



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

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

Subject: Clean Water Act, Section 401 Certification of the 41 proposed Nationwide Permits in the June 11, 2021 draft final rule for Tribal Lands within the Region 9 coverage area of the U.S. Environmental Protection Agency.

Dear Colonel Gant,

The U.S. Environmental Protection Agency Region 9 (EPA) has responsibility under Section 401 of the Clean Water Act (CWA) to evaluate and certify water quality protections for federal permits and licenses issued for work on tribal lands (40 C.F.R 123.12(a)). EPA has reviewed the U.S. Army Corps of Engineers (Corps) CWA Section 404 Nation Wide Permits (NWPs), including the regional conditions proposed for each South Pacific Division District and hereby transmit our water quality certification. The enclosed NWP conditions become binding requirements for activities on tribal lands within EPA Region 9 and will remain in effect for the authorization period of the 2021 NWPs.^{1,2}

Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable projects. If a project fails to meet the enclosed conditions, the applicant must contact EPA Region 9 at **R9cwa401@epa.gov** for individual project-specific certifications, to schedule pre-filing meeting requests, or for any certification-related questions.

EPA appreciates our long-standing partnership and coordination in implementing Section 401 of the CWA. Please contact me at (415) 972-3337 or torres.tomas@epa.gov should you have any questions, or

¹ This water quality certification does not apply to activities proceeding in the territories of the 25 tribes in Region 9 that have been approved as Section 401 certifying authorities – the Navajo Nation, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk, White Mountain Apache Tribe, Table Mountain Rancheria, Resighini Rancheria, La Posta Band of Diegueno Mission Indians. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

² Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, EPA sent a letter dated September 2, 2021, offering to consult with the tribes in Region 9 on this certification. EPA did not receive any formal request for consultation or any written comments on the draft certification.

your staff may contact our Wetlands Section Manager, Sahrye Cohen at (415) 972-3523 or cohen.sahrye@epa.gov.

Sincerely,

Tomás Torres
Director, Water Division

Enclosure

cc:

All federally recognized Indian Tribes within EPA Region 9
James Mazza, Regulatory Branch Chief, San Francisco District
Michael Jewell, Regulatory Branch Chief, Sacramento District
David Castanon, Regulatory Branch Chief, Los Angeles District
Kelly Allen, Regulatory Branch Chief, New Mexico District
Todd Tillinger, Corps South Pacific Division
Trevor Baggione, Arizona Department of Environmental Quality
Paul Hann, California State Water Resources Control Board
Britt Widegren, Nevada Division of Environmental Protection

Enclosure

U.S. Environmental Protection Agency Region 9's Clean Water Act Section 401 Certification of the 41 Nationwide Permits (2021) on applicable Tribal Lands in California, Nevada, Arizona, and Navajo Allottee Lands

This Clean Water Act (CWA) Section 401 water quality certification (WQC) 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) Nation Wide Permits (NWP) into waters of the U.S. that occur within tribal lands where tribes do not have treatment in a similar manner as a state and lands with exclusive federal jurisdiction in California, Nevada, Arizona, and Navajo Allottee land in the corresponding Sacramento, San Francisco, Los Angeles and Albuquerque Corps Districts: NWP 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 27, 30, 31, 32, 33, 34, 36, 37, 38, 41, 45, 46, 49, 53, 54, and 59. The Corps is not requesting certification for the following NWPs: 1, 2, 8, 9, 10, 11, 24, 28, and 35.

Section 401(a)(1) of the CWA requires applicants for Federal permits and licenses that may result in discharges into waters of the United States, to obtain certification that any such 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 Region 9 (EPA) is the certifying authority. In this case, the EPA is making the certification decision for potential discharges that may result from the projects authorized under the proposed CWA Section 404 NWPs listed above.¹

Project Description

On September 15, 2020, the Corps published in the Federal Register its proposal to reissue the NWPs.²

On January 13, 2021, the Corps published in the Federal Register its final rule reissuing 12 NWPs and issuing 4 new NWPs, as well as the NWP general conditions and definitions. The Corps is now proposing to re-issue 40 existing NWPs and one new NWP 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 the 41 proposed NWPs that have not been issued, the Corps has extended the reasonable period of time within which CWA Section 401 certifying authorities must act and has provided the opportunity for those CWA Section 401 certifying authorities to revise or reconsider their

¹ This water quality certification does not apply to activities proceeding in the territories of the 25 tribes in Region 9 that have been approved as Section 401 certifying authorities – the Navajo Nation, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk, White Mountain Apache Tribe, Table Mountain Rancheria, Resighini Rancheria, La Posta Band of Diegueno Mission Indians. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

² See 85 FR 57298.

prior CWA Section 401 WQC decisions. 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 or conditions.

