



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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MAR 21 2012

OFFICE OF
ECOSYSTEMS, TRIBAL AND
PUBLIC AFFAIRS

Kevin Moynahan, Regulatory Branch Chief
Portland District, Corps of Engineers
P.O. Box 2946
Portland, Oregon 97208-2946

**Re: U. S. Environment Protection Agency's Section 401 Water Quality Certification and
Conditions for 2012 Nationwide Permit Re-issuance on Tribal Lands**

Dear Mr. Moynahan:

The Environmental Protection Agency (EPA) has completed its review of the Federal Register Notice dated February 21, 2012, to reissue all existing Nationwide Permits (NWP). This review was conducted in response to the Corps' request to certify pursuant to Section 401 of the Clean Water Act (CWA) that there is reasonable assurance that the Department of the Army's proposed additions and modification of Nationwide Permits (NWP) at Appendix A to 33 CFR Part 330 will not violate applicable provisions of CWA Section 301, 302, 306, and 307 on Tribal lands and lands with exclusive federal jurisdiction.

The following is the EPA Region 10's position on Section 401 certification, partial certification with conditions, denial and the EPA general conditions for the Corps Nationwide Permit Program in the State of Oregon. The EPA's position is based on the National NWP guidelines, the Portland Corps District's "Oregon State General Regional Conditions, Applicable to all NWPs", and the NWPs' "Regional Conditions" that have been incorporated into selected NWPs for the State of Oregon (Appendix 1). Representatives from the EPA, Oregon Department of Land Conservation and Development, and Oregon Department of Environmental Quality have been meeting prior and throughout this authorization period with representatives from the Corps' Portland District in the development of both the Oregon State General Conditions and individual NWP conditions.

This letter constitutes the Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) for the reissuance of all existing nationwide permits (NWPs), general conditions, and definitions with some modifications and for the issuance of two new NWPs, several redefined general conditions, and new definitions as described by the Corps of Engineers in the February 21, 2012 Federal Register. This WQC is also based on the regional conditions as proposed in your June 20, 2011 public notice. We understand that you have not yet completed the final regional conditions for the reissued and new NWPs. If the final regional conditions are substantially different than originally proposed, we will need to consider recertifying those affected NWPs. This certification applies to those discharges on tribal lands and on lands with exclusive Federal jurisdiction within the state of Oregon.

The U. S. Environmental Protection Agency (EPA) denies without prejudice water quality certification for the following NWP:

- NWP 14 - Linear Transportation Projects
- NWP 16 - Return Water From Upland Contained Disposal Areas
- NWP 17 - Hydropower Projects
- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 40 - Agricultural Activities
- NWP 42 - Recreational Facilities
- NWP 43 - Stormwater Management Facilities
- NWP 44 - Mining Activities
- NWP 46 - Discharges to Ditches and Canals
- NWP 48 - Existing Commercial Shellfish Aquaculture Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities

The EPA partially denies water quality certification for the following NPWs. An individual 401 certification is required for any project that contains the following prohibitions. Projects which do not include the prohibited actions identified below, are certified and subject to all conditions of the Nationwide Permits, and specific water quality conditions and criteria contained in Appendix 1.

NWP 3 - Maintenance: 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 scope of the project is greater than a ½ acre of impacts to wetlands, are denied certification.

NWP 13 - Bank Stabilization: Projects in excess of 300 linear feet are denied certification.

NWP 23 - Approved Categorical Exclusions: Projects having more than 1/10 acre of fill are denied certification.

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

NWP 45 - Repair of Uplands Damaged by Discrete Events: Projects greater than ½ acre or requiring restoration beyond the pre-event ordinary high water mark are denied certification.

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

The EPA certifies that all other NWPs and conditions, including the regional conditions proposed by the Portland District, 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 4 - Fish & Wildlife Harvesting, Enhancement, and Attraction Devices and Activities**
- NWP 5 - Scientific Measurement Devices**
- NWP 15 - U.S. Coast Guard Bridges**
- NWP 18 - Minor Discharges**
- NWP 19 - Minor Dredging**
- NWP 20 - Oil Spill Clean Up**
- 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 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 36 - Boat Ramps**
- NWP 37 - Emergency Watershed Protection and Rehabilitation**
- NWP 38 - Cleanup of Hazardous and Toxic Waste**
- NWP 52 - Water-Based Renewable Energy Generations Pilot Projects**

Tribes within the State of Oregon shall be notified of these final conditions by a copy of this letter. Tribes with their own CWA 401 WQ certification authority will be provided a copy of this letter as well as a courtesy. If you have questions or wish to discuss our comments, please contact me at (206) 553-0279 or by electronic mail at szterlog.michael@epa.gov. For any clarification of the EPA's final Section 401 water quality certifications of the Corps Nationwide Permits, you may contact Yvonne Vallette of my staff at (503) 326-2716 or by electronic mail at vallette.yvonne@epa.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael J. Szerlog".

