



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

Colonel D. Peter Helminger
Division Engineer, South Pacific Division
U.S. Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103-1398

Subject: Conditional Clean Water Act Section 401 certification of the 2017 U.S. Army Corps of Engineers Nationwide Permits on tribal lands

Dear Colonel Helminger:

The U.S. Environmental Protection Agency, Region 9 (EPA) has responsibility under section 401 of the Clean Water Act (CWA) to evaluate and certify water quality protections for federal permits or licenses issued for work on most tribal lands within the Pacific Southwest Region. EPA has reviewed the U.S. Army Corps of Engineers (Corps) January 6, 2017 Federal Register notice announcing the reissuance of the Corps' CWA Section 404 Nationwide Permits (NWP), and hereby transmits a conditional programmatic water quality certification of these general permits. The enclosed conditions become binding requirements of any NWP issued for work on tribal lands within EPA's geographic jurisdiction¹ in the states of Arizona, California, and Nevada. Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable projects.

Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, on November 14, 2016, EPA offered to consult with tribes on this certification. EPA did not receive any formal requests for consultation.

In summary, EPA is certifying 53 of the 54 proposed active permits with general conditions, 17 of which are further subject to permit-specific conditions. These requirements will protect water quality and help ensure that the NWP program minimizes adverse impacts on the aquatic environment on tribal lands, both individually and cumulatively, as required by CWA Section 404(e). A table summarizing types of conditions, notification requirements, impact limits, and additional information for each NWP is included in the attached certification. Some conditions of note include:

- Notification to EPA for use of any NWP on tribal lands (General Condition 01);
- Modifications to length, size and/or acreage limits on ten of the NWPs (12, 13, 14, 29, 40, 41, 45, 46, 48, and 49);

¹ This water quality certification does not apply to activities proceeding in the territories of the thirteen tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, and White Mountain Apache Tribe. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

- General prohibition of impact limit waivers under this programmatic certification, except where EPA approves a written determination that a waiver would result in minimal impacts to aquatic resource functions;
- Limiting NWPs 12 (Utility Line Activities) and 14 (Linear Transportation Projects) to a single use for a single and complete project having independent utility;
- Requiring EPA approval that NWP 27 projects will increase aquatic resource functions;
- Requiring EPA approval that NWP 31 levee vegetation removal will have minimal adverse impacts;
- Denial without prejudice of NWP 43 (Stormwater Management Facilities) due to adverse impacts from in-stream stormwater structures.

Projects failing to meet the enclosed conditions, despite qualifying for use of a NWP, are not eligible for coverage under this programmatic certification and must contact EPA for individual project certification. Projects meeting the enclosed conditions must notify EPA pursuant to General Condition 01, but may proceed without further written verification from EPA except when a specific EPA approval is required in accordance with general or permit-specific conditions of this certification. Finally, EPA may periodically undertake inspections or other compliance monitoring activities pursuant to applicable CWA enforcement authorities (CWA Section 308(a)(4)(B)).

This conditional certification will remain in effect for the authorization period of the 2017 NWPs, and will be revisited and potentially revised when the NWPs are next proposed for reissuance and revisions in 2022.

Thank you and your staff for partnering with EPA to implement the regulatory programs of the CWA. Please contact me at (415) 972-3337 with any questions regarding this conditional certification, or have your staff contact Leana Rosetti at (415) 972-3070 or rosetti.leana@epa.gov.

Sincerely,



Tomás Torres
Director
Water Division

2/22/2017

Enclosure:

General and Permit-Specific Conditions of EPA's Programmatic Clean Water Act Section 401 certification of the 2017 Nationwide Permits for tribal lands in California, Nevada and Arizona

cc:

All federally recognized Indian Tribes within EPA Region 9
Dr. Rick Bottoms, Regulatory Branch Chief, San Francisco District
Michael Jewel, Regulatory Branch Chief, Sacramento District

David Castanon, Regulatory Branch Chief, Los Angeles District
Allan Steinle, Regulatory Branch Chief, Albuquerque District
Wade Eakle, Corps, South Pacific Division
Debra Daniel, Arizona Department of Environmental Quality
Kelly Wolff-Krauter, Arizona Department of Game and Fish
Thor Anderson, Arizona Department of Transportation
Bill Orme, California State Water Resources Control Board
Sarah Rains, California Department of Fish and Wildlife
Jay Norvell, California Department of Transportation
John Heggeness, Nevada Division of Environmental Protection
Brad Hardenbrook, Nevada Department of Wildlife
Steve Cooke, Nevada Department of Transportation

General Conditions

Projects that are unable to comply with the general conditions of this programmatic certification are denied certification without prejudice and the applicant must apply to EPA for an individual certification. Applicants can apply for an individual certification by providing the same content required in a modified pre-construction notification described in General Condition 01. *Notification*, of this programmatic certification, but EPA may request additional project information for individual certifications after receiving notification materials. When an individual certification is required, EPA will strive to issue, deny, or waive certification within sixty days of receipt of complete project information, but our review shall not exceed one year, the statutory limit beyond which certification is considered waived.²

01. Notification

To improve the government's ability to demonstrate whether the NWP program has minimal adverse impacts to the aquatic environment, individually and cumulatively, all NWP-authorized projects proceeding on tribal lands within Region 9 shall submit a form of notification to EPA Region 9 as described below.³ Notification is required in order to be eligible for any NWP under this certification.

