making the following recommendation to the Alliance Management Team.*

- **The AMT request to the to the Assistant Secretary of the Army (Civil Works) that the USACE adopt Regional Sediment Management (RSM) Programs in all Gulf of Mexico District offices, coordinated with corresponding efforts by each of the five Gulf States, to establish the technical underpinnings for a policy shift towards a watershed approach for allocating dredged sediment resources. This request should be followed by specific Congressional appropriations to fund, develop, and implement RSM plans.**

**Issue #6: State and federal permitting procedures may limit beneficial use opportunities by USACE Districts.**

During the HCRT working session in October 2009, several USACE speakers mentioned that inconsistent permitting procedures among the Gulf state governments and federal partners has hampered past opportunities for beneficial placement of dredged material. Specifically,

- coastal area management and water quality consistency determinations by the states may sometimes be at odds; and
- the time needed for federal oversight of dredged material placement projects (e.g. endangered species investigations) and the strict criteria under which projects are sometimes evaluated (e.g. land/water ratios for essential fish habitat impact) may limit the options that can be examined for dredging and sediment placement activities.

Several of the State leads present at the October 2009 and June 2010 meetings expressed concern that any attempts to streamline environmental compliance and permitting activities crossing the line to not giving those activities due diligence.

As part of its strategy, the HCRT will recommend to Corps project managers that they coordinate as early as practicable with federal and state managers to identify upcoming operations and maintenance activities, identify beneficial use opportunities, and address required regulatory procedures and natural resource concerns to maximize beneficial use. Likely components will include outreach geared to agency managers about the navigation infrastructure, bay hydrologic regimes, and ecosystem restoration and protection needs. This will increase communications between natural resource managers, the USACE, and other partners for dredging projects.

*To address Issue #6 beyond the recognized capabilities of the staff and resources of the Priority Issue Team, the HCRT is making the following recommendations to the Alliance Management Team.*

- **The state and federal members of the AMT request that personnel within their host agencies examine their procedures for conducting local permitting/consistency determinations for federal dredging projects, to identify opportunities for early issue coordination that address natural resource concerns upfront while ensuring beneficial use opportunities are not missed due to unnecessary time delays..**
- **The AMT recommend the Administration and the USACE in cooperation with the Gulf states review federal projects for beneficial use opportunities and request that these projects undergo reevaluation to incorporate beneficial use as a component of all base plans.**

## References

- CEQ. 2009. Proposed National Objectives, Principles and Standards for Water and Related Resources Implementation Studies, December 3, 2009. Council on Environmental Quality, Washington, DC. 32 pp.
- EPA. 2007. The Role of the Federal Standard in the Beneficial Use of Dredged Material from U.S. Army Corps of Engineers New and Maintenance Channel Projects. EPA842-B-07-002. United States Environmental Protection Agency, Washington, DC. 16 pp.
- GAO. 2008. Federal User Fees: Substantive Reviews Needed to Align Port-Related Fees with the Programs They Support. GAO-08-321. United States Government Accountability Office, Washington, DC. 62 pp.
- GAO. 2010. Army Corps of Engineers: Budget Formulation Process Emphasizes Agencywide Priorities, but Transparency of Budget Presentation Could Be Improved. GAO-10-453. United States Government Accountability Office, Washington, DC. 44 pp.
- USACE. 1999. Digest of Water resource Policies and Authorities. EP 1165-2-1. United States Army Corps of Engineers, Washington, DC, 381 pp.

**Appendix A: Agenda for the HCRT Federal Standard Working Session**

**Gulf of Mexico Alliance – Habitat Conservation and Restoration Team  
Federal Standard & Beneficial Use Working Session  
Le Pavillon Hotel, New Orleans  
October 14-15, 2009**

