US Army Corps of Engineers®

REGULATORY GUIDANCE LETTER

No. 07-02 **Date: July 4, 2007**

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)*(1))(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) *(1)(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. <u>Guidance for Ditches.</u>

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.[1] 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

[1] 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[2] 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.[3] 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.

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[2]See 33 CFR 323.4(a)(1)(iii)(C)(1) and (C)(2).

[3]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).[4]

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.

[4]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. <u>Duration.</u> 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.

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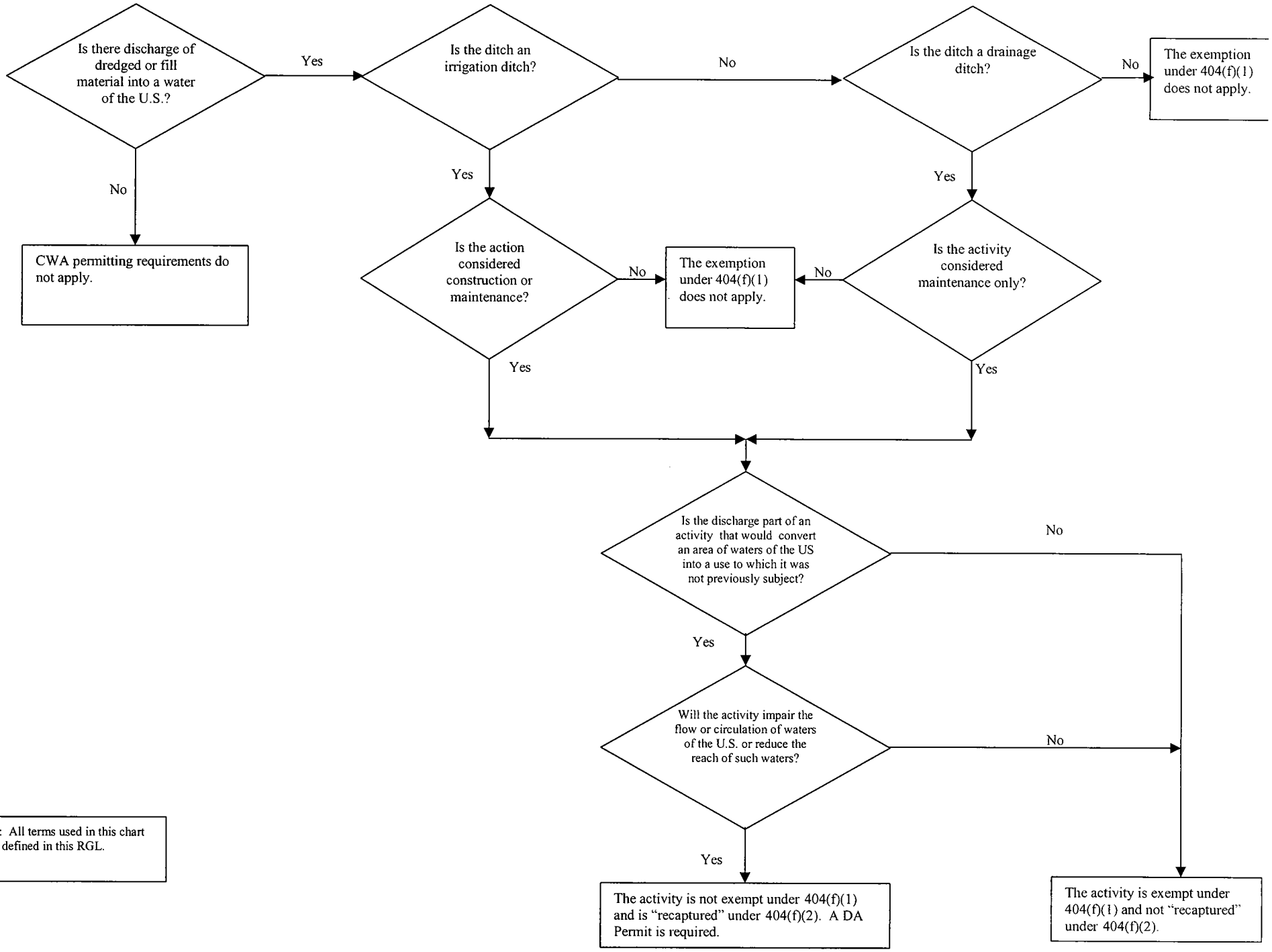
FIGURE 1: FLOWCHART FOR PROCESSING EXEMPTONS UNDER404(f)(1) AND 404(f)(2)



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