GAO

Report to the Honorable Les Aspin
House of Representatives

August 1986

WATER RESOURCES

Legislation Needed to Extend the Life of Confined Disposal Facilities

[illegible] RELEASED

GAO/RCED-86-145

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-221499

August 12, 1986

The Honorable Les Aspin
House of Representatives

Dear Mr. Aspin

In your October 10, 1985, letter (see app. I), you requested that we review the status and use of confined disposal facilities that the U.S Army Corps of Engineers built on the Great Lakes under the River and Harbor Act of 1970 (Public Law 91-611). The law required these facilities to contain contaminated dredgings that the Corps is required to remove from rivers and harbors and to be of sufficient capacity for a period not to exceed 10 years. You were particularly concerned about whether a disposal facility constructed at Kenosha, Wisconsin, in 1975, which was less than one-third full but which the Corps was planning to use after the 10-year period, should be closed Specifically, you also asked us to provide information regarding the location and status of all confined disposal facilities that the Corps has built since 1970, the use of the facilities by local governments or the private sector, and the use for other than dredged contaminated material. Further, you asked that we provide information on any remedies that other communities proposed whose facilities were not filled within the 10-year statutory period.

In summary, we believe that Public Law 91-611 limits the life of confined disposal facilities to 10 years and does not authorize the Corps to keep such facilities as the one at Kenosha or other locations open beyond this period. To continue to use such facilities the Corps should seek, in our view, legislation to extend the life of those facilities when local communities are in agreement to an extension When communities do not agree the Corps should find alternatives for disposing of the contaminated dredgings. You should note that our view conflicts with the Corps' September 1985 interpretation that Public Law 91-611 contains adequate authority to continue using such facilities beyond the 10-year period.

As of May 1985, the Corps had constructed 24 confined disposal facilities on the Great Lakes since 1970. The Corps expects that 17 of the 24 facilities will not be filled within the 10-year statutory period. Two facilities are completely filled, 9 were between 57 and 97 percent full, and 13 were 50 percent or less full. Eight facilities had been used by

local governments or the private sector, and with two exceptions, variances permitting the facilities to be used for other than contaminated dredgings have not been granted. Three communities have allowed the Corps to use their facilities beyond the 10-year period and have not proposed any remedies to the Corps. More detailed information on these data are included in appendixes III to VI.

Background

The U.S. Army Corps of Engineers periodically dredges various harbors in the Great Lakes and elsewhere in the United States The Corps normally disposes of dredgings by dumping them in open water. In 1969 a Corps study Dredging and Water Quality Problems in the Great Lakes indicated that the dredgings contained contaminated material and that a confined disposal facilities program might be desirable.

In 1970, section 123, Public Law 91-611 authorized the Corps to construct confined disposal facilities for holding contaminated dredgings from the Great Lakes and their connecting channels and provided, in part, that

"(a) The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct, operate, and maintain, contained spoil disposal facilities (confined disposal facilities) of sufficient capacity for a period not to exceed ten years, to meet the requirements of this section "

The law requires that disposal facilities be made available to federal licensees or permittees for a fee. These licensees included local governments and private companies. Further, local governments had to agree in writing to a facility prior to its being constructed and were required to furnish all lands, easements, and rights-of-way necessary for the construction, operation, and maintenance of the facility; the title remains with the local government.

We examined the legislative history of Public Law 91-611 and reviewed Corps documents showing its position on the intent of the disposal facility legislation. We discussed the matter with Corps officials, the mayor of the city of Kenosha, its attorney, and other city officials including the city administrator and the Director, Department of City Development. We also contacted other communities where confined facilities were over 10 years old and not filled to obtain their views and/or proposed remedies on the Corps using them beyond the statutory period. It was not within the scope of our review to determine the status

of the contaminated dredgings problem in Kenosha and other locations. More details on our scope and methodology are in appendix II.

Legislation Limits Facility Use to 10 Years

The Corps legal counsel has issued two different interpretations but currently believes the Corps has the authority under Public Law 91-611 to keep disposal facilities open beyond the 10-year statutory period until filled to capacity. In May 1986 the Corps advised us that since the Kenosha facility had capacity available, the Corps intended to use the facility to dispose of future dredgings until it was filled. Conversely, based on Public Law 91-611 and the written agreement required by this legislation, the city of Kenosha believes that it has the basis for a legal claim against the Corps for failure to close the Kenosha Harbor facility within 10 years after it became operational.[1]

The legislative history of Public Law 91-611 indicates that the foremost consideration was the construction and operation of a facility for a period during which substantial progress would be made to reduce pollution in the Great Lakes. In our opinion, the legislative history indicates a congressional intention to provide disposal facilities only for a 10-year period. The legislative history contains no evidence that the 10-year period was to be conditional on the extent of progress made. Subsequent to the Act's passage, the Corps estimated the capacity needed for 10 years' operations. Although the estimate proved to be incorrect in some cases, such as Kenosha, and the facilities built were larger than necessary for 10 years' actual use, we believe that a smaller amount of polluted materials deposited in the disposal facilities than the Corps anticipated would neither detract from the legislative purpose in establishing the disposal facilities nor provide a basis for extending a temporary 10-year measure.

In 1973 the Corps legal counsel interpreted the 10-year period cited in section 123(a), Public Law 91-611, and stated that a facility's operational life is limited to 10 years as intended in a 1969 Corps study on dredging. However, in 1985, the Counsel interpreted the law differently. The Counsel said

[1]By letter dated June 2, 1986, the Corps Chief Counsel advised the attorney for the city of Kenosha that although the Corps of Engineers was legally authorized to continue to fill the Kenosha facility, he would not be adverse to, and did not see any legal prohibition against turning over the facility, or any portions thereof, to the city. The Chief Counsel suggested that the city negotiate with the Corps District Engineer for the limited purpose of determining the terms and schedule of turning over the facility.

"Neither the plain language of the statute nor the legislative history suggests that a CDF (confined disposal facility) should only be used for a ten year period if that facility can be managed to produce more capacity."

As support, the Counsel referred to section 123(f) that states the transfer of facility ownership is contingent on the Corps having completed its use of a facility We believe that since section 123(a) contemplated that the facility would only be used for 10 years, this reference to transfer of facility ownership only after the Corps has completed its use of the facility for disposal purposes must be read in the context of the 10-year use period established by subsection (a).

In its 1985 interpretation, the Counsel cited section 148 of the Water Resources Development Act of 1976, Public Law 94-587, as supporting the Corps use of confined disposal facilities beyond 10 years. This section provides that

"The Secretary of the Army, acting through the Chief of Engineers, shall utilize and encourage the utilization of such management practices as he determines appropriate to extend the capacity and useful life of dredged material disposal areas such that the need for new dredged material disposal areas is kept to a minimum "

This legislation is not specifically directed to the Great Lakes facilities. It does not supersede section 123 of the 1970 Act that was directed exclusively to the construction of confined disposal facilities at the Great Lakes and to which the 10-year limit applies. In addition, section 148 does not indicate an intention to extend any expressly imposed time limit.

Conclusions

Section 123, Public Law 91-611, limits the use of disposal facilities to only a 10-year period and does not authorize the Corps to continue using the Kenosha facility or any other Great Lakes confined disposal facility beyond the 10-year period. We recognize that many existing confined disposal facilities will have unfilled capacity after the 10-year period expires and that dredging of contaminated material may be required for some time into the future. To most efficiently use these facilities, the Corps should seek, in our view, legislation to extend the life of the facilities when local communities agree to the extension; when communities do not agree, the Corps should find alternatives for disposing of harbor and river bottom sediments that may be contaminated, such as using other unfilled confined disposal facilities that have been operational less than 10 years, constructing new disposal facilities, or landfilling the

dredgings. These actions are necessary so the Corps can discharge its dredging responsibilities.

While the Corps is pursuing congressional action, we would not object to the continued use of unfilled facilities for a reasonable time, if the affected local communities approve such use.

Agency Comments and Our Evaluation

In a letter dated May 30, 1986 (see app. VIII), the Department of Defense disagreed with the basic premise on which the report is based and with our findings, conclusions, and recommendations. The Department's major argument is that while the legislation is subject to varying interpretations, its reading of the plain language of the statute is that the 10-year period relates to the capacity of a confined disposal facility, and not, as we believe, to the Corps use of the facility. The Department said that this conclusion is consistent with the legislative history of the provision. The Department also said that the law did not prohibit the Corps from using a facility beyond the 10 years after the facility was constructed

We find no merit in the Department's arguments. In essence, what is at issue is the question of whether the Congress envisioned a temporary, 10-year program, or a program that would allow the facilities to be used indefinitely until their capacity was exhausted. We agree with the Department that the wording of the statute allows different interpretations. In such instances, the legislative history must then be used to provide insight into the intent of the statute's wording. It is our view that the history was clear and direct, as evidenced by two facts: (1) Corps representatives presented testimony to the Congress in October 1970 that facilities would be needed for 10 years and (2) the report of the House Committee on Public Works noted that the section authorizing confined disposal facilities contemplated construction of facilities only for a 10-year period, at which time the sources of polluted materials were expected to be eliminated.

Our position is further buttressed by the Corps' August 1973 opinion from its General Counsel who was asked to clarify the meaning of the 10-year limitation provision in the act. The opinion, which was based on the same data we used in our analysis, concluded that the history of section 123 indicated that the Congress intended to establish a temporary federal program for the construction of disposal areas in the Great Lakes and that the operational life of such areas was limited to 10 years.