**Agenda**

<b>October 14</b>	<b>Event</b>	<b>Speakers</b>
8:00a-8:30a	Continental Breakfast (Provided)	
8:30a-8:45a	Welcome	Jim Pahl Greg DuCote Carl Ferraro
	Statement of Issues	
	Objectives and Purposes of Working Session	
8:45a-12:00p	Background Information and Existing Implementation of the Federal Standard	
	<ul style="list-style-type: none"> <li>• USACE Introduction &amp; Planning Process</li> <li>• Federal Standard History</li> <li>• Base Plans, DMMPs, Project Authorizations, and CAPS</li> <li>• Budget and OMB Issues</li> <li>• Panel Discussion: District-Specific Implementation of the Federal Standard               <ul style="list-style-type: none"> <li>○ Jacksonville District</li> <li>○ Mobile District</li> <li>○ New Orleans District</li> <li>○ Galveston District</li> </ul> </li> </ul>	Daniel Small, USACE SAD  Joe Wilson, USACE HQ  Steve Hrabovski, SAD  Sirisha Rayaprolu, SAJ Larry Parson, SAM Ed Creef, MNO Ops Bob Heinly, SWG
	Discussion	
	Identification of Issues	
	Develop Strawman Recommendations on Each Issue	
12:00p-1:30p	Lunch (Provided)	

## October 14 (continued)

## Speakers

1:30p-5:00p	Regulatory Issues Influencing Beneficial Use and Flexibility in Existing Policy	
	<ul style="list-style-type: none"><li>• NOAA CZM Enforceable Policy/Consistency Processes</li><li>• ODMDS Designations and Water Quality Certification Issues</li><li>• Port Issues and Formation of ICT/BUGs</li><li>• Precedent of Legal Challenges to Corps Implementation</li></ul>	<p>Kerry Kehoe, NOAA-OCRM</p> <p>Barbara Keeler, EPA</p> <p>Lloyd Saunders, Port of Houston</p> <p>James Wilkins, LA Sea Grant</p>
	Discussion Identification of Issues Develop Strawman Recommendations on Each Issue	

## October 15

8:00a-8:30a	Continental Breakfast (Provided)	
8:30a-12:00p	Revision of Authorization, Legislation & Policy and Project Funding	
	<ul style="list-style-type: none"><li>• Legislative Process</li><li>• Change/Revise Definition of “Environmental Acceptability” within Federal Standard Framework</li><li>• Congressional/State Funding Recommendations</li><li>• Processes for Revising Authorizations/Project Descriptions /DMMPs to Address Issues on a Project by Project Basis.</li></ul>	<p>Lou Buatt, LA DNR</p> <p>Garrett Graves, LA Governors Office of Coastal Activities</p> <p>Joe Wilson, USACE HQ</p>
	Discussion Identification of Issues Develop Strawman Recommendations on Each Issue	

12:00p Adjourn

1:30p-3:00p HCRT Core Group Working Session

**Gulf of Mexico Alliance – Habitat Conservation and Restoration Team**  
**Federal Standard & Beneficial Use Working Session**  
**Le Pavillon Hotel, New Orleans**  
**October 14-15, 2009**

**Statement of Issues:**

Numerous ecosystems across the Gulf are now or will be sediment starved and/or have an enormous need for sediment for habitat restoration and protection. Coastal Louisiana is a classic example of such a need. Given projected relative sea level rise, increased tropical storm events, changes in freshwater inflows and resulting changes in sediment inflows, and other climate change issues, the entire Gulf coast is projected to have increased need for sediment for habit restoration and protection in the future.

Dredged materials from navigational projects are the largest readily available source of sediment for habitat restoration and protection. The Gulf States view dredged material as valuable resources which need to be utilized beneficially for habitat restoration and protection to the maximum extent possible.

The current “Federal Standard” as well as other policies, regulations and programs which relate to dredge material disposal practices, as well funding limitations, in many cases inhibits the beneficial use of dredged materials. The intent of the GOMA-HCRT is to work with our state and federal partners to develop recommendations for changes to the Federal Standard, regulations, policies and programs, as well as funding sources, in order to facilitate the beneficial use of dredged materials to the maximum extent possible for improved habitat conservation, restoration and the sustainability of ecosystem services.

**Purposes of This Working Session:**

- 1) To obtain information pertaining to the Federal Standard and other related policies, regulations and programs which effect the implementation of the Federal Standard as it relates to the Beneficial Use of Dredged Materials for habitat conservation and restoration.
- 2) Begin to develop recommendations for changes to the Federal Stand and related policies, regulations and programs which will facilitate the Beneficial Use of Dredged Materials for habitat conservation, restoration and sustainability of ecosystem services. This includes recommendations for changes in funding sources.

**Overview:**

- Gather Information.
- Conduct Open Discussion.
- Develop a Strawman of Recommended Actions/Changes.
- Lay the groundwork for a follow-up workshop with a large audience of stakeholders.

## **Appendix B: Draft Changes to the Federal Standard**

## Definition

Federal standard means the dredged material disposal alternative or alternatives identified by the Corps which represent the least costly alternatives consistent with sound engineering practices and meeting the environmental standards established by the 404(b)(1) evaluation process or ocean dumping criteria **and the various state coastal management programs established pursuant to the federal Coastal Zone Management Act and which programs are approved by NOAA.**

## PART 336—FACTORS TO BE CONSIDERED IN THE EVALUATION OF ARMY CORPS OF ENGINEERS DREDGING PROJECTS INVOLVING THE DISCHARGE OF DREDGED MATERIAL INTO WATERS OF THE U.S. AND OCEAN WATERS

Sec.

336.0 General.

336.1 Discharges of dredged or fill material into waters of the U.S. 336.2 Transportation of dredged material for the purpose of disposal into ocean waters.

AUTHORITY: 33 U.S.C. 1344; 33 U.S.C. 1413. SOURCE: 53 FR 14912, Apr. 26, 1988, unless otherwise noted.

§ 336.0 General.

Since the jurisdiction of the CWA extends to all waters of the U.S. **and the CZMA to all coastal waters as defined by the various states in their federally approved coastal management programs,** including the territorial sea, and the jurisdiction of the ODA **and the CZMA** extends over ocean waters including the territorial sea, the following rules are established to assure appropriate regulation of discharges of dredged or fill material into waters of the U.S. and ocean waters.

(a) The disposal into ocean waters, including the territorial sea, of dredged material excavated or dredged from navigable waters of the U.S. will be evaluated by the Corps in accordance with the ODA **and the coastal management programs of the various states as approved by NOAA pursuant to the CZMA.**

(b) In those cases where the district engineer determines that the discharge of dredged material into the territorial sea would be for the primary purpose of fill, such as the use of dredged material for beach nourishment, island creation, or construction of underwater berms, the discharge will be evaluated under section 404 of the CWA.

(c) For those cases where the district engineer determines that the materials proposed for discharge in the territorial sea would not be adequately evaluated under the section 404(b)(1) guidelines of the CWA, he may evaluate that material under the ODA.

§ 336.1 Discharges of dredged or fill material into waters of the U.S.

(a) Applicable laws. Section 404 of the CWA governs the discharge of dredged or fill m

### **33 CFR Part 336**

#### **Factors to be Considered in the Evaluation of Army Corps of Engineers Dredging Projects Involving the Discharge of Dredged Material into Waters of the U.S. and Ocean Waters**

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

## § 336.0 - General

### § 336.1 - Discharges of dredged or fill material into waters of the U.S.

### § 336.2 - Transportation of dredged material for the purpose of disposal into ocean waters

## 336.0 - General

Since the jurisdiction of the Clean Water Act (CWA) extends to all waters of the U.S., including the territorial sea, and the jurisdiction of the Office Department of Army (ODA) extends over ocean waters including the territorial sea, the following rules are established to assure appropriate regulation of discharges of dredged or fill material into waters of the U.S. and ocean waters.

**a.** The disposal into ocean waters, including the territorial sea, of dredged material excavated or dredged from navigable waters of the U.S. will be evaluated by the Corps in accordance with the ODA.

**b.** In those cases where the district engineer determines that the discharge of dredged material into the territorial sea would be for the primary purpose of fill, such as the use of dredged material for beach nourishment, island creation, or construction of underwater berms, the discharge will be evaluated under section 404 of the CWA.

**c.** For those cases where the district engineer determines that the materials proposed for discharge in the territorial sea would not be adequately evaluated under the section 404(b)(1) guidelines of the CWA, he may evaluate that material under the ODA.

