

Clean Water Act, Section 404(f) Exemptions

as of January 2014

Section 404(f) of the Clean Water Act (CWA) provides activities which are exempt from regulation under Section 404 of the Clean Water Act (i.e. a CWA Section 404 Permit would not be required).

Exempt Activities

1. Farming, silviculture and ranching activities.
2. (Emergency) maintenance activities.
3. Construction and maintenance of farm ponds, stock ponds, or irrigation ditches or the maintenance of drainage ditches.
4. Construction of temporary sedimentation basins.
5. Any activity with respect to which a State has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C). *Not currently available in New Mexico.*
6. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

Refer to the U.S. Corps of Engineer (USACE) specific requirements of each exempt activity (provided below). Those requirements must be met in order for the exemption to apply. In addition, there are exceptions to the exemptions:

EXCEPTIONS TO THE EXEMPTIONS

I. Navigable Water. Section 404(f) exemptions DO NOT APPLY to any activity within a “navigable water of the U.S.” in which a permit is required under Section 10 of the Rivers and Harbors Act of 1899. For example, in-stream or streambank work such as bank shaping around a headgate or working on a weir/diversion dam will require a Section 404 permit.

II. Recapture Provision. Section 404(f) exemptions DO NOT APPLY where any discharge of dredged and/or fill material into “waters of the U.S.”, including wetlands, **IF 1]** the activity would convert an area of waters of the U.S. into a new use (e.g. wetland to upland, wetland to open water, etc.), **and 2]** where it would impair the flow and/or circulation or reduce the reach of the waters. If these two conditions apply, a Section 404 permit is required.

III. Toxic Pollutants. Section 404(f) exemptions DO NOT APPLY if any discharge resulting from the exempt activities contains any toxic pollutant listed under Section 307 of the Clean Water Act. If this condition applies, a Section 404 permit is required. [Refer to Appendix 1 for a list of Toxic Pollutants.](#)

1. NORMAL FARMING, SILVICULTURE, AND RANCHING ACTIVITIES

Includes: plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices.

- **MUST** be a part of an established (on-going) farming, silviculture, or ranching operation. An operation is no longer established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations. For example, if a property has been used for cattle grazing, the exemption does not apply if future activities would involve planting crops for food; similarly, if the current use of a property is for growing a crop, the exemption does not apply if future activities would involve conversion to an orchard or vineyards.
- It is important to recognize that these terms have specific, regulatory meanings. For example, "plowing" under Section 404(f) means all mechanical means of manipulating soil, including grading to prepare it for the planting of crops. However, grading activities that would change any area of waters of the US, including wetlands, into dry land are not exempt. "Minor drainage" is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the U.S. or emergency removal of blockages that close/constrict existing crop drainage ways. Minor drainage does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the U.S.

For more information, refer to the EPA Memorandum on the CWA Section 404 and Agricultural Activities: <http://water.epa.gov/lawsregs/guidance/wetlands/cwaag.cfm>

2. MAINTENANCE ACTIVITIES.

Includes emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.

- DOES NOT include any modification that changes the character, scope, or size of the original fill design. If a maintenance activity would involve ANY modifications to the original fill design, including the location of the fill, the type of material to be used, the amount of material used, etc., then the activity DOES not qualify for the maintenance exemption and a permit would be required. However, the activity may qualify for authorization under a Nationwide Permit 3, Maintenance.
- Emergency reconstruction must occur within a reasonable period of time after damage occurs to qualify.

3. FARM OR STOCK POND OR IRRIGATION DITCH CONSTRUCTION OR MAINTENANCE

Construction or maintenance of farm or stock ponds (including fish ponds), irrigation ditches or the maintenance of drainage ditches.

- DOES NOT include the construction of drainage ditches. Maintenance is only exempt under Section 404(f) if does not include any modification that changes the character, scope, or size of the original design.
- Remember that the Exemptions to the Exceptions apply.

Example 1: a pond dug within a shallow, emergent wetland. The Recapture Provision applies because it changes the use (wetland to open water) and alters the flow/circulation of the wetland; therefore a Section 404 Permit is required.

Example 2: a surface ditch through a wetland is replaced with a pipeline that includes ‘berming’ or mounding of soil above the natural grade. The Recapture Provision applies because it changes the use (wetland to upland) and alters the flow and circulation of the water (i.e. berm bisecting a wetland alter the surface flow); therefore a Section 404 Permit is required. Please note: if it is believed that the wetland was solely formed by irrigation water, this must be proven to the USCOE. Consult an NRCS wetland expert or the state biologist for assistance.

Example 3: a tar coated diversion structure is used to divert stream water into an irrigation system. The Toxic Pollutant exception applies because tar (Naphthalene) is a Section 307 pollutant.

Example 4: excess dirt from construction or maintenance (such ditch/pond sediment removal) is placed in a low, wet spot (wetland). The Recapture Provision applies; therefore a Section 404 Permit is required.

