

New Mexico Environment Department

Surface Water Quality State Permitting Program Options for Permitting Dredged or Fill Material Discharges Shelly Lemon, SWQB Bureau Chief Surface Water Advisory Panel October 2, 2024



Scope of the Dredge or Fill Program

"The commission may adopt regulations to be administered by the department of environment for surface water discharges."

NM Water Quality Act, Section 74-6-4(Q)

- To create a State program that covers discharges of dredged and fill materials into surface waters of the state (SWOTS).
- The State will not seek assumption of the CWA Section 404 Program that is currently administered by the Corps of Engineers and regulates discharges of dredged and fill materials into Waters of the US (WOTUS).



Dredge or Fill Discharges

 40 C.F.R. 232.2 defines Dredge
 Material as "material that is excavated or dredged from waters of the US"



- Fill Material is defined as "material placed in waters of the United States where the material has the effect of:
 - replacing any portion of a surface water with dry land or
 - changing the bottom elevation of a surface water.
 - Examples include: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining, etc.
 - Does not include trash or garbage.
- Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged and fill materials into waters of the United States, including wetlands.
- NMED is creating a surface water discharge permitting program that includes discharges of dredged or fill materials to SWOTS.



General Principles – Dredge or Fill

The discharge of pollutants into a surface water of the state is not a right.

- Cover all dredge or fill discharges to surface waters of the state including isolated wetlands and ephemeral waters, unless expressly exempted.
- Provide an equivalent level of water quality protection to surface waters (WOTUS and non-WOTUS), even if the methods vary.
- Achieve no net loss of wetlands as a result of permitting actions.



DESIGN – Dredge or Fill

- Retain familiar features of the federal programs in the state (WQA) program - use the same or similar definitions, exemptions, standards, permit types, and processes.
- Complement the federal program while providing efficiency and improvements to the process.
- Integrate state (WQA) rule into and use the existing administrative processes where reasonable.
- ✓ Use holistic watershed management approaches when practicable.
 - Cumulative impacts within a watershed or sub-watershed
 - Small discharge, minimal impacts (self-certification consistent with BMPs)
 - Temporary permissions (short-term activities)
 - Buffer protections
 - Thresholds for minimum discharges (1/10th acre, 300 linear feet, etc.)





Comparison of Federal and State Programs

Federal Dredge or Fill

U.S. Army Corps of Engineers

- Administers day-to-day program
- Conducts or verifies federal jurisdictional determinations
- Coordinates with other federal agencies
- Develops policy and guidance
- Enforces Section 404 permit provisions
 - Has authority to prohibit, deny, or restrict the use of any defined area under the permit provisions
 - Can request that certain BMPs or mitigation be a part of permit authorization

- New Mexico Environment Dept
- Administers day-to-day program
- Verifies state jurisdiction of water's location and extent
- Coordinates with other state and tribal agencies
- Develops policy and guidance
- □ Enforces state permit provisions
 - Has authority to prohibit, deny, or restrict the use of any defined area under the permit provisions
 - Can require that certain BMPs or mitigation be a part of permit authorization



Jurisdictional Determinations: Federal vs. State

Federal Dredge or Fill

- An approved federal JD identifies the limits of the waters on the project site that the agency views as jurisdictional under Section 404 of the Clean Water Act.
- Approved JDs will include a basis of jurisdiction (i.e., documentation to support the JD).
- Wetlands must meet the three required criteria (soils, hydrology, vegetation) to be a "wetland".
- In New Mexico, no mapping is available that is strictly WOTUS.

- The State has developed a mapping tool that covers all waters of the state including wetlands.
- The state mapping tool could be used to identify SWOTS.
- The state tool requires only one criterion (soils, hydrology, vegetation) for identification of wetlands in order to be included in the National Wetlands Inventory (NWI).





Mapping



- Hydrography data is the mapped locations of streams and other waterbodies.
- Improved hydrography data will benefit management and protection of flows, water quality, water resource planning, flood risk, restoration, conservation, wildlife and habitat, infra-structure and construction, forest resources.
- The U.S. Geological Survey is replacing previous hydrography datasets with the "3D Hydrography Program" (**3DHP**).
- This is the first systematic remapping of the Nation's hydrography.
- 3DHP will improve the ability to track information related to water (like streamflow permanence).
- 3DHP will support hydrologic modeling.



