



MEMORANDUM

Date: June 22, 2016

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to be "CHH", is written over the printed name "C.H. Huckelberry".

Re: **Draft Ordinance Related to Permitting Certain Activities and Uses of Regional Flood Control District Managed Lands**

The Regional Flood Control District (RFCD), first established in 1979, was for more than a decade an operating unit within the Department of Transportation. Management of flood control rights of way and lands essentially followed the same process as permitting certain activities within public highways, i.e. permits to install utilities and make other incidental uses of public highway rights of way. With the separation of the RFCD as an independent operating unit and with the evolution of legislatively-imposed regulatory constraints on the RFCD, it is now appropriate the RFCD create a permitting process to utilize RFCD lands and facilities.

The attached draft has been prepared by staff and will now be discussed with stakeholders. After review and comment, the draft will be appropriately revised and, after advertising, formally submitted to the Board for adoption.

If you have any questions regarding this draft ordinance, please contact me.

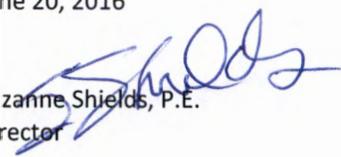
CHH/anc

Attachment

c: John Bernal, Deputy County Administrator for Public Works
Nanette Slusser, Assistant County Administrator for Public Works
Suzanne Shields, Director, Regional Flood Control District

DATE: June 20, 2016

TO: C.H. Huckelberry
County Administrator

FROM: Suzanne Shields, P.E.
Director 

SUBJECT: Facility Impact Permit – Draft Ordinance

A few years ago, the Arizona Legislature revised provisions of Title 48 of the Arizona Revised Statutes to better define county flood control districts' authorities and responsibilities to manage its facilities, i.e. property and flood control structures. These revisions established that it is a violation for any person to impact a county flood control district facility without written authorization. As a result of this legislative change, the Regional Flood Control District (District) needs to create regulatory authority and a process to permit impacts to District facilities.

The District is proposing an ordinance to create regulation requirements and processes for the District to authorize activities, including construction, which would impact District's facilities. For the purposes of the proposed ordinance, District facilities are defined as flood control structures owned by the District, and lands, drainage ways or structures for which the District has maintenance responsibility, and lands that are owned by, managed by, or dedicated by easement to the District.

Historically, authorization of construction impacts to District flood control structures occurred using the Department of Transportation's Right-of-Way Permit process. Even though this process provided some oversight of the construction activities, other activities on and uses of District managed lands were left undefined. The proposed ordinance would create a process administered by the District that would provide a better and more appropriate permitting, inspection, and compliance outcome for all District facilities. A District administered process would ensure that the District interests are met with respect to inspections, the receipt of as-builts, and ensuring compliance with other permitting programs such Sections 402 and 404 of the Clean Water Act and Section 408 of the River and Harbors Act.

In addition, in most cases, District facilities are not, and should not be considered, right-of-way and property right entitlements are required prior to the construction of permanent impacts such as utilities and storm drains. The requirement for the appropriate property right has not historically been consistently applied.

The attached draft Ordinance is the result of internal review among staff from the District, Pima County Attorney's Office, and Real Property. The District plans to begin formal outreach to relevant stakeholders that may be impacted by the adoption of this ordinance including other County departments such as Regional Wastewater Reclamation Department, Facilities Management, and Department of Transportation. Additionally, the District will reach out to traditional stakeholders such Southern Arizona Home Builders Association, Metropolitan Pima Alliance, and Tucson Utility Contractor Association.

Please let me know if you have any question regarding the attached draft ordinance.

SS/sm

Attachment

c: John Bernal, Deputy County Administrator – Public Works
Nanette Slusser, Assistant County Administrator for Public Works Policy
Chris Cawein, Director – Natural Resources Parks and Recreation Department
Andrew Flagg, Deputy County Attorney – Pima County Attorney's Office
Neil Konigsberg, Director – Real Property Department
Sandi Garrick, Utility Liaison – Public Works Administration

TITLE 21. PUBLIC LANDS AND FACILITIES

CHAPTER 21.01 COUNTY LANDS AND FACILITIES REGULATIONS

CHAPTER 21.02 FLOOD CONTROL DISTRICT LANDS AND FACILITIES REGULATIONS

21.02.010 - Definitions.

