therefore undermined for each following year. In general, the existence, magnitude, and implementation of the management and monitoring plans for this site are dependent upon funding, monitoring data results, and coordination between EPA, the U.S. Navy, the COE, and the State of Florida. Nevertheless, EPA believes that site plans are needed and that the plans in the FEIS are reasonable proposals for the Pensacola (offshore) ODMDS.

If evidence of significant adverse environmental effects outside the Pensacola (offshore) ODMDS boundaries is discovered, EPA will take appropriate measures to mitigate the impact or terminate disposal at the site. Conversely, if monitoring results exhibit no significant impact outside the ODMDS boundaries, monitoring may be discontinued or less frequent.

Related to site monitoring, EPA plans to test for tributyltin (TBT) in sediment samples from dredged material from Pensacola Harbor that would be projected for disposal at the ODMDS.

H. Proposed Action

The designation of the proposed Pensacola (offshore) ODMDS as an EPA-approved disposal site for suitable dredged material is being published as Proposed Rulemaking. Overall management of this site is the responsibility of the Regional Administrator of EPA/Region IV. The EIS provides information indicating that the proposed ODMDS may appropriately be designated for use. Interested persons may participate in this Proposed Rulemaking by submitting written comments within 30 days of the date of this publication to the address given above.

It should be emphasized that if an ocean disposal site is designated by EPA, such a site designation does not constitute EPA's approval of dredging projects or actual disposal of dredged material at the site. Before ocean disposal of dredged material at the site may commence, EPA and the COE must also evaluate the proposed dumping in accordance with the criteria in section 227 of the Ocean Dumping Regulations. In any case, EPA has the right to disapprove the actual disposal, if it determines that environmental concerns under the Act have not been met.

The Pensacola (offshore) ODMDS is not restricted to disposal use by Federal projects; private applicants may also dispose suitable dredged material at the ODMDS once relevant regulations have been satisfied. This site is restricted, however, to disposal of predominantly fine-grained dredged material from the greater Pensacola, Florida area that meets the Ocean Dumping Criteria, but is not suitable for beach nourishment or disposal in the existing, EPA-designated Pensacola (nearshore) ODMDS. The Pensacola (nearshore) ODMDS is restricted to suitable dredged material with a median grain size of >0.125 mm and a composition of <10% fines.

I. Regulatory Assessments

Under the Regulatory Flexibility Act, EPA is required to perform a Regulatory Flexibility Analysis for all rules which may have a significant impact on a substantial number of small entities. EPA has determined that this proposed action will not have a significant impact on small entities since the site designation will only have the effect of providing a disposal option for dredged material. Consequently, this proposal does not necessitate preparation of a Regulatory Flexibility Analysis.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This proposed action will not resut in an annual effect on the economy of $100 million or more, or cause any of the other effects which would result in its being classified by the Executive Order as a "major" rule. Consequently, this Proposed Rule does not necessitate preparation of a Regulatory Impact Analysis.

This Proposed Rule does not contain any information collection requirements subject to Office Management and Budget review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 228

Water pollution control.

Dated: December 9, 1988.

Lee A. DeHihns III,

Acting Regional Administrator.

In consideration of the foregoing, Part 228 of Subchapter H of Chapter I of Title 40 is proposed to be amended as set forth below.

PART 228—[AMENDED]

1. The authority citation for Part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

2. Part 228 is proposed to be amended by adding to § 228.12 paragraph (b)(72) a Ocean Dredged Material Disposal Site for Region IV as follows:

§ 228.12 Delegation of management authority for interim ocean dumping sites.

* * * * *

(b) * * *

(72) Pensacola, Florida: Ocean Dredged Material Disposal Site—Region IV.

Location:

30°08'50" N.,	87°19'30" W.;
30°08'50" N.,	87°16'30" W.;
30°07'05" N.,	87°16'30" W.;
30°07'05" N.,	87°19'30" W.

Size: Approximately 6 square statute miles.

Depth: Ranges from approximately 65 to 80 feet.

Primary Use: Dredged Material.

Period of Use: Continuing Use.

Restriction: Disposal is restricted to predominantly fine-grained dredged material from the greater Pensacola, Florida area that meets the Ocean Dumping Criteria, but is not suitable for beach nourishment or disposal in the existing, EPA-designated Pensacola (nearshore) ODMDS. The Pensacola (nearshore) ODMDS is restricted to suitable dredged material with a median grain size >0.125 mm and a composition of <10% fines.

