February 8, 1985

MEMORANDUM

TO: Josephine S. Cooper
Assistant Administrator for External Affairs

FROM: Gerald H. Yamada
Acting General Counsel

SUBJECT: Issues Concerning the Interpretation of Section 404(f) of the Clean Water Act

You have asked for guidance clarifying the application of § 404(f) of the Clean Water Act (CWA) and its implementing regulations to the expansion or intensification of farming operations.[1] This memorandum provides general guidance on the interpretation of the applicable law and regulations as they relate to that topic. It is intended to assist the Environmental Protection Agency (EPA) and Corps of Engineers personnel in understanding and consistently applying § 404(f) and in explaining that section to the public.

I. General

At the outset, it should be stressed that § 404 jurisdiction extends only to point source discharges of dredged or fill material into waters of the United States. § 404(a). Unless an activity involves such discharges into such waters, it is not subject to § 404, and there is no need to consider the applicability of § 404(f). Thus, activities confined to those portions of a property that have been determined by EPA or the Corps of Engineers, as appropriate, not to be waters of the United States do not need a § 404 permit, regardless of what the activities are.

If an activity *does* involve a discharge of dredged or fill material into waters subject to the Act, then it is relevant to consider whether the activity is exempt under § 404(f). Section 404(f)(1) states that:

> Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material [from activities specified in (A) through (F)] is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this

[1] EPA is charged with the ultimate administrative responsibility for interpreting § 404(f). *See* Op. Att'y. Gen., Sept. 5, 1979.

> Act (except for effluent standards or prohibitions under section 307).

Section 404(f)(2), commonly referred to as the "recapture provision," provides:

> 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.

Thus, in order to conclude that a given discharge activity is exempt from regulation, one must determine not only that it falls within § 404(f)(1), but also that it is not recaptured under § 404(f)(2).

Discharges which are not exempt under § 404 must be evaluated through the appropriate permit process. If the permit issuer determines the discharges comply with the § 404(b)(1) guidelines and other applicable criteria, they may be authorized by a suitably conditioned permit.

Section 404(f) was enacted in 1977 as part of the mid-course corrections to the CWA and in response to public reaction to the Corps' expansion of its § 404 jurisdiction following the decision in *NRDC* v. *Callaway*, 392 F. Supp. 685 (D. D.C. 1975). In very general terms, the legislative history indicates that § 404(f) reflects a tradeoff between activities and geographic jurisdiction, that is, a decision by Congress to explicitly exempt certain activities that it never intended to regulate or that are sufficiently minor so as not to require scrutiny through the permit process, while maintaining the program's broad geographic jurisdiction because of the latter's importance to the purposes of the Act. However, as noted in the preamble to EPA's first proposed regulations implementing § 404(f), 44 Fed. Reg. 34263 (June 14, 1979), the interpretation of the section is exceptionally complex, because of the need to work with the language of the statute and the extensive but sometimes ambiguous or inconsistent legislative history.

EPA first proposed regulations interpreting § 404(f) on June 14, 1979. After consideration of the numerous comments and following close consultation with the Corps, EPA published final § 404(f) regulations on May 19, 1980, as part of its "Con-

solidated Permit Regulations." 40 C.F.R. § 123.91. Both the proposed and final regulation were accompanied by extensive preambles. On July 22, 1982, the Corps of Engineers incorporated EPA's § 404(f) regulations into its own permit regulations (at 33 C.F.R. 323.4) verbatim, except for (with EPA's concurrence) small changes to the definition of "minor drainage" and to the description of facilities associated with irrigation ditches.[2] EPA recodified its 1980 § 404(f) regulations as 40 C.F.R. 233.35 on April 1, 1983. References in this memorandum will be to 40 C.F.R. 233.35.

