



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 155
Seattle, Washington 98101-3188

WATER DIVISION

December 11, 2020

Ms. Shannon Morgan
North Branch Chief
U.S. Army Corps of Engineers
Alaska District - Regional Division
P.O. Box 6898
JBER, Alaska 99506-0898

Subject: Clean Water Act Section 401 Certification Decisions on the Draft 2020 Nationwide Permits for Tribal Lands and Lands within Region 10 of the U.S. Environmental Protection Agency for Alaska District.

Dear Ms. Morgan:

The U.S. Environmental Protection Agency (EPA), Region 10 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 tribal lands (40 CFR 121.13(a)). We have reviewed the U.S. Army Corps of Engineers (Corps) Federal Register notice dated September 15, 2020, announcing the proposed issuance of the Corps' Nationwide Permits (NWP). The Corps proposal is to reissue 52 existing NWPs (modify 17 of those NWPs), issue five new NWPs, make changes to eight existing general conditions, and remove three definitions. The enclosed is our CWA Section 401 programmatic water quality certification for these general permits. The enclosed conditions become binding requirements of the NWPs that are issued on tribal lands and lands with exclusive federal jurisdiction within EPA Region 10.¹ Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable requests for authorization.

Based on EPA Region 10 review of the materials provided by the Corps, EPA Region 10 made a determination whether potential discharges from the proposed NWPs will comply with applicable provisions of Sections 301, 302, 303, 306 and 307 of the CWA. In summary, of the 57 proposed active nationwide permits, EPA Region 10 is conditionally certifying 17 NWPs and denying certification for 29 NWPs. The Corps is not requesting certification for 11 NWPs.² The attached programmatic 401 certification will remain in effect for the authorization period of the 2020 NWPs and will be re-evaluated when the NWPs are next proposed for reissuance and revisions in 2025.

¹ See Attachment 1 in the Enclosure which lists each of the tribes and exclusive jurisdiction lands within EPA Region 10.

² The Corps has not requested certification for NWPs: 1, 2, 8-11, 24, 28, 35, A, B. If any activity authorized by these listed NWPs may result in a discharge into a water of the United States, the Corps must seek CWA section 401 certification from the appropriate certifying authority.

This certification applies to all NWP permit authorizations by the Corps that may result in a point source discharge to waters of the U.S. where the EPA is the certifying authority on behalf of the Metlakatla Tribe and for Denali National Park and Preserve in Alaska State.

If a project fails to meet the enclosed conditions, the applicant must contact EPA Region 10 for individual project certification. Please advise project proponents who seek authorization under a NWP for individual project certification to submit their questions, pre-filing meeting requests, and subsequent 401 certification requests when required to: R10-401-Certs@epa.gov and copy Ms. Linda Storm at storm.linda@epa.gov of my staff.

If there are substantive changes to either the final Nationwide Permits or the final District's Regional Conditions, this certification may not be valid and a new request for 401 certification would be required. This certification applies to all NWP permit authorizations by the Corps that may result in a point source discharge to waters of the U.S. where the EPA is the certifying authority.

Thank you for your ongoing partnership in implementing the regulatory programs of the CWA. Please do not hesitate to contact Ms. Linda Storm, Aquatic Ecologist of my staff, at 206-437-2293 or storm.linda@epa.gov, for any questions regarding EPA Region 10's this water quality certification of the Nationwide Permits.

Sincerely,

DAVID
CROXTON

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CROXTON
Date: 2020.12.11
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David Croxton, Manager
Wetlands and Oceans Section

Enclosure

cc (via electronic mail):

Mr. Ryan Winn, Alaska District Corps of Engineers, Ryan.H.Winn@usace.army.mil

Mr. Reginald Atkinson, Mayor of Metlakatla Indian Community, reginald@metlakatla.com

Ms. Brooke Merrell, Denali National Park and Preserve, National Park Service, brooke_merrell@nps.gov

Ms. H. Sharon Kim, Denali National Park and Preserve, National Park Service, Sharon_Kim@nps.gov

Mr. Robert Henszey, U.S. Fish and Wildlife Service, Bob_Henszey@fws.gov

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Mr. Gregory Balogh, National Marine Fisheries Service, greg.balogh@noaa.gov

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Mr. James Rypkema, Alaska Department of Environmental Conservation, james.rypkema@alaska.gov

Ms. Jackie Timothy, Alaska Department of Fish and Game, jackie.timothy@alaska.gov

