Wednesday
August 25, 1993

843Z93003

federal register

Part V

Department of Defense

Department of the Army
Corps of Engineers

33 CFR Parts 323 and 328

Environmental Protection Agency

40 CFR Part 110, et al.
Clean Water Act Regulatory Programs; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

33 CFR Parts 323 and 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232 and 401

Clean Water Act Regulatory Programs

AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are issuing today final regulations that implement the following actions with regard to the Clean Water Act (CWA) Section 404 regulatory program: (1) Modification of the definition of "discharge of dredged material;" (2) clarification of when the placement of pilings is a discharge of fill material; and (3) codification of the current policy that prior converted croplands are not waters of the United States. EPA is also issuing conforming changes to the definition of "waters of the United States" and "navigable waters" in other CWA program regulations. The first two changes implement the settlement agreement in *North Carolina Wildlife Federation* v. *Tulloch*, Civil No. C90–713–CIV–5–BO (E.D.N.C. 1992).

EFFECTIVE DATE: This rule becomes effective on [Insert 30 days from the publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Mr. Michael Davis, Office of the Assistant Secretary of the Army for Civil Works at (703) 695–1376 or Mr. Sam Collinson (Corps) at (202) 272–0199 or Mr. Gregory Peck (EPA) or Ms. Hazel Groman (EPA) at (202) 260–7799.

SUPPLEMENTARY INFORMATION:

I. Background

On February 28, 1992, the Federal government agreed to settle a lawsuit brought by the North Carolina Wildlife Federation and the National Wildlife Federation (*North Carolina Wildlife Federation, et al.* v. *Tulloch*, Civil No. C90–713–CIV–5–BO (E.D.N.C. 1992)) involving CWA Section 404 as it pertains to certain activities in waters of the United States. In accordance with the settlement agreement, the Corps and EPA proposed changes to their regulations on June 16, 1992 to clarify that mechanized landclearing, ditching, channelization, and other excavation activities involve discharges of dredged material when performed in waters of the United States, and that these activities would be regulated under Section 404 of the CWA when they have or would have the effect of destroying or degrading waters of the United States, including wetlands. 57 FR 26894. In addition, the Corps and EPA agreed to propose to incorporate into the Section 404 regulations the substantive provisions of Corps Regulatory Guidance Letter (RGL) 90–8 to clarify the circumstances under which the placement of pilings have the effect of "fill material" and is subject to regulation under Section 404. The agencies stated that the proposal would not affect, in any manner, the existing statutory exemptions for normal farming, ranching, and silviculture activities in Section 404(f)(1).

In addition to the changes proposed in accordance with the settlement agreement, the Corps and EPA proposed to incorporate into the Section 404 regulations the substantive provisions of Corps RGL 90–7 to clarify that prior converted croplands are not waters of the United States for purposes of the CWA. EPA also proposed conforming changes to the definitions of "waters of the United States" and "navigable waters" for all other CWA program regulations contained in 40 CFR parts 110, 112, 116, 117, 122, and 401 to provide consistent definitions in all CWA program regulations.

Overall, these changes were proposed in order to promote national consistency, more clearly notify the public of regulatory requirements, ensure that the Section 404 regulatory program is more equitable to the regulated public, enhance the protection of waters of the United States, and clarify which areas in agricultural crop production would not be regulated as waters of the United States.

The proposed changes were published in the Federal Register on June 16, 1992, for public comment. The comment period closed on August 17, 1992. We received over 6,300 comments. The significant issues raised by public comments and the changes that have been made from the proposed rule are discussed below.

II. General Comments on the Proposed Rule

Several commentors raised general issues with regard to the proposed rule. These comments are addressed first below. Comments relating to the specific components of the rule are addressed in the following sections of this preamble.

Several commentors expressed concern that the agencies had agreed to propose these revisions as part of a settlement agreement with plaintiffs in the *Tulloch* lawsuit. These commentors felt that this procedural posture for the rulemaking impaired the agencies' ability to conduct the rulemaking impartially and based upon a good faith consideration of all public comments, as required by the Administrative Procedure Act. The commitments the agencies entered in the settlement of the *Tulloch* case have not, in any way, bound the agencies to reach a predetermined outcome in this rulemaking. The agencies agreed in the settlement agreement to propose certain revisions to their regulations in exchange for the plaintiffs' agreement to stay that litigation. The settlement agreement in no way binds the agencies to an outcome in the final rule, but provides that the plaintiffs in the lawsuit will dismiss their action if the final rule is "substantially similar" in language and effect as the proposal. The agencies do not view the settlement agreement as narrowing our discretion in any manner to adopt a final rule that best reflects relevant legal and policy considerations under Section 404. Because this rulemaking is of great national significance to the Section 404 program, EPA and the Corps have pursued this rulemaking based upon careful consideration of all the policy issues raised in the proposal and addressed by public comments. The agencies would not adopt policies in this final rule that we do not believe are appropriate merely to avoid reinitiation of litigation in the *Tulloch* lawsuit. As reflected by the discussion in this preamble, the agencies have fully considered all the public comments received on the proposal, and we have therefore fully complied with the procedural requirements of the Administrative Procedure Act.

Several commentors recommended that no decision on the final rule be made until a wetland definition was agreed upon by Congress. Two commentors stated that the wetlands definition was too broad and that it was not applicable across the country. Similarly, two commentors stated that because the rulemaking regarding the wetlands delineation manual was not yet complete, it was inappropriate to propose changes that would expand activities in wetlands covered under the program, thereby increasing uncertainty about the Federal government's regulation of wetlands. Several commentors were concerned about how

the functions and values of wetlands would be addressed or requested that a wetland classification system be developed. Some commentors requested that no decision be made until such a system was developed.

We do not agree that these concerns should delay promulgation of this rule. With the exception of the prior converted (PC) cropland aspect of this rulemaking, this rule addresses the scope of activities regulated under Section 404. The question of what activities result in a discharge of dredged or fill material is distinct and separate from the issue of what areas constitute wetlands, or how wetlands functions and values are considered in the permitting process. Today's rule will enable the Corps and EPA to make appropriate determinations as to whether an activity occurring in waters of the U.S. is subject to regulation under Section 404, however wetlands are defined. Therefore, there is no reason to delay this rulemaking pending completion of the delineation manual rulemaking. With regard to the PC cropland portion of this rule, the agencies do not believe that completion of this rulemaking should await conclusion of the manual rulemaking. The proposed revisions to the delineation manual did not alter the policy finding in Corps RGL 90–7 that PC cropland is not wetlands under the Act. Since the applicability of Section 404 to PC cropland is not an issue in the delineation manual rulemaking, delaying completion of this rule is not warranted. In any case, EPA and the Corps are both currently making wetlands delineations using the 1987 Corps Manual. Corps of Engineers Wetland Delineation Manual (Technical Report 4–87–1, Department of the Army, Corps of Engineers, Waterways Experiment Station, Vicksburg, MS). We believe that the guidance in that Manual is entirely consistent with our statutory and regulatory authorities under the CWA.

Several commentors requested that the comment period be extended. We believe that a 60-day comment period was sufficient time to provide an opportunity for the public comment, as reflected by the fact that we have received over 6,300 comments on the proposal. At least one commentor requested that the agencies hold a public hearing on the proposal. The agencies have declined to do so. The comments on the proposal addressed many legal and factual issues that were presented in great detail in written submissions, and the agencies have fully considered the submitted documents in developing the final rule. EPA and the Corps do not believe that the opportunity for meaningful public input or the agencies' understanding of public comments would have been materially advanced by the holding of a public hearing.

Several commentors requested that the Corps districts work with local regulatory agencies to avoid duplication of effort. We agree and encourage districts to develop regional general permits to avoid duplication of effort for those activities with minimal impacts.

III. Revisions to Definition of "Discharge of Dredged Material 33 CFR 323.2(d) and 40 CFR 232.2(e)

We have organized the numerous comments on the definition of discharge of dredged material into several issues. Our discussion of the comments is provided below.

A. Summary of Major Issues and Changes From the Proposal

The aspect of the rule which engendered the most public comment was the proposed revisions to the definition of "discharge of dredged material." Many commentors supported the proposed revisions on the grounds that they would better achieve the goals of the Section 404 program, and help ensure more equal treatment of different types of activities that adversely impact wetlands.

Opponents of the changes challenged the appropriateness of the proposed rule on both legal and factual grounds. In their legal arguments, many commentors contended that the proposal constituted a change in the Corps' longstanding approach to regulating landclearing and excavation activities, and that the agencies had failed to explain adequately the reasons for changing the existing approach, as required by the Administrative Procedure Act. Commentors also contended that EPA and the Corps lacked the authority under the CWA to regulate incidental discharges associated with mechanized landclearing, ditching, channelization and other excavation on the grounds that such incidental discharges do not constitute an "addition" of "dredged material" to waters of the U.S. within the meaning of the Act. These commentors also contended that the proposed rule would impermissibly regulate "activities" rather than "discharges," something they argued was beyond the agencies' jurisdiction under the statute. Other commentors argued that the proposed rule's establishment of a presumption that mechanized landclearing, ditching, channelization and other excavation destroy or degrade wetlands was contrary to the requirements of the CWA.

Factual contentions raised by commentors centered on objections to the finding in the proposed rule that mechanized landclearing, ditching, channelization and other excavation always result in a discharge of dredged material. Some commentors contended that the agencies had failed to compile an adequate factual record to support this finding, and a few commentors discussed activities which they believed did not result in a discharge. Some commentors also objected to the rebuttable presumption in the proposed rule that mechanized landclearing, ditching, channelization and other excavation destroy or degrade wetlands or other waters of the United States. Commentors suggested specific activities that they believed should be excluded from the regulation on the grounds that they did not cause such effects. Concerns were also raised in public comments that the term "degrade" was not adequately defined by the agencies.

Based upon public comments, the agencies have made certain changes to the language in the regulation defining "discharge of dredged material." However, the basic thrust of the proposal had not changed. Under the final rule, any addition or redeposition of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, that destroys or degrades waters of the United States requires a Section 404 permit.

The agencies have modified some of the language and structure of the final rule to improve clarity, since some public comments found the proposed rule language hard to follow. In response to public comments, we have decided to include definitions of the terms "destroy" and "degrade" in the final rule. These changes are discussed in section D.1, below.

In response to public comments, the agencies have deleted the irrebuttable presumption in the proposed rule that all mechanized landclearing, ditching, channelization and other excavation result in a discharge of dredged material. This change is discussed further in section C, below.

The agencies have modified the structure of the final rule to provide that any addition, including redeposit, of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, constitutes a discharge of dredged material. The final rule states, however, that a Section 404

permit is not required for an activity that would not destroy or degrade waters of the U.S. because it would have only a *de minimis* effect on such waters. Under the final rule, mechanized landclearing, ditching, channelization and other excavation activities resulting in a redeposition of dredged material associated with a discharge of dredged material require a Section 404 permit unless the discharger demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to the discharge, that the activity will not have such an effect. Under the final rule, the discharger bears the burden of demonstrating that its mechanized landclearing, ditching, channelization and other excavation activity will not destroy or degrade waters of the United States.

B. Comments on Agencies' Legal Authority To Promulgate This Regulation

Several commentors argued that EPA and the Corps lack legal authority under the Clean Water Act to issue the proposed regulation. Each of the bases for commentors' assertion is addressed below.

1. Definition of "Dredged Material"

Several commentors argued that the term "dredged material" has a narrow and specific meaning as used by Congress in the Clean Water Act, and that Congress never intended incidental discharges associated with landclearing, ditching, channelization and other excavation to be regulated as dredged material under Section 404.

These commentors cited a dictionary definition of the verb "to dredge" as meaning "to gather and bring up with a dredge, as oysters; to clear out or deepen with a dredge, as a channel," and the definition of the noun "dredge" as "a contrivance for gathering objects or material from the bed of a river, lake or harbor, by dragging along the bottom * * *. "New Webster's Dictionary of the English Language 301 (1984). According to these commentors, therefore, the term "dredged material" in Section 404 is limited to material taken from the bottom of a harbor, river or channel and cannot be construed as extending to material redeposited in the course of activities taking place in other waters of the United States, such as wetlands. While these commentors argued that the meaning of the statutory language was so clear that recourse to the legislative history was not necessary, they contended that the legislative history of the 1972 Amendments of the Clean Water Act also supports their view.

EPA and the Corps believe that these comments are unfounded, for several reasons. First, these comments are in fact not relevant to this rulemaking, for they do not address the revisions the agencies are making to the definition of the term "discharge of dredged material." Rather, these comments challenge, in effect, the agencies' definition of the term "dredged material" which includes "any material dredged or excavated from waters of the U.S." (see 40 CFR 232.2(g) and 33 CFR 323.2(c)). Presumably the commentors believe that this definition should have been revised so that it would be limited to material excavated from waterbodies such as harbors, rivers and channels. However, EPA and the Corps have not proposed to revise this longstanding definition in any respect in this rulemaking, and this comment is therefore not relevant to the proposal on which we solicited public comment.

Even if these comments were relevant to this rulemaking, however, EPA and the Corps disagree with the commentors that the statutory term "dredged material" was expressly limited by Congress to mean material dredged from the bottom of waterways such as lakes, rivers or channels. While the "narrow" and "specific" definition of this term favored by these commentors appears in the Webster's dictionary, it is not contained in any provision of the Clean Water Act. Congress therefore left to the agencies administering Section 404 the discretion to define this term. Since regulations were first promulgated implementing Section 404, the Corps has interpreted the term "dredged material" to mean any material excavated from waters subject to the full jurisdictional reach of the CWA (see 39 FR 12119, April 3, 1974), and the current language in the agencies' definition has been in existence since 1977 (see 42 FR 37145, July 19, 1977). This longstanding definition of the term "dredged material" is a straightforward and reasonable reading of the statutory language used by Congress.

The commentors' approach to defining dredged material, in contrast, would draw arbitrary distinctions in how the CWA regulates identical types of material based upon whether the waterbody from which it was excavated met some vague standard of wetness and water depth (i.e., material excavated from the bottom of a "lake" would qualify as dredged material but material excavated from a "drier" water such as a saturated wetland would not). Such distinctions are without any support in the language or structure of the CWA.

Because the commentors' approach does not reasonably reflect the structure of the Act, their suggested reading of the term "dredged material" would lead to anomalous results that we believe could not have been intended by Congress. For example, under their scenario, material excavated from a saturated wetland presumably would not qualify as "dredged material" under Section 404. However, the disposal of that material into waters of the U.S. would nonetheless require a permit under the Act, since the material, even if not meeting the definition of "dredged material," would in any case constitute a "pollutant" within the meaning of the Act (see section 502(6) of the Act, defining pollutant to include "sand" and "rock"). The disposal of such material, therefore, would require a permit under Section 402 of the Act, a regulatory provision ill-suited for authorizing such discharges. In our view, it is clearly more consistent with Congressional intent that all material dredged from and redeposited in waters of the U.S. be regulated under a single regulatory scheme—Section 404 of the CWA. Rather than draw the arbitrary distinctions suggested by these commentors, the agencies' definition of the term is a straightforward and logical interpretation of the statutory language in Section 404 that is consistent with the jurisdictional reach of Section 404 to all waters of the United States.

While the legislative history of the 1972 Amendments to the Clean Water Act reflects Congressional concern regarding disposal of material dredged from waterways to maintain navigation, EPA and the Corps do not read that legislative history as demonstrating Congressional intent to limit narrowly the agencies' discretion to define dredged material so that it includes any material excavated from waters of the U.S. The agencies' longstanding definition of this term is reasonable and fully consistent with the language and purposes of the Clean Water Act.

2. "Addition" of Pollutants to Waters of the U.S.

Some commentors argued that the activities that would be subject to this regulation are beyond the scope of Section 404 because they do not result in the "addition" of pollutants to U.S. waters, as required by the definition of "discharge" contained in section 502(6) of the Clean Water Act. According to these commentors, no such "addition" occurs when the material to be excavated falls back into the very same water being dredged. An "addition" only takes place, these commentors believe, where material is excavated from one water of the U.S. and falls into "another" water, "outside" the area

being excavated. These commentors cited as support the decisions in *National Wildlife Federation* v. *Consumers Power*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federal* v. *Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. 1982); and *U.S.* v. *Lambert*, 18 Env't Rep Cas (BNA) 1294 (M.D.Fl. 1981), *aff'd* 695 F.2d 536 (11th Cir. 1983).

In *Consumers Power* and *Gorsuch*, environmental groups challenged EPA's longstanding interpretation of the CWA that impacts on water quality and fish caused by the operation of dams were not covered by the CWA because the dams did not cause an "addition" of pollutants. EPA's longheld view was that impacts resulting from the passage of water through the dam did not constitute an "addition" because pollutants did not enter the water "from the outside world." See *Gorsuch*, 693 F.2d at 165. The *Consumers Power* and *Gorsuch* courts deferred to EPA's administrative interpretation of the CWA and upheld it as reasonable. Commentors argued that these holdings prevent EPA and the Corps from finding that redeposition of soil incidental to mechanized landclearing, ditching, channelization and other excavation constitutes an "addition" of pollutants.

We do not believe that the analysis of the *Gorsuch* and *Consumers Power* decisions is controlling here. These cases did not address what constitutes an addition of dredged material to waters of the United States. In our view, it would not be reasonable to require that dredged material enter waters of the U.S. "from the outside world" since dredged material, by definition, is contained in the waters themselves. This was the conclusion of the Fifth Circuit in *Avoyelles Sportsmen's League* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983), which addressed the applicability of the *Gorsuch* case to mechanized landclearing activities. While the court did not rule on the question whether those activities resulted in a discharge of dredged material (finding that a discharge of fill material had occurred), the court rejected the notion that dredged material is only regulated if it enters waters from the "outside world." Since dredged material comes from the water itself, the court concluded that such an interpretation "would effectively remove the dredge-and-fill provision from the statute." 715 F.2d at 294, n.43. See also *U.S.* v. *Sinclair Oil Co.*, 767 F.Supp. 200 (D.Mont. 1990) (distinguishing *Gorsuch* and *Consumers Power* cases partially on the grounds that they were decided under the "separate regulatory framework" of Section 402, and holding that redistribution of riverbed materials constituted a "discharge" of fill material). *United States* v. *MCC of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) (holding that redeposition of seabed materials by tug-boat propellers on adjacent sea grass beds was an "addition" of dredged spoil).

Some commentors suggested that the appropriate test in this context should be whether dredged material is moved from "one place to another" or "from one water to another." If the material is not moved in this manner, these commentors argued, it does not trigger Section 404. The agencies do not believe that such a vague test would be a meaningful or appropriate one to adopt in this rule. If dredged material must be "moved" from one "location" to another in order to trigger Section 404, the question arises as to how far the material must be moved. The agencies see a strong potential for drawing arbitrary distinctions among activities that may be identical in terms of the amount of soil redeposited and their effects on the aquatic ecosystem, but differ only in terms of the distance the soil is moved. EPA and the Corps certainly do not view such a distinction as legally compelled by the Clean Water Act.

