National Dredging Program Regulations Webinar, Mr. Joe Wilson.

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Julie Marcy: Okay. I have right at 1 o'clock. So let's go ahead and get started.

Hello, everyone. I'm Julie Marcy, research biologist at the ERDC Environmental Lab. And I'll be serving as your Webinar host today.

Welcome to the first in our Dredging Operations Technical Support or DOTS Summer Webinar Meeting Series. This series of meetings is intended to share topics of concern about the National Dredging Program. And the meetings will be recorded and archived on the DOTS Resources page.

Just a few notes before we start today's session, we will have about 10 to 15 minutes at the end of the presentation for questions and answers. and please if you can put your phones on mute -- and I'll talk about that in just a moment -- that will help us. If a term is unfamiliar to you as Joe goes through the presentation, please stop and ask then, or send a little note in chat so we can assist you with comprehension. And, otherwise, if you want to keep other questions until the end, that's fine as well.

Remember that if you want to ask a question, you may do so verbally. Be sure you have your phone off of mute in order to do so. Or you can use the chat feature on the right-hand side of your screen to ask a question. And if it's a question - a general content question, if you would send it to everyone so that we can all see it.

If we do run out of time and we still have more questions, we'll follow up so that we can get everyone answered. Remember to keep those phones on mute when you're listening. But please don't put us on hold because the background music can get pretty distracting.

Lastly, in order to have a more comprehensive list of attendees, if it's not apparent in the participants list with the way you signed in, if you would take just a moment using chat to identify yourself or the numbers in your group. For instance, you might say Fort Worth District/5, you know, meaning five attendees, that just helps us track who's participating and how many participants we have.

And with that, I'll give you today's speaker on the National Dredging Program Regulations, Joe Wilson.

Joe is the senior environmental policy writer in the Operations Division of the Civil Works Directorate at Corps Headquarters in Washington. He's responsible for oversight and policy development for the Corps' dredging program. And he authored the 1988 Operational and Maintenance Dredging Regulation, as well as many other policies on ocean-dumping, endangered species, social zone consistency and many others.

He serves as a program monitor for the Aquatic Nuisance Research Program, the Dredging Operations Technical Support Program and the Water Operations Technical Support Program.

When he does have free time, Joe enjoys spending it at his farm in Virginia with his family members, both two-legged and four. And more information about Joe's distinguished background may be found in his biography that's posted on the DOTS Resource pages, along with the copy of the PowerPoint that he'll be presenting today.

So, Joe, we're very happy to have you with us. And if you'll give me just a moment to assign you presenter rights, we will get started.

Joseph Wilson: Okay. Thank you, Julie.

Again, those of you that don't know me, I'm Joe Wilson. I've worked in the Operations Division in Headquarters. I have worked in Headquarters since 1983. And part of that, I worked in the Wilmington, Charleston, Mobile Districts and a short stint in the Sacramento District. I worked also several years at the Institute for Water Resources in the Dredging Division when it was formed back in the late 70s and early 80s.

With that, I will go ahead and begin. If you have questions and they're relevant and easy, you might want to enter it into the chat box. And if I can see it and I have the time, I will go ahead and answer it then. It's usually beneficial while it's fresh on everyone's mind to have a question answered when they have it available.

So with that, I'll begin. I'm going to have basically a two-part presentation. The first part is going to be an overview of the Corps' of Engineers Dredging

Program. And then secondly, I'm going to go into some depths in talking about those dredging laws or those laws and regulations that are applicable to Corps of Engineers Civil Works Dredging activities. I'm not going to talk about regulatory. And I'm not going to talk about our other Civil Works activities. I'm just going to focus almost exclusively on the Dredging Program.

The Corps has had a navigation, dredging mission essentially since about 1824 when Congress enacted the Survey Act. That mission includes dredging and disposal. And we do it in compliance with applicable laws and regulations. It also includes a lot of other activities which might be, for example, clearing and snagging waterways to get debris out or maybe sunken vessels. We remove those things as well to keep the navigation channels open.

Part of our responsibility also is in properly managing contaminated sediments. So I mentioned that because it is an important aspect of what we do both from a dredged material management perspective as well as from our research perspective.

The navigation system is comprised of about 25,000 miles of navigation channels. And again that includes all the navigation channels throughout the country. Again that's about 25,000. We could easily spilt hairs on that.

About 11,000 miles are commercially important. Those commercially important channels that include for example entrance channels to major harbors, for example like I think Mobile Harbor, they got like a 35-mile entrance channel, the Mississippi River, the Columbia River, the Atlantic, the Gulf Intracoastal Waterways, in the South again you have the Alabama Coosa, Tennessee-Tombigbee. Those waterways are a part of the 11,000 miles that we consider to be commercially important.

As far as the volumes and materials are concerned, there're about (250) million cubic yards that come from those 25,000 miles of navigation channels. An additional 75 million cubic yards is dredged and disposed every year for navigation purposes under permit from the Corps of Engineers.