[FR Doc. 88-28956 Filed 12-16-88; 8:45 am]

BILLING CODE 6560-50-M

LEGAL SERVICES CORPORATION

45 CFR Part 1609

Fee-Generating Cases

AGENCY: Legal Services Corporation.

ACTION: Proposed Rule.

SUMMARY: This proposed regulation would amend Part 1609 of the Legal Services Corporation's ("Corporation" or "LSC") regulations, 45 CFR Part 1609, governing fee-generating cases to require that the sum of all attorneys' fees received by a recipient be credited towards the recipient's LSC annual grant. Also, the requirements for a recipient to find that other adequate representation is not available in a fee-generating case would be amended to require use of local bar referral services whenever available.

Section 1007(b)(1) of the Legal Services Corporation Act of 1974, as amended, 42 U.S.C. 2996f(b)(1) provides that no funds made available by the Corporation may be used with respect to any fee-generating case except in accordance with guidelines promulgated by the Corporation. The provision contemplates that recipients would concentrate their resources on matters where representation of an eligible client is not otherwise available from the private bar. Contingent fee cases and cases in which a fee shifting provision is available are often attractice to private bar members. The proposed changes are intended to reinforce LSC's objective that such cases should be proffered to the private bar first.

Moreover, because any fees obtained constitute incidental benefits of the litigation, by definition, the proposed rule would treat such receipts as a windfall which would be credited towards the grant funds to be paid to the grantee during the following quarter.

DATE: Comments may be submitted on or before January 18, 1989.

ADDRESS: Comments may be submitted to the Office of the General Counsel, Legal Services Corporation, 400 Virginia Avenue, SW., Washington, DC 20024–2751.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy B. Shea, General Counsel, Office of the General Counsel, (202) 863–1823.

SUPPLEMENTARY INFORMATION:

Section 1609.1

Section 1609.1 is proposed to be amended in order to make clear that the restrictions apply to subrecipients as well as to recipients.

Section 1609.2

Section 1609.2 is proposed to be amended to state specifically that actions brought under a contract or a statute providing for the shifting of fees are considered fee-generating cases. Referring such cases to the local referral service will give private attorneys the opportunity to undertake representation in the matters.

Section 1609.3

Section 1609.3 is proposed to be amended by adding "or any non-public funds" to the existing provision that a recipient shall not use "funds received from the Corporation" for fee-generating cases. This revision would make clear that prohibitions of this regulation on the acceptance of fee-generating cases apply to private non-LSC funds as well as Corporation funds. Because representation in fee-generating cases is prohibited by both section 1007(b)(1) of the Act and 45 CFR Part 1610, the change would render LSC regulations consistent.

The section is also proposed to be amended to include a presumption that all attorneys' fees are for representation in cases undertaken using LSC funds or non-public funds, unless proven otherwise. This presumption is reasonable because the recipients are in a better position than the Corporation to establish and maintain the requisite recordkeeping, and also because the vast majority of recipients receive most of their funding from the Corporation and private sources. In addition, this presumption would relieve recipients of having to maintain documentation of cost allocation for each case and would also result in administrative convenience for recipients and the Corporation.

Section 1609.4

Section 1609.4 is proposed to be amended in order to state that a recipient may not undertake representation in a fee-generating case unless other adequate representation is unavailable and the recipient's executive director, pursuant to policies adopted by the recipient's governing body, has approved the undertaking.

Currently, § 1609.4(a)(1) deems other adequate representation to be unavailable when a case has been rejected by the local lawyer referral service *or* by two private attorneys. This amendment would eliminate the either/or proposition by requiring that recipients first attempt to refer fee-generating cases to a local lawyer referral service. Only in the event that a local lawyer referral service does not exist in the recipient's service area should referral be made to at least two private attorneys who have experience relevant to the case. The Corporation believes that recipients should first use a lawyer referral service, if one exists, in order the reinforce impartiality in the referral of potential fee-generating cases to private attorneys. Referral services, which are operated by local bars in nearly every jurisdiction, normally keep up-to-date lists of attorneys and their specialties and are likely to be successful in matching eligible clients in fee-generating cases with attorneys willing to represent them. These changes would reinforce the policy that recipients devote their resources to matters in which representation is not available by the private bar.

Further, recipients would be required to maintain documentation of the attempted referrals in the case file. Maintaining documentation of attempted referrals is not expected to be a burden.