The project proponents for potential activities authorized under the NWP are responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state, or tribal authorities.

Project proponents for potential projects authorized under the NWP should retain this certification in their files with the applicable NWP as documentation of EPA CWA Section 401 WQC for the above-referenced proposed final NWP. This CWA Section 401 WQC is specifically associated with the NWP described above and expires when those NWP expire.

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

The project proponent for potential activities authorized under the NWP are encouraged to contact EPA during the project planning phase if they have 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. Planning and construction practices, such as the use of native vegetation and bioengineering techniques, can be used to minimize adverse impacts to plants and animals and improve water quality.

As required by Condition 1, project proponents shall provide notice to EPA at least 30 days prior to commencing construction to provide EPA with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the project proponent should also provide the PCN to Region 9. If additional information is required per the conditions of this certification, that information shall be submitted with the PCN notification to the EPA. Concurrent with notification to the EPA, project proponents shall notify the appropriate Tribal Environmental or Governmental Office. Within 30 days of complete submittal, EPA will review the proposed project to determine compliance with this 401 certification.

Project proponents shall also notify EPA and the appropriate Tribal Environmental Office if spills or unauthorized discharges occurring during the project.

Pursuant with CWA Section 308(a), EPA representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the 401 certification and conditions.

To submit a project for review, or if you have questions regarding this certification, please contact EPA at: R9cwa401@epa.gov

Granted with Conditions (121.7(d)(2)):

On behalf of 123 federally recognized tribes within the purview of EPA Region 9, CWA Section 401 certification for the following proposed NWP is granted with conditions. EPA has determined that any discharge authorized under the following proposed NWP will comply with water quality requirements, as defined at 40 C.F.R. 121.1(n), subject to the following conditions pursuant to Section 401(d).

NWPs: 3, 5, 6, 7, 13, 14, 18, 19, 20, 23, 25, 27, 31, 32, 33, 36, 37, 38, 41, 45, 46, 59

EPA has determined that any discharge authorized under the following NWP will comply with water quality requirements as defined in 40 CFR 121.1(m) subject to the following conditions pursuant to CWA Section 401(d).

General EPA Conditions for Certification 2021 NWPs

Condition 1 – Notification to EPA

Project proponents shall provide notice to EPA Region 9 prior to commencing construction to provide EPA with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the project proponent shall also provide the PCN to Region 9. Concurrent with notification to the EPA, project proponents shall notify the appropriate Tribal Environmental or Governmental Office.

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 9 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 9 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)

Condition 2 – Projects or Activities Discharging to Impaired Waters

Projects or activities are not authorized under the NWP if the project will involve point source discharge 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 9's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-pacific-southwest-region-9>.

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 compliance 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 water quality requirements are met in the active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody.

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

Condition 3 – Dewatering

For all dewatering activities that propose structures or fill in waters of the U.S. that require authorization from the Corps, projects or activities are authorized under the NWP's if the site is naturally dewatered (e.g., seasonally dry), or if an artificial dewatering plan is developed and implemented to ensure that erosion and unauthorized discharges do not occur prior to site restoration. The dewatering plan shall be submitted to EPA Region 9 in conjunction with the notification in Condition 1, prior to site disturbance.

The Dewatering Plan shall, at a minimum, include the following:

- Methods for dewatering;
- Equipment that would be used to conduct the dewatering;
- Length of time the area is to be dewatered;
- Area (acres) and length (linear feet) in waters of the U.S. of the structure and/or fill used for the dewatering;
- Method for removal of the temporary structures and/or fill;
- Method for pre-disturbance measurement and restoration, following construction, of the preconstruction contours and site conditions of the waters of the U.S. affected by the structure or fill;
- Frequency and methods for monitoring and maintenance of dewatering measures to ensure unauthorized discharges do not occur before the site restoration is complete; all dewatering measures should be assessed within 24 hours after a rain event and any damaged measures shall be repaired or modified as required to protect water quality; and
- Reporting and adaptive management processes if any of the dewatering methods cause erosion or if unauthorized discharges occur before the site restoration is complete.
- EPA Region 9 requires reporting of unauthorized discharges or water quality violations within 24 hours.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: General conditions included in the NWP's do not address dewatering activities. Dewatering activities can often be a point source

for pollutants entering waters of the United States. This condition is necessary to ensure that the authorized activity does not result in more than minimal degradation to water quality and the aquatic environment because the project proponent will complete pre-planning, monitoring, maintenance, reporting and adaptive management to achieve site restoration.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.24; 40 CFR § 230.70; 40 CFR § 230.71; 40 CFR § 230.74

