

# BENEFICIAL USE OF DREDGED MATERIAL: Can States Drive the Process?

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# Beneficial Use of Dredged Material: Can States Drive the Process?

## **Abstract**

Dredged material is a resource that can be used for coastal restoration. This study analyzes legal issues regarding the Coastal Zone Management Act and beneficial use of dredged material in Louisiana. The report focuses on the the Corps of Engineers' Federal Standard regulation, the consistency provision of the Coastal Zone Management Act, and Louisiana's Coastal Zone Management Program. The Federal Standard regulation requires the Corps of Engineers (Corps), which is responsible for the construction and maintenance of federal navigation channels, to dispose of dredged material in the least costly manner consistent with sound engineering principles and federal environmental laws. On the other hand, the Coastal Zone Management Act's consistency provision requires the Corps to be consistent to the maximum extent practicable with a state's federally approved coastal management program. Louisiana's coastal management program requires beneficial use of dredged material in some instances, but the Federal Standard sometimes prohibits this use due to cost unless the state can provide additional funds. This project explores the tension between these laws and programs, investigates how federal and state agencies can work together, and suggests changes to law and policy that would encourage more beneficial use projects.

## Executive Summary

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Coastal erosion in the United States, particularly in Louisiana, is an issue we continually struggle to resolve. Land loss also means loss of various functions and values associated with wetlands, such as commercial fisheries, recreational fishing and hunting, water quality, flood control, and habitats for humans and threatened and endangered species. The Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA) has been implemented to address coastal land loss in Louisiana, but it is not the only mechanism through which coastal restoration can be accomplished. Indeed, as currently constructed, CWPPRA by itself cannot restore coastal Louisiana. Another component in Louisiana's coastal restoration efforts is beneficial use of dredged material to rebuild wetlands. Coastal restoration, and specifically the beneficial use of dredged material, is encouraged by the Coastal Zone Management Act (CZMA), the policy of which is to foster wise and proper use of America's natural resources and to restore coastal areas. The CZMA consistency provision allows states with federally approved coastal management plans to review federal actions, such as Corps navigation projects, and require consistency of those actions with the enforceable policies of state coastal management plans. The CZMA thus gives states a voice in deciding how federal projects will affect their coastal resources.

Millions of cubic yards of sediment are dredged from Louisiana waters each year as the U.S. Army Corps of Engineers conducts federal navigation and maintenance projects. A large amount of this dredged material could be used to restore Louisiana's eroded coastal areas. However, this course of action is often not taken because of costs that exceed the Corps's Federal Standard regulation.

The Corps maintains that the application of the Federal Standard in planning the construction and maintenance of navigation channels means that it must dispose of dredged material in the least costly manner consistent with sound engineering principles and environmental laws. However, Louisiana's coastal management plan (CMP) requires beneficial use of dredged material in certain instances, and pursuant to the CZMA, the state requires that Corps navigation projects be consistent to the maximum extent practicable with its CMP. The Corps claims that its navigation projects are consistent to the maximum extent practicable because beneficial use options that cost more than the Corps's base plan's least cost amount are prohibited by the Federal Standard. Thus, there is tension between the Federal Standard and Louisiana's coastal management plan. The Corps's Federal Standard regulation requires disposal of dredged material in the least costly manner, which many times precludes beneficial use, while the state's coastal management plan requires beneficial use in some instances. Can these roadblocks be cleared to allow for more beneficial use projects? If so, how might federal and state actors efficiently clear them and work together to devise creative solutions to the state's coastal erosion issue? The conclusions of this study are:

- Research has shown that there is no clear congressional statement on the Federal Standard/CZMA consistency issue, and there is no specific congressional mandate

for the development of the Federal Standard. Moreover, this issue has not yet been litigated. Therefore, a directive from Congress on this issue would resolve the impasse between the Corps and Louisiana.

- Congress has made clear that the Ocean Dumping Act (ODA), which preempts stricter state laws, does not preempt federal consistency requirements in a state CMP regarding ocean disposal of dredged material. Therefore, the Corps is subject to a state's federal consistency requirements when conducting ODA-related activities.
- The Clean Water Act's (CWA) Section 404(b)(1) Guidelines, developed by the U.S. Environmental Protection Agency (EPA), discourage the deposit of dredged material into waters of the U.S. that result in adverse effects on aquatic ecosystems. The guidelines are to be consulted when preparing an Environmental Impact Statement to inform Congress of the effects of projects it authorizes and in the development of the Federal Standard. Louisiana currently does not have a close working relationship with EPA Region Six with regard to beneficial use issues and would benefit from closer coordination. If EPA was aware of problems a project would pose to Louisiana's eroding coast, then the Environmental Impact Statements it coordinates might favor beneficial use as a reasonable alternative. Moreover, application of the 404(b)(1) Guidelines in the context of Louisiana's ecological and economic losses from erosion could affect the calculation of the Federal Standard to make beneficial use fit more easily within it.
- Under the CZMA, states are allowed to request mediation through NOAA's Office of Ocean and Coastal Resource Management or bring a legal challenge for alleged noncompliance with the CZMA consistency provisions by a federal agency.
- The CZMA grants authority to the states to require consistency with enforceable policies of their federally approved coastal management plans, meaning that states are exercising their federally granted authority to apply federal law. The partnership between the federal government and states that participate in the federal Coastal Zone Management Program is a contract under which part of the consideration received by these states is their federal consistency authority. A state does not have absolute veto power over federal activities, but disallowing Louisiana to require consistency with the beneficial use guidelines in its CMP because of limitations imposed by the Federal Standard would be an abridgement of the federal/state contract.
- Coastal zone management officials from the state agencies in Louisiana, California, Florida and Washington State agree that the Corps does not have the authority to use the Federal Standard to override the beneficial use requirements of their coastal management plans, but none of these states has opted to use its authority to deny consistency to Corps navigation projects. Instead, the states prefer to fund these projects with state money or work with their respective Corps Districts and EPA Regions to encourage beneficial use.
- Changes in current state and federal law and policy could lead to more beneficial use of dredged material:

- Louisiana should develop a record of denying consistency to projects that violate its beneficial use guidelines because of the Corps's application of the Federal Standard.
- Louisiana should amend its coastal management plan to strengthen its consistency procedures.
- Louisiana could elect to set aside more funds to cover the incremental cost of beneficial use projects above the least-cost option of the Federal Standard.
- Congress should revise the Corps's appropriations process regarding navigation projects to increase the availability of funds for beneficial use and articulate a national beneficial use policy to educate the nation about its cost and benefits.
- The New Orleans District of the Corps should make an effort to contemplate beneficial use at the earliest practicable project planning stage and write beneficial use into their base plans.
- Congress could amend the CZMA to further strengthen the consistency provision to make it clear that consistency is not subservient to the Federal Standard.
- Congress should fund the Louisiana Coastal Restoration Study, which addresses beneficial use and recommends more funding for this type of project.
- Congress and the President should heed recommendations of the U.S. Ocean Commission to adopt regional and ecosystem-based approaches to sediment management for civil works projects, to modify existing Corps authorities to achieve this goal, and to ensure that selection of the least-cost option per the Federal Standard accounts for the full range of costs and benefits for options to reuse dredged material and other disposal methods.

## 1.0 Introduction

Coastal erosion in the United States, particularly in Louisiana, is an issue we continually struggle to resolve. Within the last 50 years, Louisiana's coastal land loss has averaged 40 square miles per year, with the estimated rate in the 1990s between 25 and 35 square miles per year.<sup>1</sup> Natural processes such as subsidence, sea level rise and storms in conjunction with human actions have affected the rate of loss.<sup>2</sup> The collapse of Louisiana's wetlands system threatens the productivity of the state coastal ecosystems, the economic viability of industry, including a major portion of energy production from the Gulf of Mexico, and public safety.<sup>3</sup> Land loss also means loss of various functions and values associated with wetlands, such as commercial fisheries, recreational fishing and hunting, water quality, flood control, and habitats for threatened and endangered species.<sup>4</sup> Coastal planning efforts have been implemented to lessen the effects of land already lost and to prevent further land loss. The federal Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA), in partnership with Louisiana,<sup>5</sup> has been one agent of change. Since the passage of CWPPRA in 1990, hundreds of millions of dollars have been allocated to prevent further loss, and the separately funded Caernarvon and Davis Pond Freshwater Diversion projects have also been constructed.<sup>6</sup>

However, CWPPRA is not the only mechanism through which coastal restoration can be accomplished, and indeed, as currently constructed, CWPPRA by itself cannot restore coastal Louisiana. Another tool that Louisiana could and should use is the Coastal Zone Management Act (CZMA). Two directives of the CZMA are to foster wise and proper use of America's natural resources and to restore coastal areas.<sup>7</sup> Beneficial use of dredged material can help accomplish this directive. Dredged material is sediment excavated from inland or ocean waters, which is often deposited on uplands or in ocean waters. Waterways, ports, and harbors must be dredged each year to maintain the nation's navigation channels for commercial, security, and recreational purposes. While state and local governments, in addition to the nation, benefit economically from maintained navigation channels, the environmental impacts of dredging and dredged material are largely borne by nearby communities.

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<sup>1</sup> Louisiana Coastal Wetlands Conservation and Restoration Task Force and the Wetlands Conservation and Restoration Authority and Louisiana Department of Natural Resources, *Coast 2050: Toward a Sustainable Coastal Louisiana* 161 (1998).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See also La. R.S. § 49:213 et seq.

<sup>6</sup> *Id.*

<sup>7</sup> See 16 U.S.C.A. § 1452.

## 1.1 The Issue

Dredged material can sometimes be used to benefit the environment. Beneficial use of dredged material is a constructive alternative to disposing of the material as waste. Beneficial uses include, but are not limited to, habitat development, beach nourishment, shoreline protection, and fisheries improvement. Beneficial use is also one of the principles of the National Dredging Policy set forth by the Interagency Working Group on the dredging process in its report to the Secretary of Transportation in 1994 entitled, "The Dredging Process in the United States: An Action Plan for Improvement:"

"Dredged material is a resource, and environmentally sound beneficial use of dredged material for such projects as wetland creation, beach nourishment, and development projects must be encouraged."<sup>8</sup>

Financial considerations, logistics (i.e. biological, engineering, property rights issues, and seemingly conflicting laws) are often roadblocks to beneficial use. Can these roadblocks be cleared to allow for more beneficial use projects? If so, how might federal and state actors efficiently clear them and work together to devise creative solutions to the state's coastal erosion issue?

The pressing issue is not whether states have a voice in deciding whether dredged material is beneficially used. Clearly, the states do. The CZMA established a mechanism for federal-state cooperation in the management and use of our nation's coastal zones in the statute's consistency provision.<sup>9</sup> CZMA consistency requires that "each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved state management programs."<sup>10</sup> The more relevant question is how much of a voice states have under their CZMA authority in light of the Federal Standard. The Federal Standard is a regulation that requires the U.S. Army Corps of Engineers (Corps) to dispose of dredged material in the least costly manner consistent with sound engineering principles and environmental standards and criteria set forth by Section 404(b)(1) of the Clean Water Act (CWA) and the Marine Protection, Research, and Sanctuaries Act (the Ocean Dumping Act).<sup>11</sup> The Corps beneficially uses dredged material when it is both economically and practically feasible for them to do so, and it has beneficially used dredged material to create over 16,000 acres of wetlands since 1985.<sup>12</sup> At the same time, the Corps often denies Louisiana's requests for beneficial use if the request exceeds the base plan (or least cost

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<sup>8</sup> Interagency Working Group on the Dredging Process, *The Dredging Process in the United States: An Action Plan for Improvement*, A Report to the Secretary of Transportation, Section 4.0 "National Dredging Policy" (December 1994), available at <http://www.epa.gov/owow/oceans/ndt/report.html>.

<sup>9</sup> 16 U.S.C.A § 1456(c).

<sup>10</sup> *Id.*

<sup>11</sup> See 33 C.F.R. § 335.7. See also 33 C.F.R. § 335.4.

<sup>12</sup> U.S. Army Corps of Engineers, *Louisiana Coastal Area Ecosystem Restoration Study Main Report*, Volume 1, November 2004 at MR-63.

plan) of a navigation project unless the state pays the increased cost.<sup>13</sup> Even when the state is willing to cost share for beneficial use projects, other factors often prevent it.<sup>14</sup>

The state has the authority through the CZMA to disagree with federal agency consistency determinations for navigation projects that the state deems inconsistent with its federally approved coastal management plan.<sup>15</sup> So far, Louisiana has chosen not to exercise its CZMA consistency authority because doing so might cause the Corps to decline to construct or maintain a navigation project if the extra cost of beneficial use exceeds the Federal Standard. Delaying or canceling navigation projects could cost the state economically.<sup>16</sup> In addition, the financial costs associated with beneficial use projects cannot be ignored, particularly in Louisiana where transportation of dredged material can be expensive, and where property rights issues may prohibit disposal on or near private property. These issues present a challenge and require careful discussion to ensure that funding is available to both the Corps and the states to develop beneficial use projects. The federal government must also be cognizant of the importance of using dredged material beneficially when the opportunity arises.

Louisiana would like to see more beneficial use of dredged material for coastal restoration—uses that the state’s coastal management plan requires in many instances. On the other hand, the Corps insists it must follow the Federal Standard to make practical decisions regarding navigation projects. Therefore, the friction between the Federal Standard and the CZMA’s consistency provision needs resolution. How states and the federal government reconcile the Federal Standard/CZMA consistency conflict will determine how well a state can influence federal activities to comply with its coastal zone management beneficial use goals.

This report will shed light on the tension between the Federal Standard and CZMA consistency by analyzing relevant laws and regulations affecting beneficial use. This report will also strengthen the argument for beneficial use. There will be instances when, for technical reasons, dredged material cannot be used beneficially. However, when beneficial use is possible, it could be an important component in restoring the nation’s, and particularly Louisiana’s, eroding coastline. Beneficial use should, therefore, be given more consideration than it has previously received. To answer the question of how the needs of maintaining navigable waterways for commerce and security can be addressed while protecting the coastal and marine environments, the report also will suggest revisions to laws, regulations, and policy.

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<sup>13</sup> Interviews with Greg DuCote, Louisiana Department of Natural Resources, Coastal Management Division (October 13, 2004) and George Boddie, Louisiana Department of Natural Resources, Coastal Restoration Division (December 15, 2004).

<sup>14</sup> *Id.*

<sup>15</sup> LA. ADMIN. CODE Title 43, § 7:707.

<sup>16</sup> Interview with Greg DuCote, Louisiana Department of Natural Resources, Coastal Management Division (October 13, 2004).

## Section 2.0 Technical Aspects Of Beneficial Use

**Beneficial use of dredged material is a constructive alternative to disposing of dredged material as waste, but technical issues, such as contaminant status of sediment, and dredging technology can render beneficial use infeasible in some instances.**

### 2.1 Definition of Beneficial Use

There are three categories of beneficial use options: engineered uses, agricultural/product uses, and environmental enhancements.<sup>17</sup> Engineered uses include land creation, land improvement, berm creation, capping, beach nourishment, shore protection and replacement fill.<sup>18</sup> Agricultural/product uses include construction materials, aquaculture, and topsoil.<sup>19</sup> Environmental enhancement uses include wildlife habitats, fisheries improvements, and wetland restoration.<sup>20</sup> The type of material dredged is a major factor in determining its potential beneficial use. Contamination of sediments is another area of concern. One type of material can be best suited for engineered use, while another can be best suited for agricultural use or environmental enhancement. For instance, gravel and sand have a variety of potential engineered uses, from shore protection and land creation to beach nourishment and capping, whereas silt/soft clay is better suited to agricultural use and environmental enhancement.<sup>21</sup>

The federal government works with state and local governments, private entities, and semi-private entities (e.g. port authorities) during the dredged material disposal process. The Corps is the federal agency responsible for maintaining the nation's navigable waterways, and as such it issues permits to persons and other agencies for disposal of dredged material. The U.S. Environmental Protection Agency (EPA) establishes permitting guidelines via the CWA. The EPA has veto power over Corps permit decisions if the CWA's Section 404(b)(1) Guidelines are not followed.<sup>22</sup> The 404(b)(1) Guidelines are also used in developing an Environmental Impact Statement (EIS) for a congressionally authorized project. When Congress authorizes a Corps project based on an EIS, the Corps is exempt from Section 404 permit requirements. For ocean disposal of dredged material, EPA recommends areas for designation as ocean disposal sites. The EPA also develops criteria related to the effects of ocean disposal for evaluating permit applications and site management plans in conjunction with the Corps.<sup>23</sup> The Corps is the

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<sup>17</sup> U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Beneficial Uses of Dredged Material, available at <http://www.wes.army.mil/el/dots/budm/budm.html> (accessed April 21, 2004).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Dredged Material Sediment Types, available at <http://www.wes.army.mil/el/dots/budm/types.html> (accessed April 21, 2004).