On its face, § 404(f) does not provide a total, automatic exemption for all activities related to agriculture. Rather, § 404(f)(1) exempts only those agricultural activities listed in paragraphs (A) through (F), namely certain "normal" farming practices (§ 404(f)(1)(A)), certain ditching activities (§ 404(f)(1)(C)), farm roads meeting specified criteria (§ 404(f)(1)(E)), and other discharges covered by best management practices (BMPs) developed through an approved § 208(b)(4) program (§ 404(f)(1)(F)).[3] In addition, even discharges which are associated with the activities listed in § 404(t)(1) are not eligible for the exemption if they involve toxic materials[4] or if they are recaptured by § 404(f)(2).

The legislative history leaves little doubt that Congress intended to limit the environmental effect of the exemptions by defining them narrowly and by including § 404(f)(2).[5] As Sena-

---

[2] The amended irrigation ditch provision was challenged in *NWF* v. *Marsh*, D.D.C., Civ. No. 82-3632. As part of the settlement in that case, EPA and the Corps agreed to the proposal of new wording. Final regulations reflecting the settlement were published on October 5, 1984.

[3] As noted in the preamble to the 1979 proposed regulations, if § 404(f)(1)(A) covered all kinds of farming activities, there would be no need to provide for ditches, ponds, and roads in § 404(f)(1)(C) and (E). 44 Fed. Reg. 34264.

[4] Most farming operations will probably not involve discharges containing toxic pollutants. However, should the soils to be discharged contain substances such as pesticides listed as toxic pollutants pursuant to § 307, a permit would be required. *See* 40 C.F.R. 233.35(b).

[5] This legislative history was relied on by the principal reported court decisions construing § 404(f), *Avoyelles Sportsman's League* v. *Alexander*, 473 F. Supp. 525, 535-36 (W.D. La. 1979) and *Avoyelles Sportsman's League* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). The district court held that the exemptions should be narrowly construed and that under § 404(f)(1)(A) only activities that are part of an on-

Continued

tor Muskie put it, "New subsection 404(f) provides that Federal permits will not be required for those *narrowly defined activities that cause little or no adverse effects either individually or cumulatively.*" 3 Legislative History of the Water Pollution Control Act Amendments of 1972, at 474. (Emphasis added.) *See also* statements by Rep. Harsha, *id.* at 420, and Senator Wallop, *id.* at 530. The numerous statements concerning what § 404 did not exempt are also telling. For example, Senator Muskie explained, "[T]he exemptions do not apply to discharges that convert extensive areas of water to dry land or impede circulation or reduce the reach or size of the water body." 3 Leg. Hist. 474; *see also* statement of Senator Baker, *id.* at 523. As Senator Stafford stated, "Permits will continue to be required for those farm, forestry, and mining activities that involve the discharge of dredged or fill material that connect [sic—presumably intended to be 'convert'] water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters." 3 Leg. Hist. 485. *See also* Senate Report, 4 Leg. Hist. 710 (permit review necessary for discharges to convert a hardwood swamp to another use through dikes or drainage channels).[6]

---

going agricultural or ongoing silvicultural operation were intended to be exempted. (This holding preceded the regulations, and hence simply interpreted the statute, without weight being given to EPA's regulations interpreting the statute.) On appeal, the Fifth Circuit affirmed the district court's result, but found it unnecessary to decide the challenge to the district court's limitation of § 404(f)(1)(A) to "established" operations since application of § 404(f)(2) would lead to the same result.

The legislative history cited in this memorandum has also been relied on in two recent unreported decisions, *United States* v. *Huebner*, No. 83–3140 (7th Cir. Jan. 11, 1985), *United States* v. *Akers*, Civ. S–84–1276 RAR (E.D. Cal. Jan. 15, 1985).

[6] There has been a contention that the references in the legislative history implying that agricultural activities as a class are best regulated by the States (*i.e.*, not by the Corps) supports a broad exemption. However, such references are either to the "Bentsen" amendment, which was rejected, or to activities to be addressed under § 208 plans. When it authorized § 208(b)(4) programs as part of the 1977 amendments, Congress assumed that States would use such programs to control "quasi-point source" silvicultural or agricultural activities in order to obviate the need for a Federal permit. *See, e.g.*, statement by Senator Stafford, 4 Leg. Hist. 911–912. However, to date no State has an approved § 208(b)(4) plan that would qualify for exemption any agricultural activities not otherwise enumerated in § 404(f)(1)(A)–(E).

