

Reference: RGL 82-02

Subject: WETLANDS

Title: CLARIFICATION OF "NORMAL CIRCUMSTANCES" IN THE WETLAND DEFINITION

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Description: DEFINES NORMAL CIRCUMSTANCES, CONVERTED WETLANDS, AND ABNORMAL PRESENCE OF AQUATIC VEGETATION

1. This letter will serve as guidance regarding Corps policy on land-use conversion as it concerns regulatory jurisdiction. Specifically, the guidance addresses situations involving changes in the physical characteristics of a wetland which cause the area no longer to be a part of "waters of the United States" for purposes of the Section 404 regulatory program.

2. The current definition of "waters of the United States" delineates "wetlands" as follows, at 33 CFR 323.2: The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The regulations now in force cover the actual discharge of dredged or fill material into "wetlands," as they are a part of the "waters of the United States." However, these regulations do not discuss what effect the conversion of a wetland to other uses (i.e. agricultural) has upon regulatory jurisdiction, once the land-use conversion has been accomplished.

3. Nonetheless, the preamble to the current (1977) regulations does indicate some basic parameters of the intended scope of regulatory jurisdiction. In discussing the newly revised definition of wetlands, the preamble contains the following statements, at p. 37128 of the Federal Register vol. 42, no. 138:

Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation.

Furthermore, the following remarks are made in reference to the substitution of "under normal circumstances" for "normally" in the new definition:

We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes.

The discussion on the definition of wetlands concludes with these observations, at p. 37129:

Finally, to respond to those who expressed concern that our definition of "wetlands" may be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation, we have listed swamps, bogs, and marshes at the end of this definition to further clarify our intent to include only truly aquatic areas. (emphasis added).

4. It is important to note the following qualification found at p. 37128 of the Federal Register vol. 42, no. 138:

The use of the word "normally" in the old definition generated a great deal of confusion. The term was included in the definitions to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several such instances of destruction of aquatic vegetation in order to eliminate Section 404 jurisdiction actually have occurred. However, even if this destruction occurs, the area still remains as part of the overall aquatic system intended to be protected by the Section 404 program. Conversely, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program. (emphasis added).

This policy remains in effect, regardless of the substitution of "under normal circumstances" for "normally."

5. Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such "natural circumstances" are not what is meant by "normal circumstances" in the definition quoted above. "Normal circumstances" is determined on the basis of actual, present use of an area. Thus, it is the Corps' policy that once a wetland area has been converted to another use which alters its wetland characteristics to where it is no longer a "water of the United States," that area will no longer come under the Corps' regulatory jurisdiction. However, if the area is abandoned and over time in fact reverts to "wetlands" meeting our definition at 33 CFR 323.2(c), then the Corps' regulatory jurisdiction has been restored.

6. This policy is applicable to Section 404 authority only, not to Section 10.

7. This guidance expires 31 December 1984 unless sooner revised or rescinded.

FOR THE COMMANDER: