

**“Section 404 Exemptions and Recapture Provisions  
Common Misconceptions and the Facts”**

*presented by*

**C. Lee Sherrod, Vice President**

*Horizon Environmental Services*

*Austin*

How many times have I heard the following statements?

- \* “if I grow trees on my property for a while, all the wetlands are exempt and I can develop the property without a permit from the Corps”
- \* “if I plow the wetlands and plant Bermuda grass, the wetlands will be exempt and I can develop the property without a permit from the Corps”
- \* “if I cut down all the trees in a forested wetland and plant grass or a crop, the wetland will be exempt and I can develop the property without a permit from the Corps”
- \* “this land was farmed 20 years ago, therefore, it is exempt”
- \* “I have been managing this land for timber production, therefore, it is exempt and I can build houses on it without a permit from the Corps”
- \* “I can ditch, drain, and manage away all the wetlands on my property under agricultural and silvicultural exemptions, then develop the property without wetland permits.”

Virtually nothing in these statements is true from a regulatory perspective, yet I hear landowners, developers, and even other consultants regularly express these misconceptions. For those in search of the easy way out of Section 404 permitting regulations, these statements sound good, but actually result in violations of the Clean Water Act that can lead to a world of misery on the enforcement side of the regulations. It should not be too difficult to realize that when Congress, EPA, and the Corps of Engineers promulgated regulations to protect wetlands and other water resources in the nation, they did not intentionally provide loopholes to allow those water resources to be destroyed.

This paper will explain the actual exemptions and limitations in the Section 404 regulations, and more importantly, the “recapture provisions” that can negate those exemptions when the very specific purposes and activities that are allowed under the exemption statutes are not followed.

**EXEMPTIONS**

Sections 404(f)(1)(A)-(F) of the Clean Water Act provide for certain exemptions from the 404 regulatory program. The exemptions are codified at 33CFR 323.4 and are provided below. Also attached to this paper are two documents issued by the EPA and Corps that provide clarifications to regulatory personnel and the general public regarding exemptions for agricultural activities and minor drainage. One is a 1990 “Memorandum for the Field” providing clarification of exemptions on agricultural activities and the other document is Regulatory Guidance Letter 07-02 pertaining to construction of agricultural/silvicultural irrigation and drainage ditches.

**PART 323-PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS  
OF THE UNITED STATES**

**Sec. 323.4 Discharges not requiring permits.**

(a) General. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in Sec. 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(1) Minor Drainage means:

(i) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dry land) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(ii) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(iii) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs (a)(1)(iii)(C)(1)(ii) and (iii) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.);

(iv) The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent

the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(2) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a State has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be

otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the State's approved program description pursuant to the requirements of 40 CFR 233.22(i), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1) through (6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a section 404 permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1) through (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with

construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(d) Federal projects which qualify under the criteria contained in section 404(r) of the CWA are exempt from section 404 permit requirements, but may be subject to other State or Federal requirements.

### **RECAPTURE**

Note that the exemptions (323.4(a)(1)-(6)) are very specific and generally limited in their scope. Each exemption is also generally accompanied by exceptions, most important of which is the over-riding exception referred to as the "recapture provision" at 323.4(c). This exception states that "any activity listed under 323.4(a)(1)-(6) must be authorized by a permit if it is part of an activity whose purpose is to convert an area of waters of the US to a use to which it was not previously subject, where the flow or circulation of such waters may be impaired or their reach reduced." This recapture provision has a two part test that results in an activity being considered not exempt if both parts are met: (1) does the activity represent a "new use" of the wetland, and (2) would the activity result in a "reduction in reach or impairment of flow or circulation. Use is defined not only in the context of the use of the land (such as agriculture), but also as to the previous condition of the waters of the US that are affected. In other words, changing land use from forestry to agriculture (row crops) is a change of land use that nullifies the exemption, even though both activities are exempt. Changing a forested wetland to a herbaceous wetland (permanently) is also a change of use (condition). Changing a wetland to dry land is a change of use (condition). Conversion of naturally vegetated wetlands to agriculture is a change of use that is not exempted. Agricultural and silvicultural activities such as plowing, cultivating, constructing roads, and minor drainage are all exempt activities as long as those activities do not alter natural hydrology or change the bottom elevation of waters of the US. Furthermore, the fact that an activity is exempted in wetlands (such as normal farming practices) does not authorize the filling of wetlands for the construction of buildings without a 404 permit.

