

Regulatory Guidance Letter 85-04

SUBJECT: Agricultural Conversion

TITLE: Avoyelles

DATE: March 29, 1985

EXPIRES: December 31, 1987

1. This guidance interprets a Fifth Circuit Court of Appeals decision regarding 404 jurisdiction over land clearing activities.
2. Except as provided for in paragraphs 4-6 below, the general rule from the Fifth Circuit's decision in [Avoyelles Sportsmen's League v. Marsh](#), 715 F.2d 897 (5th Cir. 1983), to be implemented nationwide, is the following. Cutting, windrowing, or other landclearing activities with mechanized equipment such as backhoes or bulldozers with sheer blades, rakes, or discs constitute point source discharges which must be authorized by a Corps individual or general permit if:
 - a. the activity takes place in a water of the United States; and
 - b. the activity would involve burying logs or burying burn residue, or totally or partially filling in sloughs or low areas, or leveling the land; and
 - c. the activity is not exempted from Section 404 requirements by Section 404(f) or Section 404(r).

In addition, the side casting of material into waters of the United States from the construction of ditches requires a 404 permit unless exempted by Section 404(f) or Section 404(r).

3. Even if a landowner asserts that any filling, leveling, or burying would be merely incidental to his proposed landclearing, the district commander may still determine that those activities will be regulated under Section 404. Therefore, for the purpose of determining whether material moved, deposited, or re-deposited during landclearing operations is "fill material" under 33 CFR 323.2(k), the primary purpose of any such proposed activity will be determined by the district commander through his independent evaluation of the proposal. If the district commander determines that an activity is designed to replace aquatic areas with dry land or to raise the bottom elevation of a waterbody, then that activity will be understood to meet the primary purpose test.
4. The Fifth Circuit did not decide whether de minimis discharges of dredged or fill material are exempt from the permit requirement. The activities in the Avoyelles case did not involve a de minimis discharge because sufficient quantities of fill material were discharged to totally or partially fill in sloughs or level the land. Therefore, the court's

decision does not alter the current Corps policy stating that permits are not required for de minimis discharges (see RGL 84-1). Each landclearing operation in a water of the United States should be evaluated to determine if more than de minimis discharges would take place; if so, a permit would be required.

5. The court did not decide whether the mere removal of vegetation from the land constitutes a discharge, nor did it decide whether removal of vegetation from the surface or subsurface (grubbing) is dredging. Therefore, the court's decision does not change the Corps policy that a permit is not required for the mere removal of vegetation from the land.

6. The felling of a tree in a water of the United States is not a 404 discharge. Piling of trees, brush and stumps with de minimis amounts of soil attached to the roots or gathered in the piling operation is not necessarily a 404 discharge unless it would totally or partially fill in sloughs or level the land. Filling stump holes is normally a de minimis discharge because of the de minimis nature of the incidental soil movement. Discing, plowing, or raking of the soil surface is not necessarily a 404 discharge (see last sentence of 33 CFR 323.2(j) and (1)) unless it would totally or partially fill in sloughs or level the land to more than a de minimis degree.

FOR THE CHIEF OF ENGINEERS: