

*Name of Committee:* Coastal Engineering Research Board (CERB).

*Date of Meeting:* April 14–16, 1999.

*Place:* The Ilikai Hotel, Honolulu, Hawaii.

*Time:* 8:30 a.m. to 4:30 p.m. (April 14, 1999); 9:00 a.m. to 10:45 a.m. (April 15, 1999); 9:00 a.m. to 12:00 p.m. (April 16, 1999).

**FOR FURTHER INFORMATION CONTACT:**

Inquiries and notice of intent to attend the meeting may be addressed to Colonel Robin R. Cababa, Executive Secretary, Coastal Engineering Research Board, U.S. Army Engineer Research and Development Center, Waterways Experiment Station, 3909 Halls Ferry Road, Vicksburg, Mississippi 39180–6199.

**SUPPLEMENTARY INFORMATION:**

*Proposed Agenda:* The theme of the meeting is Military Applications of Coastal Engineering. The session on April 14 will consist of a review of CERB business, presentations pertaining to the theme, such as Examples of Past Contributions, Rapidly Installed Breakwater System/Logistics-Over-the-Shore (LOTS), Operations and Research Needs, Office of Naval Research Program, Military Applications of Civil Works Modeling Capabilities, Military Applications of Airborne Lidar Bathymetry, and Naval LOTS Program. Presentations will also include the Iwakuni Air Field Project and the Alaska District Coastal Projects. On the morning of April 15, the presentations include Summary of Marine Board Study on Coastal Engineering Research and Education Needs, Honolulu Coastal projects, Island harbors, New Directions in Coastal Research Needs, and Field Trip overview. The afternoon is devoted to a field trip to the Kaneohe Marine Corps Base for a beach invasion demonstration. On the morning of April 16, presentations include Future Direction of Corps' Shore Protection Program, Geographic Distribution of Coastal Engineering Projects, Hurricane Evacuation Studies for the Islands, and Disaster Related Issues on the Islands.

This meeting is open to the public; participation by the public is scheduled for 11:15 a.m. on April 16.

The entire meeting is open to the public, but since seating capacity of the meeting room is limited, advance notice of intent to attend, although not required, is requested in order to assure adequate arrangements. Oral participation by public attendees is encouraged during the time scheduled on the agenda; written statements may

be submitted prior to the meeting or up to 30 days after the meeting.

**Robin R. Cababa,**

*Colonel, Corps of Engineers, Executive Secretary.*

[FR Doc. 99–6922 Filed 3–19–99; 8:45 am]

BILLING CODE 3710–PU–M

**DEPARTMENT OF DEFENSE**

**Department of the Army, Corps of Engineers**

**Regulatory Guidance Letters Issued by the Corps of Engineers**

**AGENCY:** Army Corps of Engineers, DoD.

**ACTION:** Notice.

**SUMMARY:** The purpose of this notice is to provide current Regulatory Guidance Letters (RGLs) to all interested parties. RGLs are used by the U.S. Army Corps of Engineers Headquarters as a means to transmit guidance on the permit program (33 CFR parts 320–330) to its division and district commanders. Each future RGL will be published in the Notice Section of the **Federal Register** as a means to insure the widest dissemination of this information while reducing costs to the Federal Government. The Corps no longer maintains a mailing list to furnish copies of the RGLs to the public.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael D. Smith, Regulatory Branch, Office of the Chief of Engineers at (202) 761–0201.

**SUPPLEMENTARY INFORMATION:** RGLs were developed by the Corps as a system to organize and track written guidance issued to its field agencies. RGLs 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. RGLs are used only to interpret or clarify existing Regulatory Program policy, but do provide mandatory guidance to Corps district offices. RGLs are sequentially numbered and expire on a specified date. However, unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date. The Corps incorporates most of the guidance provided by RGLs whenever it revises its permit regulations. We are hereby publishing all *current* RGLs, beginning with RGL 94–1 and ending with RGL 96–2. RGLs 92–1, 92–3, and 92–5 expired on December 31, 1997, and RGL 93–1 and 93–2 expired on December 31, 1998. All five RGLs have been removed from this publication. We will continue

to publish each RGL in the Notice Section of the **Federal Register** upon issuance and in early 2000, we will again publish the complete list of all current RGLs.