Projects seeking authorization under this certification will fall under one of the following two notification categories:

Pre-Construction Notification (PCN):

- When a PCN is required by the Corps, the applicant shall submit a copy of the PCN to EPA Region 9 for 401 notification. If not already included, also include the Modified PCN (MPCN) requirements 2)d through 2)h. Any waiver of impact limits requires approval from EPA pursuant to General Condition 02. *Waivers*.

Modified Pre-Construction Notification (MPCN):

- When the Corps does not require a PCN for any activities authorized under the NWP proposed for use, or for impacts below limits identified in the NWP for a PCN, applicants must forward a MPCN to EPA Region 9 for 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 General Condition 02. *Waivers* for EPA approval.
- 1) **Timing.** Applicants shall submit an MPCN to EPA Region 9 as early as possible, and in advance of any authorization letter from the Corps allowing the applicant to proceed under a given NWP. When an EPA approval is required by condition of this certification, EPA will act within sixty days of receiving a complete MPCN.
 - 2) **Content.** MPCNs must be in writing (electronic mail submittal is acceptable) and include the following information:
 - a) Name, address and telephone numbers of the applicant and any agents or representatives. If available, the electronic mail address and fax numbers for these persons;
 - b) Location of the proposed project;

² Clean Water Act Section 401 Certification (a): <http://water.epa.gov/lawsregs/guidance/wetlands/sec401.cfm>

³ NOTE: this requirement does not modify or eliminate existing Corps requirements regarding PCNs for projects proceeding on tribal lands (or elsewhere).

- c) A description of the proposed project and impacts sufficiently detailed to determine compliance with NWP and EPA 401 conditions and to determine whether compensatory mitigation may be necessary, including:
 - i) The project's 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 NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;
 - iv) A written statement describing how the activity has been designed to avoid and 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, as well as the location of delineated waters of the U.S. on the site. The drawings shall contain a title block, legend and scale, amount (in cubic yards) and area (in acres) of fill in Corps jurisdiction, including both permanent and temporary fills/structures. The ordinary high water mark or, if tidal waters, the mean high water mark and high tide line, should be shown (in feet), based on National Geodetic Vertical Datum (NGVD) or other appropriate referenced elevation;
 - vi) Numbered and dated pre-project color photographs showing a representative sample of waters proposed to be impacted on the site, and all waters of the U.S. proposed to be avoided on and immediately adjacent to the project site. The compass angle and position of each photograph shall be identified on the plan-view drawing(s) required in the condition above;
 - vii) Delineation of aquatic resources meeting the standards adopted by the corresponding Corps District;
- d) A description of proposed construction best management practices (BMPs) and highly visible markers to be used during construction of the proposed activity, as required by Regional Condition 08, below. If no BMPs or highly visible markers are proposed, the MPCN shall provide a description of why their use is not practicable or necessary;
- e) For all activities proposed for the purpose of temporary access and construction which would result in the placement of dredged or fill material into waters of the U.S., provide:
 - i. The reason(s) why avoidance of temporary fill in waters of the U.S. is not practicable;
 - ii. A description of the proposed temporary fill, including the type and amount (in cubic yards) of material to be placed;
 - iii. The area (in acres) of waters of the U.S. and, for drainages (e.g. natural or relocated streams, creeks, rivers), the length (in linear feet) 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, including a plan for the re-vegetation of the temporary fill area, if vegetation would be removed or destroyed by the proposed temporary fill;
- f) Consistent with General Condition 02. *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) Consistent with General Condition 04. *Prohibition on the Multiple Use of One NWP for a Single Project*, for proposed utility or transportation projects where the same NWP is

proposed at multiple locations, a written determination will be provided describing independent utility of each impact location and how the project will not contribute to more than minimal direct, indirect and cumulative impacts to waters of the U.S., either at the impact site or to upstream, downstream, or adjacent aquatic resources;

- h) 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;
- i) 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.

Written notification should be mailed to:

USEPA Region 9, WTR2-4,
75 Hawthorne Street, San Francisco, CA 94105.