For purposes of this Chapter, the following definitions shall apply:

- A. "Applicant" – Applicant means any person, contractor, firm, utility company, corporation or government entity proposing an activity that will impact a District facility. The responsible party shall be considered the "applicant" even if a contractor is hired to perform the actual work.
- B. "Chief Engineer" means the Pima County Regional Flood Control District Chief Engineer appointed by the Pima County Flood Control District Board of Directors.
- C. "District" means the Pima County Regional Flood Control District.
- D. "District facilities" – District facilities means lands owned, managed by or dedicated by easement to the District, structures owned by the District, and lands, drainage ways or structures for which the District has maintenance responsibility.
- E. "District structures" – District structures means constructed conveyances such as channels or storm drains, as well as structures for flood control such as soil cement bank protection, levees, grade controls, detention and recharge basins, and associated improvements such as river parks, access roads, etc.
- F. "District lands" – District lands means lands that are under the control of the District but for which District structures are not present, including restoration areas and properties that have been dedicated to the District or purchased by the District, either in fee or as an easement.
- G. "Drainage Way" means a designated area to convey and manage flood waters whether on property owned in fee title by the District or a drainage easement owned by the District. Drainage ways may be either natural or constructed.
- H. "Facility Impact Permit" means a permit issued by the District which authorizes an impact, either temporary or permanent, to District facilities for a proposed third party use.

21.02.020 – Facility Impact Permit – Required when

- A. Scope. These rules and regulations are implemented by the District for the purpose of managing impacts of third party uses to District facilities and shall prevail over and supersede any previous policy or procedure in conflict therewith.
- B. District Facility, applicability. Any District facility which the Chief Engineer has determined to be available for secondary or temporary uses, in addition to the District's primary use, may be permitted for use by any person in accordance with the rules and regulations contained herein.
 - 1. Upon finding that the proposed disturbance or impact does not otherwise interfere with the health, safety and welfare of the general public, the Chief Engineer may issue a

Facility Impact Permit, specifying that all such work shall be done in the manner specified in this Chapter.

2. Pursuant to ARS §48-3615.D, it is unlawful for any person, contractor, firm, utility company, corporation or government entity to damage or interfere with a facility that is owned, operated or otherwise under the control of the District without written permission.
 3. A use allowed by a Facility Impact Permit shall not conflict or interfere with the drainage or conservation values of the District facility.
- C. Qualification of Applicant. Any person, contractor, firm, utility company, corporation or government entity proposing to disturb or impact District facilities shall first obtain written permission from the Chief Engineer by applying for a Facility Impact Permit on a form provided by the District.
- D. Forms. Application for any use that will have an impact to District facilities, either temporary or permanent, shall be made using forms provided by the District.

21.02.030 Permit – Exemptions

- A. A Facility Impact Permit shall not be required for any use, improvement, or disturbance to District facilities that existed prior to the adoption of these regulations. At the time of maintenance, replacement, expansion, or upgrade of an existing use or improvement, a Facility Impact Permit is required.
- B. A Facility Impact Permit shall not be required for passive uses that cause minimal disturbance, such as hiking, horseback riding, etc. that are compatible with the natural environment. The creation of new disturbances for these activities is not authorized.
- C. A Facility Impact Permit shall not be required for projects authorized and funded by the District.

21.02.040 – Application Submittal Requirement – Type of Use

The type, duration and location of a proposed impact will determine the amount of information needed to support an application for a Facility Impact Permit. Use categories and submittal requirements are described as follows:

- A. Tier 1 - Temporary impact with minimal disturbance of District Lands. This use is temporary with minimal disturbance including temporary ingress/egress to another parcel using existing roads, access for purposes of survey, non-invasive cultural or biological surveys or scientific research projects, land stewardship activities such as removal of invasive species by hand or chemical methods, installing native plants by hand or hand placement of rock structures to mitigate erosion, or other similar uses. The submittal requirements for a Tier 1 impact include:
 1. Project description. The application shall include the name and contact number of the proposed user, the scope of use, site plan, and a timeframe or schedule of the proposed activities.
 2. Property right requirement. A Temporary Right of Entry is required, unless the Chief Engineer determines that a license agreement or temporary easement is appropriate.
 3. A Scientific Research and Collecting Permit is required for plant or animal specimen collection and/or research projects
 4. Insurance. As required, pursuant to 21.02.080.
 5. Permit Fees. There is no fee for a Tier 1 Facility Impact Permit.

