

§ 231.6

does not occur until the Administrator makes a final determination.

(d) Any recommended determination under paragraph (b) of this section shall include the following:

(1) A summary of the unacceptable adverse effects that could occur from use of the disposal site for the proposed discharge;

(2) Recommendations regarding a final determination to prohibit, deny, restrict, or withdraw, which shall confirm or modify the proposed determination, with a statement of reasons.

(e) The administrative record shall consist of the following:

(1) A copy of the proposed determination, public notice, written comments on the public notice and written submissions in the hearing file;

(2) A transcript or recording of the public hearing, where a hearing was held;

(3) The recommended determination;

(4) Where possible a copy of the record of the Corps or the state pertaining to the site in question;

(5) Any other information considered by the Regional Administrator or his designee.

§ 231.6 Administrator's final determinations.

After reviewing the recommendations of the Regional Administrator or his designee, the Administrator shall within 30 days of receipt of the recommendations and administrative record initiate consultation with the Chief of Engineers, the owner of record, and, where applicable, the State and the applicant, if any. They shall have 15 days to notify the Administrator of their intent to take corrective action to prevent an unacceptable adverse effect(s), satisfactory to the Administrator. Within 60 days of receipt of the recommendations and record, the Administrator shall make a final determination affirming, modifying, or rescinding the recommended determination. The final determination shall describe the satisfactory corrective action, if any, make findings, and state the reasons for the final determination. Notice of such final determination shall be published as provided in § 231.3, and shall be given to all persons who participated in the public hearing. No-

40 CFR Ch. I (7-1-08 Edition)

tice of the Administrator's final determination shall also be published in the FEDERAL REGISTER. For purposes of judicial review, a final determination constitutes final agency action under section 404(c) of the Act.

§ 231.7 Emergency procedure.

Where a permit has already been issued, and the Administrator has reason to believe that a discharge under the permit presents an imminent danger of irreparable harm to municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas) wildlife, or recreational areas, and that the public health, interest, or safety requires, the Administrator may ask the Chief of Engineers to suspend the permit under 33 CFR 325.7, or the state, pending completion of proceedings under Part 231. The Administrator may also take appropriate action as authorized under section 504 of the Clean Water Act. If a permit is suspended, the Administrator and Regional Administrator (or his designee) may, where appropriate, shorten the times allowed by these regulations to take particular actions.

§ 231.8 Extension of time.

The Administrator or the Regional Administrator may, upon a showing of good cause, extend the time requirements in these regulations. Notice of any such extension shall be published in the FEDERAL REGISTER and, as appropriate, through other forms of notice.

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

Sec.

232.1 Purpose and scope of this part.

232.2 Definitions.

232.3 Activities not requiring permits.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 53 FR 20773, June 6, 1988, unless otherwise noted.

§ 232.1 Purpose and scope of this part.

Part 232 contains definitions applicable to the section 404 program for discharges of dredged or fill material.

These definitions apply to both the federally operated program and State administered programs after program approval. This part also describes those activities which are exempted from regulation. Regulations prescribing the substantive environmental criteria for issuance of section 404 permits appear at 40 CFR part 230. Regulations establishing procedures to be followed by the EPA in denying or restricting a disposal site appear at 40 CFR part 231. Regulations containing the procedures and policies used by the Corps in administering the 404 program appear at 33 CFR parts 320–330. Regulations specifying the procedures EPA will follow, and the criteria EPA will apply in approving, monitoring, and withdrawing approval of section 404 State programs appear at 40 CFR part 233.

§ 232.2 Definitions.

Administrator means the Administrator of the Environmental Protection Agency or an authorized representative.

Application means a form for applying for a permit to discharge dredged or fill material into waters of the United States.

Approved program means a State program which has been approved by the Regional Administrator under part 233 of this chapter or which is deemed approved under section 404(h)(3), 33 U.S.C. 1344(h)(3).

Best management practices (BMPs) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States from discharges of dredged or fill material. BMPs include methods, measures, practices, or design and performance standards which facilitate compliance with the section 404(b)(1) Guidelines (40 CFR part 230), effluent limitations or prohibitions under section 307(a), and applicable water quality standards.

Discharge of dredged material. (1) Except as provided below in paragraph (3), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback 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, associated with a dredging operation, from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback, 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)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii) *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

(3) 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