4. CONSTRUCTION OF TEMPORARY SEDIMENTATION BASINS

Construction of temporary sedimentation basins, on a construction site, which does not include the placement of fill material into waters of the U.S., including wetlands. Construction site is any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of the structures. Also includes any other land areas which involve land-disturbing excavation activities, including quarrying and other mining areas, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

6. CONSTRUCTION OR MAINTENANCE OF FARM ROADS, FOREST ROADS, OR TEMPORARY ROADS FOR MOVING MINING EQUIPMENT

Roads must be constructed and maintained in accordance with Best Management Practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the U.S. are not impaired and that the reach of the waters of the U.S. is not reduced, and that any adverse effect on the aquatic environment are minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

- Roads shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silviculture or mining operations, and local topographic and climatic conditions.
- Road fill shall be bridged, culverted or designed to prevent the restriction of expected flood flows.
- The fill shall be properly stabilized and maintained during and following construction to prevent erosion.
- Discharges shall be made in a manner that minimizes construction equipment in waters of the U.S. outside of the fill area.
- Vegetative disturbance shall be kept to a minimum.
- Construction and maintenance of crossing shall not disrupt the migration or other movement of aquatic life.
- Borrow material shall be taken from upland sources where feasible.

- The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species, or adversely modify or destroy the critical habitat of such species.
- Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided.
- The discharge shall not be located in the proximity of a public water supply intake.
- The discharge shall not occur in a component of the National Wild and Scenic River System.
- The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and
- All temporary fills shall be removed in their entirety and the area restored to its original elevation.

Conclusion: If the proposed discharge satisfies all of the above restrictions, it is automatically exempted and no further permit action from the USCOE is required. If any of the restrictions of this exemption will not be complied with, a Section 404 permit is required (a CWA nationwide permit may be available for the proposed work). State or local approval of the work may also be required.

Contact: For a written determination regarding a specific project, contact the USCOE:

Albuquerque Regulatory Office
4101 Jefferson Plaza NE
Albuquerque, NM 87109
(505) 342-3262

Durango Regulatory Office
1970 East 3rd Ave., Suite 109
Durango, Colorado 81301
(970) 259-1764

Las Cruces Regulatory Office
505 South Main Street, Suite 142
Las Cruces, New Mexico 88001
(575) 556-9939

Reference:

USACE Website: <http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx>
New Mexico Environment Department website: <http://www.nmenv.state.nm.us/swqb/404/>

Appendix 1: Toxic Pollutants

[44 FR 44502, July 30, 1979, as amended at 46 FR 2266, Jan. 8, 1981; 46 FR 10724, Feb. 4, 1981]

The following comprise the list of toxic pollutants designated pursuant to section 307(a)(1) of the Act:

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| 1. Acenaphthene | 35. Ethylbenzene |
| 2. Acrolein | 36. Fluoranthene |
| 3. Acrylonitrile | 37. Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ethers, bromophenylphenyl ether, bis(dichloroisopropyl) ether, bis-(chloroethoxy) methane and polychlorinated diphenyl ethers) |
| 4. Aldrin/Dieldrin | 38. Halomethanes (other than those listed elsewhere; includes methylene chloride, methylchloride, methylbromide, bromoform, dichlorobromomethane) |
| 5. Antimony and compounds | 39. Heptachlor and metabolites |
| 6. Arsenic and compounds | 40. Hexachlorobutadiene |
| 7. Asbestos | 41. Hexachlorocyclohexane |
| 8. Benzene | 42. Hexachlorocyclopentadiene |
| 9. Benzidine | 43. Isophorone |
| 10. Beryllium and compounds | 44. Lead and compounds |
| 11. Cadmium and compounds | 45. Mercury and compounds |
| 12. Carbon tetrachloride | 46. Naphthalene (Tar) |
| 13. Chlordane (technical mixture and metabolites) | 47. Nickel and compounds |
| 14. Chlorinated benzenes (other than di-chlorobenzenes) | 48. Nitrobenzene |
| 15. Chlorinated ethanes (including 1,2-di-chloroethane, 1,1,1-trichloroethane, and hexachloroethane) | 49. Nitrophenols (including 2,4-dinitrophenol, dinitroresol) |
| 16. Chloroalkyl ethers (chloroethyl and mixed ethers) | 50. Nitrosamines |
| 17. Chlorinated naphthalene | 51. Pentachlorophenol |
| 18. Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols) | 52. Phenol |
| 19. Chloroform | 53. Phthalate esters |
| 20. 2-chlorophenol | 54. Polychlorinated biphenyls (PCBs) |
| 21. Chromium and compounds | 55. Polynuclear aromatic hydrocarbons (including benzenanthracenes, benzopyrenes, benzofluoranthene, chrysenes, dibenz-anthracenes, and indenopyrenes) |
| 22. Copper and compounds | 56. Selenium and compounds |
| 23. Cyanides | 57. Silver and compounds |
| 24. DDT and metabolites | 58. 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) |
| 25. Dichlorobenzenes (1,2-, 1,3-, and 1,4-di-chlorobenzenes) | 59. Tetrachloroethylene |
| 26. Dichlorobenzidine | 60. Thallium and compounds |
| 27. Dichloroethylenes (1,1-, and 1,2-dichloroethylene) | 61. Toluene |
| 28. 2,4-dichlorophenol | 62. Toxaphene |
| 29. Dichloropropane and dichloropropene | 63. Trichloroethylene |
| 30. 2,4-dimethylphenol | 64. Vinyl chloride |
| 31. Dinitrotoluene | 65. Zinc and compounds |
| 32. Diphenylhydrazine | |
| 33. Endosulfan and metabolites | |
| 34. Endrin and metabolites | |