Dated: March 17, 1999.

**Charles M. Hess.**

*Chief, Operations Division, Directorate of Civil Works.*

**Regulatory Guidance Letter (RGL 94–1)**

*Issued:* May 23, 1994, EXPIRES: December 31, 1999.

*Subject:* Expiration of Geographic Jurisdictional Determinations.

1. Regulatory Guidance Letter (RGL) 90–6, Subject: "Expiration Dates for Wetlands Jurisdictional Delineations" is extended until December 31, 1999, subject to the following revisions.

2. This guidance should be applied to all jurisdictional determinations for all waters of the United States made pursuant to section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection Research and Sanctuaries Act of 1972.

3. To be consistent with paragraph IV.A. of the January 6, 1994, interagency Memorandum of Agreement Concerning the Delineation of Wetlands for Purposes of section 404 of the Clean Water Act and subtitle B of the Food Security Act, all U.S. Army Corps of Engineers geographic jurisdictional determinations shall be in writing and normally remain valid for a period of five years. The Corps letter (see paragraph 4.(d) of RGL 90–6) should include a statement that the jurisdictional determination is valid for a period of five years from the date of the letter unless new information warrants revision of the determination before the expiration date.

4. For wetland jurisdictional delineations the "effective date of this RGL" referred to in paragraphs 4 and 5 of RGL 90–6 was and remains August 14, 1990. For jurisdictional determinations, other than wetlands jurisdictional delineations, the "effective date of this RGL" referred to in paragraphs 4 and 5 of RGL 90–6 will be the date of this RGL.

5. Previous Corps written jurisdictional determinations, including wetland jurisdictional delineations, with a validity period of three years remain valid for the stated period of three years. The district engineer is not required to issue new letters to extend such period from three years to a total of five years. However, if requested to do so, the district engineer will normally extend the three year period to a total of five years unless new information warrants a new jurisdictional determination.

6. Districts are not required to issue a public notice on this guidance but may do so at their discretion.

7. This guidance expires on December 31, 1999 unless sooner revised or rescinded.

For the Director of Civil Works.

John P. Elmore, P.E.,

*Chief, Operations, Construction and Readiness Division, Directorate of Civil Works.*

**Regulatory Guidance Letter (RGL 94-2)**

*Issued:* August 17, 1994, EXPIRES: December 31, 1999.

*Subject:* Superfund Projects.

1. Regulatory Guidance Letter (RGL) 85-07, subject: "Superfund Projects" is hereby reissued (copy enclosed).

2. This RGL was previously extended by RGL 89-2. Although the extension expired, RGL 85-07 has continued to be U.S. Army Corps of Engineers policy.

3. This guidance expires December 31, 1999 unless sooner revised or rescinded.

For the Director of Civil Works.

John P. Elmore, P.E.,

*Chief, Operations, Construction and Readiness Division, Directorate of Civil Works.*

**Regulatory Guidance Letter (RGL 95-1)**

*Issued:* March 31, 1995, EXPIRES: December 31, 2000.

*Subject:* Guidance on Individual Permit Flexibility for Small Landowners.

1. Enclosed is a memorandum for the field signed by the Acting Assistant Secretary of the Army (Civil Works) and the Environmental Protection Agency dated March 6, 1995. This memorandum provides guidance on flexibility that the U.S. Army Corps of Engineers should apply when making determinations of compliance with the section 404(b)(1) Guidelines with regard to the alternatives analysis.

2. This memorandum should be implemented immediately. It constitutes an important aspect of the President's Plan for protecting the Nation's wetlands, "Protecting America's Wetlands: A Fair, Flexible, and Effective Approach" (published on August 24, 1993).

3. This guidance expires on December 31, 2000 unless sooner revised or rescinded.

For the Director of Civil Works.

Daniel R. Burns, P.E.,

*Chief, Operations, Construction and Readiness Division, Directorate of Civil Works.*

United States Environmental Protection Agency, Office of Water, Washington, DC 20460

United States Department of the Army, Office of the Assistant Secretary, Washington, DC 20310-0103

**Memorandum for the Field**

March 6, 1995.

*Subject:* Individual Permit Flexibility for Small Landowners.