Again, I'm not going to talk about the permit program other than to say that when you talk about permits, you're talking about, for example, like port authorities. It might be a private entity with a small harbor. It could also include the Navy, for example. We treat the Navy as - though they are private applicants, they would also have to come to the Corps of Engineers to get a permit from us to perform dredging of their Navy bases.

All total, it's about 325 million cubic yards that we dredge each year. That fluctuates and it can fluctuate wildly. For example, a hurricane or a flood could add a lot of sediment to the system. That might need to be dredged. So that number could be a much higher than that. Or for example, it could be lower than that as well.

We have a number of authorizations that we use to construct and to maintain those navigation channels, not the least of which is the Survey Act that I mentioned earlier. It also includes...

Joseph Wilson: . the 1899 Rivers and Harbors Act which includes several regulatory provisions, Section 10 primarily. And we also use the Federal Water Pollution Control Act which was enacted in 1972 in October and it was later amended in 1977 and it was renamed the Clean Water Act. And I think pretty much everyone on this call knows the Clean Water Act as the Clean Water Act...

Joseph Wilson: ...and not the old Federal Water Pollution Control Act.

We also...

Julie Marcy: Joe, just - excuse me. Just one minute. This is Julie.

I think we have a couple of folks that may not have their phone on mute. If you would please go ahead and mute your phones. We're picking up some background noise.

Sorry about that, Joe. Go ahead.

Joseph Wilson: Thank you, Julie.

We also have responsibilities under the EPA statute which would be the Marine Protection, Research, and Sanctuaries Act, which is commonly known as the Ocean Dumping Act. So in the future, you may see - the future part of this presentation, you may see Martine Protection, Research, and Sanctuaries Act or the Federal Water Pollution Control Act. But I'll refer to both of those as either the Clean Water Act or the Ocean Dumping Act.

As far as volumes are concerned, about 55 million cubic yards - again, this is on average. It can again fluctuate. Cubic yards disposed into the - again, it's 55 million cubic yards disposed in the ocean. Waters at 108 ocean sites and again is regulated under the Ocean Dumping Act.

About 270 million cubic yards regulated under the Clean Water Act. And that could be any number of a variety of disposal options which could be beach nourishment, it could be beneficial uses, wetland construction, upland disposal, thalweg which would be a deep river bend disposal. It could be

within banks on the rivers, for example, a whole host of other options that would be regulated under the Clean Water Act.

I thought I would mention that according to an Office of Technology Assessment Report that was published in 1989, about 3% to 5% of dredged material that we dredge every year might be contaminated...

Julie Marcy: Excuse me. This is Julie.

Could you please put your phone on mute so we don't pick up your background noise? Thank you.

Go ahead, Joe.

Joseph Wilson: Again, about 3% to 5% would be considered contaminated sufficient to require special handling and management. But again - and I think that number - that was, what, 23, 24 years ago. It's probably substantially less than that 3% to 5% now.

When we do navigation dredging from the Corps of Engineers perspective at Corps of Engineers projects, we have a number of regulatory processes that we have to follow, not the least of which is our 33 CFR 335 to 338 Dredging Regulation that was published in 1988 and I think it went final in '89.

We have a Corps of Engineers and EPA Technical Framework for Dredged Material that help project managers figure out how best to evaluate material for disposal options. We have the Ocean and Inland Testing Manuals that we have. And I'm going to talk a little bit more about that in a little bit when I go into the laws and regulations section because we have an effort underway now to combine those two manuals.

We have the Ocean Site Designation Manual which would be used in those cases where we're trying to identify new ocean disposal sites. We have a Dredged Material Capping Guidance Manual. And we have an Upland Testing Manual in those cases where dredged material might be considered for placement in the upland environments.

Near the end of this presentation, we've added in a Web page for our DOTS program. All of these manuals and documents are available through the DOTS Web site.

We also provide, along with EPA, technical leadership for the International Treaty. The one treaty, the London Dumping Convention relies very heavily on the Corps of Engineers and EPA in developing guidelines and criteria for inclusion in the technical documents for ocean disposal. In fact the scientific group of the London Convention is meeting this week in Argentina in fact. I think the Corps and EPA have representatives at that meeting.

The convention actually is called the Convention on Prevention of Marine Pollution by Dumping of Waste and Other Matter. It was ratified by the United States in 1976. So we've been involved in that treaty for quite a number of years.

Okay. Now we're going to go from a general overview to the laws and regulations. (LAD).

Are there any questions about the general overview?

Oh. Okay. There's a question I know from (Dan) on why less for special handling now. Well, if you think about it from a practical sense, we've been

dredging these contaminated sediments for, you know, four, five decades now. And we've gotten to the point that most of them have already been removed. So we're having less accretion of the contaminated materials in our navigation channels now. So the volumes would be smaller.

Okay. I'll leave it at that. If I haven't answered you sufficiently, ask me again and I'll go at it from a different angle.

So let's go ahead now into the Environmental Laws and Regulations Applicable to Dredging and Disposal Activities.

First of all, the National Environmental Policy Act, the National Environment Policy Act was named and enacted by the Congress as one of the basic environmental charters for protecting the environment. The law actually was signed in the law in January 1, 1970. But Congress had already named the law NEPA 1969. It's just an interesting little nugget for you.

The NEPA requires that we'd consider the environment and decision-making and that we provide full disclosure of all the available alternatives and how we went through our decision-making process.

The Clean Air Act of 1970, I mentioned that particular law because Section 309 requires EPA review of Federal Action Agency NEPA documents.

Back when the law was originally enacted, the Congress was trying to fix a gap or a loophole, if you will, in the NEPA provisions. In that every federal agency action would have either a - environmental assessment with a finding of no significant impact or it would have a full-blown environmental impact statement.

The environmental impact statements were fully coordinated. They're fully vetted with all the sister federal agencies and the public. But interestingly, environmental assessments, up until that point were actually prepared and placed in agency - action agency files. There was no recognition that there might be - a need for some other review.

So this was a fix for that. And so what happens now is that federal action agencies are supposed to coordinate all of their environmental assessments and their FONSI determinations with the EPA as a final NEPA check and balance.

I would mention the Resource Conservation Recovery Act - actually there's two aspects of that. One is Subtitle D of RCRA which is a program set up and administered by the states for solid waste. There's another provision which - which established a federal program to manage hazardous waste.

The Corps of Engineers through many, many meetings and over a period of almost two decades worked with the EPA to get an exclusion for dredged material as a hazardous waste. So by rule at 40 CFR 261.4(g) -- and I think (4)g is towards the end of that entire section, and it's a very long section -- dredged material is excluded as a hazardous waste.

I would point out that dredged material by federal statute wasn't or - and regulation was not excluded as a solid waste. But when you apply the solid waste regulatory protocols, they simply do not fit dredged material. And in most cases, in fact the vast majority of cases where the states have attempted to assert that dredged material should be regulated as a solid waste, we would present to the states our case for managing and regulating those dredged materials under the Clean Water Act. And in every single case, the Clean

Water Act is more protective than would be applied under the solid waste provisions of the state's regulatory protocols.

The Rivers & Harbors Act of 1899 has two provisions that are relevant. One is Section 10 which all of you that work in a regulatory program are familiar with. Anytime you alter the course, capacity or condition of a navigable water, you have to get a permit from the Corps of Engineers.

The provision that most people are not familiar with is Section 13 which was at the time known as the Refuse Act. I brought this up for a substantive reason, is that back at the turn of that century in the late 1800s and early 1900s when we were going through a lot of development in the country, a lot of the locals, municipalities and businesses would actually take their refuse, their garbage and place it on the riverbanks and near the shorelines. And when the tides came up, the stuff will get washed out. And, of course, obviously that's not a practice that we would actually engage in today. But 130 or 140 years ago, that was a common practice.

And so what happened is that in the enactment of the, again, Clean Water Act of 1972, the permitting provisions of Section 13 were subsumed under Section 402 of the Clean Water Act. But the enforcement provision of Section 13 were retained in the Rivers & Harbors Act.

What that essentially means, if for example a barge or some structure sinks into a navigable channel, the Corps of Engineers has the authority to either require the owner of that obstruction to remove it or to remove it and to sue the responsible party to recover our cost. And there are several instances every year where something sinks in the navigation channel where we have to go out and have it removed.

Let's move onto the Clean Water Act. And I'm going to talk about several provisions in the Clean Water Act. And they all fall within Title IV, which is the Permits and Licenses.

Under Title IV, we have first of all water quality certification under Section 401. Under 401, anytime there's an applicant for federal license or permit that would involve a discharge of dredged or fill material into a water in the US, has to go to the state and they have to get a certification from the state as to whether the proposed discharge would or would not violate applicable state water quality standards. Again, it is a certification. It's not a permit.

The underlying principle behind that is that Congress did not envision that the states would have veto authority over a congressionally authorized federal navigation project. So, essentially, we have to certify or get a certification from the state that whenever we discharge dredged material into waters of United States the discharge will not violate the state water quality standards.

Section 402 is the Point Source Discharges. I'm sure - if there's anyone here from the state, you recognize that provision. But Section 402 was mentioned because under 40 CFR, which is an EPA rule at 122.3(b), dredged material is excluded as an NPDES discharge when that dredged material is regulated under Section 404 of the Clean Water Act.

Section 403 of Title IV contains the Ocean Discharge Criteria. And what's noteworthy here is that the 403 criteria are almost verbatim to the 102 criteria in the Ocean Dumping Act. And for those of you that are history buffs and perhaps for those of you that are not, in late 1972 in October, the Ocean Dumping Act, the Clean Water Act and the Coastal Zone Management Act were all enacted within about two weeks of one another by separate congressional committees. And these committees oftentimes were not talking

to one another. And so that's why we have some contradictions and a little bit of a conflict in a couple of places between the Clean Water Act and the Ocean Dumping act.