The Department's comments state that it did not plan to seek amending legislation to allow the Corps to use the facilities beyond the 10 years, as we had proposed; however, in a subsequent discussion the Department advised us that it was reconsidering the need for legislative action.

The Department provided other views on our report which we discuss in appendix VIII.

Recommendations to the Secretary of Defense

Since we are not persuaded by the Department's position that the Corps has authority to use the unfilled confined disposal facilities in question, we recommend that, if the Corps determines that continued use of existing unfilled confined disposal facilities for more than 10 years is necessary to hold contaminated dredgings, the Secretary of Defense direct the Chief of Engineers to

- propose legislation amending Public Law 91-611 to allow the Corps to use such facilities beyond 10 years until filled, if local communities agree to the extension; and
- develop alternatives to dispose of contaminated dredgings where communities do not agree to the extension.

Unless you publicly announce its contents earlier, we do not plan to distribute this report further until 30 days from its issue date. At that time, copies will be sent to the Secretary of Defense; the Director, Office of Management and Budget; and other interested parties.

Sincerely yours,

J. Dexter Peach

J. Dexter Peach
Director

Contents

Congressional Request Letter

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October 10, 1985

The Honorable Charles A. Bowsher
Comptroller General of the U.S
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Bowsher:

I am writing to request that the General Accounting Office launch an inquiry, on behalf of the City of Kenosha, Wisconsin, to determine the state and fate of Confined Disposal Facilities built by the Army Corps of Engineers in the United States. Let me explain the background for this request.

Congress passed legislation about 15 years ago authorizing the federal government to construct confined disposal facilities or contained spoil disposal facilities to contain contaminated dredgings from federal projects such as harbors. The City of Kenosha entered into a written agreement with the United States April 4, 1974, whereby the Government would construct a Contained Spoil Disposal Facility at Kenosha Harbor. It was expected that the CDF would be filled within 10 years, as authorized by Section 123 of the River and Harbor Act of 1970 (Public Law 91-611, approved 31 December 1970).

Now, eleven years after construction of the facility, the CDF is about 30 percent full and Kenosha believes it has been "stuck" with a federal "garbage can." To aid Kenosha in determining its options, I am requesting a GAO investigation that would determine the following:

(1) Location of all confined disposal facilities built by the Corps of Engineers since 1970, dates of their construction; and expected "life" of each facility (expected time needed to fill the CDF with dredged spoil) if that differed from the statutory limit of 10 years;

(2) Status of each of the projects (percent complete) in relation to their contracts with the federal government,

(3) Any contracted use of these projects by local governments or the private sector, with or without a fee;

(4) Any contractual variances permitting use of any of the confined disposal facilities for other than dredged contaminated material, as specified by statute;

(5) Proposed remedies brought by other communities whose facilities were not filled within the 10 years statutory life of the CDF.

If you have any questions, please contact Judith Hoover in my home office, at (414) 632-3911. I look forward to hearing from you soon.

Sincerely,

Les Aspin
Member of Congress

cc: Mayor John D. Bilotti

LA/jhb

Introduction

Background

The U.S. Army Corps of Engineers is required by various river and harbor acts passed since the 1800's to do periodic dredging at various harbors in the Great Lakes and elsewhere in the United States to maintain certain water depth to meet the needs of commercial ships using th harbors. Individual dredging actions are subject to administrative and congressional determinations premised on engineering, economic, environmental, and fiscal consideration. The Corps normally disposes of dredgings by dumping them in open water. In 1969, a Corps study on how the disposal of dredgings affected water quality in the Great Lakes did not conclusively show harmful effects from open water disposal practices, but indicated that a confined disposal facilities program migh be desirable.

The River and Harbor Act of 1970 (Public Law 91-611) authorized the Corps to construct confined disposal facilities for holding contaminated dredgings from the Great Lakes and their connecting channels. Section 123 of the act provides, in part, that

"(a) The Secretary of the Army, acting through the Chief of Engineers, is authorize to construct, operate, and maintain, contained spoil disposal facilities (confined disposal facilities) of sufficient capacity for a period not to exceed 10 years, to mee the requirements of this section . "

The law requires that disposal facilities be made available to federal licensees or permittees for a fee. These licensees include local governments and private companies.

Further, the law contains provisions that the appropriate state or states interstate agency, municipality, or political subdivision had to agree in writing to a facility before it is constructed. A local cooperation agreement was required which stated that the entity would (1) furnish all lands, easements, and rights-of-way necessary for the construction, operation, and maintenance of the facility, (2) contribute to the United States 25 percent of the construction costs (which could be waived by the Secretary of the Army), (3) hold and save the United States free from damages due to construction, operation, and maintenance of the facility, and (4) maintain the facility in a satisfactory manner to the Sec retary of the Army after its use as a disposal facility is completed or dispose of the facility subject to the transferee's agreement to maintain the facility in a satisfactory manner to the Secretary of the Army. The entity retains title to all lands, easements, and rights-of-way.

Kenosha Harbor Facility

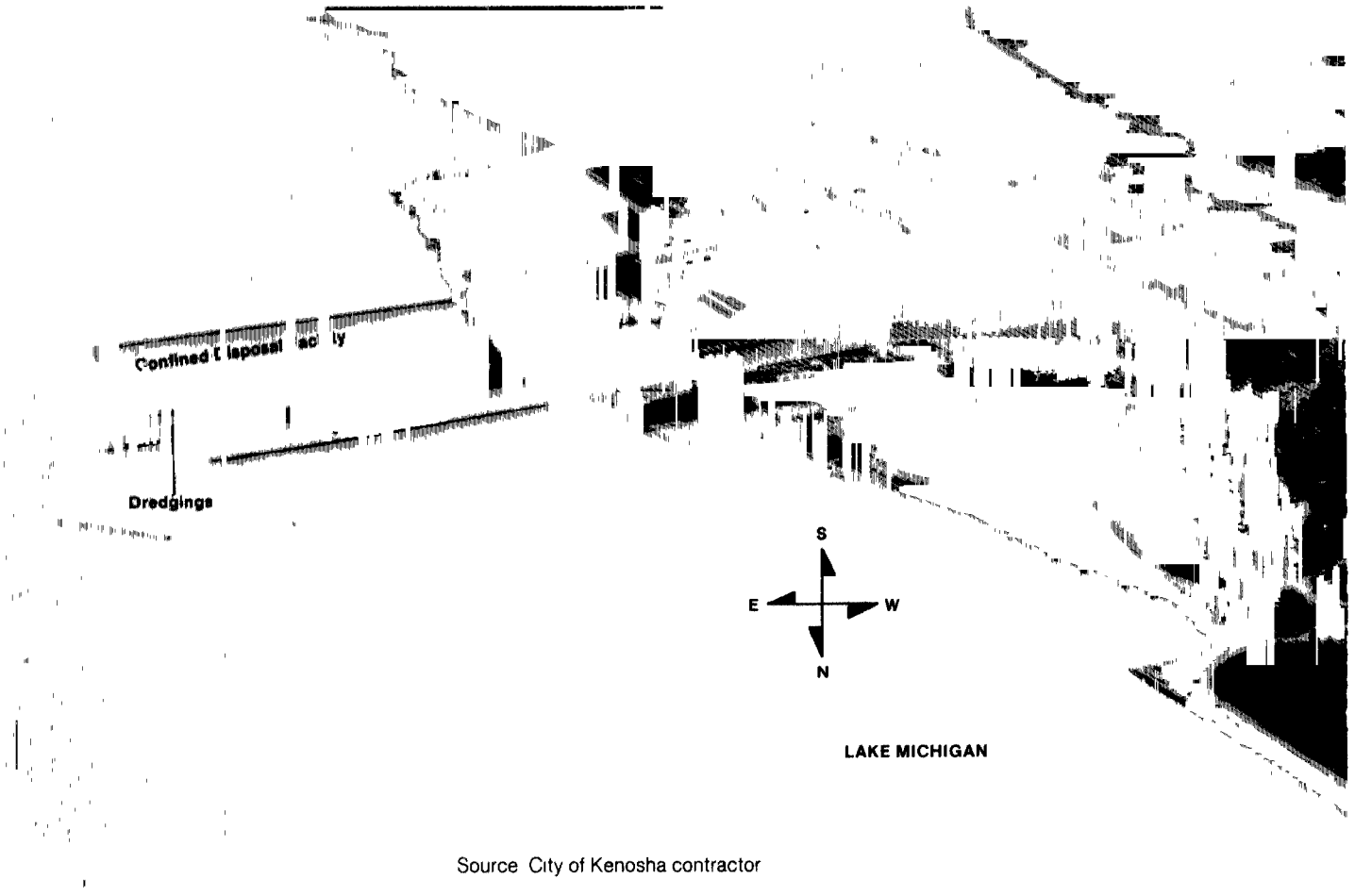
Construction of the Kenosha Harbor disposal facility was completed in 1975 and covers a total area of 32 acres. (See figure II.1, p. 14.) The Corps designed the facility with a capacity for 750,000 cubic yards of dredgings: 350,000 cubic yards from Kenosha Harbor, a like amount from Racine (Wisconsin) Harbor, and the remaining 50,000 cubic yards from nonfederal dredging at Kenosha Harbor. As of October 9, 1985, about 250,000 cubic yards of dredgings have been placed in the facility. Table II.1 shows the dredgings by fiscal year

Table II.1 Dredgings Placed in the Kenosha Facility (As of October 9, 1985)

Fiscal year	Cubic yards
1976	60,000
1977	75,000
1980	10,628
1982	49,223
1984	55,407
Total	**250,258**

Source: U.S. Army Corps of Engineers

Figure II.1: Kenosha Harbor, Wisconsin - September 1985



Source City of Kenosha contractor

The Chief, Operations and Maintenance Branch, Corps Detroit District Office, told us that maintenance dredging of about 40,000 cubic yards from Kenosha harbor is scheduled for fiscal year 1986. He said the next maintenance dredging would be in fiscal year 1988 or 1989.