To learn more about the 3D Hydrography Program, visit: <u>https://www.usgs.gov/3DHP</u>





Exclusions – Non-Jurisdictional

- □ Non-tidal drainage and irrigation ditches excavated on dry land.
- □ Artificially irrigated areas which would revert to dry land if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, or settling basins.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Erosional features that do not meet the definition of a SWOTS (e.g., swales, puddles, gullies, rills, etc.).
- Private waters that do not combine with other surface or subsurface waters.
- Waters under tribal regulatory jurisdiction pursuant to Section 518 of the Clean Water Act.
- Waste treatment systems, including treatment ponds and lagoons, unless they were originally created in a SWOTS or resulted in an impoundment of a SWOTS.



General Permits: Federal vs. State

Federal Dredge or Fill

- General permits are issued on a nationwide, regional, or state basis for particular categories of activities.
- The general permit process eliminates individual review and allows certain activities to proceed with little or no delay, provided that the general or specific conditions for the general permit are met.
- 57 Nationwide Permits (54 NWPs applicable to NM).

- General permits are issued on a statewide, regional, or watershed basis for categories of activities.
- NMED proposes to simplify general permits – one or several general permits – instead of having each activity having its own permit requirements.
- Prioritize the use of general permits in the WQA program.
- □ After the fact permits? Higher fee?
- Disturb the smallest area as possible (1. Avoid 2. Minimize 3. Mitigate unavoidable impacts).



Individual Permits: Federal vs. State

Federal Dredge or Fill

- Individual permits are reviewed by the U.S. Army Corps of Engineers
- Evaluates applications under a public interest review, as well as the environmental criteria set forth in the CWA Section 404(b)(1)
 Guidelines and regulations promulgated by EPA.

5-Year Summary – 401 Certifications

20 NWP types and 175 project reviews3 RGP types and 53 project reviews7 IP certified for various activities

- Individual permits are reviewed by the NMED
- Evaluates individual permit applications, including surface water and environmental criteria, to establish mitigation ratio.
- Individual Permits are required when the provisions and limits of a NM General, Regional, or Watershed Permit can't be met and in ONRWs, or other special surface waters.
- Individual permits will be used for discharges that significantly impact or have the potential to significantly impact/impair a surface water.
- Disturb the smallest area as possible (1. Avoid 2. Minimize 3. Mitigate unavoidable impacts).



Mitigation

Federal Mitigation Rule (2008)

- The *Mitigation Rule* establishes standards and criteria for compensatory mitigation, including on-site and off-site permitteeresponsible mitigation, mitigation banks, and in-lieu fee mitigation to offset losses associated with unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army (DA) permits pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).
- Implement appropriate and practicable measures to compensate for adverse project impacts to the aquatic ecosystem that cannot reasonably be avoided or further minimized.
- > This step is also referred to as **compensatory mitigation**.
- Uniform Performance Standards provide a standardized procedure and guidance for determining the appropriate performance standards (physical, hydrological, biological metrics) to determine interim and final "success" for compensatory mitigation plans.



Mitigation: Federal vs. State

Federal Dredge or Fill

Mitigation Requirements

For individual permits, the permittee must prepare a draft mitigation plan and submit it with the application for review. A final mitigation plan must be submitted to and approved by the USACE before an individual permit can be issued (33 C.F.R. 332.4(c)(i)).

For **general permits**, if compensatory mitigation is required, the USACE may approve a conceptual or detailed mitigation plan but a final mitigation plan must be approved before the permittee commences work (33 C.F.R. 332.4(c)(ii)).

State Dredge or Fill

Mitigation Requirements

Mitigation may be required for general permits to ensure impacts are no more than minimal. Mitigation will be required for individual permits.

The State is proposing two types of mitigation currently.

Advance Permittee Mitigation

Program for agencies that expect unavoidable impacts (e.g., NMDOT and Bureau of Reclamation)

Permittee Responsible Mitigation using certified specialists to implement with assurances.



Exemptions – No Permit Required

40 C.F.R. 232.3

- □ Normal established/ongoing farming, ranching, and silviculture activities.
- Construction and maintenance of farm and forest roads.
- Maintenance of existing drainage ditches.
- Construction or maintenance of irrigation ditches.
- Construction or maintenance of farm or stock ponds.
- Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with appropriate BMPs.
- Others? De minimis discharges? Residential property maintenance?
 Conservation/Restoration? Already permitted activities through another state agency? Discharges in compliance with an approved plan?
- □ Any exemptions we should not consider?



Dredge or Fill Program Options

Member Discussion at SWAP Meeting #5:

- 1. From your perspective, what exemptions are important and why?
- 2. From your perspective what aspects of the Section 404 framework are most important to retain?
- 3. What adaptations would you suggest to improve efficiency or improve resource protections? (what has not worked well and how can it be improved?)
- 4. What mitigation approaches would be most effective in NM?
- 5. What other suggestions or concerns do you have related to a state dredge and fill permitting program?