But essentially Congress had in mind that the ocean discharge criteria would be very much and very similar to the 404(b)(1) guidelines. And that brings me right to 404 which is the fundamental regulatory part of the Corps of Engineers program where we authorize permits for discharges of dredged or fill material into waters of United States. And that's done through guidelines that are developed by EPA in conjunction with the Corps.

And again, if you read the law, the historical parts of the law before it was amended in 1977, there was an attempt by the Congress to see that Section 403 and 404 were comparable. And again as I pointed out, the 403 discharge criteria are the same as the 102 discharge criteria. So there is an impetus to - and legal basis for having the two criteria and, as it would be, guidelines similar. And that provides a legal basis for our effort right now to combine the Inland and Ocean Testing Manuals.

Under Section 405, Disposal of Sewage Sludge basically prohibits disposal in waters absent an EPA permit. And EPA doesn't issue anymore 405 permits. I just threw it in to make the Title V Permits & Licenses complete.

Let's focus a little bit about the Ocean Dumping Act. The Section 102 of the act provides that EPA permits everything that would be dumped in ocean waters except dredged material. And currently, over the decades, since 1972, the EPA has phased out the dumping virtually everything in ocean waters except dredged material. And I think there are currently two fish waste sites off of American Samoa. And so those are active sites where EPA actively goes through the permitting process every year.

So as you would look at the Ocean Discharge criteria that were developed under 102, if you look at those, they were developed back in 1977 and they cover a very large suite of ocean disposal type activities. But, in essence, right now, the only thing that's being legally dumped in ocean waters right now is dredged material. And of course there is some burial at sea of human remains and sinking ships which are nationwide permitted.

The 102 requires that EPA established criteria for all waste. And in the case of dredge material and our Civil Works programs have to consult with the Corps for any criteria that would affect our programs.

Under Section 103 of the Ocean Dumping Act, the Corps is responsible for issuing permits for the transportation for disposal of dredged material. And we have to apply the EPA 102 criteria.

In the case of the - and this is one where there's - congressional committees were not talking with one another. In the case of the territorial sea where the Ocean Dumping Act and the Clean Water Act overlap, by rule, if the material is placed in the territorial sea where the intent would be to fill -- and again the primary example there would be like beach nourishment for example -- or if you want to construct an underwater berm where the goal would be the accretion of the sand onto the beach, again the intent is to place the material there, then that would be regulated under the Clean Water Act.

If the material is being dumped in the territorial sea for the purpose of disposal, then that material would be regulated under the Ocean Dumping Act. And again, that provision or distinction is made at 40 CFR 230.2(b) which is at the 404(b)(1) guidelines.

Let's skip over to the Coasting Zone Management Act. Section 307 requires that federal action agencies that have activities that would affect a state's approved coastal zone would have to get a determination of consistency that that project would be consistent to the maximum extent practicable. The Corps of Engineers has determined, although NOAA does not totally support this interpretation, but we have determined that if we do not have authority or we do not have the funds to comply with the Coastal Zone requirement, then we have complied to the maximum extent practicable.

I won't get into it beyond that unless you want to ask a question in there or you want to dig into it a little deeper. We can. But there's a lot of discussions about what are the federal requirements under the Coastal Zone Management Act. But our interpretation is that if we do not have authority or we do not have funding, then we have complied to the maximum extent practicable.

Under the Endangered Species Act of 1973, we have to consult with the services - the US Fish and Wildlife Service and/or the NOAA Fisheries in those cases where we might affect an endangered species. The consultation provisions are provided at the Fish and Wildlife Service rules.

They're also at - they have a consultation handbook. We go through a lot of different types of consultations with the services over, I think, for example, like sea turtles, manatees, northern right whales. On the inland waters, we have a lot of sturgeon issues we have to deal with as well as birds up and down the Mississippi and in the Missouri River basin.

Under the Fish and Wildlife Coordination Acts of '34, '56 and '58, primarily '56, the Corps of Engineers is required to consult with the services, NOAA Fisheries and the Fish and Wildlife Service and we are required to consider their recommendations in decision making. We're also required to consult

with the State Fish and Game Agencies and we're also required to consider their recommendations in decision making.

I will step back just a little bit here and point out another provision that under the Endangered Species Act that federal government is not required to consider state listed endangered species. This is a matter of point of facts for the record, if you will.

Under the National Historic Preservation Acts of '66 and '80 -- actually they go all the way back to the Antiquities Act of 1904 -- we are required to consult with the State Historic Preservation Officer for properties that might be considered eligible for listing on the National Register of Historic Places. And then if they are potentially eligible, then those consultations would move towards the National Register folks in Washington.

