

What Landowners Need to Know About Practicing Forestry in Wetlands in North Carolina

OVERVIEW

The wetland issue is one of the most serious and complicated issues facing forest landowners in North Carolina and the South. There is a great deal of misinformation being spread concerning what is or is not a wetland and what landowners are allowed to do in or with such lands. The purpose of this document is to answer, as much as possible, some basic questions about practicing forestry on jurisdictional wetlands in North Carolina.

However, **this is not a legal or regulatory document!** The interpretations and information presented do not necessarily reflect the position of the Environmental Protection Agency (EPA) or the Corps of Engineers. The information, we believe, is consistent with current practice and interpretation of the forestry exemption in the Clean Water Act.

NOTE: Because this issue is far from being resolved, we urge all landowners and foresters to check with knowledgeable sources such as the North Carolina Forestry Association (NCFA), the North Carolina Division of Forest Resources (NCDFR) and the Forest Resource Extension program at North Carolina State University prior to proceeding with forestry activities.

HOW DO I KNOW IF MY FORESTLAND IS A JURISDICTIONAL WETLAND?

There is no simple answer to this. A jurisdictional wetland must have all three of the following:

- **Hydric Soils:** These are generally wet soils with high organic matter content.
- **Water:** Water in sufficient quantity and duration to create anaerobic soil conditions.
- **Wetland Vegetation:** These are plants typically adapted to life in saturated soil conditions.

The federal manual that defines what soils are considered hydric, how much water must be present for how long and what plants are considered wetland species is being revised. Until that is complete, the manual developed by the Corps of Engineers in 1987 is the official guide. If your forestland is located in the coastal plain of North Carolina, there is a good chance that it is a jurisdictional wetland. The closer you get to the coast, the better the chance.

HOW ARE WETLANDS REGULATED?

Activities in wetlands are regulated under Section 404 of the Clean Water Act. Section 404 requires the issuance of a permit by the Corps of Engineers for the discharge of dredged or fill material into waters of the U.S., including wetlands. A "discharge" occurs when soil is deposited into

the wetlands. Forestry activities that discharge such materials into a wetland are regulated under Section 404 but are afforded specific exemptions from having to obtain a permit.

While the Environmental Protection Agency has oversight authority, implementation of the Clean Water Act regulations, including wetlands, is done by the Corps of Engineers. They are authorized to identify "jurisdictional wetlands," issue permits and make determinations regarding the application of the Section 404 exemptions.

DO I NEED TO CONTACT EITHER THE CORPS OF ENGINEERS OR EPA TO GET APPROVAL, PERMISSION OR A PERMIT TO CONDUCT A FORESTRY OPERATION?

Not if your forestry operation is exempt as defined in the regulations. If you have any questions, you should first contact the NCDFR, the NCFA or your local forester.

WHAT CRITERIA MUST BE MET IN ORDER FOR A FORESTRY ACTIVITY TO BE EXEMPT UNDER SECTION 404?

Section 404(f)(1)(A) exempts the discharge of dredged and fill material into jurisdictional wetlands if:

- it is part of an established, ongoing forestry operation.
- it is a normal activity such as seeding, planting, bedding, harvesting, cultivating, plowing and minor drainage.
- it does not contain any toxic pollutant listed under Section 307 of the Clean Water Act.
- it is not part of an activity whose purpose is to convert an area of waters of the U.S. to a use to which it was not previously subject, where the flow and circulation of waters of the U.S. may be impaired or the reach of waters reduced.

Other exempt forestry activities (subject to the above criteria) include the maintenance of drainage ditches, construction and maintenance of forest roads meeting specified criteria, and other discharges covered by best management practices developed through Section 208 of the Clean Water Act.

It is in a landowner's best interest to be able to document that a forestry operation is established, that any required best management practices (particularly for forest roads) are being implemented and that all activities are consistent with the exemptions and EPA regulations. Landowners are encouraged to develop a written forest management plan and to receive forestry advice from a professional forester.

WHAT IS THE DEFINITION OF “ESTABLISHED AND ONGOING”?

Currently there is no regulatory definition of these terms. A good indication that the operation is “ongoing” is if the land is forestland now and will continue to be managed as forestland. A February 8, 1985 EPA General Counsel opinion states that one test of whether an operation is established is to determine if a new, non-forestry use has taken place in the interim.

Past consultation with, and application by, the Environmental Protection Agency and the Corps of Engineers indicate the following items are important in establishing that your operation is “ongoing”:

- a forest management plan (Note: there is no regulation requiring a written plan).
- evidence or documentation of past forestry activities such as harvesting, thinning, reforestation, insect and/or disease control, or a history of protection from fire, insect and disease attacks.
- treatment of the land as commercial timberlands under local, state or federal zoning, tax, subsidy or regulatory programs.
- certification under the American Tree Farm System or Stewardship program.
- ownership and management by a timber company or individual whose purpose is timber production.