Condition 4 – Site Management and Construction Practices

Except as specified in the permit application, the project proponent shall not allow debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes to enter or be stored within 100 feet of where it may enter waters of the U.S. The project proponent shall develop and implement a plan to prevent pollutants from entering jurisdictional wetlands and waterways. The plan shall be submitted to EPA Region 9 in conjunction with the notification in Condition 1, prior to site disturbance. The plan shall include, at a minimum, the following measures:

- Silt fences, straw wattles, and other standard erosion control techniques³ shall be employed to protect waters of the U.S. from sedimentation and other pollutants.
- Water used in dust suppression shall not contain contaminants that could violate surface water or aquifer standards.
- Project activities (e.g., work during rain events, heavy equipment in flowing water, etc.) that may result in channel and bank erosion within waters of the United States during or after construction are not authorized under this certification. Precipitation forecasts shall be considered when planning construction activities. The project proponent shall monitor the 72- hour forecast from the National Weather Service at <http://www.nws.noaa.gov>. When there is a forecast of more than 80% chance of rain, or at the onset of unanticipated precipitation, the project proponent shall remove all equipment from waters of the United States and implement erosion and sediment control measures (e.g., jute, straw, coconut fiber erosion control fabric, coir logs, straw), and cease all project activities within the waters. Erosion control measures shall be inspected within 24 hours after each rain event and repaired or modified as required to protect water quality.
- All equipment shall be cleaned prior to arriving on the project site. All equipment shall be inspected daily and prior to entering any streams or wetlands, for oil, gas, diesel, anti-freeze, hydraulic fluid, and other petroleum leaks. All equipment detected with leaks shall be repaired promptly or moved offsite within 24 hours.

³ Many state and local agencies have developed erosion control manual and guidelines that provide detailed information on standard techniques and practices. Examples include the Los Angeles Construction Site Best Management Practices (BMPs) Manual: <http://dpw.lacounty.gov/cons/specs/bmpmanual.pdf> and the City of Sacramento's Administrative and Technical Procedures Manual for Grading and Erosion and Sediment Control: <http://www.cityofsacramento.org/-/media/Corporate/Files/DOU/Specs-Drawings/Sediment-control-manual.pdf?la=en>

- All contaminated areas shall be cleaned immediately, and contaminated soil removed from the site or contained in enclosed containers. Containers shall be located no closer than 100 feet to a jurisdictional wetland or waterbody. If it is not possible to site a storage area at least 100 feet away, the project proponent shall explain the reasons for the storage location and the additional measures that will be implemented to protect waters in their plan.
- Containment booms and/or absorbent material shall be available onsite. In the case of spills, containment booms and/or absorbent materials shall be employed immediately to prevent discharges from reaching waters of the U.S. Project proponents shall notify the appropriate Tribal government and EPA Region 9 within 24 hours if spills or unauthorized discharges occur during the project. As part of the notice, the project proponent shall provide plans for remedying the spill or unauthorized discharge.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: Protection of water quality includes implementation of suitable measures to control site runoff, spillage, waste disposal, and drainage from construction activities and raw material storage as such sources may contribute significant amounts of pollutants into waters of the United States. Timing the discharge of material, for instance by limiting fill during rain events, minimizes impacts to water quality. Measures minimize adverse effects to plant and animal populations by maintaining habitat for these species. The use of measures as required under this condition will ensure that the authorized activity does not result in more than minimal degradation to water quality. The condition is necessary to prevent the unauthorized release of pollutants into waters of the United States. This condition is necessary to ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project. The condition minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination) and allows for clean-up of potential spills before entering waters. This condition also helps protect the water quality and native biology of the impacted waters by preventing the spread of invasive or nuisance species. This condition is necessary to ensure minimization of adverse effects on populations of plants and animals and to preserve the water quality and flood protection benefits provided by vegetation in riparian areas adjacent wetlands and waterbodies. Inspection times are required to ensure that pollution and erosion controls remain effective or are repaired promptly.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.70; 40 CFR § 230.72; 40 CFR § 230.74; 40 CFR § 230.75

Condition 5 – Discharges in Aquatic Resources of Special Concern

Activities resulting in a point source discharge in the following types of jurisdictional aquatic resources of special concern shall request a project-specific CWA Section 401 WQC: bogs, fens, and other peatlands; natural springs; vernal pools; alkali wetlands; riffle-pool complexes of streams; marine or estuarine mudflats; salt marshes; marine waters with native eelgrass or kelp beds; or marine nearshore forage fish habitat. These resources may be identified using USGS