02. Waivers

For certain NWPs, Corps District Engineers may waive impact thresholds for intermittent and ephemeral drainages by making a written determination that the discharge will result in minimal adverse effects. To ensure that these waters, commonly found on tribal lands in the arid southwest, 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 EPA approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions.

For some NWPs where the Corps does not include an impact limit, EPA has added an impact limit as a permit-specific condition. Some of these NWPs also include a condition that a waiver may be provided when EPA approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions.

Impacts to special aquatic sites are not permitted under this certification unless EPA approves a written determination that impacts to aquatic resource functions will be minimal. "Special aquatic sites" include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes (40 CFR 230.40-45).

When EPA approval is required for a waiver, EPA will act within sixty days of receiving a complete PCN or MPCN.

03. Compensatory Mitigation Requirements

EPA shall make a written determination, within sixty days of receipt of a complete PCN or MPCN, whether compensatory mitigation measures are required to ensure the activity will have only minimal adverse effects. Should compensatory mitigation be determined necessary by EPA, the mitigation becomes a condition of water quality certification and thus a condition of the Corps' permit. Failure to implement an EPA mitigation requirement would place a permittee out of compliance with their NWP and in violation of Section 401 and 404 of the Clean Water Act.

The need for post-project performance and/or mitigation monitoring and reporting (if applicable) will be determined by EPA on a case-by-case basis.

04. Prohibition on the Multiple Use of One NWP for a Single Project

Permittees may not use the same NWP multiple times (more than once) for one single and complete project at locations that do not have independent utility; to do so circumvents acreage limitations of the NWPs and may result in more than minimal adverse impacts to water quality and other ecosystem services. For example, under this certification, linear transportation projects on tribal lands must sum the impacts of each proposed crossing of individual waters of the U.S. and use that total to determine eligibility for NWP 14 (Linear Transportation Projects). If the acreage or linear foot impacts exceed the limits of the applicable NWP (or combination of applicable *different* NWPs), minimal adverse impacts to water quality may be exceeded and the project is not eligible for 401 certification under this programmatic action. Under these circumstances, projects must seek individual certification from EPA, and EPA may grant, grant with conditions, waive, or deny 401 certification of the project under the NWP. In the event of a denial, the NWP would not be available to the project proponent and therefore applicants may need to apply to the Corps for authorization under a different General Permit, Letter of Permission, or Individual Permit as appropriate and determined by the Corps. EPA would review these other proposed permit actions for case-by-case certification. Note that, on a case-by-case basis, EPA may waive this General Condition and allow the use of multiple NWPs if the applicant so appeals, and demonstrates in their PCN or MPCN that authorization under the NWP will result in minimal and/or completely mitigated impacts to the aquatic environment, individually and cumulatively.

05. Use of Appropriate Fill Material

To the extent practicable, local, native materials should be used as fill material. (e.g., soil, sand, or rock from the site or near the site; clean building materials or clean imported earthen fill). Inappropriate and unauthorized fill materials include, but are not limited to: tires, junked or abandoned vehicles, appliances, or other equipment; garbage; debris; oil drums or other chemically contaminated vessels; artificial turf; non-native vegetation; etc. If an applicant has any doubts or questions about the suitability of a proposed fill material, they should consult with the Corps and/or EPA prior to discharging into waters of the U.S. Such consultation may be via phone, or written letter, fax or electronic mail.

06. Dewatered Conditions

Discharges below the ordinary high water mark or within jurisdictional wetlands are not approved under this certification unless the discharge site is naturally dewatered (e.g., seasonally dry), or dewatering has been authorized by the Corps, thereby avoiding direct discharge of pollutants into the water column. If the site is artificially dewatered, permittees shall, to the extent practicable, avoid dewatering techniques that require additional temporary or permanent discharges of fill material within jurisdictional waters (e.g., coffer dams).

For all dewatering activities that propose structures or fill in waters of the U.S. that require authorization from the Corps, please describe:

- a. The proposed methods for dewatering;
- b. The equipment that would be used to conduct the dewatering;
- c. The length of time the area is proposed to be dewatered;
- d. The area (acres) and length (linear feet) in waters of the U.S. of the structure and/or fill;
- e. The method for removal of the structures and/or fill; and

- f. The method for restoration of the waters of the U.S. affected by the structure or fill following construction.

07. Fills Within Floodplains

Projects requiring NWP authorization for discharges of fill material within 100-year floodplains shall include in their PCN or MPCN a statement of compliance with Executive Order 11988 (Floodplain Management). However, discharges within the FEMA-mapped 100-year floodplain associated with residential and commercial development are not certified for use under the NWP program on tribal lands. The 100-year floodplain is based on hydrologic conditions prior to permit issuance.

08. Best Management Practices

Except as specified in the application, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes shall be allowed to enter into or be stored where it may be washed by rainfall or runoff into waters of the U.S.

Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect waters of the U.S. from sedimentation and other pollutants.

Water used in dust suppression shall not contain contaminants that could violate surface water or aquifer standards.

Permittees and their contractors shall take necessary steps to minimize channel and bank erosion within waters of the United States during and after construction.

A copy of the permit conditions shall be provided to all contractors and subcontractors, and will be posted visibly at project construction sites.

09. Transportation Projects

Permittees shall implement State transportation agencies' guidelines for construction sites to protect water quality and aquatic habitat. In California, CALTRANS has guidance in the *CALTRANS Stormwater Quality Manuals and Handbooks*;⁴ in Nevada NDOT has guidance in their *NDOT Water Quality Manuals*;⁵ and in Arizona, ADOT has guidance in their *Erosion and Pollution Control Manual*.⁶

10. Inspections

The permittee shall allow EPA representatives to inspect the authorized activity and any mitigation areas at any time deemed necessary to determine compliance with the terms and conditions of the NWP verification.

11. Buffers

Unless specifically determined to be impracticable by the Corps and EPA, for NWPs 29, 39, 40, and 42, the permittee shall establish and maintain upland buffers in perpetuity between upland structures constructed as part of the project approved by the NWP and all preserved open waters, streams and wetlands, including created, restored, enhanced or preserved waters of the U.S. Buffers should be

⁴ <http://www.dot.ca.gov/hq/construc/stormwater/manuals.htm>

⁵ http://www.nevadadot.com/About_NDOT/NDOT_Divisions/Engineering/Hydraulics/Water_Quality_BMP_Manuals.aspx

⁶ http://www.azdot.gov/inside_adot/OES/Water_Quality/Stormwater/Manuals.asp

vegetated whenever practicable. Plantings in buffers should be dominated by native species, and not include any federal or state listed invasive or noxious weed species⁷. Except in unusual circumstances, as determined by the Corps and EPA, buffers shall be at least 50 feet in width from the lateral limits of the Corp's jurisdiction.⁸

12. Protected Lands

The permittee shall record the NWP verification with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title of interest in real property for areas designated to be preserved as part of compensatory mitigation for authorized impacts, including any associated covenants or restrictions.

13. Impaired Water Bodies

If a proposed activity would result in dredge or fill in water bodies listed as impaired under Section 303(d) of the CWA, the PCN or MPCN must include specific measures that will be used to avoid exacerbating the impairment(s).⁹

14. Low Impact Development

When the discharge of fill material results in the replacement of wetlands or waters of the U.S. with impervious surfaces, the authorized activity should not result in more than minimal degradation of water quality (in accordance with the Army Corps NWP General Condition 25. To ensure NWPs do not cumulatively degrade water quality from increasing the impervious area, the permittee shall incorporate low impact development practices (e.g. native landscaping, bioretention and infiltration techniques, and constructed green spaces) to the extent practical. A description of the low impact development concepts in the proposed project shall be included in the PCN or MPCN. More information including low impact concepts and definitions is available at: <http://www.epa.gov/owow/NPS/lid/>.

15. Acknowledgment from Tribal Government

Unless the permittee is the Tribal Government itself, the permittee shall provide EPA with a letter from the Tribal Government stating its concurrence with the project as proposed.

⁷ <http://plants.usda.gov/java/noxiousDriver>

⁸ ordinary high water mark in non-tidal and the mean higher high water line in tidal waters

⁹ EPA Region 9 lists of impaired water bodies: <http://www.epa.gov/region9/water/tmdl/303d.html>

Specific Nationwide Permits

NWP-01 Aids to Navigation

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

NWP-02 Structures in Artificial Canals

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

NWP-03 Maintenance

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

“Currently serviceable structures” which may be maintained under this permit do not include undersized culverts or structures that cause or exacerbate channel incision, bank destabilization, and/or prevent fish and wildlife passage due to inadequate design or construction standards.

Certification of this permit is granted only if the existing structure proposed to be maintained demonstrably preserves (via design, flow modeling or other information in the PCN) the natural functions of the affected aquatic resource when the structure is fully operational. Otherwise, an alternative permit should be utilized as appropriate (e.g., NWP 13 Bank Stabilization).

Where existing bank stabilization structures are to be maintained, bioengineered methods shall be utilized in lieu of “rip-rap” or other hardscape engineered materials, unless deemed impracticable by EPA.

This permit shall not authorize the enlargement of, or increase in, the footprint of a structure within waters of the U.S., unless that enlargement consists of the replacement of existing artificial channel armoring materials (e.g., rip-rap, soil cement, etc.) with low-impact bioengineered natural channel design structures (e.g., log revetments, geotextile rolls/mats, root wads, brush mattresses, willow wattling, etc.)

NWP-04 Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities

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

NWP-05 Scientific Measurement Devices

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

NWP-06 Survey Activities

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

NWP-07 Outfall Structures and Associated Intake Structures

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

NWP-08 Oil and Gas Structures on the Outer Continental Shelf

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

NWP-09 Structures in Fleeting and Anchorage Areas

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

NWP-10 Mooring Buoys

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

NWP-11 Temporary Recreational Structures

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

NWP-12 Utility Line 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 the greater of 1/2 acre or 300 linear feet of waters of the U.S., including intermittent and ephemeral streams. Any linear foot impacts are applied to the 1/2 acre limit. Only the 300 linear foot limit may be waived by EPA upon approval, consistent with General Condition 02. *Waivers*.

Under this certification, NWP 12 can only be used once for a single and complete project having independent utility. When NWP 12 is proposed for multiple locations a written determination will be provided describing independent utility of each impact location for approval by EPA, consistent with General Condition 01. *Notification*.

Permittees are required to ensure that the construction of utility lines does not result in the draining of any water of the U.S., including wetlands. This may be accomplished through the use of clay blocks, bentonite, or other suitable material (as approved by EPA) to seal the trench.

For utility line trenches, during construction, the permittee shall remove and stockpile, separately, the top 6 – 12 inches of topsoil. Following installation of the utility line(s), the permittee shall replace the stockpiled topsoil on top and seed the area with native vegetation.

Utility lines used for the transport of hazardous materials are not programmatically certified and will require an individual certification.

NWP-13 Bank Stabilization

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

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of waters of the U.S., including intermittent and ephemeral streams. Any linear foot impacts are applied to the 1/2 acre limit.

All bank stabilization activities under this permit shall involve either the sole use of native vegetation or other bioengineered design techniques (e.g. willow plantings, root wads, large woody debris, etc.) or a combination of hard-armoring (e.g. rock) and native vegetation or bioengineered design techniques, unless specifically determined to be impracticable by the EPA.

NWP-14 Linear Transportation 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 the greater of 1/2 acre or 300 linear feet of non-tidal waters of the U.S., including intermittent and ephemeral streams, and 1/3 acre or 300 linear feet of tidal waters of the U.S. Any linear foot impacts are applied to the 1/2 acre limit.

NWP 14 can only be used once for a single and complete project having independent utility. When NWP 14 is proposed for multiple locations a written determination will be provided describing independent utility of each impact location for approval by EPA, consistent with General Condition 01. *Notification.*

All bank stabilization activities under this permit shall involve either the sole use of native vegetation or other bioengineered design techniques (e.g. willow plantings, root wads, large woody debris, etc.) or a combination of hard-armoring (e.g. rock) and native vegetation or bioengineered design techniques, unless specifically determined to be impracticable by the EPA.

Crossings that propose to alter the pre-construction course, condition, capacity or location of open waters, the MPCN shall include sufficient justification to determine that the proposed activity would result in a net increase in aquatic resource functions and services. Functions and services to be considered in the justification include, but are not limited to: short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities.

For replacement crossings that would result in a reduction in the pre-construction ordinary high water mark channel width and depth of open waters of the U.S. at the crossing, as compared to the upstream and downstream open waters:

- 1) Information on why it is not practicable to approximate the pre-construction ordinary high water mark channel width of the upstream and downstream open waters, and
- 2) Sufficient justification to determine that the reduction in the pre-construction bankfull width would result in a net increase in aquatic resource functions and services. Functions and services to be considered in the justification include, but are not limited to: short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities.

NWP-15 U.S. Coast Guard Approved Bridges

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

NWP-16 Return Water from Upland Contained Disposal Areas

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

NWP-17 Hydropower Projects

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

NWP-18 Minor Discharges

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

NWP-19 Minor Dredging

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

NWP-20 Response Operations for Oil and Hazardous Substances

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

NWP-21 Surface Coal Mining Activities

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

Before an applicant may use this permit, EPA must approve a compensatory mitigation plan sufficient to ensure impacts to aquatic resource functions are minimal.

NWP-22 Removal of Vessels

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

NWP-23 Approved Categorical Exclusions

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

NWP-24 Indian Tribe or State Administered Section 404 Programs

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

NWP-25 Structural Discharges

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

NWP-26 [Reserved]

This NWP is no longer in use. No certification is necessary.

NWP-27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities

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

Notification to the EPA (in accordance with General Condition 01. *Notification*) must include sufficient justification to determine that the proposed project would result in a net increase in aquatic functions and services. Functions and services to be considered in the justification include, but are not limited to: short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities. EPA will approve or deny on a case-by-case basis whether the proposed project will result in a net increase in aquatic resource functions and services, consistent with the NWP. An individual certification may be required in the event EPA denies approval of a waiver for this NWP.

