

### Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

### Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

### Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

### Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded under the Instruction that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the

Instruction. Therefore, this rule is categorically excluded, under figure 2-1, paragraph (34)(g), of the Instruction, from further environmental documentation.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicates under

### ADDRESSES.

### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T07-1120 to read as follows:

#### § 165.T07-1120 Safety Zone; Flagler Museum New Year's Eve Celebration fireworks display, West Palm Beach, Florida.

(a) *Regulated area.* A temporary safety zone is established for the Flagler Museum New Year's Eve Celebration fireworks display in West Palm Beach, Florida. The 370 yard radius safety zone encompasses the waters surrounding the fireworks barges. The approximate positions for the two fireworks display barges are 26°42'34" N, 080°02'50" W and 26°42'33" N, 080°02'47" W.

(b) *Definitions.* The following definitions apply to this section:

*Designated representative* means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers and other officers operating Coast Guard vessels, and federal, state, and local officers designated by or assisting the Captain of the Port Miami, Florida in the enforcement of regulated navigation areas, safety zones, and security zones.

#### (c) *Regulations.*

(1) In accordance with the general regulations in § 165.23 of this part, no person or vessel may anchor, moor or transit a safety zone without permission of the Captain of the Port Miami, Florida or his designated representative. To request permission to enter into a safety zone, the Captain of the Port's designated representative may be contacted on VHF channel 16.

(2) At the completion of scheduled parade, and departure of participants from the regulated area, the Coast Guard Patrol Commander may permit traffic to resume normal operations.

(d) *Effective Dates.* This rule is effective from 11:55 p.m. on Wednesday, December 31, 2008 to 1 a.m. on Thursday, January 1, 2009.

Dated: November 28, 2008.

J.O. Fitton,

Captain, U.S. Coast Guard, Captain of the Port, Miami, Florida.

[FR Doc. E8-30878 Filed 12-29-08; 8:45 am]

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### DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS

#### 33 CFR Part 323

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 232

[FRL-8757-7]

RIN 2040-AE96

#### Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material"; Final Rule

**AGENCIES:** U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) (together, the "Agencies") are promulgating a final rule to amend a Clean Water Act (CWA) section 404 regulation that defines the term "discharge of dredged material." This action conforms the Corps' and EPA's regulations to a court order invalidating the January 17, 2001, amendments to the regulatory definition (referred to as the "Tulloch II" rule). This final rule responds to the court decision by deleting language from the regulation that was invalidated.

**DATES:** *Effective Date:* December 30, 2008.

**FOR FURTHER INFORMATION CONTACT:** For information on the final rule, contact Rachel Fertik of EPA at [Fertik.Rachel@epa.gov](mailto:Fertik.Rachel@epa.gov) or Jennifer McCarthy of the Corps at [jennifer.l.mccarthy@usace.army.mil](mailto:jennifer.l.mccarthy@usace.army.mil). For questions on project-specific activities, contact your local Corps District office. Addresses and telephone numbers for Corps District offices can be obtained

from the Corps Regulatory Homepage at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm>. If you do not have access to the Internet, telephone numbers for Corps District offices can be obtained by calling (202) 761-4614.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Potentially Affected Entities*

Persons or entities engaged in discharging dredged material to waters of the U.S. could be affected by this rule. This final rule addresses the regulatory definition of “discharge of dredged material,” a term that is important in determining what types of activities do or do not require a CWA section 404 permit. As described further below, this action does not increase regulatory burdens, but rather conforms the language in our section 404 regulations to the outcome of a lawsuit challenging the regulatory definition. Examples of entities that might potentially be affected include:

Category	Examples of potentially affected entities
State/Tribal governments or instrumentalities.	State/tribal agencies or instrumentalities that discharge dredged material to waters of the U.S.
Local governments or instrumentalities.	Local governments or instrumentalities that discharge dredged material to waters of the U.S.
Industrial, commercial, or agricultural entities.	Industrial, commercial, or agricultural entities that discharge dredged material to waters of the U.S.
Land developers and landowners.	Land developers and landowners that discharge dredged material to waters of the U.S.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to carry out activities affected by this action. This table lists the types of entities that the Agencies are now aware of that carry out activities potentially affected by this action. Other types of entities not listed in the table could also perform activities that are affected. To determine whether your organization or its activities are affected by this action, you should carefully examine the preamble discussion in section II of this final rule. If you still have questions regarding the applicability of this action to a particular activity, consult the

Corps District offices as listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. “Tulloch” Rules and Related Litigation*

Clean Water Act section 301 prohibits the discharge of a pollutant into a water of the United States, except as in compliance with specified sections of the CWA. 33 U.S.C. 1311(a). Among these sections is CWA section 404, which authorizes the Corps (or a state or tribe with an authorized permitting program) to issue permits for the discharge of dredged or fill material into waters of the U.S. Two states (New Jersey and Michigan) have assumed the CWA section 404 permitting program.

