



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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OFFICE OF
ENVIRONMENTAL REVIEW
AND ASSESSMENT

March 6, 2017

Colonel Michael Brooks
Attn: Mr. David Hobbie
Alaska District, U.S. Army Corps of Engineers
Regulatory Division (1145)
CEPOA-RD
P.O. Box 6898
JBER, Alaska 99506-0898

Dear Colonel Brooks:

The U.S. Environmental Protection Agency has completed its review of the Federal Register Notice dated January 6, 2017, to reissue the 50 existing Nationwide Permits, general conditions, and definitions with some modifications, and to issue two new Nationwide Permits (*53 Removal of low-head dams* and *54 Living shorelines*), one new general condition, and five new definitions. Changes were made at the national level to Nationwide Permits 3, 9, 12, 13, 14, 19, 20, 21, 22, 23, 27, 29, 31, 32, 33, 35, 39, 40, 41, 42, 43, 44, 45, 48, 50, 51, and 52. This review was conducted in response to the Corps' request to certify pursuant to Section 401 of the Clean Water Act that there is reasonable assurance that the Department of the Army's proposed modifications and additions of Nationwide Permits at Appendix A to 33 CFR Part 330 will not comply with applicable provisions of CWA Sections 301, 302, 303, 306, and 307 in those areas where the EPA is the certifying authority within the State of Alaska. The EPA is responsible for providing CWA Section 401 water quality certifications in Indian country for tribes who do not have treatment as a state and on lands with exclusive federal jurisdiction. In Alaska the EPA is the CWA Section 401 certifying authority for the Metlakatla tribe and for the Denali National Park and Preserve.

This letter documents the EPA's decisions to certify, partially certify with conditions, or deny certification for each specific Nationwide Permit. Appendix 1 (enclosed) identifies the EPA's CWA Section 401 water quality certification General Conditions applicable to all certified Nationwide Permits where the EPA is the certifying authority within the State of Alaska. Appendix 1 also identifies Nationwide Permit-specific water quality conditions and criteria. The EPA's decisions are based on the 2017 Nationwide Permits and National General Conditions as published in the Federal Register on January 6, 2017, the Alaska District's "Draft Final Proposed 2017 Regional Conditions" dated October 27, 2016 for the State of Alaska.

Representatives from the EPA, National Marine Fisheries Service, U.S. Fish and Wildlife Service, Alaska Department of Environmental Conservation, Alaska Department of Fish and Game, and Alaska Department of Natural Resources State Historic Preservation Office participated in meetings with representatives from the Alaska District to provide input on the District's Regional Conditions. Though few of the regional conditions we requested to strengthen protection of Alaska's aquatic resources were adopted by the District, the EPA appreciates the Corps' efforts to actively engage with us and other agencies in this process.

This letter and enclosure constitute the CWA Section 401 water quality certification for the reissuance of all existing 50 Nationwide Permits, their general conditions and definitions, and for the addition of two new Nationwide Permits 53 and 54. We understand that the final regional conditions for the reissued and new Nationwide Permits have not yet been issued. If the final regional conditions are substantially different than the October 27, 2016 version, we reserve the right to modify the EPA's CWA Section 401 water quality certification decisions for the affected Nationwide Permits within a reasonable period of time. This certification applies to Corps permit authorizations, including CWA Section 404 and Rivers and Harbors Act Section 10 activities, that may result in a discharge to waters of the U.S. where the EPA is the certifying authority.

The EPA denies CWA Section 401 water quality certification for the following Nationwide Permits:

- NWP 17 - Hydropower Projects**
- NWP 21 - Surface Coal Mining Activities**
- NWP 43 - Stormwater Management Facilities**
- NWP 44 - Mining Activities**
- NWP 49 - Coal Remining Activities**
- NWP 50 - Underground Coal Mining Activities**
- NWP 53 - Removal of Low-Head Dams**
- NWP 54 - Living Shorelines**

The EPA partially denies CWA Section 401 water quality certification for the following Nationwide Permits. An individual CWA Section 401 certification is required for any project is denied certification as described below. Projects that are not denied certification as described below, are certified and subject to all conditions of the Nationwide Permits, the District's regional conditions and the enclosed CWA Section 401 water quality certification General Conditions and Nationwide Permit-specific water quality conditions and criteria contained in Appendix 1.