## 336.1 - Discharges of dredged or fill material into waters of the U.S.

**a. Applicable laws.** Section 404 of the CWA governs the discharge of dredged or fill material into waters of the U.S. Although the Corps does not process and issue permits for its own activities, the Corps authorizes its own discharges of dredged or fill material by applying all applicable substantive legal requirements, including public notice, opportunity for public hearing, and application of the section 404(b)(1) guidelines **and appropriate enforceable policy provisions of the various states with federally approved coastal management programs pursuant to the CZMA** .

**1.** The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S.

**2.** Section 307 of the Coastal Zone Management Act (CZMA) requires that certain activities that a Federal agency conducts or supports be consistent with the Federally-approved state management plan to the maximum extent practicable.

**b. Procedures.** If changes in a previously approved disposal plan for a Corps navigation project

warrant re-evaluation under the CWA, the following procedures should be followed by district engineers prior to discharging dredged material into waters of the U.S. except where emergency action as described in 337.7 of this chapter is required.

1. A public notice providing opportunity for a public hearing should be issued at the earliest practicable time. The public notification procedures of 337.1 of this chapter should be followed.

2. The public hearing procedures of 33 CFR part 327 should be followed.

3. As soon as practicable, the district engineer will request from the state a 401 water quality certification and, if applicable, provide a coastal zone consistency determination for the Corps activity using the procedures of 336.1(b) (8) and (9), respectively, of this part.

4. Discharges of dredged material will be evaluated using the guidelines authorized under section 404(b)(1) of the CWA, or using the ODA regulations, **or the provisions of the state coastal management program** where appropriate. If the guidelines alone would prohibit the designation of a proposed discharge site, the economic impact on navigation and anchorage of the failure to use the proposed discharge site will also be considered in evaluating whether the proposed discharge is to be authorized under CWA section 404(b)(2).

5. The EPA Administrator can prohibit or restrict the use of any defined area as a discharge site under 404(c) whenever he determines, after notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas **or the coastal resources of the state**. Upon notification of the prohibition of a discharge site by the Administrator the district engineer will complete the administrative processing of the proposed project up to the point of signing the Statement of Findings (SOF) or Record of Decision (ROD). The unsigned SOF or ROD along with a report described in 337.8 of this chapter will be forwarded through the appropriate Division office to the Dredging Division, Office of the Chief of Engineers.

6. In accordance with the National Environmental Policy Act (NEPA), and the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), an Environmental Impact Statement (EIS) or Environmental Assessment (EA) will be prepared for all Corps of Engineers projects involving the discharge of dredged or fill material, unless such projects are included within a categorical exclusion found at 33 CFR part 230 or addressed within an existing EA or EIS. If a proposed maintenance activity will result in a deviation in the operation and maintenance plan as described in the EA or EIS, the district engineer will determine the need to prepare a new EA, EIS, or supplement. If a new EA, EIS, or supplement is required, the procedures of 33 CFR part 230 will be followed.

7. If it can be anticipated that related work by other Federal or non-Federal interests will occur in the same area as Corps projects, the district engineer should use all reasonable means to include it in the planning, processing, and review of Corps projects. Related work normally includes, but is not necessarily limited to, maintenance dredging of approach channels and berthing areas connected to Federal navigation channels. The district engineer should coordinate the related

work with interested Federal, state, regional and local agencies and the general public at the same time he does so for the Corps project. The district engineer should ensure that related work meets all substantive and procedural requirements of 33 CFR parts 320 through 330. Documents covering Corps maintenance activities normally should also include an appropriate discussion of ancillary maintenance work. District engineers should assist local interests to obtain from the state any necessary section 401 water quality certification and, if required, the section 307 coastal zone consistency concurrence. The absence of such certification or concurrence by the state or the denial of a Corps permit for related work shall not be cause for delay of the Federal project. Local sponsors will be responsible for funding any related work. If permitting of the related work complies with all legal requirements and is not contrary to the public interest, section 10, 404, and 103 permits normally will be issued by the district engineer in a separate SOF or ROD. Authorization by nationwide or regional general permit may be appropriate. If the related work does not receive a necessary state water quality certification and/or CZMA consistency concurrence, or are determined to be contrary to the public interest the district engineer should re-examine the project viability to ensure that continued maintenance is warranted. **If the district engineer determines that such work is in the public interest the district engineer will request sufficient funding as mandated by the CZMA to conduct the proposed maintenance in a manner that is consistent with a states federally approved program.**

