

**Morongo Band of Mission Indians
Clean Water Act Section 401 Certification
2020 Army Corps of Engineers Nationwide Permits**

This is the conditional CWA §401 Certification of the 2020 NWP for projects on the Morongo Reservation. Section 401(a)(1) of the CWA requires Applicants for Federal permits and licenses that may result in discharges into waters of the U.S. to obtain certification that the discharge will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. The Morongo Band of Mission Indians has received Treatment as a State authority to issue certification.

Applicable Water Quality Requirements

In exercising authority under 33 U.S.C. § 1341, the Tribe has reviewed the proposed permits for consistency with the following:

1. Applicable water quality-based, technology-based, and toxic or pretreatment effluent limitations as provided under 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306 and 307);
2. Federally approved water quality standards contained in California Water Quality Standards in the Water Quality Control Plan for the Colorado River Basin Region and authorized by 33 U.S.C. §1313 for protection of downstream waters;
3. Water quality objectives and protections provided for in the Morongo Band of Mission Indians Surface Water Quality Protection Ordinance (Ordinance 39); and
4. All known, available and reasonable methods to prevent and control pollution of waters of the U.S. (40 CFR 125.3).

This certification provides reasonable assurance that projects will comply with these federally approved water quality requirements, provided that the following conditions are adhered to.

General Conditions

1. Notification

Pre-construction notification requirements provide the Corps and the Tribe the opportunity to evaluate certain NWP activities on a case-by-case basis to ensure the proposed activity will cause no more than minimal adverse environmental effects individually and cumulatively. Notification allows the Corps to evaluate project impacts at a regional scale (e.g., waterbody or watershed) and determine whether to restrict NWP use in sensitive resource areas. The Corps can also add conditions to NWPs such as best management practices or compensatory mitigation to offset authorized losses of waters of the U.S., including wetlands.

The Tribe has the expertise to evaluate effects of NWPs issued on tribal land and ensure water quality requirements will be met. Additionally, tribal law requires notice to the Environmental Protection Department prior to an activity that will result in a discharge to tribal waters, within 24 hours of emergency activity, and in the case of an unpermitted discharge.¹ Notification for projects on tribal land

¹ Morongo Band of Mission Indians Surface Water Protection Ordinance Sections VI(C), VI(D), and VI(E).

will also ensure compliance with the protection of downstream waters under the jurisdiction of the State of California. Without notification, there is no way to determine whether effects will be minimal or meet water quality requirements found in tribal law.²

All NWP-authorized projects proceeding on the Morongo Reservation must submit notification to the Tribe. In the case where a PCN is required by the Corps, the applicant shall submit a copy of the PCN to the Morongo Environmental Protection Department (MEPD). In the case where a PCN is not required by the Corps, the applicant must submit either a notification as outlined in NWP General Condition 32 or a modified notification subject to the criteria below. If a waiver of impact limits is proposed beyond what is approved under this certification, applicants must include written determinations specified in this Certification's General Condition 2 *Waivers* for Tribal approval.

- 1) Timing. Applicants shall submit notice to the MEPD as early as possible and at least 30 days before initialing a project under a NWP. When a Tribal approval is required by condition in this certification, the Tribe will act within 30 days of receiving a complete notification.
- 2) Content. The notification must be in writing (email is acceptable) and include the following information:
 - a. Name, address, email address, and telephone numbers of the applicant and any agents or representatives;
 - b. Location of the proposed project;
 - c. A description of the proposed project and impacts sufficiently detailed to determine compliance with NWP and Tribal 401 conditions including:
 - i. The project purpose;
 - ii. Direct and indirect adverse environmental effects the project would cause, including the proposed acreages and linear feet (for streams) of waters impacted, avoided, and where applicable, created or otherwise mitigated;
 - iii. Any other permits used or intended to be used to authorize any part of the proposed project or related activity;
 - iv. A written statement describing how the activity has been designed to avoid or minimize adverse effects, both temporary and permanent, to waters of the United States;
 - v. Drawings, including plan and cross-section views, clearly depicting the location, size and dimensions of the proposed activity;

² Morongo Band of Mission Indians Surface Water Protection Ordinance 39 states "The purpose of this Ordinance is to carry out the provisions of the Morongo Environmental Protection Ordinance, Section IV(C)(1), to protect surface water quality on the Reservation. Carrying out this purpose includes, among other things, protecting the health, safety and welfare of Tribal members and all other persons within the exterior boundaries of the Reservation; preventing the deterioration of water quality and other natural resources resulting from surface water pollution; and protecting the cultural, social, and economic stability of the Reservation. The Tribe intends to carry out the purpose of this Ordinance by reducing and/or controlling present and future sources of surface water pollution within the exterior boundaries of the Reservation in a manner that achieves a quality of water that maintains the chemical, physical, and biological integrity of the waters within the jurisdiction of the Tribe in order to preserve and enhance the environment within the Reservation and on the lands immediately surrounding the Reservation.