In order to clearly affirm the flexibility afforded to small landowners under section 404 of the Clean Water Act, this policy clarifies that for discharges of dredged or fill material affecting up to two acres of non-tidal wetlands for the construction or expansion of a home or farm building, or expansion of a small business, it is presumed that alternatives located on property not currently

owned by the applicant are not practicable under the section 404(b)(1) Guidelines.

Specifically, for those activities involving discharges of dredged or fill material affecting up to two acres into jurisdictional wetlands for:

(1) The construction or expansion of a single family home and attendant features, such as a driveway, garage, storage shed, or septic field;

(2) The construction or expansion of a barn or other farm building; or

(3) The expansion of a small business facility;

which are not otherwise covered by a general permit, it is presumed that alternatives located on property not currently owned by the applicant are not practicable under the section 404(b)(1) Guidelines. The Guidelines' requirements to appropriately and practicably minimize and compensate for any adverse environmental impacts of such activities remain.

*Discussion*

The Clean Water Act Section 404 regulatory program provides that the Army Corps of Engineers evaluate permit applications for the discharge of dredged or fill material into waters of the U.S., including wetlands, in accordance with regulatory requirements of the section 404(b)(1) Guidelines (Guidelines). The Guidelines are substantive environmental criteria used in evaluating discharges of dredged or fill material.

The Section 404(b)(1) Guidelines establish a mitigation sequence that provides a sound framework to ensure that the environmental impacts of permitted actions are acceptable. Under this framework, there is a three-step sequence for mitigating potential adverse impacts to the aquatic environment associated with a proposed discharge—first avoidance, then minimization, and lastly compensation for unavoidable impacts to aquatic resources.

The Guidelines' mitigation sequence is designed to establish a consistent approach to be used in ensuring that all practicable measures have been taken to reduce potential adverse impacts associated with proposed projects in wetlands and other aquatic systems. The Guidelines define the term "practicable" as "available and capable of being done [by the applicant] after taking into consideration cost, existing technology, and logistics in light of overall project purposes" (40 CFR 230.3(q)). The first step in the sequence requires the evaluation of potential alternative sites under § 230.10(a) of the Guidelines, to locate the proposed project so that aquatic impacts are avoided to the extent practicable.

This policy statement clarifies that, for the purposes of the alternatives analysis, it is presumed that practicable alternatives are limited to property owned by the permit applicant in circumstances involving certain small projects affecting less than two acres of non-tidal wetlands. This presumption is consistent with the practicability considerations required under the Guidelines and reflects the nature of the projects to which the presumption applies—specifically, the construction or expansion of a single

family home and attendant features, the construction or expansion of a barn or other farm building, or the expansion of a business. For such small projects that would solely expand an existing structure, the basic project purpose is so tied to the existing structures owned by the applicant, that it would be highly unusual that the project could be practicably located on other sites not owned by the applicant. In these cases, such as construction of driveways, garages, or storage sheds, or with home and barn additions, proximity to the existing structure is typically a fundamental aspect of the project purpose.

In the evaluation of potential practicable alternatives, the Guidelines do not exclude the consideration of sites that, while not currently owned by the permit applicant, could reasonably be obtained to satisfy the project purpose. However, it is the experience of the Army Corps of Engineers and EPA that areas not currently owned by the applicant have, in the great majority of circumstances, not been determined to be practicable alternatives in cases involving the small landowner activities described above. Cost, availability, and logistical and capability considerations inherent in the determination of practicability under the Guidelines have been the basis for this conclusion by the agencies.

The agencies recognize that the presumption characterized in this policy statement may be rebutted in certain circumstances. For example, a more thorough review of practicable alternatives would be warranted for individual sites comprising a subdivision of homes, if following issuance of this policy statement, a real estate developer subdivided a large, contiguous wetlands parcel into numerous parcels. In addition, the presumption is applicable to the expansion of existing small business facilities. Small businesses are typically confined to only one location and with economic and logistical limitations that generally preclude the availability of practicable alternative locations to meet their expansion needs. Conversely, larger businesses with multiple locations and greater resources are expected to consider opportunities to practicably avoid adverse aquatic impacts by evaluating off-site alternatives.

Finally, it is important to note that this presumption of practicable alternatives is intended to apply to the individual permit process. Alternatives are not evaluated for activities covered by general permits. Many activities related to the construction or expansion of a home, farm, or business, are already covered by a general permit. In addition, in conjunction with the issuance of this policy statement, a nationwide general permit authorizing discharges related to single family residential development is being proposed and will be available for public comment.