Thus, in determining whether discharges associated with expansion or intensification of farming in waters of the United States are exempt, the issue is whether the discharge activities in question are among those specifically listed in §§ 404(f)(1)(A) through (F) and, if so, whether § 404(f)(2) recaptures them. The next section of this memorandum discusses pertinent points relating to the specific provisions of § 404(f)(1), as interpreted by existing regulations.

II. Section 404(f)(1)(A)–(F)

Section 404(f)(1)(A). This subsection 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." The implementing regulation quotes this language, and then explains that § 404(f)(1)(A) is limited to activities which are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation," gives examples of what is and is not "established," and defines the listed activities (*see* 40 C.F.R. 233.35(a)(1)(i) and (ii)). This "established" requirement is intended to reconcile the sentiments in the legislative history that although § 404 should not unnecessarily restrict a farmer in continuing to farm his land,[7] discharge activities which could destroy wetlands should be regulated.[8]

Several points should be kept in mind in deciding whether this "established" requirement is met in a given case. First, to fall within § 404(f)(1)(A), the specific cultivating, seeding, plowing, etc., activity need not *itself* have been ongoing as long as it is introduced as part of an ongoing farming operation. For example, a farmer may decide to initiate "minor drainage" for the emergency removal of blockages in an area already being farmed (*see* 40 C.F.R. 233.35(a)(1)(iii)(C)(1)(iv), definition of "minor drainage"). Similarly, if crops have been grown and

[7] *See, e.g.*, statement of Rep. Stump, 3 Leg. Hist. 418.

[8] *See supra*. An assumption in both the regulation and the legislative history is that ongoing farming operations normally are not carried on in waters of the United States (unless perhaps specializing in a wetland crop like rice or cranberries), and hence that ordinarily there is little basis or purpose to apply § 404 to ongoing operations. *See, e.g.*, statement of Senator Muskie, 4 Leg. Hist. 869.

harvested on a regular basis, the mere addition of a cultivating step to that farming operation is not inconsistent with the *operation* being an "established" one for purposes of § 404(f)(1)(A). (Of course, the mere fact that there is an "established" operation under § 404(f)(1)(A) does not foreclose the possibility of recapture under § 404(f)(2).)

Second, the thrust of the last three sentences in § 233.35 (a)(1)(ii) is to ensure that the "established" requirement is used neither too restrictively (*e.g.*, to block use of a conventional rotational cycle) nor too loosely (*e.g.*, to allow the fact that an area has been timbered or farmed at any point in history to automatically make it an ongoing farm or forest operation). To guard against the latter, the regulation sets out two alternative tests to be used to determine whether there is no longer an ongoing operation on a previously farmed area, *i.e.*, whether a new, nonfarming use has taken place in the interim or whether the area is no longer in a condition such that farming could resume without hydrologic modification. *See United States* v. *Akers*, *supra*, for an example of application of this "established" requirement.

The regulations (and preamble) define in some detail the specific "normal" activities listed in § 404(f)(1)(A). Three points may be useful in the present context. First, as explained in the 1979 preamble, the words "such as" have been interpreted as restricting the section "to the activities *named* in the statute and other activities of essentially the same character as named," and "preclude the extension of the exemption . . . to activities that are unlike those named." (Emphasis added.) 44 Fed. Reg. 34264. Second, plowing is specifically defined in the regulations not to include the redistribution of surface materials by grading in a manner which converts wetland areas to uplands (*see* 40 C.F.R. 233.35(a)(1)(iii)(D)).

