



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

CECW-CO

FEB 03 2017

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Placement of Dredged or Excavated Material in Federal Navigation Project Dredged Material Placement Facilities (DMPFs) by Non-Federal Interests and Others Pursuant to Section 217(b) of the Water Resource Development Act of 1996, Public Law 104-303, as amended (33 U.S.C. § 2326a(b)), and Section 401(c) of the Federal Water Pollution Control Act (the "Clean Water Act"), Public Law 92-500, as amended (33 U.S.C. § 1341(c)).

1. References:

- a. Water Resources Development Act (WRDA) of 1986, Pub. L. No. 99-662, § 101, 100 Stat. 4082, as amended (codified at 33 U.S.C. § 2211).
- b. Water Resources Development Act of 1996, Pub. L. No. 104-303, § 217(b), 110 Stat. 3694, as amended (codified at 33 U.S.C. § 2326a(b)).
- c. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 2 (§ 401(c)), 86 Stat. 87, as amended (codified at 33 U.S.C. § 1341(c)).
- d. Section 14 of the Rivers and Harbors Act of 1899 (codified at (33 U.S.C. § 408).
- e. Section 10 of the Rivers and Harbors Act of 1899 (codified at 33 U.S.C. § 403).
- f. Section 404 of the Clean Water Act (codified at 33 U.S.C. § 1344).
- g. Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (codified at 33 U.S.C. § 1413).
- h. OMB Circular A-25 (revised July 8, 1993).
- i. 32 C.F.R. Part 204.
- j. 33 C.F.R. 320.4(g)(4) and (5).
- k. CECW-O/CECW-A/CECW-P memorandum, subject: Policy Guidance Letter (PGL) No. 47, Cost Sharing for Dredged Material Disposal Facilities and Dredged Material Disposal Facility Partnerships, dated 3 April 1998.

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l. OASA(CW) memorandum, 07 May 2001, subject: Cleveland Harbor, Confined Disposal Facility (CDF) Site 10B Disposal of Dredged Material from LTV Steel Corporation, Cuyahoga River, Cleveland, Ohio.

m. CECW-P Memorandum, 19 Nov 2015, subject: Approved Model Memorandum of Agreement (MOA) for Construction of Additional Capacity Pursuant to Section 217(a) of the Water Resources Development Act of 1996, as amended (33 U.S.C. 2326a(a)), at Dredged Material Placement Facilities constructed by the Department of the Army.

2. Purpose. This guidance addresses the authorities, required findings, and procedures for permitting placement of dredged or excavated material in federal navigation project Dredged Material Placement Facilities (DMPFs) by non-federal interests and other eligible entities.

3. Authorities.

a. Section 217(b) of the Water Resource Development Act of 1996, Public Law 104-303, as amended (33 U.S.C. § 2326a(b)), authorizes the Secretary of the Army to permit a non-federal interest to use any DMPF under the jurisdiction of, or managed by, the Secretary if the Secretary determines that such use will not reduce the availability of the facility for project purposes. Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5(b)), defines "non-federal interest" to mean a legally constituted public body (including a federally recognized Indian tribe) or a nonprofit entity with the consent of the affected local government, that has full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.

b. Section 401(c) of the Federal Water Pollution Control Act (the "Clean Water Act"), Public Law 92-500, as amended (33 U.S.C. § 1341(c)), authorizes the Secretary of the Army, acting through the Chief of Engineers, to permit the use of a DMPF under the Secretary's jurisdiction by federal licensees or permittees if it is deemed to be in the public interest. This authority applies to federal licensees or permittees who do not qualify as non-federal interests.