**8. State water quality certification:** Section 401 of the CWA requires the Corps to seek state water quality certification for dredged material disposal into waters of the U.S. The state certification request must be processed to a conclusion by the state within a reasonable period of time. Otherwise, the certification requirements of section 401 are deemed waived. The district engineer will request water quality certification from the state at the earliest practicable time using the following procedures:

- i.** In addition to the Corps section 404 public notice, information and data demonstrating compliance with state water quality standards will be provided to the state water quality certifying agency along with the request for water quality certification. The information and data may be included within the 404(b)(1) evaluation. The district engineer will request water quality certification to be consistent with the maintenance dredging schedule for the project. Submission of the public notice, including information and data demonstrating compliance with the state water quality standards, will constitute a valid water quality certification request pursuant to section 401 of the CWA.
- ii.** If the proposed disposal activity may violate state water quality standards, after consideration of disposal site dilution and dispersion, the district engineer will work with the state to acquire data to satisfy compliance with the state water quality standards. The district engineer will use the technical manual "Management Strategy for Disposal of Dredged Material: Contaminant Testing and Controls" or its appropriate updated version as a guide for developing the appropriate tests to be conducted on such dredged material.
- iii.** If the state does not take final action on a request for water quality certification within two months from the date of the initial request, the district engineer will notify the state of his intention to presume a waiver as provided by section 401 of the CWA. If the state agency, within the two-month period, requests an extension of time, the district engineer may approve one 30-day extension unless, in his opinion, the magnitude and complexity of the information contained in the request warrants a longer or additional extension period. The total period of time in which

the state must act should not exceed six months from the date of the initial request. Waiver of water quality certification can be conclusively presumed after six months from the date of the initial request.

**iv.** The procedures of 337.2 will be followed if the district engineer determines that the state data acquisition requirements exceed those necessary in establishment of the Federal standard.

**9. State coastal zone consistency:** Section 307 of the CZMA requires that activities subject to the CZMA which a Federal agency conducts or supports be consistent with the federally approved state management program to the maximum extent practicable. The state is provided a reasonable period of time as defined in 336.1(b)(9)(iv) to take final action on Federal consistency determinations; otherwise state concurrence can be presumed. The district engineer will provide the state a consistency determination at the earliest practicable time using the following procedures:

**i.** The Corps section 404 public notice and any additional information that the district engineer determines **or may be required by a states program** to be appropriate will be provided the state coastal zone management agency along with the consistency determination. The consistency determination will consider the maintenance dredging schedule for the project. Submission of the public notice and, as appropriate, any additional information as determined by the district engineer **or may be required by a states program** will constitute a valid coastal zone consistency determination pursuant to section 307 of the CZMA.

**ii.** If the district engineer decides that a consistency determination is not required for a Corps activity, he may provide the state agency a written determination that the CZMA does not apply.

**iii.** The district engineer may provide the state agency a general consistency determination for routine or repetitive activities.

**iv.** If the state fails to provide a response within 45 days from receipt of the initial consistency determination, the district engineer will presume state agency concurrence. If the state agency, within the 45-day period, requests an extension of time, the district engineer will approve one 15-day extension unless, in his opinion, the magnitude and complexity of the information contained in the consistency determination warrants a longer or additional extension period. The longer or additional extension period shall not exceed six months from the date of the initial consistency determination.

**v.** If the district engineer determines that the state recommendations to achieve consistency to the maximum degree practicable exceed either his authority or funding for a proposed dredging or disposal activity, he will so notify the state coastal zone management agency indicating that the Corps has complied to the maximum extent practicable with the state's coastal zone management program. If the district engineer determines that state recommendations to achieve consistency to the maximum degree practicable do not exceed his authority or funding but, nonetheless, are excessive, he will follow the procedures of 337.2.

**c. Evaluation factors.** The following factors will be used, as appropriate, to evaluate the discharge of dredged material into waters of the U.S. Other relevant factors may also be evaluated, as needed.