topographic maps, the U.S. Fish and Wildlife Service National Wetland Inventory, or other aquatic resource identification documentation.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: Aquatic resources of special concern include special aquatic sites⁴ and other aquatic resources that are specific waters of the U.S. that are difficult to replace, are unique, and/or have high ecological function. General permits, including NWP's, are only allowed for those discharges and associated activities that will cause no more than minimal adverse impacts to the aquatic environment. However, point source discharges to the types of aquatic resources of special concern listed above could have more than minimal adverse impacts on an individual or cumulative basis, because the discharge of dredged or fill material would impair and degrade the chemical, physical and biological conditions of these systems. As noted in 40 C.F.R. § 230.1(d), “[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.” Discharge of dredged or fill material into these systems can alter water circulation patterns and hydroperiods, which in turn can release nutrients causing shifts in native to non-native species composition; release chemicals that adversely impact biota (plants and animals), increase turbidity levels, reduce light penetration and photosynthesis, and ultimately change the capacity of these systems to support aquatic life uses and other beneficial uses of these special aquatic sites, including impairing their diverse and unique communities of aquatic organisms, including fish, wildlife and the habitats upon which they depend. Thus, this condition is established to ensure a case-by-case review of any actions or activities proposed in these specific aquatic resource site types which are inherently difficult to replace, have high ecological functions and values, and for which degradation cannot be determined to meet water quality requirements on a general permit basis.

Citation(s) that authorizes this condition: 40 C.F.R. § 230.1(d); 40 C.F.R. § 230.10(c); 40 C.F.R. § 230.21; 40 C.F.R. § 230.23; 40 C.F.R. § 230.32; 40 C.F.R. Part 230, Subpart E.

Condition 6 – Disturbance to Streambank Vegetation

Disturbance to jurisdictional streambank vegetation shall be limited to no more than 0.5 acre of vegetation removal. Areas of vegetation removal shall be identified on construction plans and submitted to EPA as part of the notification. Areas of streambank vegetation adjacent to the planned disturbance area shall be clearly marked with signs, high visibility flagging, orange fencing, or some other method that clearly indicates the limits of the disturbance area to prevent encroachment into adjacent habitat. Revegetation of disturbed areas shall be based on pre-disturbance or reference site conditions, including percent cover and native species diversity. Therefore, the project proponent shall photo-document the site prior to, during and post-construction, and post-restoration. Revegetated areas shall use local or regionally sourced native seed and other plant materials. Non-native and invasive species shall not be used for restoration

⁴ See 40 C.F.R. Part 230 Subpart E.

activities. Stockpile weed-free topsoil shall replace disturbed soil areas. Revegetation measures may include topsoil replacement, planting, seeding, fertilization, liming, and weed-free mulching. Projects that will remove more than 0.5 acre of vegetation shall request a project-specific 401 certification.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: Streambank vegetation is important in stabilizing soils, reducing run-off, providing for shaded aquatic areas, and providing cover and habitat for aquatic wildlife. Invasive species are detrimental to functioning aquatic ecosystems. Revegetation planting with native plant species is necessary to ensure ecosystem functions and services. This condition is necessary to ensure minimization of adverse effects on water quality as well as populations of plants and animals that derive benefits provided by vegetation in riparian areas adjacent wetlands and waterbodies. This condition size limit is necessary to require project-specific CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.70; 40 CFR § 230.72; 40 CFR § 230.74; 40 CFR § 230.75

NWP Permit Specific Conditions

NWP-03 Maintenance

NWP-03 is conditionally certified subject to the General Conditions above, and the following specific condition.

Replacement of "Currently serviceable structures" under this permit shall be appropriately sized culverts or structures⁵ for the drainage area and/or anticipated peak flow so that structures do not cause or exacerbate channel incision, bank destabilization, and/or prevent fish and wildlife passage due to inadequate design or construction standards. Replacement of existing riprap is allowed but the placement of additional non-vegetated riprap beyond the original footprint is not authorized and requires an individual project-specific certification. If a PCN is required for the NWP, the project proponent shall submit design documentation used to determine the appropriate sizing of culverts and/or structures to EPA Region 9, the correlating Tribal government, and the authorizing Corps District.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: Improperly sized or undersized culverts constrict the channel, create flow hydraulics and channel conditions that are markedly dissimilar from those in the natural channel, and impede the movement fish and other aquatic organisms along the stream corridor. Areas covered by riprap limit the biological, chemical, and

⁵ For site where no hydrologic data is available methods such as Talbots formula for culvert sizing: http://www.sd-w.com/civil/talbots_formula.html. Other established methods such as those described in the Handbook For Forest, Ranch And Rural Roads (http://www.pacificwatershed.com/sites/default/files/12_-_appendix_a_-_culvert_sizing_procedures.pdf) may also be used.

physical processes that can occur in those aquatic resources. The lack of vegetation results in lower quality habitat and less carbon cycling and other ecosystem functions in aquatic and riparian areas. This condition is necessary to ensure the properly sized and designed replacement structures are used to protect aquatic habitat and to ensure that the authorize activities would result in more than a minimal degradation of water quality. Projects that require a PCN for NWP meet a size, location or resource threshold that requires design review to ensure that there are no more than minimal impacts to aquatic resources.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72

NWP-07 Outfall Structures and Associated Intake Structures

NWP-07 is conditionally certified subject to the General Conditions above, and the following specific condition.