With regard to "normal farming, silvicultural, or ranching activities" that are exempt under 323.4(a)(1), the activity must be part of an "established (i.e., on-going) farming, silviculture, or ranching operation" that has not been converted to another use or has not lain idle so long that modifications to the hydrological regime are necessary to resume operations.

As can be seen from these regulations, the exceptions to the exemptions pretty much dash the statements made at the beginning of this paper. However, there is one aspect of the 404 regulations related to agricultural land use that does carry over to land use changes. That aspect lies in the definition of waters of the US at 33CFR 328.3(a) - "Waters of the United States do not include prior converted cropland." This is not an exemption, but rather a jurisdictional determination that croplands that have been designated as "prior converted" by the USDA Natural Resources Conservation Service (NRCS) under the Food Securities Act (FSA) do not constitute jurisdictional waters of the US subject to regulation under Section 404 of The Clean Water Act. In the administration of the FSA, the NRCS must also make wetland determinations. Areas that may exhibit wetland characteristics based on soils, hydrology, and vegetation, but have been subject to on-going agricultural use (plowing, seeding, harvesting, etc) since prior to 1984 (implementation of the "Swamp Buster" provisions of the FSA), and to the extent that most natural characteristics are significantly diminished, can be classified by the NRCS as "prior converted" or "PC". There are a number of caveats however that the Corps (or EPA) considers in order to verify that such areas are not waters of the US. First of all, the NRCS must have made the PC designation under the latest soils mapping convention (since 1998) and the farming activity must be "on-going" and not abandoned or fallow for

more than 5 years. Therefore, when making a determination of jurisdiction on agricultural lands for other land use purposes (such as residential or industrial development) information on the PC designation (date) must be obtained from the NRCS and cropping history for the past 5 years must be obtained from the USDA Farm Service Agency. Qualifying crops must be a row crop, grain, or grass (for hay production) that is harvested annually for commercial sale and requires annual tillage or amendments of the soil for production. Grazing land and timber land do not fall within these parameters. Wetland areas that meet these criteria are not jurisdictional waters of the US and no permit is required for any land use change.

**MEMORANDUM FOR THE FIELD**

**CLEAN WATER ACT  
SECTION 404 REGULATORY PROGRAM  
AND AGRICULTURAL ACTIVITIES**

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**United States Environmental Protection Agency  
United States Department of the Army**

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A number of questions have recently been raised about the applicability of the Clean Water Act Section 404 Regulatory Program to agriculture. This memorandum is intended to assist Section 404 field personnel in responding to those questions and to assure that the program is implemented in a consistent manner. At the outset, we should emphasize that we respect and support the underlying purposes of the Clean Water Act regarding the exemption from Section 404 permitting requirements for "normal farming" activities. The exemptions (at Section 404(f) of the Act) recognize that American agriculture fulfills the vitally important public need for supplying abundant and affordable food and fiber and it is our intent to assure that the exemptions are appropriately implemented.

What are normal farming activities? Who makes that determination? Can agricultural producers plant crops in wetland areas that have been farmed for many years? These are questions that have generated significant confusion and concern in the agricultural community. This memorandum will explain the extent of the Section 404 program and clarify some misunderstandings that may exist in the field. Therefore we encourage you to widely distribute this memorandum.

**What is Section 404?**

The Federal Water Pollution Control Act Amendments of 1972 established the Section 404 Regulatory Program. Under this Act, it is unlawful to discharge dredged or fill material into waters of the United States without first receiving authorization (usually a permit) from the Corps, unless the discharge is covered under an exemption. The term "waters of the United States" defines the extent of geographic jurisdiction of the Section 404 program. The term includes such waters as rivers, lakes, streams, tidal waters, and most wetlands. A discharge of dredged or fill material involves the physical placement of soil, sand, gravel, dredged material or other such materials into the waters of the United States. Section 404(f) exemptions, which were added in 1977, provide that discharges that are part of normal farming, ranching, and forestry activities associated with an active and continuous ("ongoing") farming or forestry operation generally do not require a Section 404 permit.

With this background in mind, we can now turn to the issues that are the focus of concern. As previously noted, Section 404(f) exempts discharges of dredged or fill material into waters of the United States associated with certain normal agricultural activities. Of course, activities that do

not involve a discharge of dredged or fill material into waters of the United States never require a Section 404 permit. Further as provided in the Interagency Federal Manual for Identifying and Delineating Jurisdictional Wetlands, while a site is effectively and legally drained to the extent that it no longer meets the regulatory wetlands hydrology criteria (as interpreted by the Interagency Manual), it is not a wetland subject to jurisdiction under Section 404 of the Clean Water Act.