**1. Navigation and Federal standard.** The maintenance of a reliable Federal navigation system is essential to the economic well-being and national defense of the country. The district engineer will give full consideration to the impact of the failure to maintain navigation channels on the national and, as appropriate, regional economy. It is the Corps' policy to regulate the discharge of dredged material from its projects to assure that dredged material disposal occurs in the least costly, environmentally acceptable manner, consistent with engineering requirements established for the project. The environmental assessment or environmental impact statement, in conjunction with the section 404(b)(1) guidelines and public notice coordination process, can be used as a guide in formulating environmentally acceptable alternatives. The least costly alternative, consistent with sound engineering practices and selected through the 404(b)(1) guidelines or ocean disposal criteria, will be designated the Federal standard for the proposed project.

**2. Water quality.** The 404(b)(1) guidelines at 40 CFR part 230 and ocean dumping criteria at 40 CFR part 220 implement the environmental protection provisions of the CWA and ODA, respectively. These guidelines and criteria provide general regulatory guidance and objectives, but not a specific technical framework for evaluating or managing contaminated sediment that must be dredged. Through the section 404(b)(1) evaluation process (or ocean disposal criteria for the territorial sea), the district engineer will evaluate the water quality impacts of the proposed project. The evaluation will include consideration of state water quality standards. If the district engineer determines the dredged material to be contaminated, he will follow the guidance provided in the most current published version of the technical manual for contaminant testing and controls. This manual is currently cited as: Francingues, N.R., Jr., et al. 1985. "Management Strategy for Disposal of Dredged Material: Contaminant Testing and Controls," Miscellaneous Paper D-85-1, U.S. Army Waterways Experiment Station, Vicksburg, Mississippi. The procedures of 336.1(b)(8) will be followed for state water quality certification requests.

**3. Coastal zone consistency.** As appropriate, the district engineer will determine whether the proposed project is consistent with the state coastal zone management program to the maximum extent practicable. The procedures of 336.1(b)(9) **the CZMA rules and regulations and the enforceable policies of a states coastal management program**, will be followed for coastal zone consistency determinations.

**4. Wetlands.** Most wetland areas constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. The district engineer will, therefore, follow the guidance in 33 CFR 320.4(b) and EO 11990, dated May 24, 1977, when evaluating Corps operations and maintenance activities in wetlands.

**5. Endangered species.** All Corps operations and maintenance activities will be reviewed for the potential impact on threatened or endangered species, pursuant to the Endangered Species Act of 1973. If the district engineer determines that the proposed activity will not affect listed species or their critical habitat, a statement to this effect should be included in the public notice. If the

proposed activity may affect listed species or their critical habitat, appropriate discussions will be initiated with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, and a statement to this effect should be included in the public notice. (See 50 CFR part 402).

**6. Historic resources.** Archeological, historical, or architectural resource surveys may be required to locate and identify previously unrecorded historic properties in navigation channels and at dredged or fill material disposal sites. If properties that may be historic are known or found to exist within the navigation channel or proposed disposal area, field testing and analysis may sometimes be necessary in order to evaluate the properties against the criteria of the National Register of Historic Places. Such testing should be limited to the amount and kind needed to determine eligibility for the National Register; more detailed and extensive work on a property may be prescribed later, as the outcome of review under section 106 of the National Historic Preservation Act. Historic properties are not normally found in previously constructed navigation channels or previously used disposal areas. Therefore, surveys to identify historic properties should not be conducted for maintenance dredging and disposal activities proposed within the boundaries of previously constructed navigation channels or previously used disposal areas unless there is good reason to believe that historic properties exist there.

- i.** The district engineer will establish whether historic properties located in navigation channels or at disposal sites are eligible for inclusion in the National Register of Historic Places in accordance with applicable regulations of the Advisory Council on Historic Preservation and the Department of the Interior.
- ii.** The district engineer will take into account the effects of any proposed actions on properties included in or eligible for inclusion in the National Register of Historic Places, and will request the comments of the Advisory Council on Historic Preservation, in accordance with applicable regulations of the Advisory Council on Historic Preservation.

## **7. Scenic and recreational values.**

- i.** Maintenance dredging and disposal activities may involve areas which possess recognized scenic, recreational, or similar values. Full evaluation requires that due consideration be given to the effect which dredging and disposal of the dredged or fill material may have on the enhancement, preservation, or development of such values. Recognition of these values is often reflected by state, regional, or local land use classification or by similar Federal controls or policies. Operations and maintenance activities should, insofar as possible, be consistent with and avoid adverse effects on the values or purposes for which such resources have been recognized or set aside, and for which those classifications, controls, or policies were established. Special consideration must be given to rivers named in section 3 of the Wild and Scenic Rivers Act and those proposed for inclusion as provided by section 4 and 5 of the Act, or by later legislation.
- ii.** Any other areas named in Acts of Congress or Presidential Proclamations, such as National Rivers, National Wilderness Areas, National Seashores, National Parks, and National Monuments, should be given full consideration when evaluating Corps operations and maintenance activities.

## **8. Fish and wildlife.**

- i.** In those cases where the Fish and Wildlife Coordination Act (FWCA) applies, district engineers will consult, through the public notification process, with the Regional Directors of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of fish and wildlife resources by considering ways to prevent their direct and indirect loss and damage due to the proposed operation and maintenance activity. The district engineer will give full consideration to these views on fish and wildlife conservation in evaluating the activity. The proposed operations may be modified in order to lessen the damage to such resources. The district engineer should include such justifiable means and measures for fish and wildlife resources that are found to be appropriate. Corps funding of Fish and Wildlife Service activities under the Transfer of Funds Agreement between the Fish and Wildlife Service and the Corps is not applicable for Corps operation and maintenance projects.
- ii.** District engineers should consider ways of reducing unavoidable adverse environmental impacts of dredging and disposal activities. The determination as to the extent of implementation of such measures will be done by the district engineer after weighing the benefits and detriments of the maintenance work and considering applicable environmental laws, regulations, and other relevant factors.

**9. Marine sanctuaries.** Operations and maintenance activities involving the discharge of dredged or fill material in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the ODA should be evaluated for the impact on the marine sanctuary. In such a case, certification should be obtained from the Secretary of Commerce that the proposed project is consistent with the purposes of Title III of the ODA and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

**10. Other state requirements.** District engineers will make all reasonable efforts to comply with state water quality standards and Federally approved coastal zone programs using the procedures of 336.1(b) (8), (9), and 337.2. District engineers should not seek state permits or licenses unless authorized to do so by a clear, explicit, and unambiguous Congressional waiver of Federal sovereign immunity, giving the state authority to impose that requirement on Federal activities (e.g., CWA sections 401 and 404(t), and CZMA section 307 (c)(1) and (c)(2)).

**11. Additional factors.** In addition to the factors described in paragraphs (c)(1) through (9) of this section, the following factors should also be considered.

- i.** The evaluation of Corps operations and maintenance activities involving the discharge of dredged or fill material into waters of the U.S. is a continuing process and should proceed concurrently with the processing of state water quality certification and, if required, the provision of a coastal zone consistency determination to the state. If a local agency having jurisdiction over or concern with the particular activity comments on the project through the public notice coordination, due consideration should be given to those official views as a reflection of local factors.
- ii.** Where officially adopted state, regional, or local land use classifications, determinations, or policies are applicable, they normally will be presumed to reflect local views and will be considered in addition to other national factors.

## **336.2 - Transportation of dredged material for the purpose of disposal into ocean waters.**

**a. Applicable law.** Section 103(a) of the ODA provides that the Corps of Engineers may issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for disposal into ocean waters.

**b. Procedures.** The following procedures will be followed by district engineers for dredged material disposal into ocean waters except where emergency action as described in 337.7 of this chapter is required.

**1.** In accordance with the provisions of section 103 of the ODA, the district engineer should issue a public notice giving opportunity for public hearing, following the procedures described in 337.1 of this chapter for Corps operation and maintenance activities involving disposal of dredged material in ocean waters, as well as dredged material transported through the territorial sea for ocean disposal.