Commentors also cited as support for their position the decision of the district court in *U.S.* v. *Lambert*, Env't Rep. Cases (BNA) 1294 (M.D.Fla. 1981), *aff'd*, 695 F.2d 536 (11th Cir.1983), which held that "back-spill" of dredged material into the area from which it was excavated could not be considered to be an "addition" of a pollutant. Notably, however, the *Lambert* case was decided before the Supreme Court decision in *Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984), which now establishes a deferential standard of review of agency actions where Congress has not specifically addressed an issue. EPA and the Corps do not believe that Congress has specifically mandated in any provision of the CWA that redeposition of dredged material is only regulated if it is "moved" from one "place" to "another." Rather than focus simply on the spatial relationship between where the excavation and redeposition occur as the deciding factor determining regulatory jurisdiction under Section 404, this rule will regulate an activity (involving a discharge to any part of waters of the U.S.) taking into account the effect of the activity on the aquatic environment. The agencies believe that this approach is entirely consistent with the language of the CWA, and better effectuates the environmental protection goals of the statute than the approach suggested by commentors. See CWA section 101(a).

3. Regulation of "Activities," Not "Discharges"

Many commentors argued that the proposed rule was outside the agencies' authority under the CWA because the effects-based test for determining whether an activity requires a Section 404 permit impermissibly regulates "activities," whereas the statute only authorizes regulation of "discharges." These commentors also argued that if the agencies were to adopt the proposed rule, EPA and the Corps would be limited by Section 404 of the CWA to considering the environmental effects associated with the discharge itself, not the activity with which the discharge is associated. Commentors cited the decision of the district court in *Reid* v. *Marsh*, 20 Env't Rep. Cas. (BNA) 1337 (N.D.Ohio 1984) as supporting this argument.

EPA and the Corps agree with the point made by these commentors that the presence of a "discharge" into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section 404. Based on the clear language in section 301(a) of the CWA, this has been the agencies' longstanding position, and we are not altering that view in this rulemaking. For the reasons explained in this preamble, the agencies believe that addition or redeposition of dredged material in the course of activities such as mechanized landclearing, ditching, channelization and other excavation meets the discharge requirement of section 301(a). Because this rule will only regulate activities where the jurisdictional prerequisite of a "discharge" is present, EPA and the Corps disagree with commentors who argued that this rule is outside the scope of the agencies' authority under Section 404.

Commentors are therefore flatly incorrect that this rule would trigger Section 404 jurisdiction over a discharge based upon the environmental effect of the associated activity. Under today's rule, the presence of certain environmental effects is not a prerequisite for Section 404 jurisdiction; rather, this rule looks to the environmental effects for purposes of creating an exception to the Section 404 permitting requirement that would otherwise apply to the discharge. Consideration of such effects is appropriate in order to ensure that the creation of a *de minimis* exception is consistent with the goals and objectives of Section 404. See discussion in section D, below. Since the agencies clearly have the authority under Section 404 to regulate *all* discharges of dredged

material into waters of the United States, without regard to effects on the aquatic environment, we fail to see how our decision in this rulemaking to regulate a subset of these activities could conceivably be overstepping our regulatory authority under Section 404. Because the only statutory condition for regulation under Section 404 is the presence of a "discharge," commentors' arguments about the scope of environmental effects that can be considered under Section 404 are irrelevant to the findings that EPA and the Corps are making to support today's rule.

To the extent commentors argued that EPA and the Corps can only consider the environmental effects of the discharge itself in administering Section 404 (i.e., in the Corps' permitting process or EPA's Section 404(c) process), such comments are not relevant to this rulemaking, which addresses the circumstances when a discharge or dredged material will required a Section 404 permit, not how the discharge will be addressed in the permitting or 404(c) process. In any case, however, EPA and the Corps wish to clarify that consideration of the environmental effects of activities associated with discharges covered by this rule is well within the agencies' authority in carrying out their authorities under Section 404. Because the scope of the agencies' authority to consider environmental effects is not relevant to our authority to issue this rule, the following discussion is not provided as a legal justification of today's rule, but rather as an attempt to help the public understand how we administer the Section 404 program generally.

Commentors' extremely narrow reading of the agencies' authority is first belied by the language of Section 404(f) of the Act, which was discussed in the preamble to the proposed rule. Section 404(f)(1) exempts certain activities from the requirement to obtain a Section 404 permit. Section 404(f)(2), however, requires that a permit nonetheless be obtained for "any discharge of dredged or fill material into the navigable waters incidental to any activity" which has the purpose of changing the water's use and the effect of impairing the water's flow or circulation, or reducing its reach. Commentors criticized the citation of Section 404(f)(2) in the preamble to the proposed rule. They argued that this provision merely recaptures activities that are exempted under Section 404(f)(1), but that it does not expand the underlying scope of activities covered by the permit requirement of Section 404(a). These commentors have misinterpreted the reason why the agencies cited Section 404(f)(2) in the preamble to the proposal. We agree with the commentors' point that Section 404(f)(2) does not expand the scope of activities subject to Section 404. However, the agencies do not rely on Section 404(f)(2) for such a proposition. Rather, we believe that Section 404(f)(2) contradicts the argument that Congress intended to preclude EPA and the Corps from considering under Section 404 the effects of activities associated with discharges of dredged or fill material, such as mechanized landclearing, ditching, channelization and other excavation. In Section 404(f)(2), Congress expressly required EPA and the Corps to implement the statutory exemptions based upon consideration of not only the effects of the discharge itself, but also the effects of the activity "incidental" to the discharge. Because Congress expressly required the agencies to consider such effects under Section 404(f), we do not believe it would be reasonable to conclude that Congress nonetheless intended to prohibit EPA and the Corps from otherwise considering such effects under Section 404.

Morever, EPA's longstanding interpretation of Section 404, as reflected in the Section 404(b)(1) Guidelines, demonstrates that EPA and the Corps are not limited to considering solely the environmental effects of the discharge itself. The Guidelines expressly require consideration of "secondary effects," which are defined as

> effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material.

40 CFR 230.11(h). Where an activity such as mechanized landclearing, ditching, channelization and other excavation activities are performed in waters of the U.S. and result in a discharge of dredged material to those waters, we believe that such activities are clearly "associated with" the discharge, within the meaning of Section 230.11(h), and therefore considering the effects of those activities is properly within the scope of Section 404.

Commentors nonetheless cite the decision in *Reid* v. *Marsh*, which addressed the Corps' authority to regulate dredging activities under Section 404. This case held that the Corps was limited under Section 404 to evaluating the effect of the discharge itself, and that the Corps could not look at the effects of the overall dredging activity. For the reasons noted above, however, *Reid* is simply not relevant to this rulemaking, since the sole trigger under this rule for asserting Section 404 jurisdiction is the presence of a "discharge of dredged material," and the agencies therefore have clear authority to regulate the activities covered by today's rule. *Reid* did not address in any manner the scope of the agencies' authority to establish a *de minimis* exception under Section 404.

In any case, we do not view the *Reid* decision as precluding EPA and the Corps from considering the effects of activities associated with a discharge of dredged material in the Section 404 permitting or veto process. Notably, *Reid* was decided before the Supreme Court decision in *Chevron U.S.A.* v. *NRDC* which, as discussed previously, now mandates that courts defer to any reasonable agency interpretation of a statute it administers unless Congress has specifically spoken to the question at issue. The *Reid* opinion failed to cite any provision of the Clean Water Act as precluding the Corps from looking beyond the effects of the discharge itself; nor did *Reid* discuss at all the well-established administrative interpretation in the Guidelines that secondary effects must be considered in issuing permits under Section 404. Since the CWA does not reflect specific Congressional intent that EPA and the Corps be precluded from considering secondary effects under Section 404, the agencies retain broad discretion in deciding whether such an approach is appropriate. EPA and the Corps believe that considering the primary and secondary effects of a discharge is clearly consistent with the language and intent of Section 404 to ensure protection of the aquatic system from effects associated with the discharge of dredged and fill material.

In addition, the *Reid* decision is at odds with the decision of the Tenth Circuit in *Riverside Irrigation District* v. *Andrews*, 758 F.2d 508 (10th Cir. 1985). In this case, the Corps denied nationwide permit coverage for the construction of a dam, the operation of which would have resulted in depleted stream flows that would adversely affect habitat of an endangered species. Even though the discharge of fill material itself to construct the dam would not have had an adverse impact, the court held that the CWA authorized the Corps to consider the total environmental impact of the discharge, including indirect effects such as the impact of the operation of the dam on flows downstream and associated wildlife impacts.

Several commentors cited cases under section 10 of the Rivers and Harbors Act, the National Environmental Policy Act (NEPA), and Section 402 of the CWA as supporting their argument that EPA and the Corps are narrowly constrained to evaluating the effects of the discharge itself. For the reasons discussed previously, these cases are simply not on point because this rule properly triggers Section 404 jurisdiction based upon the presence of a "discharge of dredged material," and arguments about the proper scope of environmental review under Section 404 are therefore not relevant to this rulemaking. In any case, for the reasons explained above, we disagree with commentors that EPA and the Corps are limited to considering only the direct effects of discharges themselves in implementing Section 404.

4. Authority Limited to Regulating Impacts on Water Quality

A few commentors contended that EPA and the Corps could only consider "degradation" of waters of the U.S. in terms of the impacts of an activity on chemical water quality. Some commentors cited for support for this argument the decision of the Seventh Circuit Court of Appeals in *Hoffman Homes* v. *EPA*, 961 F.2d 1310 (7th Cir. 1991), reh. granted and opinion vacated, 35 ENV'T Rep. Cases (BNA) 1328 (7th Cir. Sept. 4, 1992).

EPA and the Corps believe that this comment is erroneous. First, the decision in *Hoffman Homes* relied upon by some commentors has since been vacated by the Seventh Circuit. A new opinion issued by the Court in this case contains no support for the commentor's argument that the CWA is only intended to address impacts of an activity on chemical water quality (*Hoffman Homes* v. *EPA*, No. 90–8810 (July 19, 1993)). We believe, moreover, that there is no support in the CWA as a whole or in Section 404 for the proposition that impacts to the aquatic ecosystem under Section 404 are limited to impacts on chemical water quality, as opposed to impacts on other functions such as flood storage and wildlife habitat.

First, the language in Section 404 itself repudiates the notion that EPA and the Corps may only evaluate impacts of a discharge on chemical water quality. For example, Section 404(c) authorizes EPA to deny or restrict specification of a disposal site for dredged or fill material if the disposal would have an unacceptable adverse effect on a range of aquatic system values, including "shellfish bed and fishery areas (including spawning and breeding areas)," "wildlife," or "recreational areas." There is no language in Section 404 indicating that the adverse impacts to these other aquatic functions are only remediable under Section 404 if the impacts result directly from impacts to chemical water quality.

Similarly, Congress directed that the Section 404(b)(1) Guidelines be based upon criteria comparable to the ocean discharge criteria contained in Section 403(c) of the Act. Section 403(c) states that guidelines for ocean discharges shall include consideration of impacts of a discharge on "marine ecosystem diversity, productivity, and stability; and species and community population changes." Again, there is no language in Section 403(c) limiting the consideration of such impacts solely to those deriving directly from changes to chemical water quality itself. Therefore, the line that some commentors seek to draw around EPA's and the Corps' ability to protect the aquatic environment is simply not one that has been drawn by Congress.

The agencies' interpretation of Section 404, as reflected in the Section 404(b)(1) Guidelines, reaffirms their responsibility to consider impacts of discharges on the broader aquatic ecosystem, and not just water quality itself. For example, 40 CFR 230.10(c) prohibits any discharge of dredged or fill material that would cause significantly adverse effects on ecosystem diversity, productivity and stability such as loss of fish and wildlife habitat. See also 40 CFR 230.32 (describing wildlife values that must be considered in the permitting process); 40 CFR 230.41 (describing how discharges of dredged or fill material may damage or destroy habitat and adversely affect the biological productivity of wetlands).

5. Reversal of Agency Position

Commenters argued that the proposed rule was arbitrary because it represented an abandonment and reversal of an allegedly longstanding agency interpretation of the CWA, and because the agencies allegedly had failed to provide an adequate explanation of the change in policy.

In certain respects this final rule represents a change in Corps regulations and policy, but some commenters seemed to overstate and exaggerate both the extent and the "abruptness" of that change. The Corps and EPA expect that the net effect of this rule will be that most projects involving mechanized landclearing, ditching, channelization, mining, or other excavation activity in waters of the U.S. will require authorization under CWA Section 404. Although this new rule will regulate a number of projects that previously might have escaped Section 404 regulation, it is important to realize that the Corps has been regulating many projects involving mechanized landclearing, ditching, channelization, mining, or other excavation in waters of the U.S. for years because those projects frequently involved substantial discharges of dredged or fill material into waters of the U.S. For example, many drainage ditches in wetlands traditionally have been dug by sidecasting the excavated material into the wetlands; those activities have always been regulated under Section 404. Similarly, many channelization, mining, and other excavation activities in U.S. waters have been regulated under Section 404 over the years, because they involved substantial discharges through disposal or stockpiling of the excavated material in waters of the U.S., or "sloppy" excavation practices, or other substantial discharges. As we shall explain below, the Corps has gradually changed its policy and practice to increase our regulation of mechanized landclearing activities over a period of years. Thus, this final rule is not an abrupt change in policy, interpretation, or practice, that would suddenly begin to regulate all landclearing, ditching, channelization, and other excavation activities in U.S. waters for the first time.

Nevertheless, this final rule does represent both a clarification of agency guidance and a change of agency practice regarding a sub-class of excavation-type activities in waters of the U.S.: i.e., those that would take place with relatively small-volume, "incidental" discharges of dredged material that unavoidably accompany such excavation operations. Until the Corps and EPA undertook this present rulemaking, neither agency had ever promulgated written guidance explicitly and specifically addressing the question whether CWA Section 404 could or should regulate ditching, channelization, mining, or comparable excavation activities in waters of the U.S. based solely on their incidental discharges of dredged material. However, most Corps districts normally followed the practice of not regulating such activities so long as their discharges of dredged material were limited to small-volume, "incidental" discharges.

This practice by most Corps districts was generally consistent with the informal policy of the Department of the Army during much of the 1980s, which narrowly construed the scope of Section

404 jurisdiction over these activities. The practice of not regulating small, incidental discharges was also viewed by many Corps districts as consistent with the thrust of guidance dating from the late 1970s regarding *de minimis* discharges associated with normal dredging activities. This practice led to the adoption by the Corps in 1986 of the current language in the definition of "discharge of dredged material," which excludes from regulation "*de minimis*, incidental soil movement occurring during *normal dredging operations*." 33 CFR 323.2 (1986) (emphasis added). This language was explained in several paragraphs in the preamble to the Corps' 1986 rule, which some commenters who oppose today's rule quoted to support their position. It states:

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. *Dredging operations* cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of *dredging* to Section 404 which we do not believe was the intent of Congress.
>
> 51 FR 41210 (Nov. 13, 1986) (emphasis added).

While some in the Corps (along with some commentors opposed to this rule) have interpreted this language as indicating that the Corps did not intend to regulate fallback associated with *any* activity, the Corps has never in fact adopted written guidance clarifying the scope of this exclusion, or defining the term, "normal dredging activities." Moreover, there is no explicit indication that the language of the rule, or the explanation statement in the preamble, applies generally to mechanized landclearing, ditching, channelization, or other excavation activities in the waters of the U.S. As discussed further below, an informal survey of Corps districts shows that, in fact, the districts have varied in their approach to regulating activities involving only incidental discharges, indicating that the language of the 1986 rule and preamble was not as definitive as some commentors have suggested.

Today's rule therefore represents the first time that the Corps and EPA have clarified the meaning of the term "normal dredging operations," which we have defined as:

> *Dredging for navigation* in *navigable waters of the United States*, as that term is defined in Part 329 of this chapter, with proper authorization from Congress and/or the Corps pursuant to Part 322 of this Chapter; however, this exception is *not* applicable to *dredging activities in wetlands*, as that term is defined at Section 328.3 of this Chapter. (Emphasis added).

By providing this definition, the Corps and EPA hope to substantially reduce the inconsistency among Corps District offices as to scope of the *de minimis* exclusion for discharges of dredged material.

Much of the inconsistency among the Corps district offices on this issue resulted from the decentralized nature of the Corps. Recognizing that conditions and situations differ tremendously across the country, the Corps confers a large amount of discretion upon each of its district engineers to operate the regulatory program in a reasonable manner. Each district engineer must therefore consider local and regional factors in applying national standards. This approach enables the program to remain flexible enough to interpret one standard set of regulations so that it applies to widely varying regional needs and circumstances. In carrying out their responsibilities, districts have therefore had to interpret terms used (but not defined) in the 1986 regulation, such as "*de minimis*," "incidental," and "normal dredging operations" in response to specific projects, situations, and regional needs and these interpretations have differed somewhat across the country.

Corps headquarters did not intercede to halt the adoption of these varying interpretations so long as they did not conflict with the plain words of the regulations. The Corps has always provided its districts with the flexibility to interpret the Corps' regulations so that they may be reasonably applied to varying circumstances. So long as the districts abided by the regulatory language in Section 323.1(d), that indicates that the term "discharge of dredged material * * * does not include *de minimis*, incidental soil movement occurring during normal dredging operations," districts were not prohibited from developing their own operating interpretations of "*de minimis*," "incidental," and "normal dredging operations."

Today's rule aims to rectify the ambiguity inherent in the 1986 rule's statements on "*de minimis* soil movement" and "normal dredging operations," first, by making it clear that the exclusion from Section 404 of "incidental movement" of dredged material only applies to such movement occurring in the course of "normal dredging operations"; all other incidental discharges of dredged material under this rule can be considered a discharge of dredged material regulated under Section 404. Second, today's rule for the first time defines "normal dredging operations," as quoted above.

As noted above, over the years Corps district offices have developed somewhat differing approaches to how they regulate the various activities that produce incidental discharges of dredged material. To sample this diversity, the Corps conducted an informal survey of eleven Corps district offices. The Corps selected the districts surveyed in order to obtain a cross-section of likely practices among district offices. The Corps did not intend, however, for this to be a "scientific" survey statistically representative of practices across the country; the Corps simply wanted to obtain anecdotal information regarding the range of interpretations and practices among the districts. In the survey the Corps found that many districts currently regulate some of the activities covered by this rule. Although the Corps is not aware of any district that regulates all the activities subject to the rulemaking in the same manner that today's rule dictates, there are several districts that regulate one or more of these activities in the same manner as provided for under this rule.

Since the issuance of the 1990 RGL on landclearing (RGL 90–5), the districts have been much more consistent in how they regulate landclearing. In the absence of comparable guidance on ditching, channelization, and mining, the Corps districts have shown a greater diversity in their regulation of these activities. By examining the informal survey results on an activity-by-activity basis, this diversity becomes readily apparent.

Virtually all of the districts surveyed regulate ditching activities that involve sidecasting. At least one of the districts surveyed regulates ditching activities that produce only incidental discharges. These incidental discharges were typically in the form of drippings or fallback from ditching machinery. Another district regulates ditching based on these same incidental discharges, but only if the water of the U.S. being ditched is covered by some type of vegetation that the district could use to classify the activity as landclearing, and thus, apply the guidance in RGL 90–5.