For removal of small water control structures, notification must include documentation showing that the secondary impacts to waters (e.g., erosion of downstream waters) as a result of structure removal are minimal. The PCN or MPCN should include (a) a description of the methods to be used to remove and dispose of any accumulated sediments stored behind the structure, and (b) a description of methods to ensure that the channel bed and banks are stabilized to prevent headcutting and failure after the structure is removed.

NWP-28 Modifications of Existing Marinas

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

NWP-29 Residential Developments

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

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to 1/4 acre of impacts to non-tidal waters of the U.S. for single family houses, and the greater of 1/2 acre or 300 linear feet of impact to waters of the U.S. for multi-unit residential developments.

Under this certification, this permit will not be used to approve residential developments and their attendant features within the 100-year floodplain. The 100-year floodplain is determined based on hydrologic conditions at the time of the NWP application.

Recreational facilities such as playgrounds, playing fields, and golf courses are not authorized under this certification. These projects are separate and distinct from residential developments, are not required to be included in a residential development project for it to be practicable, and their construction within waters is normally avoidable.

NWP-30 Moist Soil Management for Wildlife

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

NWP-31 Maintenance of Existing Flood Control Facilities

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

Upon review of a PCN, consistent with General Condition 01. *Notification*, EPA will approve or deny on a case-by-case basis whether the proposed project will result in minimal impacts to waters of the U.S. for projects that include removal of levee vegetation.

NWP-32 Completed Enforcement Actions

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

NWP-33 Temporary Construction, Access, and Dewatering

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

Access roads shall be designed to be the minimum width necessary and shall be designed to minimize changes to the hydraulic flow characteristics of the stream and degradation of water quality. The following Best Management Practices (BMPs) shall be followed to the maximum extent possible to

ensure that flow and circulation patterns of waters are not impaired and adverse effects on the aquatic environment will be kept to a minimum:

- The road shall be properly stabilized and maintained during and following construction to prevent erosion.
- Construction of the road fill shall occur in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself.

Vegetative disturbance in the waters of the U.S. shall be kept to a minimum.

Borrow material shall be taken from upland sources whenever feasible.

Stream channelization is not programmatically certified. Applicants must apply for an individual certification.

NWP-34 Cranberry Production Activities

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

NWP-35 Maintenance Dredging of Existing Basins

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

NWP-36 Boat Ramps

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

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to 50 cubic yards of fill and ramps that are 20 feet wide or less.

NWP-37 Emergency Watershed Protection and Rehabilitation

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

NWP-38 Cleanup of Hazardous and Toxic Waste

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

NWP-39 Commercial and Institutional Developments

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

Under this certification, this permit will not be used to approve commercial and institutional developments and their attendant features within the 100-year floodplain. The 100-year floodplain is determined based on hydrologic conditions at the time of the NWP application.

Recreational facilities such as playgrounds, playing fields, and golf courses are not authorized under this certification. These projects are separate and distinct from commercial and institutional development, are not required to be included in such developments to be practicable, and their construction within waters is normally avoidable.

Activities involving the storage and/or extraction of hazardous materials are not programmatically certified, and applicants must seek an individual certification.

NWP-40 Agricultural Activities

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

Construction of farmponds under this certification is limited to those that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters and eliminate federal regulatory jurisdiction.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

NWP-41 Reshaping Existing Drainage Ditches

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

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

All sidecast materials from excavation must be stored and/or disposed of within non-jurisdictional uplands under this certification. A statement must be included in the notification as to how the applicant's activities will improve water quality.

Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters to eliminate federal regulatory jurisdiction.

NWP-42 Recreational Facilities

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

NWP-43 Stormwater Management Facilities

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from EPA in all cases. NWP authorization of constructing stormwater facilities within waters of the U.S. discourages applicants from using practicable construction options that locate stormwater retention and detention facilities "off line" from streams. For example, retention facilities are often built as sediment (or debris) basins within a stream. This practice includes constructing a dam in the stream, excavating out a basin, and regular sediment removal to maintain the structure. These facilities cause considerable and unnecessary damages to stream functions as retention facilities can be located "off line" by constructing a high flow diversion channel above the ordinary high water mark. If applicants can continue to use the traditional, more damaging

practices that are sanctioned by this NWP, there is no incentive for these management practices to improve. We do not believe NWP-43 for new facilities complies with the CWA Section 404(b)(1) Guidelines.

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

NWP-44 Mining Activities

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

Applicants must ensure that mining activities (e.g., aggregate mining) approved by this NWP will not cause upstream head cutting or downstream incision. Notification to EPA shall include a narrative description and design drawing, when applicable, of any measure that will be implemented to comply with the condition.