- B. Tier 2 - Long-term or permanent impact with minimal disturbance of District Lands. Examples of this type of use would include permanent ingress/egress to another parcel, large-scale ecosystem restoration, removal of invasive species using heavy equipment, or other similar uses. The submittal requirements for a Tier 2 impact include:
1. Project description. The application shall include the name and contact number of the proposed user, the scope of use, a site plan and timeframe or schedule of proposed activities.
 2. Property right requirement. A license agreement or permanent easement, as appropriate.
 3. Insurance. As required, pursuant to 21.02.080.
 4. Permit Fees. There is no fee for a Tier 2 Facility Impact Permit; however applicant shall pay for all costs associated with establishment of a license agreement or permanent easement.
- C. Tier 3 - Limited disturbance of District lands. Examples of this type of impact include utility line or private storm drain construction that impact unimproved minor watercourses (less than 2000 cfs), or the temporary stockpiling of material on District lands. The submittal requirements for a Tier 3 impact include:
1. Project description. The application shall include the name and contact number of the proposed user, the scope of use, and a site plan. The following additional information is required for utilities and storm drains:
 - a. A complete set of construction drawings that show construction in compliance with District standards and specifications,
 - b. A discussion regarding alternatives that avoid impacting District lands,
 - c. A description of the methods used to minimize the impact, if not avoidable.
 - d. An assessment of the need for permits required pursuant to Section 402 or 404 of the Clean Water Act and Section 408 of the Rivers and Harbors Act. Provide a copy of these documents and a Stormwater Pollution Prevention Plan, if applicable.
 - e. The plan for mitigation of any disturbance, if required.
 2. Property right requirement. A license agreement or permanent easement, as appropriate.
 3. Insurance. As required, pursuant to 21.02.080.
 4. Permit Fees. The fee shall be determined pursuant to 21.02.110 which covers the cost of application review, permit issuance, and inspections. Additional costs associated with establishment of a license agreement or permanent easement, if necessary, may also be required.
 5. Posting of Bond – A bond shall be posted pursuant to 21.02.090.
- D. Tier 4 - Disturbance of a District Facility. Examples of this type of impact include any impact to a major watercourse, any impact to a District structure, including planting or paving, the construction of any new District structures, or significant disturbance of District lands. The submittal requirements for a Tier 4 impact include:
1. Project description. The application shall include the name and contact number of the proposed user, the scope of use, and a site plan. The following additional information is required:
 - a. A complete set of construction drawings that show construction in compliance with District standards and specifications,
 - b. A discussion regarding alternatives that avoid impacting the District facility,
 - c. A description of the methods used to minimize the impact, if not avoidable.

- d. An assessment of the need for permits required pursuant to Section 402 or 404 of the Clean Water Act and Section 408 of the Rivers and Harbors Act. Provide a copy of these documents and a Stormwater Pollution Prevention Plan, if applicable.
- e. The plan for mitigation of any disturbance, if required.
2. Property right requirement. A license agreement or permanent easement, as appropriate.
3. Insurance. As required, pursuant to 21.02.080.
4. Permit Fees. The fee shall be determined pursuant to 21.02.110 which covers the cost of application review, permit issuance, and inspections. Additional costs associated with establishment of a license agreement or permanent easement, if necessary, may also be required.
5. Posting of Bond – A bond shall be posted pursuant to 21.02.090.

21.02.050 – General Permit Conditions – Type of Impact

The following minimum conditions shall apply based on the type of disturbance or impact proposed. The Chief Engineer may provide additional specific conditions, as needed to ensure the health, safety, and welfare of the general public and the use, functionality, and integrity of the District facility:

