

Is the Farm Pond Exemption Being Abused?

Under the 1977 Amendments to the Clean Water Act, some farm ponds are exempt from §404 permits. The author explores the relevant case law for clarity on what types of farm ponds fit the criteria, whether the exemption is being abused, and offers guidance on navigating the administration of the exemption, which is shared between the U.S. Army Corps of Engineers and the Natural Resources Conservation Service.

BY NATE HUNT

Growing up in rural Iowa, many of the farms around my town included farm ponds. Although I never thought back then about why these ponds had been constructed, my friends and I did appreciate them as wonderful places for fishing, ice skating, and water skiing, as well as the occasional late-night party.

Decades later, I realize that these ponds are a necessary component of working farms because they provide a ready source of water for watering livestock and for irrigating crops. I also realize that although many of these ponds were and continue to be constructed in freshwater wetlands, they are for the most part exempt from any permit requirements under §404 of the Clean Water Act (CWA). While I do not quarrel with the exemption per se, I have noticed that some of the “farm ponds” that I have come across lately have been used to grow houses rather than to irrigate crops. It is this type of abuse of the farm pond exemption that I do find problematic. In this article, I provide background on the farm pond exemption, discuss the ways in which I have seen it abused in Georgia, and suggest some ways in which the legitimate use of the exemption could be protected.

THE FARM POND EXEMPTION

The CWA prohibits discharges of dredged or fill material into the waters of the United States unless authorized by a permit under §404 of the Act. In the 1977 Amendments to the Act, several exemptions to the §404 permit requirement were added in §404(f)(1)—including the exemption of “[n]ormal farming, silviculture and ranching activities” resulting in discharges into waters of the United States.¹ The 1977 Amendments also exempted activities in waters of the United States for the “construction or maintenance of farm and stock ponds or irrigation ditches, or the maintenance of drainage ditches.”²

The legislative history of the exemptions reveals that the U.S. Congress intended for the exemptions to be applied narrowly. For instance, Sen. Edmund Muskie (D-Me.), the legislation’s primary sponsor, stated that the exemptions for §404 permits would only apply to

those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is under-

stood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.³

This intent was embodied in specific statutory language. All activities that would otherwise fall within one of the §404(f)(1) exemptions must satisfy the requirements of the “recapture provision” contained in §404(f)(2). The recapture provision provides that any discharge of dredged or fill material that will bring the waters “into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.”⁴ That is to say that, even if a farm pond is constructed for a legitimate farming purpose and would otherwise be exempt, the pond would be “recaptured” and require a §404 permit if the construction of the pond would (1) constitute a new use of the area of water, and (2) either impair the flow or reduce the reach of water.

As the U.S. Court of Appeals for the Fifth Circuit states in the often-cited *Avoyelles Sportsman’s League, Inc. v. Marsh*, the recapture provision “takes away at least some of the exemptions arguably provided by section 404(f)(1).”⁵ In doing so, §404(f)(2) ensures that exempt activities cause minimal adverse environmental impacts to wetlands and other waters of the United States.

THE CORPS’ REGULATIONS ON THE FARM POND EXEMPTION

The U.S. Army Corps of Engineers (the Corps) has promulgated regulations that provide some guidance on the application of the §404(f)(1) exemptions. For example, “normal farming, silviculture, and ranching activities” must be part of “established” or “on-going” operations to be exempt.⁶ While the Corps regulations elaborate on what this means for other exempt activities, for farm ponds the Corps regulations essentially restate the Act’s farm pond exemption language.⁷ Thus, in the face of such a broad exemption, the regulations provide little assistance in determining how the farm pond exemption should be applied.

In 1987, the Corps did, however, issue a regulatory guidance letter (RGL 87-09) on the farm and stock ponds exemption. Unfortunately, it confuses rather than clarifies the law around farm ponds. Notably, the Corps distinguished the farm pond exemption from other §404(f)(1) exemptions. Without providing a suitable rationale, RGL 87-09 states that, unlike the farming, silviculture, and ranching activities exemptions, there is no “on-going” requirement for farm or ranch ponds.⁸ In the Corps’ words, an exempt pond “can be located on lands which are part of either a new or ongoing farming/ranching operation.”⁹

However, RGL 87-09 does provide some useful language too. It admonishes against the abuse of the farm and ranch pond exemptions, stating that it is “important to consider the relative size of a proposed pond in relation to the size of the farming/ranching operation.”¹⁰ And, as if to portend future abuses of the exemptions, the Corps states in the RGL that “ponds must actually be used in the farming/ranching operations” and “a large pond on a small farm could in a few years become the nucleus of a residential development plan and therefore such construction may require an individual permit.”¹¹

THE CORPS’ COOPERATION WITH THE NRCS

To be clear, there is no affirmative duty to seek a farm pond exemption determination from the Corps. As long as a farm pond meets the requirements of the Act—namely that the pond has a legitimate farming purpose and is not recaptured—a farmer can avoid the costs, resources, and time spent obtaining a §404 permit. Nevertheless, district offices of the Corps have established procedures that a cautious or prudent farmer may follow to ensure an exempt status for a proposed pond.

In accordance with the Food Security Act, the Natural Resources Conservation Service (NRCS) has the authority to determine whether wetlands on a farmer’s property are subject to the Food Security Act’s wetland conservation provisions (known as the “swampbuster provisions,” which withhold federal farm program benefits from farmers who convert or modify wetlands). To remain eligible for federal program benefits, farmers may seek guidance from the NRCS for help in determining whether their farms contain wetlands.

In 2005, the Corps and the NRCS prepared joint guidance and entered into a partnership agreement that encouraged both agencies to enter into field-level agreements in order to improve the management of water resources.¹² Under these agreements, the Corps and the NRCS coordinate the implementation of CWA §404 permitting and the Food Security Act’s Wetland Conservation Compliance, including utilizing each other’s wetland delineations whenever possible.¹³

In Georgia, for instance, the Corps’ Savannah District office and the NRCS entered into a 2006 field-level agreement under which the agencies may cooperatively oversee wetland delineations, jurisdictional determinations, and exemption determinations.¹⁴ According to the agreement, the NRCS is responsible for making wetlands delineations for those applicants desiring to participate in the U.S. Department of Agriculture programs involving the draining

and filling of wetlands. The Corps may use NRCS’ delineations. However, those wetlands delineations must be verified by the Corps for purposes of the CWA. The agreement also encourages coordination of efforts between the Corps and the NRCS in overseeing farm pond exemptions under the CWA. According to the agreement, the Corps and the NRCS will follow the procedures outlined in the Georgia Farm Pond Exemption Guide when providing assistance to landowners seeking to construct a farm pond.¹⁵

Under the field-level agreement with the Corps and the Georgia Farm Pond Exemption Guide, the NRCS essentially oversees farm ponds constructed in wetlands.¹⁶ The NRCS provides applicants with technical assistance in the construction of farm ponds and determines the appropriate size of the farm pond based on the amount of crops that the farm pond will be used to irrigate. And by overseeing an application for a farm pond, the NRCS fulfills the Corps’ responsibility of ensuring the pond is constructed for a legitimate purpose exempted by the CWA. The applicant and the NRCS sign a “Farm Pond Exemption Information Paper” that certifies the size and need for the farm pond. Thus, in effect, the administration of the farm pond exemption appears to lie largely with the NRCS.

Despite its title, however, the Farm Pond Exemption Information Paper does not exempt the proposed farm pond from the CWA’s §404 permit requirements. Farm pond exemptions must be issued by the Corps for CWA purposes, and the Exemption Information Paper notes that the exemption does not free the applicant from obtaining any other federal permits for the construction of the proposed pond. Although landowners may be encouraged to contact the Corps for an exemption determination, applicants are not required to do so. The NRCS maintains a log of applications for ponds that are exempt, and submits an annual report of such ponds to the Corps.¹⁷ If the farm pond exceeds 10 acres, the Exemption Information Paper states that the landowner should submit an additional farm pond exemption checklist to the Corps.¹⁸

Unfortunately for farmers, the field-level agreement, the Farm Pond Exemption Guide, and the Exemption Information Paper do not notify farmers of the recapture provision, which may render an otherwise exempt pond subject to the §404 permit requirements. Although a farmer may believe he or she has satisfied the farm pond exemption, that farmer may still be in violation of the CWA if the pond is intended, for instance, to serve a new farming operation or impairs or reduces the reach of the waters to be impounded. And although the Farm Pond Exemption Information Paper signed by the farmer notifies the farmer of potential permit obligations under state and federal law, it is entirely conceivable that in submitting the form to the NRCS, a farmer may in good faith believe that he or she has obtained a CWA exemption. Indeed, the form refers to itself as “this exemption.”¹⁹

IS THE POND INTENDED TO SERVE A FARM?

Although some oversight and coordination between the Corps and the NRCS exists, the Corps’ relatively lax oversight of farm ponds means the exemption is susceptible to abuse by those who wish to build a pond for nonfarming purposes. Specifically, people have

used the exemption to skirt permit requirements for the construction of amenity ponds. For instance, the aesthetics of a new development can be significantly enhanced by an amenity pond, and the farm pond exemption offers an opportunity to construct that pond under the guise of a farm pond.

The case of *Altamaha Riverkeeper v. Neal Wolfe* illustrates this type of abuse in Georgia. A developer submitted a Farm Pond Exemption Information Paper to the NRCS requesting to construct a three-acre pond in wetlands for a purported field of soybeans.²⁰ In violation of the Farm Pond Exemption Guide, the NRCS accepted the developer's Exemption Information Paper without the required water budget and site map. Also, at the request of the developer, the Corps verified a wetlands delineation submitted by the developer, which identified the pond. However, neither the NRCS nor the Corps sought further clarification of the purpose of the pond. Around the same time, the developer submitted a plat to Toombs County, Georgia, for the development. The plat included the proposed pond, which was located near the entrance to the development.

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During construction of the pond, the Altamaha Riverkeeper complained to the Corps that the pond did not appear to be a legitimate farm pond. As a result of these complaints, the Corps conducted a site visit. During the site visit, the Corps accepted the developer's Exemption Information Paper as sufficient documentation that the pond was an exempt farm pond. The Corps did not investigate to determine whether the farm pond was recaptured by §404(f)(2); neither did the Corps discover that the developer had a plat on file with the county. As construction of the pond continued, the Riverkeeper brought a federal lawsuit against the Corps and the developer claiming that the Corps impermissibly granted an exemption to the developer and that the developer violated the CWA in failing to obtain a §404 permit.

Although the district court dismissed the suit against the Corps under the reasoning that the Corps had not made a final agency determination, the suit against the developer continued. In the end, the Riverkeeper entered into a settlement with the local bank that had foreclosed on the property. Under that settlement agreement, the bank agreed to restore the wetlands and mitigate for the temporal loss of wetlands functions for the period the wetlands were disturbed.

In addition to illustrating how a developer can abuse the farm pond exemption, *Altamaha Riverkeeper* highlights a significant problem with the farm pond exemption—the recapture provision is being ignored. In that case, the Corps failed to consider whether

the pond would constitute a new use of the wetlands and whether the pond would impair the flow or reduce the reach of the stream that was to be dammed to create the pond. Had the Corps' research not ended with an inspection of the Exemption Information Paper, it would have found that the pine plantation was to be converted into a housing development. It might have also found that, even if the pond were constructed for a legitimate purpose, the watershed feeding the pond was so small that the dam would have effectively stopped all flow of the stream.

ARE ALL FARM PONDS EXEMPT?

The relative inattention to farm ponds may explain the paucity of case law on the subject. Only a few published cases address the farm pond exemption. Although none of the cases explicitly interpret the exemption to exclude ponds for new farming operations, the court in each case examines the interplay between the exemption and the recapture provision—finding that in contrast to RGL 87-09, new ponds on new farming operations constitute a new use and therefore require a §404 permit. Generally speaking, these decisions lend sup-

port to restricting the farm pond exemption to only those ponds on ongoing farming operations, a restriction that the Corps' regulations apply to the general farming, silviculture, and ranching exemption.

In *Conant v. United States*, Marcus Conant was constructing multiple fish ponds for a new fish farming operation on his land in Florida. One of the ponds was located in wetlands.²¹ The Corps issued a cease-and-desist order to Conant ordering him to stop placing fill in wetlands. Conant sought an injunction against the Corps' enforcement. On appeal, the U.S. Court of Appeals for the Eleventh Circuit determined that Conant's new farming operation did not fall within the exemption regarding an “established (i.e. on-going) farming, silviculture, or ranching operation,” because the activity involved “construction of a fish farming operation.” The court then found that “the reach of [the farm pond exemption] is limited by the [recapture provision].”²² Since Conant's activity involved a “new use which [would have affected] the flow of circulation within the wetlands,” it was not exempt.²³ The court concluded that the “plain purpose of the statute and regulations is to allow people to build ponds in connection with a previously established farming operation.”²⁴ Although the court's requirement of an ongoing farming operation is based on the recapture provision's restriction of the farm pond exemption, the court's analysis strongly suggests that only farm ponds for ongoing farming operations are exempt.

In *Coon v. Willet Dairy*, the U.S. Court of Appeals for the Second Circuit upheld a farm pond exemption based on similar reasoning to that used by the Eleventh Circuit in *Conant*.²⁵ In *Willet Dairy*, the defendant was a dairy farmer with an existing farming operation. He constructed a stock pond by impounding a creek. When local citizens challenged his construction of the dam as an unpermitted fill, he claimed that the pond was exempt based on a determination that he had obtained from the Corps. While the citizens argued that because the dairy farmer was constructing a new pond, which constituted a new use, the activity should have been recaptured. The Second Circuit disagreed and upheld the Corps' farm pond exemption based on the relation between the exemption and recapture provision. Referencing *Conant*, the court found that "the creation of an entirely new farm pond, even where no similar feature existed before, is permissible under the recapture provision as long as it is constructed on an *existing farm operation*."²⁶

In the third case, *In re Carsten*, a debtor in bankruptcy owned a ranch that used a slough for watering its horses and llamas.²⁷ The prior owner had attempted to expand the uses of the slough by constructing a farm pond at the slough. In bankruptcy court, the U.S. Environmental Protection Agency suggested that if the farm pond did not exist in the past, then the construction of the pond would constitute a new use invoking the recapture provision. However, quoting *Conant*, the bankruptcy court interpreted the exemption to "allow people to build ponds in connection with a previously established farming operation."²⁸ The court held that the farm pond was exempt and the recapture provision did not apply because, among other things, the "slough had functioned as a watering hole in the past, and because the pond would have enhanced [the prior owner's] *ongoing farming operation* . . ."²⁹

SHOULD THE FARM POND EXEMPTION ONLY COVER NEW PONDS CONSTRUCTED ON EXISTING FARMS?

In light of the existing case law and RGL 87-09, what is a farmer to do if he or she is in need of a farm pond for a new farm? As these three cases demonstrate, where courts have examined the farm pond exemption, the recapture provision effectively places an "ongoing" requirement on the farm pond exemption. In other words, when constructing a farm pond on a new farm, unless the farmer constructs the farm pond in a manner that ensures that the natural flow of the stream or creek will be preserved after being dammed, the pond will require a §404 permit.

From a policy perspective, this makes sense. Farmers interested in starting a new farming operation under this approach will be required to mitigate for wetlands impacts from any new ponds that will be needed to make the farm operational. In that way, these farmers will have to take into account the true costs of getting the farm up and running. If the farmer cannot internalize the costs of wetlands mitigation and make the farm profitable, there is a strong argument that the farmer should employ a different approach. For the farmer who already has an ongoing farm operation, internalizing the costs of mitigating for wetlands losses due to a new farm pond may not be an option. At least

that is what Congress seems to have concluded in 1977 when it drafted the farm pond exemption; that is, farmers with existing operations should not be burdened with the requirements of §404, but farmers that are looking to create new farms should include the cost of wetlands mitigation in determining whether their new venture will be profitable.

Requiring a demonstration that a new pond is intended to serve an ongoing operation creates a bright-line test that protects farmers with such operations and, thus, could reduce abuses of the exemption. If there is an existing operation, the farmer is protected from liability under the recapture provision because conversion of the wetlands is not considered a "new use," even if the pond alters or restricts the flow of waters downstream. And requiring a demonstration of an established farming operation when the NRCS receives an application for a farm pond would further ensure that a landowner is constructing a pond for a legitimate farming purpose. As a result, the ongoing operation requirement could reduce wetlands loss under the farm pond exemption while protecting farmers with existing operations that have a legitimate need for a new farm pond. ■

ENDNOTES

1. 33 U.S.C. §1344(f)(1)(A) (1972).
2. *Id.* §1344(f)(1)(C)
3. A Legislative History of the Clean Water Act of 1977, 95th Cong. 2d Sess, No. 95-14 at 474 (1978).
4. 33 U.S.C. §1344(f)(2).
5. *Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983).
6. 33 C.F.R. §323.4(a)(1)(ii) (2012).
7. *Id.* §323.4(a)(3).
8. U.S. Army Corps of Engineers, Regulatory Guidance Letter 87-09 (Aug. 27, 1987).
9. *Id.*
10. *Id.*
11. *Id.*
12. Joint Guidance From the Natural Resources Conservation Service and Army Corps of Engineers Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985 (February 25, 2005); Partnership Agreement Between the U.S. Department of Agriculture Natural Resources Conservation Service, and the U.S. Department of the Army Office of the Assistant Secretary of the Army (Civil Works) for Improving the Management of Water and Related Natural Resources (July 7, 2005).
13. *See* Joint Guidance, *supra* note 12, at 4.
14. Field Level Agreement Between U.S. Army Corps of Engineers, Savannah District and the Natural Resources Conservation Service Concerning Wetland Determinations and Determinations of Regulated and Unregulated Activities in Georgia (Oct. 2006).
15. *Id.* at 3.
16. U.S. Army Corps of Engineers, Georgia Farm Pond Exemption Guide (July 2008).
17. Field Level Agreement, *supra* note 14, at 3.
18. Georgia Farm Pond Exemption Guide, *supra* note 14, at 5.
19. Farm Pond Exemption Information Paper (March 2008) at 2.
20. *Altamaha Riverkeeper v. Neal Wolfe*, No. 6:09-cv-00047-BAE-GRS (S.D. Ga. 2010).
21. *Conant v. United States*, 786 F.2d 1008 (11th Cir.1986).
22. *Id.* at 1010.
23. *Id.*
24. *Id.*
25. *Coon v. Willet Dairy*, 536 F.3d 171 (2d Cir. 2008).
26. *Id.* at 175 n.4 (emphasis added).
27. *In re Carsten*, 211 B.R. 719 (Bankr. D. Mont. 1997).
28. *Id.* at 36.
29. *Id.* (emphasis added).