4. Applicability.

a. For purposes of this guidance, the term "DMPF" shall mean a federal dredged material placement facility and any improvements on lands or submerged lands that enable the placement of dredged or excavated material as a result of non-federal work

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associated with the construction, operation, or maintenance of federal navigation projects for harbors, inland harbors, or inland waterways. Such improvements may include, but are not necessarily limited to, retaining dikes, waste weirs, bulkheads, embankments, monitoring features, stilling basins, or de-watering pumps or pipes. The term also includes modifications to a dredged or excavated material placement facility to increase capacity beyond that created by regular recurring operation and maintenance activities.

b. Sections 217(b) and 401(c) apply only to DMPFs that are constructed and maintained by the Corps and are located on:

(1) Lands owned in fee by either the United States or the non-federal sponsor of a federal navigation project;

(2) Lands over which the United States or the non-federal sponsor of a federal navigation project holds an easement, lease or right of way; or

(3) Submerged lands within the navigation servitude of the United States.

5. Evaluation of Requests from Non-Federal Interests and Other Federal Permittees and Licensees to Place Dredged Material in Federal Navigation Project DMPFs.

a. Required Findings.

(1) Sufficient capacity is available to accommodate the proposed non-federal dredged material without reducing the availability of the facility for project purposes. In order to make this finding, the following determinations must be made:

(a) Excess capacity exists in the requested DMPF either because the DMPF was designed with a capacity in excess of the capacity required to meet estimated dredged material placement requirements for the associated federal navigation project over the life of the DMPF or because estimated dredged material placement requirements for the associated federal navigation project do not exceed actual, demonstrated dredged material placement capacity required for the federal navigation project;

(b) The excess capacity is sufficient to accommodate the estimated volume of non-federal dredged material proposed for placement in the DMPF; and

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(c) The proposed placement of non-federal dredged material in the DMPF will not interfere with scheduled federal actions associated with the DMPF (e.g., federal dredged material placement or DMPF dike raises).

(2) The proposed placement of non-federal dredged material is for navigation purposes directly linked to use of the federal navigation project associated with the DMPF.

(3) The proposed placement of non-federal dredged material is environmentally acceptable.

(a) The proposed non-federal dredging and/or discharge of dredged material may be regulated under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and/or Section 103 of the Marine Protection, Research, and Sanctuaries Act (Regulatory Program authorities). In order to pursue a MOA, the entity must have applied for and received Department of Army (DA) authorization pursuant to these Regulatory Program authorities, or have had a valid DA authorization appropriately transferred to the entity. A DA authorization cannot be granted until the Regulatory office receives a statement of compliance with 33 C.F.R. 320.4(g)(4) and (5). The determination of the project's compliance with 33 C.F.R. 320.4(g)(4) and (5) is project specific and should follow district specific procedures.

(b) The dredged material must meet applicable state and federal requirements for dredged material placement and approved Corps sediment testing protocols.

(4) The requesting entity must provide documentation of a right of access for the purpose of dredged or excavated material placement from all parties that hold a real property interest in the DMPF, to include the underlying fee owner of DMPFs that are located on submerged lands within the navigation servitude of the United States.

b. Procedures.

All procedures, unless otherwise noted, are required for both 217(b) and 401(c) requests.

(1) Non-federal interests or other eligible entities seeking to place dredged material in a DMPF must submit requests in writing to the Corps district responsible for the federal navigation project. Requests must include information about the purpose and need of proposed non-federal dredging activity, the estimated volume of dredged

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material, a characterization of the dredged material in accordance with applicable Corps sediment testing guidance, methods for accomplishing the dredged material placement in the DMPF, a proposed schedule, documentation of no objection from the non-federal sponsor of the federal navigation project, brief history of the Section 10/404 permit approvals along with approval/verification dates and Regulatory Program project ID numbers, and documentation demonstrating a right of access for the purpose of dredged or excavated material placement from all parties that hold a real property interest in the DMPF.

(2) Districts must document the required findings in a Letter Report. Authority to approve Letter Reports is delegated to the Major Subordinate Command (MSC) Commander. Enclosure 1 provides a format and outline for the Letter Report.