**What is the "normal farming" activities exemption?**

The Clean Water Act exempts from the Section 404 program discharges associated with normal farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices (Section 404(f)(1)(A)). To be exempt, these activities must be part of an established, ongoing operation. For example, if a farmer has been plowing, planting and harvesting in wetlands, he can continue to do so without the need for a Section 404 permit, so long as he does not convert the wetlands to dry land. Activities which convert a wetland which has not been used for farming or forestry into such uses are not considered part of an established operation, and are not exempt. For example, the conversion of a bottomland hardwood wetland to crop production is not exempt.

In determining whether an activity is part of an established operation, several points need to be considered. First, the specific farming activity need not itself have been ongoing as long as it is introduced as part of an ongoing farming operation. For example, if crops have been grown and harvested on a regular basis, the mere addition or change of a cultivation technique (e.g., discing between crop rows to control weeds rather than using herbicides) is considered to be part of the established farming operation. Second, the planting of different agricultural crops as part of an established rotation (e.g., soybeans to rice) is exempt. Similarly, the rotation of rice and crawfish production is also exempt (construction of fish ponds is not an exempt activity and is addressed below). Third, the resumption of agricultural production in areas laying fallow as part of a normal rotational cycle are considered to be part of an established operation and would be exempted under Section 404(f). However, if a wetland area has not been used for farming for so long that it would require hydrological modifications (modifications to the surface or groundwater flow) that would result in a discharge of dredged or fill material, the farming operation would no longer be established or ongoing.

As explained earlier, normal farming operations include cultivating, harvesting, minor drainage, plowing, and seeding. While these terms all have common, everyday definitions, it is important to recognize that these terms have specific, regulatory meanings in relation to the Section 404(f) exemptions. For example, plowing that is exempt under Section 404(f) means all mechanical means of manipulating soil, including land leveling, to prepare it for the planting of crops. However, grading activities that would change any area of waters of the United States, including wetlands, into dry land are not exempt. Minor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. In addition, minor drainage also refers to the emergency removal of blockages that close or constrict existing drainageways used as part of an established crop production. Minor

drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States. Seeding that is exempt under Section 404(f) includes not only the placement of seeds themselves, but also the placement of soil beds for seeds or seedlings on established farm or forest lands. Cultivating under Section 404(f) includes physical methods of soil treatment to aid and improve the growth, quality, or yield of established crops. Except as provided under Section 404(f)(2) as explained below, construction or maintenance of irrigation ditches or maintenance of drainage ditches is also exempt.

Recognizing area and regional differences in normal farming practices, EPA and the Corps agree to develop additional definitions of normal farming practices in consultation with the designated Land Grant Colleges and the Cooperative Extension Services. We also further encourage our field staffs to utilize the expertise in these colleges and agricultural services in the ongoing implementation of the Section 404 program.

#### **When the normal farming activity exemption do not apply?**

Sections 404(f)(2) provides that discharges related to activities that change the use of the waters of the United States, including wetlands, and reduce the reach, or impair the flow or circulation of waters of the United States are not exempted. This "recapture" provision involves a two-part test that results in an activity being considered not exempt when both parties are met: 1) does the activity represent a "new use" of the wetland, and 2) would the activity result in a "reduction in reach/impairment of flow or circulation" of waters of the United States? Consequently, any discharge of dredged or fill material that results in the destruction of the wetlands character of an area (e.g., its conversion to uplands due to new or expanded drainage) is considered a change in the waters of the United States, and by definition, a reduction of their reach and is not exempt under Section 404(f). In addition, Section 404(f)(1) of the Act provides that discharges that contain toxic pollutants listed under Section 307 are not exempted and must be permitted.

However, discharges that are not exempt are not necessarily prohibited. Non-exempted discharges must first be authorized either through a general or individual Section 404 permit before they are initiated.

#### **What are General Permits?**

Even if a farming activity is one that does not fall under an exemption and a permit is required, some farming activities are eligible for General Permits. Section 404(e) of the Act authorizes the Corps, after notice and opportunity for public hearing, to issue General Permits on a State, regional or nationwide basis for certain categories of activities involving a discharge of dredged or fill material in waters of the United States. Such activities must be similar in nature and cause only minimal adverse environmental effects. Discharges authorized under a General Permit may proceed without applying to the Corps for an individual permit. However, in some circumstances, conditions associated with a General Permit may require that persons wishing to discharge under that permit must notify the Corps or other designated State or local agency before the discharge takes place. A list of current General Permits is available from each Corps

District Office, as well as information regarding notification requirements or other relevant conditions.