Ms. McKenzie Johnson, Alaska Department of Natural Resources State Historic Preservation Office, mckenzie.johnson@alaska.gov

Enclosure
**U.S. Environmental Protection Agency Region 10's Programmatic
Water Quality Certification for the 2020 U.S. Army Corps of Engineers
Nationwide Permits on Tribal Lands where Tribes Do Not Have Treatment in
a Similar Manner as a State and Lands with Exclusive Federal Jurisdiction in
Alaska, Idaho, Oregon and Washington**

This Certification applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers (Corps) CWA 404 Nationwide Permit (NWP) into waters of the United States that occur within applicable tribal lands and lands with exclusive federal jurisdiction in the states of Alaska, Idaho, Oregon and Washington and corresponding Corps Districts¹: NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, D and E. The Corps is not requesting certification for 11 NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B.

Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency is the certifying authority. In this case, tribes do not have the authority to provide CWA Section 401 certification for discharges occurring on applicable tribal lands and the states of Alaska, Idaho, Oregon and Washington cannot certify on exclusive federal jurisdiction lands², therefore, the EPA is making the certification decisions for potential discharges that may result from the projects authorized under the proposed Corps CWA 404 NWPs listed above.

Project Description

The Corps is proposing to re-issue its existing NWPs and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects.” 85 FR 57298. For more details:

<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

General Information

The general information provided in this section does not constitute a certification condition(s).

Project proponents for potential projects authorized under the NWPs are responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state, or tribal authorities.

¹This 401 certification applies to all 30 tribes and exclusive federal jurisdiction lands (e.g., Denali National Park and Preserve in AK and Willamette Falls in OR) in EPA's Region 10. Region 10 of EPA covers the states of Alaska, Idaho, Oregon and Washington, which correspond to Alaska District, Walla Walla District, Portland District, and Seattle District of the U.S. Army Corps of Engineers, respectively. A list of the 30 tribes on behalf of whom EPA Region 10 has 401 certification authority is provided in Attachment 1.

² See Attachment 1.

Project proponents for potential projects authorized under the NWP should retain this certification in their files with the applicable NWP as documentation of EPA's certification decisions for the above-referenced proposed NWP. This certification is specifically associated with the proposed NWP described above and expires when those NWP expire, five years from Corps issuance date.

Copies of this certification must be kept on the job site and made readily available for reference.

If a project proposal does not meet either the general or NWP-specific certification conditions, or if certification is denied for a specific NWP, the project proponent must request an individual certification from EPA Region 10. A project proponent must request a pre-filing meeting from EPA Region 10 at least 30 days prior to submitting an individual certification request. An individual certification request must follow the requirements outlined in section 121.5 of EPA's CWA Section 401 Certification Rule, effective September 11, 2020.³

The project proponents for potential projects authorized under a NWP are encouraged to contact EPA Region 10 during the project planning phase if there are any questions about relevant best management practices (e.g., bioengineering techniques, biodegradable erosion control measures, revegetation using native plant species, suitable fill materials, and disposal of debris/construction materials preventing runoff) and resources that can assist with compliance.

Prior to work commencing, project proponents should notify the appropriate Tribal Environmental Office.

Pursuant to CWA section 308(a), EPA representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP.

If you have any questions regarding this certification, please contact Linda Storm, (206) 437-2293, R10-401-Certs@epa.gov or storm.linda@epa.gov.

Grant with Conditions (121.7(d)(2))

On behalf of the 30 federally recognized tribes and for exclusive federal jurisdiction lands (e.g., Denali National Park and Preserve and Willamette Falls) located within the states of Alaska, Idaho, Oregon and Washington,⁴ EPA Region 10 has determined that any discharge authorized under the following proposed NWP will comply with water quality requirements, as defined at 40 CFR 121.1(n), subject to the following conditions pursuant to Section 401(d).

NWP 4, 5, 15, 18, 20, 22, 25, 30, 31, 32, 33, 34, 37, 38, 40, 45, 54

³ The CWA Section 401 Certification Rule is available at https://www.epa.gov/sites/production/files/2020-07/documents/clean_water_act_section_401_certification_rule.pdf.

⁴ This 401 certification applies to all 30 tribes and exclusive federal jurisdiction lands (e.g., Denali National Park and Preserve in AK and Willamette Falls in OR) in EPA's Region 10. Region 10 of EPA covers the states of Alaska, Idaho, Oregon and Washington, which correspond to Alaska District, Walla Walla District, Portland District, and Seattle District of the U.S. Army Corps of Engineers, respectively. A list of the 30 tribes on behalf of whom EPA Region 10 has 401 certification authority is provided in Attachment 1.

General Conditions:

EPA General Condition 1 – Compliance with Stormwater Pollution Prevention and the National Pollutant Discharge Elimination System Permit Provisions

For land disturbances during construction that disturb one or more acres of land, or will disturb less than one acre of land but are part of a common plan of development or sale that will ultimately disturb one or more acres of land, the permittee must obtain and implement Construction Stormwater General Permit requirements,⁵ including:

- a. The permittee must develop an appropriate Stormwater Pollution Prevention Plan (SWPPP)⁶; and
- b. Following construction, prevention or treatment of ongoing stormwater runoff from impervious surfaces that includes soil infiltration must be implemented.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:

This condition is to ensure that the permit applicant is aware of and complies with all CWA section 402 stormwater management permit requirements. Available to applicants are compliance assistance tools such as SWPPP guide and template for applicants at <https://www.epa.gov/npdes/swpppguide>. EPA Region 10 encourages permit applicants to develop SWPPPs to ensure prevention of water quality impairment from stormwater runoff during construction and operation of projects permitted by Corps NWP's.

Citation(s) that authorizes this condition: CWA Section 301; 40 CFR 122.26

EPA General Condition 2 – Projects or Activities Discharging to Impaired Waters

Projects or activities are not authorized under the NWP's if the project will involve point source discharges into an active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody and the discharge may result in further exceedance of a specific parameter (e.g. total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed. The current lists of 303(d) and TMDL listed waterbodies are available on EPA Region 10's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-region-10>.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:

A 303(d) listed waterbody is impaired due to the cumulative effects of discharges of pollutants. The NWP's do not provide necessary activity specific information to determine that discharges will comply with specific water quality requirements, such as limits on total suspended solids, temperature, dissolved oxygen, nutrients, or pH for which a specific waterbody could be listed as impaired. Site specific analysis is required to determine whether point source discharges from activities comply with water quality requirements in the active channel of a waterbody identified as a section 303(d) or TMDL listed impaired waterbody.

Citation(s) that authorizes this condition: CWA Section 303(d)

EPA General Condition 3 – Notice to EPA

All applicants must provide notice to EPA Region 10 prior to commencing construction to provide EPA Region 10 with the opportunity to inspect the activity for the purposes of determining whether any

⁵ See <https://www.epa.gov/npdes/2017-construction-general-permit-cgp>

⁶ <https://www.epa.gov/npdes/developing-stormwater-pollution-prevention-plan-swppp>

U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2020 Nationwide Permits discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the applicant should also provide the PCN to Region 10. EPA Region 10 will provide written notification to the applicant if the proposed project will violate the water quality certification of the NWP.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:

This condition is necessary to provide EPA Region 10 with notice and information to allow for an efficient and effective pre-operation inspection to determine if the certified discharge will violate the certification. If the project scope changes during the Corps review prior to initiation of the activity, it is also critical for EPA Region 10 to be provided any changes in the project design, scope, amount and location of discharges to inform the pre-operation inspection opportunity as provided by 40 CFR 121.11(a).

Citation(s) that authorizes this condition: 40 CFR 121.11(a)

EPA General Condition 4 – Unsuitable Materials

The applicant shall not cause a point source discharge of toxic chemical components (e.g., copper, arsenic, zinc, creosote, chromium, chloride, fluoride, pentachlorophenol) into waters of the United States during installation or removal of structures, unless the structures meet the following conditions:

- a. Wood preservatives and their application must be in compliance with EPA label requirements and criteria of approved EPA Registration Documents under the Federal Insecticide, Fungicide, and Rodenticide Act;
- b. Discharges of chemically treated wood products must follow the Western Wood Preservatives Institute (WWPI) guidelines and best management practices to minimize the preservative migrating from treated wood into the aquatic environment;
- c. For new or replacement wood structures installed into waters of the United States, the wood must be sealed with non-toxic products such as water-based silica or soy-based water repellants or sealers to prevent or limit leaching. Acceptable alternatives to chemically treated wood are encouraged and include untreated wood, steel (painted, unpainted or coated with epoxy petroleum compound or plastic), concrete and plastic lumber; and
- d. All removal of chemically treated wood products (including pilings) must follow the most recent “EPA Region 10 Best Management Practices for Piling Removal and Placement in Washington State.”

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:

This condition provides further specification for applicants regarding discharges of certain materials into waters of the U.S. In the aquatic environment the chemicals and metals in certain materials are toxic and contribute to adverse biological and human health impacts.