(3) Following approval of the Letter Report, the MSC will prepare a justification and finding that the use is in the public interest for the MSC Commander approval. In addition, site specific conditions will be included in an Operations Plan for the designated DMPF prepared by the district in accordance with regional guidance promulgated by the MSC Commander.

(4) Following approval of the Letter Report, and MSC Commander's justification and finding, the Corps and the non-federal interest or other entity requesting to place dredged material in the DMPF will execute a Memorandum of Agreement (MOA). Model MOAs have been developed and are posted on the Headquarters, U.S. Army Corps of Engineers (HQUSACE) Project Partnership agreements web page. Approval of individual MOAs that follow the applicable model is delegated to MSC Commanders. MSC Counsel concurrence that the MOA does not deviate from the approved model and is appropriate for the particular proposal is required prior to approval.

(5) The MSC Commander is also delegated authority to approve non-substantive deviations to the model MOA. MSC Counsel review of such deviations, with a recommendation to approve such deviations, is required prior to approval by the MSC Commander. Where there is a question whether the deviation is substantive, HQUSACE is available for consultation. In addition, MOAs with substantive deviations, unique circumstances, or controversial matters must be coordinated with the respective HQUSACE RIT.

(6) If the district determines that a Consent to Easement or an outgrant should be executed in conjunction with a 217(b) or 401(c) request, the Consent to Easement or

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outgrant shall be consistent with the terms of the MOA and the collection of any related administrative fees must comply with paragraph 6.c. of this guidance.

(7) The Checklist in Enclosure 2 is to be used to assist the districts in preparing submissions to the MSC for approval under 217(b) or 401(c).

(8) As evaluation and approval of a 217(b) or 401(c) request will meet the requirements under 33 U.S.C. § 408 that the requested placement will not be injurious to the public interest and will not impair the usefulness of the project, no separate Section 408 permission is required. The Regulatory Program and 217(b) or 401(c) analyses can be performed concurrently; however, as noted under 5.a.(3)(a), permit issuance cannot occur until a statement demonstrating compliance with 33 C.F.R. 320.4(g)(4) and (5) is received by the Regulatory office.

(9) An environmental review will be conducted by the 401(c) managing office to ensure compliance with all environmental requirements of relevant applicable federal, state, and local laws and regulations, Executive Orders, and with DoD, Army and USACE policy. The 401(c) managing office will issue a Public Notice on the proposed use of a federal dredged material placement area. When possible and where appropriate, the 401(c) managing office and Regulatory office can share environmental documentation.

## 6. Fees.

a. General. An appropriate fee, determined in accordance with this paragraph, will be collected in advance of placement of dredged or excavated material in a designated DMPF. The method used to calculate the fee will be based on the specific statute authorizing the collection of the fee.

### b. Calculation.

(1) Fees under Section 217(b). Section 217(b) authorizes the Secretary to impose fees to recover capital, operation, and maintenance costs associated with use of DMPF by non-federal interests. The following covers the main areas of costs that are to be included in the calculation of the fee.

(a) The placement fee will include the sum of all federal administrative costs associated with reviewing and making a determination for use of the DMPF by the non-federal interest as well as a pro rata share of the federal costs associated with

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construction, operation, and maintenance of the site itself. The exception to this is costs for Regulatory review of the permit application shall not be included in the calculation.

(b) The calculation of the fees will cover all costs associated with construction of the last dike raise or initial construction of the DMPF, whichever event is the last capital expenditure. The costs are calculated based on all available contract, engineering, design, supervision and administration costs for land acquisition and construction of the designated DMPF, adjusted for inflation to the current price level. Construction costs for future dike raises are not included. The fee only covers the capacity created by the last dike raise or initial construction, thus future raises are not included. Interest during construction is also not included. This is not a financial cost and interest during construction is not included as part of the construction costs.