### **Rice Farming**

Questions have arisen regarding the relationship of the Section 404 program to rice farming. We understand these concerns, and recently have initiated actions that will allow farmers to understand better the regulatory program and provide more efficient and equitable mechanisms for implementing provisions of the Section 404 program.

In an April 19, 1990 letter responding to a request from Senator Patrick J. Leahy, Chairman and 11 members of the Senate Committee on Agriculture, Nutrition and Forestry, we stated our position that discharges of dredged or fill material associated with the construction of rice levees for rice farming in wetlands which are in established agricultural crop production are "normal farming activities" within the meaning of Section 404(f)(1)(A) and are therefore exempt from Section 404 regulation under the following conditions:

1. the purpose of these levees is limited to the maintenance and manipulation of shallow water levels for the production of rice crops; and
2. consistent with current agricultural practices associated with rice cultivation,
  - the height of the rice levees should generally not exceed 24 inches above their base; and
  - the material to be discharged for levee construction should generally be derived exclusively from the distribution of soil immediately adjacent to the constructed levee.

Land leveling for rice farming in wetlands which are in established crop production also is a "normal farming activity" within the meaning of Section 404(f)(1)(A) and is therefore exempt from Section 404 regulation.

### **Fish ponds**

We are developing a General Permit authorizing discharges of dredged or fill material associated with the construction of levees and ditches for the construction of fish ponds in wetlands that were in agricultural crop production prior to December 23, 1985. A draft General Permit has been developed by the Vicksburg District, Army Corps of Engineers and should be issued by June 1, 1990. This General Permit should serve as a model permit for other areas of the country and this activity will be considered for a nationwide General Permit.

It should be made clear, however, that the Section 404(f) exemption for "normal farming activities" and the General Permit being developed for fish ponds apply only to the use of wetlands which are already in use for agricultural crop production. These provisions do not apply to 1) wetlands that were once in use for agricultural crop production but have lain idle so long that modifications to the hydrologic regime are necessary to resume crop production or, 2) the

conversion of naturally vegetated wetlands to agriculture, such as the conversion of bottomland hardwood wetlands to agriculture.

### **Limitations of the Section 404(f) Exemptions**

It should be emphasized that the use of Section 404(f) exemptions does not affect Section 404 jurisdiction. For example, the fact that an activity in wetlands is exempted as normal farming practices does not authorize the filling of the wetland for the construction of buildings without a Section 404 permit. Similarly, a Section 404 permit would be required for the discharge of dredged or fill material associated with draining a wetland and converting it to dry land.

### **Enforcement**

Given that the normal farming practices as described above are exempt from regulation under Section 404, neither EPA nor the Corps will initiate enforcement actions against farmers or other persons for engaging in such normal farming activities. Further, there will be no enforcement against actions that meet the description of activities covered by, and any conditions contained in, general permits issued by the Corps.

### **Conclusion**

Proper implementation of the Section 404 program is an issue of extreme importance to the nation. We encourage you to distribute this memorandum not only to your staffs but to the public at large so that there will be a better general understanding of the program and how it operates.

LaJuana S. Wilcher /s/  
Assistant Administrator for Water  
U.S. Environmental Protection Agency  
May 3, 1990

Roland W. Page  
Assistant Secretary of the Army, Civil Works  
May 3, 1990





US Army Corps  
of Engineers®

# REGULATORY GUIDANCE LETTER

No. 07-02

Date: July 4, 2007

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**SUBJECT:** Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act

## **1. Purpose and Applicability.**

The purpose of this Regulatory Guidance Letter ("RGL" or "guidance") is to provide a reasonable and predictable national approach for conducting exemption determinations for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with Section 404(f) of the Clean Water Act (CWA) (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92-500, as amended by Pub. L. 95-217, Pub. L. 100-4, Pub. L. 104-66, 33 U.S.C. § 1251, et seq., and with associated regulations (33 C.F.R. 320-330, 40 C.F.R. Part 232). This guidance is intended to clarify when 404(f) exempts from permitting requirements discharges of dredged or fill material into waters of the U.S. associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches. This RGL was developed and is endorsed by the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). EPA has the ultimate authority for interpreting the scope of exemptions under CWA Section 404(f).