<sup>22</sup> 33 U.S.C. § 1344(c).

<sup>23</sup> See 33 U.S.C. § 1412.

permitting authority for ocean disposal of dredged material, subject to EPA concurrence and use of ocean disposal criteria developed by the EPA.<sup>24</sup>

## 2.2 Technical Analysis of Dredged Material

Making the decision to use dredged material or to dispose of it as waste requires that the contaminant status of the materials be determined, along with the project's technical feasibility and environmental acceptability. Site selection, cost-benefit analysis, and resolution of legal issues must also be considered.

Analyzing the contaminant status is an important step in the decision process because the characteristics of dredged material determine whether it can be used beneficially and, if so, the best possible uses. The Corps determines the contaminant status of dredged material by making analyses of the material's physical, engineering, and chemical characteristics.<sup>25</sup> Tests of soil properties include grain size, plasticity, water retention, permeability, and organic content determinations.<sup>26</sup> Engineering tests include compaction, consolidation, and shear strength.<sup>27</sup> Engineering characteristics of dredged material are critical to determining the possible types of beneficial uses. For instance, soft, fine-grained material typically cannot be used on sites involving heavy structures or intensive activities because this type of material has little load-bearing capacity.<sup>28</sup> Chemical characteristics of the material reflect the population, industry, and land use of the area from which it was dredged.<sup>29</sup> A chemical analysis of material must be made to pinpoint whether dumping the material in a disposal area could have any harmful effects. There are four potential problem areas, depending on the chemical characteristics of the dredged material: plant toxicity, animal toxicity, surface water contamination, and groundwater contamination.<sup>30</sup> Plant uptake of chemicals also may be an issue if the growth or reproduction potential of the plant is altered, or if harmful chemicals are passed to higher organisms in the food chain.<sup>31</sup> Chemical tests that are conducted relate to the capacity of soil particulates to absorb nutrients that become available for plant growth (known as cation exchange capacity). Chemical tests also assess the nitrogen and sulfur contents of the dredged material and the concentrations of heavy metals.<sup>32</sup> However, the potential of a heavy metal to become a contaminant depends on its form and availability rather than purely on concentration within dredged sediment.<sup>33</sup>

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<sup>24</sup> See 33 U.S.C. § 1413.

<sup>25</sup> U.S. Army Corps of Engineers, *Beneficial Use of Dredged Material*, EM 1110-2-5026 2-1 (1987). Chapter 2 of the Corps's Engineering Manual contains detailed discussion regarding tests for physical, chemical and engineering characteristics of dredged material.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2-5.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2-6.

<sup>33</sup> *Id.*

The Corps also considers biological limitations. Dredged material may contain soil, rock, wood, glass, metal pieces, and other debris.<sup>34</sup> Contamination in the form of oil and grease, hydrofluorocarbons, and other organics depends on the population and industry of the area from which the material was dredged. If dredged material contains contaminants, beneficial use, while remaining a possibility, would be limited. Certain factors are considered when planning for beneficial use of contaminated material: amounts and types of contaminants (e.g. sewer waste, pesticide and petroleum products); the maximum acceptable levels for pollutants in water, soil, animals and plants, which are set by the EPA; the kinds of plants and animals that will be on the site and how the material would affect them; the chances of biomagnification<sup>35</sup> in the food chain; and the impact of contaminants on the site and in surrounding areas.<sup>36</sup> Contamination can be minimized through management strategies. Examples of management strategies include stabilizing the site with plant species that do not transport contaminants into their top shoots, and managing for animals that will not feed on the site, such as fish-eating birds that use it only for nesting and roosting.<sup>37</sup> Moreover, contaminated sites can be capped with clean soil or dredged material, thus allowing for beneficial uses such as nesting meadows and recreational sites.<sup>38</sup>

Most dredging projects in the United States are associated with navigation projects carried out by the Corps, cost-shared with a local sponsor such as a port authority. Through the Water Resources and Development Act (WRDA),<sup>39</sup> the Corps is responsible for maintaining approximately 25,000 miles of navigation channels for commercial and national security purposes.<sup>40</sup> There are more than 300 ports in coastal waterways in the United States with more than 3,700 terminals that rely on navigation channels.<sup>41</sup> The economic and recreational value of American ports is in the billions of dollars.<sup>42</sup> Annual congressionally authorized navigation improvement and maintenance projects by the Corps result in the removal of an average of 300 million cubic yards of material per year.<sup>43</sup> Many of these ports are located in environmentally sensitive areas, which have recreational, economic, and aesthetic values that are critical to commercial fisheries and wildlife.<sup>44</sup> The Corps also is responsible for permitting non-federal dredging activities under the CWA Section 404, Ocean Dumping Act Section 103 and Rivers and Harbors Act Section 10. The Corps and the states must juggle the difficult goals of

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<sup>34</sup> *Id.* at 2-9.

<sup>35</sup> Biomagnification means an increase in concentration of a pollutant from one link in a food chain to another. THE AMERICAN HERITAGE DICTIONARY OF SCIENCE 67 (Robert K. Barnhart, ed., Houghton Mifflin Company) (1986).

<sup>36</sup> Army Corps of Engineers, *supra* note 24, at 2-10.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 33 U.S.C. § 2201 et seq.

<sup>40</sup> U.S. Department of Transportation, An Assessment of the U.S. Marine Transportation System: A Report to Congress (September 1999), available at <http://ntl.bts.gov/DOCS/report/mtsfinal.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> U.S. Environmental Protection Agency, The Dredging Process in the United States: An Action Plan for Improvement Section 2.0, available at <http://www.epa.gov/owow/oceans/ndt/s2.html> (accessed July 17, 2004).

<sup>44</sup> *Id.* Section 1.0, available at <http://www.epa.gov/owow/oceans/ndt/s1.html> (accessed July 17, 2004).

sustaining a healthy economy while at the same time protecting valuable habitats on a limited budget.

### **2.3 Effects of Dredging Technology and Logistics on the Beneficial Use of Dredged Material**

The beneficial use of dredged material depends in part on having the right equipment in the right place at the right time.<sup>45</sup> Cutterhead dredges, for example, are much more efficient for transporting large amounts of dredged material to beneficial use sites than are other types, such as hopper dredges.<sup>46</sup> Historically, the Corps has operated and maintained a fleet of dredges of various types at various sites in U.S. coastal waters.<sup>47</sup> Over the past few decades, the Corps has relied more and more on contracting its dredging work to private contractors and has fewer of its own dredges in operation.<sup>48</sup> Private contractors are, of course, in the business of making profits, and financial incentives may result in dredges concentrated in certain coastal areas while leaving other areas with limited dredging capability.<sup>49</sup> Not only can a dearth of dredges in a particular area pose technical hurdles to beneficial use, it can also affect a project's financial feasibility.<sup>50</sup> The government bidding process requires that bids by private contractors be no more than 125% of the government estimate.<sup>51</sup> With fewer bidders, the bids are more likely to be above the 125% limit.

Weather conditions determine the feasibility of using cutterhead dredges with long pipelines that are more vulnerable to storm events than hopper dredges.<sup>52</sup> Mobilization of dredges takes time and money, requiring long lead times and less chance that dredges will be available during favorable weather periods.<sup>53</sup>

The technical and economic issues of the dredging industry need to be thoroughly examined to determine their negative effects on the beneficial use of dredged material. Such a study is beyond the scope of this paper and the expertise of the authors, but we

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<sup>45</sup> Interviews with Greg Ducote, Louisiana Department of Natural Resources, Coastal Management Division (November 18, 2004) and George Boddie, Louisiana Department of Natural Resources, Coastal Restoration Division (December 15, 2004). See also GlobalSecurity.org, Dredges, available at <http://www.globalsecurity.org/military/systems/ship/dredges.htm> (accessed December 16, 2004).

<sup>46</sup> Interviews with Greg Ducote, Louisiana Department of Natural Resources, Coastal Management Division (November 18, 2004) and George Boddie, Louisiana Department of Natural Resources, Coastal Restoration Division (December 15, 2004).

<sup>47</sup> GlobalSecurity.org, Dredges, available at <http://www.globalsecurity.org/military/systems/ship/dredges.htm> (accessed December 16, 2004).

<sup>48</sup> Interview with George Boddie, Louisiana Department of Natural Resources, Coastal Restoration Division (December 15, 2004).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

think it is a critical component of furthering the goal of more beneficial use of dredged material.

## **Section 3.0 Administrative Aspects and Funding of Beneficial Use**

**Dredging projects are subject to specific regulatory requirements. Some of these regulations may prevent beneficial use. The Federal Standard sometimes conflicts with Louisiana's coastal management plan, which requires beneficial use of dredged material in some instances. Since funding is a major impediment to beneficial use in Louisiana, this section provides an overview of the Corps's budget, appropriations process, and federal laws that offer funding and cost-sharing mechanisms.**

### **3.1 The Administrative Process of Navigation Projects**

Dredging projects, initiated by a local demand for dredging, are subject to specific regulatory requirements. Initially, the Corps conducts feasibility studies for the proposed project, and at each step, particularly in the budgeting phase, there is interplay between the relevant Corps district office, Corps's Headquarters, the Department of the Army, the President's Office of Management and Budget, and Congress.<sup>54</sup> With only a few exceptions, Congress authorizes the construction of navigation projects on a case-by-case basis and appropriates funds for those projects each year until their completion. Congress also makes annual project-specific appropriations for the maintenance of existing channels and harbors. For new navigation projects, the Corps obtains Congressional approval and appropriations and prepares an Environmental Assessment (EA) or EIS, if required by the National Environmental Policy Act.<sup>55</sup> Before implementing the plan, the Corps generally must receive water quality certification<sup>56</sup> from the jurisdictional state and consider the EPA's CWA Section 404(b)(1) Guidelines<sup>57</sup> to ensure that minimal environmental harm will result from the project. If the state's coastal zone will be affected by the project, then the Corps must obtain a consistency concurrence from the state.<sup>58</sup> If the enforceable policies of a state's coastal management program (CMP) include beneficial use guidelines, then it is reasonable to believe that the Corps is required to follow them to the maximum extent practicable, though the Corps has argued against this rationale when cost becomes an issue.<sup>59</sup> The state CMP may have a beneficial use policy, but the Corps operates under the Federal Standard, and, therefore, the Corps does not always budget for beneficial use of dredged material as required by the enforceable policies in the CMP. If the state wants beneficial use that will cost more than the base plan, then the Corps maintains the state is responsible for securing the extra funds. The state may choose to fund the cost above the base plan from its own budget,

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<sup>54</sup> U.S. Army Corps of Engineers, Fact Sheet: Operations and Maintenance (O & M) Budgeting and Funding Process CEMVN-OD-G, February 17, 2004.

<sup>55</sup> 42 U.S.C. § 4321 et seq.

<sup>56</sup> 33 U.S.C. § 1341.

<sup>57</sup> 33 U.S.C. § 1344.

<sup>58</sup> 16 U.S.C. § 1456.

<sup>59</sup> Interview with Greg DuCote, Louisiana Department of Natural Resources, Coastal Management Division (October 13, 2004).

and some funding mechanisms at the federal level are available to alleviate part of the extra cost. The WRDA and CWPPRA are two such funding mechanisms, though both also require non-federal cost sharing<sup>60</sup> and so far have been insufficient to meet the state's needs.

Louisiana's State and Local Coastal Resources Management Act (SCLRMA) (passed pursuant to the CZMA) and regulations *require* beneficial use of dredged material for wetland protection, creation, or enhancement when a use or activity requires the dredging or disposal of 500,000 cubic yards or more of any waterbottom or wetland within the coastal zone.<sup>61</sup> If a proposed use or activity requires a coastal use permit for the dredging or disposal of 25,000 to 500,000 cubic yards of any waterbottoms or wetlands within the coastal zone, then the state *may require* beneficial use.<sup>62</sup> The crux of the debate in Louisiana is that the Department of Natural Resources would like dredged material beneficially used according to the requirements in its CMP to facilitate coastal restoration efforts, while the Corps often asserts that it must deal with the dredged material according to the Federal Standard and its limited budget. Thus, the tension and impasse between the two agencies remains unresolved.

### 3.2 The Federal Standard

During the planning process of a federal navigation project, the Corps must decide what to do with the material it will dredge. The Corps's regulations require, as a matter of policy, that projects including the disposal of dredged material from dredging projects be conducted in an economically efficient manner commonly known as the Federal Standard.<sup>63</sup> The Federal Standard means that the Corps will use "the dredged material disposal alternative or alternatives identified by the Corps which represent the least costly alternatives consistent with sound engineering practices and meeting the environmental standards established by the CWA Section 404(b)(1) evaluation process or ocean dumping criteria."<sup>64</sup>

The Corps published the Federal Standard regulation in 1988 to provide nationwide consistency in the management of dredged material disposal by balancing economics, engineering, and environmental requirements.<sup>65</sup> Promulgation of the policy as a final rule was controversial. During the commenting period, two key issues were raised: (1) whether alternatives to a proposed project should be developed as part of the Federal Standard before the Corps requests a CZMA consistency concurrence from the state, and (2) whether requirements for beneficial use of dredged material should be incorporated into the Federal Standard.<sup>66</sup> The Corps's position was that the Federal

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<sup>60</sup> See 33 U.S.C. §§ 2201-2220 and 16 U.S.C. § 3952(f).

<sup>61</sup> La. R.S. § 49:214.30(H)(1).

<sup>62</sup> La. R.S. § 49:214.30(H)(2).

<sup>63</sup> 33 C.F.R. § 335.4.

<sup>64</sup> 33 C.F.R. § 335.7.

<sup>65</sup> Final Rule for Operation and Maintenance of Army Corps of Engineers Civil Works Projects Involving the Discharge of Dredged Material Into Waters of the U.S. or Ocean Waters, 53 Fed. Reg. 14902 (April 26, 1988) (codified at 33 C.F.R. Parts 209, 335, 336, 337 and 338).

<sup>66</sup> *Id.* at 14904.

Standard must be developed before the proposed project is submitted to a state for a consistency determination. The Corps's position assumes that the state would be not able to make its consistency determination without having all information regarding the proposed activity, including the Federal Standard cost restrictions.<sup>67</sup> Regarding incorporation of beneficial use into the development of Federal Standard budget limits, the Corps responded that it is Corps policy to use dredged material beneficially using existing authority and funding, consistent with the Federal Standard development process.<sup>68</sup> When a state's recommendations for making a proposed project consistent with its CMP would require the Corps to exceed either its authorization or appropriation, then the Corps believes it has complied with the CZMA to the maximum extent practicable, and a non-federal sponsor becomes responsible for the costs that exceed the Congressional appropriation.<sup>69</sup> After additional costs are factored into the overall project cost, the project, with or without a non-federal sponsor, is re-evaluated by the Corps to determine continued economic feasibility in light of any state-imposed requirements that would increase cost.<sup>70</sup>

NOAA's opinion regarding the Federal Standard was expressed in a 1989 letter to Corps Headquarters.<sup>71</sup> The NOAA letter was a response to the Corps's promulgation of a final rule<sup>72</sup> regarding its responsibilities to address requirements under the CWA and CZMA as they pertained to operations and maintenance of dredging activities. In its letter, NOAA expressed concern over the Corps's definition for the Federal Standard in a way that precludes spending above the Federal Standard's limits by adding beneficial use costs to a project. NOAA's concern was that the use of the Federal Standard was not compatible with the Corps's obligation to make its actions consistent to the maximum extent practicable with a state's federally approved CMP. NOAA argued that while guidance in the CZMA and its regulations on the meaning of the phrase "to the maximum extent practicable" recognizes that compliance with that standard may be prohibited based upon the requirements of other federal law applicable to Corps operations, "neither the CZMA or its implementing regulations contemplate the use of economic efficiency as a reason not to comply with the requirements of Section 307 of the CZMA."<sup>73</sup> NOAA's consistency regulations state that "federal agencies cannot use a general claim of lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in federal budget and planning processes as being consistent to the maximum extent practicable" with an enforceable policy of a state CMP.<sup>74</sup> In the case of the Federal Standard, the Corps could argue that following the cost restraints imposed by the Federal

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 14906.