NWP 3 - Maintenance: Maintenance or replacement activities in fish bearing waters of the U.S. that extend beyond their prior footprint, or activities that require excavation or dredging in open water are denied certification.

NWP 6 - Survey Activities: Projects involving oil or natural gas exploration or requires trenching in wetlands are denied certification.

NWP 7 - Outfall Structures and Associated Intake Structures: Projects having associated outfall to a wetland or where receiving waters cannot be diverted are denied certification.

NWP 12 - Utility Line Activities: Any excavation or dredging activities affecting open water areas (e.g., trenching across streams), or where there are associated permanent access roads, temporary structures or fills or if the project is authorized under one or more nationwide permit by the Corps that result(s) in greater than 1/2 acre of impacts to aquatic resources or over 300 linear feet of stream are denied certification.

NWP 13 - Bank Stabilization: Projects in excess of 500 linear feet are denied certification.

NWP 14 - Linear Transportation Projects: Any excavation or dredging activities affecting open water areas (e.g., trenching across streams), or where there are associated permanent access roads, temporary structures or fills or if the project is is authorized under one or more nationwide permit by the Corps that result(s) in greater than a 1/2 acre of impacts to aquatic resources or over 300 linear feet of stream are denied certification.

NWP 23 - Approved Categorical Exclusions: Projects having more than 1/2 acre of fill or in excess of 300 linear feet of stream are denied certification.

NWP 29 - Residential Developments: Projects for which a District Engineer waiver is requested to exceed ½ acre of impacts to waters of the U.S. are denied certification.

NWP 39 - Commercial and Institutional Developments: Projects for which a District Engineer waiver is requested to exceed ½ acre of impacts to waters of the U.S. are denied certification.

NWP 41 - Reshaping Existing Drainage Ditches: Projects in excess of 500 linear feet are denied certification.

NWP 42 - Recreational Facilities – Projects for which a District Engineer waiver is requested to exceed ½ acre of impacts to waters of the U.S. are denied certification.

NWP 51 - Land-Based Renewable Energy Generation Facilities: Projects affecting greater than 1 acre of aquatic resources are denied certification.

NWP 52 - Water-Based Renewable Energy Generations Pilot Projects: Projects or activities impacting fish bearing streams, submerged aquatic vegetation, forage fish habitat or special aquatic sites (including mudflats, vegetated shallows, wetlands) are denied certification.

The EPA certifies that the discharges authorized by all other Nationwide Permits comply with the applicable provisions of the Clean Water Act provided you comply with the EPA general conditions which shall be included as enforceable conditions of the nationwide permits:

NWP 1 – Aids to Navigation

NWP 2 – Structures in Artificial Canals

NWP 4 - Fish & Wildlife Harvesting, Enhancement, and Attraction Devices and Activities

NWP 5 - Scientific Measurement Devices

NWP 8 – Oil and Gas Structures on the Outer Continental Shelf

NWP 9 – Structures in Fleeting and Anchorage Areas

NWP 10 – Mooring Buoys

NWP 11 – Temporary Recreational Structures

NWP 15 - U.S. Coast Guard Bridges

NWP 16 - Return Water from Upland Contained Disposal Areas

NWP 18 - Minor Discharges

NWP 19 - Minor Dredging

NWP 20 – Response Operations for Oil or Hazardous Substances

NWP 22 - Removal of Vessels

NWP 24 - Indian Tribe or State Administered Section 404 Programs

NWP 25 - Structural Discharges

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

NWP 28 – Modifications of Existing Marinas

NWP 30 - Moist Soil Management for Wildlife

NWP 31 - Maintenance of Existing Flood Control Facilities

NWP 32 - Completed Enforcement Actions

NWP 33 - Temporary Construction, Access and Dewatering

NWP 34 - Cranberry Production Activities

NWP 35 – Maintenance Dredging of Existing Basins

NWP 36 - Boat Ramps

NWP 37 - Emergency Watershed Protection and Rehabilitation

NWP 38 - Cleanup of Hazardous and Toxic Waste

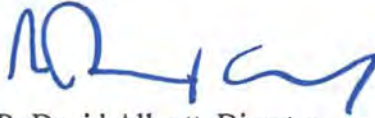
NWP 40 - Agricultural Activities

NWP 45 - Repair of Uplands Damaged by Discrete Events

NWP 46 - Discharges to Ditches and Canals
NWP 48 - Commercial Shellfish Aquaculture Activities

