



**JOINT MEMORANDUM TO THE FIELD BETWEEN
THE U.S. DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS AND
THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING
EXEMPT CONSTRUCTION OR MAINTENANCE OF IRRIGATION DITCHES AND
EXEMPT MAINTENANCE OF DRAINAGE DITCHES UNDER
SECTION 404 OF THE CLEAN WATER ACT**

I. INTRODUCTION

The U.S. Army Corps of Engineers (“Corps”) and the U.S. Environmental Protection Agency (“EPA”) (together, “the agencies”), implement Section 404 of the Clean Water Act (“CWA”).¹ Section 404 of the CWA regulates the discharge of dredged or fill material into the navigable waters, which the CWA defines as “waters of the United States, including the territorial seas.” 33 U.S.C. 1344 and 1362. The agencies are signing this memorandum to provide a clear, consistent approach regarding the application of the exemptions from regulation under Section 404(f)(1)(C) of the CWA for the construction or maintenance of irrigation ditches and for the maintenance of drainage ditches (“ditch exemptions”).

This memorandum supersedes previous Corps Regulatory Guidance Letter (“RGL”) 07-02, which superseded RGL 87-07. In an effort to provide greater clarity, this memorandum defines the following terms for purposes of implementing the ditch exemptions: “irrigation ditch,” “drainage ditch,” “construction,” and “maintenance.” This memorandum also provides a framework for determining the applicability of the ditch exemptions and the “recapture provision” in CWA Section 404(f)(2).

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

II. BACKGROUND

a. Under Section 404(f)(1)(C) of the CWA (*see also* 33 CFR 323.4(a)(3) and 40 CFR 232.3(c)(3)), discharges of dredged or fill material for the purpose of construction or maintenance of jurisdictional irrigation ditches, or the maintenance (but not construction) of jurisdictional drainage ditches, are not prohibited by or otherwise subject to regulation under Section 404 of the CWA (*i.e.*, these activities are exempt from the need to obtain a Section 404 permit).

¹ In a 1979 opinion, the U.S. Attorney General Benjamin R. Civiletti determined that EPA has the ultimate responsibility for interpreting the CWA Section 404(f) exemptions. *See* 43 Op. Att’y Gen. 197 (Sept. 5, 1979), <https://www.epa.gov/cwa-404/1979-civiletti-memorandum-under-cwa-section-404f>. Attorney General Civiletti stated that it is the EPA Administrator who has general responsibility under the Act (33 U.S.C. 1251(d)), and who has general authority to prescribe regulations (33 U.S.C. 1361(a)).

b. Section 404(f)(2) of the CWA states that “[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.” This is commonly referred to as the “recapture provision”; see paragraph c of this section for the regulations implementing this provision.

c. Under 33 CFR 323.4(c) and 40 CFR 232.3(b), exemptions under 33 CFR 323.4(a)(1)-(6) and 40 CFR 232.3(c)(1)-(6) do not apply if the discharge into a water of the United States “is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.”

III. DEFINITIONS

a. On April 21, 2020, the agencies promulgated a definition of the term “ditch,” to mean “a constructed or excavated channel used to convey water.” 85 FR 22250. The agencies believe that a clear definition of this term is useful in the context of the ditch exemptions independent of the regulatory text defining “waters of the United States,” and therefore this same definition is hereby adopted for the purpose of this memorandum. However, when referred to in this memorandum, the term “ditch” specifically refers to irrigation and drainage ditches.

b. The agencies’ regulations define “discharge of dredged material” and “discharge of fill material.” See 33 CFR 323.2(d) and (f), and 40 CFR 232.2.

c. The agencies’ regulations define “waters of the United States.” See 33 CFR 328.3 and 40 CFR 120.2. It has been the agencies’ longstanding practice that certain ditches generally are not considered waters of the United States. However, certain ditches may be a water of the United States, such as certain ditches constructed in or through a jurisdictional water, including a jurisdictional wetland.

