

Clean Water Act Exemptions

Section 404(f) of the Clean Water Act provides a list of activities exempt from regulation under Section 404 of the Clean Water Act. If an activity involves the discharge of dredged and/or fill material into waters of the U.S. and falls within one of these activity categories, a Department of the Army Permit under Section 404 of the Clean Water Act is not required (see Exceptions). These 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.

NOTE: These exemptions only apply to activities occurring within waters of the U.S. that result in a discharge of dredged and/or fill material. A permit would NOT be required under Section 404 of the Clean Water Act if the activity would NOT result in the discharge of fill material into waters of the U.S. Please contact your local district office for a determination on whether your activity is exempt under Section 404(f) of the Clean Water Act.

Exempt Activities:

1. Normal farming, silviculture and ranching activities:

(Such as plowing, seeding, cultivating, minor drainage, and harvesting.)

- 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 not 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 corn, the exemption does not apply if future activities would involve conversion to an orchard or vineyards.
- If the activity does not occur within waters of the U.S., or if it does not involve a discharge of fill material, the activity does not require a Department of the Army permit, whether or not it is part of an established farming, silviculture, or ranching operation.

2. Maintenance Activities:

- Includes: emergency reconstruction of recently damaged parts, of currently serviceable structures (Examples: dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures.)
- **DOES NOT include any modification** that changes the character, scope, or size of the original fill design
- Emergency reconstruction must occur within a reasonable period of time after damage occurs to qualify for the exemption
- 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 DA permit would be required. However, the activity may qualify for authorization under a **Nationwide Permit 3, Maintenance**.

3. Construction and maintenance of Farm ponds, stock ponds, or irrigation ditches or the maintenance of drainage ditches:

- This exemption applies to the construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (**but not construction**) of drainage ditches.
- Discharges associated with **facilities that are appurtenance and functionally related to irrigation ditches are included** in the exemption (e.g. siphons, pumps, headgates, wingwalls, weirs, diversion structures, etc.)
- **Regulatory Guidance Letter (RGL 07-02)** provides additional information regarding this exemption for the construction and maintenance of irrigation ditches and maintenance of drainage ditches, including definitions for irrigation ditches, drainage ditches, construction and maintenance.

4. Construction of temporary sedimentation basins:

- This exemption applies to the construction of temporary sedimentation basins on a construction site which does not include the placement of fill material into waters of the U.S.

- **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.

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).

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 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.

- 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 areas of concentrated shellfish production;

- 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.

Exceptions to the Exemptions- In some cases, even if an activity falls under one of the 6 categories, a permit may still be required:

Toxic Pollutants - If any discharge resulting from the exempt activities contains any toxic pollutant listed under Section 307 of the Clean Water Act, the discharge will be subject to any applicable toxic effluent standard or prohibition, and will require a Section 404 permit.

Recapture Provision - Any discharge of dredged and/or fill material into waters of the U.S. incidental to any of the exempt activities must have a permit if it is part of an activity whose purpose is to convert an area of a water of the U.S. into a use to which it was not previously subject, where the flow and/or circulation of waters may be impaired or the reach of the waters reduced. This is a **two part test**. If the **activity would convert an area of waters of the U.S. into a use to which it was not previously subject** (e.g. wetland to upland, wetland to open water, etc), but it would not **impair the flow and/or circulation or reduce the reach of the waters**, then the recapture provision does not apply, and vice versa.

Link to USACE Website:

<http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx#roads>