I mentioned the Submerged Lands Act because it's a very important provision with regards to ownership of dredged material. Up until 1953, the federal government claimed ownership of all the waters of the United States and including all the bottoms beneath those waters when Congress inacted the Submerged Lands Act of 1953, all of the lands were transferred to - or at least the federal government transferred land's ownership to all of the states. So essentially, the states own the lands beneath the navigation channels.

So the fundamental question comes, who owns the dredged material? And the answer to that is the states own the dredged material unless they claim ownership. Because the states claim ownership, then the Corps of Engineers could, under Section 13 that I talked about a little earlier where we have identified the owner of an obstruction in navigation, we could compel the state to remove that material at state's expense.

That's important because in a number of instances historically, some of the states have attempted to require the Corps of Engineers to pay a royalty or a fee for removing state's submerged lands from navigable channel. Again, it's an important provision because it allows the Corps of Engineers to, again, manage our budgets better.

Finally, let me talk about regulatory authorities. And this is the last slide that I have with regards to laws and regulations.

NOAA Fisheries - US NOAA Fisheries, the Corps of Engineers, under the Fish and Wildlife Coordination Act, is required to consult and required to consider their recommendations in our decision making. We are required to consult with them with regards to endangered species, using their rules and we abide by their rules.

The same thing applies to the US Fish and Wildlife Service.

With regards to EPA, the EPA has a veto authority under Section 404(c) of the Clean Water Act and those cases were they do not believe we have met the compliance obligations under the 404(b)(1) guidelines. And EPA also can withdraw from specification and ocean disposal site under the Ocean Dumping Act.

State Fish and Game Agencies, we are required to consult the State Fish and Game Agencies and we are required to consider their recommendations in decision making.

We are also required to consider state listed endangered species, again, just to consider. We're not required to engage in compliance activities that would alter the basic project purposes or design or increase our cost.

States water quality certifying agencies, again, I pointed out this is certification. We're required to seek a State Water Quality Certification in those cases where we have a Clean Water Act Section 404 discharge. The states certify that we are or that we are not violating applicable state water quality standards. That's the limit of that responsibility. There's not a (VETO).

The State Coastal Zone Management Agencies, as I pointed out earlier, we're required to comply to the maximum extent practicable. The Federal Action Agency, the Corps of Engineers makes that determination of whether we're in compliance or not.

As far as other federal and state agencies, and again, I'll use the term from our office of counsel, unless there is a clear an ambiguous waiver of federal supremacy and that occurs in two cases which will be the Coastal Zone Management Act and the Clean Water Act whether there is a partial waiver of federal supremacy, there are no other state or local requirements necessary for the Corps of Engineers to obtain to - in order to fulfill our missions of constructing and maintaining navigation.

And as I mentioned earlier, you could go to our DOTS Web site. This is the location for that Web site.

And I think, Julie, this presentation, along with the subsequent presentations, and all the documents that I mentioned earlier can be retrieved on that Web site.

Julie Marcy: That's correct, Joe.

Joseph Wilson: Okay? All right?

Julie Marcy: Yes. If anyone has a question for Joe, feel free to ask verbally. Remember to take your phone off of mute or you may use chat to submit a question, whichever you prefer.

Joseph Wilson: Okay.

Man: Could you put the Web site back up again please?

Joseph Wilson: Sure.

That do it?

Man: Yes, thank you.

Joseph Wilson: There is a question regarding whether or not the Fish and Wildlife Service can reject projects. Well, I'm sure they attempt to. And we might have some districts that would allow them to. But the law does not provide for that. No.

(Jennifer Gerhardt-Smith): Hi, Julie and Joe. This is (Jennifer).

Joe, you had mentioned before you are going to talk about the combination of the testing manual.

Joseph Wilson: Yes.

(Jennifer Gerhardt-Smith): I didn't know if everybody knows about that.

Joseph Wilson: Well, yes. I think I just briefly mentioned that. An effort is underway to combine the ocean manual with the inland testing manual so that we essentially come up with one manual that would meet the purposes of both the testing requirements for the Ocean Dumping Act as well as the Clean Water Act.

Certainly, we have two very voluminous manuals that in many respects are identical in many respects. And in a lot of other respects, they are the same. And in a few respects, and likely so, they're different.

And only those places where they are different are we going to make some - make distinctions. Otherwise, there will be a single manual.

(Jessie Burton Evans):Hi, Joe. This is (Jesse Burton Evans) from - can you hear me?

Joseph Wilson: Yes.

(Jessie Burton Evans):Okay, great.

From San Francisco District. And I had a question actually about the Coastal Zone Management Act.

And I know we're - we may be a little bit special in San Francisco.

But I know that other districts don't have to do the compliance and the consistency determination as frequently as we tend to do it in the San Francisco District. So I was wondering if you could speak in general to - I mean, how - what the course position is on how frequently the consistency determinations are required to do the maximum extent practicable.

Joseph Wilson: Well, again, it depends on the states. But it also depends on the Corps. It would be my recommendation that you would seek a consistency determination for a fixed period of time.

