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Part VIII

Environmental Protection Agency

40 CFR Part 230

Exception From Wetlands Mitigation Sequence for Alaska; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 230

[FRL-4530-6]

Exception From Wetlands Mitigation Sequence for Alaska

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to revise the Clean Water Act Section 404(b)(1) Guidelines (Guidelines) to provide an exception from the wetlands mitigation sequence (i.e., avoidance, minimization, and compensation) for proposed discharges of dredged or fill material into wetlands in States with less than one percent loss of historic wetlands acreage. Under this proposed revision, proposed discharges of dredged or fill material into wetlands in the State of Alaska, which is the only State with less than one percent loss of his historic wetlands acreage, would be excepted from current provisions of the Guidelines that require that all proposed discharges of dredged or fill material represent the least environmentally damaging practicable alternative (i.e., avoid adverse impacts to the aquatic ecosystem). In addition, this proposed revision would no longer require, for discharges of dredged or fill material into wetlands in the State of Alaska, that all appropriate and practicable measures to compensate for potential unavoidable adverse impacts on the aquatic ecosystem be undertaken. For the State of Alaska, minimization of impacts would constitute the requisite mitigation necessary to meet the mitigation requirements of the Guidelines. The Administrator of EPA, in consultation with the Secretary of the Interior and the State of Alaska, will monitor wetlands losses in the State to determine if the assumptions underlying this rule remain valid and whether the exception would continue to apply. This rule is being proposed in accordance with the President's August 9, 1991, Wetlands Plans.

DATES: Written comments must be submitted on or before December 21, 1992.

ADDRESSES: Written comments should be submitted to: Mr. Gregory E. Peck, Chief, Wetlands and Aquatic Resources Regulatory Branch, Wetlands Alaska Docket (A-104F), U.S. EPA, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Details are available from Mr. John Goodin at (202) 260-9910 or Mr. Clifford Rader at (202) 260-6587.

SUPPLEMENTARY INFORMATION:

Background

The Federal Water Pollution Control Act of 1972 (renamed in 1977 as the Clean Water Act) established, at section 404, a regulatory program for the evaluation of permit applications for proposed discharges of dredged or fill material into waters of the United States, including wetlands. Section 404(a) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits specifying disposal sites in waters of the U.S. in accordance with regulatory requirements of the Section 404(b)(1) Guidelines (Guidelines). The Guidelines, which were published as final regulations on December 24, 1980 (45 FR 85336), are the substantive environmental criteria used in evaluating discharges of dredged or fill material under section 404 of the Clean Water Act.

The Guidelines provide four general restrictions in § 230.10 that must be met before a permit can be issued authorizing the discharge of dredged or fill material into waters of the U.S. Today's rulemaking involves two of these restrictions: The prohibition in § 230.10(a) against any discharge where there is a less damaging practicable alternative and the requirement in § 230.10(d) that appropriate and practicable steps be taken to minimize potential harm to the aquatic ecosystem. As required by the Guidelines and clarified in an EPA/Department of the Army Memorandum of Agreement (MOA) concerning the determination of mitigation (55 FR 9210, March 12, 1990), these two regulatory provisions are the basis for the Guidelines' three step sequence for mitigating potential adverse impacts to the aquatic environment associated with a proposed discharge (i.e., first avoidance, then minimization, and lastly compensation for unavoidable impacts to aquatic resources).

The mitigation process is designed to establish a consistent approach to be used in ensuring that all practicable measures have been taken to reduce potential adverse impacts associated with proposed projects in wetlands and other aquatic systems. The first step in the sequence requires the evaluation of potential alternative sites to locate the proposed project so that aquatic impacts are avoided to the maximum extent practicable. As the next step in the sequence, remaining impacts are minimized, by making changes in project design or construction methods that reduce overall project impacts. Lastly, after all practicable steps have been taken to avoid and minimize potential adverse effects, compensation for remaining unavoidable impacts is sought by such measures as wetlands creation or restoration in order to replace lost aquatic functions and values. The result is prevention of wetlands impacts when reasonable and practicable; but where the actions necessary to prevent such impacts are not available and capable of being done, associated losses of wetland and aquatic functions and values are offset to the extent appropriate and practicable with compensatory mitigation. As recognized in the MOA, no net loss of wetlands is a goal of the section 404 regulatory program.

On August 9, 1991, the President issued a plan for protecting wetlands (President's plan or plan) that contains proposed provisions to "improve and streamline the current regulatory system." One element of the plan provides that "States with less than a 1 percent historic rate of wetlands development will be able to satisfy permit requirements through minimization." Based on historic loss data (Dahl, T.E., 1990. "Wetlands Losses in the United States 1780's to 1980's" U.S. Department of the Interior, Fish and Wildlife Service, Washington, DC, 21 pp.), this provision is applicable only in the State of Alaska. According to this data, using the estimated 170,200,000 acres of wetlands present in Alaska in the late 1700's, only 200,000 acres have been converted, or 0.1 percent of the State's original wetland acreage. Such a low loss rate in Alaska indicates a minimal impact to the State's wetlands. An estimated 45 percent of Alaska's surface area remains wetlands.