Several Corps districts surveyed regulate channelization activities based on incidental discharges. These districts tend to focus on those channelization operations that employ drag lines. At least one of these districts will only regulate these channelization activities if the activity is conducted in water.

At least three of the eleven districts surveyed regulate mining activities in

the waters of the U.S. Two of these districts are currently regulating these activities in virtually the same manner as they will be regulated under today's rule. Other districts only regulate mining activities if the material removed is in water. Yet another district regulates the discing of peat bogs, which is required in the mining of peat.

As explained above, mechanized landclearing is being regulated in a fairly consistent manner by all Corps districts due in large part to the series of regulatory guidance letters that have been issued by the Corps over the past decade. There is, however, some inconsistency in how the most recent RGL (RGL 90–5) is currently being applied by some districts. At least one district, as explained above, uses the RGL 90–5 to regulate discharges incidental to ditching, as long as the area has some type of vegetation on it.

Some degree of inconsistency among the Corps districts' in regulating ditching, channelization, mining, and even landclearing is therefore evident in the results of our survey. The Corps will readily concede that practically every district will have to change some number of their regulatory practices to conform to today's rule. However, the allegation that today's rule represents a sudden and radical departure from a longstanding, official interpretation of our Section 404 regulatory jurisdiction substantially overstates the case.

Commentors specifically cited several RGLs on landclearing, the only written, national guidance the Corps has issued concerning any of these activities, as evidence that the Corps, by promulgating this rule, allegedly is drastically departing from past agency positions. The commentors focused mainly on the RGLs that were issued by the Corps in 1982 and 1985 that more narrowly construed the extent to which mechanized landclearing activities would be subject to Section 404. RGL 82–5 stated that Section 404 did not cover "[m]inimal ("de minimis") movement of dirt, in and of itself, incidental to removal of planting of vegetation." Under this RGL, such activity would be covered if "accompanied by a land leveling operation which alters the topographic features of a 'water of the U.S.' through significant movement of soil." After the decision was issued by the 5th Circuit in *Avoyelles*, the Corps issued RGL 85–4, which provided that mechanized landclearing activities required a Section 404 permit if "the activity would involve burying logs or burying burn residue, or totally or partially filling in sloughs or low areas, or leveling the land." This RGL also stated that piling of trees, brush and stumps with *de minimis* amounts of soil attached or gathered in the piling operation did not necessarily constitute a Section 404 discharge unless it would totally or partially fill in sloughs or level the land. The RGL also stated that the filling of stump holes is normally a *de minimis* discharge because of the *de minimis* nature of the incidental soil movement.

EPA and the Corps acknowledge that the interpretation of the applicability of Section 404 to mechanized landclearing activities contained in these two earlier RGLs was more narrow than that reflected in today's regulation. Rather than view today's rule as a sharp departure of our past position, however, we believe that there has been an evolution in the agencies' treatment of mechanized landclearing under Section 404, which has gradually brought more and more mechanized landclearing activities under regulation by the Section 404 program. The 1982 RGL most narrowly construed the applicability of Section 404 to these activities, while the 1985 RGL recognized additional circumstances when mechanized landclearing would trigger Section 404 jurisdiction. Finally, almost three years ago, the Corps issued RGL 90–5, which took the position that mechanized landclearing activities generally are regulated under Section 404 because they result in the redeposition of dredged material. Today's rule is therefore entirely consistent with the guidance issued by the Corps in 1990.

Thus, while our position has changed over the course of the last decade regarding the applicability of Section 404 to mechanized landclearing activities, we do not agree with the commentors who argued that today's rule is an "abrupt" reversal of our longstanding position. The interpretation of Section 404 contained in the landclearing portion of today's rule is the position that has been taken by the Corps since 1990. This position reflects, moreover, the gradual increase in our appreciation of the severe adverse environmental effects associated with mechanized landclearing that has led us to conclude that regulation of these activities under Section 404 is warranted.

Even if one were to consider today's rule an "abrupt reversal" of a longstanding agency position, however, the Corps and EPA believe that such a change is warranted in light of our increased understanding of the severe environmental effects often associated with the activities covered by the rule, and the increasing sophistication of developers who seek to convert waters of the U.S. to uplands without being subject to the Section 404 regulatory program as previously administered by the agencies. As the Supreme Court recently provided in *Rust* v. *Sullivan*, an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 111 S. Ct. 1759, 1769 (1991), *quoting Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–64, 104 S. Ct. 2792. The Court further explained that agencies must be provided the flexibility to " 'adapt [their] rules and policies to the demands of changing circumstances.' " *Id.*

Such changes, whether dramatic or slight, must be consistent with the authorizing statute and be based on a " 'reasoned analysis.' " *Id. quoting Motor Vehicle Mfrs. Assn. of the United States* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983). The Corps and EPA both strongly believe that the regulatory mandates expressed in today's rule are within the authorities provided to our agencies pursuant to Section 404 of the Clean Water Act. Furthermore, we feel that, to whatever extent today's rule constitutes a change of previous practice, such a change is warranted, for the reasons we have explained in the preamble.

The Corps regulatory program over the years has proved to be remarkably adaptable to changes that has occurred in our appreciation of wetland functions and values and in our increased understanding of the effects of certain activities on wetlands. Ever since the Corps was first given authority to regulate discharges of dredged or fill material into waters of the U.S., the Corps and EPA have been shaping and defining the regulatory program with the broad discretion granted to the agencies by the CWA. Today's rule embodies many changes that we have gradually adopted through less formal guidance over the past two decades, and incorporates some refinements and clarifications to our policy that are long overdue.

In certain respects, and for every Corps district, today's rule will bring about changes in our previous practice; however, we believe that such changes are warranted in order to ensure that the Section 404 program can effectively protect our aquatic resources from the degradation that can result from unregulated mechanized landclearing, ditching, channelization, and other excavation activities. As discussed further below, we have learned increasingly over the last decade how

these activities can severely impact our nation's aquatic resources, and we therefore view today's rule as an important means of achieving the objectives of the CWA to "restore and maintain the chemical, physical and biological integrity" of those resources.

The specific facts of the case that led to the initiation of litigation in the *Tulloch* lawsuit provides a graphic example of how mechanized landclearing and ditching activities adversely affect the aquatic environment, and of the inequities that have resulted under the previous policies for regulating these activities. The facts in *Tulloch* help demonstrate the necessity of this rule by revealing how one developer with the technical expertise and financial resources was able, under past agency policies, to avoid the requirement to obtain a Section 404 permit for environmentally destructive activities in waters of the United States.

The *Tulloch* case involved an 1800 acre development project in New Hanover County, North Carolina, called the Pembroke Jones Park. In 1987, the Corps determined that about 700 acres of the site were wetlands. The developer performed numerous activities in the wetlands that "destroyed or degraded" them, yet the Wilmington District repeatedly determined, based on their understanding of the policies of the Corps, that the developer's activities should not be regulated under Section 404.

The developer originally applied for a permit for discharges associated with its development, but withdrew the application in light of concerns among the Corps and resource agencies about the significant adverse effects likely to be caused by the development. The developer subsequently met repeatedly with the Wilmington District of the Corps, presenting a strategy for constructing the same project without the need to obtain a Section 404 permit. First, the developer land cleared much of the wetland acreage. This was accomplished by pushing the vegetation from the cleared area. Wilmington District determined that since the developer removed all the vegetation and did not recontour the land, this activity did not require a Section 404 permit.

If these same activities were employed after the promulgation of today's rule, those activities would trigger Section 404 regulation. Under the rule, for example, the dirt falling from the roots of the trees as they were removed from the ground, in and of itself, would constitute a discharge of dredged material that would subject the mechanized landclearing operation to regulation. Pursuant to today's rule, these landclearing activities pursued by the developer would certainly destroy or degrade the wetlands and therefore require Section 404 authorization.

Second, the developer performed two types of excavation activities in the wetlands. He excavated some areas to create new ponds and excavated drainage ditches. The excavation was performed using draglines (in the ponds) and backhoes, which had sealed buckets. The soil excavated was either placed directly on uplands or placed in sealed containers resting on the beds of 4-wheel drive and 6-wheel drive trucks or pans. The excavation, for the most part, was performed in such a manner that only drippings from the buckets of the excavation machinery were allowed to fall back into the wetland.

Using computer modeling, the developer's consultant determined that by excavating ditches four feet deep every two hundred feet, the wetlands in the first conversion area could be drained, eliminating the presence of wetland hydrology and wetland vegetation, and thereby removing the area from Section 404 jurisdiction. After these ditches were completed and the water table had dropped sufficiently, the Wilmington District released the tract from jurisdiction. The developer used this technique in several other tracts which were also later released from jurisdiction.

The developer also excavated many acres of the wetlands in order to create approximately eighty-five acres of open water ponds. He also inundated portions of the wetlands acreage to create additional open water ponds. The work was accomplished by constructing wooden piers that the Wilmington District did not find to be an activity that was regulated under Section 404.

During the course of the excavation operations, the Wilmington District determined that these activities were not subject to regulation. By using sealed buckets and container trucks, the developer was able to substantially reduce the amount of dredged material being redeposited in the wetland. Although the Wilmington District later adopted a more strict position regarding excavation activities in wetlands, the District initially determined that it would not require the developer to secure a permit based on the "drippings" along.

As a result of this operation, hundreds of acres of environmentally valuable pocosin wetlands have been converted into a residential development and a golf course without being regulated, eliminating opportunities to avoid and mitigate adverse environmental effects. Pocosins are an unusual and relatively rare type of wetland found only in the Southeast. Owing their existence to poor drainage and abundant rainfall, pocosins typically serve important water quality and groundwater recharge functions, and often provide habitat for rare plants and animals. Because of the sophisticated methods employed, this developer was able to evade regulation under the Section 404 program while destroying these ecologically valuable wetlands.

It is clear that the methods used by the developer were expressly chosen because they would avoid triggering the need to obtain a Section 404 permit. The developer's representatives met repeatedly with the staff at the Wilmington District to determine what the District believed was the exact extent of its regulatory jurisdiction over wetland excavation. It was only after the developer was confident that it could successfully evade Corps regulation that it would proceed with the next destructive portion of its operation.

It is precisely because of operations like this development that the Corps and EPA have decided to promulgate this rule. At one time it appeared to be sufficient to base the regulation of ditching on sidecast material. This, as well as other similar projects, have demonstrated that this is no longer the case. It the Corps and EPA are to perform their assigned mission under the CWA, "to protect and restore the chemical, biological, and physical integrity of the waters of the U.S.," we believe that modification of earlier practices and policies is necessary and appropriate.

C. Presumption That Mechanized Landclearing, Ditching, Channelization and Other Excavation Result in Discharges

The proposed rule contained language that would have established an irrebuttable presumption that mechanized landclearing, ditching, channelization or other excavation activities in waters of the United States result in the discharge of dredged material (proposed 33 CFR 323.2(d)(2) and 40 CFR 232.2(e)(2)).

1. Public Comments and Changes to Proposed Rule

Commentors expressed several concerns with this approach. First, commentors argued that the terms "mechanized landclearing," "ditching," "channelization" and "excavation" are vague, and therefore do not provide clear guidance to the regulated public as to whether their activities would require

a permit under the rule. Commentors argued, moreover, that the agencies had not presented factual information in justify the conclusion that these activities invariably result in discharges. They contended that it is possible in some cases to conduct some of these activities without causing any fallback or redeposition of dredged material.

In response to these comments, and in order to ensure that the final rule is clear and understandable, the Corps and EPA have made certain changes in the final rule. The agencies have deleted the proposed rule language that would have established the irrebuttable presumption that the listed activities will result in discharges of dredged material. As explained in the preamble to the proposed rule and explained further below, we believe that it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process. However, the agencies cannot rule out the possibility that, in a highly unusual case, or with novel technology, one or more of these activities might be accomplished without such a discharge. Moreover, since the agencies' jurisdiction over a particular activity can only be triggered by the presence of a discharge in the specific case, the agencies declined to make a categorical finding in this regulation that the listed activities always result in discharges. That determination, by its nature, depends on the facts of a particular case. However, the agencies strongly admonish any party considering conducting any one of these activities without obtaining a permit that they may be proceeding at the risk of violating Section 404 since, under today's rule, a permit is required in any case where any incidental redeposition of dredged material (however small or temporary) is cause in connection with an activity that would destroy or degrade waters of the United States, unless otherwise exempted under Section 404(f).

Because this rule does not make a finding that mechanized landclearing, ditching, channelization and other excavation will always result in discharges, commentor's concerns about the factual support for such a finding are no longer relevant. Section C, below, however, provides a detailed description of how mechanized landclearing, ditching, channelization and other excavation activities can result in the redeposition of dredged materials.

Several commentors stated that the term "mechanized landclearing" should not be defined to include operations such as the moving or cutting of vegetation where the activity occurs at or above the soil/sediment line. Some commentors wanted the Corps and EPA to clarify which landclearing activities will be regulated under this rule. We agree that not all mechanized operations involving the removal of vegetation in wetlands and other waters of the United States should be regulated because not all these operations result in a discharge of dredged or fill material.

In response to these comments, the definition of discharge of dredged material in the final rule expressly excludes "activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, or chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material." Under this language, a discharge only occurs when mechanized landclearing activities occurring in waters of the U.S. cause soils and other excavated dredged materials to be added or redeposited in such waters. So long as all work occurs above ground level, and root systems are not substantially disturbed, the cutting of vegetation, whether using hand-held equipment or equipment mounted on heavy machinery, would not cause either the addition or the redeposition of dredged material. For example, maintenance clearing of existing powerlines and chipping cut vegetation in place or shearing vegetation above the soil line where the vegetation is not subsequently windrowed or otherwise pushed would not usually cause a discharge regulated under Section 404.

Several commentors, however, appeared to argue that maintenance of utility line corridors would never result in a discharge of dredged or fill material. These commentors cited the decision of the Fifth Circuit in *Save Our Wetlands, supra*, which held that cutting of trees with a chainsaw and windrowing of the vegetation did not result in a discharge subject to Section 404. As noted above, today's rule expressly excludes from the definition of "discharge of dredged material" the cutting of vegetation above the ground. Under today's rule, if vegetation is cut above the surface and then lifted into windrows without causing redeposition of excavated material, then no Section 404 permit is required. If, however, windrowing is accomplished in a manner that would redeposit dredged material (for example, by pushing the fallen vegetation with a bulldozer or similar equipment), then a permit would be required.

Unlike certain commentors, however, we do not read *Save Our Wetlands* as holding that EPA and the Corps are precluded under the CWA from regulating landclearing unless it would result in a conversion of waters of the U.S. to uplands. That decision did not construe the scope of the agencies' statutory authority under Section 404, but rather turned on EPA's and the Corps' regulatory definition of discharge of dredged material. The court held that the activities in that case did not constitute a discharge of dredged material under the agencies' regulatory definition because the activity would not convert wetlands to uplands. An activity involving a discharge of dredged material subject to today's rule, however, would require a permit if it would destroy or degrade a water of the United States. We do not read *Save Our Wetlands* as addressing, in any respect, the agencies' statutory authority to adopt the regulatory approach we are taking here. Indeed, the court expressly noted in its opinion that Congress left to EPA and the Corps how to define the term "dredged or fill material." *Id.* at 647.

2. Description of Mechanized Landclearing, Ditching, Channelization and Other Excavation Activities

The agencies provide below a detailed description of the actual processes involved in mechanized landclearing, ditching, channelization and other excavation. This discussion is intended to be illustrative of the major types of landclearing and excavation techniques currently used, and is not intended to be exhaustive or limit in any manner the scope or applicability of the final rule. We are providing this description in order to illustrate the manner in which these types of activities cause incidental soil movement, which results in additions or redepositions of dredged material.

a. *Mechanized landclearing.* In the mechanized landclearing process, the addition or redeposit of dredged material can occur several ways. For example, implements used in the mechanized landclearing process are scraped along the surface of the ground or pushed into the ground and then moved through the soil, usually by bulldozers or loaders. Brushrakes, rootrakes, chunkrakes, disc harrows, root plows, rippers, bulldozer plows, and many types of shearing blades are characteristic of the type of equipment which operate in this way. Brushrakes, for example, have tines which scrape

below the ground level to gather and stockpile slash and loose rock; chunkrakes have bowl shaped blades frequently up to two feet or more in diameter, which cut into the ground and fluff the soil; disc harrows knock down, chop and partially bury weeds, brush, and small saplings by using concave disc, two feet or more in diameter, with sharp scalloped edges; root rakes remove roots and stumps by use of a fork-like blade pushed through the soil; shearing blades are tractor-mounted shears which can weigh up to several thousand pounds and can move large amounts of debris, soil and roots if they are moved along the surface of the ground. Rippers and desp plows are pulled along below the soil surface to break up hard pans or other stiff subsoil. The arm which attaches them to the bulldozer or loader drags through the soil surface, moving soil aside and thereby causing a discharge.

When the implements used in mechanized landclearing move along the ground or through the soil, they scrape, pick up, move or otherwise displace debris and soil (including leaf litter and humus) and usually have a leveling effect on the ground by moving debris from high areas to low areas. When soils are picked up, moved, or otherwise displaced, they are added or redeposited to waters of the United States at various distances from the excavation point as the implements used in the mechanized landclearing process move through waters of the United States. During the discing, tining, or raking process, for example, soil will ride in front of the disc, tine, or rake if the disc, tine, or rake scrapes or penetrates the ground, resulting in a displacement and redepositing of soils and sediments.

The addition or redeposit of dredged material also occurs when equipment is used to knock down trees and rip up root systems even if the equipment used does not, in itself, scrape across or penetrate the ground. When stumps are ripped out of the waters of the United States, soils and sediments are added or redeposited back into the waters of the United States. Also, holes and depressions are created in the ground which are typically filled by using the vehicle which removed the trees and their roots or subsequently by other vehicles or equipment. This filling or redeposition would constitute a discharge in addition to that which occurs by the removal of the stumps themselves. Tree pushers and tree splitters are examples of equipment which normally operate in this way. A tree pusher uses a bar mounted to the front of a bulldozer or loader while a tree splitter uses a V-shaped blade, which is usually about 18 to 20 feet in length. As the tree pusher or tree splitter knocks the tree down, the roots are usually ripped up out of the ground. Any roots remaining are then typically removed from the ground by the bulldozer's blade. Not all equipment used to remove trees disturbs root systems, or pushes, drags, or otherwise engages in an activity which results in a discharge of dredged material. Some tree shears or tree pinchers, for example, may be operated in such a manner so that they do not cause a discharge of dredged material, provided the vegetation is cut above the ground while leaving the soils and roots intact.

b. Ditching, channelization and other excavation. During excavation, material in either a solid or semi-solid form is removed from the waters of the United States. As material is excavated from the waters of the United States, the addition or redeposit of dredged material occurs through soil or sediment spills, drippings, and moving or displacing of soils and sediments as the dredging equipment moves through the soil or sediments.

Ditching and channelization are two types of excavation activities which often occur in wetlands and in other waters of the Untied States. As we use the terms here, ditching is the act of creating ditches (i.e., trenches or troughs) by excavating the earth. Channelization is the modification made to, within, or adjacent to an existing stream channel, as well as the rerouting of a steam channel. Both ditching and channelization are used to convey water, often for irrigation or drainage purposes and can be accomplished by using the same equipment.

Most ditching and channelization activities are accomplished using excavation equipment of some type, which is usually characterized by the use of some form of bucket or scoop to excavate soil and sediment.

Mechanial dredging equipment typically consists of a backhoe, a bulldozer, a dipper, or a bucket. A backhoe is a hoe-type or pull-type shovel usually attached to the back of a front loader. A backhoe, which shovels and then lifts soil or sediments from waters of the United States, is often used during the construction of ditches or for stream channelization projects. A dipper and bucket operate at the end of a boom, which is attached to a crane or other vehicle. Buckets are suspended from a cable and dippers are fixed directly to the boom. Typically, a crane drops the bucket into the soil or through the water column to the bottom. The bucket is filled with soil or sediments and lifted from the water or off the ground and dropped or sidecast on adjacent grounds or into vehicles where it is moved to another disposal site. Bucket dredging for ditching and channelization projects is commonly done with a dragline. Draglines, or other equipment of this kind, operate by dropping the bucket into the soil or sediment and then dragging it through the soil or sediment until it is filled. With a dipper, as with a backhoe, a bulldozer or loader pushes the scoop or hoe through the soil or sediment in order to fill up the dipper. The dipper is then moved off the bottom and the collected sediments disposed of as they are with buckets.

Many stream channelization projects are accomplished by using a bulldozer to push sediments, including cobble, gravel and sand, from a particular point in the stream to another location. To complete such work, the bulldozer blade is lowered into the bottom of the stream and then moved in a forward direction which results in the pushing of sediments to another location in the steam or to an upland area.

Because of the physical processes of soil movement inherent in the act of dredging, the use of bulldozers, draglines, dippers, and backhoes, or other equipment of this kind will, except in limited situations, result in some addition or redeposition of dredged material. The addition or redeposit of dredged material occurs as soils and sediments are picked up and moved during the excavation process.

For example, when a dragline or backhoe is dragged through soils or sediments, such soils and sediments are displaced and redeposited to various distances from the initial excavation point as the implement used in the excavation process gathers the dredged material. This same type of displacement and redeposition occurs as a bulldozer pushes sediments during a stream channelization project. Also, when the dragline or backhoe stops moving along the bottom and the bucket is raised, additional additions or redeposits of soils or sediments occur as such material falls from the bucket.

The cutterhead dredge is the most commonly used hydraulic dredger. It operates by using a rotating cutter to cut into the sediments. The rotating cutter is attached to a suction line which sucks in the material as it is being cut. Typically, a cutterhead is used to break up the sediment and mix it into a slurry and then pump it through a pipe to a disposal area. As the cutterhead moves through the bottom, it pushes the sediment around. The addition or

redeposit or dredged material occurs as the whirling of the cutter slings some of the dredged material away from the suction of the pump either as discrete clumps or in suspension and adds or redeposits it at various points from where the cutterhead moved through the bottom.

D. Effects of Mechanized Landclearing, Ditching, Channelization and Other Excavation

The agencies received substantial public comment regarding whether the activities that would be covered by this rule in fact destroy or degrade waters of the U.S. Many commentors cited activities that they believed did not cause such an effect. There was also confusion regarding the meaning of "degrade" in the proposed rule. Some commentors also objected to the presumption in the proposed rule that these activities destroy or degrade wetlands, and questioned the factual basis for such a presumption. These comments are addressed below.

1. Definition of "Destroy" and "Degrade"

The proposed rule did not contain definitions of the terms, "destroy" and "degrade." In the preamble to the proposal, however, the agencies solicited public comment on defining destruction as altering an area "in such a way that it would no longer be a water of the U.S," and defining degradation as occurring when a discharge "results in an identifiable decrease in the functional values of the water of the U.S." 57 Fed. Reg., 26896.

Several commentors supported the definition of "destroy," stating it was clear and concrete. A few commentors recommended that the definition of "destroy" be modified to clarify that it is only necessary to determine whether there is destruction in areas currently being delineated as waters of the United States. Two commentors felt the destruction threshold was inadequate and that destruction would also occur when a wetland or other special aquatic site is converted to open waterbody, such as conversion of a wetland to a retention pond. Another commentor disagreed and argued that this type of activity did not destroy, and possible did not even degrade, waters of the United States. We believe that the term "destroy" is sufficiently clear that no change in the proposed approach is appropriate.

We agree with commentors that the jurisdictional status of an area before and after an activity takes place should be based on current agency guidance for making such determinations. While we agree that conversion of a wetland or other water of the U.S. to another type of water of the U.S. (e.g., conversion of a wetland to open water such as a lake) does not necessarily "destroy" a water of the U.S., such a change could in fact "degrade" an area by adversely affecting at least one of the aquatic functions of the site. As discussed further below, while there may be some environmental benefits associated with such a project, any adverse effect on any aquatic function would mean that an activity required a Section 404 permit. While such an activity may well receive a permit based on consideration of the Corps' public interest review and the Section 404(b)(1) Guidelines, we do not believe that it would be appropriate to exclude such activities from the coverage of Section 404 entirely. For clarity, we have added the definition of destroy to the final rule (see 33 CFR 323.2(d)(4); 40 CFR 232.2(e)(4)).

By far, most commentors addressing these terms were concerned with the definition of "degrade" contained in the preamble to the proposal as "an identifiable decrease in the functional values of waters of the United States." The commentors stated that "identifiable decrease" and "functional values" were vague terms, which were not susceptible to measurement, and that adoption of these terms would only contribute to increased confusion over the Section 404 regulatory process, as a result of subjective determinations made by Corps or EPA personnel. Two commentors felt that the term "functional values" was inappropriate and should be replaced with "functions and values," to be judged separately since functions are measurable and values are subjective. A few commentors recommended that regulated waters be generally classified, according to potential functions and values, for their respective geographic areas, while two others felt functions should be directly related to the science of water quality. Several commentors stated that there is no established methodology to evaluate functional values for impact assessment. Therefore, they recommended that the Corps and EPA develop a methodology and/or identify a preferred method to provide a clear and precise standard to measure degradation. Further, two of these commentors also felt that the selected methodology should be implemented only after promulgation through notice-and-comment rulemaking.

Several commentors disagreed with the example presented in the proposed rule, *i.e.*, that if the hydrologic regime of a wetland is altered enough to change the vegetative composition of the area, *it will be degraded. These commentors* did not believe a mere change in vegetative composition automatically results in degradation. As a means of better clarifying the term "degradation," several commentors suggested that the definition refer to an "identifiable adverse effect that the proposed activity is likely to have on waters of the United States." Two commentors suggested replacing the word "identifiable" with "significant" and one commentor recommended changing "identifiable decrease" with "appreciable decrease."

Because there was confusion among the public about the term "degrade" we have chosen to include a definition of degradation in the final rule that incorporates suggestions made by some commentors. Under the final rule, an activity results in degradation when it would have more than a *de minimis* effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function. As discussed further below, this standard is a threshold for determining whether an activity requires a Section 404 permit at all, so we believe that any adverse effect to any aquatic function of the site would constitute "degradation" under the final rule. Evaluation of the project and its overall impacts under the Section 404(b)(1) Guidelines and the Corps' public interest review would occur during the permit process.

This definition changes how the term "*de minimis*" is used in the rule from the way it has been used previously in the definition of "discharge of dredged material." In the previous rule, the term "*de minimis*" referred to the amount of soil moved during normal dredging activities, and the proposed rule similarly used this term to refer to the amount of soil moved in the process of mechanized landclearing, ditching, channelization and other excavation. The definition of degradation in the final rule uses the term "*de minimis*" to refer to the degree of environmental effects associated with these activities. This change makes sense for several reasons. First, using the term "*de minimis*" to refer to environmental effects is consistent with the intent of this rulemaking, which is to ensure that incidental discharges associated with mechanized landclearing, ditching, channelization and other excavation trigger Section 404 where those activities would have certain effects on waters of the U.S. Establishing a *de minimis* effects test also comports with the structure and goals of Section 404, which focus on providing protection of waters of the United States from adverse effects associated with discharges of dredged or fill material.

EPA and the Corps believe that the *de minimis* exception contained in today's regulation is within the agencies' authority under Section 404. The underlying focus of Section 404 is on evaluating and, where possible, reducing and avoiding adverse effects to the aquatic environment due to discharges of dredged or fill material. Section 404's focus on environmental effects is evident in numerous aspects of this statutory provision. For example, Section 404(c) authorizes EPA to prohibit, deny or restrict the specification of any site for the discharge of dredged or fill material if it would have "unacceptable adverse effects" on municipal water supplies, shellfish beds and fishery areas, wildlife or recreational areas. A similar focus on environmental effects is evident in Section 404(f)(2), which "recaptures" activities otherwise exempt under Section 404(f)(1) where the activities have the purpose of changing the use of an area of waters of the United States, and have the effect of impairing the flow or circulation, or reducing the reach, of waters of the United States.

Thus, the very purpose of Section 404 is to conduct an environmental review of discharges of dredged or fill material in order to determine the gravity of the environmental harm associated with the discharge, and evaluate ways in which that harm can be reduced or avoided. The focus of Section 404 on effects of discharges is reflected throughout the Section 404(b)(1) Guidelines which, for example, prohibit discharges where a practicable alternative would have less "adverse impact" on the aquatic ecosystem, where a discharge would cause or contribute to significant degradation of the aquatic environment or where appropriate and practicable steps have not been taken to minimize "adverse effects of the discharge on the aquatic ecosystem." See 40 CFR 230.10 (a), (c), and (d). See also 40 CFR 230.11 (listing types of effects that must be considered in the permitting process).

Therefore, subjecting *de minimis* activities to review under section 404 would be a needless paper exercise that would divert limited agency resources from focusing on discharges associated with environmental effects of concern under Section 404. Given the clear focus of Section 404 on regulating activities based on their environmental effects, we view an exception for discharges of dredged material having *de minimis* effects as a tool for advancing the goals and objectives of Section 404. See *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (DC Cir. 1979).

We note that the exception addressed by this rulemaking was already present in the agencies' regulatory definition of "discharge of dredged material." This rule is clarifying, and narrowing the effect of, this pre-existing exception. Moreover, as discussed further below, EPA and the Corps have included provisions in the rule to help ensure that only truly *de minimis* activities are exempted from the Section 404 program by requiring that dischargers engaging in mechanized landclearing, ditching, channelization and other excavation obtain a finding by the Corps, or EPA as appropriate, prior to their discharge, that their activities do not require a permit.

We wish to emphasize that the threshold of adverse effects for the *de minimis* exception is a very low one. Under the final rule, an identifiable adverse individual or cumulative effect on any aquatic function is sufficient to subject an activity to Section 404 jurisdiction. Some activities may cause certain adverse effects on the aquatic ecosystem while having other beneficial effects. For example, an activity altering the hydrology of a wetland may result in restoring pre-existing hydrology, or may improve habitat value or water quality in the long-term. If the activity would result in some loss or identifiable reduction of any aquatic function to achieve this result, however, the activity would "degrade" waters of the U.S. and a permit would be required under today's rule. For example, if a discharge activity would have any adverse impact on the suitability of the area as habitat for any species utilizing the area, a permit would be required. It is not our intent, therefore, that the positive and negative *effects* of the activity be balanced and to require a permit only in those cases where the net effect is adverse. Rather, an adverse effect on any one aquatic function, even if it is temporary, would be sufficient under the final rule to trigger the Section 404 permit requirement.

In the case of endangered or threatened species, any effect of an activity on such species would trigger an inquiry by the Corps as to the nature of that effect, and whether the activity would destroy or degrade waters of the U.S. within the meaning of today's rule. If there is an effect on endangered or threatened species from an activity, the Corps in consultation with the Fish and Wildlife Service or the National Marine Fisheries Service (depending on the agency having jurisdiction over the species) under Section 7 of the Endangered Species Act, will determine whether the activity is likely to adversely affect the species. If the Corps finds that the activity is not likely to adversely affect the species, and the Service concurs in writing in this finding, then the activity would not "degrade" the water within the meaning of today's rule, and no permit would be required. If, however, either the Corps or the Service believes that the effect is likely to be adverse, then a Section 404 permit will be required for the activity.

Other examples of adverse effects on any aquatic function would be an adverse alteration of the area's hydrologic regime, or of the type, distribution of diversity of vegetation, fish and wildlife that depend on such waters. Again the threshold of effect under the final rule is a low one. It would not be necessary for a discharge activity to remove or significantly impair wetland hydrology to trigger the permit requirement. An activity that would, for example, likely reduce the duration of inundation or saturation of a portion of wetland would "degrade" the wetland within the meaning of this rule. Indeed, in some cases, increasing the duration of inundation or saturation may have an adverse effect on an aquatic function. Similarly, alteration of the vegetative composition of a water of the U.S. does not require that all vegetation be removed, or that the vegetative composition be so significantly altered that the area would no longer meet the hydrophytic vegetation criteria for delineating wetlands. A lesser change to the vegetation of an area can, for example, have an impact on the function of a wetland as a food source or as habitat for a species utilizing the area.

Activities such as walking, bicycling or driving a vehicle through a wetland would have *de minimis* effects except in extraordinary situations, and the agencies do not intend to devote scarce resources to regulating such typically innocuous activities.

In response to commentors who thought that the agencies should establish a higher effects threshold in this rule (e.g., activities would be regulated only when they have a "significant" effect on the environment), we wish to emphasize that the *de minimis* exception is necessarily a narrow one, limited to "trifling" or "inconsequential" effects (see *Alabama Power Co.* v. *Costle*, 636 F2d. at 360 (DC 1979). Moreover, the evaluation of effects under this rule is for the purpose of determining whether an activity is subject to regulation under the CWA at all. When an activity poses more than *de minimis* effects on the aquatic environment, the severity of those effects will be evaluated to determine whether, for example, a class of activities would have minimal effects and therefore could be authorized by a

general permit. See CWA Section 404(e). The severity of effects is also evaluated during the individual permitting process to determine whether a permit should be issued and, if so, with what conditions. Where the question, however, is whether an activity requires authorization at all, we believe that the threshold should be a low one, consistent with the nature of the legal *de minimis* exception.

The term "significant impacts" by contrast, generally suggests a severe adverse environmental effect. As used in the National Environmental Policy Act (NEPA), an action "significantly" affecting the environment triggers the most rigorous of environmental reviews, an environmental impact statement. Similarly, under the Section 404(b)(1) Guidelines, any discharge that would "significantly" degrade waters of the U.S. is prohibited. Such a high threshold is not appropriate where, as here, the question is whether an activity should be subject to regulatory scrutiny under Section 404 at all.

Because commentors expressed confusion regarding the application of the phrase "decrease in functional values" that was included in the proposed rule, this phrase is not included in the final rule. Nevertheless, an evaluation of the functions of a water of the U.S. is obviously relevant to determining whether an activity may cause an adverse effect on waters of the U.S. For example, an area whose functions include vegetation serving as a food source or habitat for migratory waterfowl would suffer a decrease in that function by the alteration or removal of vegetation. However, it is not our intent to place on the Corps or EPA a heavy burden of conducting a detailed evaluation of the water's functions and values and documenting how they would be impacted by an activity. Such an inquiry is more relevant to the evaluation conducted by the Corps under the Section 404(b)(1) Guidelines and Corps regulations in the permitting process itself. Again, we emphasize that this is merely the threshold inquiry of whether an activity should be subject to regulation under Section 404 at all. We believe it is sufficient for this purpose that the Corps or EPA, as appropriate, evaluate the available information to make a reasonable judgment of whether an activity will adversely affect waters of the U.S.

For similar reasons, we also disagree with commenters who suggested that the agencies should establish a scheme for classifying the values of wetland areas for purposes of this rule. The "value" of a water of the U.S. is again something that should be considered in the permitting process when the Corps determines whether a discharge complies with the Section 404(b)(1) Guidelines, and what type and level of mitigation is necessary to compensate for the impacts of a project. We do not view a detailed consideration of values of an area to be necessary for the Corps or EPA to determine whether an activity would simply have an "adverse effect" on a water of the U.S.

One commenter argued that the rule should list the specific activities that require a Section 404 permit based on the type, location, and known impact of the activities and also should identify "*de minimis*" activities that will not require a Section 404 permit. While such a list might be ideal from the regulated community's standpoint, the types of activities that involve a discharge and would destroy or degrade waters of the United States are too numerous and varied to list definitively. They generally must be evaluated on a case-by-case basis. However, today's rule does provide examples of several activities that require a permit unless the discharger demonstrates they would not destroy or degrade waters of the U.S. (i.e., mechanized landclearing, ditching, channelization and other excavation in waters of the United States).

Several commentors argued that the agencies had failed to give the public adequate notice of the meaning of the terms "destroy" and "degrade" as required by the Administrative Procedure Act. We disagree. Definitions of the terms "destroy" and "degrade" were discussed in the preamble of the proposed rule, along with a request for public comment. The definitions of "destroy" and "degrade" in the final rule reflect the proposal and the public comments received. We believe that the agencies have fully complied with the Administrative Procedure Act's rulemaking requirements.

One commentor felt that the definitions of "destroy" and "degrade" contradicted Section 101(g) of the CWA. It is entirely unclear to us how this rule conceivably would be inconsistent with Section 101(g), which provides that State water rights will not be superseded, abrogated, or impaired by the CWA. This aspect of the rule simply addresses what activities result in discharges of dredged material requiring a permit under Section 404 of the Act. Merely subjecting activities to the Section 404 permitting requirement cannot, in and of itself, result in any impact on allocation of water rights. The substantive criteria for processing Section 404 permits are not altered in any way by this rule.

Two commenters believed that the determination of degradation should be the responsibility of the State agency to ensure compliance with State water quality standards. We disagree, since the Corps and EPA are charged with administering the regulatory responsibilities of CWA Section 404. Moreover, degradation of waters of the U.S. will not necessarily be limited to consideration of State water quality standards.

2. Presumption That Activities Destroy or Degrade

The proposed rule also would have established a rebuttable presumption that mechanized landclearing, ditching, channelization and other excavation would result in the destruction or degradation of waters of the United States. See 33 CFR 323.2(c)(2); 40 CFR 232.2(e)(2). Some commenters supported the proposed rebuttable presumption because they felt these activities virtually always cause adverse impacts to the aquatic ecosystem.

Other commentors opposed the presumption in the proposal on the grounds that the government should bear the burden for demonstrating that it has jurisdiction over an activity. These commentors cited the discussion in the preamble to the proposed revisions to the wetlands delineation manual, in which the government stated that it bore the burden of demonstrating that it has geographic jurisdiction over a specific area under the statue. These commentors argued that such a burden should also fall on the government here. Some commentors contended that the presumption would impose unreasonable costs on project proponents seeking to rebut the presumption. Commentors also argued that the presumption was based upon a factual finding that these activities virtually always destroy or degrade wetlands, yet the agencies have not provided record support for such a conclusion beyond the reference to the "experience" of the agencies in administering the Section 404 program.