On August 25, 1993 (58 FR 45008), the Agencies issued a regulation (the “Tulloch rule”) defining the term “discharge of dredged material” to include:

any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation. 33 CFR 323.2(d)(1); 40 CFR 232.2.

The American Mining Congress and several other trade associations challenged this regulation. On January 23, 1997, the U.S. District Court for the District of Columbia ruled that the regulation exceeded the Agencies’ authority under the CWA because it impermissibly regulated “incidental fallback” of dredged material. *American Mining Congress v. United States Army Corps of Engineers*, 951 F.Supp. 267, 272–76 (D.D.C. 1997). The court concluded that incidental fallback is not subject to the CWA as an “addition” of pollutants, and declared the rule “invalid and set aside.” *Id.*; 278. The court also enjoined the agencies from applying or enforcing the regulation. *Id.* The government appealed the court’s ruling, and, on June 19, 1998, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court’s decision. *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1339 (D.C. Cir. 1998) (“*NMA*”).

The *NMA* court described incidental fallback as “redeposit” of dredged material that “takes place in substantially the same spot as the initial removal.” *NMA*, 145 F.3d at 1401. The court further portrayed such fallback as “the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back,” and concluded that because such fallback represents a net withdrawal, it cannot constitute a

regulable “addition” of a pollutant. *Id.* at 1404. The *NMA* court did not, however, conclude that all forms of redeposit were outside the government’s authority to regulate under CWA § 404: “We hold only that by asserting jurisdiction over ‘any redeposit,’ including incidental fallback, the Tulloch rule outruns the Corps’s statutory authority.” *Id.* at 1405 (emphasis in original). The *NMA* court noted, for example, that “redepósitos at some distance from the point of removal,” could still be regulated. *Id.* at 1407, 1410 (Silberman, J., concurring).

On May 10, 1999, the Agencies issued a final rule modifying our definition of “discharge of dredged material” in response to the Court of Appeals’ decision to affirm the district court’s order invalidating the Tulloch rule (64 FR 25120, 25123) (the “1999 Rule”). The 1999 Rule made those changes necessary to conform the regulations to these decisions. First, the rule deleted use of the word “any” as a modifier of the term “redeposit.” Second, the rule expressly excluded “incidental fallback” from the definition of “discharge of dredged material.” The resulting definition was as follows:

(1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

- (i) The addition of dredged material to a specified discharge site located in waters of the United States;
- (ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and
- (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

- (i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State.
- (ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.
- (iii) Incidental fallback.

40 CFR 232.2 (July 1, 1999) (Corresponding changes were also made to Corps regulations at 33 CFR 323.2(d)(1), (2) (July 1, 1999).

As explained in the preamble to that rulemaking, the determination whether a particular redeposit of dredged material in waters of the United States requires a section 404 permit would be done on a case-by-case basis, consistent with our CWA authorities and governing case law.

After the Agencies published the 1999 Rule, the National Association of Home Builders (the "Home Builders") and others filed a motion with the district court that issued the AMC injunction seeking to compel compliance with that injunction. Home Builders' motion, among other things, asserted that the 1999 Rule violated the court's injunction by asserting unqualified authority to regulate mechanized landclearing. On September 13, 2000, the district court denied Home Builders' motion to compel compliance with the AMC injunction, finding that the 1999 Rule was consistent with its decision and injunction, and the decision of the DC Circuit in *NMA. American Mining Congress v. U.S. Army Corps of Engineers*, 120 F.Supp.2d 23, 29 (D.D.C. 2000). Specifically the court determined that the 1999 Rule did not violate the court's injunction because that rule "eliminated § 404 jurisdiction over incidental fallback, and removes the language asserting jurisdiction over 'any' redeposit of dredged material." *Id.*

EPA and the Corps proposed further revisions to the definition of "discharge of dredged material" in August 2000 (65 FR 50108), based on the Agencies' understanding of language in the relevant court decisions addressing "incidental fallback." Following receipt and analysis of public comments, EPA and the Corps promulgated a final rule in January 2001 (66 FR 4550). This "Tulloch II" rule retained the language from the 1999 Rule excluding "incidental fallback" from regulation, and added language defining "incidental fallback" as:

The redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed. (66 FR 4575) (amending 33 CFR 323.2(d)(2)(i), and 40 CFR 232.2(2)(ii)).

This Tulloch II rule also indicated that

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph ... does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA. (66 FR 4575) (amending 33 CFR 323.2(d)(2)(i); 40 CFR 232.2(2)(ii)).

In February 2001, NAHB filed a facial challenge in the district court to the Tulloch II rule, asserting that the regulations create an impermissible rebuttable presumption that all unpermitted dredging results in unlawful discharge, and alleging that the rule exceeds the Corps' CWA section 404 authority by defining "incidental fallback" in terms of volume. The district court initially dismissed these claims as unripe in *National Ass'n of Homebuilders v. U.S. Army Corps of Engineers*, 311 F.Supp.2d 91 (D.D.C. 2004) (NAHB), but the Court of Appeals for the DC Circuit reversed the district court's order dismissing the case and remanded the case to the district court for consideration of the merits. *National Ass'n of Homebuilders v. U.S. Army Corps of Engineers*, 440 F.3d 459 (2006).

In a January 2007 decision, the district court held that the Tulloch II rule violates the Clean Water Act because of the way the rule used volume to determine "incidental fallback." *NAHB*, No. 01-0274 at 7, 10 (D.D.C. Jan. 30, 2007). The court stated that "[t]he difference between incidental fallback and redeposit is better understood in terms of two other factors: (1) The time the material is held before being dropped to earth and (2) the distance between the place where the material is collected and the place where it is dropped." *Id.* at 7-8. The court also criticized the rule for failing to specify exactly when mechanized land clearing would require a permit, since the Court of Appeals has made clear "that not all uses of mechanized earth-moving equipment may be regulated." *Id.* at 9. The district court declared the Tulloch II rule "invalid" and enjoined the Agencies from enforcing the rule. *NAHB*, No. 01-0274 Order at 1 (D.D.C. Jan. 30, 2007).

## II. This Final Rule

This final rule addresses the regulatory definition of "discharge of dredged material," a term that is important in determining whether an activity requires a Clean Water Act section 404 permit. Previous amendments to the definition aimed to better differentiate between regulable

redeposits of dredged material and "incidental fallback," which is not regulated under EPA or Corps regulations. Consistent with the district court's 2007 *NAHB* order this rule returns the definition of "discharge of dredged material" to that which was promulgated in the 1999 rule, as described above. The definition outlines several examples where a discharge results in a regulable redeposit, but specifically excludes "incidental fallback" without defining that term. As with the 1999 rule, deciding when a particular redeposit of dredged material is subject to Clean Water Act jurisdiction will entail a case-by-case evaluation, consistent with our Clean Water Act authorities and governing case law.

This rule conforms the language in the Code of Federal Regulations with the legal state of the regulations defining "discharge of dredged material" following the DC district court's decision invalidating the 2001 amendment to the regulations made by the Tulloch II rule. The effect of the district court's 2007 *NAHB* order was to reinstate the 1999 rule text. *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff'd* 499 U.S. 2104 (1988) ("the effect of invalidating an agency rule is to 'reinstat[e] the rules previously in force.'"). Before the Tulloch II rule was promulgated in 2001, the regulations governing discharges of dredged material were last amended on May 10, 1999. The regulations in force following the 1999 amendments, therefore, have been reinstated by the court's decision on the Tulloch II rule. This rulemaking is being undertaken so that the published regulatory text will match the regulations reinstated by the district court's 2007 *NAHB* order.

With one exception described below, this final rule removes all changes to the definition of "discharge of dredged material" that had been made by the Tulloch II rule and restores 33 CFR 323.2(d)(2) and 40 CFR 232.2 to the text as it existed immediately following the 1999 Rule amendments. This means that the definition of "incidental fallback" is deleted from the regulation, as is the language indicating that the agencies "regard" the use of mechanized earth-moving equipment as resulting in a regulable discharge.

There is just one facet of the Tulloch II rule that is not being reversed by this final rule. The Tulloch II rule *removed* a "grandfather" provision from the regulations that had exempted from 404 permit requirements a limited class of discharges. See 33 CFR 323.2(d)(3)(iii) (1999) and 40 CFR 232.2(3)(iii) (1999).

In issuing its decision in *NAHB* (2007), the district court did not consider the merits of this provision because it was not at issue in the litigation. There is, therefore, no reason to believe that the court intended for the Agencies to *reinsert* this provision into the Agencies' regulations when the court declared the Tulloch II rule "invalid." Moreover, this "grandfather" provision expired—by its own express terms—in 1996, and it is the Agencies' view that this provision would not be meaningful if included in the regulations. Indeed, EPA received no comments on this provision when the Agency proposed to remove it from the CFR on August 16, 2000 (65 FR 50111, 50117), and it has been absent from the regulations since 2001.

