



DEPARTMENT OF THE ARMY
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS
696 VIRGINIA ROAD
CONCORD, MASSACHUSETTS 01742-2751

REPLY TO:
ATTENTION OF:

July 14, 2004

Regulatory Division
CENAE-R-PT

Mr. Lealdon Langley
Wetlands Protection Program
Massachusetts Department of Environmental Protection
One Winter Street, 5th Floor
Boston, Massachusetts 02108

Dear Mr. Langley:

This concerns an inquiry from your office regarding U.S. Army Corps of Engineers regulation of mosquito ditches in inland, non-tidal wetlands in the Commonwealth of Massachusetts. Mosquito ditching activities may involve maintaining or creating ditches in wetlands or streams to discourage¹ standing water that enhances mosquito breeding. The Corps regulates and requires a permit for the discharge of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act. Waters of the U.S. include jurisdictional wetlands as defined in 33 CFR 328.3(b). Fill material is any material placed in waters of the U.S. where the material has the effect of replacing any portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of a water of the U.S.

Constructing and maintaining ditches in jurisdictional wetlands do not themselves require a Corps permit. If the excavated material is discharged into a water of the U.S. (e.g., the wetland adjacent to the ditch), which is called side casting, a Corps permit is required for that discharge. Thus, side casting the excavated material into wetlands requires a Corps permit because it is the discharge of dredged material into a water of the U.S., not because a ditch is being excavated. If ditches are constructed without discharging the excavated material into a water of the U.S. (either temporarily or permanently), a Corps permit is not required.

Understanding the proper techniques for complying with our regulations and the enclosed Massachusetts Programmatic General Permit (PGP) should result in less regulatory burden and greater environmental protection. The PGP is located at www.nae.usace.army.mil. Select "Regulatory/Permitting." It is important to note that authorization granted under the PGP does not obviate the need to obtain other Federal, state or local authorizations required by law.

¹ Refer to the Indiana Department of Natural Resources' fact sheet "Did You Know?...Healthy Wetlands Devour Mosquitoes" on our website at www.nae.usace.army.mil. Select "Regulatory/Permitting" and then go to "Other."

The following recommendations pertain to typical mosquito ditching projects. Project proponents should contact us with any questions to ensure compliance.

I. General Suggestions

Project proponents should review the Massachusetts PGP carefully to familiarize themselves with it. Proponents are responsible for complying with all of the PGP's requirements and should be certain that whoever does the work fully understands all of the conditions.

We encourage proponents to maintain accurate records for all projects involving work in waters of the U.S., which include wetlands. Their records should specify why they believe the project does not require written Corps authorization. Proponents should contact us if there is any doubt whether a particular project is authorized by the PGP under the non-reporting Category 1 or requires written authorization under Category 2 or the Individual Permit category.

II. Existing Work

1. Drainage ditch maintenance may not require a permit. In accordance with 33 CFR 323.4, a permit is not required for drainage ditch maintenance. However, the ditching work must occur in an existing and permitted ditch. Ditches constructed before July 1, 1977 did not require Corps authorization. Therefore discharges associated with maintaining ditches constructed before July 1, 1977, do not require further permitting [33 CFR 330.3(a)] as they are authorized by being "grandfathered."

33 CFR 323.4 Discharges not requiring permits. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption. [Emphasis added.]

All exemptions are subject to the recapture provisions of our regulations. These are listed at 33 CFR 323.4(3)(c), which states:

"Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)-(6) of this section must have a permit if it 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 discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration..."

Any ditching that triggers the recapture provision will require a Corps permit. Placing ditch excavate within wetlands (side-casting) meets the maintenance definition, provided the material is spread thin and evenly enough such that the wetland is not converted to upland (“convert an area of the waters of the United States into a use to which it was not previously subject.”). Typically, the side-cast material should be composed of organic material based on soil science definitions and spread as a thin veneer, but this varies on a site-specific basis. Proponents should contact this office if they are uncertain if a particular activity will impact the wetland as stated in paragraph 33 CFR 323.4(c).

2. Written authorization from the Corps is not required for ditch maintenance that is performed as stated in Section II.1 above if any of the following are true. Again, we recommend the entity performing the maintenance keeps accurate files.

- a. The maintenance work does not involve a discharge of dredged or fill material.
- b. The original work received a Corps permit.
- c. The original ditch was constructed before July 1, 1977. Regulation 33 CFR 330.3 states activities occurring before this date do not require further permitting.

Written authorization from the Corps is required if any of the following are true. Proponents should obtain written Corps authorization for all work that meets these criteria, regardless of current conditions or future plans.

- a. The original work did not, but the maintenance ditching will involve a discharge of dredged or fill material.
- b. The original work did not receive a Corps permit.
- c. The original ditch was constructed on or after July 1, 1977, and the original and maintenance ditching involve the discharge of dredged or fill material totaling more than 5000 square feet (SF), including secondary impacts. Five thousand square feet is the upper threshold of the PGP’s non-reporting Category I.

III. New Work

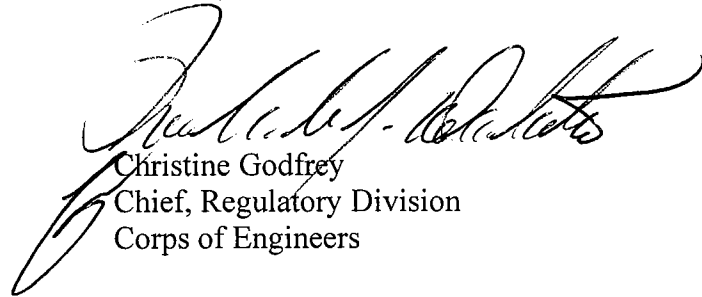
1. See the PGP, Appendix A, I. Inland Waters and Wetlands, (a) New Fill/Excavation Discharges. New work under 5,000 SF of wetland and/or waterway fill, including secondary impacts and the regraded excavation areas, may qualify for the non-reporting Category I of the PGP if the project meets the PGP’s terms and conditions. For example, one of the PGP’s terms states, “in-stream work within Category I is limited to July 1 – October 1.” Proponents must submit an application and receive written authorization from the Corps if the project doesn’t qualify for Category I.

2. Work at a site may involve constructing new work adjacent to existing work. The issue of whether the new work is a single and complete project or if it’s part of the existing work arises. Condition 5 of the PGP states the “PGP shall not be used for piecemeal work and shall be applied to single and complete projects. All components of a single project shall be treated together as constituting one single and complete project and/or all planned phases of a multi-phased project.”

If the new work is a single and complete project, the new work alone must have less than 5000 SF of wetland/waterway fill and secondary impacts to qualify for Category I. Alternatively, if the new work and the existing work are considered phases of a multi-phased project, then the combined wetland fill/impacts must be less than 5000 SF for the new work to qualify for the non-reporting Category I of the PGP. Proponents should consult with the Corps to determine if a project is single and complete or a phase of the existing project.

Project proponents are encouraged to contact Mr. Greg Penta with any questions at (978) 318-8862 or call our general number at (978) 318-8338.

Sincerely,



Christine Godfrey
Chief, Regulatory Division
Corps of Engineers