

## CHAPTER 2

### DREDGED MATERIAL MANAGEMENT REGULATION

#### 2.1 OVERVIEW

Several state and federal entities have regulatory or proprietary authority governing dredged material management. On the federal level, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) share the responsibility for regulating the discharge of dredged material. In Washington state, regulation is shared by the Departments of Ecology, Natural Resources, and Fish and Wildlife. In Oregon, this regulation is carried out by the Department of Environmental Quality, Division of State Lands, and Department of Land Conservation and Development. This chapter gives a brief overview of agency laws, regulations and authorities as they relate to the dredging and disposal of sediments.

#### 2.2 FEDERAL REGULATIONS OVERVIEW

The Clean Water Act (CWA) governs discharges of dredged material into "waters of the United States," defined as all waters landward of the baseline of the territorial sea. The Marine Protection, Research, and Sanctuaries Act (MPRSA) governs the transportation of dredged material seaward of the baseline (in ocean waters) for the purpose of disposal.

The geographical jurisdictions of the MPRSA and CWA are indicated in Figure 2-1. As shown in Figure 2-1, an overlap of jurisdiction exists within the territorial sea. The precedence of MPRSA or CWA in the area of the territorial sea is defined in 40 CFR 230.2 (b) and 33 CFR 336.0 (b). Material dredged from waters of the United States and disposed in the territorial sea is evaluated under MPRSA. In general, dredged material discharged as fill (e.g., beach nourishment, island creation, or underwater berms) and placed within the territorial sea is evaluated under the CWA. In addition, all activities regulated by these statutes must comply with the applicable requirements of the National Environmental Policy Act (NEPA), as well as other federal laws, regulations and Executive Orders which apply to activities involving the discharge of dredged material. NEPA usually acts as an umbrella authority which assures all applicable environmental requirements are complied with for federal dredging projects. An overview of MPRSA, CWA, and other federal laws is given in the following paragraphs.

**2.2.1 Rivers and Harbors Act Section 10/Clean Water Act Section 404.** The Corps administers a regulatory program under Section 10 of the Rivers and Harbors Act of 1899 which requires approval by the Secretary of the Army of any work in navigable waters.