The third point relates to the definition of "minor drainage." Because of the numerous statements in the legislative history that draining wetlands was not exempt under § 404(f),[9] and because § 404(f)(1)(C) makes it clear that discharges from the construction of drainage ditches are not exempt, the "minor drainage" definition was carefully crafted to describe very specific drainage activities that were identified and judged through rulemaking to be necessary components of normal operations

[9] *See, e.g.*, Senate Report, 4 Leg. Hist. 709, as well as the references cited *supra*.

but to have minimal adverse effects. Thus, subparagraphs (1)(ii) and (1)(iii) of the minor drainage definition are limited to discharges associated with continuation of established *wetland* crop production (*see* 40 C.F.R. 233.35(a)(1)(iii)(C)). Although those activities may involve plugging ditches and rebuilding small rice levees, for example, paragraph (2) of the minor drainage definition stresses that the term "does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a . . . wetland or aquatic area constituting waters of the United States."

Section 404(f)(1)(B). This subsection covers discharges resulting from maintenance, including emergency reconstruction of damaged parts, of currently serviceable structures. The regulation, after repeating the statutory language, states that "maintenance" does not include changes in character, scope, or size of the original fill design, and requires that emergency work take place a reasonable time after damage occurs (*see* 40 C.F.R. 233.35(a)(2)). Thus, discharges to increase the height or length of a dike are not covered by this section.

Section 404(f)(1)(C). The statutory language applies only to the "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches."

A brief history of the regulations interpreting this provision is in order, as they have been modified several times insofar as they relate to irrigation ditches. EPA's initial regulations (May 19, 1980) supplemented the statutory language by specifying that connections and certain other work related to irrigation ditches were included in the exemption.[10] In July 1982, EPA authorized the Army to replace that supplementary language with a simplified wording that EPA felt was consistent with its

[10]A simple connection of an irrigation return or supply ditch to waters of the United States and related bank stabilization measures are included within this exemption. Where a trap, weir, drain, wall, jetty or other structure within waters of the United States which will result in significant discernible alterations to flow or circulation is constructed as part of the connection, such construction requires a 404 permit.

The rationale for this expansion was that all irrigation ditches need connections in order to function. Unless the connections were exempted, too, the provision would have no meaning.

interpretation.[11] Thus, § 323.4(a)(3) of the Corps' July 22, 1982, regulations included the following statement:

> . . . Discharges associated with irrigation facilities in the waters of the U.S. are included within the exemption unless the discharges have the effect of bringing these waters into a use to which they were not previously subject and the flow or circulation may be impaired or reach reduced of such waters.

This latter language was challenged in *NWF* v. *Marsh* as improperly expanding the statutory exemption, and new, clearer language was developed under the settlement agreement. Following rulemaking, EPA and the Corps approved the following substitute language, which was published as a final regulation effective October 5, 1984:

> . . . Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures and other such facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

The preamble to the 1984 regulation explains that the new wording is intended to clarify the type of irrigation structures involved.

"Irrigation" discharges that occurred while the July 22, 1982, regulations were in effect probably should, as an equitable matter, be evaluated under the 1982 language, even though EPA's 1980 language remained on the books; however, the 1982 language must of course be interpreted in light of the statutory language, EPA's basis for approving the change, and the explanation accompanying the 1984 clarification. Thus, even under the Corps' 1982 regulation, exempted irrigation facilities must at a minimum be appurtenant to irrigation *ditches*.

Another issue that has been raised is the applicability of § 404(f)(1)(C) to construction of ditches that can serve as either irrigation or drainage ditches. The regulations and preamble do not explicitly address this issue. However, since the statute clearly does not exempt the construction of drainage ditches,[12]

---

[11] *See* Letter from Anne Gorsuch to Senator Hart, dated Jan. 5, 1982.

[12] It does exempt *maintenance* of drainage ditches. Maintenance includes removal of accumulated debris and silt.

and the legislative history indicates that limitation was deliberate and important, it follows that dual function ditches[13] should be considered drainage ditches, *i.e.*, their construction is not exempt.

One final point should be made about § 404(f)(1)(C). Because neither that section nor the implementing regulations have an "ongoing" requirement, it is immaterial for purposes of § 404(f)(1)(C) whether an irrigation ditch waters an area that was previously irrigated or indeed whether the area was previously farmed at all (although such facts could be highly relevant under § 404(f)(2)).