The EPA has authority to issue CWA 401 Water Quality Certifications on Metlakatla tribal lands and the Denali National Park and Preserve in Alaska. The Metlakatla Tribe and Denali National Park and Preserve shall be notified of these final conditions by a copy of this letter. For any questions regarding the EPA's final CWA Section 401 water quality certifications of the Corps Nationwide Permits, please contact Mark Douglas at 907-271-1217 or douglas.mark@epa.gov.

Sincerely,



R. David Allnutt, Director
Office of Environmental Review and Assessment

Enclosure

cc: Ms. Audrey Hudson, Metlakatla Tribe
Mr. Don Stricker, Superintendent, Denali National Park and Preserve
Mr. Joel Hard, National Park Service
Mr. James Rypkema, Alaska Department of Environmental Conservation
Ms. Jackie Timothy, Alaska Department of Fish and Game
Ms. Melissa Burns, U.S. Fish and Wildlife Service
Mr. Steve Brockman, U.S. Fish and Wildlife Service
Ms. Alicia Bishop, National Marine Fisheries Service
Ms. McKenzie Johnson, Alaska Department of Natural Resources State Historic Preservation Office

Appendix 1

U.S. Environmental Protection Agency's Proposed Water Quality Conditions for the 2017 Corps of Engineers Nationwide Permits on Metlakatla Tribal Lands and Lands with Exclusive Federal Jurisdiction in Alaska

In addition to all U.S. Army Corps of Engineers' National and Alaska Districts' Regional permit conditions, the following EPA Section 401 water quality certification General Conditions apply to all Nationwide Permits whether certified or partially certified with conditions.

EPA General Conditions:

EPA General Condition 1 – Special Aquatic Sites

Any activities in the following types of wetlands and waters of the U.S. will need to apply for an individual 401 certification: Mature forested wetlands; bogs; peatlands; wetlands in dunal systems along the Alaska coast; aspen-dominated wetlands; alkali wetlands; salt marshes; or marine waters with eelgrass beds.

EPA General Condition 2 – Soil Erosion and Sediment Controls

A 401 certification determination is based on the project or activity meeting established turbidity levels. The EPA will be using as guidance the State of Alaska's water quality standards [18 AAC 70]. Projects or activities that are expected to exceed these levels will require individual 401 certification.

The water quality standards allow for short-term turbidity exceedances after all necessary Best Management Practices (BMPs) have been implemented (e.g., properly placed and maintained filter fences, hay bales and/or other erosion control devices, adequate detention of runoff to prevent turbid water from flowing off-site, providing a vegetated buffer between the activity and open water, etc.), and only up to the following limits:

Wetted Stream Width at Discharge Point	Approximate Downstream Point for Determining Compliance
Up to 30 feet	50 feet
>30 to 100 feet	100 feet
>100 feet to 200 feet	200 feet
>200 feet	300 feet
Lake, Pond, Reservoir	Lesser of 100 feet or maximum surface dimension

EPA General Condition 3 – Compliance with Stormwater Pollution Prevention and National Pollutant Discharge Elimination System Permit Provisions

All projects that involve land disturbance or impervious surfaces must implement stormwater pollution prevention or control measures to avoid discharge of pollutants in stormwater runoff to waters of the U.S.

- a. For land disturbances during construction, the permittee must obtain and implement Construction Stormwater General Permit requirements [<https://www.epa.gov/npdes/stormwater-discharges-construction-activities>]
- b. Following construction, prevention or treatment of on-going stormwater runoff from impervious surfaces must be provided.

The EPA encourages prevention of discharges by managing stormwater on site through Low Impact Development principles and other prevention techniques. The 401 certification of projects and activities under Nationwide permits will use the Alaska Department of Environmental Conservation's most recent stormwater manual or an EPA approved equivalent manual as guidance in meeting water quality standards.