We believe that these commentors have misconstrued the nature of and basis of the approach in this rulemaking. In the proposed rule, the agencies stated that, in our experience, mechanized landclearing, ditching, channelization and other excavation virtually always destroy or degrade waters of the United States. While this statement accurately describes our experience, we are not relying on such a factual finding to support the approach in the final rule. Rather, we view the final rule as legally appropriate in light of the language and structure of

Section 404, which prohibits the discharge of dredged or fill material except in compliance with a permit under Section 404. In our view, the addition or redeposit of *any* dredged material into waters of the U.S. associated with mechanized landclearing, ditching, channelizaton and other excavation constitutes a "discharge," and is therefore prohibited if no permit is obtained under Section 404, unless otherwise exempted under Section 404(f).

The approach taken by the agencies in this rule is to carve out a narrow exception to the Section 404 permitting requirement for certain discharges that are associated with activities that have only *de minimis* environmental effects. We do not view this exception as compelled by the Act. There is no express *de minimis* exception in Section 404, and it would therefore be perfectly consistent with the statutory scheme to require that any person discharging dredged material in the course of mechanized landclearing, ditching, channelization, other excavation or any other activity to obtain a Section 404 permit, without regard to the effects of the associated activity on waters of the U.S. Nonetheless, the agencies believe that the better approach in this case is to maintain a narrow exception for those activities that have only a *de minimis* effect on waters of the U.S. This exception, as explained above, is consistent with Section 404 and will help improve the efficiency and effectiveness of the program by focusing limited agency resources on activities having more than inconsequential environmental effects.

The language and structure of the final rule have been modified to reflect the basis for the agencies' approach. First, the rule states that any addition or redeposit of dredged materials into waters of the U.S. incidental to any activity, including mechanized landclearing, ditching, channelization and other excavation constitutes a "discharge of dredged material." 33 CFR 323.2(d)(1)(iii); 40 CFR 232.2(e)(1)(iii). The rule therefore provides that a Section 404 permit is required for the incidental discharge unless the discharger demonstrates to the Corps, or EPA as appropriate, prior to the discharge, that the activity associated with the discharge does not have or would not have the effect of destroying or degrading any area of waters of the United States. Under the final rule, a discharger bears the burden of demonstrating that such activities will not destroy or degrade the waters of the U.S., including wetlands. 33 CFR 323.2(d)(3)(i); 40 CFR 232.2(e)(3)(i).

Given the language and structure of the Act, we believe that the approach adopted in the final rule is appropriate. Under the CWA, a party wishing to discharge dredged material into waters of the U.S. can only do so if it obtains a Section 404 permit, unless otherwise exempted. Therefore, if such a discharger conducting mechanized landclearing, ditching, channelization or other excavation desires to proceed without Section 404 authorization, we believe that it behooves the discharger to obtain an affirmative finding from the Corps, or EPA as appropriate, prior to the discharge, that the discharge is subject to the *de minimis* exception. Requiring dischargers to bear the burden of demonstrating that its activities do not require a Section 404 permit does not, as some commentors have asserted, place an unreasonable burden on the discharger. Rather, since the discharger would otherwise be required to obtain a permit for its activities, we believe that it behooves the discharger to demonstrate affirmatively that mechanized landclearing, ditching, channelization or other excavation activities should be exempted from the permitting requirement. Moreover, EPA and the Corps would not feel comfortable establishing a *de minimis* exception for mechanized landclearing, ditching, channelization or other excavation activities without the procedural protection of requiring an affirmative finding prior to the discharge by EPA or the Corps that the exception is appropriate in a particular case. This will ensure consistency in the application of the exception and guarantee that the exception is interpreted in a manner consistent with the purposes of the CWA. Under the final rule, dischargers conducting activities other than mechanized landclearing, ditching, channelization or other excavation which would not destroy or degrade waters of the United States (e.g., walking and vehicular traffic) do not require a prior finding by the relevant agency that the activity can proceed without obtaining a Section 404 permit. The agencies do not believe that it would be practical, or an efficient use of limited agency resources, to require a prior determination in such cases. However, should any activity—including activities other than mechanized landclearing, ditching, channelization or other excavation—undertaken by a discharger in fact have more than a *de minimis* effect on waters of the United States, that discharger is subject to enforcement action or citizen suit for discharging without a Section 404 permit.

Some commentors objected to the proposal of regulating only activities that are associated with incidental discharges where those activities produce certain environmental effects. These commentors felt that the agencies should regulate any addition or redeposit associated with mechanized landclearing, ditching, channelization and other excavation, regardless of its impact on the aquatic environment. We do not believe, however, that it would be an effective use of limited agency resources to eliminate completely the *de minimis* language in the current definition of "discharge of dredged material" so that all incidental discharges would be regulated, without regard to their environmental effect. The underlying purpose of Section 404 is to avoid, where possible, the degradation of our nation's aquatic resources due to discharges of dredged or fill material, and it is in keeping with that goal to focus limited agency resources on activities that have more than a *de minimis* effect on those waters. See *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 357–360 (DC Cir. 1979).

We also do not agree with one commentor that there should be an opportunity for an appeal to an independent panel of a decision to require a Section 404 permit. The CWA grants the Corps or EPA, as appropriate, the authority to determine that a certain activity is subject to the Section 404 permitting requirement. Allowing an "appeal" at such a preliminary stage in the permitting process would not be in accordance with the agencies' roles under the statute, and would be wasteful of limited agency resources.

Many commentors recommended that the Corps specify the mechanism by which project proponents may demonstrate that their activity does not require a Section 404 permit. The Corps district engineer and EPA Region, as appropriate, will require the minimum information necessary to conduct an adequate evaluation of an activity's impacts. The submittal to the Corps district engineer will include, as necessary, the following information: A written description of the project; the specific landclearing, ditching, channelization, or excavation techniques to be used; the equipment to be used; the acreage and type of wetland or other waters of the U.S. to be affected; the extent and type of impacts projected; the change or loss of wetland functions and values that could be anticipated from the activity; a project location-vicinity map; the name, address and phone number of the applicant; and other site-specific information requested by the district

engineer. Based on this information, the Corps district engineer or EPA Region, as appropriate, will determine, within a reasonable length of time, whether a Section 404 permit is required.

One commentor recommended that the language of the proposed rebuttable presumption be modified to have the nature and extent of the impact assessed during the individual permit review process. We agree with the intent of this suggestion; however, no change is necessary. If an individual Section 404 permit application is submitted, the Corps will evaluate the nature and extent of the impacts of the activity and, if appropriate, return the application if no permit is required.

Finally, we do not believe that a determination by the Corps or EPA that a discharger must obtain a permit under today's rule would be subject to judicial review, since pre-enforcement review is not available under the CWA. See *e.g., Avella* v. *Corps*, 20 ELR 20920 (S.D. Fla. 1990), *aff'd* 916 F.2d 721 (11th Cir. 1990) (holding that Corps finding that a discharger could not proceed under a general permit and had to obtain an individual permit was not subject to judicial review).

3. Whether Specific Activities Will Destroy or Degrade Waters of the U.S.

In the preamble to the proposal, we solicited public comment on whether there were certain categories of activities which, as a general rule, did not destroy or degrade waters of the U.S. and which therefore would not come within the scope of this regulation. We address below comments that were submitted on this issue.

Many commentors felt that the modification of the definition of "discharge of dredged material" was too expansive and would result in the regulation of such activities as walking, grazing, vehicular traffic, and boating in waters of the United States. Several other commentors indicated that they believe vehicular traffic should be regulated. As indicated above, under today's rule, we are not regulating every discharge associated with activities in waters of the U.S., but only those associated with activities which have or would have the effect of destroying or degrading any area of a water of the United States. We believe that activities such as walking, grazing, vehicular traffic and boating (excluding prop-dredging) in waters of the United States would not generally be regulated under this rule because, even if they do result in discharges, they generally do not destroy or degrade waters of the United States. As discussed previously, activities such as these do not require a finding prior to the discharge that the activity would not destroy or degrade waters of the United States. If the effect of the activity is *de minimis*, then a Section 404 permit is not required.

One commentor stated that the following activities should be categorically excluded from regulation under Section 404: landclearing activities for the creation and maintenance of utility line corridors; mechanized landclearing in wetlands that are seasonally dry or frozen, provided that cutting of brush and timber occurs above the soil surface; and use of corduroy roads in constructing utility lines. Another commentor said that activities associated with the construction and maintenance of powerlines and distribution corridors should be exempted from regulation under Section 404 because they do not destroy or degrade wetlands. One commentor suggested that routine maintenance of pipeline rights-of-way should not require an individual permit since there is no long-term impact on vegetation. Another commentor stated that pipeline construction on Alaska's North Slope should be specifically identified as an activity that should be excluded from regulation under Section 404 because the pipelines are elevated and supported by pilings that result in only temporary *de minimis* discharges.

If a landclearing operation does not disturb the soil, no discharge occurs; thus, such activities would not be regulated (see 33 CFR 323.2(d)(1); 40 CFR 232.2(e)(2)(ii)). We do not believe that it would be appropriate, as this commentor has suggested, to categorically exclude from regulation mechanized landclearing to create utility line or transmission line corridors. As we have explained above, where a discharge occurs, we believe that it is appropriate for the discharger to bear the burden of demonstrating that a particular activity will not destroy or degrade waters of the United States. Pipelines that are normally built on pilings and where no landclearing or fill pad construction is required are generally not regulated under Section 404. Similarly, we do not believe it is appropriate to categorically exclude from regulation mechanized landclearing in frozen or seasonally dry wetlands. While we agree with the commentor that cutting of brush and timber in wetlands above the soil's surface does not normally result in a redeposition of soil (see 33 CFR 323.2(d)(1)(ii); 40 CFR 232.2(e)(2)(ii)), as described in today's preamble at section III(c), mechanized landclearing usually results in a discharge of dredged material, and the commentor has provided no basis for concluding that mechanized landclearing in seasonally dry or frozen wetlands will never result in such a discharge. We therefore do not believe there is a basis to exclude categorically such areas from the scope of this rule. Where a regulated discharge occurs, it is subject to this rule, regardless of the type of water of the U.S. in which it occurs.

In response to the commentor's request that corduroy roads, (i.e., roads which are created by placing cut timber and brush along the centerline of a utility line corridor through a wetland without the addition of dirt or rock fill), should be excluded from Section 404 regulation, we agree that this activity generally does not constitute a discharge of dredged material. However, this activity may constitute a discharge of fill material, and require Section 404 authorization. The agencies cannot, as suggested by this commentor, administratively expand the statutory exemptions for farm, forestry and mining roads to include corduroy roads used for utility line construction unrelated to farming, forestry, or mining operations.

Other activities that commentors contended should be excluded from regulation are: Maintenance of flood control structures according to design specifications; public health and safety projects; activities associated with the maintenance of natural or mitigated wetlands; construction or repair of water diversion structures to divert water under state water rights, where there is only a minor amount of excavation with temporary, minimal impacts; maintenance dredging of cooling water intake channels; dredging operations in wetlands; the creation of stormwater retention/detention basins for residential construction which involve only *de minimis* soil movement that should not destroy or degrade wetlands; certain wetland wildlife management activities, including wetland wildlife enhancement work and gravel placement in river channels to serve as salmon spawning habitat; and excavation in a dry streambed or similar areas, which will not cause destruction or degradation of a water of the United States.

We do not agree with these commentors that these activities would, as a general rule, not result in discharges of dredged material that would destroy or degrade waters of the U.S. For example, a category of activities such as "public health and safety projects" relates to the purpose of the activity, not to whether it causes additions or redeposits of dredged

material or whether it will destroy or degrade waters of the U.S. Activities associated with the maintenance of natural or mitigated wetlands might have an overall purpose of benefiting the environment, but may nonetheless cause certain adverse effects warranting review under Section 404. Such activities may be addressed through general permits if they would have minimal environmental impacts. Similarly, we do not believe that there is a basis for concluding that the other activities listed by this commentor will not destroy or degrade waters of the United States. However, some of these activities are authorized by existing nationwide and regional general permits. In addition, to the extent construction or repair of water diversion structures involve the construction or maintenance of irrigation ditches or the maintenance of drainage ditches, such activities may be exempt under Section 404(f) of the Act. Furthermore, we do not believe that today's rule will greatly burden the regulated public because, to the extent they involve minimal environmental impacts, the Corps will consider issuing general permits to regulate those activities.

Two commentors requested that the nationwide permits not be subject to the presumption and demonstration requirements of Section 323.2(d)(2). They recommended adding to § 323.2(d)(2), as follows: "(2) For the purposes of paragraph (d)(1), mechanized landclearing, ditching, channelization, or other excavation activities in waters of the United States result in a discharge of dredged material. Further, where such activities occur in waters of the United States and are not authorized under the Nationwide Permit Program at part 330, the activity is presumed to result in destruction * * *." We do not agree with the thrust of this comment. The tests in this rule go to the question whether an activity results in a discharge of dredged material requiring a permit under Section 404. By definition, activities already covered by a Section 404 permit (including nationwide permits) are subject to regulation. The scope, applicability and potential use of nationwide permits is not affected by today's rule. Those excavation activities that destroy or degrade waters of the U.S. but only have minimal adverse environmental effects may qualify for coverage under a nationwide permit. Corps districts are encouraged to develop general permits for those classes of mechanized landclearing, ditching, channelization, and other excavation that are determined to have only minimal individual and cumulative adverse effects.

Several commentors addressed discussion in the preamble to the proposed rule regarding "snagging," which we stated included "the removal of trees, parts of trees, or the like, from a water body to prevent their interfering with navigation." We concluded that such activities generally would not result in a discharge and therefore would not be subject to Section 404, unless in a particular case, the snagging operation would result in a discharge through redeposition of soil and would destroy or degrade a water of the United States. Some commentors agreed that snagging operations, such as the removal of trees and tree parts from streams, should be regulated. Two commentors stated that all snagging operations should be regulated. Another commentor asserted that snagging, especially in waters only subject to Section 404 jurisdiction and where Section 10 permits are not required, should be regulated because it involves a discharge and will result in significant adverse impacts to wetlands and water quality. One commentor suggested that the exclusion for snagging should be more narrowly defined to allow removal of tree and tree parts only where there is interference with navigation or where they are likely to obstruct normal stream flow. Several commentors expressed concern that the new proposed rules would negatively affect flood control activities, such as snagging and dredging, by requiring Section 404 permits. Two commentors stated that an exemption to Section 404 is needed for the maintenance of flood control projects that involve the removal of vegetation.

We have carefully considered these comments and believe that qualifying the term "snagging" in the proposal to include only the removal of trees and tree parts where that removal is to prevent their interfering with navigation is not appropriate. Therefore, for purposes of today's preamble, we are eliminating that qualification (i.e., prevention of interference with navigation). The determination of whether an activity involves a discharge of dredged material is not based on the intent of the activity; instead, that determination turns on whether there is any addition or redeposit of dredged material into waters of the United States. Where only vegetation is removed during a snagging operation and no discharge of dredged or fill material occurs, a permit is obviously not required. Consequently, snagging operations will only be regulated when they would result in incidental discharges through redeposition of soil and the activity would destroy or degrade waters of the United States. For this reason, we do not agree with the commentor who suggested inclusion of an additional qualifier (i.e., snagging only includes removal of trees or tree parts where they are likely to obstruct normal stream flow).

While today's rule may affect those flood control projects that involve snagging operations that result in discharges of dredged material by requiring authorization under Section 404, some such activities may already be exempted under sections 404(f)(1) (B) and (C), and others may be covered by current general permits. Also, in some cases, general permits may be developed where the adverse environmental effects of certain snagging operations that involve a discharge of dredged material into waters of the United States are determined to be minimal.

Several commentors expressed concerns that the regulation of excavation would affect normal drainage practices around small isolated wetlands that allegedly have little or no value. It is unclear what this commentor means by normal drainage practices. Section 404(f) provides an exemption for maintenance of existing drainage ditches, and such practices would therefore not be affected by today's rule. To the extent they are not exempt, such activities in small isolated wetlands may also be authorized by nationwide permit number 26 or other general permits. In general, however, we believe that the approach suggested by the commentor is overboard. Small isolated wetlands can be of great cumulative importance to the aquatic ecosystem. Categorically exempting drainage activities in these areas from Section 404 of the Act would therefore not be warranted or appropriate.

Two commentors stated that it was unclear how commercial sand and gravel dredging operations would be regulated and wanted exemptions for such operations. Several commentors wanted mining exemptions for the removal of overburden and sand and gravel mining operations in intermittent streams. While we appreciate these concerns, we believe that an exemption would be inappropriate for this type of activity since sand and gravel operations do involve excavation activities in waters of the U.S. and there is no basis to conclude categorically that these activities will not destroy or degrade waters of the U.S. Indeed, most mining activities result in significant alteration of the aquatic environment since their very purpose is to remove

overburden and substrate materials, and such activities generally would therefore have an identifiable adverse impact on the aquatic environment. We have, however, decided to include a grandfather provision for mining activities that have not been regulated prior to the adoption of this rule to allow time for operators to obtain the necessary permits and for the Corps to consider development and issuance of general permits for mining activities that have minimal individual and cumulative impacts.

One commentor expressed concern that the rule would regulate "normal reservoir operations." Such activities below the ordinary high water mark of a reservoir will often require Section 404 authorization; however, districts may develop regional general permits to authorize certain activities with minimal impacts, as appropriate.

One commentor expressed concern that the new regulations would discourage developers from creating stormwater management ponds through the excavation of existing wetlands. The agencies note that today's rule is not meant to "discourage" activities that comply with the Section 404(b)(1) Guidelines, including the construction of appropriate stormwater management ponds. Under today's rule, the creation of stormwater management ponds will be regulated under Section 404 to the extent that such creation involves a discharge of dredged material incidental to excavation activities which destroy or degrade wetlands or other waters of the United States. However, this does not mean these activities are prohibited, only that they require Section 404 authorization. As part of the permit evaluation process, the agencies will evaluate whether the proposal to excavate an existing wetland to create a stormwater management pond is the least environmentally damaging practicable alternative, and whether all appropriate actions have been taken to minimize impacts to the aquatic ecosystem, and whether other Section 404 permitting criteria are met. Moreover, to the extent creation of stormwater management ponds require the construction of dikes or berms, such activities would be regulated as a discharge of fill material, regardless of today's rule.

Several commentors indicated we should regulate the pumping of water because pumping water from a wetland has the same effect as draining, and, according to this commentor, "the impact of draining would be considered an identifiable decrease" in functions and values of waters of the U.S. We believe that pumping water from a wetland or other waters of the United States would not, in and of itself, necessarily result in a discharge of dredged material. *See Save Our Community* v. *EPA*, 971 F.2d 1155 (5th Cir. 1992). However, if excavation would be necessary to accomplish the pumping and the activity would destroy or degrade a water of the United States, then the discharge activity would be regulated under Section 404. Further, if the pumping resulted in a discharge of other pollutants to a water of the United States, such a discharge would be regulated under Section 402 of the CWA. Section 404 covers only discharges of dredged or fill material. We do not believe that simply placing a pipe into a water of the United States, per se, would necessarily involve a regulated discharge.