The "grandfather" provision, which is *not* being added to the Agencies' regulations in this final rule, stated that section 404 authorization is not required for the following activities:

Those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, *provided* [emphasis in original] that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later than August 25, 1994. This provision does not apply to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), *e.g.*, mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision *provided* that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking 404 authorization for such excavation activity. In no event can the grandfather period under this paragraph extend beyond August 25, 1996.

See 33 CFR 323.2(d)(3)(iii) (1999), and 40 CFR 232.2(3)(iii) (1999).

### III. Statutory and Executive Order Reviews

#### A. Findings Under 5 U.S.C. 553

Under the Administrative Procedure Act (APA), 5 U.S.C. 553, agencies generally are required to publish a notice of proposed rulemaking and provide an opportunity for the public to comment on any substantive rulemaking action. Notice is not required, however,

When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(3)(B).

This rule merely conforms the language in our section 404 regulations to the current status of those regulations after the 2007 *NAHB* order and injunction. The district court judgment invalidated the changes made to the regulatory definition of "discharge of dredged material" promulgated on January 17, 2001. By removing the definition of "incidental fallback" and the language indicating that the agencies "regard" the use of mechanized earth-moving equipment as resulting in a regulable discharge, these revisions conform the regulations to reflect the legal status quo in light of the district court's January 30, 2007, order in the *NAHB* case invalidating the Tulloch II rule. Therefore, pursuant to 5 U.S.C. 553(b)(3)(B), we find that solicitation of public comment is unnecessary.

To the extent EPA must find good cause for declining to reinstate the "grandfather" clause described in section II, above, the Agency finds such good cause because it is unnecessary to seek comment to exclude meaningless provisions from the regulations.

Under 5 U.S.C. 553(d)(1) and (3), rules must be published at least 30 days prior to their effective date, except where the rule "grants or recognizes an exemption or relieves a restriction," or where justified by the agency for "good cause." The good cause rationale presented in the preceding paragraph also applies herein. Because this final rule simply conforms the published regulatory text with the applicable regulations following the district court's January 30, 2007 order in the *NAHB* case, the Agencies have good cause to make this rule effective immediately.

#### B. Paperwork Reduction Act

This final rule does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This is because it merely conforms the definition of "discharge of dredged material" to reflect the district court's January 30, 2007, order in the *NAHB* case. It does not establish or modify any information reporting, or record-keeping requirements, and therefore is not subject to the requirements of the *Paperwork Reduction Act*.

#### C. Other Statutes and Executive Orders

This final rule does not establish any new requirements, mandates or procedures. As explained above, this rule merely conforms the regulations' definition of "discharge of dredged material" to reflect the judicial decision in the *NAHB* case and associated January 30, 2007, order. Because this

final rule is a "housekeeping" measure undertaken to conform the regulatory language to that judicial determination, it does not result in any additional or new regulatory requirements.

Accordingly, it has been determined that this rule is not a "significant regulatory action" under Executive Order 12866, and therefore is not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). This rule also does not impose any federalism requirements or require prior consultation with tribal government officials as specified by Executive Order 13132 (64 FR 43255, August 10, 1999) or Executive Order 13175 (65 FR 67249, November 9, 2000). This rule does not involve special consideration of environmental justice-related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. Because this action is not subject to notice-and-comment requirements under the APA or any other statute, and because it does not impose any new requirements on small entities, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) This rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined under Executive Order 12866. Further, this final rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. Because this final rule does not involve technical standards, EPA did not consider the use of any voluntary consensus standards. Therefore, this rule is not subject to section 12(d) of the National Technology Transfer and Advancement Act of 1995, Public Law No. 104-113, § 12(d) (15 U.S.C. 272 note).

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule

effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, we have made such a good cause finding, including the reasons stated, and established an effective date of [Date of Publication]. Therefore, the Agencies will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects

##### 33 CFR Part 323

Navigation, Water Pollution Control, Waterways.

##### 40 CFR Part 232

Environmental Protection, Wetlands, Water Pollution Control.

Dated: December 19, 2008.

**John Paul Woodley, Jr.,**

*Assistant Secretary of the Army (Civil Works),  
Department of the Army.*

Dated: December 19, 2008.

**Stephen L. Johnson,**

*Administrator, U.S. Environmental Protection  
Agency.*

■ In consideration of the foregoing, 33 CFR part 323 and 40 CFR part 232 are amended as set forth below:

#### PART 323—[AMENDED]

■ 1. The authority citation for part 323 continues to read as follows:

**Authority:** 33 U.S.C. 1344.

■ 2. Amend § 323.2 as follows:

■ a. Remove paragraph (d)(2).

