How to prepare Exempt/Permit Requests

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Introduction

- Clean Water Act Section 404 permitting
- Exemptions to Section 404
  - Irrigation exemption
- Request an exemption or permit
  - Information needed
  - Drawing examples
- Summary - Questions
Clean Water Act

- Passed by Congress in 1972 via major amendments to the 1948 Federal Water Pollution Control Act.
  - Major amendments in 1977 and 1987
    - 1977 incorporated the exemptions
  - 1976 case law and regulations extended jurisdiction from navigable waters to non-navigable tributaries
Clean Water Act – Section 404

- Regulates discharges of dredged or fill material into waters of the U.S.
  - Fill is: earthen material, rock, structures, concrete, riprap, other non-trash material used to facilitate construction of a purposed feature within a waterway
  - Requires a permit from the Corps of Engineers
Clean Water Act- Section 404

- Two types of permits – Nationwide and Individual
  - NWPs ~50 issued every five years (2017)
    - Our analysis and public noticing already completed
    - Minimal impacts through acreage thresholds and regional conditions
    - Regional conditions for New Mexico require notification for many instances
    - Permittee receives verification letter indicating proposed activity meets terms and conditions of NWP
Clean Water Act Section 404

► NWPs, con’t
  • Requires Section 401 water quality certification from certifying authority (either tribe or state)
  • Corps must fulfill federal obligations on endangered species and cultural resources (Endangered Species Act and National Historic Preservation Act) – may require additional info from applicant
  • General conditions for compliance include protection of aquatic life movements, management of water flows, soil erosion and sediment controls
Clean Water Act Section 404

- Individual permits
  - Larger projects, non-minimal effects
  - Public notice
  - Alternatives analysis
  - Corps has its own NEPA process
  - Can only permit least environmentally-damaging, but practicable alternative
Section 404 Exemptions

- Six exemptions added in 1977 amendments:
  - Normal farming, silviculture and ranching
  - Maintenance or emergency repair
  - Maintenance and construction of stock ponds/irrigation ditches
  - Construction of sedimentation basins at construction sites
  - State 208 program
  - Farm, forest, temporary mining roads
Section 404 Exemptions

- Exceptions:
  - Exempt activity results in discharges containing toxic pollutants
  - Exempt activity converts an area of a water to a use to which it was not previously subject, flow and/or circulation of waters impaired or reduced – both parts must apply
Section 404 Exemptions

- Recapture, two-part test, con’t
  - 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.
Section 404 Exemptions

- Local examples:
  - Small sand berms capturing some, but not all flow at existing diversion points have been determined exempt
  - Reconstruction of existing diversions generally exempt
  - Acequia-ditch maintenance generally exempt
  - Infiltration gallery installation generally exempt
Section 404 Exemptions

- Local examples:
  - Establishing new diversions generally not exempt
  - Moving diversion point and/or diverting entire stream flow generally not exempt
  - Channelizing river some distance upstream of diversion point generally not exempt
  - Multi-purpose diversions/ditches (irrigation + domestic, municipal, industrial, recreation, other) generally not exempt
Santa Fe County Resolution

- Resolution to assist acequias
- Work may need a permit/may be exempt
- County may require documentation from Corps to reduce liability
- County should only conduct work described in above documentation – additional work may require additional permitting or other review by Corps
Exemption/Permit Request

- We generally want to know:
  - The footprint of what you’re going to do within the waterway
  - The material you are going to use
  - How you are going to do what you are proposing, construction-wise (backhoe? front-end loader? utilizing material from onsite? bringing fill in from another location?)
Exemption/Permit Request

- We generally want to know (con’t):
  - A cross-section and plan view of what your project will look like
  - A location map (print a reasonable view from google earth and mark the location)
  - Who is the applicant (they need to sign request)?
  - Who will be doing the work?
Exemption/Permit Request

- We generally want to know (con’t):
  - When will the work be done?
  - Have you applied for water quality certification from the certifying authority?
  - If on tribal land, do you have authorization from Pueblo to conduct the work?
  - PCN Checklist Guide
Example Diagram
Example Diagram
Example Diagram

Plan View Sketch Example

Drawing not to scale

Point Bar

CHAMA RIVER

50'

Top of bank

Flow

Chama 

35'

2' Rock

Length = 250'

House
Example Diagram

Cross Section Sketch Example

- Top of bank
- High water
- Old bank
- Vegetation
- Point Bar
- Drawing not to scale
- 75' Width at OHWM
- riprap 2' diameter rock
- filter material 5" thick
- Slope: 1 vert.: 2 1/2 horiz.

Drawing not to scale: 50'
Summary

- Clean Water Act Section 404
- Exemptions
- Submitting requests for permit/exemption
- Questions?
Contacts/Links

- Tribal Lands in Santa Fe County
  - Kelly Allen, 505-342-3216, Kelly.E.Allen@usace.army.mil

- Non-Tribal Lands in Santa Fe County
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