d. For the purposes of this memorandum, “irrigation ditch” is defined as a ditch (as defined in paragraph III.a above) that either conveys water to an ultimate irrigation use or place of use (“irrigation water”), or that moves and/or conveys irrigation water (*e.g.*, “run-off” from irrigation) away from irrigated lands (“irrigation return flows”).

e. For the purposes of this memorandum, “drainage ditch” is defined as a ditch (as defined in paragraph III.a above) where increasing drainage of a particular land area or infrastructure is at least part of the designed purpose. This includes the following ditch use categories: agricultural, transportation (*e.g.*, roadside, railroad), mosquito abatement, and stormwater management.

f. For the purposes of this memorandum, “related structure” is defined as a structure which is appurtenant to, and functionally related to, an irrigation ditch. Examples of such related structures include, but are not limited to: siphons, pipes, pumps or pump systems, grade control structures, headgates, wingwalls, weirs, diversion structures, and such other facilities. The key to whether a structure is a “related structure” and potentially covered by the irrigation ditch exemption is whether the structure affects the ability (*e.g.*, capacity, design velocities) of the ditch to convey water as designed.

g. For the purposes of this memorandum, “maintenance” is defined as the activity undertaken to preserve or restore the original designed purpose and approximate capacity of the original, as-built configuration of a ditch. Maintenance includes a repair to an existing structure or feature to keep the ditch in its existing state or proper condition, or to preserve it from failure or decline.

h. For the purposes of this memorandum, “construction” is defined as new work, or work that results in a relocation, an extension, or an expansion of an existing ditch and/or related structure. In general, the construction of an irrigation ditch must be intended to primarily serve an irrigation purpose in order for the construction activity to be exempt.

IV. GUIDANCE FOR APPLYING THE DITCH EXEMPTIONS

General Guidance. To determine whether one of the ditch exemptions applies, the following steps should be analyzed:

a. Step 1 is to determine whether the proposed activity will occur in waters of the United States. The agencies’ regulations and associated preamble language, guidance documents, and technical manuals may be used to make this determination. If the proposed activity will not occur in waters of the United States, the proposed activity is not prohibited by nor regulated under Section 404 of the CWA.

b. Step 2 is to determine whether the proposed activity involves a discharge of dredged and/or fill material. As noted in paragraph III.b above, the agencies’ regulations define these terms. If no discharge of dredged and/or fill material will occur, the proposed activity is not prohibited by nor regulated under Section 404 of the CWA.

c. Step 3 is to determine whether the proposed activity involves an “irrigation ditch” or a “drainage ditch” according to the definitions in Section III of this memorandum. The following clarifications may assist in making this determination:

- Irrigation Ditches:
 - Related structures, as defined in paragraph III.f above, are included in the scope of the irrigation ditch exemption.
 - If a ditch carries only irrigation water, irrigation return flows, and/or overland flow (precipitation and/or snowmelt) to and/or from an irrigated area, that ditch would be considered an irrigation ditch, not a drainage ditch.
 - A ditch that diverts water from a waterbody (*e.g.*, stream, lake, or reservoir) for irrigation purposes is an irrigation ditch and does not become a drainage ditch even if a substantial portion of the flow into or volume of the waterbody is diverted by the irrigation ditch.
- Drainage Ditches:
 - Where a ditch would have the effect of draining wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation.

d. Step 4 is to determine whether the proposed activity is “maintenance,” which is exempt for irrigation and drainage ditches, or “construction,” which is exempt for irrigation ditches only.² The following clarifications may assist in making this determination:

² In many cases, accurate historical records are not available to determine the “as-built” specifications of the original ditch and/or related structures. In these cases, agency staff should work closely with the project proponent to establish an appropriate maintenance depth and/or reference an appropriate structure design to restore the ditch’s original designed