Typically -- and this is from my history with dealing being with a number of the states when I was working in the field -- when states would issue water quality certification and the coastal zone consistency, they would coincide with the, perhaps, link of the 404(b)(1) evaluation report. Oftentimes, five years. Sometimes they give one for three to five years with a renewal if nothing had changed.

If the state is requiring coastal zone consistency determination every year for the same activity and nothing changes, then perhaps I would recommend that you have a conversation up the chain with the state coastal zone management authority, somebody that's up the chain and see if you could negotiate that to a less frequent consistency determination negotiation.

Julie Marcy: Yes. And, Joe, this is Julie.

We have - I've got a question in chat that came in.

Joseph Wilson: Yes.

Julie Marcy: The question is, is there a flowchart that guides folks through the procedure of ocean dumping in terms of meeting regulations?

Joseph Wilson: Yes, there is. And that would be found at the Web site. You can look at guidance documents and I think there's a access or manual in there that will take you through site location, how to go about finding an ocean disposal site.

It was a manual that was developed jointly by the corps and EPA.

I also see a question here that's about, how is berm construction outside of the territorial sea regulated?

The jurisdiction of the Clean Water Act typically ends at the three-mile limits of the territorial sea. So if you're building a berm outside the territorial sea, it would be ocean dumping.

I think that would occur perhaps in New Orleans. I don't know where else we would have that shallow of water closer in.

All right.

(Cheryl Montgomery): Joe, this is (Cheryl Montgomery) speaking.

Actually, if you could just give a little background on two terms I've heard which is "navigational servitude"...

Joseph Wilson: Yes.

(Cheryl Montgomery): ...and "Nationwide Permit 16?"

Joseph Wilson: Nation 16, that's the upland disposal nationwide permit.

Joseph Wilson: ...the first one. I think Nationwide 16 is the upland disposal permit. Is that one you were looking for?

(Cheryl Montgomery): Yes, I believe so.

Joseph Wilson: Okay. Well, those are two different subjects. I'll address that one first.

When there is a discharge of dredged fill material into waters of the United States, that discharge is regulated under the Clean Water Act.

And the Corps of Engineers has basically defined that effluent coming out of a disposal area would be regulated under Section 404.

So therefore, if we put dredged material into an upland disposal area and the material had run off back into waters of the United States, then the entire disposal activity is regulated under Section 404.

Now, you may have noticed earlier I mentioned I have an upland testing manual. Although the material coming out of the effluent would be regulated under Section 404, the discharge into the upland disposal site would be primarily regulated under NEPA because we would assert that the entire discharge itself would be under jurisdiction of the Clean Water Act and NEPA and therefore that's why we developed a upland testing manual.

So the testing manual will be used to determine things, for example, like plant uptake and mobility, potential for ground water contamination, leakage control, those kinds of things. That's what the upland manual is for.

Does that answer your question?

And then you have another one with regards to...

Woman: Navigational servitude.

Joseph Wilson: Navigational servitude.

Navigational servitude is a legal doctrine, if I could say it that way, that provides that if the federal government has the ultimate responsibility for maintaining navigation.

And so if there is something that impedes that ability, then we would exercise navigational servitude to maintain navigation.

Woman: Okay.

Joseph Wilson: That would apply in occasions where, for example, let's say you go back to the Clean Water Act, let's say the state denied water quality certification, we went through all the administrative procedure and processes and the state would have still denied water quality certification, well, we can't go forward when the state denies.

So therefore, we would exercise our option under Section 404(t) of the Clean Water Act which says "This section shall not preclude or deny the right of the Secretary to maintain navigation." That's navigation servitude.

Julie Marcy: And, Joe, this is Julie.

I've had a few more questions come in on chat.

The first one is - I think this refers back to your earlier comments about working in proximity to the shoreline.

The question is, what about in states where state waters extend to 9 or 12 miles?

Joseph Wilson: Well, that's what comes up with Florida and Texas. And we try to avoid that. We just don't recognize the state's jurisdiction out that far.

Julie Marcy: Okay.

Joseph Wilson: I'm not aware that the Galveston District or the Jacksonville and Mobile Districts have sought water quality certification for ocean disposal that would be five or six miles offshore.

Julie Marcy: Okay. The next question is, where can we find the memorandum of agreement between EPA and the Corps regarding civil works implementation of 404(b)(1) guidelines showing the differences between regulatory and civil works?

Joseph Wilson: Yes, that would be - I would have to bring it to the regulatory files. We're talking to regulatory folks for that. I'm not aware of that particular memo even exists. But there probably is one.

Julie Marcy: Okay. So we need to follow up on that MOA.

Joseph Wilson: We need to follow up on that, absolutely.

Joseph Wilson: If you'll send me an e-mail, whoever wrote that, I'm - I'd be happy to pursue that and find out exactly where that document is, if it exists, and I'll be happy to send it to you.

Julie Marcy: Okay. And I've got a note of that.