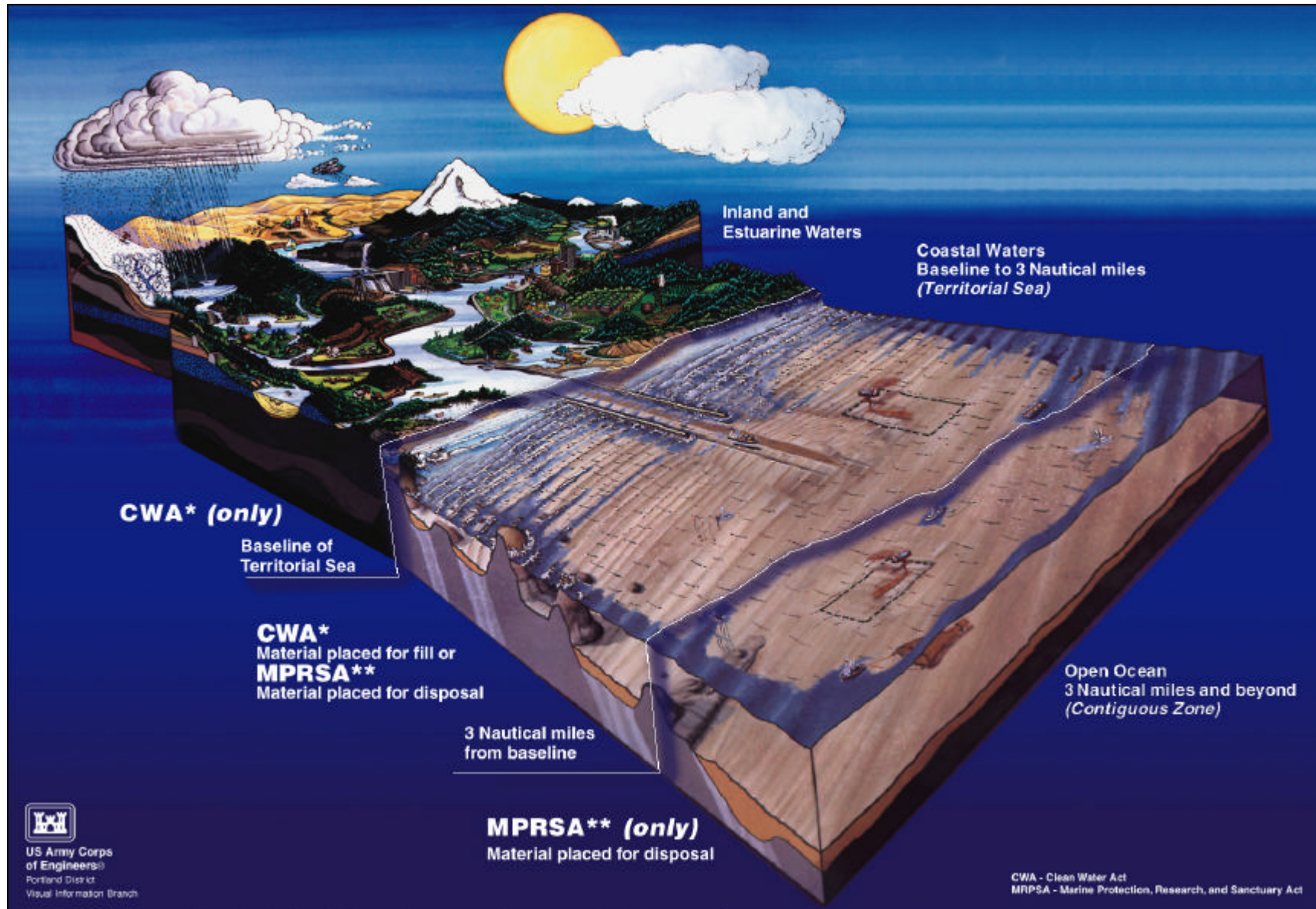


Figure 2.1: Geographic Jurisdiction of the Marine Protection, Research and Sanctuaries Act and the Clean Water Act

The Corps also has the primary responsibility for the CWA Section 404 regulatory permit program. Section 404 of the Clean Water Act requires a permit for the discharge of dredged or fill material into the waters of the United States. These permits, known as Section 10/404, may be processed concurrently when both dredging and disposal/filling are necessary, as is often the case with in-water or nearshore disposal.

The Clean Water Act applies to "waters of the United States." The Corps' administrative definition of "waters of the United States" extends to all waters, including lakes, streams, mudflats, wetlands and sloughs, "the use, degradation or destruction of which" could affect interstate or foreign commerce. This definition includes wetlands adjacent to these waters. Section 404, therefore, covers more than Section 10. (CWA Section 502(7), and Section 230.3 of the Guidelines).

All parties, including federal agencies, are subject to regulation under Section 10 and Section 404. Though the Corps does not issue itself a permit, these same regulations govern the Corps' own dredging and disposal activities.

Section 10. A Section 10 permit is required for any dredging activity in navigable waters, regardless of the location of the disposal site. For purposes of Section 10, navigable waters generally are those U.S. waters below the mean high water mark, and those used or usable for interstate or foreign commerce. A dredging project with no return flow to the waters of the U.S. would require only a Section 10 permit.

Section 404. A Section 404 permit is required only for discharges of dredged or fill material into waters of the United States. A Section 404 permit is required when dredged material is disposed in either an aquatic or nearshore environment. It is also required when dredged material will be hydraulically placed in an upland environment and effluent from the disposal will be returned to waters of the U.S. This can occur where dredged material that is not de-watered is placed in nearshore or upland disposal sites.

Under Section 404(b)(1), the Administrator of the Environmental Protection Agency (EPA) has developed, in conjunction with the Secretary of the Army, Guidelines for evaluating specific proposed aquatic or nearshore disposal sites.

The Guidelines evaluate potential disposal sites based on potential impacts on the physical, chemical, and biological characteristics of the aquatic environment. The Guidelines specify four conditions for the selection of any aquatic site for the disposal of dredged or fill material (Section 404 (b)(1) Final Rule 40 CFR 230). They are:

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1. There must be no other practicable alternatives available that would have less adverse impacts on the aquatic environment.
2. The disposal must not result in violations of applicable state water quality standards, toxic effluent standards, marine sanctuary requirements, or requirements of the Endangered Species Act.
3. The disposal must not cause or contribute to significant degradation of the waters of the United States.
4. The permit applicant must show that all appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic environment.

While considering the Guidelines, the Corps conducts a public interest review and considers comments from agencies and the public. The final permit decision is based on whether the activity is in compliance with the Guidelines (including sediment quality) and a determination that the proposed activity is not contrary to the public interest. The public interest review includes a broad range of factors, from environmental concerns to public health issues to property ownership as well as compliance with other federal laws. The Corps has substantial authority to require mitigation to avoid, minimize, rectify, reduce, or compensate for resource losses. In cases where no aquatic site is proposed for disposal, the Corps' decision to issue a permit is based solely on the public interest review and not the Guidelines.

EPA retains oversight authority regarding the Corps' decision to issue a permit and may veto permit approval if it concludes that the discharge of dredged or fill materials would have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fisheries, wildlife, or recreational areas.