(c) The fee will also include all costs for operating and maintaining the DMPF. This will include all operations and maintenance costs since the last dike raise or initial construction. These costs will be adjusted to current price levels. This will also include all future operations and maintenance costs. The future operations and maintenance costs will not include future capital expenditures for dike raising, but only future estimated annual operations and maintenance associated with maintaining the current site until the next scheduled dike raise. The future operations and maintenance costs will be discounted back to the current price level.

(d) The federal administrative costs, the construction costs and the operations and maintenance costs will then be summed to the total cost at current price levels. The total cost is then divided by the total cubic yards of placement capacity to arrive at a per cubic yard placement tipping fee. The total cubic yards of placement capacity, not the remaining cubic yards, are the total yards created by the last raise or initial construction, whichever event was the last capital expenditure.

(2) Fees under Section 401(c). Section 401(c) authorizes the Secretary to make an appropriate charge for use of DMPFs by federal licensees and permittees other than non-federal interests. Fees assessed under Section 401(c) will be based on market prices in accordance with references 1.h. and 1.i. USACE will calculate market prices by using a fair market value real estate appraisal that complies with the Uniform Standards of Professional Appraisal Practice (USPAP) and ER 405-1-04 and that includes a per cubic yard calculation. The scope or problem statement for the appraiser will be to develop a market level compensation due to the government for loss of capacity in the DMPF. In addition to the standards set forth in the USPAP and

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ER 405-1-04, the following paragraphs provide specific guidance for applying standard appraisal methods to calculate fees under 401(c):

(a) Sales comparison approach - The appraiser will evaluate current placement fees being charged in the market area, when available, and use the comparables to determine the market price. The analysis can be done for a single DMPF or, when justified, for a known market area (e.g., Houston), and then applied to all the DMPFs within that market.

(b) Cost approach - The appraiser will seek to capture all project costs for the DMPF, including site acquisition, construction (to include historical contingency repairs and redesigns), maintenance and monitoring, and planning for replacement of capacity. The appraiser will compare these project costs to the costs of various feasible methods for the government to replace capacity lost due to the placement of non-project dredged material. The unit of comparison will be dollars per cubic yard of dredged material capacity. The most feasible replacement methods will then be given a cost per cubic yard, representing the market value.

c. Real Estate Fees. If the district executes a Consent to Easement in connection with a 217(b) or 401(c) request, no administrative fees shall be charged and retained under 10 U.S.C. 2695. If the district executes an outgrant in connection with a 217(b) or 401(c) request, the district may assess under 10 U.S.C. § 2695 only those administrative expenses directly attributable to executing and administering the real estate transaction that, but for the real estate transaction, the district would not otherwise have incurred. For example, Section 2695 cannot be used to recover and retain expenses associated with evaluating the Required Findings under paragraph 5 of this guidance. Nor can section 2695 be used to recoup expenses associated with the fee calculations described in paragraph 6.b. of this memorandum.

d. Fee Approval and Review. The MSC commander must approve all placement fees under Sections 217(b) and 401(c) and ensure that the fees are calculated in accordance with paragraph 6.b. of this guidance. All market value appraisals used to calculate fees under section 401(c) must receive the concurrence of the MSC Review appraiser and Chief of Real Estate. Districts may seek approval of fee calculations on a per-site basis or for a particular market area when justified. MSC approval of fee calculations is valid for one year from the date of approval. Districts will re-calculate fees and seek MSC approval on an annual basis to assure fee calculations remain current. Out of cycle re-calculations are permitted and may be required if significant changes in project and/or market conditions occur.

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e. Collection and Disposition. Fees collected will be retained by the Corps in a suspense account until the placement action is complete. If the actual total cubic yards of dredged material placed in the designated DMPF exceeds the estimated total cubic yards, the non-federal interest or other entity will provide the fee associated with the additional volume of material within 60 days of written notification by the Corps. If the actual total cubic yards of dredged material placed in the designated DMPF is less than the estimated total cubic yards, the Corps will refund the excess fee to the non-federal interest or other entity.