If you have any questions regarding this memorandum, please contact Gregory Peck of EPA's Wetlands Division at (202) 260-8794

or Michael Davis of the Corps of Engineer's Regulatory Branch at (202) 272-0199.

Robert Perciasepe

*Assistant Administrator for Water, U.S. Environmental Protection Agency.*

John Zirschky,

*Acting Assistant Secretary of the Army (Civil Works).*

### Regulatory Guidance Letter (RGL 96-1)

*Issued:* November 5, 1996, Expires: December 31, 2001.

*Subject:* Use of Nationwide Permit Number 23 for U.S. Coast Guard Categorical Exclusions.

1. We have concurred with the categorical exclusions (CE) enclosure submitted by the United States Coast Guard (Coast Guard) pursuant to the subject nationwide permit number 23 at 33 CFR part 330, including a notification requirement for CE numbers (6) and (8). The U.S. Army Corps of Engineers published the Coast Guard CEs in 61 FR 18573, April 26, 1996, for comment regarding the applicability of nationwide permit number 23 for those activities requiring Department of the Army authorization. This Regulatory Guidance Letter supersedes the Coast Guard CEs previously approved under nationwide permit number 23 in accordance with Regulatory Guidance Letter 83-5, dated April 18, 1983.

2. The Corps has conditioned the nationwide permit to require notification to the appropriate Corps office prior to beginning work under Coast Guard CE number (6) to address potential impacts to wetlands (notification is only required to the Corps for projects where wetland impacts are proposed) and number (8) to address potential impacts/encroachment on Federal navigation projects. The District Engineer will review the notification and will either verify whether the activity meets the terms and conditions of nationwide permit 23, will require evaluation under standard permit procedures, or that additional conditioning of the activity is necessary to ensure that no unacceptable adverse effects will result to wetlands for projects under CE number (8). Authorization of the Coast Guard CEs does not restrict the Division or District Engineers' authorities to exercise discretionary authority, or the Corps modification, suspension, or revocation procedures. Development of local procedures to streamline coordination is encouraged where a Corps division or district further conditions the nationwide permit to require a notification for additional activities.

3. It should be noted that the Coast Guard provided a complete listing of CEs, including many that do not require Department of the Army authorization. However, to reduce confusion when referencing the CE number, we have included all Coast Guard CEs in the enclosure.

4. This guidance expires December 31, 2001 unless sooner revised or rescinded.

For the Director of Civil Works.

Daniel R. Burns, P.E.,

*Chief, Operations, Construction, and Readiness Division, Directorate of Civil Works.*

### U.S. Coast Guard Categorical Exclusion List

The following is a consolidated list prepared from the U.S. Coast Guard **Federal Register** notices (59 FR 38654, July 29, 1994, 60 FR 32197, June 20, 1995, and 61 FR 13563, March 27, 1996). The list does not include the procedures the U.S. Coast Guard must follow to determine whether certain activities qualify for a categorical exclusion. Notification to the U.S. Army Corps of Engineers is required prior to initiation of work for activities conducted under numbers (6) (notification is only required to the Corps for projects when wetland impacts are proposed) and number (8).

1. Routine personnel, fiscal, and administrative activities, actions, procedures, and policies which clearly do not have any environmental impacts, such as military and civilian personnel recruiting, processing, paying, and record keeping.

2. Routine procurement activities and actions for goods and services, including office supplies, equipment, mobile assets, and utility services for routine administration, operation, and maintenance.

3. Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an existing approved disposal site.

4. Routine repair, renovation, and maintenance actions on aircraft and vessels.

5. Routine repair and maintenance of buildings, roads, airfields, grounds, equipment, and other facilities which do not result in a change in functional use, or an impact on a historically significant element or settings.

6. Minor renovations and additions to buildings, roads, airfields, grounds, equipment, and other facilities which do not result in a change in functional use, a historically significant element, or historically significant setting. (When wetland impacts are proposed, notification is required to the appropriate office of U.S. Army Corps of Engineers prior to initiation of work.)

7. Routine repair and maintenance to waterfront facilities, including mooring piles, fixed floating piers, existing piers, and unbundled power cables.