Although the Kenosha facility was designed to hold dredgings from Racine Harbor and Kenosha Harbor, all the dredgings in the facility are from Kenosha harbor. According to the Chief, Construction-Operations Division, Corps Detroit District Office, it has not been necessary for the Corps to dredge Racine Harbor due to the lack of commercial ships using the harbor. The Detroit District Office Dredging List does not show any nonfederal use of this facility.

According to the Chief, Operations and Maintenance Branch, Corps Detroit District Office, a Corps survey party calculated that based on its survey in the fall of 1985, the Kenosha disposal facility was 23 percent full and is not expected to be filled until 2007—32 years after it was constructed. Further, the Chief said that the 23 percent differs from the indicated one-third full (250,000 to 750,000 cubic yards) because dredgings are in lumps or chunks when first placed in a facility and they eventually settle and compact with time.

The mayor of the city of Kenosha in a letter dated August 30, 1985, to the Corps Detroit District Office stated that the city was led to believe that the federal disposal facility would be filled within 10 years, as specified in the authorizing legislation and the written agreement it has with the Corps. The city has asked the Corps to fill and close the facility so it may use the land area created by the filled facility as part of its lake-front land development plans City officials told us that the city plans legal action against the federal government for failure to close the facility.

Objectives, Scope, and Methodology

In response to your request of October 10, 1985, we reviewed certain aspects of the confined disposal facilities program of the U.S. Army Corps of Engineers. You were particularly concerned that the Corps was continuing to use the Kenosha facility after the 10-year period contained in the law authorizing such facilities had expired. In subsequent discussions with your office, we agreed to review Public Law 91-611 and its legislative history to determine whether the 10-year period as specified in the law restricted the Corps' use of disposal facilities to 10 years or whether the Corps could use the facilities until filled to capacity regardless of the period involved.

You also requested us to provide information on

- the location of all confined disposal facilities that the Corps of Engineers constructed under Public Law 91-611 since 1970, the dates constructed, the percent each facility is filled, and the life expectance of each facility if different from the statutory 10-year period,
- the use of each facility by local governments and/or the private sector;
- variances permitting the facilities to be used for other than contaminated dredgings; and
- remedies proposed by communities when the facility in their area was not filled within the 10-year statutory period.

We obtained from the Corps Dredging Division, Fort Belvoir, Virginia, information on confined disposal facilities that the Corps constructed since 1970, including dates constructed, life expectance, and percent filled as of May 1985. The Corps had compiled data as of May 1985 to comply with other requests for detailed information on these facilities and has not updated the data since then. The Corps district offices in Buffalo, New York, and Detroit, Michigan, provided us with information on the use of disposal facilities by nonfederal entities, including Corps payment requests for disposal facility use and correspondence on permits issued. Officials at the Corps North Central Division Office told us that nonfederal entities had not used the two confined disposal facilities under the jurisdiction of its district office in Chicago, Illinois. As agreed with your office, we limited our review of Corps records to those maintained by the Corps Detroit District Office that has jurisdiction over 16 of the 24 disposal facilities; we did not visit the individual facilities to verify the actual use.

We obtained confirmation on variances issued from officials at the Corps North Central Division in Chicago, Illinois, responsible for overall management of confined disposal facilities at the Great Lakes, and Corps officials from the Construction-Operations Divisions of Buffalo and Detroit district offices

We identified four disposal facilities that were 10 years or older in 1985 and not filled to capacity: Kenosha, Manitowoc and Milwaukee, Wisconsin, and Huron, Ohio. We contacted city officials in each location to obtain their views on any remedies that they had considered because the facility was open beyond the 10-year limitation. We also visited the disposal facilities at Kenosha, Milwaukee, and Huron

We conducted our review between November 1985 and February 1986 in accordance with generally accepted government auditing standards.

Legislation Limits Facility Use to 10 Years

In 1969 the Corps Buffalo District Office issued a report entitled Dredging and Water Quality Problems in the Great Lakes. It concluded that a program for the disposal of polluted dredgings for 10 years was feasible and might be desirable in the interest of pollution abatement The 10-year period was based on the assumption that during this time period water pollution management would have progressed to the point that there would be a material reduction of lake pollution. With a resultant reduction in lake pollution, harbor and river bottom sediments were

not expected to be contaminated to the extent that disposal in a confined facility would be necessary when the sediments were dredged.

In 1970 the President proposed legislation to establish a disposal program for the Great Lakes. In testimony, the Corps Deputy Director of Civil Works referred to the 1969 study and to the subsequent report of the Chief of Engineers as proposing that "during a 10-year period . . . a diking program be carried out " A similar statement regarding the 10-year period was made in testimony by the Executive Director of the Corps' Civil Works Office.

The House Committee on Public Works in reporting on the provision for contained spoil disposal facilities stated that ". . . the section contemplates the construction of disposal facilities only for a ten-year period, at which time the sources of the polluted materials are expected to be eliminated . . . ." (Emphasis added.)

The legislative history indicates that the foremost consideration was the construction and operation of a facility for a period during which substantial progress would be made to reduce pollution in the Great Lakes. The legislative history contains no evidence that the 10-year period was to be conditional on the extent of progress made in reducing the pollution. Subsequent to the Act's passage, the Corps estimated the capacity needed for 10 years' operations. Although the estimate proved to be incorrect in some cases, such as Kenosha, and the facilities built were larger than necessary for 10 years' actual use, we believe that a smaller amount of polluted materials deposited in the disposal facilities than the Corps anticipated would neither detract from the legislative purpose in establishing the disposal facilities nor provide a basis for extending a temporary 10-year measure to one of longer duration.

The Corps view that facilities would be needed for 10 years was conveyed to the Congress in testimony by Corps' representatives and was adopted by the Congress, as reported by the House Committee cited above.

Corps Legal Interpretations of 10-Year Limitation Differ

In 1973 and 1985, the Corps legal counsel interpreted the 10-year period cited in Public Law 91-611. The 1973 opinion stated that a facility's operational life is limited to 10 years. The 1985 opinion is that the law does not state that a facility should only be used for 10 years, if it could be used longer.

In a memorandum of August 27, 1973, the Corps' General Counsel considered the meaning of the 10-year period provision of section 123. After a review of the legislative history, the Counsel concluded that the operational life of Great Lakes contained disposal areas was limited to 10 years. According to the Counsel analysis, the Congress intended to establish a temporary federal program pursuant to the recommendations in the 1969 Corps study.

A September 10, 1985, memorandum prepared by the Corps' Chief Counsel (formerly General Counsel) presented a different opinion. This memo makes no reference to the previous legislative analysis and does not explain the change in the Corps' position. According to the memorandum,

"Neither the plain language of the statute nor the legislative history suggests that a CDF (confined disposal facility) should only be used for a ten year period if that facility can be managed to produce more capacity "

In support of this view, the memorandum refers to section 123(f) which provides that the local owner's right to transfer ownership of the facility to a third party is contingent on the Corps' completing its use of the facility. However, in our view, section 123(a) contemplated that the CDF would only be used for 10 years. Thus, the Corps reference to "use" in subsection (f) must be read in the context of the 10-year use period established by subsection (a).

Other Confined Disposal Facility Legislation

The September 1985 memorandum cited other legislation to reinforce the Chief Counsel's position. Reference was made to section 148 of the Water Resources Development Act of 1976, Public Law 94-587, as supporting continued use of confined disposal facilities This section provides that

"The Secretary of the Army, acting through the Chief of Engineers, shall utilize and encourage the utilization of such management practices as he determines appropriate to extend the capacity and useful life of dredged material disposal areas such that the need for new dredged material disposal areas is kept to a minimum "

Although this provision encourages the Corps to use management practices to extend the capacity and useful life of dredged material disposal areas, it is not specifically directed to the Great Lakes facilities to which section 123 of the 1970 Act was limited and to which the 10-year limit applies. There is no indication in section 148 of an intention to extend any expressly imposed time limit.

Local Cooperation Agreements

Public Law 91-611 provides that the appropriate entity shall agree in writing to provisions specified in the law prior to the construction of a disposal facility in their community.

In the local cooperation agreement dated April 4, 1974, between the city of Kenosha and the federal government, the city gives the United States the unqualified right to enter its land, and grants easements for operating and maintaining the facility, "as contemplated by section 123." Our view is that the completion of an agreement contemplated by section 123 incorporates the 10-year limit

Local cooperation agreements between the cities of Manitowoc and Milwaukee, Wisconsin, and Huron, Ohio, contain the same language relative to section 123 as the Kenosha agreement. Thus, we believe these agreements also incorporate the 10-year limit.