I have one other one that came in on the chat from one of our regulatory functions attendees.

Does the Corps' dredging operations have authority under the Refuse Act to remove a dilapidated barge tied against the bank which are noncompliant permittee will not remove?

Joseph Wilson: That's correct.

Julie Marcy: So you do have authority.

Joseph Wilson: ...talk about the Refuse Act if, again, the permitting provisions were subsumed under Section 402 in 1972 under the 1972 Water Pollution Control Act but the enforcement provisions were not. So if there's a dilapidated structure or dilapidated - or sunk barge or boat or anything that's blocking navigation, the Corps of Engineers has authority under Section 13, known as the Refuse Act, to remove that and could sue the responsible party to recover cost.

We actually have a remaining items funding line for those types of activities that's in the Corps of Engineers budget every year.

Julie Marcy: Okay. And, Joe, this is Julie again.

We had a couple of other questions that have come in.

Do we have an anticipated date when the merged manual inland and ocean will be released? And also, will it still have the four-tier process?

Joseph Wilson: The four-tier process is going to stay in there because it's in the rules. The manual is going to be very consistent with what's in the rules. It's just a matter of merging what we can in the rules.

I think we're going to have a draft of that by the fall. (Jenny) is on the line here. I'm not sure if (Jennifer) - let's say you. I know (John Childs) is working on those as well, right?

(Jennifer) left. So anyway.

Joseph Wilson: ...to provide a document over these probably sometime later this summer.

Julie Marcy: Okay.

Joseph Wilson: And EPA will be looking at that and then we'll probably have a sit down made by the end of this year hopefully and then we'll move it to the next stage.

Joseph Wilson: I'm looking here. What is the threshold of which dredged material is contaminated such that require special handling? Was that threshold determined?

When it fails the 404(b)(1) guidelines, if the dredged material fails the 404(b)(1) guidelines, then that material will be eligible for special handling.

Now, I will add to that that once that material fails the 404(b)(1) guidelines and requires special handling, then the entire navigation project would be re-evaluated because once you go into special handling or you go into the - for example, some sort of treatment technology like hydrocyclone or mixing the contaminated material with some inert material to make a brick or do something else with it, it gets very costly. And oftentimes, it makes the economics for the navigation project to bring the project to not be justified economically.

Julie Marcy: Okay. And, Joe, this is Julie.

A couple of others have come in.

Joseph Wilson: Okay.

Julie Marcy: One, in general, asking, will the presentation be available?

Yes. A PDF of Joe's PowerPoint is already on the DOTS site and the archive, the recording plus the transcript will be placed there as well.

Another question, is there any work ongoing by the Corps to develop better - and you're going to have to define acronyms for me here, SQG...

Joseph Wilson: Oh, sediment quality guidelines.

Julie Marcy: Okay. Guidelines...

Joseph Wilson: The Corps of Engineers recognizes that many states -- and, in fact, some EPA regions -- like to use sediment quality guidelines. And I would note they are guidelines.

The Corps of Engineers and EPA went through well to say them out loud bloodletting back in the '90s over development of sediment quality criteria.

And ultimately, we came up with the idea that it's within the state's purview to develop sediment quality guidelines and it's also within the federal government's purview to not use them as it would be deterministically in dredged material management decisions.

So in other words, if the state says we pass or we fail, we would say, “Thank you very much but we’re using the 404(b)(1) guidelines and material testing protocol to determine whether this material passes or fails and meets the legal obligations under the Clean Water Act.”

So sediment quality guidelines will be used as a screen to more comprehensive or perhaps detailed testing.

Now, we actually have a policy on that at the DOTS webpage. You could go to Guidance Documents and look under Guidance Documents. And I published a guidance document in 1998 which explains how we would use sediment quality guidelines in decision making.

Julie Marcy: Okay. And this is Julie again.

We have another question. Why is CWA, which I assume is Clean Water Act, the controlling authority for an upland disposal site?

Joseph Wilson: Because there is a nexus to the Clean Water Act at the point of effluent discharge. You’re putting basically - when you put dredged materials to upland disposal area, you’re putting a liquid into an upland disposal area. And that liquid is decanted out.

So the primary area where you have a contaminant pathway and a contaminant where you might be concerned about would be at the effluent discharge.

Nevertheless, when you placed material in an upland site, you also are required to evaluate that material underneath them. And underneath, you

would look at things like plant uptake and mobility, leakage, volatility, whatever else would be subject to NEPA review.

So it will be a combination of Clean Water Act and NEPA that would be the regulatory and controlling authorities for upland placement except in those cases where EPA has decided that material would be regulated as a hazardous waste and that would mean the material will be highly contaminated. And again, in those cases, very likely, the Corps of Engineers would step back and we would say, "This project cannot be dredged because it's not economically feasible to do all the things that EPA likes to do at these regulated sites."

Julie Marcy: That's all I have in chat so far.

Anyone else on the line have a question you'd like to ask Joe?