Outfall structures shall be appropriately sized and designed to prevent high pressure discharge of stormwater that may result in localized scouring and erosion⁶. The project proponent shall submit project plans to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The project plans shall describe the design documentation used to determine the appropriate sizing of outfall structures in the final project design.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: Storm drain and outfall systems are dependent on topography, hydrology, surface hydraulics, outfall location and constraints for design layout. Outfall materials have a design maximum velocity to ensure that structures and surrounding areas do not have detrimental erosion. This condition is necessary to ensure outfall structures are designed and constructed in a manner that will prevent localized erosion at the point of discharge and will minimize impacts to downstream water quality.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d), 40 CFR § 230.70; 40 CFR § 230.73

NWP-13 Bank Stabilization

NWP-13 is conditionally certified subject to the General Conditions above, and the following specific condition.

For any activities that include bank stabilization, the project proponent shall use bioengineering techniques for bank stabilization activities instead of or in combination with hard armoring; this may be either the sole use of native vegetation or other bioengineered design techniques (e.g.,

⁶ Outfall design information for common types, like stormwater, may be found through state Departments of Transportation (e.g. Caltrans <https://dot.ca.gov/programs/design/hydraulics-stormwater>) and state water quality regulatory agencies (e.g. https://www.waterboards.ca.gov/rwqcb2/water_issues/programs/stormwater/muni/nrdc/chapter%2013%20design%20examples%20part%202.pdf). Local, county, state, and tribal resources may also be used to determine outfall design criteria and/or the maximum design velocity for stormwater and similar outfalls.

willow plantings, root wads, large woody debris, etc.), or a combination of hard-armoring (e.g., rock) and native vegetation or bioengineered design techniques. If it is not possible to solely rely on bioengineering techniques, the project proponent shall submit project plans to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. Projects consisting entirely of riprap or similar rock techniques are limited to 300 linear feet under this conditional certification; project proponents with riprap or similar rock activities over 300 linear feet shall request a project-specific water quality verification. For both partially bioengineered projects, and those composed of riprap, the project plans shall describe the design techniques and stabilization methods assessed to determine the final project design. The use of soil cement, concrete, and grouted rip-rap hard armoring methods are not authorized under this certification and project proponents shall submit a request for a project-specific water quality certification.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: The use of native vegetation and bioengineering is necessary to ensure the activity incorporates appropriate measures to that will minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Planning and construction practices can be used to minimize adverse impacts to plants and animals and can compensate for destroyed habitat. This condition is necessary to provide the project proponent with clarity on how to meet appropriate soil erosion and sediment controls, as required by NWP's General Condition 12. These appropriate and practicable alternatives often include more ecologically beneficial soft or bioengineering techniques. In conjunction with other bank stabilization practices, this condition will ensure water quality impacts from potential discharges of dredged or fill material are minimized. As a result, this condition is necessary to require project-specific CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements. Native vegetation and natural materials and structures, such as biodegradable erosion control blankets, staking and live cutting, biologs, coir fiber rolls, brush mattresses, etc. can be effective erosion control measures are when installed properly under the right conditions. Projects without bioengineering are limited to 300 linear feet due to the negative impacts of hard armoring on aquatic habitat functions and water quality. 300 linear feet is the previous restriction in the NWP's without waiver by the District Engineer and is supported by years of data on minimal adverse impacts to the aquatic environment.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.75

NWP-14 Linear Transportation Projects

NWP-14 is conditionally certified subject to the General Conditions above, and the following specific condition.

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

documentation to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The documentation shall include:

- Information on why it is not practicable to approximate the pre-construction ordinary high water mark channel width and depth of the upstream and downstream open waters, and
- Documentation demonstrating that the reduction in the pre-construction bankfull width and the channel depth would not result in adverse effects to water quality and aquatic resource functions and services. Adverse effects may include, but are not limited to erosion, degradation, and increased water velocity. Functions and services to be considered include but are not limited to short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities.

Projects that may result in an adverse effect because of reduction in channel width, depth, or open water shall request a project-specific 401 certification.

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 ensure the authorized activity will result in only minimal impacts to water quality and the aquatic ecosystem through obstruction of flow or other reductions in physical characteristics related to water circulation. This condition is necessary to require project-specific CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements.

Citation(s) that authorizes this condition: 40 CFR § 230.10 and 40 CFR § 230.72

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

NWP-27 is conditionally certified subject to the General Conditions above, and the following specific conditions.

