made by any available means of communication, and the action requested by the District Engineer shall be confirmed in writing under date of the same day to the office of the Regional Director of the Bureau of Reclamation which has jurisdiction of the area in which the projects are located.

(d) The flood control storage diagrams for Prineville and Ochoco Reservoirs currently in force as of the promulgation of this section are those dated April 2, 1970, Files Nos. DS–20–1/11 and DS–20–1/12 and are on file in the Office of the Chief of Engineers, Department of the Army, Washington, D.C., and in the office of the Commissioner, Bureau of Reclamation, Washington, D.C. Modification of the flood control storage diagrams for Prineville and Ochoco Reservoirs may be made from time to time as deemed necessary and approved by the Corps of Engineers and the Bureau of Reclamation. Each such revision shall be effective upon the date specified in the approval thereof by the Chief of Engineers and the Commissioner of Reclamation and, from that date until rescinded, shall be in force for purposes of this section. Copies of the flood control storage reservation diagrams currently in force shall be kept on file in the Office of the District Engineer, Portland District, Corps of Engineers, and the Regional Director, Bureau of Reclamation, charged with the responsibility of these projects and may be obtained from the respective offices.

(e) Nothing in the regulations in this section shall be construed to require dangerously rapid changes in magnitude of releases, or that releases be made at rates or in a manner that would be inconsistent with requirements for protecting the dams and the reservoirs from major damage, or inconsistent with safe routing of the inflow design flood.

(f) The Bureau of Reclamation, acting through the Ochoco Irrigation District, shall procure current basic hydrological data, make determinations of the required flood control space reservations to effect the regulation set forth in the objectives prescribed in these regulations, and make calculations of permissible releases from the reservoirs as are required to accomplish the flood control objectives prescribed in this section.

(g) The Bureau of Reclamation shall keep the District Engineer, Portland District, Corps of Engineers, advised of hydrological conditions and other operating criteria which affect the flood control operation.

[55 F.R. 6650, Apr. 25, 1970]

PART 209—ADMINISTRATIVE PROCEDURE

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209.610 Environmental impact statements.

Authority: The provision of this Part 209 issued under R.S. 161; 5 U.S.C. 301, unless otherwise noted.

Source: The provisions of this Part 209 appear at 33 F.R. 18870, Dec. 18, 1968, unless otherwise noted.

§ 209.110 Purpose.

Sections 209.120 to 209.335 state the general course and method by which the
functions of the Corps of Engineers are channeled and determined, including the nature and requirements of all procedures as well as forms and instructions. They are intended to show what the Department requires and how the Department acts in a given type of case.

§ 209.120 Permits for activities in Navigable Waters or Ocean Waters.

(a) Purpose. This regulation prescribes the policy, practice, and procedure to be followed by the Corps of Engineers in connection with applications for permits authorizing structures and work in or affecting navigable waters of the United States, the discharge of dredged or fill material into navigable waters, and the transportation of dredged material for the purpose of depositing it into ocean waters.

(b) Laws requiring authorization of structures or work. (1) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways built by the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States, and to artificial islands and fixed structures located on the outer continental shelf by section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)).

(2) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403) prohibits the construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit or letter of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)).

(3) Section 11 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads, or other works may be extended or deposits made without approval of the Secretary of the Army. Regulations (ER 1145-2-304) have been promulgated relative to this authority and published at § 209.150. By policy stated in those regulations effective May 27, 1970, harbor lines are guidelines only for defining the offshore limits of structures and fills insofar as they impact on navigation interests. Except as provided in paragraph (e) (1) of this section below, permits for work shoreward of those lines must be obtained in accordance with section 10 of the same Act, cited above.

(4) Section 13 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency, under sections 402 and 405 of the Federal Water Pollution Control Act (PL 92-500, 86 Stat. 816, 33 U.S.C. 1342 and 1345).

