



Clean Water Act (CWA) Section 404 Documentation Requirements for Floodplain Permits for Projects in/near Open Water or Wetlands (Mar. 2021 v1.0)

Background:

The City & County of Denver [Floodplain Ordinance](#) Section 56-204(b)(5) requires, prior to issuance of the floodplain permit, that the Floodplain Administrator must “...assure that all necessary water and/or floodplain permits have been obtained from those Federal, State or local governmental agencies (including Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334) from which prior approval is required.”

Floodplain Management staff at Denver are not Clean Water Act (CWA) Section 404 experts. The regulatory agency responsible for Section 404 permitting is the US Army Corps of Engineers (USACE). Historically, standard practice was to obtain written documentation from the USACE on all projects in/near open water and/or wetlands, prior to issuing floodplain permits to determine if jurisdictional waters of the U.S. (WOTUS), including adjacent wetlands, were present. In cases where WOTUS were not present, the local USACE office used to provide simple email no-WOTUS-present confirmation with a quick desk review. However, currently the USACE Denver Regulatory office interprets *USACE Regulatory Guidance Letter 16-01* as prohibiting informal determinations. All determinations must now go through formal a Jurisdictional Determination (JD) process, which can take anywhere from 1 month to more than 6 months. This timeline means that to avoid delays, project proponents must take steps prior to submitting a floodplain permit application to determine the presence/absence of WOTUS in their project area and if CWA Section 404 authorization is required. Floodplain Management staff will no longer obtain any documentation from USACE.

Purpose:

The intent of this document is to provide guidance on what documentation is required to be submitted with the floodplain permit application in order to meet the intent of Section 56-204(b)(5), while ensuring that the project meets Section 404 permit obligations. **Please be aware that the Denver Floodplain Group reserves the right to request additional information to confirm the project complies with the CWA.**

Notwithstanding this guidance, all floodplain permit applicants are responsible for complying with CWA Section 404. Issuance of a City and County of Denver floodplain permit cannot be relied upon as evidence of Clean Water Act compliance. Holding a floodplain permit does not relieve the permittee from Clean Water Act compliance requirements.

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The following sections describe the most common scenarios encountered by projects in need of a floodplain permit. The scenarios are organized into Tiers, each of which has its own submittal requirements to document compliance with CWA Section 404. If a project does not fit within in one of these Tiers, the Denver Floodplain Group should be contacted to determine documentation requirements.

Some Tiers include providing figures generated from the U.S. Fish and Wildlife Service National Wetland Inventory (NWI) mapper, which can be accessed here:

<https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>

TIER 1: Projects that occur exclusively in uplands and have no effect on wetlands or on waters:

- Project located exclusively in uplands that has no effect on wetlands or on waters, provide the following items in a Memo/Report:
 - Description of the project and associated land disturbance activities,
 - Project potential land disturbance area identified on a NWI mapper PDF,
 - Statement from a qualified professional that the project is located entirely in uplands and will have no effect on wetlands or on waters, regardless of their jurisdictional status.

TIER 2: Projects that impact wetlands and/or waters, but are exempt from Clean Water Act Section 404 regulations:

- Project will impact wetlands and/or waters, but the project is claiming the activities are eligible for exemptions under section 404(f) of the Clean Water Act, provide the following items in a Memo/Report:
 - Description of the project and associated land disturbance activities, including impacts to wetlands and waters,
 - Project potential land disturbance area identified on a NWI mapper PDF,
 - If the project activities are eligible for 1 of the 6 exemptions under section 404(f) of the Clean Water Act, provide a copy of the activity exemption letter from the USACE Denver Regulatory Office. Exempt Activities are listed here:
<https://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section-404-Exemptions/>

TIER 3: Projects impacting non-jurisdictional wetlands and/or waters:

- Project will impact non-jurisdictional wetlands and/or waters, provide the following:
 - Approved Jurisdictional Determination from USACE documenting no WOTUS will be impacted by the project

TIER 4: Projects that impact jurisdictional WOTUS and qualify for coverage under a Nationwide Permit (NWP), Regional General Permit (RGP), or Individual Permit (IP).

- Project will impact WOTUS and is authorized under a NWP or RGP that requires Preconstruction Notification (PCN) or is authorized by an IP, provide the following:
 - A copy of the PCN or IP application and the NWP Verification Letter, RGP Permit Authorization, or signed IP issued by the USACE
- For projects impacting WOTUS authorized under a NWP without a PCN required, provide the following:
 - Delineation of WOTUS, including adjacent wetlands, documented by a qualified professional in conformance with current USACE delineation methods. There is no license or certification for wetland delineation professionals that is recognized by the USACE. However, the Association of State Wetland Managers has developed some suggestions for selecting a consultant at www.aswm.org/pdf/lib/consultant0607.pdf.
 - Memo/report on company letterhead, dated and signed by the qualified professional that includes the following, at a minimum:
 - Description of work,
 - Methodology for determination WOTUS,
 - Area of disturbance below the Ordinary High Watermark and/or to wetlands,
 - Specify the Nationwide Permit(s) that will cover the proposed project impacts to WOTUS,
 - Clause stating that any changes to the character, scope, or size of the original design may require CWA Section 404 authorization by the USACE, and stating the applicant understands it is applicant's responsibility to determine the need for and acquire necessary authorization.