<sup>70</sup> *Id.*

<sup>71</sup> Memorandum from the National Oceanic and Atmospheric Administration to Brigadier General Patrick J. Kelley, U.S. Army Corps of Engineers (December 15, 1989) (on file with the Louisiana Sea Grant Legal Program). At the time the Dredging Guidance Letter was written, the Corps had asked for the Department of Justice's (DOJ) opinion on the issue, and the DOJ responded that ODA Section 106(d) did preempt state regulation of ocean dumping activities covered by the Act, including CZMA consistency concurrence.

<sup>72</sup> 33 C.F.R. Parts 335-338.

<sup>73</sup> *Supra* note 69.

<sup>74</sup> 15 C.F.R. § 930.32(a)(3).

Standard is being consistent to the maximum extent practicable because other federal laws, such as WRDA Section 204, allow beneficial use if a state or local sponsor agrees to enter into a binding cost-sharing agreement with the Corps.<sup>75</sup> However, the Corps has yet to make this argument, and we believe it is a weak one.<sup>76</sup>

The Federal Standard regulations have continued to be the subject of debate between the Corps, NOAA, and states such as Louisiana that are being affected by coastal erosion. To what extent then does the Federal Standard apply in light of CZMA consistency requirements, specifically Louisiana's beneficial use guidelines when funding is an issue? There is no quick and easy answer to this question because the issue is complex, and Congress has not provided clear guidance. Insight may be gleaned from Congressional intent in enacting various laws, including the CZMA, and Congressional directives to the Corps. Case law sheds little light because the issues surrounding the Federal Standard and CZMA consistency have not been litigated.

There was no specific Congressional directive to develop the Federal Standard. The Corps developed it from its interpretation of various environmental laws, executive orders and case law.<sup>77</sup> According to the final rule published in the *Federal Register*,<sup>78</sup> the Federal Standard was derived from the CWA, the ODA, the National Historic Preservation Act of 1966,<sup>79</sup> the Reservoir Salvage Act of 1960,<sup>80</sup> the Endangered Species Act,<sup>81</sup> the Estuary Protection Act,<sup>82</sup> the Fish and Wildlife Coordination Act,<sup>83</sup> the Wild and Scenic Rivers Act,<sup>84</sup> the National Environmental Policy Act,<sup>85</sup> CZMA Section 307(c), WRDA and Executive Orders 11593,<sup>86</sup> 11988,<sup>87</sup> 11990,<sup>88</sup> 12372<sup>89</sup> and 12114.<sup>90</sup> The Federal Standard gives equal weight to cost, engineering, and environmental considerations. When applied to navigation projects, the Federal Standard requires the Corps to consider not only those factors, but also the impact of the failure to maintain navigation channels on the national, and in some cases regional, economy.<sup>91</sup> Data generated by Environmental Assessments, Environmental Impact Statements, the CWA

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<sup>75</sup> David Kaiser, Federal Consistency Coordinator, NOAA Office of Ocean and Coastal Resource Management, Gulf of Mexico CZMA Federal Consistency Workshop, New Orleans, Louisiana (December 1, 2004).

<sup>76</sup> *Id.* See further discussion on page 34.

<sup>77</sup> *Supra* note 63 at 14902.

<sup>78</sup> *Supra* note 63 at 14911, 14912.

<sup>79</sup> 16 U.S.C. § 470a et seq., as amended.

<sup>80</sup> 16 U.S.C. § 469, as amended.

<sup>81</sup> 16 U.S.C. § 1531 et seq., as amended.

<sup>82</sup> 16 U.S.C. § 1221.

<sup>83</sup> 16 U.S.C. § 661 et seq., as amended.

<sup>84</sup> 16 U.S.C. § 1271 et seq., as amended.

<sup>85</sup> 42 U.S.C. § 4341 et seq., as amended.

<sup>86</sup> Protection and Enhancement of the Cultural Environment, May 13, 1971, 36 Fed. Reg. 8921 (May 15, 1971).

<sup>87</sup> Floodplain Management, May 27, 1977, 42 Fed. Reg. 26951 (May 25, 1977).

<sup>88</sup> Protection of Wetlands, May 24, 1977, 42 Fed. Reg. 26961 (May 25, 1977).

<sup>89</sup> Intergovernmental Review of Federal Programs, July 14, 1982, 47 Fed. Reg. 3959 (July 16, 1982).

<sup>90</sup> Environmental Effects Abroad of Major Federal Actions, January 4, 1979.

<sup>91</sup> *Supra* note 63 at 14914.

Section 404(b)(1) Guidelines and the public notice coordination process also guide the Corps in formulating alternatives to disposal of dredged material.<sup>92</sup>

The Congressional Record of floor debates on the CZMA and the relationship between beneficial use and the Federal Standard provide little insight into Congressional intent regarding the relationship between CZMA consistency requirements and the Federal Standard. While beneficial use and the Federal Standard are mentioned in Congressional proceedings and debates, Congress makes no statement about how to resolve conflicts between the Federal Standard and CZMA consistency. Congress generally has recognized the restoration needs of America's coasts, and the vital role the Corps plays in environmental restoration, but also recognizes that the Corps's limited funding is a significant hurdle to overcome.<sup>93</sup> Legislation has been introduced throughout the years to increase Corps funding for environmental restoration projects. For example, legislation introduced by U.S. Representative Walter B. Jones (R-NC) would have authorized beneficial use of dredged material for shoreline protection and restoration projects that cost more than the base plan, as long as non-federal interests agreed to pay 35% of the cost.<sup>94</sup> This legislation, had it passed, would have provided \$75 million per fiscal year for such projects.<sup>95</sup> The legislation, introduced in July 2002, remains in the Subcommittee on Water Resources and Environment.<sup>96</sup>

The Corps disagrees with NOAA and coastal states as to what degree the Federal Standard affects the CZMA consistency provision, and a Congressional directive would help resolve the impasse. Congress's silence on this issue thus presents a challenge.

### 3.3 Funding Beneficial Use Projects

A brief overview of the Corps's budget and appropriations process will facilitate understanding of how beneficial use projects ultimately are funded. The time period for the Corps's budget and appropriations process is approximately 20 months.<sup>97</sup> Budget development and execution in the Corps's Operation and Maintenance (O&M) Program takes place on a federal fiscal year basis, and the development of a budget occurs during the two fiscal years preceding the fiscal year when funding is available for the execution of O&M projects (also referred to as the Budget Year or BY).<sup>98</sup> The process begins in February, two years (BY-2) before the budget year,<sup>99</sup> when the President's Office of

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<sup>92</sup> *Id.*

<sup>93</sup> *See, e.g.*, 140 CONG. REC. S4334-04 (April 14, 1994) (statement of Sen. Sarbanes) and 141 CONG. REC. H6772-02 (July 11, 1995) (statement of Rep. Cardin).

<sup>94</sup> H.R. 5137, 107<sup>th</sup> Cong. (2002).

<sup>95</sup> *Id.*

<sup>96</sup> *See* THOMAS: Legislative Information on the Internet, Summary and Bill Status (accessed November 18, 2004) (status of H.R. 5137 is available via search engine).

<sup>97</sup> National Dredging Team, Dredged Material Management and State Coastal Management Programs: Lessons from a Workshop in New Orleans, Louisiana (January 1999), *available at* <http://www.epa.gov/owow/oceans/ndt/napareport/budget.html>.

<sup>98</sup> U.S. Army Corps of Engineers, Fact Sheet: Operations and Maintenance (O & M) Budgeting and Funding Process CEMVN-OD-G, February 17, 2004.

<sup>99</sup> *Supra* note 95.

Management and Budget (OMB) sets the Corps's budget ceiling for that budget year.<sup>100</sup> The Corps then allocates money for each program, and Corps district offices set priorities and amounts for each project in their areas.<sup>101</sup> By September BY-2, the Corps submits its proposed budget to OMB for comments. In February BY-1, the President's administration proposes a budget for the next fiscal year (FY) in the form of an appropriations bill.<sup>102</sup> Congress holds hearings on the proposed FY budget and may mark up the appropriations bill, meaning that the text of the bill may be revised and amendments offered before it is presented to the House or Senate for action. Once Congress enacts the appropriations bill, funds are available for the BY.<sup>103</sup> The budget schedule is relevant to dredging projects because almost all of them are funded by name with specific appropriations. There are four "zones of influence" in which state and local interests can have input on the Corps's budget:

- Budget planning usually begins in the Corps field offices. In order to have maximum input in the design of projects, potential state and local sponsors should contact the District Engineer (DE) and work closely with the DE to identify and characterize dredging projects. Sponsors should present the DE with their views by February BY-2.
- Sponsors can visit Washington, D.C. in July and August BY-2 when Corps Headquarters presents the proposed budget to the Assistant Secretary of the Army for Civil Works. At this stage, potential sponsors can influence specific projects or specific funding levels in the Corps's proposed budget.
- When Congress debates the administration's proposed budget, Congressional committees hold hearings, and committee members may be influenced by letters from constituents and statements from members of Congress.
- Since appropriations committees are bound by the limitations set by their respective budget committees, project supporters should consider speaking with the budget committee to encourage adequate funding.<sup>104</sup>

Although the Corps's operation and maintenance budget should be increased to meet the rising costs of adequately maintaining and constructing new navigation projects, securing increases has proved difficult over the years.<sup>105</sup> Attempts by the Corps and state and local entities with interests in dredging and beneficial use projects to influence Congress during the appropriations stage will continue to be necessary. A more detailed explanation of the Corps's budgeting and funding process for Operation and Maintenance projects is located in Appendix B.

There are two ways the Corps can aid state and local water resource development projects that include environmental restoration projects: (1) an individual authorized

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> National Dredging Team, Dredged Material Management and State Coastal Management Programs: Lessons from a Workshop in New Orleans, Louisiana (January 1999), *available at* <http://www.epa.gov/owow/oceans/ndt/napareport/budget.html> (accessed August 12, 2004).

study, or (2) support through the Continuing Authorities Program (CAP).<sup>106</sup> An individual authorized study is the most common way a community and the Corps co-sponsor a project. This requires Congressional approval to conduct a feasibility study and construct the project.<sup>107</sup> Local sponsors share study and construction costs and ultimately are responsible for all operation and maintenance costs.<sup>108</sup> Through the CAP, the Corps has standing Congressional authority to study and build water resource projects for specific purposes and with specific funding limits per project.<sup>109</sup> The process and guidelines, such as cost sharing rules, are generally the same as those that apply to individual authorized studies, except that individual Congressional authority is not needed.<sup>110</sup>

There are five existing principal authorities under which the Corps typically applies beneficial use to a dredging project: (1) including a beneficial use component in the base plan, (2) including beneficial use in a Congressionally authorized navigation project, or through the CAP via (3) Section 204 of WRDA, (4) Section 206 of WRDA or (5) Section 1135 of WRDA.<sup>111</sup> (See Appendix A for a flow chart regarding the funding of beneficial use projects.) When beneficial use is included in the base plan, it is incorporated into the Federal Standard, meaning it is unlikely that the beneficial use component of the project would require additional funds from the state or local interest.<sup>112</sup> The Corps New Orleans District dredges an average of 70 million cubic yards annually in Louisiana and, at this time, uses approximately 14.5 million cubic yards beneficially in the surrounding environment. For these purposes, the Corps uses funding from the Operation and Maintenance program or the Continuing Authorities Program, as defined in Section 204 of WRDA.<sup>113</sup> However, cost sharing may be involved even if beneficial use is incorporated into the Federal Standard in some instances.<sup>114</sup> With maintenance dredging projects, for example, the federal government bears the transportation and placement costs of the material,<sup>115</sup> but projects involving the maintenance of disposal facilities are cost-shared; the non-federal interest pays between 10% and 60% of the cost.<sup>116</sup> Construction projects involving transportation and placement of dredged material may involve non-federal costs of between 10% and 60%, depending on the depth of the

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<sup>106</sup> U.S. Army Corps of Engineers, *The Corps Can Help: A Guide to Community Assistance and Cost-Sharing Programs with the Corps of Engineers*, available at <http://www.swl.usace.army.mil/planning/PERbrochure.pdf>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Note: Regulations for the CAP are located at 33 C.F.R. § 26.10 et seq.

<sup>110</sup> *Id.*

<sup>111</sup> National Dredging Team, *Dredged Material Management and State Coastal Management Programs: Lessons from a Workshop in New Orleans, Louisiana* (January 1999), available at <http://www.epa.gov/owow/oceans/ndt/napareport/budget.html> (accessed August 12, 2004).

<sup>112</sup> *Id.*

<sup>113</sup> U.S. Army Corps of Engineers, *Louisiana Coastal Area Ecosystem Restoration Study Main Report*, Volume 1, November 2004 at xi.

<sup>114</sup> *Supra* note 103.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

channel.<sup>117</sup> These types of cost sharing are not based on paying the incremental cost of beneficial use, but on the fact that the underlying project is cost-shared.<sup>118</sup>

If beneficial use is included as part of a Congressionally authorized navigation project, usually a multi-use project authorized and funded by Congress, cost sharing is required. The cost-sharing process includes funding the feasibility study, obtaining Congressional authority and funding, and securing an agreement between the federal interest and state or local interest to cover the non-federal share of the project's cost.<sup>119</sup> This type of project usually requires a non-federal sponsor to pay 25% of the increase in incremental cost of beneficial use above the base plan and 100% of the non-federal maintenance cost.<sup>120</sup>

The WRDA provides funding mechanisms for the conservation and development of water and related resources and the improvement and rehabilitation of America's water resources infrastructure.<sup>121</sup> Section 204 of WRDA authorizes the Corps to carry out projects "for the protection, restoration and creation of aquatic and ecologically related habitats, including wetlands, in connection with dredging for construction, operation or maintenance by the Corps of an authorized navigation project."<sup>122</sup> Moreover, funding under this law can be used to cover the federal share of the cost above the base plan of navigation projects for beneficial use projects.<sup>123</sup> Section 204 provides programmatic authority, which means that the Corps does not need Congressional authorization or appropriations for each project. Projects undertaken pursuant to Section 204 are initiated only after non-federal interests have entered into a binding agreement with the Corps to provide 25% of the cost associated with the construction of the project for the protection, restoration, and creation of aquatic and ecologically related habitats and also to pay 100% of the operation, maintenance, replacement and rehabilitation costs.<sup>124</sup> Congressionally authorized appropriations for this section are limited by law not to exceed \$15 million annually,<sup>125</sup> but, according to the Corps, Section 204 authority has been underused in the past, and the Corps has received only as high as \$2 to \$3 million per fiscal year in recent years.<sup>126</sup> In 1999, Congress appropriated only \$350,000 because expenditures under the Section 204 program were low the previous fiscal year.<sup>127</sup> Under the Louisiana Coastal Wetlands Conservation Plan, the state budgets approximately \$1 million annually to provide the 25% cost share for beneficial use projects associated with the maintenance of federal navigation channels via programs under WRDA Sections 204 and 1135.<sup>128</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> 33 U.S.C. § 2201 et seq., as amended.

<sup>122</sup> 33 U.S.C. §§ 2326(a) and (c). Note: § 2326 is commonly referenced as Section 204.

<sup>123</sup> WRDA 1986, Pub. L. No. 99-662, Preamble, HR 6 (1986).

<sup>124</sup> 33 U.S.C. § 2326(c).

<sup>125</sup> *Id.* at § 2326(f).

<sup>126</sup> *Supra* note 107.

<sup>127</sup> *Id.*

<sup>128</sup> Louisiana Department of Natural Resources Office of Coastal Restoration and Management, Louisiana Coastal Wetlands Conservation Plan, 1997 at 21.

Section 204(e) of WRDA contains a provision regarding the selection of dredged material disposal methods. Section 204(e), added to WRDA in 1996, allows the Corps to select, with the consent of non-federal interests, a dredged material disposal method that is not the least-cost option if the Corps determines that the incremental costs of the method at issue are reasonable in relation to the environmental benefits, “including the benefits to the aquatic environment to be derived from the creation of wetlands and control of shoreline erosion.” The selection may be made as long as a non-federal interest funds 25% of the cost for construction and 100% of the maintenance cost.<sup>129</sup> Authority under Section 204(e) is separate from authority under Section 204 established by WRDA 1992.

