

**GUIDELINES FOR SILVICULTURE EXEMPTIONS
UNDER THE CLEAN WATER ACT (CWA)
IN THE STATE OF GEORGIA**

I. PURPOSE:

These guidelines are intended to clarify the roles and responsibilities of the US Environmental Protection Agency, Region IV (USEPA), the Savannah District, US Army Corps of Engineers, Regulatory Division (USACE), the Natural Resources Conservation Service (NRCS) and the Georgia Forestry Commission (GFC) when determining whether silviculture activities occurring in waters of the US are exempt under Section 404(f) of the CWA.

Guidelines do not alter existing guidance, rules, regulation or other statutory requirements pertaining to silviculture exemptions.

The 404(f) exemption is not available to silviculture activities conducted in navigable waters of the United States that are subject to jurisdiction under Section 10 of the Rivers and Harbors Act.

II. RELATED GUIDANCE:

The CWA Section 404 (33 CFR Part 323.4 & 40 CFR Part 232.3) exempts normal, ongoing silvicultural activities from the permitting process for discharges of dredged or fill material in waters of the US.

The 1979 "Civiletti" Memorandum concerning the US Attorney General opinion on ultimate administrative authority under Section 404 when determining the reach of "navigable waters" and the meaning of Section 404(f).

The Regulatory Guidance Letter 86-03 concerning exemptions of farm and forest roads under Section 404(f)(1); 33 CFR Part 323.4(a)(6).

The Memorandum of Agreement (MOA) between the Department of Army and the USEPA concerning the determination of the geographic jurisdiction of the Section 404 program and the application of the exemptions under Section 404(f) of the CWA, dated January 19, 1989.

The Memorandum to the Field, dated November 28, 1995, concerning application of Best Management Practices (BMPs) to mechanical silviculture site preparation activities for the establishment of pine plantations in the southeast.

The Georgia's BMPs for Forestry, dated May 2009.

III. OVERVIEW:

There is no requirement at 33 CFR Part 323.4 or 40 CFR Part 232.3 for a landowner to obtain verification from the USACE or the USEPA prior to conducting silviculture activities in waters of the US.

The Section 404(f) silviculture exemption is a statutory exemption that cannot be granted or denied by the USACE and/or the USEPA. The USACE and/or the USEPA role is merely to verify whether a proposed silviculture activity in waters of the US qualifies for the exemption.

The USACE and the USEPA are the only federal agencies that can verify whether or not an activity qualifies for silviculture exemption. Neither the GFC, nor any other state agency can verify whether or not a proposed silviculture activity would qualify for the Section 404(f) exemption.

Prior to conducting work in waters of the US for normal, ongoing silviculture activities, a landowner should contact the GFC for assistance in determining if the activity may be exempt under the CWA. Additionally, a landowner may request a formal silviculture exemption verification from the USACE. If necessary, the USACE may request the USEPA to further review and comment on the USACE findings. All requests submitted to the USACE or the USEPA for Section 404(f) silviculture exemption verifications will be reviewed on a case-by-case basis. It is incumbent on the party seeking an exemption verification (e.g., landowner, forester, logger, etc.) to provide adequate and accurate factual information necessary to fully describe all silviculture activities that may result in a discharge of dredged or fill material into waters of the US, including streams and wetlands. If adequate and accurate factual information is not provided for the USACE or the USEPA to make a final verification determination, then the USACE or the USEPA will generally determine such activities are not exempt.

If the USACE or the USEPA determine proposed silviculture activities in waters of the US are not exempt under Section 404(f)(1), then Department of the Army authorization must be obtained prior to performing the proposed work. Information on permits is available on the USACE web page at: <http://www.sas.usace.army.mil/regulatory/regulatory.html>.

If a landowner chooses to conduct silviculture activities without prior USACE or USEPA verification, then the landowner is responsible for meeting the requirements of the statutory exemption, including maintenance of adequate and accurate factual information necessary to fully describe all silviculture activities that may result in a discharge of dredged or fill material into waters of the US, including streams and wetlands. In such cases, the landowner would be conducting silviculture activities at their own risk and if the USACE or the USEPA subsequently determine the silviculture activities are not exempt, then the activities would be considered an unauthorized activity and subject to enforcement procedures under Section 404 of the CWA.

IV. AGENCY ROLES AND RESPONSIBILITIES:

These guidelines were prepared by the USACE and coordinated with the USEPA, the NRCS, the GFC, the US Forest Service, the Georgia Department of Natural Resources (Georgia DNR) –

Environmental Protection Division, and the Georgia DNR – Wildlife Resources Division. The intent of this section is to outline procedures that will reduce duplication of effort and overlap of agency responsibility, to promote efficient administration of Section 404(f). Agency roles and responsibilities are as follows:

A. GFC. The GFC is the primary point-of-contact for landowners, foresters, loggers and the general public for responding to inquiries concerning proposed silvicultural activities and/or for responding to complaints concerning ongoing silvicultural activities. Normal contact between the GFC and landowners would include but not be limited to: rural or urban forestry advice, federal cost share assistance, BMP Assurance Exams, prescribed burning assistance (including firebreaks), timber management and Stewardship Management Plans. The GFC will conduct the initial review of proposed activities and initiate an investigation in response to complaints concerning ongoing activities.

The GFC has a renewable Section 319 grant contract with the Georgia Environmental Protection Division (GAEPD).¹ The contract specifies that the GFC will investigate and mediate forestry complaints concerning forest water quality, which often involve adverse impacts to waters of the US. The GFC maintains a permanent file for all silvicultural requests and complaints; files include a site inspection report, a determination concerning whether the activities are in compliance with state BMPs, and a time table to bring the operation into compliance with said BMPs. Follow-up site visits are also documented.

When providing advice or responding to complaints that involve wetlands and BMPs, the GFC will advise landowners of required state BMPs. The GFC will include the following disclaimer in correspondence involving wetlands:

The Federal Clean Water Act, Section 404 (33 CFR Part 323.4 & 40 CFR Part 232.3), exempts normal established, ongoing silvicultural activities from the permitting process for discharges of dredged or fill material in wetlands, streams and/or other jurisdictional waters of the US. However, fifteen (15) baseline provisions for forest road construction and maintenance in and across waters of the US (33 CFR Part 328.3 & 40 CFR Part 230.3) are mandated to qualify for the forest road exemption. The burden of maintaining silvicultural exemptions through historical activity, current activities and future plans falls on the landowner. The ultimate determination of whether activities are exempt can only be made by the USACE and the USEPA.

The GFC shall forward these and complex and/or potentially controversial silvicultural issues to the GAEPD, the USACE and the USEPA.

B. NRCS. The NRCS provides technical and financial assistance to land users to apply conservation practices on a variety of land uses, including forestlands. The NRCS recognizes the GFC as the lead technical agency for forestry matters, and as such, will consult with the GFC to address proposed silviculture activities in waters of the US, and especially those activities that

¹ GAEPD has a Section 319 Grant with the USEPA for the administration of Section 401 and 402 of the CWA.

may be considered controversial or that may not be considered normal ongoing silviculture. The NRCS will also refer jurisdictional cases to the USACE that involve a change in use from forested wetlands to other uses.

C. USACE. The USACE reviews silviculture activities forwarded by the GFC, the NRCS, and/or a landowner. The USACE has primary responsibility for conducting initial federal review of activities potentially subject to silviculture exemptions and verifying whether such activities would be considered exempt. For standard/routine exemptions determinations, the USACE will render final verification determinations with no further coordination with the USEPA. For complex/controversial exemptions determinations, the USACE will forward a preliminary verification determination to the USEPA for their review and concurrence.

D. USEPA. The USEPA reviews preliminary exemption determinations forwarded by the USACE, with final verification responsibility and oversight for all determinations. The USEPA will also continue to review silviculture activities reported by the public and other agencies and will coordinate or forward these reviews to the GFC and/or the USACE after initial review. When the USEPA determines that an activity is not exempt under 404(f), the USEPA will take appropriate actions to forward the applicant to the USACE for permitting or take appropriate enforcement action. The USEPA has primary responsibility to determine what an exempt activity is or what activities are covered under Section 404 and enforcement authority for activities in waters of the US.

V. TIERED EXEMPTION DETERMINATION APPROACH:

For the purposes of these guidelines, silviculture activities are subdivided into the following four categories:

A. Category I – Minor Impact and/or Routine. Under the terms of these guidelines, the GFC will investigate, review and respond to all requests and complaints that concern silviculture activities in waters of the US. The GFC will confirm whether the silviculture activity under review would qualify as a Category I activity. Category I silviculture activities in waters of the US that are subject to the GFC routine review include, but are not limited to: (1) forest roads with minor stream and/or wetland crossings; (2) routine timber harvesting; and (3) mechanical site preparation in established pine plantations. As discussed above at Part IV (Agency Roles and Responsibilities), the GFC will maintain a written record of all Category I silviculture activity reviews. A detailed list of all Category I silviculture activities will be developed by the USEPA, the USACE, the NRCS and the GFC, and added as an appendix to these guidelines.

B. Category II – More than Minor Impact and/or Complex. This category includes proposed silviculture activities in waters of the US that would exceed Category I criteria, and ongoing or completed silviculture activities in waters of the US where the GFC confirms that irresolvable BMP violations have occurred. For all proposed or ongoing Category II activities reviewed by the GFC, the GFC will respond in writing to notify the landowner that a formal exemption verification by the USACE is required. The GFC will copy letters recommending formal exemption verification to the USACE and the USEPA.

1. For those silviculture activities determined to exceed Category I criteria, the USACE will notify the landowner in writing that a Category II review of the activity has been initiated, and that coordination will be initiated with the USEPA. The initial letter to the landowner will also request any additional information that will be necessary for the USACE to complete a review of the activity and make a preliminary Category II finding. The USACE may also schedule a site inspection, if necessary. Within 30 days of receipt of ALL requested information from the landowner, and/or conducting a site inspection, whichever occurs last, the USACE will make a preliminary Category II finding. The USACE's preliminary Category II finding will discuss whether or not the silviculture activity is considered exempt, and why.

2. The USACE will coordinate all preliminary Category II exemption findings with the USEPA along with a copy of the case file. All Category II coordination between the USACE and the USEPA will be conducted via e-mail; therefore, transmittal and receipt dates will be the same for the purposes of these guidelines. All Category II e-mail communication between the USACE and the USEPA will be copied to the GFC.

3. Within 30 days of receipt of a preliminary Category II exemption finding from the USACE and a complete copy of the case file, the USEPA will notify the USACE in writing that further coordination is not necessary; or notify the USACE in writing that USEPA will assume lead.

4. In cases where the USEPA notifies the USACE that further coordination is not necessary for a Category II silviculture activity, the USACE will complete its review and make final exemption verification within 30 days of the USEPA's notification. The USACE will provide a letter to the landowner stating whether or not the silviculture activities are exempt from the permit requirements of Section 404. For activities that the USACE determines not to be exempt, the letter to the landowner will also provide information concerning permit requirements for the proposed activity. An exemption verification made by the USACE under Category II will be final upon issuance.

5. If the USACE determines that the administrative file is not complete and the landowner, forester, logger or other interested party is uncooperative or incapable of providing essential information, thereby disabling the USACE from rendering exemption verification, then there is a rebuttable presumption that a permit is required.

C. Category III – Substantial Impact and/or Controversial. This category includes proposed silviculture activities in waters of the US that would exceed Category II criteria, and ongoing or completed silviculture activities in waters of the US where the USEPA has assumed lead. As part of their review of a Category III silviculture activity, the USEPA may conduct additional coordination with the USACE, request additional information from the landowner, and/or schedule a site inspection. Within 30 days of receipt of any requested information and/or after completing a site inspection, whichever occurs last, the USEPA will complete its review and make final exemption verification.

1. The USEPA will provide a letter to the landowner stating whether or not the silviculture activities are exempt from the permit requirements of Section 404. For activities that the USEPA

determines not to be exempt, the letter will recommend that the landowner contact the USACE for information concerning permit requirements for the proposed activity or initiate appropriate enforcement actions to restore the violation site and bring the site into compliance with the CWA. An exemption verification made by the USEPA under Category III will be final upon issuance.

2. If the USEPA determines that the administrative file is not complete and the landowner, forester, logger or other interested party is uncooperative or incapable of providing essential information, thereby disabling the USEPA from rendering exemption verification, then there is a rebuttable presumption that a permit is required.

D. Category IV – Non-Exempt. Silviculture activities that do not meet one or more of the above discussed criteria and would typically not be considered exempt, include:

1. The conversion of riverine bottomland hardwood wetlands to pine plantation or to uplands.

2. Activities that are determined not to be part of a normal or ongoing silvicultural operation.

3. The landowner's intent to bring an area into use other than silviculture and where the activities would result in an impairment of the reach or flow of waters of the US ("also known as the "recapture clause" at 33 CFR Part 323.4(c) & 40 CFR Part 232.4(c)).

4. As stated above, silviculture activities conducted in Section 10 waters are not exempt from Department of the Army the permit requirements.

VI. ACTIVITY SPECIFIC GUIDANCE:

The USACE, the USEPA and the GFC will continue coordination to develop additional appendices for making exemption verifications for the below listed activities. The USACE will lead this effort by scheduling meetings and facilitating prompt development of activity specific information.

These guidelines will be periodically amended to incorporate future activity specific information.

VII. APPENDICES:

Characteristics of Ongoing Silviculture

Forest Management Plan

APPENDIX A CHARACTERISTICS OF ONGOING SILVICULTURE

To comply with Section 404(f), a landowner must demonstrate past, present, and future plans for silviculture management. The following indicators may be used by the USACE and/or the USEPA to determine whether an activity would be considered part of an ongoing silviculture operation. This list of indicators is not all inclusive and may not cover all silviculture activities.

1. Evidence of prior management activities, including, but not limited to: stumps from earlier harvests; aerial photographs documenting past management activity; and/or records of past tree establishment, cultivation or utilization.

2. Evidence of implementation of a pre-existing forest management plan that includes timber harvesting and reforestation by natural or artificial means. The harvest plan should have been developed by a trained Georgia Master Timber Harvester Program participant or a Georgia Registered Forester, and outline the harvest method and haul routes.

3. For recently harvested bottomland hardwood forest land that are specified in the Memorandum to the Field dated November 28, 1995, where tree stumps were left in place to provide coppice sprouts.

4. For recently harvested bottomland hardwood forest land, skid trails have been minimized and installed in accordance with Georgia approved Best Management Practices (BMPs) for logging operations.

5. The landowner is engaged in a forest management activity(s) such as boundary maintenance; firebreak construction and maintenance; invasive plant, insect or disease control, and/or timber stand improvement (TSI).

6. The forest land is enrolled in a third party certification program (i.e., Tree Farm, Forest Stewardship Council, Sustainable Forestry Initiative, etc.) or is enrolled in agricultural-use tax status.

7. Low ground-pressure equipment or mat logging techniques has and/or will be used on especially wet sites to minimize ground disturbance and soil compaction and to facilitate natural regeneration. Mat logging should incorporate acceptable techniques that maximize the facilitation of natural regeneration.

8. Intensive mechanical site preparation (i.e., shearing, root raking, etc.) has not and/or will not be employed in those stands specified in the Memorandum to the Field dated November 28, 1995, to facilitate the conversion to pine plantations.

9. Forest roads have been constructed in accordance with Georgia and federal BMPs and are consistent with the purpose and practice of forestry. Forest roads are typically narrow, low-cost and minimally spaced as to be practical and economically feasible.

APPENDIX B FOREST MANAGEMENT PLAN

The forest management plan should outline that silviculture has been, is currently and will be conducted into the future. There are many types of nationally and internationally recognized forest management plans available. No particular or specific plan is preferred by the USACE or the USEPA for the purpose of silviculture exemption verifications pursuant to Section 404 of the CWA, provided the plan is prepared by a Georgia Registered Forester.

The plan must clearly state that timber production is the primary land use of the landowner. As defined by The Society of American Foresters, silviculture is “[t]he art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis.” “Silvicultural system”, as defined for the United States Forest Service in 36 CFR Part 219.3, is

“A management process whereby forests are tended, harvested, and replaced, resulting in a forest of distinctive form. Systems are classified according to the method of carrying out the fellings that remove the mature crop and provide for regeneration and according to the type of forest thereby produced.”

An acceptable forest management plan should meet all of the following criteria:

1. The plan provides for maintaining or restoring the health of the land in order to provide a sustainable flow of silviculture uses, benefits, products, and services.
2. The plan provides for desired conditions, objectives, and guidance for site-specific project and activity decisions.
3. Plan objectives must be realistic, achievable, and within reasonable budget assumptions.
4. “Land suitability” must be met for desired goals and is defined for the US Forest Service in 36 CFR Part 219.3 as, “[t]he appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses foregone.”
5. Desired conditions may be long-term aspirations and, therefore, may only be achievable over many plan periods; however, desired conditions should be realistic.