- d. A description of proposed construction best management practices (BMPs) to be used during construction of the proposed activities. If no BMPs are proposed, the notification shall include a description of why their use is not practicable or necessary;
- e. For activities proposed for the purpose of temporary access and construction which would result in the placement of dredged or fill material into the waters of the U.S., provide:
 - i. The reason(s) why avoidance of temporary fill is not practicable;
 - ii. A description of the proposed temporary fill, including the type and amount (in cubic yards) or material to be placed;
 - iii. The area (in acres) and length (in linear feet) of waters where the temporary fill is proposed to be placed; and
 - iv. A proposed plan for restoration of the temporary fill area to pre-project contours and conditions'
- f. Consistent with this Certification General Condition 2 *Waivers*, a written demonstration that any proposed impact limit waiver that may be allowable under this certification will result in minimal impacts to aquatic resource functions;
- g. The name(s) of any species listed as endangered or threatened under the Endangered Species Act which may be adversely affected by the proposed work, either directly or by impacting designated critical habitat;
- h. Identification of any cultural or historic properties listed in, or eligible for listing in, the National Register of Historic Places that may be adversely affected by the proposed work.

Correspondence should be submitted to:

Morongo Band of Mission Indians
Environmental Protection Department
12700 Pumarra Road
Banning, CA 92220
Email: epd@morongo-nsn.gov

2. *Waivers*

For Certain NWP, Corps District Engineers may waive impact thresholds by making written documentation that that the discharges will result in minimal adverse effects. To ensure that tribal waters receive an adequate level of protection, and to prevent the NWP Program from having more than minimal adverse impacts to the aquatic environment, all proposed impact limit waivers are denied under this certification unless the Tribe approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions. Tribal waiver review is consistent with the avoidance of "substantial" impacts required in Morongo Ordinance 39 and will allow for compliance with all tribal laws relating to water quality impacts.³ Without tribal waiver review, there is not sufficient information that the discharge from the NWP activity will comply with water quality requirements.

³ Morongo Band of Mission Indians Surface Water Protection Ordinance 39 states "Any activity shall not cause substantial alteration of hydroperiod, flows, groundwater or surface water quality, or fish and wildlife habitat. All activities shall comply with all applicable federal and Morongo Band of Mission Indian laws, including those related

The Tribe will act within 30 days of receiving a complete PCN or modified notification as outlined in General Condition 1 *Notification* when tribal approval is required for a waiver.

3. Retention of 300 Foot Linear Limit

The Corps' 2020 NWP eliminates the 300 linear foot (LF) limit for streambed losses that currently applies to 10 NWPs. The 300 LF limit helps ensure that using these 10 NWPs results in no more than minimal individual and cumulative adverse environmental effects as required by the CWA.

The 2017 NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 include a two-part threshold for use: impacts can't exceed 1/2-acre or 300 LF of a streambed loss. The two-part threshold ensures that adverse impacts covered by these NWPs are no more than minimal.

The existing process to assess stream impacts is an efficient and defensible two-part threshold to estimate the magnitude of impact. Looking at area alone (1/2-acre threshold) does not provide a reliable measure of the extent of impact. Many tribal waters are narrow and a 1/2-acre threshold may result in thousands of feet of impact that could potentially exceed minimal adverse effects and no longer comply with water quality requirements such as limits on sediment and suspended solids as outlined in Morongo Ordinance 39.⁴ Tribal law requires the avoidance of substantial impacts including but not limited to flow, surface water quality, and fish habitat.⁵ In many of the narrow, headwater streams that exist on the Reservation, impacted stream length will affect the aquatic function along the longitudinal gradient.⁶

To ensure that they will cause no more minimal adverse environmental effects individually and cumulatively, 300 LF limits are included in the conditions for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

Specific Nationwide Permits

1. Aids to Navigation

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

2. Structures in Artificial Canals

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

to sediment control, pollution control, floodplain restrictions, storm water management, and on-site wastewater disposal. All activities that could potentially cause a discharge shall follow all appropriate best management practices associated with that activity or required by the applicable permit.