WHEN DOES AN OPERATION CEASE TO BE ESTABLISHED (ONGOING)?

A forestry operation ceases to be established when the area on which it was conducted has been changed to another land use or the wetland has been converted to an upland through significant modifications to hydrology, soils and vegetation. In the context of agriculture, the regulations also state that an operation ceases to be established when the area has lain idle so long that hydrological modifications are necessary to resume operations.

Surface water management practices such as bedding and minor drainage are normal silvicultural activities that do not cause significant hydrological modifications.

DOES A CHANGE IN OWNERSHIP AFFECT ONGOING ACTIVITIES OR THE EXEMPTION?

A change in ownership has no bearing on determining the “established and ongoing” nature of the forestry operation. The history of the operation, the land and the practices carried out are the important factors.

If a change in ownership involves the initiation of a new activity that results in the conversion of wetlands to a use to which they were not previously subject, the exemption does not apply.

MAY A LANDOWNER INTENSIFY FOREST MANAGEMENT ACTIVITIES UNDER THE FORESTRY EXEMPTION?

A landowner may intensify forestry management activities as part of a conventional rotation on an establish operation. This may include artificial regeneration, bedding, etc. For example, a landowner may harvest a naturally regenerated stand, site prepare the land and plant it. An activity need not itself have been ongoing as long as it is introduced as part of an ongoing operation.

MAY A LANDOWNER PLANT DIFFERENT SPECIES OF TREES AS PART OF AN ONGOING FORESTRY OPERATION?

A species change resulting from the intensification of management can be part of an established forestry operation. This is a normal forestry activity if the property is in forest before and after the harvest and regeneration. Thus, no change in use occurs, and the operation is exempt. A change from one species to another (hardwood to pine, for example) does not constitute a “conversion” provided that the species is considered a wetland species (see EPA wetland plant manual). A species must be listed as “facultative, facultative wetland, or obligate wetland species” to be considered a wetland species for the purpose of the regulations.

As a regulatory term, “conversion” applies to a change in use (wetland to upland or forestland to agricultural land) where there is a discharge of dredged or fill material.

IS MINOR DRAINAGE AN EXEMPT ACTIVITY?

EPA’s June 6, 1988 regulations state that “minor drainage means the discharge of dredged or fill material for the purpose of installing ditching or other water control facilities.” Minor drainage is a normal silvicultural activity and is exempt if it is part of an ongoing forestry operation and does not result in the immediate or gradual conversion of a wetland to an upland.

Minor drainage is conducted to (1) temporarily lower the surface water in order to minimize adverse impacts on a wetland site during harvesting and site preparation activities; and (2) accomplish successful regeneration by removing surface water that would inhibit the growth of new seedlings.

It is recommended that either active or passive water control devices be part of all minor drainage. This can be as simple as rock dams to allow sediment to settle out, plugging the end of the ditch at the outfall when the harvesting/reforestation is complete or installing flash-board risers for long-term water management.

Ditches associated with road construction (borrow ditches) must not tie into an outfall. Also, other drainage ditches cannot tie into borrow ditches if they lead to an outfall.

IS BEDDING A NORMAL SILVICULTURAL ACTIVITY THAT IS EXEMPT?

The placement of soil beds for seeds or seedlings (bedding) is an exempt activity (Section 232.3(c)(5)) if performed as part of an ongoing forestry operation. Like all activities, it must not result in the conversion of the wetland to an upland.

The placement of soil beds may have temporary minor and nonsignificant effects on flow and circulation. From a practical standpoint, the beds would be of little use if they did not create a micro-site where seedling survival is enhanced. However, bedding is not conducted with the intent or result of converting the wetland to an upland.

Beds may not be connected to any ditch or drainage system.

IS THE CONSTRUCTION OF FIRE LINES AN EXEMPT ACTIVITY?

Fire lines constructed as part of an established, ongoing forestry operation are exempt from permitting. The primary purpose of the fire lines must be related to the commercial production of timber. Fire line construction for the purpose of wildlife management or other activities not directly related to timber production may be covered by general permits available through the Corps of Engineers. Coverage under these general permits must be approved by the Corps of Engineers.

IS THE CONSTRUCTION AND MAINTENANCE OF FARM OR FOREST ROADS AN EXEMPT ACTIVITY?

