

APPENDIX B: FEDERAL LEGISLATION AND PROGRAMS

AN OVERVIEW OF THE LEGAL AND POLICY FRAMEWORK

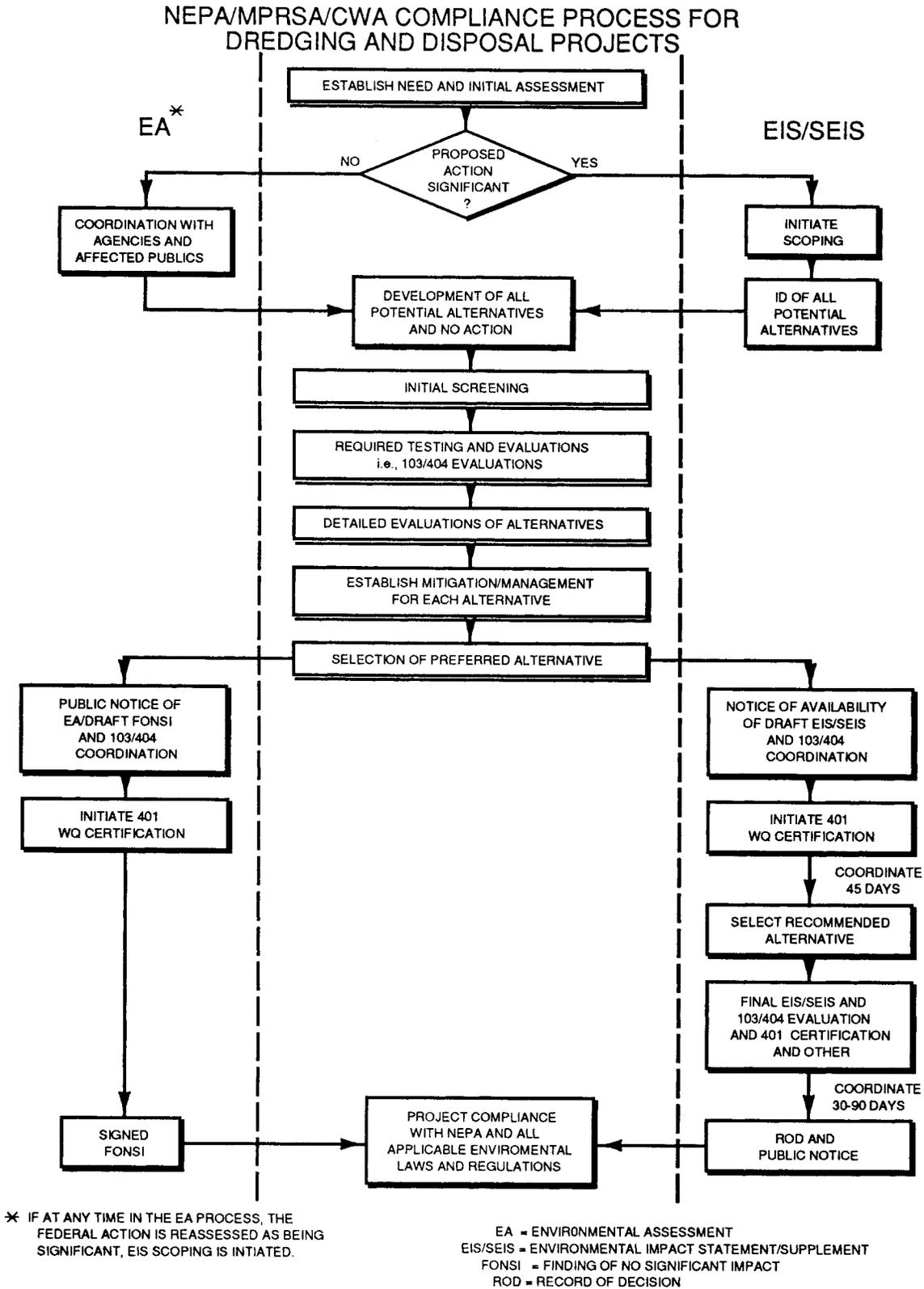
A number of Federal environmental Executive orders, regulations, and Federal statutes control dredging and disposal operations. The General Survey Act of 1824 directed the U.S. Army Corps of Engineers (USACE) to develop and improve harbors and navigation, and Section 10 of the River and Harbor Act of 1899 required USACE to issue permits for any work in navigable waters. Dredging and disposal operations were considered more fully by Congress in the major environmental statutes passed after 1969. A brief discussion of these follows.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) OF 1969

The NEPA [(Pub. L. No. 91-190) (42 U. S. C. 4321 et seq.)] applies to major Federal actions (e.g., proposals, permits, and legislation) that may significantly affect the environment. USACE activities in the areas of dredging and disposal, including regulatory actions, come under the NEPA jurisdiction. It is through the NEPA process that the dredged material disposal alternatives including no action, open-water disposal, or confined disposal of dredged material are evaluated, documented, and publicly disclosed.

A flowchart illustrating the NEPA process as it is applied to dredging projects is shown in Flowchart B-1. The components of this process have been incorporated in the framework for determining environmental acceptability of alternatives described in Chapter 3 of the main text.

The NEPA requires that government use all practicable means, consistent with the act and other essential considerations of national policy, to fulfill the requirements of the act. This requirement specifically applies to Federal agencies, their plans, regulations, programs, and facilities. The process that has been established under the guidelines of the NEPA helps public officials to make decisions based on an understanding of their environmental consequences and to take actions that protect, restore, and enhance the environment. The public disclosure document in this process is the preparation of a report that provides information about the environmental impact of a proposed action. This document is either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA)/ Finding of No Significant Impact (FONSI).



Flowchart B-1. NEPA Process for Dredged Material Disposal Projects

Existing Federal navigation projects and existing permits will have had an environmental evaluation accomplished at some time in their history. Evaluation of environmental acceptability of an alternative will have been done in the NEPA compliance documents, in the Section 404 or Section 103 evaluations and the Public Notice, and to some extent in the engineering or project reports. Existing project and permit reevaluations will normally require a comparison of what is to be done with the existing NEPA document discussed. If the alternative is to remain the same or was discussed in detail in the NEPA document and there is no reason to believe any new significant issues or information have raised since the issuance of the NEPA document, then no additional NEPA coverage is warranted.

If, however, new significant issues such as new disposal options not addressed in the EIS/EA, public interest concerns, or reason to believe significant new contaminants are present, then NEPA requirements should be updated with either an EA/FONSI or a supplement to the existing EIS. In either of the above cases whether additional NEPA documentation is required or not, all other environmental laws and regulations must be followed (see Appendix A for a discussion of necessary compliance). This is either done in the compliance and coordination section of the EA/EIS or in the Section 404 or Section 103 evaluations. If the former is done, the 404/103 evaluation should be appended to and discussed in the NEPA document. In either case, there is full public disclosure of the information in the public review process for NEPA or in the Public Notice for the 404/103 evaluation process and an opportunity for public comment prior to selection of the preferred alternative.

Federal navigation projects involving new work (i.e., new channels or improvements to existing channels) and new 404/103 permit applications will normally not have complied with NEPA, and will require compliance with the Council on Environmental Quality regulations for implementing NEPA. This will be initiated as early in the evaluation process as possible. For a more detail discussion of the USACE regulations implementing NEPA, refer to 33 Code of Federal Regulations (CFR) Parts 230 and 325.

IMPLEMENTING REGULATIONS OF THE COUNCIL ON ENVIRONMENTAL QUALITY (CEQ)

Subchapter II of the NEPA established the CEQ as part of the Executive Office of the President. Exercising its mandate to oversee the implementation of the NEPA, in 1978 the CEQ issued regulations (40 CFR Parts 1500-1508) covering the procedural provisions of the Act. The regulations state that the NEPA procedures are designed to ensure that high-quality information on environmental consequences relative to significant issues is available to public officials and private citizens before decisions are made.

FEDERAL WATER POLLUTION CONTROL ACT--1972 AND 1977 (CWA)

Under Section 404 of the CWA, USACE authorizes discharges of dredged or fill material in "waters of the United States." The USACE jurisdiction includes most freshwater areas, estuaries, and nearshore coastal areas including many wetlands inside the 3-mile limit. Material dredged from waters of the United States and disposed in the territorial sea is evaluated under MPRSA. In general, dredged material discharged as fill (e.g., beach nourishment, island creation, or underwater berms) and placed within the territorial sea is evaluated under the CWA.

The States also review permit applications for discharges in fresh water, estuaries, and the territorial sea (along with Federal resource agencies). Under Section 401 of CWA, these disposal operations must be certified by the affected State as complying with applicable State water quality standards (USEPA 1989).⁸

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA) OF 1972

Under Section 103 of the MPRSA, USACE must evaluate proposed projects that require the transportation of dredged material for the purpose of disposal in the open ocean beyond the baseline. The evaluation of these activities is based on Criteria promulgated in 1977 by the U.S. Environmental Protection Agency (USEPA) after consultation with USACE and other Federal agencies. These Criteria are revised from time to time to maintain compatibility with disposal constraints set forth in the London Dumping Convention to which the United States is a signatory. Non-Corps Federal projects and private projects that are approved receive an ocean-dumping permit from USACE. USACE projects are evaluated in accordance with the same Criteria, but they do not receive formal permits. If a permit does not comply with established Criteria, disposal of the material cannot proceed unless a waiver is obtained from USEPA.