One commentor indicated that the deepening and widening of existing ditches should be regulated. Maintenance of existing drainage ditches are exempted from the permit requirement under Section 404(f)(1)(C), provided the original dimensions of the drainage ditches are not increased. Those excavation activities in drainage ditches that deepen or widen an existing drainage ditch beyond the original dimension do not qualify for an exemption and, if they would expand the carrying capacity of the ditch, would likely alter the hydrological regime of adjacent areas, and therefore result in degradation.

Some commentors indicated that they believe that many excavation activities are beneficial to the environment and result in increased aquatic functions and values, including excavation for purposes of stormwater management and maintenance of ditches, and were concerned that many such activities will be regulated under Section 404. However, even though these activities may have some beneficial effects, they can still have adverse effects by, for example, altering the hydrology of an area of the water of the U.S. Therefore, they may be covered under this rule. However, the Corps will consider the use of general permits where such environmentally beneficial activities otherwise result in minimal impacts. In addition, particular cases where the applicant can demonstrate that the activity would not destroy or degrade a water of the United States would not be regulated under Section 404.

One commentor indicated that the preamble should clarify that the excavation of wetlands to place drainage tiles should be regulated under Section 404 since this involves a discharge and destroys wetlands. The excavation of wetlands to place drainage tiles is currently regulated under Section 404 unless such activities qualify for a Section 404(f) exemption. Activities that involve replacing existing field drainage tiles where the replacement does not increase the extent of drainage beyond that provided by the original tiling would generally qualify for such an exemption.

E. Normal Dredging Operations

Many commentors suggested that all discharges of dredged material should be regulated, stating that it does not seem reasonable or consistent to exclude discharges incidental to "normal dredging operations" for navigation, while regulating excavation for non-navigation purposes. One commentor stated that the proposal was extremely confusing because, while the preamble discussed eliminating the *de minimis* exemption, the proposed rule mentioned exemptions for certain *de minimis* activities. The commentor stated that the proposed rule has created a disparity with respect to excavation in waters of the United States versus normal dredging operations in navigable waters of the United States. Several commentors stated that, contrary to the explanation that normal dredging operations "generally do not alter the reach or flow or circulation of the waters, nor do they convert waters of the United States into dry land or degrade wetlands," these operations do in fact have negative impacts. These commentors further cited specific examples, including increased sedimentation, changes in salinity, loss of habitat, alteration of flows, changes in circulation and lowered dissolved oxygen concentrations. Two commentors stated that the exemption for normal dredging operations to maintain navigation is acceptable so long as the term "navigation channel" is clearly defined as that type of channel capable of carrying commercial traffic. However, those commentors stated that the extension or deepening of navigation channels should be regulated under Section 404.

Today's rule clarifies that "normal dredging operations" will continue to be excluded from the definition of "discharge of dredged material." "Normal dredging operations" are defined as "dredging for navigation in navigable waters of the United States, as that term is defined in part 329 of this Chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that terms is defined at § 328.3 of this Chapter" (33 CFR 323.2(d)(3)(ii)).

There are several reasons for continuing to exclude incidental soil movement occurring during "normal dredging operations" from the regulatory definition of "discharge of dredged material." The overriding goal is to ensure that discharges of dredged or fill material into the waters of the United States are regulated in a satisfactory manner. In light of this goal, the Corps, as well as all other Federal or private dredging entities, fully comply with the regulatory requirements of the Section 404 process for any and all disposal of the dredged material removed from the navigation channel during dredging and discharged in the waters of the United States, whether that dredged material has been generated by Corps or other dredging operations. Furthermore, the Corps applies for state Section 401 water quality certifications and any required state permits for these disposal activities.

The Corps has established a two-part regulatory framework for the actual dredging portion of its own normal dredging operations. Prior to conducting any normal dredging operations for Corps dredging projects, the Corps must comply fully with its Operations and Maintenance dredging regulations. (33 CFR 209, 335, 336, 337, and 338.) These regulations were developed by the Corps in 1986 specifically to address environmental and other aspects of normal dredging operations on the waters of the United States. Pursuant to these regulations the Corps must fully comply with NEPA, the Clean Water Act, including Section 401, the Coastal Zone Management Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the Marine Protection Research and Sanctuaries Act, and all other applicable environmental laws. Furthermore, each time a federally authorized navigation channel is designated or modified, Congress, in effect, conducts a public interest review through the authorization process. This provides another safeguard that the subsequent normal dredging operations to maintain these channels are in the best interests of the Nation.

The procedure is different for those normal dredging operations conducted by other Federal agencies or non-Federal entities. The Corps requires that these dredgers apply for a Section 10 Rivers and Harbors Act permit. The Section 10 permit process includes an extensive public interest review pursuant to which any adverse impacts of the proposed dredging are fully discussed and analyzed. The Corps must ensure that NEPA, CWA Section 401, the Coastal Zone Management Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the Marine Protection Research and Sanctuaries Act, and all other applicable Federal environmental laws are complied with prior to granting a Section 10 permit.

Considering these various types and levels of review, the Corps and EPA have concluded that it would not be in the public interest to require that the Corps, other Federal agencies, and private entities also be required to secure a Section 404 permit for each normal dredging operation. This process would be resource intensive and duplicative, and would only serve to divert limited Corps and EPA resources away from permit applications that deserve our careful scrutiny.

Additionally, the Corps and EPA believe that this is an appropriate approach because, as a general rule, normal dredging operations which have been subjected to the above regulatory process and associated environmental safeguards do not have a substantially adverse effect on the aquatic environment. It may be true, as some commentors have stated, that normal dredging operations can, in some cases, cause changes in sedimentation, salinity, habitat, flows and circulation patterns, and dissolved oxygen concentration. However, the Corps and EPA believe that these impacts are adequately addressed as part of the regulatory and congressional review processes described above and do not warrant the additional scrutiny of the Section 404 regulatory process.

As stated above, two commentors agreed that normal dredging operations conducted in Federal (Corps of Engineers) navigation channels should not be regulated under Section 404; however, these commentors argued that any deepening or extension of these channels should be regulated under Section 404. We disagree, and see no reason to distinguish between normal dredging operations, on the one hand, and channel deepening or extensions, on the other hand. For one thing, Congress must authorize any major extensions of, and any deepening of, any Corps Federal navigation channel. Through this authorization process, Congress is responsible for determining whether it is in the public interest to conduct these activities. Moreover, Federal agencies and non-Federal entities must apply for a Section 10 permit for any project to extend or deepen a Federal navigation channel.

The Corps' and EPA's position that incidental soil movement associated with normal dredging operations does not constitute a discharge under Section 404 is specifically addressed in the Corps' regulations at 33 CFR 323.2. Since 1977, the Corps has consistently held that Section 404 does not apply to incidental soil movement during normal dredging operations. We continue to believe that "normal dredging operations" to maintain or deepen navigation channels in the navigable waters of the United States, with proper authorization from the Congress and/or the Corps under Section 10, will not result in significant environmental impacts affecting the reach or flow or circulation of the waters, nor do they convert waters of the United States into dry land. The definition of "normal dredging operations" excludes dredging that takes place in wetlands. We made this exclusion to reflect the fundamental purpose of the normal dredging operations exception, which is to allow for the maintenance of navigation channels. We believe it would be a rare and exceptional circumstance for a party to propose dredging wetlands for purposes of navigation. If such an exceptional case were to arise, however, we believe that the activity should be evaluated under Section 404 in light of the special functions and values of wetlands that Section 404 is specifically designed to address.

As we stated in the proposed rule, it is our desire to avoid duplicative regulation of dredging itself in waters within the jurisdictional scope of the Rivers and Harbors Act. Normal dredging operations in the navigable waters will continue to be regulated and evaluated under Section 10 of the Rivers and Harbors Act of 1899.

F. Section 404(f)(1)(A) Exemptions

Several commentors expressed concern that the language of the proposed rule might be construed as weakening the exemptions provided for normal farming, silviculture, and ranching activities under Section 404(f)(1)(A). A few commentors urged the continued exemption for normal farming and forestry practices as provided in Section 404(f). Many commentors requested clarification that the 404(f)(1) exemptions would not be affected by the new regulations and some requested that the following language be added to the rule: "The term 'discharge or dredged material' does not include activities defined in 33 CFR 323.4(a)." One commentor requested assurance by suggesting changing § 323.2(d)(2) to state that the existing exemptions of Section 404(f) are not presumed to have the effect of destroying or degrading waters of the United States. A few commentors stated that § 323.2(d)(1) be amended to read

"the term does not include the activities defined in § 323.4(a)(1)–(6)." We disagree that any further clarification is necessary. As indicated in the Preamble of the proposed rule, this rule does not change, in any way, the manner in which the Corps and EPA determine whether an activity is exempt under Section 404(f) of the CWA. Therefore, this regulation will not, in any way, affect the exemptions for normal agriculture, silviculture or ranching activities now provided by Section 404(f)(1)(A) of the CWA, or any of the other exemptions found in Section 404(f)(1).

As part of today's rule, the agencies have also made an additional minor revision to the Corps' definition of "discharge or dredged material" which would make EPA's and Corps' definition consistent with each other and conform the definitions to the language and intent of Section 404(f). The EPA' pre-existing definition expressly excludes "plowing, cultivating, seeding and harvesting for the protection of food, fiber and forest products." 33 CFR 323.2(d). EPA's current definition, by contrast, does not contain this exclusion, see 40 CFR 232.2(e), although the proposal would have added the Corps' language in EPA's definition. The final rule deletes this exclusion entirely from the definition of "discharge of dredged material" because it has created confusion with regard to the effect of today's rule on the Section 404(f) exemptions.

This exclusion in the Corps' regulation predates the adoption of Section 404(f) in the 1977 Amendments to the CWA. Clean Water Act of 1977, Public Law No. 95–217, 91 Stat. 1566 (amending 33 U.S.C. 1251–1376). Section 404(f)(1)(A) expressly lists these activities as examples of normal farming, silviculture, and ranching activities exempt from Section 404, unless the activities would be recaptured under Section 404(f)(2). The exclusion of these activities from the definition of "discharge of dredged material" is broader than the exemption in Section 404(f) because, under the Corps' regulatory definition, these activities would never require a Section 404 permit, even if they would have effects "recapturing" the activities under Section 404(f)(2). Since Congress expressly stated in Section 404(f) that discharges associated with these activities require a permit if they would be recaptured under Section 404(f)(2), we believe that the exclusion in the current rule should be deleted in order to be consistent with Congressional intent in this area. The Corps and EPA reiterate that today's rule, including deletion of this sentence, has no effect with regard to the scope and applicability of the Section 404(f) exemptions. This is further emphasized in the rule at §§ 323.3(d)(3)(iv) and 232.2(e)(3)(iv). Under Section 404(f)(1), discharges of dredged or fill material associated with certain activities, including normal farming, ranching, and silviculture activities, are exempt from the Act's permit requirement, provided that they are not "recaptured" under Section 404(f)(2).

G. Grandfather Provision

Numerous commentors requested that the Corps and EPA include a grandfather provision as part of the revised definition of "discharge of dredged material." In light of these comments and consistent with past Corps practice, the Corps and EPA have included such a provision in this part of the final rule.

By including a grandfather provision here, the Corps and EPA are intending to avoid application of the revised definition of "discharge of dredged material" in a manner that would frustrate the reasonable expectations of persons who, as explained below, justifiably relied on the previous definition of that phrase as interpreted by the regulatory agencies. At the same time, however, we are also mindful of the goals of today's rule and the overall goals of the Clean Water Act.

Therefore, we have developed procedures to "grandfather" certain "discharges of dredged material" that, in some Corps districts, were not considered to be subject to regulation under the previous definition of that term. Under these procedures, Section 404 authorization will not be required for discharges of dredged material associated with ditching, channelization and other excavation activities in waters of the United States where such discharges were not previously regulated and where such activities had commenced or were under contract prior to the date of publication of this final rule in the Federal Register, and where such activities are completed within one year from the date of publication of the final rule. This provision does not apply to discharges associated with mechanized landclearing because the Corps current policy (reflected in RGL 90–5) has generally subjected this activity to Section 404 regulation. To further ensure that implementation of the revised definition proceeds in a fair and equitable manner, the Corps will be able to extend the one-year grandfather provision on a case-by-case basis subject to the following three conditions: (1) The excavation activity is of a type that occurs on an ongoing basis, either continuously or periodically (e.g., seasonally); (2) the discharger submits a completed individual permit application to the Corps within one year from the date of publication of this final rule; and (3) the total time period within which the excavation activity proceeds subject to this grandfather provision does not exceed three years from the date of publication of today's rule. The agencies recognize that the revised definition of "discharge of dredged material" is likely to apply to some persons who have been engaging in ongoing excavation activities, such as some mining or sand and gravel operations, which given their ongoing nature on either a continual or periodic basis, will not be able to be completed within one year from the date of publication of today's rule. Therefore, in situations where persons engaged in excavation activities occurring on an ongoing basis have acted in good faith by submitting a complete individual permit application seeking Section 404 authorization for such activities no later than one year from the date of publication of this rule, the agencies believe it is appropriate to retain sufficient flexibility to ensure that such persons are not prevented from proceeding with these excavation activities pending the evaluation of a Section 404 permit application for the discharges associated with the activity. The agencies have further determined that a grandfather period not to extend beyond three years from publication of today's rule is sufficiently long to ensure fair and equitable treatment of the regulated community in a manner consistent with the environmental goals of this rulemaking and the Clean Water Act. Moreover, discharges associated with activities that were regulated by a particular Corps district prior to the promulgation of this rule will not be subject to the grandfather provision in the regulation. If a discharger is uncertain whether its activity was regulated by the Corps district in which the discharge would take place, the discharger should contact the Corps district. Finally, the grandfather provision does not apply to landclearing activities, since the Corps has interpreted current regulatory provisions as covering mechanized landclearing under the Section 404 program since 1990. See RGL 90–5.

H. General Permit Comments

We invited public comment to identify mechanized landclearing, ditching, channelization, or other

excavation activities that would generally have minimal environmental impacts and therefore be potential candidates for authorization under general permits. Several commentors suggested activities that are either exempt from regulation or already covered under the nationwide general permit program. Several commentors suggested that activities having minimal environmental impacts should be authorized by general permits, but they did not give specific candidate activities. Another commentor indicated that all activities should be regulated on a case-by-case basis. Several activities were suggested for authorization by general permits. These include all mechanized landclearing; mechanized landclearing in seasonally dry or frozen wetlands where brush and timber cutting occurs above the soil surface; landclearing for creation and maintenance of utility line or overhead transmission line corridors; water diversion structures constructed to exercise water rights; activities when states already have effective regulatory controls; discharges incidental to dredging or excavation to improve fish and/or wildlife habitat or to restore previously filled wetlands; excavation in dry streambeds; use of a hydroax to clear vegetation; creation of stormwater retention/detention basins for residential construction; and sand and grsvel mining activities having minor impacts.

The general permit program is an extremely important regulatory tool used by the Corps to regulate effectively activities with minimal impacts on the aquatic environment. The Corps does not have the resources to regulate all activities on a case-by-case individual permit basis. Therefore, we must focus our resources on those activities with more than minimal impacts. Moreover, general permits are very effective in protecting the aquatic environment, because they are issued with stringent conditions that limit authorized activities to those with minimal adverse effects. This regulation may increase the number of discharges regulated by the Corps nationwide. In order to administer reasonably the regulatory program and protect effectively the environment, the Corps will identify those activities with minimal impacts and pursue development of general permits. We appreciate the suggestions made and will consider them for possible issuance as nationwide or regional general permits in the near future. Any proposed nationwide permits will be published in the Federal Register and any proposed regional general permits will be proposed by public notice to obtain public comment before a decision is made whether to issue such nationwide or regional general permits.

IV. Revision to Definition of "Discharge of Fill Material;" 33 CFR 323.3(c) and 40 CFR 232.2(r)

We have organized the numerous comments on the regulation of pilings as fill material into several issues. Our discussion of the comments is provided below.

A. Summary of Major Issues and Changes From the Proposal

Many commentors supported the proposed revisions on the grounds that the regulation of the placement of pilings as a discharge of fill material was necessary under Section 404 to ensure that adverse impacts to wetlands and other aquatic resources are minimized. Many of these commentors, as explained in more detail below, also argued that the placement of pilings should be regulated as a discharge of fill material in *all* circumstances, and that the proposed revisions contained unnecessary and unjustified limitations and exceptions. Other commentors contended that EPA and the Corps lacked the authority under the CWA to regulate the placement of pilings as fill material. Concerns were also raised by commentors that the terms used in the proposed revisions were not adequately defined by the agencies.

Based upon public comments, the agencies have made certain changes to the language in the regulations to clarify when the placement of pilings constitutes a discharge of fill material subject to regulation under Section 404. Under the final rule, the placement of pilings in waters of the United States shall require a Section 404 permit when such placement has or would have the physical effect of a discharge of fill material.

The agencies have made two major changes to the rule in response to public comments. First, we have deleted the "functional use and effect" test in the proposed rule. In addition, the final rule does not contain an exception for structures "traditionally constructed" on pilings. For the reasons explained further below, we agree with commentors who argued that the physical effect of the placement of pilings (as opposed to its functional use, or whether the structure was traditionally placed on pilings) should be the focus for determining when placement of pilings constitutes a discharge of fill material. We recognize, however, that some projects generally use pilings in a manner that does not result in the same physical effect as the placement of fill material. Consequently, the final rule notes that placement of pilings for these projects (i.e., linear projects, piers, wharves, and individual houses on stilts) generally do not have the effect of a discharge of fill material and therefore a Section 404 permit will generally not be required for these projects. The Corps and EPA, nevertheless, reserve the right on a case-by-case basis to determine that the proposed placement of pilings to support a particular linear project or a particular pier, wharf, or individual home on stilts does have or would have the effect of fill material and therefore requires Section 404 authorization.

B. Need for Regulating Pilings Having the Effect of Fill

The Corps adopted RGL 90–8 in order to address projects placed on pilings in waters of the U.S. that would have the kinds of adverse environmental consequences generally associated with discharges of fill material, but which were not subject to any environmental review under Section 404 to avoid or mitigate those adverse effects. For example, in one case, a developer proposed a large, multi-use high rise waterfront complex which would have covered over 16 acres of the East River in New York. The developer proposed an unconventional construction method, using pilings instead of solid fill to support the 16 acres of structures. The developer apparently pursued this course of action in order to try to avoid the necessity of obtaining a Section 404 permit. To provide the necessary structural support, the pilings would have been so large and so closely spaced that they would have physically displaced over 20% of the bottom surface area and the water column. In addition to the physical displacement of aquatic habitat due to the extraordinarily dense spacing, the project would have substantially altered current and sedimentation patterns such that at least some of the covered area would have silted in and eventually lost its character as a water of the U.S.

