



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

OFFICE OF  
ENVIRONMENTAL REVIEW  
AND ASSESSMENT

MAR 06 2017

Lt. Colonel Damon Delarosa  
Attn: Ms. Kelly Urbanek, Mr. Greg Martinez  
Walla Walla District, Corps of Engineers  
201 North Third Avenue  
Walla Walla, Washington 99362-1876

Dear Colonel Delarosa:

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 comply with applicable provisions of CWA Section 301, 302, 303, 306, and 307 in those areas where the EPA is the certifying authority within the State of Idaho. The EPA is responsible for providing CWA Section 401 water quality certification in Indian country for tribes who do not have treatment as a state and on lands with exclusive federal jurisdiction. In Idaho the three tribes for whom the EPA has this responsibility are listed in the cc line below.

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 Idaho. 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 Walla Walla District's proposed General Regional Conditions and the Nationwide Permit-specific Regional Conditions as published in special public notice dated June 13, 2016 for the State of Idaho.

Representatives from the EPA, Idaho Department of Environmental Quality, Idaho Department of Water Resources, Idaho Department of Fish & Game, and the Idaho State Historic Preservation Office have met throughout this reauthorization period with representatives from the Walla Walla District to provide input in the development of the District's Regional Conditions. The EPA appreciates the Corps' efforts to actively engage with us and other agencies in this process. The EPA's CWA Section 401 certification decisions and conditions were developed after coordinating with and providing consultation offer letters to affected tribes and coordinating with the Idaho Department of Environmental Quality.

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 District's final regional conditions for the reissued and new Nationwide Permits may not be published until March 19, 2017. If the final regional conditions are substantially different than originally proposed, we reserve the right to modify the EPA's CWA Section 401 water quality certification decisions for the affected Nationwide Permits within a reasonable 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 NWPs:

- NWP 16 - Return Water from Upland Contained Disposal Areas**
- NWP 17 - Hydropower Projects**
- NWP 21 - Surface Coal Mining Activities**
- NWP 29 - Residential Developments**
- NWP 39 - Commercial and Institutional Developments**
- NWP 42 - Recreational Facilities**
- NWP 43 - Stormwater Management Facilities**
- NWP 44 - Mining Activities**
- NWP 46 - Discharges to Ditches and Canals**
- NWP 49 - Coal Remining Activities**
- NWP 50 - Underground Coal Mining Activities**
- NWP 53 - Removal of Low-Head Dams**

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 that 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 1/10 acre of impacts to aquatic resources, results in a permanent conversion of greater than 1/10 acre of wetlands (i.e., forested wetlands to emergent wetlands), or over 300 linear feet of stream are denied certification.

**NWP 13 - Bank Stabilization:** Projects in excess of 300 linear feet, or that do not include bioengineering (unless a registered professional engineer identifies non-bioengineered solutions that are the only way to protect an existing transportation related structure), or that propose permanent fill in adjacent wetlands 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 authorized under one or more nationwide permit by the Corps that result(s) in greater than a 1/10 acre of impacts to wetlands, results in a permanent conversion of greater than 1/10 acre of wetlands (i.e., forested wetlands to emergent wetlands), or over 300 linear feet of stream are denied certification.

**NWP 23 - Approved Categorical Exclusions:** Projects having more than 1/10 acre of fill or in excess of 300 linear feet of stream are denied certification.

**NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities:** Projects that will involve greater than 1/2 acre of fill in 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 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, 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 that the permittee complies 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 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 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**

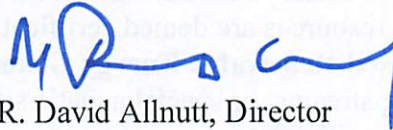
**NWP 38 - Cleanup of Hazardous and Toxic Waste**



- NWP 40 - Agricultural Activities**
- NWP 45 - Repair of Uplands Damaged by Discrete Events**
- NWP 48 - Commercial Shellfish Aquaculture Activities**
- NWP 54 - Living Shorelines**

Tribes within the State of Idaho for whom the EPA has authority to issue CWA Section 401 water quality certifications shall be notified of these final conditions by a copy of this letter. Tribes with their own CWA Section 401 water quality certification authority will be provided a copy of this letter as a courtesy. For any questions regarding the EPA's final CWA Section 401 water quality certifications of the Corps Nationwide Permits, please contact Tracy Peak at 208-378-5756 or [peak.tracy@epa.gov](mailto:peak.tracy@epa.gov).