**2.2.2 Marine Protection, Research, and Sanctuaries Act of 1972.** The Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972, as amended (Public Law 92-532), specifies that all proposed operations involving the transportation and dumping of dredged material into the ocean have to be evaluated to determine the potential environmental impact of such activities. Section 103 of the MPRSA appoints the Corps the permitting agency, subject to EPA review. Regulations are at 40 CFR 220-228. An Ocean Testing Manual has been jointly issued by EPA and the Corps (EPA/USACE 1991) in which a "tiered" testing approach is employed. Section 102 of the MPRSA requires EPA, in consultation with the Corps, to develop environmental Criteria that must be complied with before any proposed ocean-disposal activity is allowed to proceed. The Criteria call for no unacceptable adverse effects. Section 103 of the MPRSA assigns to the Corps the specific responsibility for authorizing the transport of dredged material for ocean disposal at designated sites.

In evaluating proposed ocean-disposal activities, the Corps is required to apply the Criteria developed by EPA relating to the effects of the proposed disposal activity. In addition, in reviewing permit applications, the Corps is also required to consider navigation, economic, and industrial development, and foreign and domestic commerce, as well as the availability of alternatives to ocean disposal. EPA has a major environmental oversight role in reviewing the Corps' determination of compliance with the ocean-disposal Criteria relating to the effects of the proposed disposal. If EPA determines the Criteria are not met, disposal may not occur without a waiver of the Criteria by EPA (40 CFR 225.2 (e)). In addition, EPA has authority under Section 102 to designate ocean-disposal sites. The Corps is required to use such sites for ocean disposal to the extent feasible. Section 103 authorizes the Corps, where use of an EPA-designated site is not feasible or a site has not been designated, to select ocean-disposal sites. In exercising this authority, the Corps utilizes the EPA site-selection Criteria (40 CFR 228), and the site selection is subject to EPA concurrence.

**2.2.3 Coastal Zone Management Act of 1972.** The Coastal Zone Management Act (CZMA) of 1972, as amended (Public Law 92-583), declared a national interest in the effective management, beneficial use, protection and development of the coastal zone. The law grants to state and local governments the primary responsibility for planning and regulation of land and water uses in the coastal zone. States are charged with developing and administering land and water use management programs for the coastal zone. Federal projects within the coastal zone, including dredging and disposal projects, must be consistent, to the maximum extent practicable, with the approved state programs. For non-federal projects, a required Corps permit cannot be issued until the State of Washington (Ecology) and/or Oregon (DLCD) has concurred that the project is in compliance with the approved coastal zone management plan. Concurrence with CZMA is considered waived after a six-month period has elapsed since the Corps public notice.

**2.2.4 Endangered Species Act of 1973.** Section 7 of the Endangered Species Act of 1973, as amended, requires Federal agencies to ensure their actions do not jeopardize endangered or threatened species or their critical habitats. If a project could affect an endangered species, coordination with the U.S. Fish and Wildlife Service or National Marine Fisheries Service is required.

**2.2.5 National Environmental Policy Act (NEPA).** These dredging programs are operated in accordance with NEPA, which requires documentation of potential primary and secondary impacts, including those associated with dredging and disposal.

## **2.3 WASHINGTON STATE REGULATIONS**

**2.3.1 Section 401 Certification Program.** Section 401 of the Clean Water Act requires state certification that any federally-permitted project discharging into U.S. waters will not violate state water quality standards which are based on federal water quality criteria. For non-federal dredging, Section 401 certification is a precondition to compliance with Section 404 guidelines and is required

before receiving a Section 404 permit for disposal of dredged or fill material. The Section 401 certification is required when dredged material is to be placed in an aquatic or nearshore environment, or when dredged material is hydraulically placed in an upland environment where return flows may affect waters of the U.S.

The Washington State Department of Ecology is the agency for certifying under Section 401 that a proposed discharge will comply with state water quality standards. As a condition of certification, Ecology may apply any requirement or policy of state law that protects aquatic habitat. In situations where the state has no jurisdiction (for example, tribal lands and military installations), EPA provides Section 401 certification. EPA may also comment on compliance with state and federal water quality under Section 401. These conditions may be accepted by the Corps and used as conditions in the Section 404 permit.

**2.3.2 Hydraulic Project Approval.** A State Hydraulic Project Approval permit is required for actions affecting the natural flow of waters. This generally means any action in saltwater or a stream below the ordinary high water mark. The permit application must be acted upon by the Washington Department of Fish and Wildlife (WDFW) within 30 days after receipt of the full permit application, including determination of compliance under the State Environmental Policy Act.