Section 206 of WRDA authorizes a program for the Corps to carry out environmentally beneficial modifications to water resources projects constructed by the Corps for improvement of the environment.<sup>130</sup> These aquatic ecosystem restoration projects also must be cost effective and in the public interest.<sup>131</sup> Non-federal interests are required to pay 35% of the cost of construction<sup>132</sup> and 100% of the operation and maintenance costs.<sup>133</sup> Individual projects are limited to \$5 million in federal cost,<sup>134</sup> and the Section 206 program has an annual appropriations limit of \$25 million.<sup>135</sup>

Although not specifically oriented to beneficial use projects, Section 1135 of WRDA authorizes a program for modifications in the structures and operations of water resource projects constructed by the Corps. These modifications must be made for the purpose of environmental improvement in the public interest and to determine if the operation of such projects has contributed to environmental degradation.<sup>136</sup> The Corps is authorized to carry out project modifications as part of the program once the Secretary of the Army determines that they are feasible and consistent with the project’s purposes and will improve the quality of the environment in the public interest.<sup>137</sup> The Corps has the option of carrying out modifications either at the project site or at other locations that have been affected by the construction and operation of the project, if such measures do not conflict with the purposes of the authorized project.<sup>138</sup> Non-federal sponsors are required to pay 25% of the project cost<sup>139</sup> and usually pay 100% of the operation and maintenance costs. The federal monetary limit per project is \$5 million,<sup>140</sup> and the annual appropriations limit is \$25 million.<sup>141</sup>

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<sup>129</sup> *Id.* at § 2326(e). Note: Section 2326(e) is sometimes referenced as Section 207.

<sup>130</sup> 33 U.S.C. § 2330(a).

<sup>131</sup> *Id.*

<sup>132</sup> 33 U.S.C. § 2330(b).

<sup>133</sup> 33 U.S.C. § 2330(c)(1).

<sup>134</sup> 33 U.S.C. § 2330(d)

<sup>135</sup> 33 U.S.C. § 2330 (e).

<sup>136</sup> 33 U.S.C. § 2309a.

<sup>137</sup> 33 U.S.C. § 2309a(b).

<sup>138</sup> 33 U.S.C. § 2309a(c)(1)

<sup>139</sup> 33 U.S.C. § 2309a(d).

<sup>140</sup> *Id.*

<sup>141</sup> 33 U.S.C. § 2309a(h).

In 1990, Congress passed CWPPRA to address Louisiana's coastal land loss crisis. CWPPRA established a task force to identify and prioritize wetlands restoration projects in Louisiana that would restore, protect and enhance coastal wetlands.<sup>142</sup> Rankings are based on cost effectiveness and include small demonstration projects that test new technology.<sup>143</sup> Included in CWPPRA is the Louisiana Coastal Wetlands Conservation program. This program authorizes the development of a conservation plan by the state, with approval from EPA, the Corps, and the U.S. Fish and Wildlife Service (FWS), for the purpose of achieving no net loss of coastal wetlands in Louisiana.<sup>144</sup> The program also authorizes the FWS to provide matching grants to carry out coastal wetlands conservation projects.<sup>145</sup> Since approval of Louisiana's conservation plan was received, the state's cost share for wetlands projects developed pursuant to CWPPRA decreased from the usual 25% to 15%.<sup>146</sup> CWPPRA Section 307 provides the Corps with additional authority to "carry out projects for the protection, restoration, or enhancement of aquatic and associated ecosystems, including projects to protect, restore or create wetlands and coastal ecosystems."<sup>147</sup> Sediment dredged from navigation channels can be used to construct CWPPRA projects at a reduced cost-share. CWPPRA Section 307 also authorizes the Corps to conduct feasibility studies for modifying the operation of existing navigation and flood control projects "to allow for an increase in the share of the Mississippi River flows and sediment sent down the Atchafalaya River for purposes of land building and wetlands nourishment."<sup>148</sup>

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<sup>142</sup> 16 U.S.C. § 3952.

<sup>143</sup> *Id.*

<sup>144</sup> 16 U.S.C. § 3953(b).

<sup>145</sup> 16 U.S.C. § 3954.

<sup>146</sup> U.S. Fish and Wildlife Service, The National Wetlands Conservation Grant Program Fact Sheet, available at [http://www.fws.gov/cep/cwg\\_jan04.pdf](http://www.fws.gov/cep/cwg_jan04.pdf).

<sup>147</sup> 16 U.S.C. § 3956.

<sup>148</sup> *Id.*

## Section 4.0 Legal Issues Affecting Beneficial Use

**The Corps has specific responsibilities affecting beneficial use under the Ocean Dumping Act, Clean Water Act, Coastal Zone Management Act, and the National Environmental Policy Act. These responsibilities can be used to encourage more beneficial use in some instances.**

### 4.1 Corps Responsibilities Under the Ocean Dumping Act

Ocean dumping of dredged material falls mainly under the jurisdiction of the Marine Protection Research and Sanctuaries Act, commonly known as the Ocean Dumping Act or ODA. Congress passed the ODA to prevent unregulated ocean disposal because it “endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.”<sup>149</sup> Both the Corps and EPA have roles in the regulation of ocean dumping. The ODA provides for control of both the transportation of material to be dumped and the dumping itself.<sup>150</sup>

The EPA regulates the dumping of all ODA-regulated materials except dredged material, which is regulated by the Corps.<sup>151</sup> However, EPA recommends designated ocean disposal sites for dredged material.<sup>152</sup> The standard for permit issuance by the Corps is whether the dumping will “unreasonably degrade or endanger human health, welfare or amenities, or the marine environment, ecological systems and ecological potentialities.”<sup>153</sup> During the permit process for ocean disposal of dredged material, the Corps uses criteria promulgated by EPA and also consults with EPA throughout the process.<sup>154</sup> The EPA has developed specific environmental criteria to evaluate permit applications, and the development of these criteria is conducted in coordination with the Corps for ocean disposal of dredged material.<sup>155</sup> In developing criteria for the evaluation of permit applications, the ODA requires the consideration of elements such as: (1) the need for the proposed ocean disposal; (2) the effects on human health and welfare, fisheries resources, marine ecosystems, and shorelines; (3) the “persistence and permanence of the effects” of disposal; (4) the effects of the disposal “in particular volumes and concentrations”; (5) “appropriate locations and methods of disposal or recycling, including land-based alternatives” and their impacts; and (6) the effects of disposal on “alternate uses of the oceans.”<sup>156</sup> The Department of Commerce, through NOAA, also has some authority pursuant to the ODA: it conducts research on the effects on ocean systems of ocean dumping and other human-induced changes.<sup>157</sup>

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<sup>149</sup> 33 U.S.C. § 1401(a).

<sup>150</sup> *See id.* at (c).

<sup>151</sup> *See id.* at § 1412.

<sup>152</sup> *See id.* at §§ 1412 and 1413(b).

<sup>153</sup> *See id.* at §§ 1412 and 1413.

<sup>154</sup> *See id.* at § 1413.

<sup>155</sup> *See id.*

<sup>156</sup> 33 U.S.C. § 1412.

<sup>157</sup> *See id.* at §§ 1441 and 1442.

The section of the ODA that is most relevant to the issue in question is Section 106(d), which states, in part:

In the case of a federal project, a state may not adopt or enforce a requirement that is more stringent than a requirement under this subchapter if the Administrator finds that such requirement—

(A) is not supported by relevant scientific evidence showing the requirement to be protective of human health, aquatic resources, or the environment;

(B) is arbitrary or capricious; or

(C) is not applicable or is not being applied to all projects without regard to federal, state, or private participation and the Secretary of the Army concurs in such finding.<sup>158</sup>

In the past, the Corps has argued that its ocean disposal projects did not require consistency with state CMPs.<sup>159</sup> While the Corps argued that the ODA preempted consistency, the agency stated that it would voluntarily comply with the CZMA as a matter of comity.<sup>160</sup> On the other hand, NOAA argued that the ODA did not preempt the CZMA. A brief summary of the Corps's and NOAA's arguments and an analysis of Congressional intent during the CZMA Reauthorization Amendments of 1990 follow.

In 1989, the Corps promulgated its final rule for discharge of dredged materials into the waters of the U.S. or ocean waters.<sup>161</sup> In its 1989 Dredging Guidance Letter, which was drafted to clarify and interpret various sections of the new regulations and regulations regarding transportation of dredged material for ocean disposal,<sup>162</sup> the Corps expressed uncertainty over the legal authority of a state to require compliance with the CZMA consistency provision for the agency's ODA-authorized ocean disposal of dredged material within the three-mile extent of the territorial sea.<sup>163</sup> The basis for this argument was the doctrine of federal preemption, which means that federal legislation on a subject matter is controlling over state laws on the same subject matter and precludes states from enacting laws on the same subject matter, upon either an express or implied statement from Congress to that effect.<sup>164</sup> The Corps stated it would comply as a matter of comity and submit to the consistency process as a matter of practice,<sup>165</sup> except when a state "unreasonably denies" consistency with a Corps ocean dumping project. If this should occur, then the Corps Division's District Engineer (DE) would consider whether it should proceed without state concurrence, but only after consultation between the DE and

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<sup>158</sup> 33 U.S.C. § 1416(d)(2).

<sup>159</sup> U.S. Army Corps of Engineers, Dredging Guidance Letter (Sept. 19, 1989) (on file with the Sea Grant Legal Program).

<sup>160</sup> *Id.*

<sup>161</sup> *Supra* note 63.

<sup>162</sup> *See* 33 C.F.R. § 336.2(c).

<sup>163</sup> *See also supra* note 63 at 14908.

<sup>164</sup> U.S. CONST. art. VI. *See, e.g.,* California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987).

<sup>165</sup> 33 C.F.R. § 336.2(c).

Corps Headquarters.<sup>166</sup> NOAA argued that the Corps was under a legal obligation to submit to the consistency process<sup>167</sup> and stated that while the language of Section 106(d) “may leave some doubt” about the extent to which consistency may apply, the use of consistency by the states is implementation of a federal statute and not a state regulation per se.<sup>168</sup> NOAA also pointed towards a similar issue that Congress addressed in 1986 during the reauthorization of the Superfund law that, according to one of its sponsors, amended the ODA in order to overturn a series of cases that held the CWA and ODA preempted state regulation.<sup>169</sup> The ODA amendment established the “general rule that state laws, standards or limitations are not preempted by the [ODA] ... where there is a potential conflict between a state authority governing environmental quality, public health or welfare and the prohibitions in Section 106(d) of the ODA, the presumption favors the continuing validity of state law.”<sup>170</sup>

Congress again touched on this issue in 1990 during the CZMA Reauthorization Amendments.<sup>171</sup> A U.S. House of Representatives Conference Report stated that House Bill 4450 contained a section,<sup>172</sup> which provided that the CZMA’s consistency requirements applied to federal agency activities under the ODA, if the federal activity affected land uses, water uses or natural resources of the coastal zone.<sup>173</sup> This section was not included in the conference report because there was “no doubt that all federal agency activities and all federal permits are subject to the CZMA’s consistency requirements.”<sup>174</sup> The House was aware of, and rejected, the argument that requiring consistency of ODA-authorized dumping with state CMPs violated the ODA’s state preemption provision.<sup>175</sup> Thus, the Congressional Record indicates that CZMA consistency requirements are not preempted by federal law, and the argument should be even stronger with regard to regulations such as the Federal Standard.

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<sup>166</sup> U.S. Army Corps of Engineers, Dredging Guidance Letter (Sept. 19, 1989) (on file with the Sea Grant Legal Program).

<sup>167</sup> Memorandum from the National Oceanic and Atmospheric Administration to Brigadier General Patrick J. Kelley, U.S. Army Corps of Engineers (December 15, 1989) (on file with the Louisiana Sea Grant Legal Program). At the time the Dredging Guidance Letter was written, the Corps had asked for the Department of Justice’s (DOJ) opinion on the issue, and the DOJ responded that ODA Section 106(d) did preempt state regulation of ocean dumping activities covered by the Act, including CZMA consistency concurrence.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> CONFERENCE REPORT ON H.R. 5835, OMNIBUS BUDGET RECONCILIATION ACT OF 1990, H. Rept. 101-964, 136 Cong. Rec. H12423-02, H12695 (1990).

<sup>172</sup> Section 7207

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

## 4.2 Corps Responsibilities Under the Clean Water Act

The CWA,<sup>176</sup> passed in 1972, established federal laws for regulating discharges of pollutants into the waters of the U.S and gave the EPA primary authority to implement and enforce pollution control programs.<sup>177</sup> Section 404 of the CWA authorized the Corps to regulate the disposal of dredged or fill material into navigable waters of the U.S. in accordance with guidelines developed by the EPA, which are commonly known as the 404(b)(1) Guidelines.<sup>178</sup> The purpose of the guidelines is to restore and maintain the chemical, physical, and biological integrity of the waters of the U.S. through the control of discharges of dredged or fill material.<sup>179</sup> They were developed to implement the CWA policy that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that it will not have an unacceptable adverse impact on the ecosystem(s) of concern.<sup>180</sup> Under the 404(b)(1) Guidelines, a discharge of dredged or fill material is not permitted if there is a practicable alternative that would have a less adverse impact on the aquatic ecosystem, so as long as the alternative does not have other significant adverse impacts.<sup>181</sup> Findings of significant degradation from a proposed discharge are based on factual determinations and tests, with emphasis on the permanence and persistence of effects.<sup>182</sup> Effects that contribute to significant degradation include significantly adverse effects on: (1) human health or welfare, (2) life stages of aquatic life and other wildlife dependent on aquatic ecosystems, (3) effects on aquatic ecosystem diversity, productivity and stability, or (4) effects on recreational, aesthetic and economic values.<sup>183</sup> Analysis under the 404(b)(1) Guidelines comprises part of the decision regarding whether to use dredged material beneficially.

The CWA implements the 404(b)(1) Guidelines mainly in the context of Section 404 permits issued by the Corps to individuals and entities for deposit of dredged or fill material into navigable waters of the U.S. However, the guidelines also play a role in two other important areas. Congressionally authorized federal projects, including Corps activities such as dredging for navigation projects, are exempt from CWA Section 404 permitting requirements only if Congress has been informed of the effects of the discharge before authorization and appropriation.<sup>184</sup> The vehicle specified by the CWA to inform Congress of the effects of projects it authorizes and funds is the Environmental Impact Statement (EIS) required under the National Environmental Policy Act.<sup>185</sup> The CWA specifically names the 404(b)(1) Guidelines as a consideration to be addressed in the EIS.<sup>186</sup>

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<sup>176</sup> 33 U.S.C. § 1251 et seq.

<sup>177</sup> U.S. EPA, *Laws and Regulations: Clean Water Act History*, available at <http://www.epa.gov/region5/water/cwa.htm> (accessed August 2, 2004).

<sup>178</sup> 33 U.S.C. § 1344(b)(1); 40 C.F.R. Part 230.

<sup>179</sup> 40 C.F.R. § 230.1(a). *See also* 33 U.S.C. § 1251.

<sup>180</sup> *Id.* at § 230.1(c).

<sup>181</sup> *Id.* at § 230.10(a).

<sup>182</sup> *Id.* at § 230.10(c).