Sincerely,



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

Enclosure

- cc: Mr. Scott Fields, Coeur D'Alene Tribe  
Mr. Kevin Greenleaf, Kootenai Tribe of Idaho  
Mr. Ken Clark, Nez Perce Tribe  
Ms. Nicole Deinarowicz, Idaho Department of Environmental Quality  
Mr. Rick Ward, Idaho Department of Fish and Game  
Mr. Chris Murphy, Idaho Department of Fish and Game  
Mr. Aaron Golart, Idaho Department of Water Resource  
Mr. Ethan Morton, Idaho State Historic Preservations Office

## Appendix 1

### **U.S. Environmental Protection Agency's Water Quality Conditions for the 2017 U.S. Army Corps of Engineers Nationwide Permits on Tribal Lands without Treatment as a State and Lands with Exclusive Federal Jurisdiction in Idaho**

In addition to all the U.S. Army Corps of Engineers' (Corps) National and Walla Walla District's Regional permit conditions, the following EPA Section 401 water quality certification General Conditions apply to all Nationwide Permits (NWP). It is the responsibility of the permit applicant to meet the EPA's General Conditions, ensure that the EPA has all relevant information, and to contact the EPA with questions. The EPA will strive to issue individual 401 certifications within 90 days of receipt of a complete request, but under statute has up to one (1) year.<sup>1</sup> The EPA point of contact (Linda Storm) can be reached by emailing [storm.linda@epa.gov](mailto:storm.linda@epa.gov) or calling (206) 553-6384.

The EPA either certifies, partially certifies (with conditions), or denies water quality certification for projects located on tribal lands that are authorized by Corps NWPs. For the 2017-2022 permit cycle, the EPA has certified, conditioned, or denied water quality certification for the following NWPs in Idaho:

Certified: 1, 2, 4, 5, 8-11, 15, 18-20, 22, 24, 25, 28, 30-38, 40, 45, 48, and 54.

Partially Certified with Conditions: 3, 6, 7, 12, 13, 14, 23, 27, 41, 51, and 52.

Denied: 16, 17, 21, 29, 39, 42, 43, 44, 46, 49, 50, and 53.

- For NWPs which have been denied, the EPA shall prepare a 401 water quality certification. For NWPs which have been partially certified, the EPA may require an individual 401 water quality certification. It is the responsibility of the permit applicant to review the EPA specific water quality conditions and the EPA General Conditions. The permittee must provide the EPA with the same project documentation provided to the Corps, to include any updates and/or change in plans. Separately, the EPA must also receive a request for an individual 401 water quality certification from the Corps. The EPA's preparation of a 401 water quality certification will not commence until documentation is received from both the permittee and the Corps.
- For NWPs which are certified but subject to one or more of the EPA General Conditions, the EPA shall conduct a 401 certification review to confirm the activity meets all the criteria under the certification. See General Condition 6 below for additional information.

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<sup>1</sup> The Clean Water Act Section 401(a)(1) states that if the ... Administrator fails or refuses to act on a request for certification within a reasonable time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the ... Administrator (<https://www.epa.gov/cwa-404/clean-water-act-section-401-certification>)

## EPA GENERAL CONDITIONS

### EPA General Condition 1 – Special Aquatic Sites

Any activities in the following types of waters of the U.S., including wetlands, will require individual 401 certification review: Mature forested wetlands; bogs; peatlands; vernal pools; aspen-dominated wetlands; alkali wetlands; or camas prairie wetlands.

### 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 use as guidance the State of Idaho's water quality standards [IDAPA 58.01.02.250.02.e] to determine if standards are exceeded. Turbidity shall not exceed background turbidity by more than 50 NTU instantaneously or more than 25 NTU for more than 10 consecutive days. Projects or activities that are expected to exceed these levels will require an individual 401 certification, as determined by the EPA. For more information about Idaho's water quality standards, visit the Idaho Department of Environmental Quality's website at: <http://www.deq.idaho.gov/water-quality/surface-water/standards.aspx>.

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 the 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 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  
[\[https://www.epa.gov/npdes/stormwater-discharges-construction-activities\]](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 implemented.

The EPA encourages prevention of discharges by managing stormwater on site through Low Impact Development principles and other prevention techniques. The EPA will use Idaho Department of Environmental Quality's (IDEQ) most recent Catalog of Stormwater Best Management Practices for Idaho Cities and Counties as guidance for meeting water quality standards when writing individual 401 water quality certifications.

#### **EPA General Condition 4 – Compliance with Requirements of the National Pollutant Discharge Elimination System Permit for Industrial or Municipal Activities**

For projects and activities requiring coverage under an industrial or municipal (non-stormwater) NPDES permit, 401 certification is based on compliance with the requirements of that permit. The EPA will determine if the project is compliant. Projects and activities not in compliance with NPDES requirements will require an individual 401 certification, as determined by the EPA. To inquire about whether an individual 401 certification may be required, contact the EPA point-of-contact (Linda Storm) by emailing [storm.linda@epa.gov](mailto:storm.linda@epa.gov) or calling (206) 553-6384.

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

An individual 401 certification review is required for projects or activities authorized under the Nationwide Permits (NWP) if the project will involve work in an active channel of a waterbody on the 303(d) List of impaired waterbodies *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 EPA will determine if the discharge results in an exceedance of a specific parameter.

The current list of 303(d)-listed waterbodies is available on the Idaho Department of Environmental Quality web site at: <http://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>, or by contacting IDEQ'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 (TMDL) or an approved water quality management plan, the permittee must provide documentation for EPA approval demonstrating that the discharge will not result in further exceedance of the listed contaminant or impairment. Contact the EPA point-of-contact (Linda Storm) by emailing [storm.linda@epa.gov](mailto:storm.linda@epa.gov) or calling (206) 553-6384 with questions.

