

Regulatory Guidance Letter 92-02

SUBJECT: Water Dependency and Cranberry Production

DATE: June 26, 1992 EXPIRES: December 31, 1995

1. Enclosed for implementation is a joint Army Corps of Engineers/Environmental Protection Agency Memorandum to the Field on water dependency and cranberry production. This guidance was developed jointly by the Army Corps of Engineers and the U.S. Environmental Protection Agency.

2. This guidance will expire 31 December 1995 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

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MEMORANDUM TO THE FIELD

SUBJECT: Water Dependency and Cranberry Production

1. The purpose of this memorandum is to clarify the applicability of the Section 404(b)(1) Guidelines water dependency provisions (40 CFR 230.10(a)) to the cultivation of cranberries, in light of Army Corps of Engineers (Corps) regulations at 33 CFR 323.4(a)(1)(iii)(C)(1)(ii) and (iii), and Environmental Protection Agency (EPA) regulations at CFR 232.3(d)(3)(i)(B) and (C). These sections of the Corps and EPA regulations state, among other things, that cranberries are a wetland crop, and that some discharges associated with cranberry production are considered exempt from regulation under the provisions of Section 404(f) of the Clean Water Act. The characterization of cranberries as a wetland crop has led to inconsistency in determining if cranberry production is a water dependent activity as defined in the Section 404(b)(1) Guidelines (Guidelines).

2. The intent of Corps regulations at 33 CFR 320.4(b) and of the Guidelines is to avoid the unnecessary destruction or alteration of waters of the U.S., including wetlands, and to compensate for the unavoidable loss of such waters. The Guidelines specifically require that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the

aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences" (see 40 CFR 230.10(a)). Based on this provision, an evaluation is required in every case for use of non-aquatic areas and other aquatic sites that would result in less adverse impact to the aquatic ecosystem, irrespective of whether the discharge site is a special aquatic site or whether the activity associated with the discharge is water dependent. A permit cannot be issued, therefore, in circumstances where an environmentally preferable practicable alternative for the proposed discharge exists (except as provided for under Section 404(b)(2)).

3. For proposed discharges into wetlands and other "special aquatic sites," the Guidelines alternatives analysis requirement further considers whether the activity associated with the proposed discharge is "water dependent". The Guidelines define water dependency in terms of an activity requiring access or proximity to or siting within a special aquatic site to fulfill its basic project purpose. Special aquatic sites (as defined in 40 CFR 230.40-230.45) are: **(1)** sanctuaries and refuges; **(2)** wetlands; **(3)** mud flats; **(4)** vegetated shallows; **(5)** coral reefs; and **(6)** riffle and pool complexes. If an activity is determined not to be water dependent, the Guidelines establish the following two presumptions (40 CFR 230.10(a)(3)) that the applicant is required to rebut before satisfying the alternatives analysis requirements:

- a. that practicable alternatives that do not involve special aquatic sites are presumed to be available; and,
- b. that all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem.

It is the responsibility of the applicant to clearly rebut these presumptions in order to demonstrate compliance with the Guidelines alternatives test.

4. If an activity is determined to be water dependent, the rebuttable presumptions stated in paragraph 3 of this memorandum do not apply. However, the proposed discharge, whether or not it is associated with a water dependent activity, must represent the least environmentally damaging practicable alternative in order to comply with the alternatives analysis requirement of the Guidelines as described in paragraph 2 of this memorandum.

5. As previously indicated, Corps and EPA regulations consider cranberries as a wetland crop species. This characterization of cranberries as a wetland crop species is based primarily on the listing of cranberries as an obligate hydrophyte in the National List of Plant Species That Occur in Wetlands (U.S. Fish and Wildlife Service Biological Report 88(26.1 - 26.13)) and the fact that cranberries must be grown in wetlands or areas altered to create a wetland environment. Therefore, the Corps and EPA consider the construction of cranberry beds, including associated dikes and water control structures associated with dikes (i.e., headgates, weirs, drop inlet structures), to be a water dependent activity. Consequently, discharges directly associated with cranberry bed construction are not subject to the presumptions applicable to non-water dependent activities discussed in paragraph 3 of this memorandum. However, consistent with the requirements of Section

230.10(a), the proposed discharge must represent the least environmentally damaging practicable alternative, after considering aquatic and non-aquatic alternatives as appropriate. To be considered practicable, an alternative must be available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. For commercial cranberry cultivation, practicable alternatives may include upland sites with proper characteristics for creating the necessary conditions to grow cranberries. Factors that must be considered in making a determination of whether or not upland alternatives are practicable include soil pH, topography, soil permeability, depth to bedrock, depth to seasonal high water table, adjacent land uses, water supply, and, for expansion of existing cranberry operations, proximity to existing cranberry farms. EPA Regions and Corps Districts are encouraged to work together with local cranberry growers to refine these factors to reflect their regional conditions.

6. In contrast, the following activities often associated with the cultivation and harvesting of cranberries are not considered water dependent: construction of roads, ditches, reservoirs, and pump houses that are used during the cultivation of cranberries, and construction of secondary support facilities for shipping, storage, packaging, parking, etc. Therefore, the rebuttable practicable alternatives presumptions discussed in paragraph 3 of this memorandum apply to the discharges associated with these non-water dependent activities. However, since determinations of practicability under the Guidelines includes consideration of cost, technical, and logistics factors, determining the availability of practicable alternatives to discharges associated with these non-water dependent activities must involve consideration of the need of an alternative to be proximate to the cranberry bed in order to achieve the basic project purpose of cranberry cultivation. Once it has been determined that the location of the cranberry bed, including associated dikes, and water control structures, represents the least environmentally damaging practicable alternative, practicable alternatives for maintenance roads, ditches, reservoirs and pump houses will generally be limited to the bed itself and the area in the vicinity of the actual bed. For example, the bed dikes may be the only practicable alternative for location of maintenance roads. When practicable alternatives cannot be identified within such geographic constraints, the applicant must minimize the impacts of the roads, reservoirs, etc., to the maximum extent practicable.

7. During review of applications for discharges associated with cranberry cultivation, it is important to reiterate that proposed discharges must also comply with the other requirements of the Guidelines (i.e., 40 CFR 230.10(b),(c) and (d)). In addition, evaluations of all discharges, whether or not the proposed discharge is associated with a water dependent activity, must comply with the provisions of the National Environmental Policy Act, including an investigation of alternatives to the proposed discharge. Further, applications for discharges associated with cranberry cultivation will continue to be evaluated in accordance with current Corps and EPA policy and practice concerning mitigation, cumulative impact analysis, and public interest review factors.

8. This guidance expires 31 December 1995 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

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