(5) Section 14 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 408) provides that the Secretary of the Army on the recommendation of the Chief of Engineers may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.
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(6) Section 1 of the River and Harbor Act of June 13, 1902 (32 Stat. 371; 33 U.S.C. 565) allows any persons or corporations desiring to improve any navigable river at their own expense and risk to do so upon the approval of the plans and specifications by the Secretary of the Army and the Chief of Engineers. Improvements constructed under this authority, which are primarily in Federal project areas, remain subject to the control and supervision of the Secretary of the Army and the Chief of Engineers. The instrument of authorization is designated a permit.

(7) Section 404 of the Federal Water Pollution Control Act (PL 92–500, 86 Stat. 816, 33 U.S.C. 1344) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites. The selection of disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army. Furthermore, the Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shell fish beds and fishery areas, wildlife or recreational areas.

(8) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (PL 92–532, 86 Stat. 1052, 33 U.S.C. 1413) authorizes the Secretary of the Army to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters. However, similar to the EPA Administrator's limiting authority cited in paragraph (b) (7) of this section, the Administrator can prevent the issuance of a permit under this authority if he finds that the dumping of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas.

(9) The New York Harbor Act of June 29, 1888, as amended (33 U.S.C. 441 et seq.) provides for the issuance of permits by the Supervisors of the New York, Baltimore, and Hampton Roads Harbors for the transportation upon and/or discharge in those harbors of a variety of materials including dredgings, sludge and acid. The District Engineers of New York, Baltimore and Norfolk have been designated the Supervisors of these harbors, respectively. However, section 511 (b) of the Federal Water Pollution Control Act (PL 92–500, 86 Stat. 816) provides that the discharge of these materials into navigable waters shall be regulated pursuant to that Act and not the New York Harbor Act except as to the effect on navigation and anchorage. In addition, section 106(a) of the Marine Protection, Research and Sanctuaries Act of 1972 (PL 92–532, 86 Stat. 1052) provides that all permits for discharges in ocean waters shall only be issued in accordance with the Act after April 23, 1973. Therefore, the supervisors of these three harbors will no longer issue permits under the authority of the New York Harbor Act, as amended, for transportation and/or discharge of these materials.

(c) Related Legislation. (1) Section 401 of the Federal Water Pollution Control Act (PL 92–500; 86 Stat. 816, 33 U.S.C. 1411) requires any applicant for a Federal license or permit to conduct any activity which may result in a discharge into navigable waters to obtain a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(2) Section 307(c)(3) of the Coastal Zone Management Act of 1972 (PL 92–583, 86 Stat. 1280, 16 U.S.C. 1456(c)(3)) requires any applicant for a Federal license or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State has concurred with the applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program.

(3) Section 302 of the Marine Protection, Research, and Sanctuaries Act...
of 1972 (Pub. L. 92-532, 86 Stat. 1052, 16 U.S.C. 1432) authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(4) The National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 209.120

Section 102 of that Act directs that "to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * * ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations * * * *" See also paragraph (1) (1) of this section on environmental statements.

(5) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, et seq.), the Migratory Marine Game-Fish Act (16 U.S.C. 760c-760g) and the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) and other acts express the concern of Congress with the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any Federal Agency which proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, as appropriate, and with the head of the appropriate State agency exercising administration over the wildlife resources of the affected State.

(6) The Federal Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 791a et seq.), as amended, authorizes the Federal Power Commission (FPC) to issue licenses for the construction, operation and maintaining of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. remain fully applicable. In all cases involving the discharge of dredged or fill material into navigable waters or the transportation of dredged material for the purpose of dumping in ocean waters, Department of the Army permits under section 404 of the Federal Water Pollution Control Act, or under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 will be required.

(7) The National Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places.

(8) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.) prohibits any developer or agent from selling or leasing any lot in a subdivision unless the purchaser is furnished in advance a printed property report including
information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is in a wetlands area, the report is required by Housing and Urban Development regulation to state that no permit has been granted by the Corps of Engineers for the development under Section 10 of the River Harbor Act of 1899.

