Regulatory Guidance Letter 90-05

SUBJECT: Landclearing Activities Subject to Section 404 Jurisdiction

DATE: 18 July 1990 EXPIRES: 31 December 1992

1. The purpose of this guidance is to interpret the statutory and regulatory definitions of "discharge of a pollutant" (CWA section 502(12) and 33 CFR 327.2(f)) to the effect that land- clearing activities using mechanized equipment such as backhoes or bulldozers with sheer blades, rakes, or discs constitute point source discharges and are subject to section 404 jurisdiction when they take place in wetlands which are waters of the United States.

2. In Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 - 24 (5th Cir.1983) the court stated that the term "discharge" may reasonably be understood to include "redeposit" and concluded that the term "discharge" covers the redepositing of soil taken from wetlands such as occurs during mechanized landclearing activities. Although the court in Avoyelles did not decide whether all landclearing activities constitute a discharge, it is our position that mechanized landclearing activities in jurisdictional wetlands result in a redeposition of soil that is subject to regulation under section 404. Some limited exceptions may occur, such as cutting trees above the soil's surface with a chain saw, but as a general rule, mechanized landclearing is a regulated activity.

3. As with any discharge subject to section 404, each case must be reviewed to determine if the discharge qualifies for a regional or nationwide permit, or for an exemption under section 404(f). This guidance is not intended to alter the exemptions for normal farming or silviculture activities under section 404(f).

4. This interpretation alters in some respects the guidance provided by previous Regulatory Guidance Letters (RGLs) on Landclearing (in particular RGL 85-4) and FOAs should exercise appropriate enforcement discretion with regard to properties whose owners have previously been informed that no permit is required for such landclearing based on the prior RGLs. The guidance in this RGL should apply to property which has not been cleared, unless the owner can demonstrate that he has committed substantial resources towards the clearing, in reliance on earlier Corps guidance, to the extent that it would be inequitable to apply this guidance.

5. This guidance expires on 31 December 1992 unless sooner modified or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

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