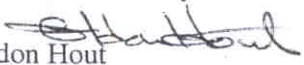




UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

DEC 18 2003

MEMORANDUM FOR: State and Territory Coastal Management Programs

FROM: 
Eldon Hout
Director

SUBJECT: State Beneficial Use Policies for Dredging Projects that Would Require the Project Proponent to Obtain *Alternative Sources* of Material

The purpose of this memorandum is to inform you of an emerging issue where a coastal State is seeking to add a policy to its federally approved coastal management program (CMP) that would require the proponent of a dredging project to find an *alternative source* of sand for a beneficial use if the dredged material from a navigation project is *unsuitable* for beneficial use. (An *alternative source* of sand is material that *does not come from the dredging project*, but is a quantity of suitable material from another source that would substitute for unsuitable dredged material.) *Alternative source* of sand policies raise program change and implementation issues. The Office of Ocean and Coastal Resource Management (OCRM) is providing guidance on this issue should your State be considering developing such a policy.

Beneficial use of dredged material recognizes that the dredged material is not always a waste to be discarded but may be a resource that can be used for public benefits, either to be used to offset the environmental impacts of the dredging (e.g., beach replenishment because the removal of material from a channel can reduce sand migration along a shoreline resulting in increased erosion of affected down-drift beaches), or to be used in ways unrelated to the dredging of a waterway (e.g., wetlands creation, sanitary landfill, agricultural soil improvement). Many States have policies requiring or encouraging such beneficial use of dredged material in their federally approved CMPs.

These issues are covered below under "Program Change Approval" and "Implementation of an Approved *Alternative Source* Policy." If you have any questions regarding this memorandum, please contact David Kaiser, Federal Consistency Coordinator, OCRM, at (301) 713-3155, extension 144.

Program Change Approval

OCRM will determine whether an *alternative source* policy would be an amendment or a routine program change (RPC) to a State's CMP, on a case-by-case basis, pursuant to 15 CFR part 923, subpart H and OCRM's *Program Change Guidance* (July 1996). In addition, OCRM will determine whether a particular *alternative source* policy is written in such a way that it can be approved under OCRM's *Program Change Guidance*. In particular, OCRM must ensure that *alternative source* policies proposed by coastal States:

1. are not preempted by Federal law, e.g., the Water Resources Development Act (WRDA) and implementing regulations regarding dredging, beneficial use and cost-sharing. *See* OCRM's *Program Change Guidance*, section II.D.;
2. would be applied to all relevant public and private entities. *Id.*;
3. would not discriminate against a Federal agency or activity. *Id.*; and



4. are consistent with CZMA requirements on the State's use of federal consistency. *Id. See also id.* at Appendix B.5. (federal consistency procedures).

OCRM's particular concern under item 4 is that a Federal agency not be required to change its proposed action to accommodate beneficial uses not related to mitigation for project impacts. A State may include alternatives/conditions to mitigate impacts to coastal uses or resources resulting from the proposed federal action (where such alternatives/conditions are based on approved enforceable policies). A State cannot, however, redefine an activity proposed by a Federal agency in such a way that is not related to the intended purpose of the Federal agency's proposed action or to mitigate impacts as described above. For Federal agency activities under CZMA section 307(c)(1), States review activities and development projects that are *proposed* by a Federal agency. 15 CFR § 930.36(a). *See also, e.g.*, 15 CFR §§ 930.35, .39(a), .46(a), .1(c), .11(d); 65 Fed. Reg. 77130, Col. 2-3 (December 8, 2000) (preamble to final 2000 rule); and 68 Fed. Reg. 77141, Col. 1 (June 11, 2003) (preamble to proposed rule discussing "proposed" Federal agency activities). A State, therefore, could not require a Federal agency to obtain sand from an *alternative source* for a beneficial use not related to mitigation merely because the dredged material is unsuitable for the State's chosen purpose. If, however, there is a nexus between the proposed Federal agency's dredging and adverse impacts to affected down-drift beaches or other coastal resources, then it may be reasonable for the Federal agency to obtain a source of material from another location to mitigate those impacts, subject to compliance with Federal law governing mitigation and federal cost-sharing requirements, *see* implementation section below.

