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REGULATORY BRANCH MEMORANDUM 2007-02

SUBJECT: Applicability of Agricultural Exemptions

1. Purpose: The purpose of this memorandum is to describe the applicability of agricultural exemptions as described in existing laws, regulations, and policy.

2. Applicability: The memorandum is applicable to the regulation of activities on agricultural lands.

3. References:

a. 33 CFR 323.2 entitled "Definitions"

b. 33 CFR 323.4 entitled "Discharges not requiring permits"

c. 33 CFR 328.3 (a)(8)

d. Regulatory Guidance Letter (RGL) 86-03 entitled "Exemptions to CWA-Roads"

e. Regulatory Guidance Letter 90-7 entitled "Clarification of the Phrase "Normal Circumstances" as it pertains to cropped wetlands".

f. Regulatory Guidance Letter 96-2 entitled "Applicability of exemptions under Section 404(f) to "Deep Ripping" activities in wetlands".

g. May 10, 1990, Information Paper on Section 404 and Agriculture.

4. Policy:

a. The Clean Water Act (CWA) provides a number of exemptions to the need to obtain a Department of the Army Permit for established (i.e., ongoing) farming, silvaculture, or ranching operations. To fall under the exemption, an activity must be one of the activities listed at 33CFR 323.4 and must be part of an established operation. Activities which bring an area into, farming, silvaculture, or ranching use are not part of an established operation.

b. At 33 CFR 323.2, the term "fill" is defined as material being placed in waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any

portion of a water of the United States. Additionally, it is indicated that the Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback.

c. 33 CFR 328.3 (a)(8) indicates that waters of the United States do not include prior converted cropland. It is also indicated that "notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA." The preamble to this section of the regulation indicates that PC cropland which now meets wetland criteria is considered abandoned unless for once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

d. RGL 86-03 indicates that to qualify for a Section 404(f) exemption, a forest or farm road must comply with the requirements of 33 CFR 323.4(a)(6), 33 CFR 323.4(b), and 33 CFR 323.4(c) (implementing Section 404 (f)(2). Specifically with reference to 33 CFR 323.4(c), the forest or farm road must be part of an ongoing silvaculture, farming, or ranching operation, which will not bring new areas into use, and will comply with best management practices of 33 CFR 323.4(a)(6).

e. RGL 96-2 indicates that:

i. that plowing is defined in the regulations <u>not</u> to include the redistribution of surface material in a manner that converts wetland areas to uplands. Plowing is exempt from regulation when: it is conducted as part of an ongoing, established agricultural, silvacultural, or ranching operation; and the activity is consistent with the definition of plowing in EPA and Corps regulations; and the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters.

ii. discharges associated with activities that establish an agricultural operation in wetlands, where previously ranching has been conducted, represents a "change in use" within the meaning of 404(f)(2). Similarly, discharges that establish forestry practices in wetlands historically subject to agriculture also represent a change in use of the site.

iii. the statute includes a provision at Section 404(f)(2) that "recaptures" or reestablishes the permit requirement for those otherwise exempt discharges which: convert an area of waters of the U.S. to a new use,; and impair the flow or circulation of waters of the U.S. <u>or</u> reduce the reach of waters of the U.S.

iv. It should be noted that in order to trigger the recapture provisions of Section 404(f)(2), the discharges themselves need not be the sole cause of the destruction of the wetland or other change in use or sole cause of the reduction or impairment of reach, flow, or circulation of waters of the U.S. Rather, the discharges need only be "incidental to" or "part of" an activity which is intended to or will forseeably bring about that result. Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

v. Deep-ripping and related activities in wetlands are not part of a normal ongoing activity, and therefore not exempt, when such practices are conducted in association with efforts to establish for the first time (or when a previously established operation was abandoned) an agricultural silvicultural or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2). Deep-ripping to establish a farming operation at a site where a ranching or forestry operation was in place is a change in use of such a site. Deep-ripping and related activities that also have the effect of altering or removing the wetland hydrology of the site would trigger Section 404(f)(2) and such ripping would require a permit. Deep-ripping a site that has the effect of converting wetlands to non-waters would also trigger Section 404(f)(2) and such ripping would require a permit.

f. The May 10, 1990, Information Paper on Section 404 and Agriculture, indicates that for an activity to be exempt, it must be part an established, ongoing agricultural operation. While the planting of different crop as part of an established crop rotation is exempt, a discharge associated with the change from agricultural to aquaculture, or a discharge that converts an area to farming or forestry for the first time is not exempt.

5. Discussion.

a. Section 404(f)(1) of the CWA exempts from the permit requirement certain discharges associated with normal farming, forestry, and ranching practices in waters of the United States, including wetlands. Discharges into waters subject to the Act associated with farming, forestry, and ranching practices identified under Section 404(f)(1) do not require a permit except as provided under Section 40.4(f)(2). Section 40.4(f)(2) indicates that, "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the 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."

b. Section 404(f)(1) does not provide a total automatic exemption for all activities related to agricultural silvicultural or ranching practices. Rather, Section 404(f)(1) exempts only those activities specifically identified in paragraphs (A) through (F), and "other activities of essentially the same character as named" [44 FR 34264]. For example, Section 404(f)(1)(A) lists discharges of dredged or fill material from "normal

farming, silviculture and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

c. Section 404(f)(1)(A) is limited to activities that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation." This "established" requirement is intended to reconcile the dual intent reflected in the legislative history that although Section 40.4 should not unnecessarily restrict farming, forestry, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.

d. The Corps of Engineers headquarters website indicates that, "Regulatory Guidance Letters (RGL's) were developed by the Corps as a system to organize and track written guidance issued to its field agencies. RGL's are normally issued as a result of evolving policy; judicial decisions and changes to the Corps regulations or another agency's regulations which affect the permit program. RGL's are used only to interpret or clarify existing Regulatory Program policy, but do provide mandatory guidance to the Corps district offices. RGL's are sequentially numbered and expire on a specified date. However, unless superseded by specific provisions of subsequently issued regulations or RGL's, the guidance provided in RGL's generally remains valid after the expiration date. The Corps incorporates most of the guidance provided by RGL's whenever it revises its permit regulations."

6. Conclusion.

33 CFR 323.4(a)(1)(ii) indicates that, "To fall under these exemptions, the activities must be part of an established (i.e., on-going) farming, silviculture, or ranching operation." Therefore, activities which result in a discharge of dredge or fill material into waters of the U.S., that are not part of an established, normal farming, silviculture, or ranching activities are not exempt from Section 404 permitting requirements. Fill activities associated with the conversion of range land to vineyard, agricultural land to silvaculture, agricultural land to aquaculture, changes in crops which are not part of an established crop rotation, or otherwise bringing an area into a use to which it was not previously subject are subject to Section 404 permit requirements. Additionally, discharges associated with the resumption of an activity on an area that has been determined to have been abandoned from a previous use are subject to Section 404 permitting requirements. Neither is the construction of agricultural roads associated with a "change in use" exempt from permitting requirements. Finally, these discharges need only be "incidental to" or "part of" an activity that is intended to or will forseeably bring about the "change in use". Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

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