- Maintenance (for both irrigation and drainage ditches):
 - Removal of material, including vegetation, from an existing ditch such as by dredging or recontouring in accordance with the historical design and purpose of the ditch, qualifies as maintenance. However, the ditch must not be deepened such that it would drain additional areas compared to the original design.
 - Minor changes to the cross-section of the ditch to conform with current engineering standards (e.g., where more graduated side-slopes result in greater stability) qualify as maintenance, so long as those modifications of the ditch will not result in the drainage, degradation, or destruction of additional jurisdictional waters.
 - Replacement or repair of existing related structure(s) qualify as maintenance as long as the original purpose of the structure is not changed and original approximate capacity of the irrigation ditch or related structures are not increased. Activities related to structures that were not designed to contribute to the original purpose and capacity of the ditch are not covered by the maintenance portion of the irrigation ditch exemption or the drainage ditch exemption. There may, however, be circumstances where a drainage ditch includes associated structures which may be evaluated on a case-by-case basis as to whether the maintenance of such structures is exempt.
- Construction (for irrigation ditches only):
 - Relocation of existing ditches or tributaries, and converting existing ditches into pipes, qualifies as construction. However, these actions should be analyzed in Step 5, below, to determine whether they would be subject to the recapture provision.
- Maintenance (for irrigation and drainage ditches) and/or Construction (for irrigation ditches only) Depending on the Site-specific Circumstances:
 - Sidecasting, for purposes of this memorandum, is the casting of dredged or excavated material to the side of or near the ditch being constructed or maintained. Sidecasting of any dredged material for the purpose of construction or maintenance of jurisdictional irrigation ditches, or the maintenance (but not construction) of jurisdictional drainage ditches, into jurisdictional wetlands or other waters of the United States is exempt. However, these actions should be analyzed in Step 5, below, to determine whether the sidecasting would be subject to the recapture provision.
 - Armoring, lining, and/or piping repair activities qualify as maintenance only where a previously armored, lined, or piped section is being repaired and all work occurs within the footprint of the previous work. All new lining of ditches, where the ditch had not previously been lined, is considered construction.
 - Temporary discharges of fill material in waters of the United States that would be used to facilitate the completion of the exempt ditch maintenance and ditch construction activities described above, such as the placement of temporary cofferdams for erosion and sediment control purposes, are also exempt under Section 404(f)(1)(C) of the CWA, provided the temporary fills are not recaptured under Step 5, below, and provided the temporary fills are removed from waters of the United States in their entirety upon completion of the ditch maintenance or ditch construction activity.

purpose and approximate capacity, while meeting the spirit of the exemption and ensuring adequate protection of aquatic resources. In situations where the potential applicability of the exemption under CWA Section 404(f)(1)(C) to a proposed activity has been raised to the District, and where the District cannot make a determination due to a lack of pertinent factual information, the District should request additional documentation or supporting evidence from the project proponent or inform the proponent that the activity may not qualify for the exemption.

e. Step 5 is to determine applicability of the “recapture provision.” CWA Section 404(f)(2) sets forth a two-part test, and both parts must be met to “recapture” an activity (*i.e.*, to bring the activity within the scope of regulation under CWA Section 404, such that a permit would be required).

Part 1: Is the discharge incidental to a proposed activity where the purpose of the activity is to convert an area of the waters of the United States into a use to which it was not previously subject? This is also known as the “change in use” test. The following clarifications may assist in making this determination:

- Construction of an irrigation ditch that cuts through (or across) a jurisdictional waterbody, including wetlands, may be a change in use of the waterbody because the footprint of the ditch and any structure(s) within the jurisdictional water(s) may convert that portion of the waterbody from a non-irrigation use to an irrigation use.
- Conversion of a jurisdictional wetland to a non-wetland is a change in use. However, the development of wetland characteristics in a ditch does not establish a new use for the ditch. The recapture provision would not apply to the maintenance activities of ditches which have developed wetland characteristics even if sediment and vegetation removal occurs to eliminate obstructions to flow.³
- Construction of dikes, drainage ditches, or other works or structures used to effect conversion of a wetland from silvicultural to agricultural use (such as by draining the wetland) is a change in use (33 CFR 323.4(c) and 40 CFR 232.3(b)).
- The fill of the former area of existing jurisdictional ditches or tributaries associated with relocation of such waters or converting existing jurisdictional ditches into pipes, is a change in use (*i.e.*, from jurisdictional waters to dry land or to non-jurisdictional waters).