Thus, States developing an *alternative source* policy should consider whether the policy is consistent with other Federal law, including implementation of the policy using applicable Federal cost-sharing requirements; that the policy would apply equally to Federal and non-Federal entities, and the policy includes a connection between *alternative sources* of material and mitigation of dredging impacts, when the dredged material is unsuitable for the mitigation. OCRM also recommends that any beneficial use of dredged material policy, including a proposed *alternative source* policy, provide flexibility to States and the dredging entity so that one type of use is not dictated, e.g., rather than "direct placement of dredged material or alternative source material on beach," a policy should say, "place material in a manner suitable to meet the objectives of the beneficial use and/or mitigation."

In addition, a State's program change submission for an *alternative source* policy, when addressing the "Uses Subject to Management" in the description of the change, *see* OCRM's *Program Change Guidance* at III.A.3. (July 1996), should provide some data and analysis discussing a nexus between dredging in that State's water bodies and reasonably foreseeable impacts to coastal resources resulting from the dredging or activities related to the dredging project, as well as the geographic applicability of the policy. This information will facilitate OCRM's review and approval.

Finally, OCRM strongly encourages States to coordinate with applicable Federal agencies (primarily the Army Corps of Engineers (Corps) and the Navy) and port authorities while developing beneficial use and *alternative source* policies. If OCRM determines that a State's *alternative source* policy is an amendment, then the State will need to show the opportunities the State provided to Federal agencies, ports, and others to participate in the development of the policies. 15 CFR § 923.81(b)(5).

Implementation of an Approved *Alternative Source* Policy

OCRM offers the following advice to States implementing an approved *alternative source* policy through Federal Consistency reviews:

1. States and Federal agencies should coordinate during the planning of a dredging project, and before the Federal Consistency review begins, to determine the scope and nature of any adverse impacts on coastal resources from the dredging, determine options to mitigate the effects, and consider the cost of the options. Such coordination will allow the Federal agency and the State to pursue adequate funding for the project, including applicable Federal cost-sharing and mitigation funds.
2. The extent to which an approved *alternative source* policy applies through CZMA Federal Consistency reviews will be determined on a case-by-case basis. The application of the consistent to the maximum extent practicable standard for Federal agency activities and other applicable Federal law may limit the State's implementation. Under the CZMA, for Federal agency activities, it is the Federal agency that initially decides whether its proposed project will have coastal effects and whether it is consistent to the maximum extent practicable with the State's enforceable policies. A Federal agency must develop an administrative record for the proposed project and base its CZMA decisions on that record. In the context of complying with a State's *alternative source* policy to mitigate coastal effects, the Federal agency would determine the suitability of the dredged material for beneficial uses, whether a nexus exists between the dredging and adverse coastal effects, and the volume of material needed to mitigate any adverse effects. In addition, for dredging projects by the Corps, the CZMA consistent to the maximum extent practicable standard and Corps requirements may limit the Corps' ability to be consistent with the State's policy to the least costly, environmentally sound alternative.
3. In applying the *alternative source* policy through a Federal Consistency review, the State has the burden to dispute the Federal agency's findings regarding effects, suitability of dredged material, whether a nexus between dredging and adverse impacts is demonstrated, and volume of material. For example, the State would have to show that a nexus exists between the particular dredging project and adverse effects on the affected down-drift beach or other coastal resources. In addition, the State must show that beach replenishment is necessary to mitigate the effects from the dredging and that other mitigation measures that are less costly are not adequate.
4. In addition, States should be cognizant that a Federal agency's ability to fund mitigation measures may be limited by (1) application of other Federal law, including the potentially applicable cost-sharing requirements, and (2) the total amount of federal funds available in a particular federal cost-sharing program. Thus, to ensure adequate funds exist to meet beneficial use policies, States, ports, and/or local sponsors of a dredging project should seek sources of funds through their State and/or Federal legislative delegations.