Condition (a): To document that the project results in a net increase in aquatic functions and services, the project proponent shall submit a project monitoring and adaptive management plan to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The plan shall include:

- Goals and objectives of the project;
- Specific performance metrics that will be used to evaluate the success of meeting those goals and objectives;
- Monitoring methods or techniques (including timing and duration) used to evaluate the progress towards achieving the desired increase in aquatic functions and services; and

- Adaptive management techniques and reporting processes to be implemented if the project is not meeting net increase performance metrics.

Functions and services to be considered in the justification include, but are not limited to, short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: Minimization of adverse effects on populations of plants and animals can be achieved by using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat. The project proponent will complete pre-planning, monitoring, maintenance, reporting and adaptive management to achieve site restoration and enhancement.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.72; 40 CFR § 230.75

Condition (b): For removal of small water control structures authorized under NWP 27, to ensure that effective implementation measures are employed for the prevention of uncontrolled discharges and water quality violations, the project proponent shall conduct pre-disturbance site assessment and submit project plans to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The project plans shall include:

- Methods to remove and dispose of any accumulated sediments stored behind the structure;
- Methods to ensure that the channel bed and banks are stabilized to prevent head-cutting and failure after the structure is removed;
- Stabilization methods that will be implemented to minimize secondary impacts to waters resulting from the removal of the structure; and
- Adaptive management and reporting processes if an unauthorized discharge or water quality violation were to occur

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 ensure that physical habitat and hydrologic characteristics of waters are not degraded. Uncontrolled release of sediment could contribute to degradation of water quality, aquatic dependent plants and animals, and loss of capacity of the waterbody to assimilate nutrients and purify water. The project proponent will complete pre-planning,

monitoring, maintenance, reporting and adaptive management to ensure that removal of small water control structures complies with water quality requirements.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.75

NWP-31 Maintenance of Existing Flood Control Facilities

NWP-31 is conditionally certified subject to the General Conditions above, and the following specific condition.

If flood control facilities have levees that support existing jurisdictional non-invasive riparian vegetation, the project proponent shall submit project plans including baseline measurement of the existing vegetative cover, and measures to avoid and minimize impacts to jurisdictional non-invasive riparian vegetation growing on levees to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. Limited removal of riparian vegetation required to access an individual maintenance work area is permitted under this certification, but the removal of jurisdictional non-invasive riparian vegetation from levees as a specific and intended maintenance activity is not authorized and requires a project-specific 401 certification. For authorized project activities that remove jurisdictional non-invasive riparian vegetation for access to work areas, the project proponent shall submit a revegetation plan developed using the native vegetative cover baseline, or other appropriate vegetative cover (per Natural Resources Conservation Service, CA Department of Fish and Wildlife, etc. guidelines), to EPA Region 9, the correlating Tribal government, and the authorizing Corps District.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: Riparian vegetation can provide many benefits for water quality such as bank stabilization and ground cover protecting slopes from rain-induced surface erosion. In cases where levees are composed of largely uncohesive materials, root-reinforcement provides significant support to the soil matrix, whilst additionally reducing shear stresses acting on the soil from flowing water and protecting the levee from rainfall impact and runoff. Riparian vegetation also provides for other beneficial uses including aesthetics, habitat and protection for fish and wildlife species and overall improved complexity to the river system. This condition is necessary to ensure activities authorized under this permit will not result in more than minimal impacts to water quality and beneficial uses.

Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.72, 40 CFR § 230.75

NWP-33 Temporary Construction, Access, and Dewatering

NWP-33 is conditionally certified subject to the General Conditions above, and the following specific condition.

New temporary access roads shall be no more than 20 feet wide and shall be designed to minimize changes to the hydraulic flow characteristics of the stream and degradation of water quality.

Temporary access roads are those that are in place for no more than one growing season.

The following site management and construction practices shall be followed to ensure that flow and circulation patterns of waters are not impaired and adverse effects on the aquatic environment are minimized:

- The temporary road or access shall be stabilized, monitored, and maintained during and following construction to prevent erosion. Stabilization materials that are damaged shall be repaired or modified within 24 hours of damage to protect water quality.
- Mats shall be used in temporary access and construction occurring in wetlands and ephemeral streams. Mat should be in good condition and installed with minimal dragging to reduce soil disturbance.
- The boundaries of temporary access within waters and wetlands shall be clearly marked by flagging, orange construction fencing, or other visible marking method to minimize the impacts by heavy equipment.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: This measure is included to ensure that temporary access roads and dewatering activities minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Heavy equipment can compress wetland soils and result in decreased wetland function. Mats spread out the weight of heavy equipment so the soil is not compressed and can prevent ruts and other destructive impacts. In stream crossings, mats are used to reduce soil disturbance and prevent excessive rutting. Visible marking of the wetlands and water boundaries minimizes impacts that can result in ruts, erosion, and other negative impacts to water quality. Fill impacts that last longer than one growing season can have permanent reductions on ecosystem function and permanent loss of habitat to aquatic plants and animals.

Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.72; 40 CFR § 230.75

NWP-37 Emergency Watershed Protecting and Rehabilitation

NWP-37 is conditionally certified subject to the General Conditions above, and the following specific conditions.

Condition (a): Construction activities shall not result in the permanent channelization of streams or sloughs. Channelization is defined, for this purpose, as the placement of excess material in a manner that modifies the bank alignment, and subsequently the channel alignment, from its pre-emergency condition. Permanent for the purposes of this conditional certification are impacts to waters lasting more than one growing season.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: The discharge of dredged or fill material which alters the contours of a waterbody and/or its riparian zone can lead to increased erosion and sediment loads to the waterbody and the loss or change of habitat and preferred food sources for wildlife species associated with the aquatic ecosystem.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.73; 40 CFR § 230.75; 40 CFR § 230.76

Condition (b): Construction of temporary structures or drains for the purpose of reducing or preventing flood damage shall be removed within 60 days following the completion of the permitted action.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: This measure is included to ensure that temporary activities minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Dredge and fill impacts in response to emergency that are in place after the permitted action are complete can have permanent reductions on ecosystem function and permanent loss of habitat to aquatic plants and animals.

Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.73; 40 CFR § 230.75

NWP-41 Reshaping Existing Drainage Ditches

NWP-41 is conditionally certified subject to the General Conditions above, and the following specific conditions.

Condition (a): To document that the modification of existing drainage and irrigation ditches results in improvement to water quality, the project proponent shall submit project plans and documentation to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The documentation shall include:

- Water quality improvements that are expected from implementation of the project. These may include, but are not limited to, improvement in water characteristics such as pH, dissolved oxygen, or temperature, and/or a decrease in pollutants, algal blooms, etc.
- Construction and modification methods or techniques that are expected to result in water quality improvement
- Monitoring methods and/or techniques to evaluate progress in improving water quality

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 ensure the authorized activity will improve water quality as required by the NWP. Water movements including current and water circulation are the physical [movements](#) of water that affect aquatic ecosystem. Reshaping of existing drainages ditches should result in improvement of environmental characteristics and values related to water flow circulation by removing obstructions or otherwise changing the dimensions of a water body.

Citation(s) that authorizes this condition: 40 CFR § 230.23

Condition (b): All side-cast materials from excavation shall be removed from unstable slopes and disposed of within non-jurisdictional areas. Sidecast material that is incorporated into authorized activities shall be placed to avoid erosion, slumping, or leaching of materials into the surrounding aquatic features. Depending on topographic and precipitation conditions, side-cast materials may need to be contained by silt fencing, or other containment control materials to prevent point source [pollution](#) into the adjacent drainage ditch.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: [Disposal sites](#) adjacent to aquatic features have the potential for erosion, slumping or leaching of [materials](#) into the surrounding aquatic ecosystem unless properly sited or controlled. Unstable slopes may slump and introduce material in ditches, which increases turbidity. Disposal of side-cast material from excavation of existing drainage ditches placed in jurisdictional wetlands constitutes a fill that can adversely affect water quality and the aquatic environment and is not authorized under this certification.

Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.72

NWP-45. Repair of Uplands Damaged by Discrete Events

NWP-45 is conditionally certified subject to the General Conditions above, and the following specific condition.

For any activities that include bank stabilization to protect restored uplands, the project proponent shall use bioengineering techniques for bank stabilization activities instead of hard armoring; this may be either the sole use of native vegetation or other bioengineered design techniques (e.g., willow plantings, root wads, large woody debris, etc.) or a combination of hard-armoring (e.g., rock) and native vegetation or bioengineered design techniques. If it is not possible to solely rely on bioengineering techniques, the project proponent shall submit project plans to EPA Region 9, the correlating Tribal government, and the correlating authorizing Corps District. Projects consisting entirely of riprap or similar rock techniques are limited to 300 linear feet under this conditional certification; project proponents with riprap or similar rock activities over 300 linear feet shall request a project-specific water quality verification. For both partially bioengineered projects, and those composed of riprap, the project plans shall describe the design techniques and stabilization methods assessed to determine the final project design. If the project proponent did not consider bioengineering techniques in the submitted project design, they shall request a project-specific water quality certification. The use of soil cement, concrete, and grouted rip-rap hard armoring methods are not authorized under this certification and project proponents shall submit a request for a project-specific water quality certification.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: The use of native vegetation and bioengineering is necessary to ensure the activity incorporates appropriate measures to that will minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Planning and construction practices can be used to minimize adverse impacts to plants and animals and can compensate for destroyed habitat. This condition is necessary to provide the