The USEPA has the primary responsibility for designating ocean-disposal sites within and beyond the 3-mile limit, i.e., within and beyond the territorial sea. USACE can and has selected a few ocean-disposal sites, as in the Portland and Mobile Districts, when USEPA does not have a designated site where one is needed by USACE to carry out its dredging responsibilities.

LONDON DUMPING CONVENTION (1972)

The London Dumping Convention (LDC) [Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, December 29, 1972 (26 UST 2403:TIAS 8165)], to which the United States is a signatory, is an international treaty that deals with marine-waste disposal. The Convention entered into force for the United States on August 30, 1975. The LDC prescribes a duty to "take all practicable steps" to prevent pollution resulting from ocean dumping. The dumping of wastes is regulated by

⁸ For purposes of this report Criteria (capitalized) refers to criteria developed by the Environmental Protection Agency under Section 102 of MPRSA relating to the effects of the proposed disposal action.

three annexes to the LDC. LDC jurisdiction includes all waters seaward of the baseline of the territorial sea. The ocean-dumping Criteria developed under the MPRSA are required by Section 102(a) to "apply the standards and criteria binding upon the United States under the Convention, including its Annexes." These criteria must, at a minimum, reflect the standards set forth by LDC. Therefore, the LDC places environmental constraints upon the ocean disposal of dredged material and directly affects the policy, regulatory, and technical aspects of the dredged material ocean-disposal program.

ADDITIONAL APPLICABLE FEDERAL LEGISLATION

COASTAL ZONE MANAGEMENT ACT

The Coastal Zone Management Act requires USACE to coordinate permit review and Federal projects with all State level coastal zone review agencies. Under this act, coastal States are required to formulate a management program for the land and water resources of its coastal zone, which extends out to the seaward limit of the territorial sea, and submit it for approval to the Secretary of Commerce. After final approval by the Secretary of Commerce of a State's management program, any applicant for a Federal permit must have certification that the proposed disposal complies with the State's approved program.

RIVERS AND HARBORS ACT OF 1899

The Rivers and Harbors Act of 1899 requires a USACE permit for any work or structure, including fill material discharges, in navigable waters of the United States. The primary purpose of Section 10 is to ensure that private structures do not adversely affect Federal interstate navigation. It empowers USACE to review applications and issue approved construction permits for dredging and fill projects for any structure in the water (e.g., piers, pipelines, and bridges).

FISH AND WILDLIFE COORDINATION ACT OF 1958

The Fish and Wildlife Coordination Act of 1958 provides that, for any proposed Federal project or permit that may affect a stream or other body of water, USACE must first consult with Federal and State fish and wildlife agencies. This consultation must address the prevention of damages to wildlife resources and provide for the development and improvement of wildlife resources.

ENDANGERED SPECIES ACT OF 1973

Section 7 of the Endangered Species Act of 1973 establishes a consultation process between Federal agencies and the Secretaries of the Interior or Commerce for conducting programs for the conservation and protection of endangered species. Pursuant to this act, a biological assessment is performed to determine whether an endangered species or a critical habitat will be impacted by a proposed action.

WATER RESOURCES DEVELOPMENT ACT OF 1986

The passage of the Water Resources Development Act of 1986 created a financing arrangement for dredging associated with navigation improvement and maintenance projects. In a cost-sharing program between the local sponsors and USACE, local sponsors will finance one-half the cost of improvements and one-half the cost for additional maintenance dredging resulting from the improvements. USACE will finance the other half of these costs. This tremendous amount of work, in addition to the annual USACE maintenance dredging requirements, the Navy's annual maintenance work, and private dredging requirements, will have a significant impact on dredging and dredged material disposal practices.

NATIONAL HISTORIC PRESERVATION ACT OF 1966

USACE is directed to take into account the effects of the proposed project on any site, building, structure, or object that is included or is eligible for inclusion in the National Register of Historic Places. Comments from the Advisory Council on Historic Preservation, both Federal and State, must be sought prior to granting a permit for construction or disposal. Local historical and archeological societies may also be useful sources of this kind of information about the site. Magnetometer surveys to locate any possible objects of historic value under water may be required prior to the preparation of an EIS.

OTHER FEDERAL STATUTES

Requirements of additional Federal statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Rivers and Harbors Improvement Act of 1978, Submerged Lands Act of 1953, Rivers and Harbors, Flood Control Acts of 1970, the National Fishing Enhancement Act of 1984, as amended, should also be considered in the evaluation of proposed projects, as these requirements may influence the disposal of dredged material in certain circumstances.