No other State in the U.S. has experienced so low a percentage loss of original wetlands acreage as has Alaska. The average wetlands loss for States outside of Alaska is approximately 53 percent of their original wetlands acreage.

In addition, the U.S. Fish and Wildlife Service has determined that 40 percent of Alaska's wetlands—68 million acres, more than the total remaining wetlands in Florida, Louisiana, Minnesota, Texas, North Carolina, Michigan, Wisconsin, Georgia, Maine, and South Carolina combined—are already in federal or state conservation units. In many cases in Alaska, there are no practicable alternatives for development except in wetlands due to factors such as topography and climate. For example, in Alaska, because of the high proportion of land that is wetland, it is difficult to

avoid impacts to wetlands when development and growth occur. Similarly, due to the high proportion of wetlands in Alaska, it is difficult to compensate for wetland loss. In most other states, compensation takes the form of restoration of historic wetlands. In the case of Alaska, because of its extremely low loss rate, it is exceptionally difficult to restore historic wetlands. In addition, opportunities for compensatory mitigation are reduced when loss rates are low and there are many unimpacted wetlands.

EPA and the Department of the Army issued a joint memorandum to their field staff on January 24, 1992, that emphasized existing mitigation provisions in the Guidelines and the EPA/Department of Army MOA that currently apply to most permit decisions in Alaska. Consistent with the Guidelines and MOA, the guidance noted that the agencies should strive for avoidance of impacts to existing aquatic resources, and that there is a general goal of a minimum of one for one functional replacement of wetlands. However, the guidance emphasized that the MOA also states that "this minimum requirement may not be appropriate and practicable, and thus may not be relevant in all cases." This statement is further explained in footnote seven of the MOA, which states in part:

> For example, there are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands.

The guidance memorandum notes that this footnote makes it clear that there are areas where it may not be practicable to restore or create wetlands; in such cases compensatory mitigation is not required under the Guidelines.

Section 404(b)(1) grants authority to the Administrator to develop guidelines for use by the Secretary of the Army (i.e., the Corps of Engineers) in designating disposal sites for dredged or fill material into waters of the United States. Section 404(b)(1) commits to the Administrator's discretion the exact terms of those guidelines, which "shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under [Clean Water Act] section 403(c)." EPA believes that, if there is a reasonable basis for treating Alaska wetlands differently from wetlands in the rest of the United States (based on the geographic, climatic, historical, and other factors summarized above), section 404(b)(1) provides sufficient discretion to the Administrator to modify the section 404(b)(1) Guidelines to treat Alaska differently for wetlands sequencing purposes.

Summary of Proposed Rule

Today's proposed rule would revise the Guidelines to provide an exception from the wetlands mitigation sequence for proposed discharges of dredged or fill material into wetlands in the State of Alaska. This rule is being proposed in accordance with the President's August 9, 1991, Plan and in recognition of: (1) The relatively low historic loss of wetlands in the State of Alaska; the State retains over 99 percent of its original wetlands acreage, which totals approximately 170,000,000 acres, or 45 percent of the State's total surface area; (2) the significant percentage of Alaska's wetlands being managed as Federal and State conservation units; (3) the limited availability of upland alternatives for development projects given the high percentage of wetlands in Alaska, as well as large expanses of permafrost, mountainous terrain, glaciers and lakes; and (4) the technical and logistical difficulties in restoring or creating wetlands in large portions of Alaska; some of these difficulties include permafrost hydrology, unavailability of restoration sites, and limited creation opportunities due to the high proportion of wetlands.

Under this proposed revision, proposed discharges of dredged or fill material into wetlands in the State of Alaska would not be subject to current provisions of the Guidelines that require that all proposed discharges of dredged or fill material represent the least environmentally damaging practicable alternative. In addition, this proposed revision would no longer require, for discharges of dredged or fill material into wetlands in the State of Alaska, that all appropriate and practicable measures to compensate for potential unavoidable adverse impacts on the aquatic ecosystem be undertaken. For discharges of dredged or fill material into wetlands in the State of Alaska, minimization of impacts would constitute the requisite mitigation necessary to meet the requirements of the Guidelines. The proposed rule would revise § 230.10 (a) and (d), and add a new subsection at 230.10(a)(6) to codify these changes. Conforming changes are also proposed at §§ 230.5(c), 230.5(j), and 230.12(a)(3).

EPA notes that subpart H of part 230, which remains unchanged, details possible actions to minimize adverse impacts of a proposed discharge. These actions may be undertaken to minimize adverse impacts of proposed discharges in the State of Alaska, although the wetlands development and restoration techniques discussed in § 230.75(d) are no longer applicable to Alaska as part of the wetland mitigation sequence which applies in other States. Appropriate and practicable steps to minimize potential adverse impacts of proposed discharges in Alaska, as elsewhere, would continue to include the use of such techniques as altering project size or configuration.