8. Minor renovations and additions to waterfront facilities, including mooring piles, fixed floating piers, existing piers, and unbundled power cables, which do not require special, site-specific regulatory permits. (Notification is required to the appropriate office of U.S. Army Corps of Engineers prior to initiation of work.)

9. Routine grounds maintenance and activities at units and facilities. Examples include localized pest management actions and actions to maintain improved grounds (such as landscaping, lawn care, and minor erosion control measures) that are conducted in accordance with applicable Federal, State, and local directives.

10. Installation of devices to protect human or animal life, such as raptor electrocution

prevention devices, fencing to restrict wildlife movement on to airfields, and fencing and grating to prevent accidental entry to hazardous areas.

11. New construction on heavily developed portions of Coast Guard property, when construction, use, and operation will comply with regulatory requirements and constraints.

12. Decisions to decommission equipment or temporarily discontinue use of facilities or equipment. This does not preclude the need to review decommissioning under Section 106 of the National Historic Preservation Act.

13. Demolition or disposal actions that involve buildings or structures when conducted in accordance with regulations applying to removal of asbestos, PCB's, and other hazardous materials, or disposal actions mandated by Congress. In addition, if the building or structure is listed, or eligible for listing, in the National Register of Historic Places, then compliance with Section 106 of the National Historic Preservation Act is required.

14. Outleasing of historic lighthouse properties as outlined in the Programmatic Memorandum of Agreement between the Coast Guard, Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers.

15. Transfer of real property from the Coast Guard to the General Services Administration, Department of the Interior, and other Federal departments and agencies, or as mandated by Congress; and the granting of leases, permits, and easements where there is no substantial change in use of the property.

16. Renewals and minor amendments of existing real estate licenses or grants for use of government-owned real property where prior environmental review has determined that no significant environmental effects would occur.

17. New grants or renewal of existing grants of license, easements, or similar arrangements for the use of existing rights-of-way or incidental easements complementing the use of existing rights-of-way for use by vehicles; for such existing rights-of-way as electrical, telephone, and other transmission and communication lines; water, wastewater, stormwater, and irrigation pipelines, pumping stations, and irrigation facilities; and for similar utility and transportation uses.

18. Defense preparedness training and exercises conducted on other than Coast Guard property, where the lead agency or department is not Coast Guard or Department of Transportation and the lead agency or department has completed its NEPA analysis and documentation requirements.

19. Defense preparedness training and exercise conducted on Coast Guard property that do not involve undeveloped property or increase noise levels over adjacent property and that involve a limited number of personnel, such as exercises involving primarily electric simulation or command post personnel.

20. Simulated exercises, including tactical and logistical exercises that involve small numbers of personnel.

21. Training of an administrative or classroom nature.

22. Operations to carry out maritime safety, maritime law enforcement, search and rescue, domestic ice breaking, and oil or hazardous substance removal programs.

23. Actions performed as a part of Coast Guard operations and the Aids to Navigation Program to carry out statutory authority in the area of establishment of floating and minor fixed aids to navigation, except electronic sound signals.

24. Routine movement of personnel and equipment, and the routine movement, handling, and distribution of nonhazardous materials and wastes in accordance with applicable regulations.

25. Coast Guard participation in disaster relief efforts under the guidance or leadership of another Federal agency that has taken responsibility for NEPA compliance.

26. Data gathering, information gathering, and studies that involve no physical change to the environment. Examples include topographic surveys, bird counts, wetland mapping, and other inventories.

27. Natural and cultural resource management and research activities that are in accordance with interagency agreements and which are designed to improve or upgrade the Coast Guard's ability to manage those resources.

28. Contracts for activities conducted at established laboratories and facilities, to include contractor-operated laboratories and facilities, on Coast Guard-owned property where all airborne emissions, waterborne effluents, external radiation levels, outdoor noise, and solid and bulk waste disposal practices are in compliance with existing applicable Federal, State, and local laws and regulations.

29. Approval of recreational activities (such as Coast Guard unit picnic) which do not involve significant physical alteration of the environment, increase disturbance by humans of sensitive natural habitats, or disturbance of historic properties, and which do not occur in, or adjacent to, areas inhabited by threatened or endangered species.

