

REGULATORY OVERVIEW

Robert Huff¹

Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. Under the CWA, it is unlawful to discharge dredged or fill material into waters of the United States without first receiving authorization from the Corps, unless the discharge is covered under an exemption.

The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972. “Clean Water Act” became the Act’s common name with amendments in 1977. The amendments included a set of six exemptions from permitting requirements, which can be found under Section 404(f) of the CWA.

One of the six exemptions from permitting requirements listed under Section 404(f) of the CWA is normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products. To qualify under this exemption, the activity must be part of an established (i.e. ongoing) farming, silviculture, or ranching operation and not be part of an activity whose purpose is to convert an area of waters of the United States into a use to which it was not previously subject (i.e. change of use, silviculture to farming), and/or the immediate or gradual conversion of a wetland to a non-wetland. If a change of use occurs and the activity impairs the flow or circulation of waters of the U.S., that activity shall be required to have a permit under Section 404(f)(2) of the CWA, commonly referred to as the “recapture provision.”

¹Forester, US Army Corps of Engineers, Conway, SC 29526

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