- A. Tier 1 impacts are temporary and minimal. As such, the following conditions apply:
 1. Intentional ground disturbance or construction activity, including earthmoving, road grading, blading, leveling, or vegetation removal are prohibited. Invasive species removal as described in Section 21.02.040.A is exempt from this prohibition. Temporal impacts, such as creation of tire tracks, is considered incidental to the activity.
 2. Vegetation trimming may be allowed if required to meet the intent of the proposed impact.
 3. Any disturbance identified during the final inspection shall be mitigated by the permittee.
- B. Tier 2 impacts are permanent but minimal. As such the following conditions apply:
 1. Intentional ground disturbance or construction activity, including earthmoving, road grading, blading, leveling, or vegetation removal are prohibited. Invasive species removal as described in Section 21.02.040.B is exempt from this prohibition. Temporal impacts, such as creation of tire tracks, is considered incidental to the activity.
 2. Vegetation trimming may be allowed if required to meet the intent of the proposed impact.
 3. Any disturbance identified during either the initial or periodic inspection shall be mitigated by the permittee.
- C. Tier 3 impacts are on minor watercourses, District lands, natural drainage ways, and are limited in extent. As such, the following conditions apply:
 1. The proposed impact shall be constructed in accordance with the Facility Impact Permit and the associated construction plans. Any deviation from the plan that impacts the District facility shall require written authorization by the District prior to construction.
 2. The permittee shall call the District for inspection at the milestones identified on the Facility Impact Permit.
 3. The applicant shall comply with the provisions of Section 21.02.100.
 4. As-built plans of the authorized activity shall be submitted to the District within 30 days of project completion, which may include material certifications and engineer of record inspection documentation.

- D. Tier 4 impacts are on major watercourses, impact District structures, and include construction of structures that the District will maintain. As such, the following conditions apply:
1. The proposed impact shall be constructed in accordance with the Facility Impact Permit and the associated construction plans. Any deviation from the plan that impacts the District facility shall require written authorization by the District prior to construction.
 2. The permittee shall call the District for inspection at the milestones identified on the Facility Impact Permit.
 3. The Applicant shall comply with provisions of Section 21.02.100.
 4. As-built plans of the authorized activity shall be submitted to the District within 30 days of project completion, which may include material certifications and engineer of record inspection documentation.

21.02.060 – Special Conditions

Depending on the type and complexity of a proposed impact on District facilities, the following special conditions may be included on the Facility Impact Permit:

- A. Pre-construction meetings
- B. Special mix designs
- C. Shop drawings
- D. Third party materials testing
- E. Material certifications
- F. Specific inspection milestones, including final walkthrough inspection

21.02.070 – Inspections

In order to ensure compliance with the Facility Impact Permit, the on-going protection of the health, safety and welfare of the general public, and to verify that additional or unauthorized damage or interference to the District facility has not occurred, the District shall perform inspection at the following milestones:

- A. Tier 1 impacts. Within 30 days after completion of the proposed use of the property, the District shall perform a final inspection.
- B. Tier 2 impacts. The District shall perform an inspection within 30 days after initial establishment of the impact, and periodically thereafter.
- C. Tier 3 impacts. The District shall perform inspections, as requested by the applicant, pursuant to the milestones established in the Facility Impact Permit. The District shall perform a final inspection upon completion of construction in order to verify the District facility was restored as required.
- D. Tier 4 impacts. The District shall perform inspections, as requested by the applicant, pursuant to the milestones established in the Facility Impact Permit. The District shall perform a final inspection upon completion of construction in order to verify the District facility was restored as required.

21.02.080 – Insurance Requirement

Insurance requirements shall be determined by the Pima County Department of Finance and Risk Management, Risk Management Division. No evidence of liability insurance is necessary for federal, state, county, or municipal agencies, political subdivision or other public service corporation with a net worth of more than \$1,000,000 as reflected on its most current balance sheet.

21.02.090 – Posting of Bond

An applicant may at the time of filing his application for a Facility Impact Permit, be required to post a performance bond for one hundred percent of the cost of the work impacting the District facility. A cash bond or its equivalent, equal in value to one hundred percent of the work impacting the District facility, may be substituted for a performance bond. This bond or its substitute will be held until the work has been completed and accepted. An applicant may be exempted from posting bond with the approval of the Chief Engineer.