In another case, a 13-acre hotel/office development project was proposed to be constructed in palustrine forested wetland in New Jersey. This wetland was identified as habitat for more than 80 species of birds, including numerous migratory birds that had witnessed decreasing population numbers due to fragmentation and loss of habitat. The developer originally proposed that the project be built on fill material, which would have required a Section 404 permit, but subsequently proposed to

build virtually the identical project on 12-16 inch diameter pilings. While the pilings did not need to be spaced densely to support the structure, as in the East River situation, the platform supporting the 13 acre development would have rested from 3 inches to approximately one foot above the wetland. The project would therefore have prevented sunlight from reaching almost all of the 13 acres of wetlands underneath the structures, thereby making wetland vegetation growth impossible and causing the area to lose virtually all of its wildlife habitat value. The project also would have contributed to soil erosion by killing vegetation that provide soil stability, resulting in interference with the site's natural flood protection function, and impairment to downstream water quality. Ultimately, the developer decided not to pursue this project.

In both of these cases, the environmental effects of the projects would have been severe, comparable in many respects to the effects that would have resulted had the projects been built on fill material. Adoption of RGL 90–8 reflected the Corps' belief that allowing such projects to proceed without any environmental review under Section 404 would not be consistent with the goals and objectives of the CWA or Section 404. Regulating pilings when the project would have the effect of fill will therefore help insure that potentially damaging activities constructed on pilings in waters of the United States are reviewed under Section 404.

C. Comments on Agencies' Legal Authority To Promulgate This Aspect of the Regulation

Several commentors argued that EPA and the Corps lack legal authority under the Clean Water Act to issue the proposed regulation. These commentors, however, did not cite any provision of the statute or discussion in the legislative history to support this contention; they simply asserted that placement of pilings having the effect of fill was not the same thing as a discharge of fill material itself. We believe, however, that today's rule is a reasonable exercise of our authority under the statute.

The CWA does not define the term, "fill material." Nor does the CWA specifically address, in any manner whatsoever, whether the placement of pilings in waters of the U.S. is a discharge of fill material subject to Section 404 of the Act. Therefore, it is up to EPA and the Corps to determine a reasonable regulatory approach to this activity, consistent with the language and purposes of the CWA. We have made what we believe to be a very straightforward determination here that placement of pilings is a discharge of fill material when it would have the effect of fill material on waters of the U.S. The agencies believe that this approach is entirely consistent with the language of the Act, and helps effectuate the underlying goal of the statute of protecting our nation's aquatic resources.

Several commentors requested that we not pursue this rulemaking but instead wait to see how Congress addresses pilings in the upcoming reauthorization of the CWA. Because this rule is entirely consistent with existing statute, we see no reason to delay promulgating this rule.

One commentor argued that there is no justification for regulating certain pilings under Section 10 of the Rivers and Harbors Act, but not regulating them as "fill" under the Clean Water Act, when the pilings are placed in waters subject to jurisdiction of both Acts. This commentor also suggested that Section 10 jurisdiction does not substitute for Section 404 jurisdiction. Today's decision to define fill material under Section 404 to include the placement of certain pilings is not in any manner related to the regulation of pilings under Section 10. Section 10 establishes an independent regulatory program that regulates any work, among other things, in navigable waters that affects the navigable capacity of those waters. Regulatory jurisdiction under Section 10 does not depend to any degree on whether the work involves a "discharge of fill material." Therefore, we do not believe, as this commentor does, that the scope of activities regulated under Section 10 of the Rivers and Harbors Act and Section 404 of CWA must be the same.

D. Establishment of "Effects" Tests and Exceptions to the Regulation of the Placement of Pilings as Fill Material

The proposed rule contained language that would have regulated the placement of pilings where the pilings were essentially equivalent to a discharge of fill material in physical effect or in functional use and effect. In addition, the rule would have provided exceptions to the regulation of the placement of pilings as fill material in circumstances involving linear projects or projects which have traditionally been constructed on pilings.

Commentors expressed several concerns with this approach. First, several commentors contended that all pilings, without exception, should be regulated. One commentor also argued that pilings are by definition "fill material" and therefore must be regulated in all cases. Numerous commentors were concerned that the proposed rule was arbitrary since it would regulate the placement of pilings based on what type of structure is built on the pilings. Asserting that the functional use of the pilings is irrelevant, several commentors suggested that the agencies rely solely on the physical effect test to determine when the placement of pilings would constitute fill material. Other commentors disagreed, supporting the inclusion of a functional use and effect test.

We agree with commentors who argued that it is not appropriate to determine whether Section 404 applies to the placement of pilings solely on the basis of the functional use of the pilings or whether the structures on the pilings have traditionally been built in this fashion. As discussed earlier, the agencies have deleted the "functional use and effect" test set forth in the proposed rule. We agree with certain commentors that this test was vague, and that focusing on the use of the pilings structure is not appropriate where our paramount concern is the effect of the placement of pilings on the aquatic environment. Our primary motivation in adopting the pilings RGL in December 1990 and in proposing this rule, has been to address the growing practice among some project proponents of building large development projects on pilings, even though they would normally have been placed on top of fill material. In these cases, the projects had a clear adverse impact on the aquatic environment, yet no permit was being required for the activity. While the type of structures built on top of pilings can be indicative of how the pilings will affect the aquatic environment, ultimately it is the effect of the pilings that is of concern to us. Focusing solely on those effects will therefore simplify implementation of this regulation.

For the same reasons, the final rule provides that the placement of pilings will not be excluded from regulation under Section 404 based on whether the structures they support are traditionally constructed on pilings. The final rule will require a Section 404 permit when the placement of pilings has or would have the effect of a discharge of fill material; this test will be applied in all circumstances. The final rule also provides examples of activities that generally have the effect of a discharge of fill material, including the following: projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the

pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

We disagree, however, with the commentor who argued that the placement of a piling is by definition a discharge of fill material in all cases and that all pilings must therefore be regulated under Section 404. As discussed above, the CWA does not define fill material. We believe that it is reasonable to define the placement of pilings as a discharge of fill material when such placement would have the effect of fill material. This commentor apparently believes that EPA and the Corps are compelled to regulate the placement of a piling in waters of the United States as a discharge of fill material, even where the placement would not have effects associated with discharges of fill material. We see no provision of the Clean Water Act that would compel the adoption of such an approach. We have taken what we believe to be a straightforward and common-sense approach to defining when the placement of pilings is a discharge of fill material, an approach that we believe is entirely consistent with the Clean Water Act.

Several commentors raised concern over the exception for the placement of pilings in linear projects. Some commentors suggested deleting the exception based on their concerns that adverse impacts to the aquatic ecosystem would occur as a result of the construction of linear projects. One commentor suggested that linear projects not be excepted if the project would "significantly alter the flow of water or increase sedimentation so that the quantity and quality of habitat is reduced." One commentor also suggested that the exception for projects that have traditionally been constructed on pilings be eliminated, while another commentor was concerned that determining what constitutes a pier or marina is subject to "elastic interpretations" and therefore should not be exempted. Other commentors supported the exception for linear projects, and one commentor requested that "hot-oil" pipelines constructed in Alaska's North Slope be included in the list of linear projects where the placement of pilings would not require a Section 404 permit. Some commentors argued that the proposed exceptions were too narrow, and suggested additional examples of activities involving the placement of pilings that should not be considered a discharge of fill material. In particular, several commentors suggested that the examples of structures that would not require a Section 404 permit due to their having been traditionally constructed on pilings should be expanded to include "commercial and industrial structures interrelated to wharves, piers, and marinas." Finally, one commentor suggested that all non-water dependent activities in waters of the United States be regulated under Section 404.

We believe that linear project construction on pilings will generally not have the physical effect of fill material. We recognize, however, the possibility that such projects could, in certain cases, have the effect of fill material and therefore should be subject to Section 404. Therefore, the regulation does not establish a definitive rule that linear projects will never have the effect of fill material.

Nonetheless, we believe that it will be a rare case when pilings used for linear projects have the effect of fill material and require authorization under Section 404. The most significant factors in determining whether placement of pilings has the effect of fill material are how densely the piles are placed, the size of the pilings, and the ground clearance of the structures built on pilings, and the overall areal coverage of the structures built on pilings.

Closely spaced pilings of any size, for example, can have the effect of substantially replacing an aquatic area. Very large pilings, regardless of their spacing, may also substantially replace an aquatic area. Large or closely spaced pilings can also affect current patterns and sedimentation rates. The above-ground clearance, and the overall areal coverage of the structures built on pilings, affect the suitability of the area underneath for vegetation and wildlife. The losses of aquatic and wetland functions and values under these circumstances can be the same as would occur from the discharge of fill material itself.

Most linear projects (piers, wharves, bridges, elevated roads and pipelines, etc.) do not require either closely spaced pilings or overly large pilings since they generally do not support massive structures requiring great support. Also, although some linear projects (e.g., bridges and elevated roads and pipelines) may be quite long, they generally are not very wide, and therefore would generally not result in the overall areal coverage that can result in substantial adverse effects on vegetation and suitability of the area as wildlife habitat.

Although an individual home on pilings is generally not "linear" in design, it generally shares many of the same attributes as linear projects so that we believe that it generally will not have the effect of fill material. Most pile supported individual houses require neither closely spaced nor large pilings. An individual home also generally does not cover large areas. Some commentors objected to the term "single-family" houses contained in the proposed rule. We agree that this term was somewhat vague and confusing. We have substituted the word "individual" for "single-family" in the final rule in order to more effectively exclude larger structures (e.g., a development of multiple single-family houses) that may indeed have the effect of a discharge of fill material, as outlined above.

We do not take the position that pile supported linear projects and an individual house on pilings can never have any adverse effects on the aquatic ecosystem. Obviously, aquatic life located where a single piling is placed will be crushed by the placement of the piling. Similarly, even less-than-massive structures on widely spaced pilings have some effects on the aquatic environment. We, however, are concerned with the cases where the pilings and structures they support cause impacts on the aquatic environment comparable to those which occur with the discharge of fill material (i.e., by displacing many or all of the aquatic functions of an area). Today's rule will ensure that such effects do not occur without undergoing environmental review under Section 404 of the CWA.

We do not agree with commentors who argued that we should expand the proposed exceptions to include "commercial and industrial structures interrelated to wharves, piers and marinas." Such a broad category of structures could certainly include those with large area coverage or those built on large or closely spaced pilings; therefore we cannot find as a general matter that these types of structures generally would not have the effect of fill material.

Several commentors expressed concern over the manner in which the effects tests were defined. Some of these commentors suggested that the rule should be consistent with the test proposed for determining whether a discharge of dredged material occurs, i.e., the rule should clarify that the placement of pilings should be regulated as a discharge of fill material only when the activity would destroy or

degrade any area of waters of the United States. One commentor suggested that the proposal to regulate the placement of pilings as fill material when a project "significantly alters or eliminates aquatic functions and values" was too vague. Another commentor was concerned that the proposed test of whether the "pilings are so closely spaced that sedimentation rates are increased" would be difficult to implement given technical difficulties in predicting sedimentation rates. Commentors also requested that we develop specific thresholds, such as flow/temperature, or volume change, to determine if pilings have the same physical or functional effect as fill material. For example, one commentor recommended setting a standard volume of piles to be used in one project below which a project would not be regulated because there would be "minimal environmental impact." One commentor suggested that use of the phrase "essentially the same effects as fill" was vague, and left open questions of how similar the effect would have to be in order to be "essentially the same."

The agencies disagree with the comments that suggested the inclusion of the same "destroy or degrade" test proposed for the definition of "discharge of dredged material." We note that the definition of "discharge of dredged material," unlike that of the "discharge of fill material," historically has contained an exclusion for *de minimis* discharges associated with "normal dredging operations." As part of today's rule, the agencies are narrowing that exclusion in a manner that we believe carries out the purposes and objectives of the CWA. There is no comparable language in the agencies' definition of "discharge of fill material" and we see no justification for adding such language.

In response to the comment that "significantly alters or eliminates aquatic functions and values" was too vague, we have deleted the term "significantly." We agree that this qualifier would add confusion to the determination of whether the placement of pilings should be regulated as fill material, and is unnecessary. We agree with the comment that precise predictions would be difficult. We believe, however, that Corps and EPA staff are able to make general predictions regarding sedimentation rates that may result from the placement of pilings. Moreover, we believe that such generalized findings would be sufficient to determine whether a placement of pilings would have the effect of a discharge of fill material. Consequently, we have retained this part of the proposed rule without modification.

We agree with the concern expressed over the use of the term "large" when referring to structures, and have deleted it from the final rule. We have not set specific standards or thresholds to measure the physical effect of pilings as suggested by comments, as we believe the circumstances related to each situation are so diverse that setting specific standards would be inappropriate. Instead, we believe the determination of the effect of the placement of pilings should be determined on a case-by-case basis considering the facts of each individual case. We agree with the commentor that "essentially" the same is unclear, and we have deleted use of the term "essentially" in the final rule.

E. Additional Comments

A few commentors expressed the need to note specifically that existing nationwide permits are not affected by this rule and that activities determined not to be subject to Section 404 regulation may still need a Section 10 permit when undertaken in traditionally navigable waters of the United States. With regard to the first point, today's rule does not modify, in any manner, current authorizations provided by existing nationwide permits. However, the Corps will examine the need for additional general permits under Section 404 for those projects involving the placement of pilings that have less than minimal adverse effects on the environment. In addition, as specifically provided for in today's rule, the placement of pilings in traditionally navigable waters of the United States remains subject to authorization under Section 10 of the Rivers and Harbors Act.

Another commentor expressed concern that the regulation will prohibit construction of any structures in wetlands (either on fill material or on pilings). This is clearly not our intent. The Corps authorizes thousands of projects involving fill material every year, and the Corps expects to authorize activities on pilings where appropriate. One commentor proposed that a set of quantifiable standards be developed for how and where structures such as decks may be built. We believe that national standards for pile supported structures are inappropriate; instead, these determinations are more properly addressed on a case-by-case basis in the permitting process. One commentor suggested that pilings should be defined to include pile caps, columns, piers and abutments which are part of linear projects, such as bridges. We agree with this comment.

V. Revision to the Definition of Waters of the United States to Exclude Prior Converted Cropland

A. Background and Rationale for the Final Rule.

The agencies proposed to add language in the definition of waters of the U.S. providing that the term does not include prior converted ("PC") cropland, as defined by the National Food Security Act Manual (NFSAM) published by the Soil Conservation Service (SCS). PC cropland is defined by SCS as areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible. PC cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothold or playa wetlands. EPA and the Corps stated in the preamble to the proposal that we were proposing to codify existing policy, as reflected in RGL 90–7, that PC cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands.

Some commentors supported the proposed change. They felt that it was important for EPA, the Corps and the Department of Agriculture to follow consistent procedures and policies, because to do otherwise undermines the credibility and effectiveness of federal wetlands protection programs. Other commentors opposed the change in its entirety or took issue with specific aspects of the PC cropland definition that they believed were inappropriate. We have decided to retain the approach contained in the proposed rule. The reasons for this approach and responses to comments opposing the proposal are discussed below.

As stated in the preamble to the proposal, we are excluding PC cropland from the definition of waters of the U.S. in order to achieve consistency in the manner that various federal programs address wetlands. One commentor argued that such consistency is not a "goal of the CWA," and that it was therefore not appropriate to base wetlands policy on this consideration. We believe, however, that effective implementation of the wetlands provisions of the Act without unduly confusing the public and regulated community is vital to achieving the environmental protection goals of the Clean Water Act. The CWA is not administered in a vacuum. Statutes other than the CWA and agencies other

than EPA and the Corps have become an integral part of the federal wetlands protection effort. We believe that this effort will be most effective if the agencies involved have, to the extent possible, consistent and compatible approaches to insuring wetlands protection. We believe that this rule achieves this policy goal in a manner consistent with the language and objectives of the CWA.

Moreover, we believe that excluding PC cropland from the definition of waters of the U.S. is consistent with EPA's and the Corps' paramount objective of protecting the nation's aquatic resources. By definition, PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA.

The altered nature of PC cropland was discussed in RGL 90–7, in which the Corps concluded that cropped conditions constitute the "normal circumstances" of such areas. The Corps contrasted FC cropland with "farmed wetlands," defined by SCS as potholes and playas with 7 or more consecutive days of inundation or 14 days of saturation during the growing season, and other areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season. Because the hydrology of farmed wetlands has been less drastically altered than it has for PC cropland, the Corps stated in RGL 90–7 that farmed wetlands continued to retain their basic soil and hydrological characteristics, and that such areas should therefore be considered to be wetlands.

B. Technical Validity of Excluding PC Cropland From Regulation Under Section 404

Several commentors argued that it was not technically valid to treat all PC cropland as non-wetlands. These commentors pointed out that the SCS definition of PC cropland excludes areas that are inundated for more than 14 consecutive days a year, and they argued that this requirement was inconsistent with EPA's and the Corps' regulatory definition of wetlands, which includes areas that have wetland hydrology due to inundated or saturated soil conditions.

We believe that these commentors have oversimplified the relationship between the SCS definition of PC cropland and the wetlands definition under Section 404. In fact, except for a brief period of time after the adoption of the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual), the Section 404 program has generally not considered such farmed areas as meeting the regulatory definition of wetlands under the CWA. In 1986, the Corps issued RGL 86–9, which interpreted the phrase "normal circumstances" in our regulatory definition of wetlands as referring to an area's characteristics and use in the present and recent past. Under this interpretation, cropped areas did not constitute wetlands where hydrophytic vegetation has been removed by the agricultural activity. In the 1989 Manual, EPA and the Corps modified this approach and evaluated whether a cropped area retained wetland hydrology to the extent that wetland vegetation would return if the cropping ceased. Under the 1989 Manual, therefore, the phrase "normal circumstances," as applied to agricultural areas, meant the circumstances that would be present absent agricultural activity. The Corps ceased using the 1989 Manual in August, 1991 at the direction of Congress (Energy and Water Development Appropriations Act of 1992, Publ L. 102–580) and began using its earlier 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for wetlands delineations. EPA is currently also using the Corps' 1987 Manual in implementing Section 404 (See 58 FR 4995, January 19, 1993). While the 1987 Manual does not address application of the "normal circumstances" phrase as it relates to areas in agricultural production, both agencies continue to follow the guidance provided by RGL 90–7, which interprets our regulatory definition of wetlands to exclude PC cropland.

The evolution over the last several years in the EPA and Corps policy for delineating wetlands in agricultural areas attests to the difficult technical, legal and policy considerations that bear on this issue. We therefore disagree with commentors who seemed to believe that ascertaining the jurisdictional status of PC cropland is a cut-and-dried technical question readily resolved by reference to generally accepted delineation methodologies. In utilizing the SCS definition of PC cropland for purposes of Section 404 of the CWA, we are attempting, in an area where there is not a clear technical answer, to make the difficult distinction between those agricultural areas that retain their wetland character sufficiently that they should be regulated under Section 404, and those areas that been so modified that they should fall outside the scope of the CWA. As is inevitable where the government engages in such line-drawing, we recognize that the particular line we have chosen to draw is not perfect. Two areas that are inundated for 14 days and 15 days a season respectively may not, in fact, differ materially in terms of their function and values. This criticism, however, could be made no matter where we chose to draw the line between wetlands and non-wetlands. We believe that the distinctions under the Food Security Act between PC cropland and farmed wetlands provides a reasonable basis for distinguishing between wetlands and non-wetlands under the CWA. In addition to the fact that we believe this distinction is an appropriate one based on the ecological goals and objectives of the CWA, adopting the SCS approach in this area will also help achieve the very important policy goal of achieving consistency among federal programs affecting wetlands.