EPA General Condition 4 – Compliance with requirements of the National Pollutant Discharge Elimination System for Industrial or Municipal Activities

For projects and activities requiring coverage under an industrial or municipal (non-stormwater) NPDES permit, certification is based on compliance with the requirements of that permit. Projects and activities not in compliance with NPDES requirements will require individual 401 certification.

EPA General Condition 5 – Projects or Activities Discharging to Impaired Waters

Individual 401 certification is required for projects or activities authorized under NWP's if the project will discharge to a waterbody on the list of impaired waterbodies (the 303(d) List) and the discharge may result in further exceedance of a specific parameter the waterbody is listed for. The current list of 303(d)-listed waterbodies is available on DEC's web site at: <http://dec.alaska.gov/water/wqsar/waterbody/integratedreport.htm> or by contacting DEC's Water Quality staff.

For projects or activities that will discharge to a 303(d)-listed waterbody that does not have an approved Total Maximum Daily Load or an approved water quality management plan, the permittee must provide documentation for EPA approval showing that the discharge will not result in further exceedance of the listed contaminant or impairment.

The EPA may issue 401 certification for projects or activities that would result in further exceedance or impairment if mitigation is provided that would result in a net decrease in listed pollutants or less impairment in the waterbody. This determination would be made during individual 401 certification review.

EPA General Condition 6 – Notification and 401 Water Quality Certification Application

For projects requiring individual 401 certification, permittees must provide the EPA with

the same documentation provided to the Corps (as described in Corps' National General Condition 32, Pre-Construction Notification), including, when applicable:

- a. A description of the project, including site plans, project purpose, direct and indirect adverse environmental effects the project would cause, any other U.S. Department of the Army permits used or intended to be used to authorize any part of the proposed project or any related activity.
- b. Delineation of special aquatic sites and other waters of the United States. Wetland delineations must be prepared in accordance with the current method required by the Corps. Eelgrass delineation must be prepared in accordance with current methods recommended by the Corps and state agencies.
- c. A statement describing how the mitigation requirement will be satisfied. A conceptual or detailed mitigation or restoration plan may be submitted.
- d. Other applicable requirements of Corps National General Condition 32, Corps Regional Conditions, or notification conditions of the applicable NWP.

A request and application for an individual 401 certification is not complete until the EPA is provided the applicable documents noted above and the EPA has received a copy of the final authorization letter from the Corps providing coverage for a proposed project or activity under the NWP Program.

EPA General Condition 7 – Suitable Material

No activity, including placement of structures, work in navigable waters of the United States, or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt) and material used for construction or discharged in waters of the U.S. must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

EPA General Condition 8 – Compensatory Mitigation

An individual 401 certification is based on adequate compensatory mitigation being provided for unavoidable impacts to aquatic resources, as required by the Corps, and other water quality-related impacts of projects or activities authorized under the NWP Program. If the Corps is not requiring mitigation, the issuance of the individual 401 certification may require aquatic resource mitigation to maintain water quality standards and the integrity of the aquatic systems.

EPA General Condition 9 – Temporary Fills

An individual 401 certification is required for any activity where temporary fill will remain in wetlands or other waterbodies for more than 90 days. The 90-day period begins when filling activity starts in the wetland or other waterbody.

EPA General Condition 10 – Designated Critical Resource Waters

An individual 401 certification is required for any proposed project or activity in waterbodies on the most current list of the following Designated Critical Resource Waters

(per Corps General Condition #22).

EPA General Condition 11 – Fills Within 100-Year Floodplains

An individual 401 certification is required for any proposed project that would increase permanent, above-grade fill within the 100-year floodplain (including the floodway and the flood fringe).

[*Note:* The 100-year floodplain is defined as those areas identified as Zones A, A1-30, AE, AH, AO, A99, V, V1-30, and VE on the most current Federal Emergency Management Agency Flood Rate Insurance Maps, or areas identified as within the 100-year floodplain on applicable local Flood Management Program maps. The 100-year flood is also known as the flood with a 100-year recurrence interval, or as the flood with an exceedance probability of 0.01.]

