

Memorandum

Subject: Agricultural Exemption from the
Section 404 Permit Process

Date: 21 MAY 1990

From: Acting Director, Office of Environmental Policy
Washington, D.C. 20590

Reply to
Attn. of: HEV-20

To: Regional Federal Highway Administrators
Federal Lands Highway Program Administrator

Attached is a copy of the subject discussion which appeared on May 3, 1990, in the Congressional Record. This material is being made available for your information and further distribution as appropriate.

Contained within this discussion is a May 3, 1990, memorandum for the field jointly signed by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (COE) (pages S-5644 and S-5645). A more legible copy of the memorandum is also attached. This memorandum is the result of a joint effort between several members of Congress, the COE, and EPA, to clarify those normal farming practices which occur in wetlands that are exempt from Section 404 regulations. However, as stated in the third paragraph of the center column on page S-5645, "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." In the same context, the construction of a highway on lands meeting the definition of wetlands, but exempted for farming, would likewise require a 404 permit (emphasis added) and is not exempt.

The other item of interest begins in the middle of the first column on page S-5649. The EPA and the COE have "expressed their intention to more strictly adhere to regulations requiring the identification of all three wetlands parameters." The need for this reemphasis of the regulatory definition of 404 wetlands results from reports ". . . that a wetlands determination is often made when only one indicator, hydric soils, is present." It should be remembered, however, that in cases of disturbed and problem area wetlands, one or more of the parameters is usually absent and the procedures in Sections 4.23 and 4.25 of the Federal Manual for Delineating Jurisdictional Wetlands should be followed. It is anticipated that these procedures will rarely be used.

If and when questions regarding these issues arise in the development of highway projects, please contact Messrs. Charles DesJardins or Robert Falkenstein of this office on FTS 366-9173.

/S/

Kevin E. Heanue

Attachments

United States Environmental Protection Agency
Office of Water
Washington D.C. 20460

United States Department of the Army
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Washington, D.C. 20310-0103

3 MAY 1990

MEMORANDUM FOR THE FIELD

SUBJECT: Clean water Act Section 404 Regulatory Program and Agricultural Activities

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 wetlands 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 on page 5 of this memorandum). 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 levelling, 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 (eg., 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 exemptions do not apply

Section 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 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/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 use of 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(c) 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 material associated with the construction of rice levees for rice farming in wetlands which we 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 soft immediately adjacent to the constructed levee.

Land levelling 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 area 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. If you have any questions regarding this memorandum, please contact us or have your staff contact Suzanne Schwartz in EPA's Office of Wetlands Protection at 202-475-7799, or John Studt in the Headquarters' Office of the U.S. Army Corps of Engineers at 202-272-1785 (temporary number 202-272-1294).

/S/

LaJuana S. Wilcher
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/S/

Robert W. Page
Assistant Secretary of the Army
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