

Regulatory Guidance Letter 86-09

SUBJECT: Clarification of "Normal Circumstances" in the Wetland Definition (33 CFR 323.2 (c))

DATE: August 27, 1986

EXPIRES: December 31, 1988

1. This letter will serve to continue the guidance originally issued as RGL 82-2, 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 to lose or gain characteristics which would alter its status 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(c) 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 (e.g., agricultural) has upon regulatory jurisdiction, once the land-use conversion has been accomplished.

3. As was stated in RGL 82-2, it is our intent under Section 404 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 wetland 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. We do not intend 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. Neither do we intend the definition of "wetlands" to be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation. Thus, we have listed swamps, bogs, and marshes at the end of the definition at 323.2(c) to further clarify our intent to include only truly aquatic areas.

4. The use of the phrase "under normal circumstances" is meant 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 instances of destruction of aquatic vegetation to eliminate Section 404 jurisdiction have actually occurred. Because those areas would still support aquatic vegetation "under normal circumstances", they remain a part of the overall aquatic system intended to be protected by the Section 404 program; therefore, jurisdiction still

exists. On the other hand, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program.

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" are determined on the basis of an area's characteristics and use, at present and in the recent past. Thus, if a former wetland has been converted to another use (other than by recent unpermitted action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a "water of the United States", that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404. However, if the area is abandoned and over time regains wetland characteristics such that it meets the definition of "wetlands", then the Corps 404 jurisdiction has been restored.

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

7. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS: