RULES and REGULATIONS

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 232 and 233

[FRL-3214-1]

Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations

Monday, June 6, 1988

*20764 AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: We are hereby issuing final rules containing 404 program definitions and 404(f)(1) exemptions and the procedures and criteria used in approving, reviewing and withdrawing approval of State 404 programs. Part 232 contains definitions and exemptions related to both the Federal and State-run 404 program and Part 233 deals with State programs only. The revisions in these rules will provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Clean Water Act (the Act).

EFFECTIVE DATES: This final rule is effective on July 6, 1988. In accordance with 40 CFR 23.2, this regulation shall be considered issued for purposes of judicial review at 1:00 p.m., Eastern time on June 20, 1988.


*** EXCERPTS OF ALL SECTIONS ADDRESSING THE SCOPE OF "WATERS OF THE UNITED STATES"***

The following summarizes the major comments and EPA’s response to them.

Response to Comments and Explanation of Changes

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Section 232.2 (q) and (r): Several comments were directed toward the definitions of "waters of the United States" and wetlands. The commentors suggested that these definitions exceed the original intent of Congress.
The legislative history of the Act, from both 1972 and 1977, emphasizes Congress' intent that the jurisdiction of the Act over waters of the United States reflect the maximum extent permissible under the Commerce Clause of the Constitution. The specific definition of wetlands used in these regulations was originally promulgated in 1977 (prior to the 1977 Amendments to the Act) and has been approved in numerous courts, most recently by the Supreme Court in *U.S. v. Riverside Bayview Homes Inc.* (106 S.Ct. 455 (Dec. 4, 1985)). The overall definition of waters of the United States has also been approved by the courts, both in its current articulation and in earlier versions. Therefore, we see no need to change these definitions to narrow their coverage.

Several questions have arisen about this application of this definition to isolated waters which are or could be used by migratory birds and endangered species. As the Agency explained in an opinion by the General Counsel dated September 12, 1985, if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In addition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of jurisdiction would have to be made, and would turn on the particular facts.

For clarity and consistency, we are adding the following language from the preamble to the Corps' regulations published on November 13, 1986 (51 FR 41217). This language clarifies some cases that typically are or are not considered "waters of the United States."

"Waters of the United States" typically include the following waters:

- Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

- Which are or would be used as habitat by other migratory birds which cross State lines; or

- Which are or would be used as habitat for endangered species; or

- Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "waters of the United States." However, EPA reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. Pursuant to agreements with EPA,
the permitting authority also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

- Non-tidal drainage and irrigation ditches excavated on dry land.
- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.


Lee M. Thomas,
Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, 40 CFR Part 232 is amended as set forth below.

(q) Waters of the United States means:

(1) All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

(2) All interstate waters including interstate wetlands.

(3) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (g)(1)-(4) of this section;

(6) The territorial sea; and

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(r) 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.