<sup>183</sup> *Id.*

<sup>184</sup> 33 U.S.C. § 1344(r).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

Another area where the 404(b)(1) Guidelines play a role is in development of the Federal Standard for navigation projects. While the Federal Standard requires that the Corps dispose of dredged material in the least costly manner, it also requires that dredged material be disposed of in a manner consistent with the 404(b)(1) Guidelines.<sup>187</sup> The technical analysis the Corps performs in determining whether or not material can be used beneficially is chemical and biological in nature, considering such factors as whether the material will cause or contribute to violations of applicable water quality and toxic effluent standards, jeopardize species listed as endangered or threatened under the Endangered Species Act or their critical habitat, or violate requirements imposed by the Secretary of Commerce to protect marine sanctuaries designated under the ODA.<sup>188</sup>

In discussions with other coastal states, namely California and Washington State, we learned that those states have a close working relationship with their respective EPA regions regarding beneficial use issues.<sup>189</sup> Our discussions with the Coastal Management Division of LDNR revealed that there is little coordination between the state and EPA on beneficial use issues in Louisiana apparently because of a lack of interest by EPA Region Six.<sup>190</sup> The lack of a close-working relationship between EPA and LDNR is troublesome for the following reasons: (1) an EPA more attuned to Louisiana coastal land loss issues would be more likely to develop and apply the 404(b)(1) Guidelines in a manner consistent with the state's beneficial use and overall coastal restoration policies, and (2) not only does EPA develop and enforce the 404(b)(1) Guidelines, but the agency is also responsible for reviewing and commenting on other agencies' EISs, rating their quality and referring unsatisfactory actions to the Council on Environmental Quality.<sup>191</sup> EPA's important position in the EIS process means that it can have a great influence on the quality and emphasis of the document. For instance, if LDNR told EPA that a project would pose problems to Louisiana's eroding coast, and that the ecological and economic values of beneficially used material were more likely to outweigh the costs in Louisiana, the consequences and alternatives section of an EIS might strongly favor beneficial use. On the other hand, if EPA is not well informed of issues involving Louisiana's landscape, as well as problems and policies regarding coastal management and restoration, it is less likely to focus on those issues in an EIS. An EIS that strongly emphasizes the benefits of following Louisiana's beneficial use policies, as opposed to the costs of ignoring them, could go a long way towards changing Congress's and the Corps's authorization, funding, and operating procedures in public works projects. An EIS strongly favoring Louisiana's beneficial use policies would also give the state better footing should it decide to deny a consistency determination.

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<sup>187</sup> 33 C.F.R. § 335.4.

<sup>188</sup> 40 C.F.R. § 230.10(b).

<sup>189</sup> Telephone Interviews with Larry Simon, Consistency Coordinator, California Coastal Commission (March 29, 2004) and Linda Rankin, Loree Rodkin and Joan Marchioro, Washington Department of Ecology (April 1, 2004).

<sup>190</sup> Interview with Greg DuCote and Jeff Harris, Louisiana Department of Natural Resources, Coastal Management Division (November 18, 2004).

<sup>191</sup> See 42 U.S.C. § 7609; 40 C.F.R. §§ 1506.9 and 1506.10.

Likewise, 404(b)(1) Guidelines developed and applied in the context of the great ecological and economic losses Louisiana is suffering could affect the calculation of the Federal Standard to better integrate beneficial use. A rebalancing of the Federal Standard costs and benefits could also help Louisiana assert its consistency authority and achieve its coastal restoration goals.

### 4.3 Corps Responsibilities Under the Coastal Zone Management Act

Congress passed the CZMA in 1972 to “preserve, protect, develop and, where possible, restore and enhance the resources of the nation's coastal zone and to encourage and assist the states to exercise effectively their responsibilities in the coastal zone to achieve wise use of land and water resources there, giving full consideration to ecological, cultural, historic, and esthetic values, as well as the need for compatible economic development...”<sup>192</sup> In order to meet the challenges presented by increasing economic and population growth in the nation’s coastal zone, the National Coastal Zone Management Program created a partnership between federal, state, and local governments. The partnership was designed to facilitate effective communication and coordination to meet the goals of the CZMA. Under this partnership, participating states can develop and implement their own CMPs, which are approved by NOAA with input from other relevant federal agencies principally affected by the program.<sup>193</sup>

The CZMA provision most relevant to the issues presented in this report is the consistency provision.<sup>194</sup> Consistency requires federal actions that affect any land or water use or natural resource of the coastal zone to be consistent to the maximum extent practicable with the enforceable policies of a coastal state’s federally approved CMP.<sup>195</sup> There are five categories of federal actions that require federal consistency reviews. The category relevant to the discussion here is federal agency activities affecting the coastal zone.<sup>196</sup>

“Federal agency activities” are any functions performed by or on behalf of a federal agency in the exercise of its statutory responsibilities. This definition encompasses a wide range of activities that initiate an event or series of events where coastal effects are reasonably foreseeable (e.g. rulemaking, planning, physical alteration and exclusion of uses).<sup>197</sup> A determination of whether a federal agency activity has reasonably foreseeable coastal effects is subject to the “effects test,” which determines whether the federal activity will affect any natural resources, land uses, or water uses in

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<sup>192</sup> 16 U.S.C. § 1452.

<sup>193</sup> 16 U.S.C. § 1456(b). Note: “Relevant federal agencies” means federal agencies with programs, activities, projects, regulatory, financing or other assistance responsibilities in certain fields that could impact or affect a state’s coastal zone. These fields are energy production or transmission, recreation of a more than local nature, transportation, production of food and fiber, preservation of life and property, national defense, historic, cultural and conservation values, mineral resources and extraction and pollution abatement and control. 15 C.F.R. § 923.2(d)(1). 15 C.F.R. § 923.2(d)(2) lists the relevant federal agencies.

<sup>194</sup> 16 U.S.C. § 1456.

<sup>195</sup> *Id.*

<sup>196</sup> 16 U.S.C. § 1456.

<sup>197</sup> 15 C.F.R. § 930.31(a).

the coastal zone.<sup>198</sup> No federal agency activities are categorically exempt from this requirement.<sup>199</sup> While there have been extensive discussion and debate as to which federal actions and activities are subject to the CZMA consistency requirements, for the purpose of this discussion it can be stipulated that the disposal of dredged or fill material in a state's coastal zone or removal of dredged material from a state's coastal zone falls under the category of "federal agency activity" and is subject to CZMA consistency.<sup>200</sup>

Federal agencies consider enforceable policies of CMPs as requirements to which they must adhere, in addition to other federal statutory mandates.<sup>201</sup> The term in the consistency provision "to the maximum extent practicable" means consistent with the enforceable policies of a state CMP, to the extent allowed by other federal law applicable to the federal agency.<sup>202</sup> However, if an exigent circumstance creates a "substantial obstacle" that prevents complete adherence to the state CMP, then the agency may deviate from full consistency to the minimum extent necessary to address the exigent circumstance until it has passed.<sup>203</sup> If federal appropriation acts specifically prohibit full consistency with a state's CMP, then the agency's actions related to appropriation will be considered consistent to the maximum extent practicable.<sup>204</sup> Federal agencies cannot, however, use general lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent with CMPs in federal budget and planning processes as a basis for not being fully consistent with an enforceable policy.<sup>205</sup> In situations where the cost of being consistent with enforceable policies was not included in the federal agency's budget and planning processes, the federal agency should determine the amount of funds needed and seek additional federal funds.<sup>206</sup> Federal agencies should include the cost of being fully consistent with enforceable policies in their budget and planning processes to the same extent that a federal agency would plan for the cost of complying with other federal requirements.<sup>207</sup> The Corps could argue that following the cost restraints imposed by the Federal Standard is not using general lack of funding or insufficient appropriated funds as a reason to avoid consistency to the maximum extent practicable because other federal laws (e.g. WRDA Section 204) allow beneficial use if a state or local sponsor agrees to enter into a binding cost-sharing agreement with the Corps.<sup>208</sup> The argument would be that, by negative implication, beneficial use outside the Federal Standard is only allowed by federal law with local cost-

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<sup>198</sup> 15 C.F.R. § 930.11(g).

<sup>199</sup> H.R. CONF. REP. No. 964, 101st Cong., 2d Sess. 968–975, 970. *See also* 136 CONG. REC. H12423-02, H12695 (October 26, 1990).

<sup>200</sup> *See* NOAA Office of Coastal and Resource Management, Federal Consistency: State Input into Federal Actions Affecting the Coast, *available at* [http://coastalmanagement.noaa.gov/pcd/federal\\_consistency.html](http://coastalmanagement.noaa.gov/pcd/federal_consistency.html) (accessed December 14, 2004).

<sup>201</sup> 15 C.F.R. § 930.32(a)(2).

<sup>202</sup> 15 C.F.R. § 930.32(a)(1).

<sup>203</sup> 15 C.F.R. § 930.32(b).

<sup>204</sup> 15 C.F.R. § 930.32(a)(3).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> David Kaiser, Federal Consistency Coordinator, NOAA Office of Ocean and Coastal Resource Management, Gulf of Mexico CZMA Federal Consistency Workshop, New Orleans, Louisiana (December 1, 2004).

share. We believe this is a tenuous argument at best, and the Corps has yet to assert it in disagreements with states regarding the Federal Standard and CZMA consistency.<sup>209</sup>

The consistency process that federal and state agencies follow, as laid out in the Code of Federal Regulations,<sup>210</sup> is very complex and detailed and will only be briefly summarized here. The federal agency in charge of conducting the activity determines whether the action will affect the coastal uses or resources of a state with a federally approved CMP.<sup>211</sup> Effects are determined by looking at reasonably foreseeable direct and indirect effects on any coastal use or resource.<sup>212</sup> The federal agency may determine it is not required to submit a consistency determination or may coordinate with state agencies,<sup>213</sup> but federal agencies are required to “broadly construe” the effects test in favor of providing state agencies with a consistency determination<sup>214</sup> rather than a negative determination<sup>215</sup> or determination of no effects.<sup>216</sup> The deposit of dredged material in, or its removal from, Louisiana’s coastal zone has long since been determined as an activity subject to the state’s consistency authority. Early coordination and cooperation between federal and state agencies prior to federal agency determination is, therefore, crucial for allowing the parties to focus their efforts on particular agency activities of concern.

Once a federal agency has determined that coastal effects are reasonably foreseeable, the federal agency provides the state agency “with a consistency determination at the earliest practicable time in the planning or reassessment of the activity.”<sup>217</sup> The consistency determination will indicate whether the activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the state’s CMP and the basis thereof.<sup>218</sup>

The federal agency consults and cooperates with the state agency throughout the consistency process for a proper assessment of whether the activity will be consistent with the state’s CMP.<sup>219</sup> A consistency determination is prepared once there is sufficient information to reasonably determine the consistency of the activity with the state CMP, but before the federal agency has lost the ability to modify the project to meet consistency requirements.<sup>220</sup> Consistency determinations are provided to state agencies at least 90 days before final approval of the federal agency activity, unless the federal agency and state agency agree to an alternate time period.<sup>221</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> *See* 15 C.F.R. Part C.

<sup>211</sup> 15 C.F.R. § 930.33(a).

<sup>212</sup> 15 C.F.R. § 930.33(a)(1).

<sup>213</sup> 15 C.F.R. § 930.33(a)(2).

<sup>214</sup> 15 C.F.R. § 930.33(a)(5)(d).

<sup>215</sup> 15 C.F.R. § 930.35.

<sup>216</sup> 15 C.F.R. § 930.33(a)(5)(d).

<sup>217</sup> 15 C.F.R. § 930.36(b).

<sup>218</sup> 15 C.F.R. § 930.36(a).

<sup>219</sup> *Id.*

<sup>220</sup> 15 C.F.R. § 930.36(b).

<sup>221</sup> *Id.*

If the state agency objects to the federal agency's consistency determination, then the state agency is required to justify its reasoning.<sup>222</sup> The state agency objection is required to describe how the proposed activity will be inconsistent with the enforceable policies of the state CMP and what alternatives, if they exist, could be adopted by the federal agency to render the activity consistent.<sup>223</sup>

If a state agency objects to a consistency determination, and the state and federal agencies cannot resolve their differences within the 90-day time period, then federal agencies can use dispute resolution procedures and postpone final agency action until the problems have been resolved.<sup>224</sup> At the end of the 90-day time period, the federal agency cannot proceed with its action over the objections of the state agency unless: (1) the federal agency has concluded that consistency with the enforceable policies of the state CMP is prohibited by existing law applicable to the federal agency, and it has described the legal impediments to consistency to the state agency in writing, or (2) the federal agency has concluded that the proposed activity is fully consistent, though the state agency objects.<sup>225</sup>

In the event of a disagreement between the federal agency and state agency regarding consistency, and before the state agency renders an official determination, either party may request mediation by the Secretary of Commerce (Secretary) or through NOAA's Office of Ocean and Coastal Resource Management (OCRM) mediation services.<sup>226</sup> Participation in mediation is voluntary, and if either party declines to participate, the Secretary will cease mediation assistance.<sup>227</sup>

If the parties agree to mediation, the Secretary appoints a hearing officer who schedules a hearing in the local area concerned.<sup>228</sup> Hearings are informal, and federal and state agencies and other interested parties may offer information at the hearing, subject to the hearing officer's supervision.<sup>229</sup> After the hearing is closed, the hearing officer provides the Secretary with a record, after which the Secretary schedules a mediation conference<sup>230</sup> that includes representatives from the Office of the Secretary, the disagreeing federal and state agencies, and other interested parties whose participation is deemed necessary by the Secretary.<sup>231</sup> Secretarial mediation efforts last only as long as the federal and state agencies agree to participate.<sup>232</sup>

A state or federal agency that is a party to a serious disagreement may seek judicial review of a disputed consistency decision without first having exhausted the

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<sup>222</sup> 15 C.F.R. § 930.43(a).

<sup>223</sup> *Id.*

<sup>224</sup> 15 C.F.R. § 930.43(d)

<sup>225</sup> *Id.*

<sup>226</sup> 15 C.F.R. § 930.44.

<sup>227</sup> 15 C.F.R. § 930.112.

<sup>228</sup> 15 C.F.R. § 930.113(a).

<sup>229</sup> 15 C.F.R. § 930.113(c).

<sup>230</sup> 15 C.F.R. § 930.114.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

mediation process.<sup>233</sup> A state or federal agency can bring a legal challenge if the complaint involves alleged noncompliance with the CZMA.<sup>234</sup> Judicial review is obtained through the Administrative Procedure Act (APA).<sup>235</sup> It is unclear whether a private party that is affected by the proposed federal activity can bring an action against either a state or federal agency.<sup>236</sup> Pursuant to the APA, a federal agency's decision that its action is consistent with the state CMP, even though the state disagrees, will be set aside only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."<sup>237</sup> The "arbitrary or capricious" standard is the standard of review under administrative law and is appropriate for resolutions of factual disputes implicating agency expertise, though purely legal questions and determinations of law and fact can be reviewed de novo.<sup>238</sup> The arbitrary and capricious standard could be a difficult standard for a state to overcome. To prevail against a federal agency it would have to show the federal agency's consistency determination failed to meet the statutory, procedural or constitutional requirements<sup>239</sup> of the CZMA. In light of the state's coastal problems, a good portion of which are the result of dredging operations without environmental mitigation, Louisiana could very well make its case.

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<sup>233</sup> 15 C.F.R. § 930.116.

<sup>234</sup> *See, e.g.,* State of New York v. Delyser, 759 F. Supp. 982 (W.D.N.Y. 1991) and State of California v. Watt, 683 F. 2d 1253, 1270 (9<sup>th</sup> Cir. 1982).

<sup>235</sup> *See generally* 5 U.S.C. §§ 701-706.

<sup>236</sup> Whether a party is allowed to bring action depends on if the party suffers a legal wrong because of agency action or is harmed by agency action within the meaning of the statute, in this case the CZMA, i.e., in the "zone of interests." 5 U.S.C. § 702. *See also* Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

<sup>237</sup> 5 U.S.C. § 706(2)(A). Federal courts ordinarily must defer to the informed discretion of the responsible federal agencies. Deference is accorded agency determinations not because the agency possesses substantive expertise, but because the agency's decision-making process is accorded a presumption of regularity. Reviewing courts consider whether the agency's decision must be based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Akiak Native Community v. U.S. Postal Service*, 213 F. 3d 1140, 1146 (9<sup>th</sup> Cir. 2000). *See also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>238</sup> De novo review to determine if agency action was unwarranted by the facts is authorized when the action is adjudicatory in nature, the agency fact-finding procedures are inadequate and when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action. *See* 5 U.S.C. § 706(2)(F). *See also* *Citizens to Preserve Overton Park*, 401 U.S. at 415. While purely factual determinations made by an administrative agency without formal hearings are governed by the arbitrary or capricious standard, purely legal questions and mixed questions of law and fact are reviewed de novo, and the reviewing court may substitute its judgment for that of the agency. *See Akiak Native Community*, 213 F. 3d at 1146.

<sup>239</sup> 5 U.S.C. §§ 706(2)(A), (B), (C), (D).

## 4.4 Corps Responsibilities Under the National Environmental Policy Act

When Congress passed the National Environmental Policy Act (NEPA) in 1969, it recognized the impacts human activity has on the environment and the critical importance of restoring and maintaining environmental quality.<sup>240</sup> To that end, Congress declared that it is the policy of the federal government, in cooperation with state and local governments, and other public and private organizations to use all practicable means and measures to foster and promote the general welfare to create and maintain conditions under which humans and nature can exist.<sup>241</sup> To carry out this policy, federal agencies are required to evaluate major federal actions significantly affecting the quality of the human environment and assess the environmental impacts of the proposed action. They must also consider any adverse effects that cannot be avoided and provide an analysis of alternatives.<sup>242</sup> These evaluations take the form of Environmental Assessments (EA) and Environmental Impact Statements (EIS).

During this period, federal agencies consult with each other regarding the proposed action and seek comments and views from state and local agencies and the public.<sup>243</sup> The EIS examines both the economic and environmental effects of the disposal of dredged material, and Congress uses that analysis to determine whether a federal navigation project is to be exempt from the CWA Section 404 requirements.<sup>244</sup> The EIS would appear to provide an opportunity for a state to argue for inclusion of its CZMA consistency requirements in the calculation of the environmental and economic justifications for beneficial use. In this way, the EIS may help beneficial use become part of the congressionally authorized and appropriated base plan.

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<sup>240</sup> See 42 U.S.C. § 4331.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> See 42 U.S.C. § 4332(C).

<sup>244</sup> See 33 U.S.C. § 1344(r).

## 4.5 Statutory and Regulatory Tension

The tension between the Federal Standard and Louisiana's CMP beneficial use requirements seems to arise from the application of the Federal Standard and not necessarily with the Federal Standard itself. It has been stated that the Federal Standard has not been applied evenly,<sup>245</sup> so it would be helpful for a study to review applications of the Federal Standard in various situations. The results of such a study could reveal whether the application of the Federal Standard is at least partially dependent on financial assets available at the time of the request for beneficial use of dredged material rather than solely on the least-cost standard.

While the general rule is that federal law preempts state law, the Louisiana CMP derives its authority over federal activities from the CZMA, which requires federal agencies to be consistent to the maximum extent practicable with the enforceable policies of federally approved state CMPs. When a state requires a federal agency to be consistent with its federally approved CMP, the state is exercising its federally granted authority to apply federal law. The partnership between the federal government and the coastal and Great Lakes states allows the establishment of state coastal management programs. This partnership constitutes a contract under which a major portion of the consideration received by these states is their federal consistency authority. The Stratton Commission, which made written recommendations to the President and Congress in 1969 on coastal and marine issues, recognized that coastal states were in the best position to manage and protect their coastal resources, but needed assistance in the form of federal funding and a voice in the federal decision-making process.<sup>246</sup> Consistency is one of the linchpins of the CZMA, and it would violate the spirit and the letter of that federal law for the Federal Standard to be used as a rationale against consistency with Louisiana's beneficial use policies.

On the other hand, the Corps maintains that the Federal Standard places the CZMA in the proper context and evaluates alternatives to disposal of dredged material consistent with federal environmental laws. While the CWA and ODA are the major environmental laws with which the Corps must comply, the agency also must comply with other federal environmental laws and the CZMA consistency requirements. Despite the inclusion of various environmental laws in the Federal Standard analysis, the U.S. Ocean Commission in its report "Ocean Blueprint for the 21<sup>st</sup> Century," has stated that navigation-related dredged material is not used beneficially "as often as perhaps it should" partly because Corps policies favor ocean or upland disposal.<sup>247</sup> The Ocean Commission added that these policies might unnecessarily forego beneficial use opportunities that could have economic and environmental benefits and may have

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<sup>245</sup> Telephone Interview with George Boddie, Louisiana Department of Natural Resources, Coastal Restoration Division (December 15, 2004).

<sup>246</sup> See Stratton Commission, *Our Nation and the Sea: A Plan for National Action* (1969) at 56, 57, available at <http://www.lib.noaa.gov/edocs/stratton/chapter3.html>.

<sup>247</sup> U.S. Ocean Commission, *Ocean Blueprint for the 21<sup>st</sup> Century Final Report of the U.S. Ocean Commission on Ocean Policy – Pre-Publication Copy*, Washington, D.C. (2004) at 145.

consequences for aquatic ecosystems.<sup>248</sup> Furthermore, the Ocean Commission’s report critiqued both the Corps’s view of beneficial use as “extraneous to the navigation mission” and the cost-benefit methodologies the Corps employs. The report claimed that these methodologies tend to “undervalue the benefits of projects that use dredged material, while failing to account for the full costs, including environmental and other non-market costs, of traditional disposal methods.”<sup>249</sup> This, in turn, often results in disposal as the least-cost option.<sup>250</sup> Therefore, the Ocean Commission report recommended that the Corps ensure that its selection of the least-cost option reflect a “more accurate accounting of the full range of economic, environmental and other relevant cost and benefits” for beneficial use and other disposal methods.<sup>251</sup>

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 146.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

## Section 5.0 Louisiana's Coastal Management Plan and Case Study

**Louisiana's coastal management plan requires the beneficial use of dredged material in certain instances. Although sediment dredged from navigation channels is not always used beneficially when Louisiana's coastal management plan requires it, the state has nevertheless granted consistency to Corps navigation projects that do not meet these requirements.**

### 5.1 Louisiana's Coastal Management Plan

Louisiana's federally approved CMP, implemented by the State and Local Coastal Resources Management Act (SLCRMA)<sup>252</sup> and Coastal Use Guidelines,<sup>253</sup> contains specific beneficial use policies. While many coastal states have developed general beneficial use policies, Louisiana is the only state with a CMP that contains specific policies and includes an official definition and examples of beneficial use.<sup>254</sup> The public policy of the state, as stated in the SLCRMA, echoes the public policy of the CZMA: to protect, develop and, where feasible, restore or enhance the resources of the state's coastal zone.<sup>255</sup> The Louisiana Department of Natural Resources (LDNR) Coastal Management Division (CMD) administers the state's CMP and is responsible for reviewing federal projects and regulating private projects in order to protect wetlands and other sensitive coastal features, under the CZMA and SLCRMA. Coastal Use Guidelines 4.1 through 4.7 relate to beneficial use:

- Guideline 4.1 requires spoil to be deposited using the best practicable techniques to avoid disruption of water movement, flow, circulation, and quality.
- Guideline 4.2 requires spoil to be used beneficially to the maximum extent practicable to improve productivity or create new habitat, reduce or compensate for environmental damage done by dredging activities, or prevent environmental damage. Otherwise, existing spoil disposal areas are required to be utilized to the maximum extent practicable rather than create new disposal areas.
- Guideline 4.3 states that spoil shall not be disposed of in a manner which could result in the impounding or draining of wetlands or the creation of

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<sup>252</sup> La. R.S. § 49:214.21 et seq.

<sup>253</sup> See LA. ADMIN. CODE Title 43, § 7:701 et seq.

<sup>254</sup> Jennifer L. Lukens, NOAA National Ocean Service Office of Ocean and Coastal Resource Management, *National Coastal Program Dredging Policies: An Analysis of State, Territory and Commonwealth Policies Related to Dredging and Dredged Material Management Volume I of II* (April 2000), available at <http://coastalmanagement.noaa.gov/pdf/finaldredge.pdf>.

<sup>255</sup> La. R.S. § 49:214.22(1).

development sites unless the spoil deposition is part of an approved levee or land surface alteration project.

- Guideline 4.4 states that spoil shall not be disposed of on marsh, known oyster or clam reefs, or in areas of submerged vegetation to the maximum extent practicable.
- Guideline 4.5 states that spoil shall not be disposed of in a manner as to create a hindrance to navigation or fishing or hinder timber growth.
- Guideline 4.6 requires spoil disposal areas be designed and constructed and maintained using the best practical techniques to retain spoil at the site, reduce turbidity, and reduce shoreline erosion when appropriate.
- Guideline 4.7 states that alienation of state-owned property shall not result from spoil deposition activities without the consent of LDNR.<sup>256</sup>

The SLCRMA contains a specific mandate for beneficial use by stating that LDNR shall insure that when a “proposed use or activity requires the dredging or disposal of 500,000 cubic yards or more of any waterbottom or wetland within the coastal zone, the dredged material *shall* be used for the beneficial purposes of wetland protection, creation or enhancement, or combinations thereof, in accordance with a long-term management strategies plan for each existing or proposed channel or canal” (emphasis added).<sup>257</sup>

Furthermore, SCLRMA states: “when a proposed use or activity requires a coastal use permit for the dredging or disposal from 25,000 to 500,000 cubic yards of any waterbottom or wetland within the coastal zone, the LDNR Secretary *may* require the beneficial use of dredged material for wetland or barrier island protection, creation, enhancement or combinations thereof” (emphasis added).<sup>258</sup> Consideration includes site-specific estimated costs and the availability of a suitable disposal area, and long-term management strategies of these types of areas are required to be utilized when practical.<sup>259</sup> Activities not in the vicinity of long-term management strategy disposal areas are considered on a case-by-case basis. A system of mitigation has been initiated to encourage beneficial use by permit applicants for dredging projects, and beneficial use is required when economically feasible with consideration given to the value of the established mitigation credits.<sup>260</sup>

When a proposed use or activity involves dredging to construct or maintain a channel or canal greater than one mile in length in the coastal zone and where failure to maintain and stabilize the banks of the channel or canal will result in a direct or indirect loss of wetlands or adverse impacts to wetlands or waterbottoms, SCLRMA requires that the banks be maintained and stabilized using dredged material or structural stabilization measures or both.<sup>261</sup> If dredged material placement alone is insufficient, the use of

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<sup>256</sup> LA. ADMIN. CODE Title 43, § 7:707.

<sup>257</sup> La. R.S. § 49:214.30(H)(1).

<sup>258</sup> La. R.S. § 49:214.30(H)(2).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> La. R.S. § 49:214.30(H)(3).

structural measures such as rock breakwaters are also required.<sup>262</sup> Any dredged material disposal and channel bank stabilization must be done in accordance with a long-term management strategies plan for each existing or proposed channel or canal. At a minimum, the plan must address environmental and economic concerns and emergency situations.<sup>263</sup>

Despite the specific guidelines in the Louisiana's statutory and regulatory frameworks, they are not always followed for Corps navigation projects because beneficial use under the guidelines is sometimes more expensive than the Corps's base plan.<sup>264</sup> If beneficial use required by the state is not within the base plan, and the state cannot acquire the funds to pay the amount above the base plan, either through state or federal funds, then dredged material disposal is conducted in accordance with the Federal Standard. However, when the Corps has informed the state that it could not beneficially use or dispose of the dredged material consistent with the state CMP during the consistency process, the state has nevertheless granted consistency.<sup>265</sup> The reasons that the state has decided not to pursue the issue are uncertainty as to whether it would prevail in mediation or litigation and concerns over the impact a denial of consistency would have on ports, the shipping industry, and the state and local economies.<sup>266</sup>

## **5.2 Case Study: Atchafalaya River Bar Channel Ocean Dredged Material Disposal Site**

Although LDNR has never denied consistency to a Corps project for lack of beneficial use, the agency came close to doing so in the late 1990s. A case study of this project from a consistency/beneficial use perspective would highlight the difficulties the state faces both when administering its CMP and when exercising its consistency authority.

The EPA designation of the Atchafalaya River Bar Channel Ocean Dredged Material Disposal Site (ODMDS) project began in the early 1980s. During the early phase of the process, EPA submitted a Draft EIS (DEIS) to provide information to evaluate the impacts of dredged material disposal under existing conditions before officially designating the site. In 1984, the LDNR issued a determination of inconsistency based on lack of information to support consistency and suggested alternative sites that would render the project consistent with the state CMP.<sup>267</sup> The LDNR also suggested beneficial use as an alternative to open water disposal in certain nearby areas experiencing erosion.<sup>268</sup> Between 1984 and 1991, EPA compiled more information, and

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Interview with Greg DuCote, Louisiana Department of Natural Resources, Coastal Management Division (October 13, 2004).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> Letter from Frank P. Simoneaux, Louisiana Department of Natural Resources, to John Hill, Ocean Dumping EIS Task Force, Environmental Protection Agency (April 18, 1984) (on file with the Sea Grant Legal Program).

<sup>268</sup> *Id.*

the agency drafted and released a Supplemental DEIS. In 1991, LDNR had the opportunity to comment again on the designation of the ODMDS in light of the SDEIS. The LDNR commented that designating the site as an ODMDS would be unfavorable to the state because it would encourage the designation of other ocean disposal sites, making ocean disposal of dredged material more frequent than using it to address Louisiana's coastal erosion problems.<sup>269</sup> The LDNR repeated the objections it had in 1984 over the inadequate consideration of beneficial use alternatives and stated that EPA had not addressed or resolved that issue in the SDEIS.<sup>270</sup> There was also disagreement between EPA and LDNR over whether designation of the ODMDS would preclude the Corps from considering alternative beneficial use sites for future navigation projects. The EPA asserted that ODMDS designation did not preclude future alternative beneficial use considerations, but LDNR disagreed. The LDNR claimed that since the Corps's Federal Standard requires it to use the least costly alternative, designation of the ODMDS site would force the Corps to use that site rather than use dredged material beneficially, unless the state or other entity could provide funding for the additional cost.<sup>271</sup>

In 1996, LDNR and the Corps New Orleans District reached an agreement to allow interim designation of the Atchafalaya ODMDS site for five years, during which beneficial use alternatives would be considered.<sup>272</sup> The LDNR was willing to concur with designation of the portion of the site in federal waters, provided that material dredged landward of the three-mile limit was used beneficially.<sup>273</sup> However, the EPA decided to prepare a Final EIS (FEIS) and consistency determination for permanent designation of the site as an ODMDS.<sup>274</sup> The EPA concluded that designating the site did not violate any enforceable policy of Louisiana's CMP (i.e. designation of the site did not preclude beneficial use). The LDNR again expressed disagreement with this conclusion because, in its opinion, designation of the ODMDS site would provide a disposal alternative so inexpensive that it would set the Federal Standard "too low" to allow beneficial use.<sup>275</sup> In December 1997, LDNR sent EPA a letter, declaring the ODMDS designation inconsistent with the state CMP and asked the Secretary of Commerce to mediate the disagreement between the EPA and LDNR, pursuant to Subpart G of NOAA's consistency regulations.<sup>276</sup> In its consistency denial, LDNR reiterated its argument that site designation would preclude beneficial use and also included criticisms of the Federal Standard and analysis and cost of beneficial use alternatives.<sup>277</sup> The LDNR stated that the Federal Standard sets the Corps's budget, and the Federal Standard would have included the beneficial use alternative if the ODMDS was not available.<sup>278</sup> The LDNR also stated

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<sup>269</sup> Letter from David M. Soileau, Louisiana Department of Natural Resources, to Norm Thomas, Environmental Protection Agency, Federal Activities Branch (February 15, 1991) (on file with the Sea Grant Legal Program).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Letter from Terry Howey, Louisiana Department of Natural Resources to Secretary William Daley, Department of Commerce (December 15, 1997) (on file with the Sea Grant Legal Program).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

that EPA overlooked the fact that the Corps may increase or attempt to increase its budget for projects, if the Federal Standard required it.<sup>279</sup> The LDNR was concerned that the FEIS did not contain a direct comparison between beneficial use and ODMDS disposal options and that reported costs for beneficial use in the FEIS were obtained without independent analysis of their reasonableness.<sup>280</sup> While this inconsistency determination was sent to the EPA, it was ultimately rescinded in January 1998, after LDNR reentered negotiations with EPA and the Corps.<sup>281</sup> In October 1998, LDNR declared the final designation of the Atchafalaya River Bar Channel ODMDS consistent with the CMP, with a caveat: consistency concurrence should not be construed as support of offshore deposition of dredged material.<sup>282</sup> The LDNR stated that it “remained concerned that the cost estimates for beneficial use alternatives contain contingencies we believe to be greater than justified while the costs estimated for other methods have no contingencies associated with them.”<sup>283</sup> The LDNR stated in its concurrence that it was granting consistency because, the agency acknowledged, it “may be advantageous to the state to have a disposal site available for those times when beneficial use may not be possible.”<sup>284</sup>

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Letter from Terry Howey, Louisiana Department of Natural Resources, to Robert Lawrence, Environmental Protection Agency (January 16, 1998) (on file with the Sea Grant Legal Program).