This document supercedes RGL 87-07, which addresses the Section 404(f)(1)(C) Statutory Exemption for Drainage Ditch Maintenance. Other documents, such as the 1989 MOA addressing 404(f) coordination, are unaffected. As indicated above, this RGL addresses statutory exemptions for both irrigation and drainage ditches. In this effort to provide greater clarity, the following terms are defined for purposes of Subsection 404(f): irrigation ditch, drainage ditch, construction, and maintenance. This document also provides a framework for determining the applicability of the exemptions and the recapture provision. (See Figure 1). While providing greater clarity, both the framework and the definitions are consistent with the agencies' current practice in interpreting the Section 404(f) exemption.

## **2. Background.**

a. Under Section 404(f)(1)(C) of the CWA (see also 33 CFR 323.4(a)(3) and 40 CFR 232.3(c)(3)), discharges of dredged or fill material associated with construction or maintenance of irrigation ditches, or the maintenance (but not construction) of drainage ditches, are not prohibited by or otherwise subject to regulation under Section 404 of the CWA (i.e., these activities are exempt from the need to obtain a Section 404 permit from the Department of the

Army (DA)). Discharges of dredged or fill material associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant to and functionally related to irrigation ditches are included in the exemption for irrigation ditches.

b. Section 404(f)(2) of the CWA states that “[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.” This is commonly referred to as the “recapture provision.” See Section c, below.

c. Under 33 CFR 323.4(c) and 40 CFR 232.3(b), exemptions under 33 CFR 323.4(a)(1-6) and 40 CFR 232.3(c)(1-6) do not apply if the discharge into a water of the U.S. “is part of an activity whose purpose is to convert an area of the waters of the U.S. into a use to which it was not previously subject, where the flow or circulation of waters of the U.S. may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.”

d. Under 33 CFR 323.4(a)(1)(iii)(C)(I)(i), “[c]onstruction and maintenance of upland (dryland) facilities such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the U.S., and as such never require a section 404 permit.”

The CWA Subsection 404(f)(1)(A) exemption for “minor drainage” covers “(t)he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the U.S., adequate to effect the removal of excess soil moisture from upland crops.” (See 33 CFR 323.4(a)(1)(iii)(C) (I)(i))

e. The construction and maintenance of irrigation ditches and maintenance of drainage ditches may require the construction and/or maintenance of a farm road. In those circumstances, the Subsection 404(f)(1)(E) exemption for discharges of dredged or fill material associated with the construction or maintenance of farm roads applies where such related farm roads are constructed and maintained in accordance with best management practices (BMPs), 33 CFR 323.4(a)(6) and 40 CFR 232.3(c)(6), to assure that flow and circulation patterns and chemical and biological characteristics of waters of the U.S. are not impaired, that the reach of the waters of the U.S. is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. All of the limitations and conditions mandated by the current Section 404(f) regulations relating to farm roads apply.

### **3. Guidance for Ditches.**

General Guidance: Before carrying out ditch maintenance or construction activities, the following issues should be analyzed:

**a. Is there a discharge of dredged or fill material into a water of the U.S.?** To make that determination, the statute, regulations, and guidance provided by the Corps and EPA regarding what areas constitute "waters of the United States" subject to CWA jurisdiction must be consulted and followed. Corps and EPA guidance on the extent of CWA geographic jurisdiction define certain categories of "upland ditches" and "upland swales" that generally are not subject to CWA jurisdiction. Discharges of dredged or fill material into those defined categories of upland ditches and upland swales are not subject to either CWA permitting requirements or the subsection 404(f) exemptions.

**b. Identify the type of ditch and activity, and whether the activity is eligible for the exemptions at Subsection 404(f)(1).** An analysis of the CWA statute and existing EPA and Corps regulations indicates that there are differences between irrigation ditches and drainage ditches for purposes of applying the Subsection 404(f)(1)(C) exemption. The Subsection 404(f)(1)(C) exemption applies to the *construction* and *maintenance* of irrigation ditches, but it applies only to the *maintenance* of drainage ditches.

For purposes of this RGL, wetlands include all wetlands that meet the definition in 33 CFR 328.3. Guidance for applying the regulation is contained in the 1987 Wetland Delineation Manual, and the regional supplements and supplemental guidance, as appropriate, except where the wetland plants were established as a result of the irrigation process. Wetlands established solely due to the presence of irrigation water, irrigated fields, or irrigation ditches do not qualify as wetlands for purposes of applying the 404(f) exemption for construction and maintenance of irrigation ditches and for maintenance of drainage ditches.<sup>1</sup> Where sufficient information is not available to determine the hydrological contribution of irrigation waters to a particular wetlands (i.e., whether the wetland existed at the location prior to the presence of irrigation activities), such wetlands are not removed from consideration as wetlands or waters of the U.S.