Michael J. Szerlog, Manager
Aquatic Resource Unit

cc: ODEQ, Peter Anderson
DLCD, Juna Hickner
USACE Colonel John W. Eisenhower, District Engineer
USACE Michael Turaski, Permits Section Chief

Enclosure

**U.S. Environmental Protection Agency's (EPA)
Proposed Water Quality Conditions for Reissued Corps of Engineers Nationwide Permits on
Tribal Lands in Oregon**

Proposed EPA General Conditions:

EPA General Condition “A” – Special Aquatic Sites

Any activities in the following types of wetlands and waters of the United States will need to apply for an individual 401 certification: Mature forested wetlands; bogs; bog-like wetlands; wetlands in dunal systems along the Oregon coast; vernal pools; aspen-dominated wetlands; alkali wetlands; camas prairie wetlands; salt marshes; or marine waters with eelgrass beds.

EPA General Condition “B” – 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 Oregon’s water quality standards [OAR 340-041-001 to 340-0410-0975]. Projects or activities that are expected to exceed these levels or that do 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 “C”– Compliance with Stormwater Provisions

401 certification of projects and activities authorized under NWP permits will use the applicable provisions of the Oregon Department of Environmental Quality’s (DEQ) 2004 Guidance Document for Preparation of the NPDES Stormwater Pollution Control Plan and Recommended Best Management Practices for Stormwater and the 2005 Erosion and Sediment Control Manual as guidance in meeting water quality standards.

EPA General Condition “D” – Compliance with requirements of the National Pollutant Discharge Elimination System

For projects and activities requiring coverage under an NPDES permit, certification is based on compliance with the requirements of that permit. Projects and activities not in compliance with NPDES requirements will require an individual 401 certification.

EPA General Condition “E” – Projects or Activities Discharging to Impaired Waters

Individual 401 certification is required for projects or activities authorized under NWRPs 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 DEQ’s web site at:

<http://www.deq.state.or.us/wq/assessment/rpt2010/search.asp>, or by contacting DEQ’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 applicant must provide documentation for EPA approval showing that the discharge will not result in further exceedance of the listed contaminant or impairment.

For projects or activities that will discharge to a 303(d)-listed waterbody that does have an approved TMDL, the applicant must provide documentation for EPA approval showing that the discharge is within the limits established in the TMDL. Locating a proposed project within a TMDL area can be done at: <http://www.deq.state.or.us/wq/tmdls/basinmap.htm>.

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 contaminants or less impairment in the waterbody. This determination would be made during individual 401 certification review.

EPA General Condition “F” – Notification

For projects requiring individual 401 certification, applicants must provide the EPA with the same documentation provided to the Corps, (as described in Corps National General Condition 31, 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 use 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 most current method required by the Corp.
- (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 30, Corps Regional Conditions, or notification conditions of the applicable NWP.

A request for individual 401 certification review is not complete until the EPA receives 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 “G” – Suitable Material

No activity, including structures and 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, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

EPA General Condition “H” – Mitigation

An individual 401 certification is based on adequate compensatory mitigation being provided for wetland and other water quality-related impacts of projects or activities authorized under the NWP Program.

401 certification is subject to the applicant receiving written approval from the EPA of the mitigation plan for projects and activities resulting in any of the following:

- impacts to any unique wetlands described in as high value aquatic resources (Regional Condition #1);
- any impacts to tidal waters or non-tidal waters adjacent to tidal waters (applies to NWP #14);
- or, any impacts to wetlands greater than ¼ acre.

Compensatory mitigation plans submitted for the EPA review and approval shall be based on the guidance provided in Oregon Department of State Land’s November 2011 Fill-Removal Guide- Chapter 8: Compensatory Mitigation for Wetlands and Tidal Waters, which is available at [http://oregonstatelands.us/DSL/PERMITS/docs/8_Compensatory Mitigation for Wetlands and Tidal Waters.pdf](http://oregonstatelands.us/DSL/PERMITS/docs/8_Compensatory_Mitigation_for_Wetlands_and_Tidal_Waters.pdf)

A mitigation plan shall, at a minimum, include the following:

- evidence of wetland hydrology at the mitigation site;
- met the mitigation planting success standard of 80 percent survival of each plant species planted, after five years;
- completion and submittal of an “as-built report” upon construction of the mitigation;
- completion and submittal of reports at Years 3 and 5 showing the results of monitoring for wetland hydrology, vegetation types, and areal coverage of vegetation.

Projects and activities that do not receive written approval of their mitigation plan, or do not meet the conditions stated above, will require an individual 401 certification.