<sup>282</sup> Letter from Katherine Vaughn, Louisiana Department of Natural Resources, to Robert Lawrence, Environmental Protection Agency (October 9, 1998) (on file with the Sea Grant Legal Program).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

## Section 6.0 Experiences of Other Coastal States

**Coastal zone management officials in California, Florida, and Washington State do not believe application of the Federal Standard should override requirements for beneficially using dredged material. However, rather than deny consistency to Corps projects these states prefer to coordinate with the Corps, use state funds to cover the cost of beneficial use projects above the base plan, or both.**

### 6.1 California

The California Coastal Act of 1976 (CCA) includes policies that address ports, shoreline public access and recreation, terrestrial and marine habitat protection, commercial fisheries, industrial uses, water quality, offshore oil and gas development, landform alteration, and agricultural lands.<sup>285</sup> The CCA contains the consistency requirements of the California CMP,<sup>286</sup> and the California Coastal Commission (CCC) is responsible for the implementation of the CCA across the state except for San Francisco Bay, which is not included in the coastal zone established by the CCA.<sup>287</sup> The San Francisco Bay Conservation and Development Commission (BCDC) regulates development in San Francisco Bay.<sup>288</sup> The CCC partners with coastal cities and counties to plan and regulate land and water uses in the state's coastal zone.<sup>289</sup> Development activities are broadly defined by the CCA to include the construction of buildings, divisions of land and activities that change the intensity of land use or public access to coastal waters and generally require a coastal permit from either the CCC or the local government with jurisdiction.<sup>290</sup>

Although California's statutes and regulations do not contain specific beneficial use policies, there are general policies related to dredged material disposal and beneficial use. Dredged material disposal is to be planned and carried out to "avoid significant disruption to marine and wildlife habitats and water circulation,"<sup>291</sup> and dredged material suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable long-shore current systems.<sup>292</sup> The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes are permitted when there is no feasible, less environmentally damaging alternative, and when feasible mitigation measures have been provided to minimize adverse environmental effects.<sup>293</sup> All port-related developments are located, designed, and constructed to minimize substantial

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<sup>285</sup> Cal. Pub. Res. Code §§30230-30237.

<sup>286</sup> See Cal. Pub. Res. Code §§ 30330 and 30400.

<sup>287</sup> California Coastal Commission, Overview Page, *available at* <http://www.coastal.ca.gov/whoware.html> (accessed August 18, 2004).

<sup>288</sup> See Cal. Gov. Code Tit. 7.2, § 66600 et seq.

<sup>289</sup> Cal. Pub. Res. Code §§ 30330-30344 and 30500-30526.

<sup>290</sup> Cal. Pub. Res. Code § 30106.

<sup>291</sup> Ca. Pub. Res. Code § 30233(b).

<sup>292</sup> *Id.*

<sup>293</sup> Ca. Pub. Res. Code § 30233(a).

adverse environmental impacts and provide for other beneficial uses consistent with the public trust, including, but not limited to, recreation and wildlife habitat uses, to the extent feasible.<sup>294</sup>

While California does not have specific beneficial use policies, the state's Public Resources Code encourages beneficial use by calling for "less damaging" environmental alternatives and feasible mitigation to offset adverse environmental impacts before permitting activities, including dredging in open coastal waters and wetlands.<sup>295</sup> Examples of beneficial use of dredged material in California are wetlands creation and creating buffer zones using 10' to 15' thick layers of clean materials capped over contaminated areas that serve a dual function of bird foraging habitat and covering contaminants.<sup>296</sup> Moreover, the San Francisco BCDC has drafted a long-term maintenance strategy that includes a 50-year plan for dealing with beneficial use of dredged material.<sup>297</sup> There are also multi-agency programs in San Francisco, Long Beach, and the ports of Los Angeles and Long Beach to coordinate the storage of dredged material for future beneficial use.<sup>298</sup> Due to these strategies, the amount of dredged material dumped offshore has decreased in the past 10 to 15 years.<sup>299</sup> However, beneficial use and economics are usually harmonious in California (i.e. it is less expensive to use material to nourish a beach, for example, than to dispose of it offshore).<sup>300</sup> Such is not the case in Louisiana, where transportation of materials to coastal areas for beneficial use is often costly.<sup>301</sup>

It is the opinion of the CCC that lack of funds is not a defensible constraint against beneficial use that is not part of the Corps's base plan.<sup>302</sup> However, the CCC and the Corps have a "good working relationship" and work out beneficial use plans when the state believes it is in the state's best interest in accordance with its laws, and state or federal funds to cover the cost above the base plan are available.<sup>303</sup> The CCC believes that in many cases, beneficial use in the state, and particularly beach nourishment projects, should simply be incorporated into navigation plans as part of the cost of doing business.<sup>304</sup> In the opinion of the CCC, this strategy reflects good policy.<sup>305</sup>

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<sup>294</sup> See Ca. Pub. Res. Code § 30708.

<sup>295</sup> Telephone Interview with Larry Simon, Consistency Coordinator, California Coastal Commission (March 29, 2004).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> Interview with Greg DuCote, Louisiana Department of Natural Resources, Coastal Management Division (October 13, 2004).

<sup>302</sup> *Supra* note 313.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

## 6.2 Florida

Florida's CMP (FCMP), a network of 23 statutes, including the Florida Coastal Management Act,<sup>306</sup> was approved in 1981. The FCMP is administered by 11 state agencies, with the Florida Department of Environmental Protection (FDEP) as the lead agency, and four of Florida's five water management districts. Local government participation is allowed also in certain circumstances.<sup>307</sup> The FCMP was "designed to ensure the wise use and protection of the state's water, cultural, historic, and biological resources; to minimize the state's vulnerability to coastal hazards; to ensure compliance with the state's growth management laws; to protect the state's transportation system, and to protect the state's proprietary interest as the owner of sovereign submerged lands."<sup>308</sup> Florida's coastal zone includes the geographical area encompassed by 35 coastal counties and the territorial seas,<sup>309</sup> in which federal actions throughout these areas are reviewed by the state for consistency with the FCMP.<sup>310</sup> Pursuant to Florida's comprehensive planning act, local governments that have developed their own coastal zone rules are also given the opportunity to determine whether federal actions are consistent with their goals and policies.<sup>311</sup>

Florida does not have a specific beneficial use policy, but beneficial use is encouraged, particularly to protect beaches. Florida law states that, as a matter of public policy, beach-quality material should be used to nourish critically eroded shorelines when cost-effective in order to properly manage and protect them<sup>312</sup> and states that the Florida Legislature should "make provisions for beach restoration and nourishment projects," because they are in the public interest.<sup>313</sup> Beach restoration and nourishment projects are funded in a manner to encourage cost-saving strategies, foster regional coordination of projects, improve the quality of projects and provide long-term solutions.<sup>314</sup> To meet this goal, the state established an Ecosystem Management and Restoration Trust Fund (EMRTF), a dedicated revenue source, to provide funding for beach preservation,

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<sup>306</sup> FLA. STAT. ANN. Chapter 380, Part II.

<sup>307</sup> According to FLA. STAT. ANN. § 380.24, local government units abutting the Gulf of Mexico or Atlantic Ocean or that include or are contiguous to waters of the state where marine species of vegetation listed in § 373.4211 constitute the dominant plant community are required to develop a coastal zone protection element in their comprehensive plans.

<sup>308</sup> Florida Department of Environmental Protection, Federal Consistency Intergovernmental Coordination and Review, available at <http://www.dep.state.fl.us/cmp/federal/index.htm> (last visited August 1, 2004).

<sup>309</sup> FLA. STAT. ANN. § 380.205(2).

<sup>310</sup> However, the state has limited its federal consistency review of federally licensed and permitted activities specified in the FCMP and to those federal licenses or permits for activities located in or seaward of a coastal county. See FLA. STAT. ANN. §§ 380.23(3)(c) and § 380.205(2).

<sup>311</sup> FLA. STAT. ANN. § 380.24. See also FLA. STAT. ANN. § 163.3177(6)(g).

<sup>312</sup> See FLA. STAT. ANN. Chapter 161.

<sup>313</sup> FLA. STAT. ANN. § 161.088.

<sup>314</sup> *Id.*

restoration and nourishment.<sup>315</sup> Thirty million dollars were paid into the State Treasury to the credit of the EMRTF in Fiscal Year 2000-2001, and each fiscal year thereafter.<sup>316</sup>

Florida has not denied consistency for any federal projects based on insufficient beneficial use.<sup>317</sup> Although it is FDEP's opinion that the least cost alternative portion of the Corps's Federal Standard cannot be used to avoid compliance to the maximum extent practicable with the FCMP,<sup>318</sup> the agency has taken a pragmatic approach: coordinate with the Corps on beneficial use issues and apply the funds from the EMRTF to pay for the cost above the Corps's base plan for nourishment of critically eroded beaches.<sup>319</sup> The FDEP understands the cost issues the Corps faces, particularly in regard to beneficial use. Since the state believes that the public interest in healthy beaches is strong enough to warrant support from the EMRTF, the state uses its funds to pay extra costs rather than asking the Corps to request additional funds from Congress. Such a request to Congress would only delay or eliminate the project.<sup>320</sup> When a beneficial use application for a Corps project requires a local sponsor, and the local sponsor does not have full funding available in its budget, then the local sponsor may apply for EMRTF money.<sup>321</sup> The focus is on creating and maintaining a state-local-Corps partnership.<sup>322</sup>

### 6.3 Washington State

In 1976, Washington became the first state with a federally approved CMP. The state's Department of Ecology (WDOE) is the principal agency that administers the program. Washington chose to use existing laws rather than enact a new, all-encompassing law geared towards coastal management. This type of CMP is known as a "networked" program,<sup>323</sup> and Washington's legal authorities and implementing regulations that comprise its CMP are the Shoreline Management Act,<sup>324</sup> State Water Pollution Control Act,<sup>325</sup> Washington Clean Air Act,<sup>326</sup> State Environmental Policy

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<sup>315</sup> *See id.*

<sup>316</sup> FLA. STAT. ANN. § 201.15(11). *See also* Telephone Interview with Jasmin Raffington, Federal Consistency Community Program Administrator, Florida Department of Environmental Protection (August 31, 2004).

<sup>317</sup> Telephone Interview with Jasmin Raffington, Federal Consistency Community Program Administrator, Florida Department of Environmental Protection (August 31, 2004).

<sup>318</sup> The rationale for this argument is that the Federal Standard is a self-imposed regulation and not a law with which the Corps must comply. *Id.*

<sup>319</sup> *See id.*

<sup>320</sup> *See id.*

<sup>321</sup> Local governments with coastal zone protection elements in their comprehensive plans are eligible to apply to FDEP for available financial assistance. *See* FLA. STAT. ANN. § 380.24.

<sup>322</sup> *Supra* note 335.

<sup>323</sup> Washington Department of Ecology, *Managing Washington's Coast: Washington State's Coastal Zone Management Program 97* (2001).

<sup>324</sup> Wash. Rev. Code § 90.58.010 et seq. This law is the principal means of regulating land and water uses throughout the state's coastal zone.

<sup>325</sup> Wash. Rev. Code § 90.48.010 et seq. This law is the state counterpart to the federal CWA.

<sup>326</sup> Wash. Rev. Code § 70.94.011 et seq. This law is the state counterpart to the federal Clean Air Act.

Act,<sup>327</sup> Energy Facility Site Evaluation Council,<sup>328</sup> and Ocean Resources Management Act.<sup>329</sup> These enforceable policies outline the permissible land uses and water uses with the coastal zone.

Washington law does not specifically address beneficial use of dredged material, but as a matter of policy in keeping with the State Environmental Policy Act<sup>330</sup> and Aquatic Resources Mitigation Act,<sup>331</sup> beneficial use is preferred when practicable. According to the Aquatic Resources Mitigation Act, it is state policy to use “innovative” mitigation measures by requiring state regulatory agencies to consider mitigation proposals for existing infrastructure projects “that are timed, designed, and located in a manner to provide equal or better biological functions and values compared to traditional on-site, in-kind mitigation proposals.”<sup>332</sup> While this law applies to existing projects and not new ones, it is relevant because beneficial use can be applied in this context. WDOE coordinates with the Portland and Seattle Corps Districts during the consistency process for federal navigation projects. The agency prefers beneficial use to upland or ocean disposal when material is suitable.<sup>333</sup> Typical beneficial uses of dredged material in the state include flowlane activities, beach nourishment, and protection of nearshore habitat.<sup>334</sup> Using the material for pilot projects and as part of adaptive management has been relatively successful, though fish and wildlife issues are involved in some cases since sand is problematic for fish.<sup>335</sup>

While the WDOE generally has smooth relations with the Portland and Seattle Corps Districts, each district has a different approach to the beneficial use and related consistency issues.<sup>336</sup> While the Seattle District is generally favorably disposed to beneficial use applications, the Portland District is more resistant to WDOE’s argument that the Corps must be consistent to the maximum extent practicable with enforceable state policies because it maintains the state has no authority on this issue.<sup>337</sup> This has been a bone of contention between WDOE and the Portland District, though there are

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<sup>327</sup> Wash. Rev. Code § 43.21C.010 et seq. This law manages the preparation of EIS for major projects, trains and guides local agencies and the public, prepares rule amendments and interpretation guidance and manages a statewide information clearinghouse.

<sup>328</sup> Wash. Rev. Code § 80.50.030 et seq. The Council provides for a state-local permitting system for large thermal energy facilities, oil refineries which process petroleum transported over marine waters and petroleum and natural gas pipelines.

<sup>329</sup> Wash. Rev. Code § 43.143.005 et seq. This law establishes guidelines and policies for activities in the Pacific Ocean.

<sup>330</sup> It is the state’s policy to use all practicable means and measures to protect the natural resources of the state to restore and maintain environmental quality and to improve and coordinate plans, functions, programs and resources for the general welfare. To achieve this overall policy, one of the state’s goals is to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. Wash. Rev. Code § 43.21C.020.

<sup>331</sup> Wash. Rev. Code § 90.74.005 et seq.

<sup>332</sup> *Id.* at (2).

<sup>333</sup> Telephone Interview with Linda Rankin, Loree Rodkin and Joan Marchioro, Washington Department of Ecology (April 1, 2004).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

many instances when it will coordinate with the WDOE to use the material beneficially.<sup>338</sup> Suitable material may not always be used beneficially since it is unsafe and cost prohibitive, but active coordination has played a key role in the consistency/beneficial use debate in Washington State.

Funding for beneficial use applications has been an issue in Washington. According to WDOE, the state so far has not had to provide its own funds for projects, though the state does provide funding for erosion studies.<sup>339</sup> Local governments have provided matching funds in some instances.<sup>340</sup> Most of the funding comes from the Portland and Seattle Districts under their base plans.<sup>341</sup> The state would consider requesting federal funds in the future, if needed.<sup>342</sup>

## 6.4 California Coastal Commission v. U.S.

Based on interviews with agency representatives from Louisiana, Florida, California, and Washington and the fact that most states only have general rather than specific beneficial use policies, no state has denied consistency based on disputes over beneficial use.<sup>343</sup> However, there have been instances when states have sued federal agencies over dredged material disposal. In one such case, California Coastal Commission v. U.S.,<sup>344</sup> the CCC successfully enjoined the U.S. Navy from disposing of dredged material previously designated for a beach nourishment project. While this case did not concern a Corps navigation project, the U.S. Navy's project is a federal agency activity and is, therefore, relevant to the discussion. The facts of the case are complex and are summarized here to facilitate understanding of the court's rationale in its opinion.

The Navy project at issue in California Coastal Commission v. U.S. included dredging portions of San Diego Bay and using the dredged material to nourish beaches in several California coastal communities. The consistency determination submitted by the Navy called for the deposit of approximately 7.9 million cubic yards on beaches. An additional 2 million cubic yards of material not suitable for beach nourishment were designated for ocean disposal.<sup>345</sup> The remaining material, unsuitable for ocean disposal, was to be confined to a new wharf structure.<sup>346</sup> The CCC concurred with the Navy's project plan, and the project commenced in 1997.<sup>347</sup> However, shortly after commencement of the project, live ordnance and munitions were discovered in the

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<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> Telephone Interviews with Jasmin Raffington, Federal Consistency Community Program Administrator, Florida Department of Environmental Protection (August 31, 2004), Larry Simon, Consistency Coordinator, California Coastal Commission (March 29, 2004) and Linda Rankin, Loree Rodkin and Joan Marchioro, Washington Department of Ecology (April 1, 2004).

