



**U.S. Environmental Protection Agency and U.S. Department of the Army
Interpretive Rule Regarding the Applicability of
Clean Water Act Section 404(f)(1)(A)**

SUBJECT: Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices.

PURPOSE: The purpose of this interpretive rule is to clarify the applicability of the exemption from permitting provided under section 404(f)(1)(A) of the Clean Water Act (CWA) to discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service (NRCS) conservation practice standards that are designed and implemented to protect and enhance water quality.¹

BACKGROUND:

Section 404(f)(1)(A) of the CWA exempts from permit requirements certain discharges associated with normal farming, silviculture, and ranching activities in waters of the United States, including wetlands. It is important to emphasize that this interpretive rule identifies additional activities considered exempt from permitting under section 404(f)(1)(A), but does not affect, in any manner, the scope of agriculture, silviculture, and ranching activities currently exempt from permitting under section 404(f)(1)(A) including, for example, plowing, seeding, cultivation, minor drainage, etc.

Section 404(f)(1)(A) does not provide an automatic exemption for all discharges related to farming, silvicultural or ranching practices. Rather, Section 404(f)(1) exempts only those discharges associated with activities specifically identified in subparagraphs (A) through (F), and "other activities of essentially the same character as named" (44 FR 34264). 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." This interpretive rule further clarifies the scope of this statutory exemption.

¹ As this interpretation addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with the U.S. Department of Agriculture (USDA).

Section 404(f)(1)(A) is limited to discharges associated with activities listed in the statute and defined by the agencies' regulations and that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation" (40 CFR 232.3(c)(1)(ii)(A); 33 CFR 323.4(a)(1)(ii)). This "established" requirement reconciles the dual intent reflected in the legislative history that although section 404 should not unnecessarily restrict farming, silviculture, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.²

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) regulations (40 CFR 230 and 33 CFR 320) and preamble to these regulations provide additional detail on "normal" activities listed in section 404(f)(1)(A). The words "such as" have been consistently interpreted as meaning the section applies "to the activities named in the statute and other activities of essentially the same character as named," and "preclude[s] the extension of the exemption ... to activities that are unlike those named." (44 FR 34264).

INTERPRETATION FOR CERTAIN CONSERVATION PRACTICES:

USDA and NRCS's natural resources conservation programs help people reduce soil erosion, enhance water supplies, improve water quality, increase wildlife habitat, and reduce damages caused by floods and other natural disasters. These longstanding USDA programs are effective in promoting the water quality and broader environmental goals identified in both the Food Security Act and Clean Water Act. The agencies believe working together to improve the consistency and integration of programs like these is fully consistent with the law, promotes the mutual objectives of our regulations and statutes, and increases clarity and predictability for the agriculture community. The result is good for the nation's waters and for farmers and foresters who want to protect the resources on their lands.

In light of the longstanding adoption of these agricultural conservation practices and their goal of protecting and enhancing water quality, the section 404(f)(1)(A) exemption is interpreted to cover certain agricultural conservation practices as "normal farming" activities. Normal farming necessarily includes conservation and protection of soil, water and related resources in order to sustain agricultural productivity, along with other benefits to environmental quality and continued economic development. "Upland soil and water conservation practices" are explicitly identified in the statute as "normal" farming activities, and conservation activities within the waters of the U.S. that include discharges in waters of the U.S. and that are designed to protect and enhance the waters of the U.S. have been determined to be of essentially the same character. As the statute does not limit the exemption to only those activities explicitly listed, it is reasonable to conclude that agricultural conservation practices that are associated with waters and where water quality benefits accrue are similar enough to also be exempt from the section 404 permitting requirements. This interpretation preserves congressional intent by ensuring that beneficial agricultural conservation practices will not be unnecessarily restricted so long as those activities are designed and implemented to protect and enhance water quality and do not destroy waters.

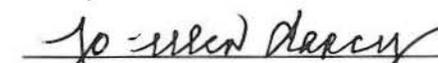
² This interpretive rule does not affect section 404(f)(2) of the CWA.

Specific NRCS agricultural conservation practices, identified by the EPA, the Army, and USDA, that could include the discharge of dredged or fill material in a waters of the U.S. for the purposes of benefitting those waters are appropriately considered "normal farming" activities and exempt from permitting under Section 404(f)(1)(A). To qualify for this exemption, the activities must be part of an "established (i.e., ongoing) farming, silviculture, or ranching operation," consistent with the statute and regulations. The activities must also be implemented in conformance with NRCS technical standards. So long as these activities are implemented in conformance with NRCS technical standards, there is no need for a determination of whether the discharges associated with these activities are in "waters of the United States" nor is site-specific pre-approval from either the Corps or the EPA necessary before implementing these specified agricultural conservation practices. The EPA, the Army, and USDA will enter into a Memorandum of Agreement to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices and activities that may include discharges in waters of the United States that would qualify under the exemption established by section 404(f)(1)(A).



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