(1) Following payment of any additional required fee or refund of any excess fee, fees collected under section 401(c) will be deposited in the general fund of the Treasury as miscellaneous receipts.

(2) Following payment of any additional required fee or refund of any excess fee, fees collected under Section 217(b) will be deposited in a special account in the Treasury. Consistent with applicable USACE procedures (currently in ER 37-1-30 para. 5-14.b.), this account is reserved for the specific purpose of holding funds credited as receipts received for non-federal use of placement facilities under Section 217(b) (33 U.S.C. § 2326a). These receipts are unavailable for expenditure at the time of collection. A non-expenditure transfer will be processed on an annual basis by Army Corps, Directorate of Resource Management (CERM-B), Office of Management and Budget, and Treasury to transfer the collected amounts into the O&M account of the Army Corps at Treasury level. By law, the funds collected may only be used for the operation and maintenance of the placement facility for which the fees were collected, after appropriation of the credited fees. Districts must submit a separate work package in the annual budget or workplan in the amount of the fees collected in the project for which the fees were collected. The work package must match the amount of fees collected and should clearly indicate that the funds are for the DMPF for which the fees were collected. As such, CECW-IP will issue funds in such amounts to the district with responsibility for each placement facility's use.

#### 7. Requirement for MSC to Audit and Report on 217(b) and 401(c) Requests:

a. Annually, each MSC approving 217(b) and 401(c) requests under this delegation of authority will prepare a report. The report will address the following items:

- (1) Number of requests received by district.
- (2) Number of requests granted by district.

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b. For each request granted the following information will be provided:

- (1) 217(b) or 401(c) Authorization Number.
- (2) Requestor.
- (3) Date of Approval.
- (4) Dredged Material Placement Area Used.
- (5) Cubic yards approved.
- (6) Remaining Capacity.
- (7) Placement Fee rate reimbursed to the Government and the total estimated reimbursement.
- (8) Regulatory Section 404 Permit Number.
- (9) List of Environment documents for the Project.
- (10) Approved Operations Plan.

c. MSCs will submit an annual report using the format outlined in Enclosure 3 by 30 November for the previous fiscal year to HQUSACE (CECW-CO-D).

3 Encls



JAMES C. DALTON, P.E.  
Director of Civil Works

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**Enclosure 1**  
**Section 401(c) Determinations Letter Report Outline & Format**

- 1) Map with the Authorized Project Description and history and status of the project to include the following:
  - a. Channel Dimensions
  - b. Federal Dredged Material Placement Facility (DMPF)
  - c. Non-Federal Berthing and Channel Areas
  
- 2) DMMP- Describe the 20-year plan for the proposed location.
  - a. 3-5 year plan or until the next dike raising schedule
  - b. Federal Maintenance
  - c. Federal Dredging Capacity
  - d. Non-Federal Dredging Capacity
  
- 3) Proposed Non-Federal Dredging
  - a. Proposed DMPF
  - b. Non-Federal Berthing and Channel Area Map
  
- 4) Assessment (Information on 401(c) or 217 (b))
  - a. Purpose
  - b. Discussion and 401(c) Analysis
    - i. Has the DMPF been designed with sufficient capacity to accommodate private dredging so as not to reduce the availability of it for placement of Federal dredged material?
      1. DMPF features and Capacity. Provide details of each the following areas:
        1. Describe the DMPF.
        2. Acreage.
        3. Current capacity (include non-fed capacity).
        4. Total capacity.
        5. Defined use limitations.
        6. Jurisdiction.
        7. All current and known future needs of this DMPF have been considered. This action will not negatively affect the District's ability to operate and maintain the designated DMPF or dredging mission.
      - ii. Current and future Federal use
      - iii. Placement Fee and method used to determine
    - ii. Current and future Federal use
    - iii. Placement Fee and method used to determine
  - c. Is the private dredging for navigation purposes directly linked to the use of the Federal project?
    - i. Applicant information.
    - ii. Discuss rationale as to why accomplishment of work is advantageous to the public's interest.
    - iii. Discuss impact, if any, to other work being performed with appropriated resources.