Part 2: If Part 1 of the test is met, will the proposed activity impair the flow or circulation of waters of the United States or reduce the reach of such waters? This determination should be made on a case-by-case basis,⁴ and the following clarifications may assist in making this determination:

- The agencies’ regulations implementing CWA Section 404(f) (*i.e.*, 33 CFR 323.4(c) and 40 CFR 232.3(b)) specify that “(w)here the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.” The project proponent should provide information to the agencies regarding why this presumption is not met if they request an exemption determination by the agencies.
- A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States (33 CFR 323.4(c) and 40 CFR 232.3(b)). An example of this could be “thin-spreading” dredged material into jurisdictional wetlands. Case-specific information should be considered to determine if such alterations to flow or circulation would rise to the level of impairment.

³ In certain circumstances, the accumulation of sediment over time may be so extensive that the ditch is no longer capable of being used to convey water, or the intended purpose of the ditch as a drainage resource has been abandoned. The removal of sediment and vegetation in such cases may be considered construction instead of maintenance, depending on the factual circumstances, and may require a permit, assuming the feature is, or the activity at issue is performed in, an otherwise jurisdictional water. When accumulation of sediment or debris occurs in response to a flood, storm, hurricane or similar event or series of events, the maintenance designed to restore such ditches to their original capacity should fall within the scope of the CWA Section 404(f) permit exemption. The maintenance activities performed to restore the ditch, however, must not expand the ditch beyond the contours of the ditch that existed before the event or events occurred.

⁴ Because the CWA Section 404(f)(1) exemption for maintenance of irrigation or drainage ditches applies only to maintenance activities that would maintain existing capacity and functionality (not to construction activities), it is unlikely that the recapture provision in CWA Section 404(f)(2) would apply to ditch maintenance activities as defined above.

- A proposed activity for the purpose of construction or maintenance of a ditch that has the effect of substantially increasing or decreasing water levels in a nearby jurisdictional wetland or other jurisdictional water would be an alteration of the flow and circulation of said water(s), and should be analyzed to determine whether that alteration rises to the level of impairment.
- Construction of an irrigation ditch which converts a jurisdictional ditch into a pipe is a change in use of waters of the United States, and by definition also a reduction in their reach, within the meaning of CWA Section 404(f)(2).
- Certain construction or maintenance activities in a ditch have the potential to sever the hydrologic connection of waters of the United States and/or to sever adjacency between a jurisdictional wetland and another water of the United States. Ditch maintenance or construction activities having such an effect would reduce the reach of waters of the United States, and therefore may meet the second part of the recapture provision test. However, if a project proponent is able to demonstrate that hydrologic connectivity is maintained between the waters that would otherwise be severed, such as through the use of a culvert, flood or tide gate, pump, or similar artificial feature, or through the intentional breaches of levees or similar features, the reach of waters of the United States may not be reduced by the activity, although it may result in an impairment of flow or circulation.

V. CONCLUSION

When an activity has been determined in the first four steps of Section IV above to involve discharges of dredged or fill material into waters of the United States, the discharges are for the purpose of construction or maintenance of irrigation ditches or the maintenance (but not construction) of drainage ditches, and the elements of the recapture provision are not satisfied, then the activity is exempt from regulation under Section 404 of the CWA.

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**FLOW CHART ATTACHMENT TO THE JOINT MEMORANDUM TO THE FIELD BETWEEN
ARMY AND EPA CONCERNING SECTION 404(f)(1)(C) OF THE CLEAN WATER ACT**