For purposes of this RGL, the following definitions apply:

**Definition of "Irrigation Ditch:"** For purposes of this RGL, an irrigation ditch is a man-made feature and/or an upland swale that either conveys water to an ultimate irrigation use or place of use, or that moves and/or conveys irrigation water (e.g., "run-off" from irrigation) away from irrigated lands. Irrigation ditches may include the distribution system or parts thereof, consisting of manmade canals, laterals, ditches, siphons, and/or pipes, or pump systems. If a ditch carries only irrigation water, irrigation return flows, and overland flow (precipitation and/or snowmelt) that moves from an irrigated field either to or away from an area subject to irrigated agriculture (e.g., an irrigated field), that ditch would be considered an irrigation ditch, not a drainage ditch.

Where a natural or man-altered water body is used as part of an irrigation ditch system, such as where the water body is used to transport irrigation water between manmade ditches, that segment generally is not considered an irrigation ditch for purposes of this exemption, except

<sup>1</sup>As stated in the preamble to the Corps' Final Rule of November 13, 1986: "...we generally do not consider the following waters to be 'Waters of the United States' . . . (b) Artificially irrigated areas which would revert to upland if the irrigation ceased." 51 Federal Register 41217, November 13, 1986. Thus, waters, including wetlands, created as a result of irrigation would not be considered waters of the US even when augmented on occasion by precipitation.

where the Section 404(f)(1) exemption has been determined to apply based on a case-by-case evaluation. Following a case-by-case evaluation, such a natural or man-altered water body may be considered an irrigation ditch eligible for this exemption if it has characteristics suggesting a limited functional role in the broader aquatic ecosystem, such as infrequent or low volume flow, minimal habitat value, or small channel size.

**Definition of "Drainage Ditch:"** For purposes of this RGL, a drainage ditch is a ditch that conveys water (other than irrigation related flows) from one place to another. Where a ditch would have the effect of more than minor drainage<sup>2</sup> of wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation. However, a ditch that diverts water from an open body of water (e.g., stream, lake, or reservoir) for irrigation purposes is an irrigation ditch, even if a substantial portion of the flow or volume is diverted.

A ditch determined to be either an irrigation ditch or a drainage ditch would then need to be evaluated on a case-by-case basis to determine if the recapture provision of Section 404(f)(2) applies (see below).

**Definition of "Construction:"** For purposes of this RGL, construction includes new work or work that results in an extension or expansion of an existing structure. Ditch construction generally includes, but is not limited to, activities such as:

- Ditch relocation.
- Ditch conversion into pipe.
- Lining, which means placing impervious material such as concrete, clay, or geotextile within the flow perimeter of an open canal, lateral, or ditch with the intent of reducing seepage losses and improving conveyance efficiency. All new lining of ditches, where the ditch had not previously been lined, is considered construction.
- Placement of new control structures.

**Definition of "Maintenance:"** For purposes of this RGL, maintenance includes a repair to an existing structure or feature to keep the ditch in its existing state or proper condition, or to preserve it from failure or decline.<sup>3</sup> Maintenance generally includes, but is not limited to, activities such as:

- Excavation of accumulated sediments back to original contours.
- Re-shaping of the side-slopes.

<sup>2</sup>See 33 CFR 323.4(a)(1)(iii)(C)(1) and (C)(2).

<sup>3</sup>Maintenance means the physical preservation of the original, as-built configuration of the ditch and appurtenant structures, to restore the original function and the approximate capacity of the ditch. In many cases, accurate historical records are not available to determine the exact "as-built" specifications of the original ditch. In these cases, districts should work closely with the project proponent to establish an appropriate maintenance depth to restore the ditch's original function and approximate capacity, while meeting the spirit of the exemption and ensuring adequate protection of aquatic resources. Districts should allow maintenance of ditches to be performed to the level of current engineering standards where more graduated side-slopes result in greater stability, so long as those modifications of the ditch will not result in the drainage, degradation, or destruction of additional natural wetlands or other waters of the U.S., as referenced above. Removal of material and re-contouring of the ditch should be in accordance with the historical design and function of that ditch (i.e., the ditch must not be substantially deepened so as to drain additional areas).