[Note: Characterization of wetlands shall be based on field identification and using either the “Guidebook for Hydrogeomorphic (HGM)-based Assessment of Oregon Wetland and Riparian Sites: Statewide Classification and Profiles”, dated February 2001 or the most recent version of

the “Oregon Rapid Wetland Assessment Protocol.” Copies of both documents are available through DSL’s Wetlands Program found at http://statelands.dsl.state.or.us/DSL/WETLAND/hgm_guidebook.shtml or http://www.oregon.gov/DSL/WETLAND/or_wet_prot.shtml

EPA General Condition “I” – 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 “J” – Designated Critical Resource Waters

An individual 401 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 #21).

“Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, and outstanding national resource waters or other waters officially designated by a Tribe as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment...”

EPA General Condition “K” – 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.]

NWP-SPECIFIC CONDITIONS AND CERTIFICATION

1. Aids to Navigation.

EPA 401 Certification – Not Applicable (Section 10).

2. Structures in Artificial Canals.

EPA 401 Certification – Not Applicable (Section 10).

3. Maintenance.

EPA 401 Certification – Partially denied without prejudice

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

- Activities require excavation or dredging in open water.

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

EPA 401 Certification – Approved

5. Scientific Measurement Devices.

EPA 401 Certification – Approved

6. Survey Activities.

EPA 401 Certification – Partially denied without prejudice

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

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

7. Outfall Structures and Associated Intake Structures.

EPA 401 Certification – Partially denied without prejudice

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

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

8. Oil and Gas Structures on the Outer Continental Shelf

EPA 401 Certification – *Not Applicable (Section10).*

9. Structures in Fleeting and Anchorage Areas.

EPA 401 Certification – *Not Applicable (Section10).*

10. Mooring Buoys.

EPA 401 Certification – *Not Applicable (Section10).*

11. Temporary Recreational Structures.

EPA 401 Certification – *Not Applicable (Section10).*

12. Utility Line Activities.

EPA 401 Certification – Partially denied without prejudice

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

- 1) Any excavation or dredging activities affect open water areas (e.g., trenching across streams), or
- 2) There are any permanent access roads, temporary structures or fill associated with the utility line activities, or
- 3) The entire scope of the project is greater than ½ acre of impacts to wetlands.

13. Bank Stabilization.

EPA 401 Certification – Partially denied without prejudice

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 – Denied

An individual 401 certification is required for all projects.

15. U.S. Coast Guard Approved Bridges.

EPA 401 Certification – Approved

16. Return Water from Upland Contained Disposal Areas.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

17. Hydropower Projects.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

18. Minor Discharges.

EPA 401 Certification – Approved

19. Minor Dredging.

EPA 401 Certification – Approved

20. Oil Spill Cleanup.

EPA 401 Certification – Approved

21. Surface Coal Mining Activities.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

22. Removal of Vessels.

EPA 401 Certification – Approved

23. Approved Categorical Exclusions.

EPA 401 Certification – Partially denied without prejudice

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

- The project or activities have fill impacts greater than 1/10 acre.

24. Indian Tribe or State Administered Section 404 Programs.

EPA 401 Certification – Approved

25. Structural Discharges.

EPA 401 Certification – Approved

26. [Reserved]

27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities

EPA 401 Certification – Approved

28. Modifications of Existing Marinas.

EPA 401 Certification – *Not Applicable (Section 10)*.

29. Residential Developments.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

30. Moist Soil Management for Wildlife.

EPA 401 Certification – Approved

31. Maintenance of Existing Flood Control Facilities.

EPA 401 Certification – Approved

32. Completed Enforcement Actions.

EPA 401 Certification – Approved

33. Temporary Construction, Access, and Dewatering.

EPA 401 Certification – Approved

34. Cranberry Production Activities.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

35. Maintenance Dredging of Existing Basins.

EPA 401 Certification – *Not Applicable (Section 10)*

36. Boat Ramps.

EPA 401 Certification – Approved

37. Emergency Watershed Protection and Rehabilitation.

EPA 401 Certification – Approved

38. Cleanup of Hazardous and Toxic Waste.

EPA 401 Certification – Approved

39. Commercial and Institutional Developments.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

40. Agricultural Activities.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

41. Reshaping Existing Drainage Ditches.

EPA 401 Certification – Partially denied without prejudice

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 – Denied

An individual 401 certification is required for all projects.

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 – Partially denied without prejudice

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

- 1) The project or activity is greater than ½ acre, or
- 2) The project or activity requires restoration beyond the OHWM before the event occurred.

46. Discharges in Ditches.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

47. [Reserved].

48. Existing Commercial Shellfish Aquaculture Activities.

EPA 401 Certification – Denied

An individual 401 certification is required for all projects.

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 – Partially denied without prejudice

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 – Approved