Location and Status of Confined Disposal Facilities

Since 1970, the Corps has built 24 confined disposal facilities under the authority of Public Law 91-611. These facilities were built at various locations on each of the Great Lakes, except Ontario. Construction of the earliest facility was completed in 1974 and the most recent one was completed in 1985. As of May 1985, two of the facilities were 100 percent filled, 9 were between 57 to 97 percent filled, and 13 were filled 50 percent or less. The Corps anticipates that 5 of the 22 facilities below 100 percent will be filled within the initial 10 years and 17 will be filled after the 10 years.

Table III.1: Confined Disposal Facilities Built by the Corps of Engineers Under Public Law 91-611 Since 1970 (As of May 1985)

Name/Location	Year construction completed	Year filled or expected to be filled to capacity	Percent filled	Life expected to exceed 10 years
Toledo, Toledo, Ohio	1976	1992	65	X
Huron, Huron, Ohio	1975	1990	70	X
Dike #12, Cleveland, Ohio	1974	1979	100	
Dike #14, Cleveland, Ohio	1979	1991	40	X
Erie, Erie, Pa	1979	1993	40	X
Dike #4, Buffalo, N Y	1977	1995	40	X
Lorain, Lorain, Ohio	1977	1990	70	X
Michigan City, Michigan City, Ind	1978	1989	80	X
Chicago Area, Chicago, Ill	1984	1995	10	X
Bolles Harbor, Monroe County, Mich	1977	1990	25	X
Point Mouillee, Monroe County, Mich	(a)	1993	38	X
Erie Pier, Duluth, Minn	1978	1993	50	X
Grand Haven Harbor, Grand Haven, Mich	1974	1985	100	
Green Bay Harbor, Green Bay, Wis	1979	1986	97	
Holland Harbor, Holland, Mich	1977	1988	75	X
Dickinson Island, St Clair County, Mich	1976	1990	48	X
Inland Route, Emmet County, Mich	1982	1992	20	
Kenosha Harbor, Kenosha, Wis	1975	2007	23	X
Kewaunee Harbor, Kewaunee, Wis	1982	1992	57	
Manitowoc Harbor, Manitowoc, Wis	1975	1992	61	X
Milwaukee Harbor, Milwaukee, Wis	1975	1990	44	X
Monroe Harbor, Monroe, Mich	1985	1995	0	
Saginaw Bay, Saginaw, Mich	1978	1990	48	X
Sebewaing Harbor, Village of Sebewaing, Mich	1979	1989	65	

[a]Facility was built in two phases Phase I completed 1978, Phase II completed 1981

Note A confined facility was built at Frankfort Harbor, Michigan, but is not included because the facility is not used for permanent disposal and has been filled-in with gravel

Source U S Army Corps of Engineers

Use of Confined Disposal Facilities by Local Governments and/or the Private Sector

According to authorizing legislation, Public Law 91-611, disposal facilities are to be made available to federal licensees or permittees and they are to pay a disposal fee for such use. This allows local governments and private companies to dredge dock areas they own to maintain water depths suitable to their needs and dispose of the dredgings in the confined disposal facilities. Since the time disposal facilities were available for use through calendar year 1985, 23 local governments and/or private sector entities used 8 facilities. These facilities are located at Lorain, Cleveland (two different facilities located here) and Huron, Ohio; Buffalo, New York; Green Bay and Milwaukee, Wisconsin; and Monroe County, Michigan.

Table IV.1: Nonfederal Use of Confined Disposal Facilities Through Calendar Year 1985

Permittee	Disposal facility used
U.S Steel Corporation	Lorain-Lorain, Ohio Dike #12 - Cleveland, Ohio
International Salt Company	Dike #14 - Cleveland, Ohio Dike #12 - Cleveland, Ohio
The Pillsbury Company	Huron-Huron, Ohio Dike #4 - Buffalo, N Y
Norfolk & Western Railway Company	Huron - Huron, Ohio
Republic Steel Corporation	Lorain-Lorain, Ohio Dike #14 - Cleveland, Ohio Dike #12 - Cleveland, Ohio
Consolidated Rail Corporation	Dike #14 - Cleveland, Ohio Dike #12 - Cleveland, Ohio
Town of Grand Island, N Y	Dike #4 - Buffalo, N Y
Bethlehem Steel Corporation	Dike #4 - Buffalo, N Y
Hanna Furnace Corporation	Dike #4 - Buffalo, N Y
Jones & Laughlin Steel Corporation	Dike #14 - Cleveland, Ohio Dike #12 - Cleveland, Ohio
Merchants Dispatch Transportation Corporation	Dike #12 - Cleveland, Ohio
Huron Cement Company	Dike #12 - Cleveland, Ohio
Cleveland Yachting Club	Dike #12 - Cleveland, Ohio
Vermilion Lagoon Inc	Lorain-Lorain, Ohio
Cleveland-Cuyahoga County Port Authority	Dike #12 - Cleveland, Ohio
Ashland Oil	Dike #14 - Cleveland, Ohio Dike #12 - Cleveland, Ohio
City of Lorain, Ohio	Lorain-Lorain, Ohio
Buffalo Yacht Club	Dike #4 - Buffalo, N Y
Edward Kraemer & Sons, Inc	Green Bay - Green Bay, Wis
Dunbar & Sullivan Inc	Point Mouillee - Monroe County, Mich
Port of Milwaukee, Wis	Milwaukee Harbor, Milwaukee, Wis
Milwaukee Metropolitan Sewage District	Milwaukee Harbor, Milwaukee, Wis
Wisconsin Electric Power Company	Milwaukee Harbor, Milwaukee, Wis

Source U S Army Corps of Engineers

Variances Permitting Confined Disposal Facilities to Be Used for Other Than Contaminated Dredgings

The Assistant Chief, Construction-Operations Division, the Corps North Central Division, Chicago, Illinois; current Chief, Operations and Maintenance Branch, the Corps district office, Detroit, Michigan; and the Chief, Regulatory Branch, the Corps district office, Buffalo, New York, told us that they were not aware of any variances in their areas of jurisdiction that permitted the use of confined disposal facilities for other than contaminated dredgings

We noted, however, two instances where noncontaminated dredgings were placed in confined disposal facilities For example, noncontaminated dredgings were placed in the Kenosha facility In a memorandum dated May 20, 1982, to Counsel, Construction-Operation Division, Detroit District office, the former Corps' Chief, Operations and Maintenance Branch, proposed that about 40,000 cubic yards of clean dredgings from Kenosha Harbor be placed in the Kenosha confined disposal facility. The memo stated that this proposal was made because the branch was unable to locate an upland disposal site. A May 27, 1982, memorandum from the Detroit Office District Counsel stated that Public Law 91-611 contained no limitations as to the type of material to be placed within the confined disposal facility, and therefore, either polluted or clean material could be placed within the disposal facility. The District Counsel recommended that the clean material be placed in the Kenosha facility. In January 1986, the Chief, Construction-Operations Division, Detroit District Office, told us that he thought these clean dredgings had been placed in the Kenosha disposal facility.

Communities Have Not Proposed Remedies When Confined Disposal Facilities in Their Area Were Not Filled Within the 10-Year Statutory Period

Corps data showed three communities in addition to Kenosha—Manitowoc and Milwaukee, Wisconsin, and Huron, Ohio—where the Corps operates a confined disposal facility that has not been filled within the 10-year statutory period. Current Corps estimates show that it will take 5 to 7 years beyond the 10 years to fill these three other facilities.

Table VI.1: Confined Disposal Facilities Constructed in 1975 and Not Filled to Capacity Excluding Kenosha

Disposal facility	Estimated fill date	Percent filled at May 1985
Huron, Ohio	1990	70
Milwaukee, Wis	1990	44
Manitowoc, Wis	1992	61

Source U S Army Corps of Engineers

We contacted the city manager or city/harbor engineer in each of the three communities who generally told us the cities recognize that as long as a commercial navigation need exists, the Corps will have to do maintenance dredging in their harbors and therefore will need a place to dispose of the contaminated dredgings. On this basis, the communities are willing to let the Corps continue to operate the disposal facilities.

General Accounting Office Legal Memorandum on 10-Year Statutory Limitation

UNITED STATES GOVERNMENT

Memorandum

GENERAL ACCOUNTING OFFICE

April 7, 1986

TO Director, RCED - J. Dexter Peach

FROM General Counsel - Harry R. Van Cleve

SUBJECT The Corps of Engineers' Use of the Kenosha, Wisconsin, Confined Disposal Facility for More Than 10 Years. B-221499-O.M.

Your division, as the result of a congressional request, is conducting a review of the U.S. Army Corps of Engineers (Corps) Confined Disposal Facilities (CDF) Program, Code 140808. Incident to this review, your staff memorandum dated December 23, 1985, indicates that the City of Kenosha, Wisconsin, is considering filing suit against the Federal Government for failure to close the Kenosha CDF after 10 years. The following questions are asked:

(1) "Does the capacity limit for a period not to exceed 10 years, as specified in Section 123 of P.L. 91-611, restrict the Corps use of disposal facilities to 10 years or can the Corps use these facilities until filled to capacity, regardless of how long it takes?

(2) "What effect does Section 148 of P.L. 94-587 have on the time limitation imposed by Section 123 of P.L. 91-611?

(3) "Does the Local Cooperation Agreement between the City of Kenosha and the federal government required by Section 221 of P.L. 91-611 contain any provisions that will impact on how long the Corps can use the disposal facility at Kenosha?"