EPA General Condition 12 – Chemically Treated Wood

If and where practicable, permittee shall avoid using wood products treated with biologically harmful leachable chemical components (e.g., copper, arsenic, zinc, creosote, chromium, chloride, fluoride, and pentachlorophenol). If treated wood is used, it shall be treated with wood preservatives in compliance with the Registration Documents issued by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and following the Western Wood Preservatives Institute (WWPI) guidelines and BMPs to minimize the preservative migrating from treated wood into aquatic environments

(see: http://www.wwpinstitute.org/documents/BMP_Revise_4.3.12.pdf).

Rub strips are required if treated wood is to be used for fender piling.

- a. New Structures: Wood may be permanently or temporarily 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 include untreated wood, steel (painted, unpainted or coated with epoxy-petroleum compound or plastic), concrete and plastic lumber.
- b. Removal of existing chemically treated wood: Permittee shall try to prevent chemically treated wood debris from entering any waters or wetlands. In the event chemically treated wood debris inadvertently enter a water or wetland, the permittee shall remove the material as soon as practicable and dispose of the material at an approved upland location.

Permittee shall make every practicable effort to remove chemically treated wood piles in their entirety using a vibratory hammer.

- i. In uncontaminated sediment, piling that breaks off during extraction shall be cut off at least three feet below the surface of the sediment.
- ii. In contaminated sediment, piling that breaks off above the surface shall be cut off at the sediment line. If the break occurs within contaminated sediment, no further effort shall be made to remove the pile. Any resulting hole shall be filled with clean, native substrate.

NWP-SPECIFIC REGIONAL CONDITIONS

1. Aids to Navigation.

EPA 401 Certification – Certified

2. Structures in Artificial Canals.

EPA 401 Certification – Certified

3. Maintenance.

EPA 401 Certification – Conditioned

An individual 401 certification is required for projects authorized under this NWP if:

- bank stabilization maintenance or replacement activities in fish bearing waters of the U.S. that extend beyond their prior footprint, or
- activities that require excavation or dredging in open water are denied certification.

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

EPA 401 Certification – Certified

5. Scientific Measurement Devices.

EPA 401 Certification – Certified

6. Survey Activities.

EPA 401 Certification – Conditioned

An individual 401 certification is required for projects authorized under this NWP if:

- project or activity involves oil or natural gas exploration, or
- project or activity requires trenching in wetlands.

7. Outfall Structures and Associated Intake Structures.

EPA 401 Certification – Conditioned

An individual 401 certification is required for projects authorized under this NWP if:

- project or activities have an associated outfall to a wetland, or
- receiving waters cannot be diverted.

8. Oil and Gas Structures on the Outer Continental Shelf

EPA 401 Certification – Certified

9. Structures in Fleeting and Anchorage Areas.

EPA 401 Certification – Certified

10. Mooring Buoys.

EPA 401 Certification – Certified

11. Temporary Recreational Structures.

EPA 401 Certification – Certified

12. Utility Line Activities.

EPA 401 Certification – Conditioned

An individual 401 certification is required for projects authorized under this NWP if:

- any excavation or dredging activities affecting open water areas (e.g., trenching across streams), or
 - there are any permanent access roads, temporary structures or fill associated with the utility line activities, or
- the project is authorized under one or more nationwide permit by the Corps that result(s) in greater than 1/2 acre of impacts to aquatic resources or over 300 linear feet of stream.

13. Bank Stabilization.

EPA 401 Certification – Conditioned

An individual 401 certification is required for projects authorized under this NWP if the entire scope of the project is greater than 300 linear feet.

14. Linear Transportation Projects.

EPA 401 Certification – Conditioned

An individual 401 certification is required for projects authorized under this NWP if:

- any excavation or dredging activities affecting open water areas (e.g., trenching across streams), or
- there are any permanent access roads, temporary structures or fill associated with the utility line activities, or
- the project is authorized under one or more nationwide permit by the Corps that result(s) in greater than 1/2 acre of impacts to aquatic resources or over 300 linear feet of stream.