⁴ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A).

⁵ Morongo Band of Mission Indians Surface Water Protection Ordinance Section VI(A).

⁶ The linear or longitudinal gradient along streams is important in maintaining functions such as organic carbon and detrital biomass export, particulate retention, biogeochemical processes, and habitat interspersions and connectivity.

3. Maintenance

Subject to the General Conditions above, this NWP is hereby programmatically certified.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

5. Scientific Measurement Devices

Subject to the General Conditions above, this NWP is hereby programmatically certified.

6. Survey Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

7. Outfall Structures and Associated Intake Structures

Subject to the General Conditions above, this NWP is hereby programmatically certified.

8. Oil and Gas Structures on the Outer Continental Shelf

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

9. Structures in Fleeting and Anchorage Areas

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

10. Mooring Buoys

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

11. Temporary Recreational Structures

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

12. Oil or Natural Gas Pipeline Activities

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."⁷ Oil and natural gas pipeline activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create an adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.⁸ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b).⁹ Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

13. Bank Stabilization

Subject to the General Conditions above, this NWP is hereby programmatically certified.

14. Linear Transportation Projects

Subject to the General Conditions above, this NWP is hereby programmatically certified.

15. U.S. Coast Guard Approved Bridges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

16. Return Water from Upland Contained Disposal Areas

Subject to the General Conditions above, this NWP is hereby programmatically certified.

17. Hydropower Projects

Subject to the General Conditions above, this NWP is hereby programmatically certified.

18. Minor Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

19. Minor Dredging

⁷ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A)(15).

⁸ 2018 California Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report)

⁹ Pursuant to sections 303 and 101(a) of the Clean Water Act, the federal regulation at 40 CFR 131.10(b) requires that "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."

Subject to the General Conditions above, this NWP is hereby programmatically certified.

20. Response Operations for Oil or Hazardous Substances

Subject to the General Conditions above, this NWP is hereby programmatically certified.

21. Surface Coal Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

22. Removal of Vessels

Subject to the General Conditions above, this NWP is hereby programmatically certified.

23. Approved Categorical Exclusions

Subject to the General Conditions above, this NWP is hereby programmatically certified.

24. Indian Tribe or State Administered Section 404 Programs

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

25. Structural Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

26. [Reserved]

This NWP is not used and does not require section 401 water quality certification.

27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

28. Modifications of Existing Marinas

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

29. Residential Developments

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

30. *Moist Soil Management for Wildlife*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

31. *Maintenance of Existing Flood Control Facilities*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

32. *Completed Enforcement Actions*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

33. *Temporary Construction, Access, and Dewatering*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

34. *Cranberry Production Activities*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

35. *Maintenance Dredging of Existing Basins*

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

36. *Boat Ramps*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

37. *Emergency Watershed Protection and Rehabilitation*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

38. *Cleanup of Hazardous and Toxic Waste*

Subject to the General Conditions above, this NWP is hereby programmatically certified.

39. *Commercial and Institutional Developments*

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

40. *Agricultural Activities*

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

41. Reshaping Existing Drainage Ditches

Subject to the General Conditions above, this NWP is hereby programmatically certified.

42. Recreational Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

43. Stormwater Management Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

44. Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

45. Repair of Uplands Damaged by Discrete Events

Subject to the General Conditions above, this NWP is hereby programmatically certified.

46. Discharges in Ditches

Subject to the General Conditions above, this NWP is hereby programmatically certified.

47. [Reserved]

This NWP is not used and does not require section 401 water quality certification.

48. Commercial Shellfish Mariculture Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

49. Coal Remining Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

50. Underground Coal Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

51. Land-Based Renewable Energy Generation Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

52. Water-Based Renewable Energy Generation Pilot Projects

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

53. Removal of Low-Head Dams

Subject to the General Conditions above, this NWP is hereby programmatically certified.

54. Living Shorelines

Subject to the General Conditions above, this NWP is hereby programmatically certified.

A. Seaweed Mariculture Activities

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

B. Finfish Mariculture Activities

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

C. Electric Utility Line and Telecommunications Activities

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."¹⁰ Electric utility lines and telecommunications activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create and adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.¹¹ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b). Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

D. Utility Line Activities for Water and Other Substances

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."¹⁰ Electric utility lines and telecommunications activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create and adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.¹¹ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient

¹⁰ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A)(15).

¹¹ 2018 California Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report)

information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b). Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

E. Water Reclamation and Reuse Facilities

Subject to the General Conditions above, this NWP is hereby programmatically certified.