



Reply to
Attention of:

DEPARTMENT OF THE ARMY
PORTLAND DISTRICT, CORPS OF ENGINEERS
P.O. BOX 2946
PORTLAND, OREGON 97208-2946

Operations Division
Regulatory Branch

Mr. Kenneth F. Bierly
Deputy Director
Oregon Watershed Enhancement Board
775 Summer Street NE., Suite 360
Salem, Oregon 97301-1290

Re: Permit Requirements for Fish Passage Projects

Dear Ken:

My apologies for not getting a response back to you before now regarding your letter of June 13, 2000, and your questions about permit requirements for activities funded by the Oregon Watershed Enhancement Board (OWEB.) I have been working with our Northwest Division Office (NWD), staff in the Portland District, and my counterparts in the other Districts in NWD to identify what type of activities could proceed without requiring a permit under Section 404 of the Clean Water Act.

Your letter presented three questions I would like to address. Hopefully, the information I can provide in this letter will assist you in responding to questions raised by OWEB's grantees. If not, and they still have questions, please give them my name and telephone number, 503-808-4370, and I will be glad to assist them in any way I can.

You asked the following questions:

1. We understand that there is a specific exemption in Federal law for the replacement of existing, serviceable transportation structures as well as exemptions for farm or forest roads. How are projects reviewed for compliance with these exemptions? Do these exemptions apply to the replacement of culverts to improve fish passage? What direct findings or facts can be used to ensure a project complies with the exemption?

The exemption you mentioned applies to a discharge of dredged or fill material associated with the maintenance of currently serviceable transportation structures where the maintenance does not change the character, scope, or size of the original fill design. The U.S. Army Corps of Engineers (Corps) is responsible for evaluating a proposed activity and determining whether: the work would require a permit pursuant to Section 404 of the Clean Water Act; the activity is exempt from a permit; or the work would not require a permit at all. Roads are considered transportation structures and the Portland

District believes the replacement of a culvert would be a maintenance activity so, yes, the exemption could apply to the replacement of culverts to improve fish passage. In streams that are not navigable waters of the United States, the Corps would not regulate excavation of the existing fill material around the culvert and would not regulate removal of the culvert (unless a discharge of fill material occurs while performing either activity.) If the new culvert required excavation in the streambed to accommodate its larger diameter, that excavation would also not require a permit. To be exempt from a permit requirement, the fill material replaced after the new culvert is installed should not exceed the dimensions of the original road section. One issue we are trying to resolve is whether riprap placed at either end of the new culvert would require a permit. Presently, if riprap is placed at the mouth of the culvert within the “shape” of the original road design, a permit is not required. If it is necessary to place riprap outside of the original road design, i.e. along the streambank or in a volume that increases the dimensions of the road section, then a permit could be required. Another issue deals with the potential need to place fill in the stream at the downstream end of the new culvert where flow from the old culvert may have resulted in “headcut” of the streambed. Presently, if there is a need to place fill material in the streambed under this scenario, that discharge could require a permit.

2. I also understand there are “recapture” provisions of the law. What are the specific activities that would trigger a “recapture” and require an individual Federal permit?

Any activity that converts an area of waters of the United States into a use it was not previously subject to, i.e. building a forest road into an area that was never used for silviculture or logging before, where the flow or circulation of waters may be impaired or the reach reduced would require a permit. Another example would be placing riprap along the sides of a stream upstream and downstream from a new culvert or filling and rerouting a streambed if a new culvert is placed in an alignment different than the old culvert.

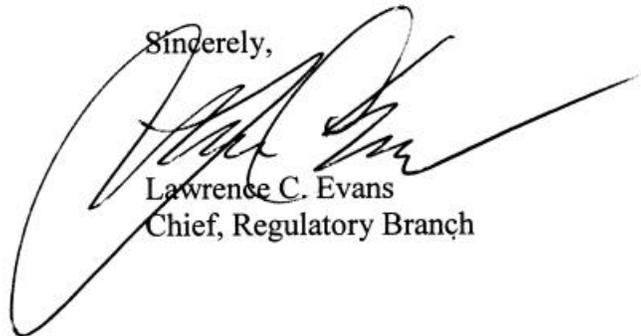
3. How can we provide clear instructions to our grantees and others on the Federal exemption and Federal requirements?

Until we can publish the document I have been working on, which would provide specific definitions to the terms in the regulations and give examples of exempt work, I would recommend your grantees submit culvert refit plans to our office for review. I don’t believe it would be necessary to fill out the joint permit application form. Instead, a cover letter with attached drawings might be sufficient for the regulatory project managers to review the project and provide a reply. These documents could be FAXed to our office at 503-808-4375 or submitted as a file attached to an email message. To avoid delay, I would ask my staff to prioritize their review. It is my hope that the document we are working on

will provide the information your grantees and others could use to design their projects to avoid the need for a permit from the Corps. It is important to remember, however, that these projects would still need to be done in a manner that would not violate the Endangered Species Act. It may be necessary to coordinate the activities with the National Marine Fisheries Service and/or U.S. Fish and Wildlife Service.

Again, my apologies for not having finalized the document we discussed last May. I have recently hired a new Permits Section Chief, Mr. Donald Borda. With Don's assistance I believe the district can continue to improve its service to you and your grantees. If it would help, I would be glad to participate in a regulatory presentation with Don at a location convenient to your grantees to further discuss the questions you have asked. Please let me know if you are interested in such an activity. I will also provide you with a copy of the document we are working on as soon as the District Engineer signs it.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'Lawrence C. Evans', is written over the typed name and title.

Lawrence C. Evans
Chief, Regulatory Branch