■ b. In paragraph (d)(1) introductory text, remove the words "paragraph (d)(3)" and add, in their place, the words "paragraph (d)(2)".

■ c. Redesignate paragraphs (d)(3) through (d)(6) as paragraphs (d)(2) through (d)(5), respectively.

■ d. In the newly redesignated paragraph (d)(3), in the first sentence of paragraph (d)(3)(i) remove each time they appear the words "paragraphs (d)(5) and (d)(6)" and add, in their place, the words "paragraphs (d)(4) and (d)(5)".

#### PART 232—[AMENDED]

■ 1. The authority citation for part 232 continues to read as follows:

**Authority:** 33 U.S.C. 1344.

■ 2. Amend § 232.2 as follows:

■ a. In the definition of "Discharge of dredged material", remove paragraph (2).

■ b. In paragraph (1) of the definition of "Discharge of dredged material", remove the words "paragraph (3)" and add, in their place, the words "paragraph (2)".

■ c. Redesignate paragraphs (3) through (6) as paragraphs (2) through (5), respectively.

■ d. In the newly redesignated paragraph (3) of the definition of "Discharge of dredged material", in the first sentence of paragraph (3)(i) remove each time they appear the words "paragraphs (5) and (6)" and add, in their place, the words "paragraphs (4) and (5)".

[FR Doc. E8-30984 Filed 12-29-08; 8:45 am]

**BILLING CODE 3710-KF-P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 21

**RIN 2900-AM67**

#### Increase in Rates Payable Under the Survivors' and Dependents' Educational Assistance Program and Other Miscellaneous Issues

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Final rule.

**SUMMARY:** This document amends Department of Veterans Affairs (VA) regulations to reflect increases effective for fiscal years 2005, 2006, 2007, 2008, and 2009, respectively, in the monthly rates payable under the Survivors' and Dependents' Educational Assistance (DEA) program in accordance with statutory requirements and previously established formulas; a change in the formula used to calculate entitlement charges for individuals pursuing apprenticeship or other on-job training in accordance with the Veterans Benefits Improvement Act of 2004; and nonsubstantive changes for the purpose of clarity and to reflect agency organization.

**DATES:** *Effective Date:* This final rule is effective December 30, 2008.

*Applicability Dates:* For information concerning the dates of applicability for certain provisions, see the Supplementary Information section of this document.

#### FOR FURTHER INFORMATION CONTACT:

Brandye R. Terrell, Regulation Development Team Leader (225C), Education Service, Veterans Benefits Administration, Department of Veterans

Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 461-9822.

#### SUPPLEMENTARY INFORMATION:

#### I. Increase in Monthly Rates Payable Under the Survivors' and Dependents' Educational Assistance Program

Under the formula mandated by 38 U.S.C. 3564, the monthly rates of basic educational assistance payable under the Survivors' and Dependents' Educational Assistance (DEA) program must be increased by the percentage by which the total monthly Consumer Price Index-W for the 12-month period ending on June 30 preceding the fiscal year (FY) during which the increase is applicable exceeds the Consumer Price Index-W for the 12-month period ending on June 30 preceding the previous FY. Using this formula, VA calculated a 2 percent increase for FY 2005, a 3 percent increase for FY 2006, a 4 percent increase for FY 2007, a 2.5 percent increase for FY 2008, and a 3.9 percent increase for FY 2009.

Public Law 91-219 authorized monthly educational assistance payments for eligible persons pursuing training at less than half time. Since the effective date of that public law, February 1, 1970, students pursuing a program of education at less than one-half time but more than one-quarter time have had their payments limited to the prorated amount of tuition and fees not to exceed the half-time rate. Similarly, students pursuing a program of education at one-quarter time or less have had their payments limited to the prorated amount of tuition and fees not to exceed 25 percent of the full-time institutional rate. The monthly rates of basic educational assistance for students pursuing a program of education at less than half time are increased in accordance with the provisions of this paragraph, and this document makes changes in the regulations accordingly.

The entitlement charge for correspondence courses is based on the monthly rates of basic educational assistance. Hence, the amount used to determine entitlement charge for correspondence courses is increased by 2 percent for FY 2005, 3 percent for FY 2006, 4 percent for FY 2007, 2.5 percent for FY 2008, and 3.9 percent for FY 2009, consistent with the adjustments in the monthly rates of basic educational assistance discussed above.

The increases in the DEA rates are applied in accordance with the applicable statutory provisions discussed above. Thus, VA began paying the increases for FY 2005, 2006, 2007, and 2008 effective for training pursued on or after October 1, 2004, October 1, 2005, October 1, 2006, and