Section 404(f)(1)(D). This section relates only to construction of temporary sedimentation basins on construction sites, not to the actual building or other structure being constructed.

Section 404(f)(1)(E). This section covers farm, forest, and temporary mining roads, provided they are:

> constructed and maintained in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the environment will be otherwise minimized.

EPA's regulations translate these statutory criteria into a number of BMPs (*see* 40 C.F.R. 233.35(a)(5)). If a farm road is built in accordance with those BMPs (and in the case of a State § 404 program, with any additional BMPs specified by the State), it is deemed to meet the criteria of § 404(f)(1)(E).

Section 404(f)(1)(F). As discussed above, this provision is designed to cover activities controlled under an approved § 208(b)(4) program, and therefore is inoperative where a State does not have an approved § 208(b)(4) program. To date, no State has such a program.

---

[13] Of course, a ditch is not considered "dual function" in this sense if the water it carries away is not water which contributes to the maintenance of waters of the United States (*e.g.*, wetlands) but rather is simply irrigation return flow.

III. Section 404(f)(2)

As noted above, if a discharge activity falls within the scope of the specific § 404(f)(1)(A)–(F) subsections just described but does not pass muster under § 404(f)(2), it is not exempt from regulation. The applicable regulations, 40 C.F.R. 233.35(c), provide:

> Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in [(f)(1)(A)–(F)] 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. (Emphasis added.) [Note: 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 materials into waters of the United States in conjunction with construction of dikes, drainage ditch or other works or structures used to effect such conversion. A discharge which elevates the bottom of waters of the United States without converting it to dryland does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.]

Section 404(f)(2) has two requirements: the "new use" requirement, and the "reduction in reach/impairment of flow or circulation" requirement. Although both requirements must be met, it is the interpretation of the first that raises the most questions.

The legislative history discussed earlier leaves no doubt that the destruction of the wetland character of an area (*i.e.*, its conversion to uplands) is a change in use of the waters of the United States, and by definition also a reduction in their reach, within the meaning of § 404(f)(2). The fact that some farming operations may have previously been conducted in the wetland

without altering its wetland status, or that some new operation could theoretically be conducted without a discharge, does not mean that discharges associated with an operation that *does* convert the wetland are exempt. Conversely, if there is already an established farming operation in a wetland, any discharges resulting from farming activities listed in the regulation which do not convert the wetland to upland *are* exempt, whether or not there is an intensification of farming, change in crops, etc. Similarly, discharges from the construction of irrigation ditches[14] are exempt, even if they affect a wetland, as long as they do not convert the wetland to upland, bring it into initial farming use, or otherwise bring a water of the United States into a new use, and reduce or impair its reach, flow, or circulation.

To give some concrete examples, if there is an established hay harvesting operation in a wetland, discharges associated with the activities listed in § 404(f)(1)(A) would not need a permit, even if new agricultural crops were introduced, as long as the wetland was not destroyed. If annual "upland" crops[15] could be grown in the wetland (during the dry season, presumably) without such an effect, their introduction would not *per se* eliminate the exemption. Conversely, if the listed farming activities are employed to grow a perennial upland crop that cannot survive in a wetland, it follows that establishing that crop so that it survives from year to year will require effectively eliminating the wetland; the associated discharges would not be exempt (because elimination of the wetland would be both a "new use" and a reduction in reach).

Finally, it should be noted that in order to trigger the recapture provisions of § 404(f)(2), the discharges themselves do not need to 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 United States. Rather, the discharges need only be "incidental to" or "part of" an activity that is intended to or will forseeably

---

[14] Per discussion above, this means ditches strictly for irrigation, not dual function ditches.

[15] Such labels should be used cautiously in this context. The controlling factor is whether establishing the crop is compatible with the area's remaining a wetland, not what the plant label is.

bring about that result. Thus, in applying § 404(f)(2), one must consider discharges in context, rather than in isolation.

If additional questions arise concerning the interpretation of § 404(f) that are not addressed by this memorandum, please contact me or Cathy Winer of my staff.