- Bank stabilization to prevent erosion where reasonably necessary using best management practices. For maintenance of drainage ditches as defined in this guidance, materials used for stabilization should be compatible with existing bank materials.
- Armoring, lining and/or piping. These activities qualify as maintenance only where a previously armored, lined, or piped section is being repaired and all work occurs within the footprint of the previous work.
- Replacement of existing control structures, where the original function is not changed and original approximate capacity is not increased.

Maintenance is generally viewed as involving activities that keep something in its existing state or proper condition or preserve it from failure or decline. If a drainage ditch has not been serving a drainage function for an extended period of time, drainage ditch re-establishment would be considered construction, not maintenance, and would thus be ineligible for the exemption. However, a ditch that has not been regularly maintained should not automatically be considered ineligible for the ditch maintenance exemption. Some ditches require little or no periodic maintenance to remain functional. Lack of periodic maintenance in these situations does not preclude the ditch from being maintained under the exemption.

**c. The third step is to determine if the Recapture Provision applies:**

**Part 1:** Is the discharge part of an activity whose purpose is to convert an area of the waters of the U.S. into a use to which it was not previously subject?

The regulations guiding implementation of CWA Section 404(f) specify that a change in use occurs when there is a "conversion of a section 404 wetland to a non-wetland" and in addition "a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion." 33 C.F.R. 323.4(c).

Part 1 of the test is met if there would be a change of use. For example, any time an irrigation ditch would cut through (or across) a natural or man-altered water body, including wetlands, this would qualify as a change in use and Part 1 of the Section 404(f)(2) test is met.

**Part 2:** If Part 1 of the test is met, may the activity also impair the flow or circulation of waters of the U.S. or reduce the reach of such waters?

The regulations guiding implementation of the CWA Section 404(f) specify that "(w)here the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration." "A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States." 33 C.F.R. 323.4(c).

The determination as to whether construction or maintenance of an irrigation ditch, or maintenance of a drainage ditch, would result in a significant discernible alteration in flow or circulation, or a reduction in reach, of waters of the U.S. should be made on a case-by-case basis using the factors such as the following: (1) whether the proposed construction or maintenance of the ditch would harmfully sever or fragment the wetland or water body; (2) whether the proposed construction or maintenance of the ditch would significantly and discernibly alter flow or circulation or reduce reach through sidecasting into the wetland or waterbody; (3) whether the proposed construction or maintenance of the ditch would harm the wetland or water body by substantially increasing or decreasing water levels; (4) the relative size of the ditch compared to the wetland or water body; and (5) whether the proposed construction or maintenance employs techniques and best management practices designed to minimize impacts and ensure that there is not significant discernible alteration of flow or circulation or reduction of reach.

Because the Section 404(f)(1) exemption for maintenance of irrigation or drainage ditches applies only to maintenance activities that would maintain existing capacity and functionality (not to construction activities), it is unlikely that the recapture provision in Section 404(f)(2) would apply to ditch maintenance activities as defined above. However, if a question arises as to whether ditch maintenance activities would trigger the Section 404(f)(2) recapture provision (e.g., if the maintenance is "incidental" to a larger activity that triggers the provision – see footnote 4 below), this should be evaluated on a case-by-case basis using the factors such as those listed above.


**This recapture provision is a two-part test. If the answers to both parts are "yes," a (DA) permit is required for the activity. If one part of the test is not satisfied and that activity qualifies for an exemption under 404(f)(1), it is not "recaptured" under 404(f)(2).<sup>4</sup>**

In situations where the potential eligibility of a proposed discharge of dredged or fill material for an exemption under Section 404(f)(1)(C) has been raised to the district, and where the district cannot make a determination due to a lack of pertinent factual information, it is incumbent on those seeking exemption to provide the documentation necessary to establish the facts on a case-by-case basis.