For the reasons discussed below, we conclude: (1) section 123 of Pub. L. No. 91-611 only provides the U.S. Army Corps of Engineers with authority to use disposal facilities for a 10-year period, (2) section 148 of Pub. L. No. 94-587 does not extend the 10-year limit for Great Lakes confined disposal facilities and (3) the local cooperation agreement between the Federal Government and the City of Kenosha, Wisconsin, contemplates a 10-year life for the Kenosha Confined Disposal Facility.

B-221499-O.M.

The 10-year Period

Section 123 of the River and Harbor Act of 1970, Pub. L. No. 91-611, 84 Stat. 1818, 1823-4, provides:

> "(a) The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct, operate, and maintain, * * * contained spoil disposal facilities of sufficient capacity for a period not to exceed ten years, to meet the requirements of this section.* * *"

The 10-year period has been a significant aspect of this program from its inception. In 1969 the Buffalo District Corps Office issued its report, "Dredging and Water Quality Problems in the Great Lakes." The report concluded that a 10-year program for diked disposal of polluted dredgings was feasible and might be desirable in the interest of pollution abatement (p. 12.2). The 10-year period was based on the assumption that during this time water pollution management would have progressed to the point that there would be a material reduction of lake pollution (pp. xiii,9.81). The report noted that it would be up to the Congress to decide whether the extra expenditures required for a 10-year program of dredging disposal was warranted (p. xv).

In 1970 the President proposed legislation to establish a diked disposal program for the Great Lakes. Message from the President, H.R. Doc. No. 308, 91st Cong., 2d Sess. (1970). In testimony on H.R. 17099, which incorporated the executive proposal, the Deputy Director, Civil Works, of the Corps referred to the study and to the subsequent report of the Chief of Engineers as proposing that "* * * during a 10-year period * * * a diking program be carried out." (Hearings on The Omnibus River and Harbor and Flood Control Act of 1970 before the Subcommittee on Rivers and Harbors of the House Committee on Public Works, 91st Cong., 2d Sess. 234 (1970).) A similar statement regarding the 10-year period during which the diking program would be carried out was made by the Executive Director of the Corps' Civil Works Office incident to his testimony on S.3743, which also incorporated the President's proposed legislation. (Hearings on Omnibus Water Resources Authorizations, 1970 before the Subcommittee on Flood Control - Rivers and Harbors of the Senate Committee on Public Works, 91st Cong., 2d Sess. 1073 (1970).)

The House Committee on Public Works in reporting on H.R. 19877, into which provision for contained spoil disposal facilities was incorporated, stated that:

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> "* * * the section contemplates the construction of disposal facilities only for a ten-year period, at which time the sources of the polluted materials are expected to be eliminated * * *." (Emphasis added.) (H.R. Rep. No. 1665, 91st Cong., 2d Sess. 29 (1970).)

Our reading of the section 123 and the pertinent legislative history indicates a congressional intention to provide contained spoil disposal facilities only for a 10-year period. The 1969 Corps report indicated that CDF's would be needed for 10 years. This view was conveyed to the Congress in testimony by the Corps' representatives, and was adopted by the Congress, as indicated by the House report cited above.

Subsequent to passage of section 123, on October 18, 1972, the Corps' Chicago District issued, "Letter report on Confined Disposal Areas for Kenosha and Racine Harbors, Wisconsin." It proposed a single spoil disposal facility for polluted dredgings from Federal navigation projects at both harbors, to be constructed at Kenosha (p. 7). The report is instructive because it demonstrates the understanding of those charged with planning and constructing the facility. It discusses the expected benefits "for the next 10 years" (p. 2). As to maintenance and operation costs the report states:

> "* * * Annual maintenance and operation costs over this 10-year period are included. Annual maintenance of the facility beyond the 10-year period is not included since the city of Kenosha would take over control and development of the property upon completion of disposal operations by the Government." (p. 17).

In an August 27, 1973 memorandum, the Corps' General Counsel considered the meaning of the 10-year limitation provision of section 123. After a review of the legislative history, he concluded that the operational life of Great Lakes contained disposal areas is limited to 10 years. According to his analysis, the Congress intended to establish a temporary Federal program pursuant to the recommendations in the 1969 Corps study.

Your staff has given us a copy of a September 10, 1985 memorandum, prepared by the Corps' Chief Counsel. According to the memorandum, "Neither the plain language of the statute

nor the legislative history suggests that a CDF should only be used for a ten year period if that facility can be managed to produce more capacity." In support of this view the author refers to section 123(f) which provides that the local owner's right to transfer ownership of the facility is contingent on the Corps completing the use of the facility but makes no reference to the expiration of a 10-year period. However, since section 123(a) contemplated that the CDF would be used only for 10 years, this reference to "use" in subsection (f) must be read in context of the 10-year use period established by subsection (a).

The legislative history indicates that the foremost consideration was the construction and operation of a facility for a period during which substantial progress would be made to reduce pollution in the Great Lakes. First the Congress, based on Corps recommendations, established the appropriate duration of the temporary facilities and then the disposal facilities were sized by the Corps to meet the anticipated need. Subsequent to the Act's passage, the Corps estimated the capacity needed for 10 years' operations. The fact that the estimate proved to be incorrect, and the facility built is larger than necessary for 10 years' actual use, provides no proper basis for an extension of the time period. The disposal facilities have served their statutory purpose to provide temporary relief pending the anticipated institution of permanent measures. That a smaller amount of polluted materials was deposited than anticipated by the Corps neither detracts from the legislative purpose in establishing the disposal facilities nor provides a basis for extending a temporary 10-year measure to one of much greater duration.

Effect of Authority to Extend

The 1985 memorandum also refers to section 148 of the Water Resources Development Act of 1976, Pub. L. No. 94-587, 90 Stat. 2917, 2931, as supporting continued use of the disposal facilities. This section provides that:

> "The Secretary of the Army, acting through the Chief of Engineers, shall utilize and encourage the utilization of such management practices as he determines appropriate to extend the capacity and useful life of dredged material disposal areas such that the need for new dredged material disposal areas is kept to a minimum. * * *"

B-221499-O.M.

Corps of Engineers' use of disposal facilities to a 10-year period. Also, section 148 of Pub. L. No. 94-587 does not extend the 10-year limit for Great Lakes confined disposal facilities. Finally, the local cooperation agreement between the Federal Government and the City of Kenosha, Wisconsin, does not change the 10-year limit for the Kenosha Confined Disposal Facility.

Advance Comments From the Department of Defense

Note: GAO comments supplementing those in the report text appear at the end of this appendix

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

30 MAY 1986

Mr. J. Dexter Peach
Director, Resources, Community, and
Economic Development Division
U.S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Peach:

This is the Department of Defense (DOD) response to the General Accounting Office (GAO) draft report, "The Corps of Engineers Cannot Use Confined Disposal Facilities Beyond 10 Years," dated April 17, 1986, OSD Case 6992, GAO Code 140808.

The DOD does not agree with the findings and recommendations included in the report. The GAO based its report on the premise that Section 123 of P.L. 91-611 restricts the U.S. Army Corps of Engineers use of confined disposal facilities to ten years and does not authorize the Corps to keep such facilities beyond this period. Subsequent to the GAO review, however, the DOD has reviewed this matter and determined that P.L. 91-611 does not prohibit the Corps from using a confined disposal facility beyond ten years from the facility's completion. Rather, the 10-year period contained in Section 123 refers to a facility's capacity, not the Corps term of use of the facility. Contrary to the GAO's conclusion, this position is not inconsistent with the 1973 Corps General Counsel position.

Section 148 of P.L. 94-587 is also particularly important to this issue. That section requires the Corps to extend the capacity and useful life of dredged material disposal areas such that the need for new disposal sites is kept to a minimum, and is applicable to disposal facilities throughout the country, including those located on the Great Lakes. While a particular local cooperation agreement between a local community and the Government may limit the right of entry to a specified time period, the Kenosha local cooperation agreement, referred to in the GAO draft report, is not so limited.

The GAO findings and recommendations are addressed in greater detail in the enclosed comments and legal opinion. The DOD appreciates the opportunity to comment on the draft report.

Sincerely,

Robert K. Dawson
Assistant Secretary of the Army
(Civil Works)

Enclosure

See Comment 1

Mr. Read,

This is a very important matter with broad practical impact on how we do the job Congress has given us. If you are not convinced by the response, I believe the importance of the matter warrants a face to face meeting to discuss it.