When used for in-stream aggregate mining activities, compensatory mitigation is likely to be required due to extensive indirect impacts and temporal losses typical of this type of impact.

NWP-45 Repair of Uplands Damaged by Discrete Events

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

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

NWP-46 Discharges in Ditches

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

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

NWP-47 [Reserved]

This NWP is no longer in use. No certification is necessary.

NWP-48 Commercial Shellfish Aquaculture Activities

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

Under this certification, impacts to submerged aquatic vegetation are prohibited, consistent with NWP 19. *Minor Dredging*, and NWP 36. *Boat Ramps*.

NWP-49 Coal Remining Activities

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

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

Applicants must provide information in the PCN illustrating that activities authorized under NWP-49 will result in a net increase in aquatic resource functions.

NWP-50 Underground Coal Mining Activities

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

NWP-51 Land-Based Renewable Energy Generation Facilities

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

NWP-52 Water-Based Renewable Energy Generation Pilot Projects

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

NWP-53 Removal of Low-Head Dams

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

NWP 54 Living Shorelines

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

Summary Table – EPA Region 9 §401 Certification of 2017 NWP for projects on tribal lands

NWP	Certification Status			*Notification	Impact Limits	Notes
	General Conditions	Specific Conditions	Denied			
1	X			MPCN	None	
2	X			MPCN	None	
3	X	X		PCN or MPCN	Generally no increase in fill footprint	-No undersized structures -Bioengineering used whenever practicable
4	X			MPCN	None	
5	X			MPCN	25 cyds	
6	X			MPCN	25 cyds	
7	X			PCN	None	
8	X			PCN	None	
9	X			MPCN	None	
10	X			MPCN	None	
11	X			MPCN	None	
12	X	X		PCN or MPCN	**1/2 acre or 300'	-Only once per single and complete project with independent utility -Waiver approval required from EPA for 300' - No transport of hazardous substances
13	X	X		PCN or MPCN	**1/2 acre or 300'	Waiver approval required from EPA
14	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal, 1/3 acre or 300' tidal	Only once per single and complete project with independent utility
15	X			MPCN	None	
16	X			MPCN	None	
17	X			PCN	None	
18	X			PCN or MPCN	1/10 acre or 25 cyds	
19	X			MPCN	25 cyds	
20	X			MPCN	None	
21	X	X		PCN	1/2 acre or 300'	EPA approves mitigation plan first
22	X			PCN or MPCN	None	
23	X			PCN or MPCN	None	
24	X			MPCN	None	
25	X			MPCN	None	
26						Reserved
27	X	X		PCN or MPCN	None	Approval required from EPA
28	X			MPCN	None	
29	X	X		PCN or MPCN	**1/4 acre for single house, 1/2 acre or 300' for multi-unit	-Waiver approval required from EPA -No recreational impacts authorized
30	X			MPCN	None	

USEPA Region 9 Conditional CWA§401 Certification of the 2017 NWP for projects on applicable tribal lands

31	X	X		PCN	None	Approval for levee vegetation removal required from EPA
32	X			MPCN	5 acres non-tidal or 1 acre tidal	
33	X			PCN	None	
34	X			PCN	10 acres	
35	X			MPCN	Lesser of previously authorized or controlling depths	
36	X			PCN or MPCN	50 cyds, 20'-wide ramp	Waiver approval required from EPA
37	X			PCN or MPCN	None	
38	X			PCN	None	
39	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA No transport of hazardous substances
40	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
41	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal	Waiver approval required from EPA
42	X	X		PCN	1/2 acre or 300' non-tidal	
43			X	MPCN	N/A	Must apply to EPA for individual cert.
44	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
45	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal	Waiver approval required from EPA
46	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal	Waiver approval required from EPA
47						Reserved
48	X	X		PCN or MPCN	**Impacts to submerged aquatic veg. prohibited	
49	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal	Waiver approval required from EPA
50	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
51	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
52	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA

***Notification Category: Pre-Construction Notification (PCN):**

- When a PCN is required by the Corps, the applicant shall submit a copy of the PCN to EPA Region 9 for 401 notification. If not already included, also include the Modified PCN (MPCN) requirements 2)d through 2)h. Any waiver of impact limits requires approval from EPA pursuant to General Condition 02. *Waivers*.

Notification Category: Modified Pre-Construction Notification (MPCN):

- When the Corps does not require a PCN for any activities authorized under the NWP proposed for use, or for impacts below limits identified in the NWP for a PCN, applicants must forward a MPCN to EPA Region 9 for 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 General Condition 02. *Waivers* for EPA approval.