EPA also notes that nothing in this rule affects the current provision of § 230.10(c) of the Guidelines, which requires that no permit can be issued where the proposed discharge would result in significant degradation of the aquatic environment. In addition, § 230.10(b) remains unchanged, which requires, among other things, that no discharge be permitted if it violates State water quality standards or jeopardizes threatened or endangered species.

It is important to note that the exception in Alaska from the requirements found at § 230.10(a) applies only to requirements under section 404 of the Clean Water Act. Today's proposed rule does not eliminate the need to conduct other applicable alternative analyses potentially required by such statutes as the National Environmental Policy Act, Endangered Species Act, or other regulations or Federal planning processes.

It is also important to note that this rule does not affect the ability of the State of Alaska to protect what it considers to be high value wetlands using its authority under section 401 of the Clean Water Act, applicable authorities under the Coastal Zone Management Act, or other authority under State or Federal law. Neither does this rule affect the ability of local governments to protect wetlands through their power to regulate land use, to the extent allowable under Alaska law. With regard to the most relevant Federal statutes, section 401(a)(1) of the Clean Water Act provides that "No license or permit shall be granted if certification has been denied by the State * * *". Similarly, the Coastal Zone Management Act (16 U.S.C. 1456(c)(3)(A)) provides that "No license or permit shall be granted by the Federal agency until the State or its designated agency has concurred with the applicant's certification * * *", although under certain circumstances the Secretary of Commerce retains the right to over-rule the State.

In addition, the Administrator of EPA, in consultation with the Secretary of the Interior and the State of Alaska, will monitor wetlands losses in the State to determine if the assumptions underlying this rule remain valid and whether the exception would continue to apply.

Efforts underway by the State of Alaska to develop a wetlands categorization approach as part of a State regulatory package for freshwater wetlands may prove useful for the identification and protection of high value wetlands. Examples of the types of wetlands which may be identified as being of high value include, but are not necessarily limited to, important anadromous fish spawning habitat and significant spawning and nursery habitat for commercially valuable marine fisheries. This rule is not intended to, and should not conflict with the State's efforts. Indeed, EPA specifically invites comment on how Alaska's wetlands regulatory initiative might be integrated into EPA's final rule, and how Federal agencies might most appropriately apply Alaska's system for identifying high value wetlands. More generally, EPA invites public comment on whether or not it would be appropriate for this rule to more directly address the protection of high value wetlands as identified through Alaska's wetlands categorization process, including the option of maintaining the full sequencing of avoidance, minimization, and compensation for high value wetlands, and if appropriate, how this might be accomplished.

This proposal will become effective 30 days after publication of a final rule in the Federal Register.

Paperwork Reduction Act

Today's rule places no additional information collection or record-keeping burden on respondents. Therefore, an information collection request has not been prepared and submitted to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Executive Order 12291 and the Regulatory Flexibility Act

The Environmental Protection Agency has determined that the revisions to this regulation do not constitute a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. This rule was submitted to the Office of Management and Budget for Review under E.O. 12291. Pursuant to section 605(b) of the Regulatory Flexibility Act, the Environmental Protection Agency certifies that this regulation will not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 230

Alaska, Water pollution control, Wetlands.

William K. Reilly,

Administrator, Environmental Protection Agency.

Accordingly, 40 CFR part 230 is proposed to be amended as follows:

40 CFR CHAPTER I—[AMENDED]

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

1. The authority citation for part 230 continues to read as follows:

Authority: 33 U.S.C. 1344(b) and 1361(a).

2. Section 230.5 is amended by revising paragraphs (c) and (j) to read as follows:

§ 230.5 General procedures to be followed.

* * * * *

(c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§ 230.10(a)), except as provided in § 230.10(a)(6).

* * * * *

(j) Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, as provided for in § 230.10(d) and based upon the specialized methods of minimization of impacts in subpart H.

* * * * *

3. Section 230.10 is amended by revising the introductory text of paragraph (a), by adding paragraph (a)(6), and by revising paragraph (d) to read as follows:

§ 230.10 Restrictions on Discharge.

* * * * *

(a) Except as provided under § 404(b)(2) and in paragraph (a)(6) of this section, no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

* * * * *

(6) The requirements in paragraph (a) of this section are not applicable to discharges occurring in wetlands in States with less than one percent loss of historic wetlands acreage.[1]

* * * * *

(d)(1) Except as provided under § 404(b)(2) and in paragraph (d)(2) of this section, no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

(2) For discharges into wetlands in States with less than one percent loss of historic wetlands acreage, however, actions to compensate for adverse impacts of discharges through wetlands development and restoration techniques, as specified in § 230.75(d), are not required.

4. Section 230.12 is amended by revising paragraphs (a)(3)(i) and (a)(3)(iii) to read as follows:

§ 230.12 Findings of compliance or noncompliance with the restrictions on discharge.

(a) * * *

(3) * * *

(i) Except as provided under § 230.10(a)(6), there is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or

* * * * *

(iii) Except as provided under § 230.10(d)(2), the proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or

* * * * *

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[1] The State of Alaska is the only State with less than one percent loss of historic wetlands acreage.