<sup>344</sup> California Coastal Commission v. U.S., 5 F. Supp. 2d 1106 (S.D. Cal. 1998).

<sup>345</sup> *Id.* at 1108.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

dredged material deposited on the beach.<sup>348</sup> In October 1997, the Navy requested CCC concurrence with modifications to the project that would permit ocean disposal of 2.5 million cubic yards of material originally designated for beach nourishment.<sup>349</sup> The Navy argued that the modifications were necessary to prevent excessive dredging expenses and possible delay of the overall project.<sup>350</sup> On October 17, 1997, the Navy submitted a new consistency determination (CD-2), which proposed that some materials be used for beach nourishment and that all remaining sediment be disposed in the ocean.<sup>351</sup> CD-2 also recommended the use of a three-inch ordnance grate on the dredge to screen out larger ordnance, but could not guarantee that all ordnance would be removed, and proposed a second alternative whereby a three-eighths of an inch screen on the beach be used along with the three-inch screen on the dredge to eliminate public health risks from the ordnance.<sup>352</sup> In late October 1997, the Navy hired a consulting firm to examine available sand screening technologies and to prepare a report of its findings, referred to as the Harris Report. The report outlined a number of alternatives to ocean disposal that the CCC believed should have been more fully explored to resolve the ordnance issue.<sup>353</sup> The Harris Report was submitted to the Navy in November 1997, but was not made available to the CCC until December 1997.<sup>354</sup> During a CCC public hearing to discuss CD-2 in November 1997, the Navy further modified the project to limit the ocean disposal of materials to 500,000 cubic yards<sup>355</sup> and modified the consistency determination again (CD-3) by proposing ocean disposal of up to 883,000 cubic yards of material.<sup>356</sup> The Navy also proposed further negotiations with CCC to resolve its objections to CD-2 and explore reasonable alternatives to ocean disposal, but later withdrew that proposal.<sup>357</sup> In November 1997, the Navy applied for and received a Section 404 permit from the Corps,<sup>358</sup> authorizing ocean disposal of all remaining materials.<sup>359</sup> The permit was approved without CCC concurrence, which the Navy argued was unnecessary.<sup>360</sup>

The CCC brought suit for a preliminary injunction to enjoin the Navy from dredging and disposal until the alternatives outlined in the Harris Report, CD-3, and other reports generated by the CCC were explored. The CCC argued that the Navy was in violation of the CZMA because it had not demonstrated that ocean disposal pursuant to the Navy's activity was consistent to the maximum extent practicable with the state's CMP.<sup>361</sup> The Navy counter-argued that: (1) the CMP was not applicable because the ordnance-laden dredged material was not suitable for beaches, (2) consistency with the

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<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 1109.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> Section 404 of the CWA gives the Corps authority to regulate the Navy's dredging and disposal operations for the project. *Id.* at 1109.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

CMP could not require the Navy to violate other applicable federal and state laws (e.g. CWA Section 404), and (3) the discovery of the ordnance was an unforeseen event that allowed the Navy to deviate from the CMP under the CZMA.<sup>362</sup> The court held that equitable discretion would be applied on judicial review<sup>363</sup> and granted the preliminary injunction<sup>364</sup> to the CCC,<sup>365</sup> reasoning that the Navy had not shown that the proposed dredging and disposal were consistent to the maximum extent practicable with the state CMP because the feasibility of pending alternatives, including alternatives outlined in the Harris Report, had not been considered by the Navy or the CCC.<sup>366</sup> Therefore, the court reasoned that it was illogical to conclude that ocean disposal was consistent with the state CMP.<sup>367</sup> The court rejected the Navy's argument that it had submitted feasible, less environmentally damaging alternatives and provided for mitigation measures because the Navy's alternatives contained in CD-3 and other analyses were either withdrawn from consideration by the Navy or never submitted in final form to the CCC.<sup>368</sup> If feasible alternatives and analyses were not properly before the CCC, then the Navy could not successfully argue it was in compliance with the state CMP or CZMA.<sup>369</sup> California did get the beach nourishment it originally sought, but had to seek out additional money. The Navy placed uncontaminated material on the beaches after California lobbied Congress for the additional money.<sup>370</sup>

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<sup>362</sup> *Id.* at 1109, 1110.

<sup>363</sup> Although judicial review of federal agency action is typically obtained through the APA, this case was brought under the APA because the CZMA does not provide a private right of action. The district court in this case applied the principles of equitable discretion in this case because "Congress had provided in the CZMA approved more than one method" in achieving the purpose of protecting the nation's coastal zones. *Id.* at 1110.

<sup>364</sup> Preliminary injunction relief is granted if the party meets one of two tests: (1) a combination of probable success and the possibility of irreparable harm, or (2) the party raises serious questions, and the balance of hardship tips in its favor. *Id.* at 1111.

<sup>365</sup> *Id.* at 1110.

<sup>366</sup> *Id.* at 1111.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 1112.

<sup>369</sup> *Id.*

<sup>370</sup> Telephone Interview with Larry Simon, Consistency Coordinator, California Coastal Commission (March 29, 2004).

## **Section 7.0 Suggestions for Change**

**If Louisiana and the Corps would like to encourage more frequent beneficial use of dredged material, then statutory, regulatory, and policy revisions are needed in order to make beneficial use a priority. This section will suggest some such revisions, with the goal that they will promote discussion and additional ideas.**

### **7.1 Actions for Immediate Change**

The state could take policy action not requiring legislation that may bring about results more quickly than legal reform. For example, input from the governor expressing her interest in beneficial use of dredged material may impress upon the Corps the importance of beneficial use to the state, especially in light of its coastal restoration crisis. Louisiana also should strengthen its resolve to use its CZMA authority to deny consistency to federal projects that violate the CMP's beneficial use guidelines. Although the state has never denied consistency to a federal navigation project for lack of or not enough beneficial use, it came close in 1997 to denying consistency to the Atchafalaya River Ocean Dredged Material Disposal Site. When beneficial use is an environmentally suitable and economically viable option in the state's opinion, then it should exercise its CZMA consistency authority. Louisiana should develop a record of denying consistency when projects do not meet the CMP's beneficial use guidelines, and no agreement can be reached between the state and the federal agency to resolve the disagreement. A consistency denial is not without risk in that it may delay or stop a dredging or navigation project that could have economic consequences for the state. However, Louisiana will be in no worse position by challenging the Federal Standard than it is now, even if it were to lose a legal challenge, by continuing to subjugate its beneficial use needs to that standard. While denial of consistency should be the last resort in a disagreement regarding beneficial use of the dredged material, and should be used selectively in crucial or important situations, the state should not foreclose this option.

### **7.2 Changes to Federal Law and Federal Appropriations Process**

Revisions to the Corps's appropriations process regarding navigation projects can increase the chances for beneficial use funding. During the planning and appropriations phases, beneficial use should be contemplated and funds set aside for that purpose. Since the Corps has knowledge of Louisiana's beneficial use policies in the state's federally approved CMP, the Corps should make efforts at the earliest practicable stage of project planning to ensure that funding for beneficial use is part of project budgets. Contemplating beneficial use during the early stages of the project (i.e. writing beneficial use into the base plan), would help ensure that funding is available. The Corps, however, cannot be left to singlehandedly encourage more beneficial use funding. It will take strong urging from all sectors of the state and Louisiana's Congressional delegation to overcome the agency's traditional mindset on the issue.

A second recommendation is for Congress to articulate a national beneficial use policy. Although beneficial use provisions are included in laws such as WRDA,<sup>371</sup> by articulating such policy Congress could show its support for beneficial use, direct agencies such as the Corps to beneficially use dredged material when feasible, and make appropriations for beneficial use. A federal policy addressing beneficial use would be a step forward in educating the nation about beneficial use, which could lead to increased funding.

Louisiana is already lobbying Congress for more CWPPRA and WRDA Section 204 funding. Although it has proven difficult over the years to secure more funding from Congress for a variety of reasons, solving Louisiana's wetland loss problem requires that the state use every avenue available to secure federal funding. Louisiana can strengthen its case for federally funded coastal restoration by demonstrating a strong commitment to wetlands protection and by using its federal consistency authority to show a commitment to coastal restoration.

Congress could amend the CZMA to further strengthen the consistency provision and make it clear that CZMA consistency is not subservient to the Federal Standard. Although the Corps is not allowed to exceed its Congressionally authorized appropriations limit for projects, it should, in light of its requirement to be consistent to with state CMPs, contemplate beneficial use during the planning stage and submit to Congress budgets that reflect the true costs of projects. By amending the CZMA, Congress can affirm that consistency requires all federal agencies to take into account state CMPs when planning projects. Such congressional action could also help ensure that funding is available to make each project as consistent as practicable with the CMP, particularly when a state CMP contains beneficial use guidelines. A Congressional mandate reaffirming the consistency requirements in the CZMA would encourage more in-depth consultation and partnership between federal agencies and states with CMPs.

### **7.3 Changes to Louisiana Law**

Changes in Louisiana law could be made to facilitate beneficial use and strengthen the state's commitment to consistency. Since funding is frequently an issue for projects, and federal appropriations for WRDA are often low, the state could elect to set aside more funds for the costs of beneficial use projects that are above the base plan when federal funding is not available to cover that extra cost. In a time of budget crises, it may not be practical for the state to allocate more funds. Nevertheless, it would demonstrate Louisiana's commitment to coastal restoration and is an option the state may wish to explore in the future.

A second option for Louisiana is to amend its CMP to strengthen its commitment to consistency. SLCRMA sets forth the state's beneficial use requirements,<sup>372</sup> and the

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<sup>371</sup> See, e.g., 33 U.S.C. § 2326(a).

<sup>372</sup> See La R.S. § 214.32(F).

statute is specific with respect to when dredged material shall be used beneficially and the development of long-term management strategies pursuant thereto. However, SLCRMA has no stated procedure for granting or denying consistency, and it does not have policies pertaining to disagreements between the state and a federal agency. Louisiana should amend the SCLRMA and Coastal Use Guidelines to expressly state a procedure for consistency determinations as allowed by the CZMA rather than its current practice of following federal procedures in the Code of Federal Regulations.

## 7.4 Louisiana Coastal Area Ecosystem Restoration Study

The Louisiana Coastal Area Ecosystem Restoration Study (LCA) is a joint effort between the Corps, the State of Louisiana, USFWS, NOAA Fisheries, EPA, U.S. Geological Survey and U.S. Department of Agriculture. The LCA's purpose is to develop strategies for addressing the long-term needs of coastal restoration in Louisiana and identify restoration actions that could be implemented within five to 10 years to address the coast's most critical needs.<sup>373</sup> The LCA Study recommends programmatic authority for the expansion of beneficial use, which would allow the Corps New Orleans District to take greater advantage of existing sediment resources that would become available as a result of maintenance activities.<sup>374</sup> If funding is available, the study estimates that beneficial use could be increased from the approximately 14.5 million cubic yards currently performed to approximately 30 million cubic yards.<sup>375</sup> However, the study cautioned that not all material dredged annually would be available for beneficial use.<sup>376</sup>

The LCA outlined specific areas with "significant opportunity" for beneficial use: the bar channel of the Mississippi River-Gulf Outlet; the bay reach of the Barataria Waterway; the lower Mississippi River and Tributaries project at Head of Passes and Southwest Pass; the bar channel of the Atchafalaya River and Bayous Chene, Beouf and Black; and the inland reach of the Calcasieu River and Pass.<sup>377</sup> The LCA recommended \$100 million in programmatic authority over the initial 10 years of the program to take advantage of available sediment for beneficial use purposes.<sup>378</sup> According to the LCA study, programmatic authority would allow funds to be appropriated for LCA beneficial use of dredged material under guidelines established by the Secretary of the Army rather than require Congressional authorization and appropriation for each project.<sup>379</sup> Approval of beneficial use projects would be given by the Secretary of the Army and managed by the Division based on annually appropriated funds.<sup>380</sup> LCA beneficial use has the potential to create approximately 21,000 acres of wetlands.<sup>381</sup>

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<sup>373</sup> U.S. Army Corps of Engineers, Louisiana Coastal Area Ecosystem Restoration Study Main Report, Volume 1, November 2004 at i.

<sup>374</sup> *Id.* at MR 4-54.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at MR 4-55.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at MR-183.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at MR-182.

The LCA study represents a step forward in Louisiana because it recognizes the need for additional beneficial use and recommends a specific dollar amount to achieve the study's stated purpose. However, Congress has not approved the LCA, there is no guarantee that it will be approved, and the study's recommended funding level for the programmatic authority may change.

## 7.5 U.S. Ocean Commission Recommendations

The U.S. Ocean Commission made several relevant recommendations in its report. Two of the Ocean Commission's recommendations for managing sediment and shorelines are that Congress should: (1) direct the Corps to adopt regional and ecosystem-based management approaches in carrying out its sediment-related civil works projects and should modify Corps authorities and processes necessary to achieve this goal,<sup>382</sup> and (2) should ensure that its selection of the least-cost option per the Federal Standard for dredging projects reflects "a more accurate accounting of the full range of economic, environmental and other relevant costs and benefits for options that reuse dredged material, as well as for other disposal methods."<sup>383</sup> The Ocean Commission agreed with the recommendations in the National Dredging Team's *Dredged Material Management: Action Agenda for the Next Decade*, which advocated ecosystem-based approaches and urged implementation of all of the National Dredging Team's recommendations.<sup>384</sup> The Commission added that regional dredging teams should establish sediment management programs that expand from single watersheds to regional ecosystems.<sup>385</sup> The Commission also recommended that Congress modify its current authorization and funding processes to require the Corps or an appropriate third party to monitor the outcomes from past Corps projects and assess the cumulative regional impacts of Corps activities within coastal watersheds and ecosystems, and these assessments should be peer-reviewed with recommendations from the National Research Council.<sup>386</sup>

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<sup>382</sup> U.S. Ocean Commission, *Ocean Blueprint for the 21<sup>st</sup> Century Final Report of the U.S. Ocean Commission on Ocean Policy – Pre-Publication Copy*, Washington, D.C. (2004) at 144.

<sup>383</sup> *Id.* at 146.

<sup>384</sup> *Id.* at 147. See also National Dredging Team, *Dredged Material Management: Action Plan for the Next Decade*, available at <http://www.epa.gov/owow/oceans/ndt/DredgingActionPlan.pdf>.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 148.

## **Section 8.0 Conclusion**

The Federal Standard/Beneficial Use issue is not one that will be easily resolved. It will require open discussion and action by both the state and the Corps. Of all the issues that may preclude beneficial use of dredged material in Louisiana, funding is perhaps the largest obstacle. New strategies highlighting the value of beneficial use to coastal restoration need to be formulated to increase funding at both the state and federal levels. The LCA study and recommendations in the U.S. Ocean Commission report offer constructive ideas. For its part, the state should make a case to the Corps that it wants more beneficial use of dredged material, strengthen its commitment to CZMA consistency, and appropriate additional state funds to pay for beneficial use projects that have incremental costs. Louisiana also should urge the state's Congressional delegation to continue seeking increased WRDA funding and increases in the Corps's budget while requiring the Corps to budget for beneficial use when drafting base plans. If the state wants more beneficial use projects to facilitate coastal restoration, then it must be prepared to take an active role in changing state policy and encouraging a change in Corps policy. The state should be willing to use its consistency authority to push the issue, if necessary.

The CZMA consistency provision is federal law and should take precedence over the Federal Standard, which is a federal regulation that has not been expressly mandated by Congress. Legal proceedings that attempt to resolve the conflict between CZMA consistency and the Federal Standard could render a decision unfavorable to the state merely because of the vicissitudes of legal interpretation. Even if Louisiana were to lose a decision in a particular case, it is not prevented from raising the issue again, as often as it believes it can prove federal agency activities are inconsistent with its CMP and coastal restoration goals. On the other hand, in the case where the state does prevail, causing delay or postponement of particular dredging projects, Louisiana should view any short-term inconveniences and possible monetary losses in light of long-term benefits of restoring its irreplaceable coastal resources.