(9) The Water Resources Planning Act (42 U.S.C. 1962 et seq.) provides for the possible establishment upon request of the Water Resources Council or a State of river basin water and related land resources commissions. Each such commission shall coordinate Federal, State, interstate, local and nongovernmental plans for the development of water and related land resources in its area, river basin, or group of river basins. In the event the proposed Corps of Engineers permits to non-governmental developers or other agencies under section 10 of the River and Harbor Act of 1899 and section 404 of the Federal Water Pollution Control Act may affect the plans of such river basin commissions, the permits will be coordinated with the appropriate concerned river basin commissions. The same is true of Corps of Engineers authorizations to private persons or corporations to improve navigable rivers at their own expense under section 1 of the River and Harbor Act of 1902.

Definitions. For the purpose of issuing or denying authorizations under this regulation:

(1) The term “navigable waters of the United States” and “navigable waters,” as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce (See 33 CFR 209.260 for a more complete definition of these terms).

(2) The term “ocean waters,” as defined in the Marine Protection Research and Sanctuaries Act of 1972 (PL 92-532, 86 Stat. 1052), means those waters of the open sea lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(3) The term “dredged material” means any material excavated or dredged from navigable waters of the United States including any runoff or overflow which occurs during a dredging operation or from a contained land or water disposal area.

(4) The term “fill material” means any material deposited or discharged into navigable waters which may result in creating fastlands or other planned elevations of lands beneath navigable waters.

(5) The term “person” means any individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, any interstate body, or any agency or instrumentality of the Federal Government.

(6) The term “coastal zone” means the coastal waters and adjacent shorelands designated by a State as being included in its approved coastal zone management program under the Coastal Zone Management Act of 1972.

(e) Activities requiring authorizations. (1) Department of the Army authorizations are required under the River and Harbor Act of 1899 (See paragraph (b), of this section) for all structures or work in navigable waters of the United States except for bridges and causeways (see Appendix A), the placement of aids to navigation by the U.S. Coast Guard, structures constructed in artificial canals within principally residential developments where the canal has been connected to a navigable water of the United States (See paragraph (g)(11) of this section), and activities which were commenced or completed shoreward of established harbor lines before May 27, 1970 (See §209.150) other than those activities involving the discharge of dredged or fill material in navigable waters after October 18, 1972.

(i) Structures or work are in the navigable waters of the United States if they are within limits defined in §209.260. Structures or work outside these limits are subject to the provisions of law cited in paragraph (b) of this section if these structures or work affect the course, location, or condition of the waterbody in such a manner as to significantly impact on the navigable capacity of the waterbody. A tunnel or other structure under a navigable water of the United States is considered to have a significant impact on the navigable capacity of the waterbody.

(ii) Structures or work licensed under the Federal Power Act of 1920 do not
§ 209.260 Definition of navigable waters of the United States.

(a) Purpose and scope. This section defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice, and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters."

(b) General policies. The term "navigable waters of the United States" is used to define the scope and extent of the regulatory powers of the Federal Government. Precise definitions of "navigable waters" or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this section are in close conformance with the tests used by the Federal courts and determinations made under this section are considered binding in regard to the activities of the Corps of Engineers.

(c) General definition. Navigable waters of the United States are those waters which are present, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

(d) General scope of determination. The several factors which must be examined when making a determination whether a water body is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

1. Past, present, or potential presence of interstate or foreign commerce;
2. Physical capabilities for use by commerce as in subparagraph (1) of this paragraph;
3. Defined geographic limits of the water body.

(e) Interstate or foreign commerce—

1. Nature of commerce: type, means, and extent of use. The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in paragraph (h) of this section, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use, by a connection with foreign or other frontier commerce, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well recognized commercial use of many navigable waters. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a water body is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

2. Nature of Commerce: Interstate or intrastate. Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same State. It is only necessary that goods may be brought from, or eventually be destined to go to, another State. (For purposes of this section, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

3. Intrastate or interstate nature of waterway. A water body may be entirely within a State, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one State. Nor is it necessary that there be a physically navigable connection across a State boundary. Where a water body extends through one or more States, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the States, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

4. Improved or natural condition of the water body. Determinations are not limited to the natural or original condition of the water body. Navigability may also be found where artificial aids have been or may be used to make the water body suitable for use in navigation.