C. Role of SCS PC Cropland Determinations

In the preamble to the proposal, we stated that jurisdictional determinations under the CWA can only be made by EPA and the Corps. While we stated we would accept and concur in SCS determinations to the extent possible, this rule does not alter the final authority of EPA regarding CWA jurisdiction.

This discussion in the preamble was criticized by commentors from several angles. Some commentors were concerned that the proposed rule effectively "delegated" EPA's and the Corps' authority regarding CWA jurisdiction to SCS. Some of these commentors urged that SCS be required to obtain Corps (or EPA) concurrence for the purposes of making PC cropland determinations. From the other side, commentors argued that EPA and the Corps should not be allowed to make an independent judgment at a site, and should be required to defer absolutely to SCS determinations.

In response to these comments, we note that today's rule does not "delegate" EPA's ultimate authority for determining the scope of geographic jurisdiction under the CWA. At the same time, we believe it is critical that duplication between the SCS's wetlands program and the CWA Section 404

program be reduced. In that regard, we believe that farmers should generally be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the Section 404 program. In order to make this reliance possible, we are working with SCS to develop appropriate procedures, including monitoring, for coordinating wetland determinations by the agencies. We are also working with SCS to develop field guidance for implementing the 1987 Corps Manual to clarify procedures for identifying wetlands in areas managed for agriculture, and are expediting current efforts to revise the SCS's NFSAM to provide greater consistency between our wetlands delineation procedures. Moreover, we are also developing an interagency training program with SCS and other agencies to ensure that agency field staff are properly trained, and that standard, agreed-upon methods are utilized in making wetland determinations. However, in order to clarify the relationship between determinations made by SCS and the Corps or EPA, we have added language to the rule itself stating that the final authority regarding CWA jurisdiction remains with EPA.

We also disagree with commenters who stated that SCS should be required to obtain EPA or Corps concurrence in their PC cropland determinations. First, since SCS is the administering agency under the Food Security Act, we do not believe it would be appropriate to require that SCS obtain the concurrence of other federal agencies before making determinations under that statute. Moreover, requiring EPA/Corps concurrence on every PC designation made by the SCS would be an inefficient use of our limited resources, since a site being evaluated by SCS may not be one where a regulated activity will occur (i.e., a discharge of dredged or fill material not exempt under Section 404(f)). In those cases, a Section 404 delineation will not be necessary at all, and expending our resources on delineations in such cases would be a waste of taxpayer money. In light of EPA's ultimate statutory responsibility for determining the scope of CWA jurisdiction, we cannot satisfy commentors who argued that we should be required to defer absolutely to SCS determinations. However, recognizing SCS's expertise in making these PC cropland determinations, we will continue to rely generally on determinations made by SCS.

Many commentors expressed concerns about the alleged lack of consistency and reliability in SCS prior converted cropland determinations. These commenters stated that most SCS PC cropland determinations are made based on aerial photos, and they argued that site visits were necessary to accurately delineate wetlands under Section 404. As discussed earlier, the SCS, in consultation with the Corps and EPA, is working to improve the consistency of its prior converted cropland determinations.

D. Expand Exclusion to All Agricultural Areas

Some commentors argued that the exclusion of agricultural areas should not be limited to land that meets the SCS definition of PC cropland but that the exclusion should apply to any agricultural area that is not inundated for more than 14 consecutive days during the growing season. While these commentors believed there would be advantages to treating all agricultural areas similarly in this manner, we believe that such considerations are outweighed by the importance of achieving the goal of consistency with the PC definition under the Food Security Act.

E. Incorporation of NFSAM Into EPA/Corps Regulations

Several commentors made the procedural argument that adoption of the NFSAM by reference into EPA's and the Corps' regulations violated the Administrative Procedure Act. These commentors pointed out that the NFSAM had not yet gone through rulemaking when it was adopted by SCS and they argued that reference to the NFSAM in the proposed rule was not legally adequate. Other commenters questioned the appropriateness of incorporating the NFSAM into EPA's and the Corps' regulatory provisions when the agency that developed the manual (SCS) uses it as a guidance document. Some commentors also felt that EPA and the Corps should retain the flexibility to follow future revisions to the NFSAM made by SCS.

As explained above, one of the primary reasons that EPA and the Corps are amending the definition of waters of the United States to exclude prior converted croplands is to ensure consistency in the way various federal agencies are regulating wetlands. We believe that consistency with SCS policy will best be achieved by our utilizing the NFSAM in the same manner as SCS, i.e., as a guidance document used in conjunction with other appropriate technical guidance and field testing techniques to determine whether an area is prior converted cropland. We also agree with the commentors' arguments about the need to be able to maintain consistency with SCS in the future when revisions are made to the NFSAM; incorporating one version of the manual into EPA's and the Corps' regulations would impair our ability to follow future revisions to the NFSAM in administering Section 404. The final rule, therefore, continues to exclude prior converted cropland from the definition of waters of the United States, but does not specifically incorporate by reference the provisions of the NFSAM. EPA and the Corps will, however, implement this exclusion in a manner following the guidance contained in the NFSAM and appropriate field delineation techniques, and will continue to rely, to the extend appropriate, on determinations made by SCS. The Corps and EPA will continue to work with SCS on procedures for implementing the prior converted cropland portion of the NFSAM. We will also issue policy guidance directing our field staff to utilize the guidance in the NFSAM when determining the presence of wetlands on agricultural lands.

By codifying our existing policy that prior converted croplands are not waters of the U.S., the final rule strengthens the regulatory basis for not regulating these areas under Section 404. The fact that we have not incorporated by reference the actual provisions of the NFSAM into our rules does not undercut our ability to maintain this consistency. Rather, as explained above, we believe that utilizing the NFSAM as a guidance manual, as it is used by SCS, will enhance consistency in the administration of the Food Security and Clean Water Act programs.

F. Section 404(f) Exemptions

Some commentors expressed concern that codifying Regulatory Guidance Letter 90–7 would eliminate all exemptions for agricultural activities under Section 404(f)(1)(A) of the Act. Other commentors felt that the rule was not needed and that prior converted croplands should be considered exempt under the Section 404(f) normal farming activities exemption.

As previously stated in this preamble, today's rule will not eliminate or in any way effect the exemptions for normal farming, ranching, or silviculture activities in Section 404(f)(1). Moreover, the exemptions apply only to discharges and not to the issue of whether an area is within the geographic scope of Section 404.

G. Criteria for Abandonment

Some commentors expressed concerns that the abandonment rule was not clear. A few commentors opposed

the use of prior converted croplands for non-agricultural uses. One commentor objected to the fact that there is no mechanism providing for "recapture" into Section 404 jurisdiction of those prior converted croplands that revert back to wetlands. One commentor objected to the requirement that a prior converted cropland is considered abandoned unless it is used for the production of an agricultural commodity at a regular interval, stating that it should include use for any agricultural production, including hay and pastureland.

The Corps and EPA will use the SCS provisions on "abandonment," thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to Section 404 regulation. While we agree that SCS's abandonment provisions may be complex, SCS has been applying these provisions for several years in implementing the Swampbuster program, and farmers have become familiar with the standards used to determine whether a property has been "abandoned." If EPA and the Corps were to use different abandonment provisions in implementing today's rule, we believe the resulting inconsistency between the two regulatory programs would serve only to create confusion as to which standards are applicable to the same parcel of property. In response to commentors who opposed the use of PC croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas. The agencies also note that today's rule will provide a mechanism for "recapturing" into Section 404 jurisdiction those PC croplands that revert back to wetlands where the PC cropland has been abandoned. Finally, in response to the request that a PC cropland not be considered abandoned if the area is used for any agricultural production, regardless of whether the crop is an agricultural commodity, we note that SCS's abandonment provisions do recognize that an area may be used for other agricultural activities and not be considered abandoned. In particular, PC cropland which now meets wetland criteria is considered to be abandoned *unless*: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

H. Grandfather Clause

One commentor said that RGL 90–7 results in the retroactive grandfathering of illegal drainage activities between 1977 and 1985. It has been and continues to be the position of the Corps and EPA that unauthorized discharge activity cannot eliminate Section 404 jurisdiction. Therefore, wetlands that were converted to prior converted cropland between 1972 and 1985 as a result of unauthorized discharges of dredged or fill material do not constitute "prior converted cropland" within the meaning of today's rule and remain "waters of the United States" subject to Section 404 regulation.

VI. Environmental Documentation

Some commentors wanted the Corps to prepare an Environmental Impact Statement (EIS), arguing that this rulemaking constitutes a major federal action significantly affecting the quality of the human environment. Some commenters felt that since these rules protected wetlands, an EIS would be needed to determine such environmental effects as mosquito infestation, odors, and gases. Others wanted an EIS prepared because they felt that these rules would result in a loss of wetlands. One commentor requested that the Corps prepare an EIS for farming, forestry and ranching disturbances and other questionable wetland impacts before proceeding with further rulemaking.

Section 511(c) of the CWA provides that, except for certain actions not relevant here, no action by EPA constitutes a major federal action significantly affecting the quality of the human environment with the meaning of NEPA. In this joint rulemaking by EPA and the Corps, these two agencies are making substantively identical revisions to their regulations in order to better carry out the purposes of Section 404 of the CWA. EPA is exempt from NEPA under Section 511(c), and we believe that, under the circumstances of this joint rulemaking, the Corps is exempt as well.

Nonetheless, the Corps has prepared an environmental assessment and determined that there will not be a significant impact on the quality of the human environment. This assessment is contained in the record for this rulemaking. Consequently, an EIS has not been prepared by the Corps. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for all permit decisions.

VII. Executive Order 12291 and the Regulatory Flexibility Act

Numerous commentors indicated that a regulatory impact analysis under Executive Order 12291 should be done because the rule would allegedly cause an increase in the Corps' workload and in costs to permit applicants and because the rule will allegedly result in additional encumbrances or burdens on the public in the form of tax increases, project delays, project scrutiny and increased project costs. One commentor felt that agency resources would be diverted from larger, more significant projects by this rule. EPA and the Corps do not believe that this regulation meets the definition of a major rule under Executive Order 12291, and we therefore have not prepared a regulatory impact analysis for the rule.

Some commentors also argued that the agencies were required to perform a Regulatory Flexibility Analysis for this regulation under the Regulatory Flexibility Act, 5 U.S.C. 601–612. EPA and the Department of the Army certify, pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, that this regulation will not have a significant impact on a substantial number of entities. Therefore we have not prepared a regulatory flexibility analysis for this rule.

EPA and the Corps do not believe that this regulation will have a significant impact on a substantial number of small entities first because most of the components of this rule merely codify current agency policies and these aspects of the rule will therefore not result in any increased regulatory burden on the public, including small businesses. Since 1990, the Corps has followed the policy under RGL 90–5 of regulating mechanized landclearing activities under Section 404. Similarly, RGL 90–8 established, in December 1990, the Corps policy of regulating the placement of pilings when the activity would have the effect of discharge of fill material. The amendment of the definition of waters of the United States in today's rule also codifies the agencies' current policy of not regulating prior converted cropland under Section 404, as reflected by Corps RGL 90–7. RGL 90–7, moreover, eased the regulatory burden of the Section 404 program by excluding prior converted cropland from coverage under this provision.

EPA and the Corps believe, moreover, that coverage of discharges associated with ditching, channelization and other

excavation activities that would destroy or degrade waters of the United States should not result in a significant impact on a substantial number of small entities. Prior to today's rule, the Corps has uniformly regulated these activities where they were accomplished by excavating dredged material and sidecasting the material in adjacent waters of the United States. Conducting these activities without sidecasting dredged material is technically difficult and costly, and operators unable or unwilling to pay the costs to perform their activities in this manner have therefore already been subject to the Section 404 program. In addition, the practices of Corps districts have varied in this area, with some districts already regulating ditching, channelization and other excavation activities where dredged material was not sidecast. Therefore, we do not believe that the incremental regulatory burden associated with this aspect of the regulation should be significant.

Moreover, EPA and the Corps have included a provision in this regulation that would minimize any increased regulatory burden that may result from subjecting some activities to Section 404 jurisdiction for the first time. The rule does not regulate discharges of dredged material associated with activities that would not destroy or degrade waters of the United States. Establishing this threshold for requiring a Section 404 permit should be relevant for small entities in most instances, since they may be more likely than large operations to engage in minor activities having only a *de minimis* impact on the aquatic ecosystem. Some commentors believed that there would be regulatory impacts on the public due to regulating activities such as mowing, certain snagging activities, pumping, and vehicular traffic. While such activities may occur in waters of the United States, they generally do not involve a discharge of dredged material or would not have the effect of destroying or degrading a water of the United States and therefore would not trigger the requirement of a Section 404 permit.

In addition, as discussed elsewhere in this preamble, the Corps intends to issue general permits (regional or nationwide) for newly regulated activities that would have a minimal individual or cumulative impact on the aquatic environment. Issuance of general permits should further reduce any regulatory burden associated with complying with today's rule.

Finally, one primary purpose of the Regulatory Flexibility Act is to encourage agencies to explore regulatory alternatives that would minimize impacts of the regulatory scheme on small entities. See 5 U.S.C. 604(a)(2) (requiring that final regulatory flexibility analysis include "a description of each of the significant alternatives to the rule * * * designed to minimize any significant economic impact of the rule on small entities"). The only issue addressed in this rulemaking, however, is whether a discharge of dredged or fill material will require a Section 404 permit. Under Section 404, there are therefore only two regulatory "alternatives" available to the agencies: either a Section 404 permit is required or it is not. Section 404 does not authorize any other "intermediate" regulatory control mechanisms for regulated discharges that the agencies could consider establishing for small entities. Because, under Section 404, the requirement to obtain a permit is the sole tool for regulating activities covered by this provision, we do not believe that there are less burdensome alternatives available to achieve the objectives of this rulemaking. Rather, we believe that the appropriate forum for exploring means of reducing impacts on small businesses is through the permitting process itself (e.g., through issuance of general permits where appropriate, and by tailoring permit requirements to the severity of the environmental harm, which in turn may correlate with the size of the entity undertaking the project). As explained previously, the agencies have considered in this rulemaking alternatives that may, indirectly, have resulted in less of a regulatory burden on small entities (e.g., by excluding from regulation activities associated with a discharge of dredged material that would not have a "significant" effect on the environment). For the reasons explained in this preamble, however, we rejected these alternatives as not being consistent with the language, goals and/or objectives of Section 404. Therefore, we believe that the final rule reflects a regulatory approach that appropriately meets the requirements of Section 404.

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.

List of Subjects

33 CFR Part 323

Navigation, Water pollution control, Waterways.

33 CFR Part 328

Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, and 401

Wetlands, Water pollution control.

Dated: August 19, 1993.

Carol M. Browner,

Administrator, Environmental Protection Agency.

G. Edward Dickey,

Acting Assistant Secretary of the Army (Civil Works), Department of the Army.

Accordingly, 33 CFR parts 323 and 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232 and 401 are amended as follows:

33 CFR Chapter II—Corps of Engineers, Department of the Army

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

1. The authority citation for part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Section 323.2(d) is revised to read as set forth below.

3. Section 323.2(e) is amended by adding a sentence at the end that reads as set forth below.

4. Section 323.2(f) is amended by adding a sentence at the end that reads as set forth below.

§ 323.2 Definitions.

* * * * *

(d)(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

(i) the addition of dredged material to a specified discharge site located in waters of the United States;

(ii) the runoff or overflow from a contained land or water disposal area; and

(iii) any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such

material may require a permit from the Corps or applicable state Section 404 program.

(ii) activities that involve only the cutting or removing of vegetation above the ground (e.g:, mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

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

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

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

(iii) those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, *provided* that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later than August 25, 1994. This provision does not apply to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), e.g., mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision *provided* that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking Section 404 authorization for such excavation activity. In no event can the grandfather period under this paragraph extend beyond August 25, 1995.

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

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

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

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

(e) * * * See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(f) * * * See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

5. Section 323.3(c) is added to read as follows:

§ 323.3 Discharges requiring permits.

* * * * *

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

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

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

6. The authority citation for part 328 continues to read as follows:

Authority: 33 U.S.C. 1344.

7. Section 328.3(a) is amended by adding a new paragraph (a)(8) that reads as follows:

§ 328.3 Definitions.

* * * * *

(a) * * *

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

40 CFR Chapter I—Environmental Protection Agency

PART 110—DISCHARGE OF OIL

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 1321 (b)(3) and (b)(4) and 1361(a); 33 U.S.C. 1517(m)(3).

2. Section 110.1, definition of *navigable waters*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 112—OIL POLLUTION PREVENTION

1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 112.2(k), definition of *navigable waters*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

1. The authority citation for part 116 continues to read as follows:

Authority: 33 U.S.C. 1521 *et seq.*

2. In § 116.3, the definition of *navigable waters* is amended by adding three new sentences of concluding text at the end of the definition, as set forth below, and the definitions are placed in alphabetical order.

§ 116.3 Definitions.

* * * * *

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. The definition of *navigable waters*, § 117.1(i), is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 117.1 Definitions.

* * * * *

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: 33 U.S.C. 1251 *et. seq.*

2. Section 122.2, definition of *waters of the United States*, is amended by adding three new sentences at the end of the concluding text of the definition to read as follows:

§ 122.2 Definitions.

* * * * *

* * * Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

1. The authority citation for part 230 continues to read as follows:

Authority: 33 U.S.C. 1344(b) and 1361(a).

2. Section 230.3(s), definition of *waters of the United States*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 230.3 Definitions.

* * * * *

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

1. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. In § 232.2, the definition of *discharge of dredged material* is revised to read as set forth below.

3. In § 232.2, the definition of *discharge of fill material* is revised to read as set forth below.

4. In § 232.2, the definition of *waters of the United States* is amended by adding two new sentences of concluding text at the end of the definition to read as set forth below.

§ 232.2 Definitions.

* * * * *

Discharge of dredged material. (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the Untied States;

(ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and

(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

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

(i) Any incidental addition, including redeposit, of dredged material

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

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in 33 CFR part 329, with proper authorization from the Congress or the Corps pursuant to 33 CFR part 322; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at § 232.2(r) of this Chapter.

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

(iv) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 40 CFR 232.3 for discharges that do not require permits.

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

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

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

Discharge of fill material. (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 that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

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

(i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in 33 CFR part 329, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

(ii) [Reserved]

* * * * *

Waters of the United States. * * *

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 401—EFFLUENT GUIDELINES AND STANDARDS

1. The authority citation for part 401 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 401.11(l), definition of *navigable waters*, is amended by adding two new sentences at the end of the definition to read as follows:

§ 401.11 General definitions.

* * * * *

(l) * * * Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

[FR Doc. 93-20530 Filed 8-24-93; 8:45 am]

BILLING CODE 6560-50-M