Section 1609.4(b) is proposed to be amended in order to delete the exemption from referral for cases in which recovery of damages may be ancillary and not the principal object of an action for equitable or other non-pecuniary relief. Because numerous statutes permit payment of attorney's fees for prevailing parties in suits for equitable or non-pecuniary relief, see, for example, 28 U.S.C. 2412 (Equal Access to Justice); 5 U.S.C. 552 (Freedom of Information Act); 42 U.S.C. 1988 (Civil Rights); 29 U.S.C. 216 (Fair Labor Standards Act); and 15 U.S.C. 2073 (Consumer Product Safety Act), private attorneys are often willing to represent clients in such matters with the expectation of being awarded fees after prevailing in the case. The change would merely require that such cases first be proffered to the private bar through a referral service. This change would not place any disproportionate burden on recipients, as referrals to a lawyer referral service or to two private attorneys are simply accomplished.

Section 1609.4 is also proposed for revision to require a recipient's director to give prior written approval pursuant to the policies adopted by the recipient's governing body before a fee-generating case could be undertaken even after the requisite rejection by the referral service or private attorneys.

Because recipients generally should not be representing clients in fee-generating cases, any exceptions to this rule should be undertaken only after review and specific approval by the director in accordance with policies adopted by the recipient's governing body. The proposed revision sets forth criteria a governing body should establish for deciding whether or not representation in a fee-generating case should be undertaken. As with any decision on case acceptance, a recipient must consider each case to determine if it falls within the recipient's priorities and allocation of resources.

Section 1609.5

A new § 1609.5(c) is proposed in order to confirm the Corporation's position on the acceptance of attorney's fees in cases seeking retroactive benefits under Titles II and XVI of the Social Security Act. Although recipients may under section 1609.4 accept these cases without first attempting a referral to a private attorney, a recipient may not accept a fee for such representation when the fee is deducted from an award of subsistence benefits. This has been the Corporation's longstanding position, based on the 1977 amendments to the LSC Act, wherein representation in benefit cases by recipients without prior attempted referral was specifically approved. P.L. 95–222; 42 U.S.C. 2996f(b). However, Congress clearly intended that recipients not deduct attorneys' fees from the client's retroactive benefit award. S. Rep. 95–172, 95th Cong., 1st Sess., 15–16; *reprinted in* 123 CONG. REC. 33027 (daily ed. October 10, 1977) (Statement of Sen. Nelson).

Section 1609.6

The proposed changes to § 1609.6 would require each recipient to file a quarterly report as to the amount of attorneys' fees received by the recipient. The recipient would also show on the

report any attorneys' fees received by a subrecipient in cases funded by the recipient as well as fees for co-counseling. This amount would then be credited towards the recipient's LSC funding for the next quarter and would be deducted by the Corporation from the recipient's subsequent monthly funding checks. The Corporation has ample authority in making decisions concerning the funding of recipients to consider the availability of other resources. *See e.g., National Clearinghouse v. Legal Services Corp.*, 674 F. Supp. 37 (D.D.C. 1987), *aff'd* C.A. 88-7027 (D.C. Cir. filed Oct. 21, 1988) (*per curiam*).

The Corporation wishes to maintain its established policy of encouraging recipients to seek attorneys' fees in appropriate cases. The policy is based, in part, on congressional recognition that attorneys' fees awards further the purpose of encouraging private enforcement of important public policies by enabling injured parties to obtain counsel. Under the proposed change, programs arguably may have less incentive to pursue cases that may result in an attorneys' fees award; however, program priorities and case acceptance practices should be based foremost on individual client needs rather than on the potential benefit to the program in the form of attorneys' fees. Recipients should not use the likelihood or probability of a fee award as a consideration in their selection of cases.

The Corporation also believes that this change in policy would not discourage recipients from filing actions under statutes providing attorneys' fees to prevailing parties. Recipients, of course, would continue to receive support from the Corporation, regardless of any potential fee award under these statutes.

Sums credited to recipients would free up funds previously appropriated for basic field grants. Given a line item funding formula such as provided in section 505 of Public Law 100-459, 102 Stat. 2223, such sums would be allocated to field programs as supplemental grants for that year, granting the largest share of funds to programs with the lowest funding per person. Thus, this change would promote general equalization of funding. If recipients continue to receive attorneys' fees as they have in the past, the Corporation should be able to supplement the grants of the lower per capita funded programs by a total of approximately $6 million a year, which represents two percent of the total amount granted by the Corporation to basic field programs.

List of Subjects in 45 CFR 1609

Legal services.