30. Review of documents, such as studies, reports, and analyses, prepared for legislative proposals that did not originate in DOT and that relate to matters that are not the primary responsibility of the Coast Guard.

31. Planning and technical studies which do not contain recommendations for authorization or funding for future construction, but may recommend further study. This includes engineering efforts or environmental studies undertaken to define the elements of a proposal or alternatives sufficiently so that the environmental effects may be assessed and does not exclude consideration of environmental matters in the studies.

32. Bridge Administration Program actions which can be described as one of the following:

(a) Modification or replacement of an existing bridge on essentially the same alignment or location. Excluded are bridges with historic significance or bridges providing access to undeveloped barrier islands and beaches. (Approach fills regulated by the U.S. Army Corps of Engineers under Section 404 of the Clean

Water Act will require a separate individual or general permit.)

(b) Construction of pipeline bridges for transporting potable water.

(c) Construction of pedestrian, bicycle, or equestrian bridges and stream gauging cableways used to transport people.

(d) Temporary replacement of a bridge immediately after a natural disaster or a catastrophic failure for reasons of public safety, health, or welfare.

(e) Promulgation of operating regulations or procedures for drawbridges.

(f) Identification of advance approval waterways under 33 CFR 115.70.

(g) Any Bridge Program action which is classified as a CE by another Department of Transportation agency acting as lead agency for such action.

34. Preparation of guidance documents that implement, without substantive change, the applicable Commandant Instruction or other Federal agency regulations, procedures, manuals, and other guidance documents.

(a) Regulations which are editorial or procedural, such as those updating addresses or establishing application procedures.

(b) Regulations concerning internal agency functions or organization or personnel administration, such as funding, establishing Captain of the Port boundaries, or delegating authority.

(c) Regulations concerning the training, qualifying, licensing, and disciplining of maritime personnel.

(d) Regulations concerning manning, documentation, admeasurement, inspection, and equipping of vessels.

(e) Regulations concerning equipment approval and carriage requirements.

(f) Regulations establishing, disestablishing, or changing the size of Special Anchorage Areas or anchorage grounds.

(g) Regulations establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones.

(h) Special local regulations issued in conjunction with a regatta or marine parade; provided that, if a permit is required, the environmental analysis conducted for the permit included an analysis of the impact of the regulations.

(I) Regulations in aid of navigation, such as those concerning rules of the road, International Regulations for the Prevention of Collisions at Sea (COLREGS), bridge-to-bridge communication, vessel traffic services, and marking of navigation systems.

35. Approvals of regatta and marine event permits for the following events:

(a) Events that are not located in, proximate to, or above an area designated as environmentally sensitive by an environmental agency of the Federal, State, or local government. For example, environmentally sensitive areas may include such areas as critical habitats or migration routes for endangered or threatened species or important fish or shellfish nursery areas.

(b) Events that are located in, proximate to, or above an area designated as environmentally sensitive by an environmental agency of the Federal, State, or local government and for which the Coast

Guard determines, based on consultation with the Government agency, that the event will not significantly affect the environmentally sensitive area.

#### Regulatory Guidance Letter (RGL 96-02)

*Issued:* December 12, 1996, Expires: December 31, 2001.

*Subject:* Applicability of Exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands.

1. Enclosed is a memorandum to the field jointly signed by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. The memorandum provides guidance clarifying when "deep-ripping" activities within wetlands require Department of the Army authorization.

2. This guidance expires December 31, 2001, unless sooner revives or rescinded.

For the Director of Civil Works.

Daniel R. Burns, P.E.,

*Chief, Operations, Construction and Readiness Division, Directorate of Civil Works.*

Department of the Army, U.S. Army Corps of Engineers, United States Environmental Protection Agency

#### Memorandum to the Field

December 12, 1996.

*Subject:* Applicability of Exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands.

*Purpose:* The purpose of this memorandum is to clarify the applicability of exemptions provided under Section 404(f) of the Clean Water Act (CWA) to discharges associated with "deep-ripping" and related activities in wetlands.<sup>1</sup>

<sup>1</sup> As this guidance addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with experts at the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service.

#### Background

1. 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).

2. 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."

3. 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.