For projects or activities that will discharge to a 303(d)-listed waterbody that does have an approved TMDL, the permittee must provide documentation for EPA approval showing that the discharge is within the limits established in the TMDL. The current list of 303(d)-listed waterbodies in Idaho State will be consulted in making this determination and is available on the EPA's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-region-10> with reference to IDEQ's web site at: <http://www.deq.idaho.gov/water-quality/surface-water/tmdls/>.

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

For projects requiring either an individual 401 certification or a 401 certification review, 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.
- c. A statement describing how the compensatory 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.
- e. Any updated information or changes to the proposed project, activities or work must also be submitted to the EPA.

Preparation of an individual 401 certification will not commence until EPA is provided the applicable documents noted above, and will be finalized after the EPA has received a copy of the Corps' provisional verification letter authorizing the project under the NWP Program. The EPA will strive to issue individual 401 certifications within 90 days of receipt of a complete application, but under statute has up to 1-year.<sup>2</sup>

### **EPA General Condition 7 – 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. The issuance of an individual 401 certification may require additional aquatic resource mitigation to maintain water quality standards and the integrity of the aquatic systems if the project:

- a. impacts aquatic resources requiring special protection (as defined in EPA General Condition 1), or
- b. impacts greater than 1/10 acre of aquatic resources or greater than 300 linear feet of stream and requires an individual 401 certification for NWPs 12, 13, 14, 17, 21, 23, 29, 39, 42, 43, 44, 49, and 50.<sup>3</sup>

Compensatory mitigation plans must be based on the 2008 Corps and the EPA Joint Federal Rule on Compensatory Mitigation (<https://www.epa.gov/cwa-404/mitigation>; [https://www.epa.gov/sites/production/files/2015-03/documents/2008\\_04\\_10\\_wetlands\\_wetlands\\_mitigation\\_final\\_rule\\_4\\_10\\_08.pdf](https://www.epa.gov/sites/production/files/2015-03/documents/2008_04_10_wetlands_wetlands_mitigation_final_rule_4_10_08.pdf)) and must include, at a minimum, the following:

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<sup>2</sup> The Clean Water Act Section 401(a)(1) states that if the ... Administrator fails or refuses to act on a request for certification within a reasonable time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the ... Administrator (<https://www.epa.gov/cwa-404/clean-water-act-section-401-certification>)

<sup>3</sup> The list of Nationwide Permits under General Condition 7b is a sub-set of those that the EPA either denied or conditioned. The list provided here is to indicate when compensatory mitigation for unavoidable impacts is likely to be required by the EPA as part of the Section 401 water quality certification conditions so that permit applicants can provide compensatory mitigation plans to address impacts for activities authorized by the Corps under these specific NWPs.



- 1) A description of the measures taken to avoid and minimize impacts to wetlands and other waters of the U.S.
- 2) The nature of the proposed impacts (e.g., acreage of wetlands and functions lost or degraded).
- 3) The rationale for the mitigation site that was selected.
- 4) The ecological goals and objectives of the compensatory mitigation project.
- 5) How the mitigation project will be accomplished (work plan), including proposed performance standards for measuring success.
- 6) How the site will be maintained and monitored through time to assess progress towards goals and objectives.
- 7) Submittal of an “as-built conditions report” upon construction of the mitigation.
- 8) Submittal of monitoring reports at agreed upon intervals showing the results of monitoring to meet performance standards and criteria.
- 9) Legal site protection mechanism (conservation easement or restrictive covenant) to ensure that the compensatory mitigation site will be legally protected for the long-term.
- 10) Long term management and maintenance plan.
- 11) Financial assurances.

### **EPA General Condition 8 – Temporary Fills**

An individual 401 certification review is required for any activity planning to retain temporary fill in wetlands or other waterbodies for more than 90 days. The 90-day period begins when the fill material is placed in the wetland or other waterbody, not the date of permit issuance. For unplanned temporary fill in wetlands or other waterbodies that will exceed 90 days, the permittee must notify the EPA point-of-contact (Linda Storm, [storm.linda@epa.gov](mailto:storm.linda@epa.gov)) in writing prior to the 90<sup>th</sup> day, to request an individual 401 certification review.

### **EPA General Condition 9 – Designated Critical Resource Waters**

An individual 401 certification review is required for any proposed project or activity in waterbodies on the most current list of the following Designated Critical Resource Waters (per the Corps’ National General Condition #22).

### **EPA General Condition 10 – Fills Within 100-Year Floodplains**

An individual 401 certification review is required for any proposed project or activity that involves fill in waters of the U.S. and 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 11 – Chemically Treated Wood**

An individual 401 certification review is required if the permittee proposes to use wood products treated with biologically harmful leachable chemical components (e.g., copper, arsenic, zinc, creosote, chromium, chloride, fluoride, pentachlorophenol), unless the wood products meet the following conditions:











