

**Summary of Regulatory Changes Needed in Michigan Section 404 Program
To Ensure Federal Consistency**

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Activities Exempt from CWA Section 404 Permitting

40 CFR Part 232 Section 232.3 defines the activities which are not prohibited or otherwise subject to regulation under Section 404 of the Clean Water Act. The discussion which follows only includes those activities that have a broader scope exemption under Michigan Law than under federal law. Text in italics is copied from the federal regulation .

Farming Exemptions Under Federal Law

Part 232.3 (c) (1)(i) *Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.*

- (A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture or ranching operation and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.*
- (B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long the modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it is part of an established farming, silviculture or ranching operation.*

In order to fall under this federal exemption, activities must be part of an established or on-going farming, silviculture or ranching operation. Michigan law does not require farming or other operations (horticulture, silviculture or ranching) to be established or ongoing. To be considered established or ongoing the activities conducted as part of a farming operation cannot not include modification of the hydrological regime. In other words, if an area has lain idle so long that hydrological modifications are required the area is no longer part of an established operation under federal law. Currently under Michigan law, bringing areas which are waters of the State into farming or other use, is an exempt activity. The Michigan exemption for farming and other operations must be revised to explicitly state that only established or on-going operations are exempted in other words, if hydrological modifications are required to undertake an exempt farming activity, then the area in question is no longer part of an established operation.

[Part 232.3(d) provides definitions for activities, such as cultivating, harvesting, minor drainage plowing and seeding that are exempt under section 232.3(c) of federal law.]

Michigan statute also appears to exempt discharges which would result in the conversion of an area from one exempted use to another. The federal exemption at 232.3(b) requires a permit for any discharge into waters of the U.S. if the discharge is part of an activity whose purpose is to convert waters of the U.S. to a use for which it was not previously subject. For example, the conversion of a wetland from silvicultural use to farming, when a discharge is required to accomplish the change of operation, is not exempt from permitting. In Michigan law, it is not clear that an activity that includes a discharge to waters of the state, and results in a change from one exempt activity to another, requires a permit.

Relevant Sections of Michigan Law:

324.30305 Activities not requiring permit under part; uses allowed without permit; farming operation in wetland not requiring permit; incidental creation of wetland.

(2) The following uses are allowed in a wetland without a permit subject to other laws of this state and the owner's regulation:

e) Farming, horticulture, silviculture, lumbering, and ranching activities, including plowing, irrigation, irrigation ditching, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. Wetland altered under this subdivision shall not be used for a purpose other than a purpose described in this subsection without a permit from the department.

Change needed in Michigan Law:

Michigan Law needs to be revised to ensure only activities which meet the federal definition of established or ongoing operations are exempted. Michigan law must also regulate the change of one exempt operation to another, if a discharge to waters of the state is required to facilitate the change. The key requirement for determining when an operation is on-going or established, is to ensure that no modifications to the hydrological regime of a water of the US is required to resume an operation. In other words, if a discharge results in a significant discernable alteration to flow, circulation or reach of waters, a permit is required. The Michigan statute at 324.30305(2)(e) needs to be amended to be consistent with the federal regulations at Part 232.3(b) and (c)(1).

Minor Drainage Exemptions Under Federal Law

Minor drainage associated with farming, silviculture and ranching activities is exempt under federal law. Minor drainage is defined at 232.3(d)(3) (i) in the federal regulations. Minor drainage is further defined **not** to include:

Part 232.3(d)(3)(ii)...

Minor drainage does not include drainage that is associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog, or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

Relevant Section of Michigan Law:

324.30305 (j) Drainage necessary for the production and harvesting of agricultural products if the wetland is owned by a person who is engaged in commercial farming and the land is to be used for the production and harvesting of agricultural products. Except as otherwise provided in this part, wetland improved under this subdivision after October 1, 1980 shall not be used for non-farming purposes without a permit from the department. This subdivision does not apply to a wetland that is contiguous to a lake or stream, or to a tributary of a lake or stream, or to a wetland that the department has determined by clear and convincing evidence to be a wetland that is necessary to be preserved for the public interest, in which case a permit is required.

Change needed in Michigan Law

Michigan law exempts drainage necessary for commercial farming. There is no similar exemption for drainage in federal law. The exemption at 324.30305 (j) needs to be deleted from Michigan law, or revised so it only includes minor drainage activities similar in scope to the federal exemption for minor drainage found at 232.3(d)(3).

Drainage Ditch Maintenance Exemption Under Federal Law

The following activity is exempt:

Part 232.3(c) (3)

..... *the maintenance (but not construction) of drainage ditches....*

In the Corps Regulatory Guidance Letter(RGL) 07-02,maintenance is defined as meaning “the physical preservation of the original, as-built configuration of the ditch and appurtenant structures, to restore the original function and approximate capacity of the ditch.” This RGL goes on to state that maintenance includes a repair to an existing structure or feature to keep the ditch in its existing state or proper condition, or to preserve it from failure or decline.

Maintenance activities may include excavation of accumulated sediments back to original contours; reshaping of side-slopes; bank stabilization to prevent erosion where reasonably necessary; armoring or lining only where a previously armored or lined section is being repaired; replacement of existing control structures.

An additional assessment that must be made before an activity is determined to be exempt under the maintenance of drainage ditches provision relates to the "recapture" provision under the Clean Water Act. The assessment is a two part "test" and in order to be exempt from 404 regulation. The first "test" requires that the ditch maintenance activity does not convert waters of the U.S. to a use it was not previously subject. (For example would result in draining a wetland which would then allow farming of the drained wetland). The second test is will the activity impair the flow or circulation of waters of the U.S. or reduce the reach of such waters. If a proposed maintenance activity would result in **both** conditions being met, the activity is not exempt and is "recaptured" under part 404(f)(2) of the Clean Water Act.

*Note: I included the information regarding the recapture provision so you all know it is part of the federal regulations, however, if an activity qualifies as a ditch maintenance exemption under federal regulations, it is **unlikely** that the recapture provision will apply.*

Michigan Statutes related to Exemption of Drain Maintenance Activities

324.30305 Activities not requiring permit under part; uses allowed without permit; farming operation in wetland not requiring permit; incidental creation of wetland.

(h) Maintenance, operation, or improvement which includes straightening, widening, or deepening of the following which is necessary for the production or harvesting of agricultural products:

324.30103 Exceptions;

(d) Construction or maintenance of a private agricultural drain regardless of outlet.
g) Maintenance and improvement of all drains legally established or constructed prior to January 1, 1973, pursuant to the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630, except those legally established drains constituting mainstream portions of certain natural watercourses identified in rules promulgated by the department under section 30110.

Changes needed in Michigan Law to Address Drain Exemptions

The exemption in the Michigan Statute, 30305(2)(h) is much broader than the federal exemption. It includes operation, or improvement activities which include straightening widening or deepening. These activities could result in the impairment of flow of waters of the U.S. or a reduction in the reach of waters of the U.S. These types of activities are regulated under federal law through the re-capture provision and as such are regulated activities. The Michigan Statute at 30305(2)(h) needs to be revised to ensure that only activities that meet the federal definition of maintenance are exempt from regulation by the state. To be consistent with federal law, improvement as currently defined in statute

can no longer be exempt from regulation. Michigan Statute 324.30103(d) also needs to be clarified to ensure that only activities that meet the federal definition of maintenance are exempt.

Federal Exemption for Maintenance

Part 232.3(c)(2) exempts maintenance including transportation structures. *Maintenance does not include any modification that changes the character, scope, or size of the original fill design.*

Michigan Exemption for Road Maintenance

§324.30305(2)(k) Maintenance or improvement of public streets, highways, or roads, within the right-of-way and in such a manner as to assure that any adverse effect on the wetland will be otherwise minimized. Maintenance or improvement does not include adding extra lanes, increasing the right-of-way, or deviating from the existing location of the street, highway, or road.

Change needed to Michigan Law for Road Maintenance

The exemption for work within road right-of-way is not consistent with any federal exemption. The exemption at 324.30305(2)(k) needs to be revised to be consistent with the federal exemption for maintenance at 232.3(c)(2) and clearly state that the only road maintenance activities that are exempt from permitting, are those activities that do not result in any modification to the character, scope or size of the original fill design.

Michigan Exemption for Pipelines

§324.30305(2)(l) Maintenance, repair, or operation of gas or oil pipelines and construction of gas or oil pipelines having a diameter of 6 inches or less, if the pipelines are constructed, maintained, or repaired in a manner to assure that any adverse effect on the wetland will be otherwise minimized

Change needed to Michigan Law regarding Pipeline Maintenance

There is no federal exemption for pipeline maintenance, specifically. Similar to the road maintenance exemption discussed above, the only federal exemption for maintenance is a "generic" exemption which states that the only maintenance activities exempted in waters of the U.S. are activities that do not result in the change to "*the character, scope, or size of the original fill design.*" Michigan law needs to be amended to only exempt pipeline activities that do not result in a change of the original fill.

Michigan Exemption for Electric Transmission Lines

§324.30305(2)(m) Maintenance, repair, or operation of electric transmission and distribution power lines and construction of distribution power lines, if the distribution power lines are constructed, maintained, or repaired in a manner to assure that any adverse effect on the wetland will be otherwise minimized

Michigan Law Changes Related to Electric Transmission Line Exemptions

Here again, federal law does not have an exemption that deals with electric transmission lines, but does provide exemption for any activities that do not change the "*character, scope, or size of the original fill design.*" Michigan law will need to be amended to only exempt activities associated with electric transmission lines etc., if the maintenance activity does not result in a change to the original fill design.

Federal Exemption for Tailings Basins

There is no federal exemption for any hard rock mine tailings basins

Michigan Exemption

324.30305(2)(o) Construction of iron and copper mining tailings basins and water storage areas.

Change needed to Michigan Law regarding Tailings Basins

There is no exemption under federal law for construction of tailings basins associated with iron or copper mining. To maintain consistency with federal law this exemption needs to be deleted from Michigan's wetland statute.