4. EPA and Corps regulations (40 CFR part 230 and 33 CFR part 320) and preamble define in some detail the specific "normal" activities listed in Section 404(f)(1)(A). Three points may be useful in the current context:

a. As explained in the preamble to the 1979 proposed regulations, the words "such as" have been consistently 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." (44 FR 34264).

b. Plowing is specifically defined in the regulations not to include the redistribution of surface material in a manner which converts wetlands areas to uplands (See 40 CFR 233.35(a)(1)(iii)(D)).

c. Discharges associated with activities that establish an agricultural operation in wetlands where previously ranching had been conducted, represents a "change in use" within the meaning of Section 404(f)(2). Similarly, discharges that establish forestry practices in wetlands historically subject to agriculture also represent a change in use of the site (See 40 CFR 233.35(c)).

5. The statute includes a provision at Section 404(f)(2) that "recaptures" or reestablishes the permit requirement for those otherwise exempt discharges which:

a. Convert an area of the waters of the U.S. to a new use, and

b. Impair the flow or circulation of waters of the U.S. or reduce the reach of waters of the U.S.

Conversion of an area of waters of the U.S. to uplands triggers both provisions (a) and (b) above. Thus, at a minimum any otherwise exempt discharge that results in the conversion of waters of the U.S. to upland is recaptured under Section 404(f)(2) and requires a permit. 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 foreseeably bring about that result. Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

#### Issue

1. Questions have been raised involving "deep-ripping" and related activities in wetlands and whether discharges associated with these actions fall within the exemptions at Section 404(f)(1)(A). In addition, the issue has been raised whether, if such activities fall within the exemption, they would be recaptured under Section 404(f)(2).

2. "Deep-ripping" is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface. As such it requires the use of heavy equipment, including bulldozers, equipped with ripper-blades, shanks, or chisels often several feet in length. Deep-ripping and related activities involve extending the blades to appropriate depths and dragging them through the soil to break up the restrictive layer.

3. Conversely, plowing is defined in EPA and Corps regulations (40 CFR part 230 and 33 CFR part 320) as "all forms of primary tillage \* \* \* used \* \* \* for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops" (40 CFR 232.3(d)(4)). As a general matter, normal plowing activities involve the annual or at least regular, preparation of soil prior to seeding or other planting activities.

According to USDA, plowing generally involves the use of a blade, chisel or series of blades, chisels, or discs, usually 8-10 inches in length pulled behind a farm vehicle to prepare the soil for the planting of annual crops or to support an ongoing farming practice. Plowing is commonly used to break up the surface of the soil to maintain soil tilth and to facilitate infiltration throughout the upper root zone.

#### Discussion

1. Plowing in wetlands is exempt from regulation consistent with the following circumstances:

a. It is conducted as part of an ongoing, established Agricultural, silvicultural or ranching operation; and

b. The activity is consistent with the definition of plowing in EPA and Corps regulations (40 CFR part 230 and 33 CFR part 320); and

c. The plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters.

2. Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., discing, harrowing) with regard to the purposes and circumstances under which it is conducted, the nature of the equipment that is used, and its effect, including in particular the impacts to the hydrology of the site.

a. Deep-ripping and related activities are commonly conducted to depths exceeding 16 inches, and as deep as 6-8 feet below the soil surface to break restrictive soil layers and

improve water drainage at sites that have not supported deeper rooting crops. Plowing depths, according to USDA, rarely exceed one foot into the soil and not deeper than 16 inches without the use of special equipment involving special circumstances. As such, deep-ripping and related activities typically involve the use of special equipment, including heavy mechanized equipment and bulldozers, equipped with elongated ripping blades, shanks, or chisels often several feet in length. Moreover, while plowing is generally associated with ongoing operations, deep-ripping and related activities are typically conducted to prepare a site for establishing crops not previously planted at the site. Although deep-ripping may have to be redone at regular intervals in some circumstances to maintain proper soil drainage, the activity is typically not an annual or routine practice.

b. Frequently, deep-ripping and related activities are conducted as a preliminary step for converting a "natural" system or for preparing rangeland for a new use such as farming or silviculture. In those instances, deep ripping and related activities are often required to break up naturally-occurring impermeable or slowly permeable subsurface soil layers to facilitate proper root growth. For example, for certain depressional wetlands types such as vernal pools, the silica-cemented hardpan (durapan) or other restrictive layer traps precipitation and seasonal runoff creating ponding and saturation conditions at the soil surface. The presence of these impermeable or slowly permeable subsoil layers is essential to support the hydrology of the system. Once these layers are disturbed by activities such as deep-ripping, the hydrology of the system is disturbed and the wetland is often destroyed.