DEPARTMENT OF DEFENSE COMMENTS
ON
GAO DRAFT REPORT - DATED APRIL 17, 1986
(GAO CODE 140808) - OSD CASE 6992

"THE CORPS OF ENGINEERS CANNOT USE CONFINED DISPOSAL FACILITIES BEYOND 10 YEARS"

* * * * *

FINDINGS

FINDING A: Requirements and Provisions Under The River and Harbor Act of 1970 (P.L. 91-611). The GAO reported that P.L. 91-611 authorized the Corps of Engineers to construct confined disposal facilities for holding contaminated dredgings from its Great Lakes dredging operations, and limited the life of the disposal facilities to 10 years. In addition, the GAO noted that the law requires the disposal facilities be made available to local governments and private companies, and that local governments had to agree to a facility prior to its construction. According to the GAO, the Corps Legal Counsel has issued two different interpretations of the 10-year limitation. The GAO found that in 1973, the Corps Legal Counsel interpreted the 10-year period as meaning that a facility's operational life is limited to 10 years. In 1985, however, the GAO found the Counsel interpreted the law differently, stating that neither the language of the statute nor the legislative history suggests that a facility should be used only for 10 years if that facility can be managed to produce more capacity. The GAO noted that the Legal Counsel referred to provisions of Section 123(f), P.L. 91-611, and Section 148, P.L. 94-587, as support for the 1985 interpretation. The GAO pointed out, however, that Section 123(f) should be read in the context of the 10-year period established by Section 123(a), while P.L. 94-587 is not specifically directed to the Great Lakes facilities and, therefore, does not supersede the 10-year limit contained in P.L. 91-611. Based on an assessment of the legislative history of P.L. 91-611, a review of Corps documents, and discussions with local government officials, the GAO disagreed with the latest Corps Legal Counsel interpretation, and concluded that P.L. 96-611 limits the life of confined disposal facilities to 10 years and does not authorize the Corps to keep such facilities beyond this period. The GAO further concluded that the Corps will need to seek a legislative change or find alternatives for disposing of dredgings that may be contaminated in order to be in compliance with other harbor and river laws. (pp. 1-6, Letter; and pp. 12 and 18-21, Appendix II, GAO Draft Report)

Now on pp. 1-6, Letter, pp. 12 and 17-19, App. II

RESPONSE: The DOD nonconcurs. The premise of the GAO draft report is that Section 123 of P.L. 91-611 limits use of confined disposal facilities (CDF) to a ten-year period and does not authorize the Corps of Engineers to continue using the Kenosha facility nor any other CDF beyond the ten-year period. This premise is inconsistent with the legal opinion of the Corps Chief Counsel that concludes that Section 123 of P.L. 91-611 does not prohibit the Corps from using a CDF beyond ten years from the date of that facility's completion. Accordingly, the DOD disagrees with the basic premise on which the GAO draft report is based and its subsequent findings, conclusions, and recommendations.

A copy of the Corps Chief Counsel's legal opinion, dated May 6, 1986, that addresses the GAO draft report is attached. This opinion should be carefully read to fully understand the basis for the DOD nonconcurrence; however, the following summary of the Chief Counsel's opinion is provided. In that opinion, the Chief Counsel concludes that the plain language of the statute indicates that the ten-year period applies only to a CDF's planned capacity and not to the Corps use of that facility. He reviews, and finds consistent with his conclusion, the legislative history of the provision. In addition, he explains that the Corps 1973 and 1985 legal opinions are not inconsistent, and further, he describes a 1981 Corps legal opinion which also concluded that the ten-year period applies to capacity, not operation or maintenance. Moreover, he discusses Section 148 of P.L. 94-587 as providing a clear mandate that the Corps must manage CDFs, including those under Section 123, for as long as appropriate management practices allow. He notes that, in addition to being based on sound principles of statutory construction, his conclusions are reasonable from a common sense standpoint. Finally, he recognizes that while a particular local cooperation agreement may limit the right of entry to a ten-year period, the Kenosha local cooperation agreement (see Finding B) is not so limited.

The GAO draft report also incorrectly characterizes Corps dredging activities as universal requirements when, in fact, such activities are individually subject to administrative and Congressional determinations premised on engineering, economic, environmental, and fiscal considerations.

FINDING B: Status and Use of Confined Disposal Facilities. The GAO found that, as of May 1985, the Corps had constructed 24 confined disposal facilities on the Great Lakes, 17 of which the Corps expects will not be filled within the 10-year statutory period. The GAO also found that eight facilities had been used by local governments or the private sector and, with two exceptions, variances permitting the facilities to be used for other than contaminated dredgings have not been granted. In

addition, the GAO found that three communities have allowed the Corps to use their facilities beyond the 10-year period and have not proposed remedies. The GAO reported, however, that a fourth community--Kenosha, Wisconsin--has asked the Corps to fill and close their facility, and plans legal action against the Government for failure to do so. The GAO reviewed the cooperation agreements between the communities and the Government, and concluded that the 10-year limit provided by P.L. 91-611 applies in each case. The GAO also concluded that even though the Corps in some cases estimated the needed capacity incorrectly and built the facilities larger than necessary for 10 years actual use, a smaller amount of polluted materials deposited than anticipated would neither detract from the legislative purpose for establishing the facilities, nor provide a basis for extending a 10-year measure. (p. 2 and 4, Letter; pp. 13-15, 19 and 21, Appendix II; and p. 30, Appendix VI, GAO Draft Report).

Now on pp 2 and 3, Letter, pp 17-19, App II p 25, App VI

RESPONSE: The DOD nonconcurs. Although the DOD agrees that some of the facts presented are correct, the DOD disagrees with the conclusions of, and many of the characterizations in the GAO draft report. See response to Finding A.

RECOMMENDATIONS

RECOMMENDATION 1: The GAO recommended that if the Corps determines that continued use of existing unfilled confined disposal facilities for more than 10 years is necessary, the Secretary of Defense should direct the Chief of Engineers to propose legislation to the Congress amending P.L. 91-611, to allow the Corps to use such facilities beyond 10 years until filled, if local communities agree to the extension. Until such legislation is enacted, the GAO noted the Corps has no authority to use the facilities. (p. 6. GAO Draft Report).

Now on p 5

RESPONSE: The DOD nonconcurs. See response to Finding A.

RECOMMENDATION 2: The GAO recommended that if the Corps determines that continued use of existing unfilled confined disposal facilities for more than 10 years is necessary, the Secretary of Defense should direct the Chief of Engineers to develop alternatives to dispose of contaminated dredgings where communities do not agree to the extension. (p. 6, GAO Draft Report).

Now on p 5

RESPONSE: The DOD nonconcurs. See response to Finding A.

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D C 20314-1000

REPLY TO ATTENTION OF

6 MAY 1986

DAEN-CCZ-A

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: GAO Draft Report Regarding Corps Use of Confined Disposal Facilities

This responds to your 30 April 1986 DF requesting my views on the conclusions contained in the subject General Accounting Office (GAO) report. As stated in that report, I have previously concluded that Section 123 of PL 91-611 does not prohibit the Corps from using a Confined Disposal Facility (CDF) beyond ten years from the date of that facility's completion. After a careful review of the applicable authorities and background materials, I have again reached that conclusion.

Your request requires that I analyze the various points raised in the GAO legal opinion. Essentially, the GAO General Counsel relies on legislative history and past Corps documents to conclude that Section 123(a) limits the Corps' use of a CDF to ten years. Using that conclusion, he then finds that Section 148 of PL 94-587, 33 U.S.C. 419a (1982), is not applicable to the Kenosha CDF, and that the local cooperation agreement between the Corps and Kenosha precludes the Corps' further use of that facility. I have addressed each of these issues in the detailed discussion below.

Section 123 of PL 91-611 states that:

> The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct, operate, and maintain ... contained spoil disposal facilities of sufficient capacity for a period not to exceed ten years, to meet the requirements of this section.

PL 91-611, s 123(a), 84 STAT. 1818, 1823 (1970) (emphasis added). The critical question when analyzing the Secretary's authority concerns the application of this ten year period. In my opinion, two interpretations are possible. First, one could argue that all the activities in Section 123 are limited to ten years. Second, one could view the ten year period as applying

only to a CDF's planned capacity and not to the Corps' use of that facility. In my opinion, a strict reading of the section's language clearly indicates that the second interpretation is the more reasonable analysis. For example, as Congress used it in this sentence, the phrase "of sufficient capacity" has no logical meaning unless the word "sufficient" is related to an appropriate standard. In this case, that standard is provided by the phrase "for a period not to exceed ten years." The sentence structure, and especially the placement of a comma after the word "years," shows a conscious effort by Congress to isolate the ten year period and relate it solely to capacity. If Congress had intended to modify the actual operation of the CDF, it could have easily placed the ten year qualifier after "contained spoil disposal facilities" to state clearly that the overall authority is restricted to a certain time period; it chose not to do so, however.

Moreover, the Corps should not, in my opinion, transpose the language of Section 123 so that the time period does apply to all activities in subsection (a). As stated in Singer's treatise on statutory construction, "[t]he courts have refused to transpose words or phrases where there is no ambiguity in the statute, and where a change in the statute would involve the exercise of a legislative function." 2A N. Singer, Sutherland Stat. Const. section 47.35 (4th ed. 1984). Given my reading above, I believe that Section 123(a) is unambiguous; that is, that the ten year period applies only to capacity. To find otherwise might redefine the Corps' authority and thus involve the "exercise of a legislative function." Id.

In my opinion, my interpretation does not contradict the earlier version of this authority. The original language as introduced and passed by the House stated that:

> The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct operate, and maintain ... contained spoil disposal facilities of sufficient capacity to meet the requirements of this section for a period not to exceed ten years.

H.R. 19877, 91st Cong., 2nd Sess. 123(a) (1970) (emphasis added). Although the sentence structure is arguably less clear than the current version, I believe that this previous language can reasonably be interpreted as only applying the ten year period to capacity. Under Section 111, therefore, the Corps would have ensured that CDFs had sufficient capacity to meet the Great Lakes program requirements while also ensuring that the planned capacity did not exceed ten years. To the extent this language may have been ambiguous, the conference committee clarified the sentence structure in Section 123(a) to make

absolutely clear that the ten year reference applied only to capacity.