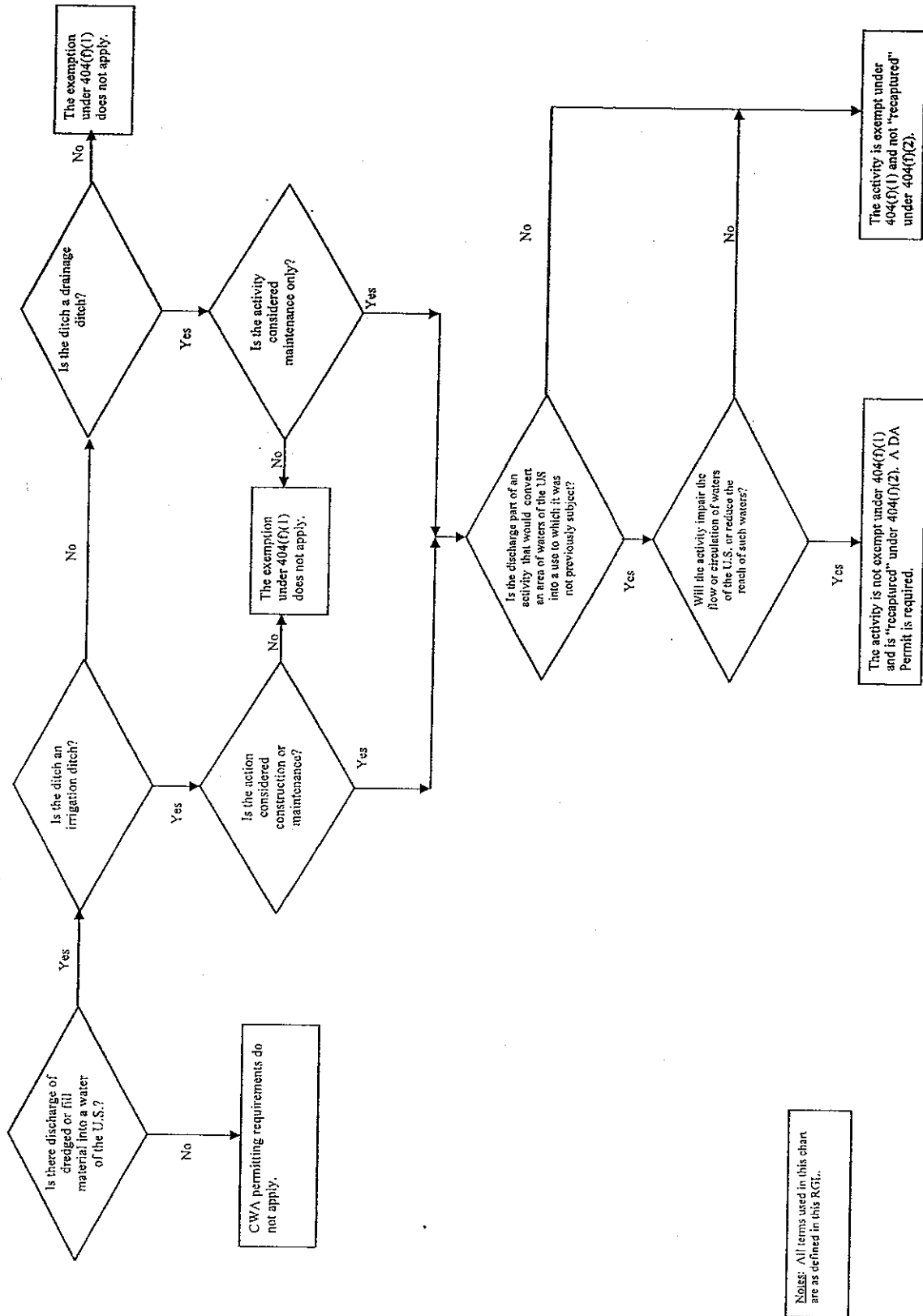
If the proposed activity is not exempt under Section 404(f)(1), the work may be authorized under one or more Nationwide General Permits (NWPs), or under a Regional General Permit (RGP), or pursuant to a Standard Individual Permit. The NWPs can be found at: <http://www.usace.army.mil/cw/cecwo/reg/> and the RGPs can be found on the local Corps District regulatory web pages. Additional guidance on the NWPs/RGPs may be obtained from the local Corps District office.

<sup>4</sup>The discharge of dredged or fill material itself does not need to be the sole cause of the destruction of the waters of the United States (e.g., wetlands) or other change in use or the sole cause of the reduction in or impairment of, reach flow, or circulation of such waters. The discharge need only be "incidental to" or "part of" an activity that is intended to or will foreseeably bring about that result.

4. **Duration.** This guidance rescinds and supersedes RGL 87-7. This guidance remains in effect unless revised or rescinded. Additional guidance may be issued in the near future to further define irrigation ditch, drainage ditch, construction, and maintenance.

  
DON T. RILEY  
Major General, US Army  
Director of Civil Works

**FIGURE 1: FLOWCHART FOR PROCESSING EXEMPTIONS UNDER 404(F)(1) AND 404(F)(2)**



**Notes:** All terms used in this chart are as defined in this RGL.