c. In contrast, there are other circumstances where activities such as deep-ripping and related activities are a standard practice of an established on-going farming operation. For example, in parts of the Southeast, where there are deep soils having a high clay content, mechanized farming practices can lead to the compaction of the soil below the sod surface. It may be necessary to break up, on a regular although not annual basis, these restrictive layers in order to allow for normal root development and infiltration. Such activities may require special equipment and can sometimes occur to depths greater than 16 inches. However, because of particular physical conditions, including the presence of a water table at or near the surface for part of the growing season, the activity typically does not have the effect of impairing the hydrology of the system or otherwise altering the wetland characteristics of the site.

#### Conclusion

1. When deep-ripping and related activities are undertaken as part of an established ongoing agricultural silvicultural or ranching operation, to break up compacted soil layers and where the hydrology of the site will not be altered such that it would result in conversion of waters of the U.S. to upland, such activities are exempt under Section 404(f)(1)(A).

2. 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):

(a) 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.

(b) 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.

3. It is the agencies' experience that certain wetland types are particularly vulnerable to hydrological alteration as a result of deep-ripping and related activities. Depressional wetland systems such as prairie potholes, vernal pools and playas whose hydrology is critically dependent upon the presence of an impermeable or slowly permeable subsoil layer are particularly sensitive to disturbance or alteration of this subsoil layer. Based upon this experience, the agencies have concluded that, as a general matter, deep-ripping and similar practices, consistent with the descriptions above, conducted in prairie potholes, vernal pools, playas, and similar depressions wetlands destroy the hydrological integrity of these wetlands. In these circumstances, deep-ripping in prairie potholes, vernal pools, and playas is recaptured under Section 404(f)(2) and requires a permit under the Clean Water Act.

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[FR Doc. 99-6892 Filed 3-19-99; 8:45 am]

BILLING CODE 3710-92-P

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Acting Leader, Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before May 21, 1999.

**ADDRESSES:** Written comments and requests for copies of the proposed information collection requests should

be addressed to Patrick J. Sherrill, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202-4651, or should be electronically mailed to the internet address *Pat—Sherrill@ed.gov*, or should be faxed to 202-708-9346.

**FOR FURTHER INFORMATION CONTACT:**

Patrick J. Sherrill (202) 708-8196.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Leader, Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 16, 1999.

**Joseph Schubart,**

*Acting Leader, Information Management Group, Office of the Chief Information Officer.*

### Office of Postsecondary Education

*Type of Review:* New.

*Title:* Upward Bound, Upward Bound Math/Science, and Veterans Upward Bound Programs Annual Performance Report.

*Frequency:* Annually.

*Affected Public:* Not-for-profit institutions; State, local or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Burden:*

Responses: 810.

Burden Hours: 4,680.

*Abstract:* Upward Bound grantees must annually submit this report so the Department can evaluate the performance of grantees prior to awarding continuation grants and to assess a grantee's prior experience at the end of each budget period. The Department will also aggregate the data to provide descriptive information impact.

This performance report replaces the EDGAR based collection the Department has been receiving.

### Office of the Under Secretary

*Type of Review:* New.

*Title:* Study of State Agency Activities Under Title I, Part D of Elementary and Secondary Education Act, as Amended.

*Frequency:* One-time only.

*Affected Public:* State, local or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 100.

Burden Hours: 100.

*Abstract:* ED requires nationally representative information on the Title I, Part D, Subpart 1 program, as reauthorized by the Improving America's Schools Act of 1994, to develop a descriptive profile useful in ongoing program improvement efforts and in updating performance indicators for the program in compliance with the Government Performance and Results Act of 1993. ED will collect data from the universe of state agencies with administrative responsibility for the program through a mail survey. Respondent agencies will include State Educational Agencies, Departments of Corrections, Youth Services Agencies, Correctional School Districts, and other state agencies.

[FR Doc. 99-6844 Filed 3-19-99; 8:45 am]

BILLING CODE 4000-01-P