**2.3.3 Aquatic Lands Act.** The Aquatic Lands Act, Revised Code of Washington, Chapter 79.90, gives the Department of Natural Resources (DNR) proprietary authority to manage state-owned aquatic lands in trust for the public. In accordance with the Act, and implementing regulations cited as Chapter 332-30 of the Washington Administrative Code (WAC), DNR has the power to lease state-owned aquatic lands for development and charge a fee for the discharge or use of dredged material. Aquatic or nearshore disposal sites can be subject to DNR's management. However, DNR does not directly control upland disposal of dredged material except on DNR-managed lands.

**2.3.4 Sediment Management Standards.** The State of Washington has adopted Sediment Management Standards (SMS) as Chapter 173-204 WAC. The SMS were promulgated for the purpose of reducing and ultimately eliminating adverse effects on biological resources and significant health threats to humans from surface sediment contamination. They apply to marine, low salinity, and freshwater surface sediments within the state of Washington. Numerical criteria exist for marine waters only.

The SMS provide two levels of effects specific to the contamination of marine sediments: a "No Adverse Effects" criteria (defined as the Sediment Quality Standard, or SQS) and a "Minor Adverse Effects" criteria (defined as the Cleanup Screening Level, or CSL). These criteria guide decisions pertaining to sediment cleanup and source control actions.

The SQS represents the goal to be attained for all sediments. However, it is recognized that this goal (No Adverse Effects) may be impractical in some cases. The CSL represents an acceptable upper limit (Minor Adverse Effects level) of chemical contamination.

**2.3.5 Shoreline Management Act.** The Washington Shoreline Management Act, RCW Chapter 90.58, requires a permit for any "substantial development" within the shorelines of the state. The Act defines "shorelines of the state" to include designated water bodies and their submerged beds within the state's territorial limits and all land areas 200 feet landward of ordinary high water and adjacent wetlands. Local jurisdictions have responsibility for overseeing compliance with Washington State's Shoreline Management Act of 1971. Ecology's Shorelands Program oversees and reviews municipalities' plans and decisions as well as provides an avenue for appeals.

Local Shoreline Master Programs have been adopted as state regulations under the Administrative Procedures Act. These state regulations, as well as others affecting the quality of the shoreline environment, were approved by the Secretary of Commerce as the state's Coastal Zone Management Program. Thus, in Washington, a local Shoreline Permit which has been issued and survived appeals is the mechanism for determining compliance with Federal Coastal Zone Management Act.

Preferential uses for shorelines are (in their order of preference):

1. Recognize and protect the state-wide interest over local interest
2. Preserve the natural character of the shoreline
3. Result in long-term over short-term benefit
4. Protect the resources and ecology of the shoreline
5. Increase public access to publicly-owned areas of the shorelines
6. Increase recreational opportunities for the public in the shoreline
7. Provide for any other element as defined in (the Act) deemed appropriate or necessary.

The affected local jurisdiction may issue a shoreline substantial development permit if the proposed use is consistent with both the local Shoreline Master Program and the policies of the Shoreline Management Act. Local zoning and land use requirements are integrated with the Shoreline Master Program process.

## **2.4 OREGON STATE REGULATIONS**

**2.4.1 Coastal Program Approval.** Federal projects and those projects receiving a federal permit are reviewed by the Department of Land Conservation and Development for consistency with enforceable state and local policies of the Oregon coastal management program. Projects complying with this program are issued a coastal program approval.



**2.4.2 Section 401 Certification Program.** Section 401 of the Clean Water Act requires state certification that any federally-permitted project discharging into U.S. waters will not violate state water quality standards which are based on federal water quality criteria. For non-federal dredging, Section 401 certification is a precondition to compliance with Section 404 guidelines and is required before receiving a Section 404 permit for disposal of dredged or fill material. The Section 401 certification is required when dredged material is to be placed in an aquatic or nearshore environment, or when dredged material is to be hydraulically placed in an upland environment where return flows may affect waters of the United States.

The Oregon Department of Environmental Quality (DEQ) is the agency for certifying under Section 401 that a proposed discharge will comply with state water quality standards. Under the Section 401 certification program, DEQ certifies and may use any requirement or policy of state law that protects aquatic habitat to condition the Section 401 certification. In situations where the state has no jurisdiction (for example, tribal lands and military installations), EPA provides Section 401 certification.

**2.4.3 Removal/Fill Permit.** The Oregon Division of State Lands issues a permit for any activity that proposes removal, fill or alterations equal to or exceeding 50 cubic yards of material within the beds or banks of the waters of the state of Oregon. In addition, any amount of removal, filling or alteration in State Scenic Waterways and essential Indigenous Salmonid streams requires approval from the Division. Typical examples of projects requiring a permit include gravel mining, dredging, gold mining, placement of riprap, bulkheads, land reclamation, channel alteration or relocation and stream crossings.

**2.4.4 State Beaches.** Oregon State Parks issues permits for any activity, including placement of dredged material, on state beaches.