21.02.100 - Liability and Project Site Requirements

- A. The permittee assumes the responsibility and all liability for any injury or damage to any person or property caused by or arising from the impact authorized by the Facility Impact Permit. The permittee shall indemnify, defend and hold harmless the District and Pima County, its officers, departments, employees and agents from and against any and all suits, actions, legal or administrative proceedings, claims, demands or damages of any kind or nature arising out of the exercise of the permit which are attributed to any act or omission of the applicant, its agents, employees or anyone acting under its direction, control or on its behalf. In the event suit shall be brought and the District or Pima County is named as a defendant, all costs for counsel, either house counsel or retained counsel, and any other court costs associated with defending itself shall be paid by the applicant.
- B. Where work is performed in a drainageway, drainage easement or designated floodplain, the permittee shall not at any time obstruct or diminish in any manner the ability of the drainageway, drainage easement or designated floodplain to convey or pass stormwater. All existing District structures damaged or removed shall be replaced immediately to the satisfaction of the Chief Engineer or authorized representative at no cost to the District or Pima County.
- C. All work shall occur in a manner that is least destructive to existing public improvements and natural resources and shall be completed in the shortest possible timeframe, at no cost to the District, as directed by the Chief Engineer or authorized representative. Permittee shall notify the District representative noted on the Facility Impact Permit at least forty-eight hours prior to starting work. Once the work has begun it shall continue in a timely manner until completion with no significant gaps in the time between execution of the various phases of the work. In the case of an emergency requiring immediate work impacting a District facility, the permittee shall make a diligent effort to contact the District prior to commencement of work. Such emergency work shall be halted upon issuance of a stop work order by the Chief Engineer. Emergency work shall not continue beyond twenty-four hours during the normal workweek or the next full work day following a weekend or holiday without the issuance of a written permit.
- D. If the work performed or materials used by the permittee under the Facility Impact Permit fails to pass final inspection, the permittee shall remove defective improvements and replace with improvements that meet specifications under the approved plan within the timeframe specified by written notice from the Chief Engineer or authorized representative.
- E. The permittee shall not allow any condition to exist in connection with the exercise of the permit which would be a hazard or source of danger to the general public. If the work presents or becomes a hazard to the general public, the District may take immediate corrective action and bill the permittee for the full cost incurred for such corrective action.

- F. The permittee shall be responsible for verifying the location of all underground utilities in accordance with the Blue Stake laws prior to the commencement of any excavation and shall protect said utilities from damage.
- G. All work shall be accomplished in accordance with applicable requirements of the Pima County Code, including Floodplain Management Ordinance, Grading Ordinance, Channel Design Standards Manual, and any other applicable engineering details, standards or specifications of the District and Pima County. With the exception of plans prepared by public service corporations that are subject to federal and state regulations concerning safety and design, all work shall be performed in accordance with plans prepared by a professional engineer.
- H. The permittee shall keep a copy of the Facility Impact Permit at the construction site, at all times and make it available upon request.
- I. If at any time, the District facility, or any portion thereof, occupied and used by the permittee in accordance with the Facility Impact Permit is needed or required by the District or County, the permittee, upon receipt of notice shall, at no cost to the District or County, remove, relocate, or abandon in place all property belonging to the permittee, unless other arrangements are agreed to by the Chief Engineer.
- J. In the event the applicant does not repair the District facility to the conditions set forth by the Chief Engineer or authorized representative after a thirty-day notice of any deficiencies, the applicant by the acceptance of a permit agrees to be responsible for all costs of completing such repair, and in the event suit is necessary, agrees to be responsible for all costs of collection including but not limited to court costs and attorney's fees.
- K. Applicant is placed on notice that the District may not own the particular property or property rights for which the permit is issued. Applicant assumes all liability resulting from any defect to the title of the land and no warranty of title to the underlying land is expressed or implied.

21.02.110 - Fees.

Pertinent charges for the above required permit and for meeting the conditions of the permit, as well as fines applied to the applicant due to violations of the permit requirements, shall be set forth by a fee schedule approved by the Board of Directors for the Flood Control District and amended from time to time. A copy of the fee schedule is on file at the District's office and website.

21.02.120 - Violation—Penalty.

- A. Any person, contractor, utility company or corporation violating any of the provisions of this chapter shall be punished as provided by pertinent state statutes such as but not limited to ARS Section 48-3615.01 and Section 16.64.020 of the Pima County Code.
- B. In addition to any penalties that occur during to the compliance enforcement process, any impact that has occurred prior to issuance of a Facility Impact Permit fee shall be required to pay the double the permit fee.