1. Existing improvements: Artificial water bodies. (1) An artificial channel
may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above; that is, whether the water body is capable of use for purposes of interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce.

(ii) The artificial water body may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area.

(iii) Private ownership of the lands underlying the water body, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used for purposes of interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private water body, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(2) Nonexisting improvements, past or potential. A water body may also be considered navigable depending on the feasibility of future use for interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvements need not exist, be planned, or even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement was "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

(h) Time at which commerce exists or determination is made—(1) Past use. A water body which was navigable in its natural or improved state, or which was susceptible of reasonable improvement: (as discussed in paragraph (g) (2) of this section) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the water body. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a water body are nonnavigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(2) Future or potential use. Navigability may also be found in a water body's susceptibility for future use for purposes of interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Nonuse in the past therefore does not prevent recognition of the potential for future use.

(i) Existence of obstructions. A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" for commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

(j) Geographic and jurisdictional limits of rivers and lakes—(1) Jurisdic-
§ 209.260 Title 33—Navigation and Navigable Waters

**Regulatory jurisdiction.** Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable water body, which includes all the land and waters below the ordinary high water mark.

(i) The "ordinary high water mark" on nontidal rivers must be determined by the ordinary flows of the river; neither peak nor flood stages can be included, nor the lowest stages of flow. Physical markings on the lands may be used in determining the mark only where, due to variations of flow, there is no absolute ascertainable level, and where more precise information is not available.

(ii) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to State law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable water body.

(2) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to nonnavigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet further upstream.

(k) *Geographic and jurisdictional limits of oceanic and tidal waters.*

(1) **Ocean and coastal waters.** The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone 3 geographic (nautical) miles seaward from the coast line. Wider zones are recognized for special regulatory powers, such as those exercised over the Outer Continental Shelf.

(i) **Coast line defined.** Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the coast line from which the distance of 3 geographic miles is measured. On the Pacific coasts the line of mean lower low water is used. The line has significance for both domestic and international law (in which it is termed the "baseline"), and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the line may have to be drawn to seaward of such bodies.

(ii) **Shoreward limit of jurisdiction.** Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. However, on the Pacific coasts, the line reached by the mean of the higher high waters is used.

Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(3) **Bays and estuaries.** Regulatory jurisdiction extends to the entire surface and bed of all water bodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (k)(1) of this section, "Shoreward Limit") of all such water bodies, even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

(1) **Geographic limits: Shifting boundaries.** Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable water. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a water body which also change the shoreline boundaries of the navigable waters. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water, regardless that they may be dry at a particular point in time.

(i) **Determinations of navigability.**

(1) **Effect of determinations.** Although conclusive determinations of navigability can be made only by Federal courts, those made by Federal agencies are nev-
ertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under the guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(2) Procedures of determination. A determination whether a water body is a navigable water of the United States will be made by the Chief of Engineers, and will be based on a report of findings prepared at the District level in accordance with the criteria set out in this section. Each report of findings will be prepared by the District Engineer, accompanied by an opinion of the District Counsel, and forwarded through the Division Engineer to the Office of the Chief of Engineers, DAEN-GCZ, for a final determination. Each report of findings will be based substantially on applicable portions of the format in subparagraph (3) of this paragraph.

(3) Suggested format of report of findings.

(1) Name of water body.
(2) Tributary to.
(3) Physical characteristics:
   (a) Type (river, bay, slough, estuary, etc.).
   (b) Length.
   (c) Approximate discharge volumes:
       Maximum.
       Minimum.
       Mean.
   (d) Fall per mile.
   (e) Extent of tidal influence.
   (f) Range between ordinary high and ordinary low water.
   (g) Description of improvements to navigation not listed in subdivision (v) of this subparagraph.
   (h) Nature and location of significant obstructions to navigation in portions of the water body used or potentially capable of use in interstate commerce.
   (i) Authorized projects:
       (a) Nature, condition, and location of any improvement made under projects authorized by Congress.
       (b) Description of projects authorized but not constructed.
       (c) List of known survey documents or reports describing the water body.
   (j) Procedures of determination:
       (a) General types, extent, and period in time.
       (b) Documentation if necessary.
   (k) Potential use for Interstate Commerce, if applicable:
       (a) If in natural condition.
       (b) If improved.
   (l) Nature of jurisdiction known to have been exercised by Federal agencies, if any.
   (m) Finding of navigability (with date) and recommendation for determination.