The legislative history does not specifically address this issue. The majority of that history is concerned with the cost sharing provisions in the omnibus bill; the final version of Section 123 contained a conditional twenty-five percent local cost sharing arrangement, as opposed to the Administration supported fifty percent requirement. In fact, the House made only a limited reference to the ten year period, cited by the GAO opinion, in the section-by-section analysis of H.R. 19877; that reference occurred during a committee discussion of the difference between the House approach to cost sharing and that of the Administration. Specifically, the committee believed that its cost sharing arrangement was appropriate because local governments would be spending money to eliminate pollution while materials were confined through the CDF program; the committee did not discuss which aspect of the CDF program would be limited to a ten year period. H.R. Rep. No. 1665, 91st Cong., 2d Sess. 29 (1970). Similarly, Congress did not discuss the application of the ten year period during the floor debates in either the House or the Senate when considering and approving this legislation. The limited reference to the ten year period made in an unrelated context does not, in my opinion, affect the plain meaning of the statute.

Certain Army documents and Corps testimony did discuss the ten year period for this program. After reviewing those documents available to me, however, I have found that, while they do strongly suggest that a ten year program is appropriate for the Great Lakes problem, they do not specifically address which aspect of the program should be limited to ten years. The Secretary of the Army, on the other hand, did provide some guidance on this issue in his letter transmitting the Army's proposed legislation to Congress. In that letter, the Secretary stated that:

> No facilities will be constructed to meet more than ten years of estimated disposal requirements. This ten year period is specified in recognition of the development within that period of facilities necessary to treat at their sources the industrial and municipal wastes which are presently deposited in channels and harbors in the Great Lakes.

See 1973 Corps legal opinion at page 2 (emphasis added). He thus envisioned that the Corps could meet the need for a ten year program of temporary pollution control through designing CDFs to a ten year capacity. This reference comports with the ultimate plain language of the statute. The other unspecific

references do not, in my opinion, affect the meaning of Section 123.

As the Secretary's letter suggests, the legislative history does indicate that Congress was addressing a serious problem in the Great Lakes and that it intended Section 123 to be a temporary solution to the problem; during this temporary period, local governments would presumably implement pollution controls so that confined disposal techniques would not be needed. I believe that my interpretation is consistent with this Congressional intent. By ensuring that the Corps would only construct facilities with a planned ten year capacity, Congress limited the reach of the Section 123 program in a manner it believed was appropriate. Although the Legislature could have chosen a more restrictive arrangement, such as specifically limiting the use or maintenance of a CDF, Congress selected this more flexible arrangement to ensure that the program would have a temporary nature. The fact that several other options may have been suggested prior to enactment does not alter Congress's clear choice of a planned capacity time period as the most appropriate mechanism.

I note that the GAO legal opinion refers to a 1972 Corps Chicago District report which states that, with respect to Kenosha and Racine Harbors:

> ... Annual maintenance of the facility beyond the 10-year period is not included [in operation costs reports] since the city of Kenosha would take over control and development of the property upon completion of disposal operations by the Government."

See GAO legal opinion at page 3. I do not view this language as persuasive. The author of this letter was writing prior to the Corps' construction of the Kenosha - Racine facility; he apparently had no reason to assume that the disposal activities would exceed the planned ten years capacity of that CDF. Indeed, he did not know that the Racine harbor would subsequently not require any maintenance dredging over the ten year period. I am not surprised, therefore, that this author assumed that the Corps' planning would be accurate and thus that "completion of disposal operations by the Government" would occur in ten years. Finally, I note that he linked Kenosha's control and development of the property to completion of the Corps' disposal activities.

I have carefully reviewed my predecessor's 1973 legal opinion on Section 123 and I do not believe that his conclusions are inconsistent with my present findings; in fact, I believe that his previous findings support my position. In 1973, the Corps' General Counsel was asked to address a very specific

issue; that is, whether the Corps must limit a CDF's capacity to fewer than ten years if that facility was constructed after 1971. In other words, the General Counsel was essentially addressing a question of capacity, and his interpretation of the term "operational life" should be read in that light. That opinion concurred in the North Central Division's position that planning for CDF's constructed after 1971 should provide for a ten year operational life, including the disposal of Corps and local material. Thus the critical conclusions reached by that opinion concerned the type and capacity of CDF's, especially during the Corps' planning activities, and was not intended to address the actual use of those facilities. Indeed, by concluding that the Corps may build facilities that will extend beyond the ten year period after Congress passed Section 123, the earlier opinion implies that the key criteria for the temporary nature of the program is the ten year capacity, not an arbitrary ten year cutoff date. To the extent that the General Counsel's opinion could be read as making broader statements regarding the potential operational use of a CDF, I believe that those broad references are not necessary to his ultimate conclusion.

In 1981, the Corps' Assistant Chief Counsel for Legislation and General Law, Mr. Ron Allen, also addressed the meaning of the "ten year" language in Section 123. In that opinion, he concluded that the phrase "for a period not to exceed ten years" only applies to capacity, not operation or maintenance. Therefore, with my conclusion in 1985 and my findings in this opinion, I believe that the Corps has consistently interpreted the time period in Section 123(a) in terms of capacity.

Given my finding that Section 123(a) does not restrict the operation and maintenance of a CDF to the ten year period, I believe that Section 148 of the Water Resources Development Act of 1976 is particularly appropriate to this issue. That statute states that:

> The Secretary of the Army, acting through the Chief of Engineers, shall utilize and encourage the utilization of such management practices as he determines appropriate to extend the capacity and useful life of dredged material disposal areas such that the need for new dredged material disposal sites is kept to a minimum.

33 U.S.C. 419a (1982) (emphasis added). Section 148 was added to PL 94-587 as an amendment offered on the floor of the Senate. In discussing the importance of this amendment, Senator Thurmond stated that:

> The legislation is needed to encourage the use of disposal area management practices at the earliest possible time so that the Nation can derive the maximum benefit from their use. In an important way, this proposed legislation provides assistance on immediate problems. These management practices can be carried on now in conjunction with ongoing maintenance and construction projects. They need not wait for the development of new equipment or for the resolution of uncertain policy issues like those affecting open-water disposal.
>
> Mr. President, this legislation would make a significant contribution to easing the current nationwide disposal crisis, and have positive environmental benefits.

Cong. Rec. S16850 (daily ed. September 28, 1976) (statement of Sen. Thurmond) (emphasis added). Hearings for this legislation indicate that a prime impetus for Section 148 was the protection of marshlands in South Carolina. Water Resources Development: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 94th Cong., 2nd Sess. 650-652 (1976) (testimony of Hon. Kenneth L. Holland, Rep. from South Carolina). Congress was also concerned, however, with the problem of dredged material disposal on a national level. See, e.g., id. at 6-7. In fact, Senator Thurmond's statement is not limited in geographical application, but rather is directed to the immediate relief of a nationwide disposal crisis. In addition, he noted that this provision would have immediate application to ongoing projects, presumably such as those on the Great Lakes. Finally, as enacted and codified, Section 148 is not limited to any particular CDF, but instead is generally applicable to CDF's throughout the nation. In light of this clear mandate, the Corps must manage any CDF, including those under Section 123, for as long as appropriate management practices allow. In addition, to the extent that one might argue that Section 123(a) is ambiguous, Congress, through its subsequent enactment of Section 148, has resolved the ambiguity in favor of a more efficient use of the nation's current CDFs.

Because Section 123(a) does not, in my opinion, restrict the actual use of a CDF, and because Section 148 directs the Corps to make the most efficient use possible of current CDFs, the Corps should continue to utilize any Great Lakes facility even if the actual filling rate would cause the life of that CDF to exceed the designed ten year capacity. This interpretation is consistent with other provisions in the statute. For example, Sections 123(c) and 123(f) state that the state's responsibility

to maintain a facility and its right to transfer a facility is contingent on the Corps' completing its use of the facility, not on the expiration of an arbitrary time period. Therefore, given that the ten year period only concerns the planned capacity of a CDF, nothing in the statute would prevent the Corps from using those facilities for more than ten years if management practices make that result possible.

In addition to being based on sound principles of statutory construction, I believe my conclusions are reasonable from a common sense viewpoint. As I noted above, Congress could have chosen several, more restrictive means to achieve its goal of providing effective, temporary measures to the disposal of dredged material. It instead chose to limit capacity at the planning stage only and allow flexibility on other aspects of the program. The Legislature thus avoided the inefficient result that the Federal government would spend considerable amounts of Federal money to construct CDFs and then arbitrarily stop using those facilities notwithstanding any remaining capacity. Not only would this result waste government funds, but, in the long run, it would necessitate the use and potential destruction of more area than necessary to dispose of material from Corps construction and maintenance projects; this is precisely the scenario the Congress has attempted to avoid through its enactment of Section 148. In this light, I do not believe that Congress intended that inefficient result.

Moreover, I believe that Section 123 should not be interpreted as turning on the return of CDFs to the local governments. The program is admittedly temporary and is designed to benefit local entities; however, this benefit is primarily intended, in my opinion, to derive from interim pollution control measures that also provide for maintaining navigation. Under Section 123, the Corps constructs diked disposal areas, normally at no cost to the local interests, which allow continuing maintenance of navigation channels and temporary relief from polluted dredged materials. If the Corps is arbitrarily required to return partially filled facilities to local sponsors who may then fill those areas and use them for other purposes, then one could reasonably argue that the statute is also designed to be a land enhancement program. I do not believe that Congress intended this result; in fact, the statute avoids that result by focusing on the Corps' use of a facility rather than a time limit after which the Corps must return the CDF. See Sections 123(c) and 123(f), noted above. Thus, as long as the Corps can identify a continuing Section 123 need for a CDF, it should be allowed to use that facility.