Road construction is exempt if construction and maintenance are conducted in accordance with best management practices (BMPs) designed to minimize adverse effects on the aquatic environment. BMPs that must be applied to ensure exemption are detailed in the EPA's June 6, 1988 regulations (Section 232.3(c)(6)(i-xv)). These may also be downloaded from the "rules and regulations" section of the NCFCA web page at www.ncforestry.org. If a landowner implements these BMPs, it is assumed that compliance is achieved with the Section 404 and 319 requirements. All roads should be kept to the minimum length and width necessary to accomplish the job. **NOTE: The Corps of Engineers is developing additional guidance related to road size and placement for forest roads in NC.** In general, log roads should be kept to one-lane roads. Turn-outs are allowed. Log roads should not be placed closer than one-half mile apart. Check with the NCFCA or the Division of Forest Resources for the most current information.

CAN PESTICIDES BE LEGALLY APPLIED IN JURISDICTIONAL WETLANDS?

EPA issued a memorandum on April 16, 1991 explaining that the term "wetlands" as used in the pesticide warning label and as applied under the Clean Water Act is different. EPA *does not intend* to apply the term "wetlands" for the purposes of pesticide regulation as broadly as it is currently defined under the Clean Water Act.

EPA's current position is that pesticides bearing the "wetlands" warning must not be applied directly to water, or to areas where surface water is present, or to intertidal areas below the mean high water mark. Our understanding is that pesticides can be applied to wetlands as long as the pesticides are not applied directly to standing water.

For enforcement purposes, EPA will continue to presume that when pesticides bearing this warning are found in areas where surface water is present or in intertidal areas below the mean high water mark, this indicates that the pesticide was applied directly to water and would represent a "use inconsistent with labeling."

WHAT SHOULD I DO IF MY FORESTRY OPERATION IS CHALLENGED BY CORPS OF ENGINEERS OR EPA PERSONNEL?

If your forestry activities are challenged by Corps or EPA personnel, you should:

- be courteous but do not waive any of your rights as a landowner.
- obey any "stop work" or "cease and desist" orders. Ask the government agent to document in writing what regulations are being applied and specifically why your operation is in violation.
- contact the NCFCA at (800) 231-7723 or the NCDFR at (919) 733-2162 for assistance.
- collect all pertinent documentation on past forest management activities on the property, current management plans, tax records, land history, etc.

IS LANDCLEARING CONDUCTED AS PART OF A NORMAL SILVICULTURAL OPERATION AN EXEMPT ACTIVITY?

Certain land-clearing activities associated with site preparation for planting can involve the use of mechanized equipment that may cause a discharge of fill material. Regulatory guidance issued by the EPA and the Corps of Engineers in January 1996 explains the circumstances where a 404 permit may be required for such activities. In general, permits will be required for mechanical site preparation for the establishment of pine plantations in wetlands that are permanently flooded, intermittently exposed and semi-permanently flooded (such as cypress-gum swamps, muck and peat swamps, and cypress strands/domes). This also includes certain very wet wetland types such as riverine bottomland hardwood wetlands (does not include sites where more than 25 percent of the

canopy is or was pine), non-riverine forest wetlands (seasonally flooded, poorly drained sites dominated by swamp chestnut oak, cherrybark oak or laurel oak, and undisturbed), white cedar swamps (underlain by more than one meter of peat with more than 50 percent white cedar), portions of Carolina Bays (dominated by cypress with peat greater than one-half meter in depth), low pocosins, wet marl forests, tidal freshwater marshes, and maritime grasslands, shrub swamps and swamp forests.

Permits are not required:

- for mechanical site preparation activities in other wetland types.
- for the establishment of hardwoods in any wetland type.
- in established pine plantations regardless of the wetland type.

However, the guidance does require that certain best management practices be followed to maintain this exemption. In general terms, the BMPs require minimization of soil disturbance, avoidance of excessive soil compaction, arrangement of windrows to limit erosion and runoff, protection of water quality and maintenance of natural contours.

Also, the guidance does not affect any other activity or any other part of the exemption.

ARE THERE STATE REGULATIONS CONCERNING FORESTRY IN WETLANDS?

Yes. The North Carolina Environmental Management Commission (EMC) adopted a rule concerning forestry and agriculture in wetlands. Under this rule, compliance with the federal Section 404(f)(1) requirements shall be deemed to comply with the state wetland standards. The only change from the federal regulations is a requirement that spoil from any drainage ditch, except that used for road construction, be placed within 20 feet of the ditch. The rule gives the director of the Division of Water Quality, in consultation with the Corps of Engineers or the Environmental Protection Agency, the authority to determine compliance with these requirements. Landowners should contact the NCFA office or the local Division of Forest Resources office for the most current information.



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