For reasons set out above, 45 CFR 1609 is proposed to be amended as follows:

PART 1609—FEE GENERATING CASES

1. The authority citation for Part 1609 continues to read as follows:

Authority: Sec. 1007(b)(1) Legal Services Act of 1974, as amended (42 U.S.C. 2996f(b)(1)).

2. Section 1609.1 is revised to read as follows:

§ 1609.1 Purpose.

This part is designed to insure that recipients and subrecipients do not compete with private attorneys and, at the same time, to guarantee that eligible clients are able to obtain appropriate and effective legal assistance.

3. Section 1609.2 is revised to read as follows:

§ 1609.2 Definition.

"Fee-generating case" means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party. Any action brought on behalf of a client under a contract or statute with a fee-shifting provision is considered a fee-generating case.

4. Section 1609.3 is revised to read as follows:

§ 1609.3 Prohibition.

No recipient shall use funds received from the Corporation or any non-public funds to provide legal assistance in a fee-generating case unless other adequate representation is unavailable. It shall be presumed that all cases undertaken by a recipient are undertaken using LSC or non-public funds. A recipient may rebut this presumption with contemporaneous documentation showing that a case was otherwise funded. All recipients shall establish procedures for the referral of fee-generating cases.

5. Section 1609.4 is revised to read as follows:

§ 1609.4 Authorized representation in a fee-generating case.

(a) Recipients are authorized to provide representation in fee-generating cases if other adequate representation is determined to be unavailable and the executive director has approved the undertaking of the case in writing pursuant to written policies adopted by the recipient's governing body.

(b) Other adequate representation is deemed to be unavailable when:

(1) The recipient has determined that free referral is not possible because:

(i) The case has been rejected by the local lawyer referral service or, if there is no lawyer referral service operating in the recipient's service area, by two attorneys in private practice who have experience in the subject matter of the case. The recipient shall maintain contemporaneous documentation of the requisite rejections in the case file;

(ii) Neither the referral service nor any lawyer will consider the case without payment of a consultation fee. The recipient shall maintain contemporaneous documentation of such refusal in the case file; or

(iii) Emergency circumstances compel immediate action before referral can be made, but the client is advised that if appropriate, and consistent with professional responsibility, referral will be attempted at a later time; or

(2) Inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims; or

(3) A court appoints a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction; or

(4) An eligible client is seeking benefits under Subchapter II of the Social Security Act, 42 U.S.C. 401, et seq., as amended, Federal Old Age, Survivors, and Disability Insurance Benefits; or Subchapter XVI of the Social Security Act, 42 U.S.C. 1381, et seq., as amended, Supplemental Security Income for Aged, Blind, and Disabled.

(c) The governing body of a recipient shall adopt written policies to guide the director of the recipient in determining whether to approve action in such cases which will require the director to:

(1) Verify that other adequate representation is unavailable as required by § 1609.4;

(2) Determine how the case conforms with the recipient's priorities in resource allocation; and

(3) Document the executive director's consideration of the above listed factors and maintain such documentation and written approval in the case file.

6. Section 1609.5 is amended by adding paragraph (c) and the introductory text is republished to read as follows:

§ 1609.5 Acceptance of fees.

A recipient may seek and accept a fee warded or approved by a court or dministrative body, or included in a settlement, if:

* * * * *

(c) The fee is not deducted from the award to the client in connection with any claim for statutory benefits permitted by Section 1007(b)(2) of the Act and § 1609.4(d) of these regulations.

7. Section 1609.6 is revised to read as follows:

§ 1609.6 Accounting for attorneys' fees.

Any recipient who has been awarded fees shall submit a quarterly report due April 15, July 15, October 15, and January 31 of each year on a form approved by the Corporation, which shall state all attorneys' fees received by the recipient during the previous quarter. The quarterly report shall also include all attorneys' fees received by a subrecipient in all cases funded by the recipient. All such sums received by a recipient after the effective date of this rule shall be credited towards the recipient's LSC grant for the succeeding quarter and the sums shall be deducted from the recipient's monthly funding checks.

8. Section 1609.8 paragraph (c) is revised and the introductory text is republished to read as follows:

§ 1609.8 Applicability.

Nothing in this part shall prevent a recipient from:

* * * * *

(c) Acting as co-counsel with a private attorney when the case meets standards set forth in § 1609.4, and accepting part of any fees that may result from a shared case when the requirements of §§ 1609.5 and 1609.6 are met.

Timothy B. Shea,
General Counsel.