Finally, I do not believe that the current local cooperation agreement between the Corps and the City of Kenosha alters the above analysis. As I briefly noted in my 10 September 1985 opinion, the Corps must consider the local agreements regarding

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rights of entry when deciding what actions are necessary to extend usage of a CDF. If an agreement has restricted rights of entry to a ten year limit, then the Corps should renegotiate those rights when conditions warrant continued disposal. In the agreement with Kenosha, however, the Corps has a right of entry to operate and maintain the CDF, "as contemplated by section 123." In a purely legal sense, therefore, the Corps may continue to dispose of material until it no longer needs the facility; as discussed above, Section 123(a) does not impose a limit on use. From a practical standpoint, on the other hand, the Corps may choose to turn the facility over to Kenosha provided that it makes appropriate findings that it no longer needs the facility for Section 123 purposes.

In conclusion, I believe that the plain language of Section 123(a) clearly indicates that the ten year time period only applies to capacity. In fact, Congress changed the sentence structure of what became Section 123 to ensure that interpretation. In addition, my finding is consistent with the limited legislative history available for Section 123, and with the various background documents cited by the GAO. Given that Section 123(a) does not limit the Corps' use of a CDF, the mandate of Section 148, the need for efficient use of the nation's financial and natural resources, and principles of common sense justify the Corps' use of a Section 123 facility as long as the need to do so exists. I do not believe that the statute should be read to require the Federal government to stop using CDFs if those facilities can accept more material. In this light, the CDF can continue to benefit both the Federal government and the local interests in the manner Congress originally intended; that is, the continuing maintenance of navigation and the concomitant preservation of water quality standards.

Lester Edelman

LESTER EDELMAN
Chief Counsel

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The following are GAO comments on the Department of Defense's letter dated May 30, 1986.

GAO Comments

1. GAO discussed these matters with the Assistant Secretary on June 12, 1986

By letter dated May 30, 1986, the Department of Defense provided its comments on our draft report and enclosed a May 6, 1986, legal memorandum by the Chief Counsel of the Corps which detailed the Corps arguments. The Department disagreed with our report findings, conclusions, and recommendations, and cited three principal reasons to substantiate its position·

- Section 123 of Public Law 91-611 clearly indicates that the 10-year limitation refers to capacity, not the Corps operational use of confined disposal facilities. The Department cited the plain language of the statute and its opinion that the legislative history does not specifically address this issue, and its judgment that the 1973 legal opinion of the Corps' Chief Counsel concluded that the 10-year period applied only to capacity, not use.
- Section 148, Public Law 94-587, requires the Corps to use disposal facilities including those under section 123 for as long as possible, even if the 10-year limitation imposed by Public Law 91-611 is exceeded.
- Common sense argues that the Congress chose to limit capacity at the planning stage and thus avoided the inefficient result that the federal government would (1) spend considerable amounts of federal funds to construct confined disposal facilities and (2) then arbitrarily stop using the facilities, notwithstanding any remaining capacity.

Legislative Intent on Capacity and Use

Legislative History

The Chief Counsel stated that two interpretations are possible when analyzing the Secretary's authority about the 10-year period—one, that all activities in section 123 are limited to 10 years, and the other, that the 10 years applies only to planning capacity, not to the Corps use of the facility. The Counsel then rejected the option that the 10 years referred to the use of the facility, because of his contention that the

plain language of the statute clearly indicated the 10-year period applied to a facility's capacity. The Chief Counsel also stated that the legislative history does not specifically address the issue that the 10-year period pertains to the Corps use of confined disposal facilities.

While we agree that the law allows two interpretations, we do not agree with the Chief Counsel's views regarding the legislative history. We believe the legislative history provides ample evidence supporting our conclusion that the Congress intended the confined disposal facility program to be a temporary program of 10 years' duration. For example, Corps representatives presented testimony to the Congress in October 1970 that confined disposal facilities would be needed for 10 years. Also, the report of the House Committee on Public Works noted that the section authorizing confined disposal facilities contemplated the construction of facilities only for a 10-year period at which time the sources of polluted materials were expected to be eliminated. We believe these data clearly demonstrate the congressional intent to limit use of confined disposal facilities to 10 years.

The 1973 Opinion

The Chief Counsel stated that the 1973 legal opinion was not inconsistent from its present conclusion, that is, that the 10-year limitation refers to capacity. We have carefully read the August 1973 opinion by the Corps' General Counsel and believe that it strongly supports our position that the 10 years refers to the operational life of facilities.

The General Counsel was requested by a Corps Division Engineer to provide his views on the meaning of the 10-year limitation of section 123. The Counsel stated that the legislative history showed that legislation for the construction and utilization of contained spoil disposal facilities on the Great Lakes arose out of the Corps of Engineers 1969 study of Dredging and Water Quality Problems in the Great Lakes and that the study recommended the federal government provide diked containment disposal areas near the Great Lakes harbors for a 10-year period of operation. The General Counsel also pointed out that the areas would provide an interim solution to the water quality problems of the Great Lakes and that during the 10-year operation period, it was assumed that local interests would be constructing adequate waste treatment facilities which, when operating, would obviate any further need for the containment of dredge spoil. The Counsel also said that in transmitting the proposed legislation to the Congress, the Secretary of the Army reinforced the policy that the disposal areas were only interim measures. The Secretary noted that no facilities would be constructed to meet more than

10 years of estimated disposal requirements and that the 10-year period was specified to recognize the development of treatment facilities within that period. Other statements by the General Counsel consistently referred to the 10-year operation period

The proposed legislation incorporated into the House version of the act, according to the Counsel, stressed the temporary nature of the program in connection with local responsibilities from constructing sewage treatment plans: ". . . the section contemplates the construction of disposal facilities only for a 10-year period, at which time the sources of the polluted material are expected to be eliminated . . . ." The General Counsel noted that this provision was not changed as the bill was reported out of conference and enacted into law.

The General Counsel concluded that the history of section 123 indicated that the Congress intended to establish a temporary federal program for the construction of contained dredged spoil disposal areas in the Great Lakes pursuant to the recommendations of the 1969 Corps study. He also stated that the disposal facilities were

" . . only interim solutions to the problem of proper disposal of contaminated lake bottom material, and were accordingly intended to have a limited operational life span—in this case 10 years—while local governments undertook to construct waste treatment facilities "

Language in Kenosha's April 1974 local cooperation agreement with the Corps was in line with the General Counsel's 1973 opinion. The agreement paraphrased the law as authorizing ". . . disposal facilities of sufficient capacity to contain the deposits of dredged materials for a period not to exceed 10 years . . . ."

In summary, we believe the legislative history clarifies the wording of the statute and strongly shows the congressional intent to limit the confined disposal areas to a 10-year operational life The Corps' General Counsel's 1973 opinion also provides clear support for our conclusion.

Section 148 Extends Useful Life

The Chief Counsel stated that section 148 of Public Law 94-587 was particularly appropriate to this issue because the section requires the Corps to encourage the use of management practices to extend the capacity and useful life of dredged material disposal areas so that the need for

new disposal sites is kept to a minimum. The Counsel said that the section was not limited to any particular disposal facility but instead was generally applicable to disposal facilities throughout the nation

We do not agree that section 148 permits the Corps to extend the life of confined disposal areas authorized under section 123 of Public Law 91-611. In order for legislation to supersede other legislation, we believe that it must make specific reference to the legislation affected or otherwise indicate by its terms that the original legislation is changed. Our review of the legislative history of section 148 provided no indication that the Congress intended to extend the 10-year time limitation nor did the history make any specific reference to section 123 of Public Law 91-611 that imposed the limitation. In our view, section 148 does not supersede section 123, therefore, it does not allow the Corps to use confined disposal facilities beyond a 10-year operational life.

Common Sense Viewpoint

The Chief Counsel stated that his conclusions were reasonable from a common sense viewpoint because the Congress would not spend considerable federal money to construct the facilities and then not allow the use of facilities with unfilled capacity. The Counsel also said that this would waste government funds and also necessitate the use and potential destruction of more area than necessary to dispose of material from Corps projects. The Counsel concluded that he did not believe the Congress intended that inefficient result, as evidenced by the enactment of section 148.

As we have noted above, section 148 did not extend the 10-year operational life of confined disposal facilities. Moreover, the manner in which a program is carried out by an executive agency must be grounded in the legislation underlying that program. In this case, the legislative history clearly shows that the Congress wanted to limit the life of disposal facilities to 10 years.

We recognize that many existing confined disposal facilities will have unfilled capacity after the 10-year operational period expires and that continued dredging may be required for some time into the future. We agree that the most efficient use of these unfilled facilities would be to operate them until the capacity is exhausted. Therefore, we are recommending that if such facilities are needed in the future, the Corps obtain legislation to amend Public Law 91-611 to allow the use of the facilities, if the local communities agree. If the communities do not agree, we are

recommending that the Corps develop alternatives to dispose of the dredged material.

While the Corps is pursuing congressional action, we would not object to the continued use of unfilled facilities for a reasonable time, if the affected local communities approve such use.

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