(Dave Bierl): Joe, this is (Dave Barrel) from Rock Island District.

Joseph Wilson: Yes?

(Dave Bierl): Even though dredged material isn't regulated under RCRA, there's instances where we have upland placement sites and if this material is primarily sand and we want beneficial users to take this material but they wanted to - they want to know, you know, is the material contaminated? That's always the question they ask. Is using RCRA-type analytical techniques like TCLP analysis appropriate for that kind of a determination or are there other...

Joseph Wilson: No, no.

Joseph Wilson: The answer to your question is simple. We would not be able to put that material on the beach or on the sandbar or wherever it is if it didn't meet the 404(b)(1) guidelines.

In other words, if it violated applicable state water quality standards or if contaminants are concerned or if you had all these things and there might be ecological environmental concerns where it might fail the 404(b)(1) guidelines, well, it wouldn't be eligible to be placed there in the first place.

RCRA does not apply when the Clean Water Act does. If the Clean Water Act is applying to this, you shouldn't be talking about RCRA at all nor using the TCLP because the TCLP test passes for dredged material100% of the cases, we always pass because it just simply - it was not designed for wet sediments.

Does that help?

(Dave Bierl): Yes. Thank you.

Julie Marcy: And, Joe this is Julie. I had another question come in.

This is asking about a nonpoint discharge permit, NPDES permit. And then in 402 for the outfall, does that still need a 404 review?

Joseph Wilson: No. Again, go back and read the rule citation 40 CFR 122. Basically, it says that if this dredged material is regulated under the Clean Water Act and the effluent discharge from the CBF would be, then that material will not be subject to regulation under 402. That is codified in the rule.

Julie Marcy: Okay.

Joseph Wilson: By the way, I'm happy to do this pass an hour. I was in Portland a couple of months ago and we spent an entire day talking about this.

Julie Marcy: Any other questions for Joe from our participants?

(Kathleen Wu): Joe?

Julie Marcy: Go ahead.

(Kathleen Wu): Joe, this is SWD (Kathleen Wu).

I just want to find out if you're involved in that 408 permit for Barber and Bayport. Are you in that or not?

Joseph Wilson: I am not. I don't volunteer.

(Kathleen Wu): Okay. Because there's a process coming through on the regulatory side for 408.

Joseph Wilson: They have very capable people in our regulatory office to handle those situations.

(Kathleen Wu): Okay, thank you.

Joseph Wilson: If they need help, I'm happy to help them.

Julie Marcy: Any additional questions for Joe?

(Jessie Burton): This is (Jesse) again from San Francisco.

I do actually have a question along the 408 topic just to make sure I'm on the correct page.

So 408 is for modifications to a federal project, correct?

Joseph Wilson: Correct.

(Jessie Burton): And that sort of decision making would have to comply with NEPA and other regulations, correct?

Joseph Wilson: Well, it depends on what the activity is. It may or may not. I don't know what the activity is.

(Jessie Burton): Well, if we're - I mean, if we're granting permission for somebody to modify a project, it would have to have - comply with the environmental regulations as well. So is there an established process for adding Section 408 to our other permitting regulatory decisions or is it standing alone? I know it's not...

Joseph Wilson: ...standing alone. I don't think that's been - I don't think it's used very much. I don't think...

(Jessie Burton): I know...

Joseph Wilson: ...under 408 are used very frequently.

(Jessie Burton): I know they're not used very frequently right now but as the funding has been falling off for a lot of our shallow draft projects, I think that it may become more popular for other people who want to maintain a federal project. And so...

Joseph Wilson: ...issue, what I would recommend then is actually go up to your regulatory chain and recommend perhaps up in navigation work with the folks in regulatory. I sit very close to (Meg) and the folks there in regulatory and I'm happy to work with them to...

(Jessie Burton): Well, that was my question was, is there any headquarters level or high level guidance about working such inquiry permits into the existing processes or are each of the districts on their own right now?

Joseph Wilson: Not that I'm aware of and, indeed, you would be on your own right now. If you need guidance, we're always there to help.

(Kathleen Wu): I'm not familiar with the 204F and it has come out with the 408 on that. So I don't know. I'm just seeing this in the e-mails passing around.

Julie Marcy: This is Julie.

Do we have any other questions for Joe?

Okay. Hearing none, let's go ahead and wrap up for today. If you think of something later, you can just shoot an e-mail to myself or to Joe - to Julie Marcy or Joe Wilson and - or Cynthia Banks at ERDC and we'll get that answered for you.

Joe, thank you so much for sharing your knowledge with us today. I think we all understood how extensive it is and what a great resource you are to have access to. We really appreciate you sharing with us.

And also thank you to all of our participants for tuning in today. Be watching for upcoming notices on additional DOTS Webinars this summer from Cynthia Banks at ERDC.

And I wish everyone a great afternoon.

That concludes our meeting.

Joseph Wilson: Thank you, Julie.

END