15. U.S. Coast Guard Approved Bridges.

EPA 401 Certification – Certified

16. Return Water from Upland Contained Disposal Areas.

EPA 401 Certification – Certified

17. Hydropower Projects.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

- 18. Minor Discharges.**
EPA 401 Certification – Certified
- 19. Minor Dredging.**
EPA 401 Certification – Certified
- 20. Oil Spill Cleanup.**
EPA 401 Certification – Certified
- 21. Surface Coal Mining Operations.**
EPA 401 Certification – Denied
An individual 401 certification is required for all projects.
- 22. Removal of Vessels.**
EPA 401 Certification – Certified
- 23. Approved Categorical Exclusions**
EPA 401 Certification – Conditioned
An individual 401 certification is required for projects authorized under this NWP if the project or activities have fill impacts greater than 1/2 acre.
- 24. Indian Tribe or State Administered Section 404 Programs**
EPA 401 Certification – Certified
- 25. Structural Discharges.**
EPA 401 Certification – Certified
- 26. [Reserved]**
- 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities**
EPA 401 Certification – Certified
- 28. Modifications of Existing Marinas.**
EPA 401 Certification – Certified
- 29. Residential Developments.**
EPA 401 Certification – Conditioned
An individual 401 certification is required for projects authorized under this NWP if a District Engineer waiver is requested to exceed ½ acre of impacts to waters of the U.S.
- 30. Moist Soil Management for Wildlife.**
EPA 401 Certification – Certified
- 31. Maintenance of Existing Flood Control Facilities.**
EPA 401 Certification – Certified

- 32. Completed Enforcement Actions.**
EPA 401 Certification – Certified
- 33. Temporary Construction, Access, and Dewatering.**
EPA 401 Certification – Certified
- 34. Cranberry Production Activities.**
EPA 401 Certification – Certified
- 35. Maintenance Dredging of Existing Basins.**
EPA 401 Certification – Certified
- 36. Boat Ramps.**
EPA 401 Certification – Certified
- 37. Emergency Watershed Protection and Rehabilitation.**
EPA 401 Certification – Certified
- 38. Cleanup of Hazardous and Toxic Waste.**
EPA 401 Certification – Certified
- 39. Commercial and Institutional Developments.**
EPA 401 Certification – Conditioned
An individual 401 certification is required for projects authorized under this NWP if a District Engineer waiver is requested to exceed ½ acre of impacts to waters of the U.S.
- 40. Agricultural Activities.**
EPA 401 Certification – Certified
- 41. Reshaping Existing Drainage Ditches.**
EPA 401 Certification – Conditioned
An individual 401 review is required for projects authorized under this NWP if scope of project is greater than 500 linear feet.
- 42. Recreational Facilities.**
EPA 401 Certification – Conditioned
An individual 401 certification is required for projects authorized under this NWP if a District Engineer waiver is requested to exceed ½ acre of impacts to waters of the U.S.
- 43. Stormwater Management Facilities.**
EPA 401 Certification – Denied
An individual 401 certification is required for all projects.

- 44. Mining Activities.**
EPA 401 Certification – Denied
An individual 401 certification is required for all projects.
- 45. Repair of Uplands Damaged by Discrete Events.**
EPA 401 Certification – Certified
- 46. Discharges in Ditches.**
EPA 401 Certification – Certified
- 47. [Reserved].**
- 48. Commercial Shellfish Aquaculture Activities.**
EPA 401 Certification – Certified
- 49. Coal Remining Activities.**
EPA 401 Certification – Denied
An individual 401 certification is required for all projects.
- 50. Underground Coal Mining Activities.**
EPA 401 Certification – Denied
An individual 401 certification is required for all projects.
- 51. Land-Based Renewable Energy Generation Facilities**
EPA 401 Certification – Conditioned
An individual 401 review is required for projects authorized under this NWP if the project or activity affects greater than 1 acre of aquatic resources.
- 52. Water-Based Renewable Energy Generation Pilot Projects.**
EPA 401 Certification – Conditioned
An individual 401 certification is required for projects authorized under this NWP if projects or activities impact fish bearing streams, submerged aquatic vegetation, forage fish habitat or special aquatic sites (including mudflats, vegetated shallows, wetlands).
- 53. Low-Head Dam Removal.**
EPA 401 Certification – Denied
An individual 401 certification is required for all projects.
- 54. Living Shorelines.**
EPA 401 Certification – Denied
An individual 401 certification is required for all projects.