(n) Inquiries regarding determinations. (1) Findings and determinations should be made whenever a question arises regarding the navigability of a water body. Where no determination has been made a report of finding will be prepared and forwarded to the Chief of Engineers, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the Chief of Engineers. If a determination has not been obtained due to emergency or similar conditions in which expedited action is necessary, District Engineers may act in reliance on a finding prepared as in paragraph (m) of this section. The report of finding should then be forwarded to the Chief of Engineers on an expedited basis.

(2) Where determinations have been made by the Chief of Engineers, inquiries regarding the navigability of specific portions of water bodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that the ____________ (river) (bay) (lake, etc.) is a navigable water of the United States from ____________ to _____________. Actions which modify or otherwise affect these waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

(3) Specific inquiries regarding the jurisdiction of the Corps of Engineers can be answered only after a determination whether (i) the waters are navigable waters of the United States or (ii) if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters that the assertion of regulatory jurisdiction is deemed necessary. (See § 209.170.)
§ 209.300 Flood control regulations.

(a) Regulations for the operation and maintenance of local flood protection works approved by the Secretary of the Army under the authority contained in Section 3 of the Flood Control Act of June 22, 1936, as amended and supplemented, are codified as § 208.16 et seq. of this chapter. These regulations cover conditions normally and regularly required. Whenever the regulations are not sufficiently broad to cover the specific maintenance and operation requirements of a particular project, District Engineers will submit through the Division Engineers supplemental regulations needed for that particular project. Such supplemental regulations will require approval of the Secretary of the Army and will be made applicable only to the individual project concerned. Local interests will be advised of the approved regulations for operation and maintenance of local flood protection works at the time assurances of local cooperation are requested. District Engineers will keep informed as to the extent of compliance with approved regulations for operation and maintenance through regular, periodic inspection of the projects concerned and through careful analysis of the semianual reports which the operating and maintaining agencies are required to submit in accordance with the regulations. The District Engineer's views as to any measures required to conform to the approved regulations will be furnished to the agencies responsible. In any case where the District Engineer has been unable to arrange satisfactory compliance or where there is question or disagreement as to the measures required for compliance, a report of the circumstances, together with the recommendations of the District and Division Engineers, will be submitted to the Chief of Engineers for consideration. (b) Regulations for the use of storage allocated for flood control or navigation at reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, are contained in § 208.16 et seq. of this chapter.

§ 209.310 Representation of submarine cables and pipelines on Government charts.

The policy of the Corps of Engineers with respect to showing the locations of submarine cables and pipelines on charts published by the Government is as follows:

(a) Within protected waters such as harbors, rivers, bays, estuaries, or other inland waterways, the location of submarine pipelines and cables is to be indicated by shaded areas marked "Pipeline area" or "Cable area" on Government charts issued for general use. The extent of the limits of the area will be governed by local conditions but shall include in all cases the immediate area which overlaps the cable or pipeline.

(b) Outside protected waters or in the open sea, as a general rule, the location of the offshore approaches of submarine pipelines and cables should not be indicated on Government charts issued for general use.

(c) Whenever a change is made in the position of any submarine cable or pipeline shown by shaded area on Government charts, or a new cable or pipeline is laid beneath navigable waters at a depth where interference with navigation or fouling by anchors is probable, the District Engineer will indicate the changed or new location of a copy of the Coast and Geodetic Survey Chart of the locality or on a reproduction made from such chart. The District Engineer will furnish three copies of the chart showing the cable or pipeline location by a shaded area to the Chief of Engineers with his recommendation concerning the designation thereof on Government charts. Ordinarily the shaded area should