**Impact limits are modified by EPA



U.S. Environmental Protection Agency
Pacific Southwest / Region 9

EPA's Water Quality Certifications on Tribal Lands of the Pacific Southwest

Water Division
Wetlands Office, November 2016

75 Hawthorne Street, San Francisco, CA 94105
866-EPA-WEST • www.epa.gov/region9

Under Section 401 of the Clean Water Act (CWA), any activity requiring a federal license or permit that might result in a discharge to jurisdictional waters (which include many wetlands) must also receive a certification ensuring the permit or license will protect water quality. The certifying authority can either grant, deny, or condition a certification, or determine that a certification isn't needed (a waiver).

Usually, states issue these certifications. However, because states lack jurisdiction on most tribal lands, the CWA requires the federal government – in this case EPA – to fulfill this role. In some circumstances, tribes may assume this and related responsibilities from EPA (see box below).



For larger impacts, a typical EPA certification involves reviewing project details, working with project proponents to minimize environmental harm, and certifying the project with specific conditions, usually within 60 days.

The most common federal permits subject to Section 401 certifications are CWA Section 404 permits for placing dredged or fill material in jurisdictional waterways and wetlands, including seasonally dry creek beds or wetlands that are common on tribal lands in the West. These permits are often needed for building roads, utility lines and other structures, or even ecosystem restoration or flood control.

The U.S. Army Corps of Engineers (Corps) issues Section 404 permits, and coordinates with EPA or the applicable state or tribal government for the Section 401 certification. Usually, EPA uses the same information for a 401 certification that the Corps requires for the 404 permit.

However, certifications are not limited to 404 permits, and may also be needed for Federal Energy Regulatory Commission hydropower licenses, Rivers and Harbors Act Section 9 and 10 permits, and CWA Section 402 permits for storm and waste water.

Tribal Treatment as a State (TAS)

Some tribes can apply for “treatment in a similar manner as a state,” or TAS, for implementing certain environmental programs under the Clean Air Act, Clean Water Act, and Safe Drinking Water Act.

Once EPA grants TAS for water quality standards, the tribe assumes responsibility for processing 401 certification applications and ensuring water quality is protected. To apply for TAS, a tribe must:

- ✓ Be federally recognized
- ✓ Have a governing body carrying out substantial governmental duties
- ✓ Demonstrate legal jurisdiction over waters
- ✓ Have organizational capacity to implement environmental programs

What Water Quality Standards Apply on Tribal Lands?

Where tribes have EPA-approved water quality standards, those tribal standards apply. If a tribe does not have EPA-approved standards, and a waterbody flows into an adjacent state, the state standards for the receiving water body are generally applied to tribal lands.

Traditional cultural water uses are also important. If a water body needs stronger protections due to its use by a tribe (for example, there are threatened species on tribal lands not covered by the state standard, or there is a higher fish consumption rate than covered by the state standard), then EPA will coordinate with the affected tribe(s) to ensure these uses are protected as much as possible.

At a minimum, the federal water quality criteria set by EPA in Section 304(a) of the CWA are applied. This national framework protects different water uses with different criteria for specific substances. Generally the criteria that protect the most sensitive use is applied.



Typical Conditions of an EPA 401 Certification:

- Erosion control measures
- Construction stormwater management
- Spill control and cleanup requirements
- Vegetated buffers around waters
- Seasonal or weather-related work windows
- Restoration of temporarily disturbed areas

For more information, visit www.epa.gov/cwa-404, click “Laws and Regulations” and then the Section 401 Overview. To find EPA staff in your area, go to www.epa.gov/wetlands and click “Regional Contacts.”

Corps “Nationwide Permits” and Blanket Certifications

The Corps can approve a project’s filling of waters with either “standard” or “general” 404 permits. Regardless of which 404 permit is used, EPA always coordinates certifications with affected tribe(s).

“Nationwide” permits (NWP) are one type of 404 general permit that streamline approval of low-impact fills (for example, a half-acre of fill for a utility line). There are about 50 activity-specific NWPs, and they are reissued as a group every five years (next in March 2017).

When NWPs are being reissued, EPA Region 9 evaluates them for a conditional blanket (or “programmatic”) water quality certification. This avoids most case-by-case reviews, as the majority of fill projects (under most NWPs) are covered simply by notifying EPA and following conditions in the blanket certification.

This is why it is particularly important for EPA to receive input from the public – and especially affected tribes – as we consider certifying the NWP program every five years. EPA sends letters to all affected tribes in the Pacific Southwest to notify them of the review and solicit comments.

A few of the NWPs may not warrant a blanket approach. For these, and higher-impact “standard” Corps permits in general, EPA reviews certification applications case-by-case. So, while most projects are certified “in advance” under EPA’s conditions for the NWPs, EPA also tailors 401 conditions for higher-impact 404 permits to the particular action and water body.

Typical Steps for 401 Certification of Corps Permits