project proponent with clarity on how to meet appropriate soil erosion and sediment controls, as required by NWP's General Condition 12. These appropriate and practicable alternatives often include more ecologically beneficial soft or bioengineering techniques. In conjunction with other bank stabilization practices, this condition will ensure water quality impacts from potential discharges of dredged or fill material are minimized. As a result, this condition is necessary to require individual CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements. Native vegetation and natural materials and structures, such as biodegradable erosion control blankets, staking and live cutting, biologs, coir fiber rolls, brush mattresses, etc. can be effective erosion control measures are when installed properly under the right conditions. Projects without bioengineering are limited to 300 linear feet due to the negative impacts of hard armoring on aquatic habitat functions and water quality. 300 linear feet is the previous restriction in the NWP's without waiver by the District Engineer and is supported by years of data on minimal adverse impacts to the aquatic environment.

Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.75

NWP-46 Discharges in Ditches

NWP 46 is conditionally certified, subject to the general conditions listed above, except for the following projects, where an individual project-specific water quality certification is required, when impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams are greater than 0.5 acre.

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

Drainages, including ditches, in the Arid West are typically narrow. For example, typical roadway ditches designed by AZDOT are between 2-10" wide. Because of the narrow width typical of ditches in the Arid West, measurement by area can result in many linear feet of impact relative to other regions of the U.S. The 0.5 acre limit is necessary to regionalize the 401 certification for this condition due to the resource types and typical practices. This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded. Discharge of large amounts of fill material in intermittent and ephemeral streams could contribute to degradation of water quality, aquatic dependent plants and animals, and loss of capacity of the waterbody to assimilate nutrients, purify water, or reduce wave energy.

Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.70

Waived (121.9(a)(1)):

On behalf of 123 federally recognized tribes within the purview of EPA Region 9, EPA is expressly waiving its authority to act on the CWA Section 401 certification request for the following proposed NWP's:

NWP's: 4, 15, 16, 17, 22, 30, 34, 49, 53, 54

Summary Table

General Permit	2021 EPA 401 Certification
1. Aids to Navigation	No cert. request
2. Structures in Artificial Canals	No cert. request
3. Maintenance	Certify with Conditions
4. Fish and Wildlife Harvesting, Enhancement, Attraction Devices and Activities	Waived
5. Scientific Measurement Devices	Certify with Conditions
6. Survey Activities	Certify with Conditions
7. Outfall Structures and Associated Intake Structures	Certify with Conditions
8. Oil and Gas Structures on the Outer Continental Shelf	No cert. request
9. Structures in Fleeting and Anchorage Areas	No cert. request
10. Mooring buoys	No cert. request
11. Temporary Recreation Structures	No cert. request
13. Bank Stabilization	Certify with Conditions
14. Linear Transportation Projects	Certify with Conditions
15. U.S. Coast Guard Approved Bridges	Waived
16. Return Water from Upland Contaminated Disposal Areas	Waived
17. Hydropower Projects	Waived
18. Minor Discharges	Certify with Conditions
19. Minor Dredging	Certify with Conditions
20. Response Operations for Oil or Hazardous Substances	Certify with Conditions
22. Removal of Vessels	Waived
23. Approved Categorical Exemptions	Certify with Conditions
24. Indian Tribe or State Administered Section 404 Program	No cert. request
25. Structural Discharges	Certify with Conditions
27. Aquatic Habitat Restoration, Enhancement and Establishment Activities	Certify with Conditions
28. Modifications of Existing Marinas	No cert. request
30. Moist Soil Management for Wildlife	Waived
31. Maintenance of Existing Flood Control Facilities	Certify with Conditions
32. Completed Enforcement Actions	Certify with Conditions
33. Temporary Construction, Access, and Dewatering	Certify with Conditions
34. Cranberry Production Activities	Waived
35. Maintenance Dredging of Existing Basins	No cert. request
36. Boat Ramps	Certify with Conditions
37. Emergency Watershed Protection and Rehabilitation	Certify with Conditions
38. Cleanup of Hazardous and Toxic Waste	Certify with Conditions
41. Reshaping Existing Drainage Ditches	Certify with Conditions
45. Repair of Uplands Damaged by Discrete Events	Certify with Conditions

General Permit	2021 EPA 401 Certification
46. Discharges in Ditches	Certify with Conditions
49. Coal Remining Activities	Waived
53. Removal of Low Head Dams	Waived
54. Living Shorelines	Waived
59. Water Reclamation and Reuse Facilities	Certify with Conditions