- d. Does this action comply with the environmental requirements of relevant applicable Federal, State, and local laws and regulations, Executive Orders, and with DOD, Army and USACE policy?
  - i. Regulatory Permit History (permit number, brief description of work, and permit issuance and expiration dates)
  - ii. Contaminant Considerations (document verification that dredged material to be placed meet all applicable Federal and state laws).
  - iii. NEPA Considerations (documentation that proposed placement action meets all requirements under NEPA).
  
- e. Has the requester provided documentation of a right of access from all parties that hold a real property interest in the DMPF?
  - i. Describe the non-Federal sponsor, Federal, and any other real property interests, including application of navigation servitude, for the DMPF(s) to be used by the non-Federal interests.

5) Recommendation

## Enclosure 2

### Quality Assurance (QA) Checklist 401(c) or 217(b) Determinations

District: \_\_\_\_\_

Date: \_\_\_\_\_

The following set of questions are to aid in preparing the required submission package and associated documents for the approval of 3<sup>rd</sup> party use by Non-Federal entities of Federal Dredge Management Placement Facilities under Section 401c of the Clean Water Act or for Section 217b requests under the Water Resources Development Act 1996. As part of the QA review, additional data on specific actions may be required. NOTE: Not all questions below apply to each authority.

QUESTION	YES	NO	N/A	REMARKS (If No or N/A explain why/corrective actions)
<b>Name of Applicant/Project:</b>				
1. Is this request under Section 401c or 217b?				
2. Do you have a transmittal memo from the district to the MSC with the requirements below? Note: electronic signatures are acceptable. Requirements: a. Name of non-Federal sponsor for authorized project. b. Non-Federal entity requesting use of DMPF. c. Schedule for action d. Tie to existing Federal dredging contract				
3. Does the transmittal memo include a statement identifying the HQ approved MOA used in developing the current MOA?				
4. If the MOA deviates (as shown in track changes) from the latest approved HQ MOA, did you provide a list of deviations and detailed reasons for deviations in the transmittal memo?				
5. Do you have a Draft MOA that shows deviations in track changes				

format of the latest approved MOA in Microsoft WORD?				
6. Do you have a "clean" version of Draft MOA in Microsoft WORD?				
7. Do you have a Certificate of Legal Review signed by District Counsel?				
8. Do you have a Letter from the Non-Federal Entity Applicant confirming ability to execute the MOA?				
9. Do you have a statement from the Non-Federal Sponsor supporting the use of Dredged Management Placement Facility by the 3 <sup>rd</sup> Party, Non-Federal Entity Applicant?				
10. Did you prepare a Letter Report documenting the 401c Determination that follows the approved format provided as an Appendix to this Checklist? Is it included in the submittal package?				
11. Do you have a copy of the most current Agreement with Non-Federal sponsor (PPA, PCA, LCA, or Letter of Assurance) that defines the Non-Federal sponsor role and responsibilities for the associated federal navigation channel?				
12. Do you have an approved Dredged Maintenance Management Plan (DMMP)? Does it define the use of placement areas by Fed, Non-Fed and/or 3 <sup>rd</sup> party applicants?				
13. Do you have a copy of the DA Section 10 and/or Section 404 authorization or a copy of either the transferred individual permit, or letter in cases of nationwide permits to the Non-Federal Entity Applicant?				

14. Have you documented that all required environmental coordination has been completed and any specific environmental compliance concerns are identified in the Letter Report?				
15. Do you have a summary statement of NEPA compliance certified by Office of Counsel?				
16. Has the requester provided documentation of a right of access from all parties that hold a real property interest in the DMPF?				