**2.** The public hearing procedures of 33 CFR part 327 should be followed.

**c. State permits and licenses.** The terms and legislative history of the ODA leave some doubt regarding whether a state has legal authority to exert control over ocean dumping activities of the Corps in the territorial sea covered under the Act (see section 106(d)). Notwithstanding this legal question, the Corps will voluntarily as a matter of comity apply for state section 401 water quality certification and determine consistency with a Federally-approved coastal zone management plan for Corps ocean disposal of dredged material within the three-mile extent of the territorial sea. Moreover, the Corps will attempt to comply with any reasonable requirement imposed by a state in the course of the 401 certification process or the CZMA consistency determination process. Nevertheless, the Corps reserves its legal rights regarding any case where a state unreasonably denies or conditions a 401 water quality certification for proposed Corps ocean disposal of dredged material within the limits of the territorial sea, or asserts that such disposal would not be consistent with an approved state CZMA plan. If such a circumstance arises, the district engineer shall so notify the division engineer who then decides on consultation with CECW-D, CECW-Z, and CECC-E for purposes of determining the Corps of Engineers' appropriate response and course of action.

### **d. Evaluation factors.**

**1.** In addition to the appropriate evaluation factors of 336.1(c), activities involving the transportation of dredged material for the purpose of disposal in ocean waters will be evaluated by the Corps to determine whether the proposed disposal will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, the district engineer, in addition to considering the criteria developed by EPA on the effects of the dumping, will also consider navigation, economic and industrial development, and foreign and domestic commerce, as well as the availability of alternatives to ocean disposal, in determining the need for ocean disposal of dredged material. Where ocean disposal is determined to be appropriate, the district engineer will, to the extent feasible, specify disposal sites which have been designated by the Administrator pursuant to

section 102(c) of the ODA.

**2.** As provided by the EPA regulations at 40 CFR 225.2(b-e) for implementing the procedures of section 102 of the ODA, the regional administrator of EPA may make an independent evaluation of dredged material disposal activities regulated under section 103 of the ODA related to the effects of dumping. The EPA regulations provide that the regional administrator make said evaluation within 15 days after receipt of all requested information. The regional administrator may request from the district engineer an additional 15-day period for a total of to 30 days. The EPA regulations provide that the regional administrator notify the district engineer of non-compliance with the environmental impact criteria or with any restriction relating to critical areas on the use of an EPA recommended disposal site designated pursuant to section 102(c) of the ODA. In cases where the regional administrator has notified the district engineer in writing that the proposed disposal will not comply with the criteria related to the effects of dumping or related to critical area restriction, no dredged material disposal may occur unless and until the provisions of 40 CFR 225.3 are followed and the Administrator grants a waiver of the criteria pursuant to section 103(d) of the ODA.

**3.** If the regional administrator advises the district engineer that the proposed disposal will comply with the criteria, the district engineer will complete the administrative record and sign the SOF.

**4.** In situations where an EPA-designated site is not feasible for use or where no site has been designated by the EPA, the district engineer, in accordance with the ODA and in consultation with EPA, may select a site pursuant to section 103. Appropriate NEPA documentation should be used to support site selections. District engineers should address site selection factors in the NEPA document. District engineers will consider the criteria of 40 CFR parts 227 and 228 when selecting ocean disposal sites, as well as other technical and economic considerations. Emphasis will be placed on evaluation to determine the need for ocean disposal and other available alternatives. Each alternative should be fully considered on an equal basis, including the no dredging option.

**5.** If the regional administrator advises the district engineer that a proposed ocean disposal site or activity will not comply with the criteria, the district engineer should proceed as follows:

- i.** The district engineer should determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer will evaluate the engineering and economic feasibility and environmental acceptability of the alternative sites.
- ii.** If the district engineer makes a determination that there is no economically feasible alternative method or site available, he will so advise the regional administrator of his intent to proceed with the proposed action setting forth his reasons for such determination.
- iii.** 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 ODA to prohibit use of a proposed disposal site, the case will be forwarded through the respective Division office and CECW-D to the Secretary of the Army or his designee for further coordination with the Administrator of EPA and final resolution. The report forwarding the case should be in the format described in 337.8 of

this chapter.

**iv.** The Secretary of the Army or his designee will evaluate the proposed project and make a final determination on the proposed disposal. If the decision of the Secretary of the Army or his designee is that ocean disposal at the proposed site is required because of the unavailability of economically feasible alternatives, he will seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with section 103(d) of the ODA.