Citation(s) that authorizes this condition: CWA Sections 301, 303, 307; 40 CFR 401.15

Denied (121.7(e)(2))

Federally recognized tribes located within the states of Alaska, Idaho, Oregon and Washington

On behalf of the 30 federally recognized tribes located within the states of Alaska, Idaho, Oregon and Washington, EPA Region 10 cannot certify that the range of discharges from potential projects authorized under the following proposed NWP's will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWP's 3, 6, 7, 12, 13, 14, 16, 17, 19, 21, 23, 27, 29, 36, 39, 41, 42, 43, 44, 46, 48, 49, 50, 51, 52, 53, C, D and E, and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). In EPA's unique role certifying on behalf of a tribe, in a tribal jurisdiction where EPA is not the regulator, EPA lacks important information about tribal water resources. In the case of the 30 federally recognized tribes located within the states of Alaska, Idaho, Oregon and Washington, EPA Region 10 lacks sufficient information on sensitive resources that may exist on tribal land, potential impaired waters on tribal land, and potential cultural importance of the water resources on tribal land. Additional information on these specific subjects would be needed for EPA Region 10 to assure that the range of discharges from potential projects authorized under NWP's 3, 6, 7, 12, 13, 14, 16, 17, 19, 21, 23, 27, 29, 36, 39, 41, 42, 43, 44, 46, 48, 49, 50, 51, 52, 53, C, D and E will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 10 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 10 is therefore denying certification.

Lands of Exclusive Federal Jurisdiction

On behalf of the lands of exclusive federal jurisdiction located within Alaska, Idaho, Oregon and Washington (e.g., Denali National Park and Preserve and Willamette Falls), EPA Region 10 cannot certify that the range of discharges from potential projects authorized under the following proposed NWP's will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWP's 3, 6, 7, 12, 13, 14, 16, 17, 19, 21, 23, 27, 29, 36, 39, 41, 42, 43, 44, 46, 48, 49, 50, 51, 52, 53, C, D and E, and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). The states in which these lands of exclusive federal jurisdiction are located are also certifying these same NWP's and EPA lacks sufficient information on how these states are certifying the NWP's and how they are assessing and interpreting applicable water quality requirements in their evaluation of certification for these NWP's. Additional information on these specific subjects would be needed for EPA Region 10 to assure that the range of discharges from potential projects authorized under NWP's 3, 6, 7, 12, 13, 14, 16, 17, 19, 21, 23, 27, 29, 36, 39, 41, 42, 43, 44, 46, 48, 49, 50, 51, 52, 53, C, D and E will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 10 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this

U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2020 Nationwide Permits information, EPA Region 10 is therefore denying certification.

Attachment 1

Tribal and other Lands where EPA Region 10 has CWA Section 401 Water Quality Certifying Authority for Federal Licenses and Permits that may result in a Discharge to Waters of the U.S.

Alaska

Metlakatla Indian Community

Denali National Park and Preserve (exclusive federal jurisdiction lands)

Idaho

Kootenai Tribe of Idaho

Nez Perce Tribe

Shoshone Paiute Tribes of the Duck Valley Reservation (in Idaho only, EPA R9 provides to SPTDVR in Nevada)

Coeur d'Alene Tribe (EPA writes 401 WQ Certifications for all waters within reservation boundaries with the exception of Coeur d'Alene Lake and St. Joe River for which the Tribe has treatment in the same manner as a state (TAS) and EPA-approved water quality standards (WQS))

Oregon

Burns Paiute Tribe

Coquille Indian Tribe

Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians

Cow Creek Band of Umpqua Tribe of Indians

The Confederated Tribes of Grand Ronde

The Klamath Indian Tribe

Confederated Tribes of Siletz Indians

Willamette Falls (exclusive federal jurisdiction lands)

Washington

Cowlitz Indian Tribe

Hoh Indian Tribe

Jamestown S'Klallam Tribe

Lower Elwha Klallam Tribe

Muckleshoot Indian Tribe

Nisqually Indian Tribe

Nooksack Indian Tribe

Quileute Tribe

Samish Indian Nation

Sauk-Suiattle Indian Tribe

Shoalwater Bay Tribe

Skokomish Indian Tribe

Snoqualmie Tribe

Squaxin Island Tribe

Stillaguamish Tribe of Indians

Suquamish Indian Tribe

Upper Skagit Indian Tribe

Confederate Tribes and Bands of the Yakama Nation