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

MAR 30 2012

Colonel Michael C. Wehr, PE
Division Engineer, South Pacific Division
U.S. Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103-1398

Subject: Conditional Clean Water Act Section 401 certification of the 2012 Nationwide Permits for tribal lands within Region 9 of the U.S. Environmental Protection Agency

Dear Colonel Wehr:

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 or licenses issued for work on most tribal lands. We have reviewed the U.S. Army Corps of Engineers (Corps) February 21, 2012 Federal Register notice announcing the reissuance of the Corps' CWA Section 404 Nationwide Permits (NWPs), and are transmitting our conditional programmatic water quality certification of these general permits. The enclosed conditions become binding requirements of any NWP issued for work on tribal lands within Region 9[1]. Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable projects.

Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, EPA sent a letter dated October 31, 2011, offering to consult with tribes in Region 9 on this certification. We subsequently provided our draft conditional certification, dated February 2, 2012, to tribes for review and comment. EPA did not receive any formal requests for consultation or any written comments on the draft certification.

In summary, we are certifying 49 of the 50 proposed active permits with general conditions, 17 of which are further subject to permit-specific conditions. These requirements will protect water quality and help ensure that the NWP program will have no more than minimal adverse impacts on the aquatic environment on tribal lands, both individually and cumulatively, as required by CWA Section 404(e). A table summarizing types of conditions, notification requirements, impact limits, and additional information for each NWP is included in the attached certification. Some conditions of note include:

- Notification to EPA for use of any NWP on tribal lands (General Condition 01)
- Modifications to length, size and/or acreage limits on ten of the NWPs (12, 13, 14, 29, 40, 41, 45, 46, 48, and 49)

[1] This water quality certification does not apply to activities proceeding in the territories of the ten tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, 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, and White Mountain Apache Tribe. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

- General prohibition of impact limit waivers under this programmatic certification, except where EPA approves a written determination that a waiver would result in minimal impacts to aquatic resource functions
- Limiting NWPs 12 (Utility Line Activities) and 14 (Linear Transportation Projects) to a single use for a single and complete project having independent utility
- Requiring EPA approval that NWP 27 projects will increase aquatic resource functions
- Requiring EPA approval that NWP 31 levee vegetation removal will have minimal adverse impacts
- Denial without prejudice of NWP 43 (Stormwater Management Facilities) due to ongoing experience with adverse impacts from in-stream stormwater structures

Projects failing to meet the enclosed conditions, but otherwise qualifying for use of a NWP, are not eligible for coverage under this programmatic certification and must contact EPA for individual project certification. Projects meeting the enclosed conditions must notify EPA pursuant to General Condition 01. *Notification*, but may proceed without further written verification from EPA except when a specific EPA approval is required in accordance with general or permit-specific conditions of this certification. Finally, EPA may periodically undertake inspections or other compliance monitoring activities pursuant to our CWA enforcement authorities (CWA Section 308(a)(4)(B)).

In 2002, we concluded that twelve of the NWPs were insufficiently protective of water quality to be covered by our programmatic certification; in 2007, that list was narrowed to four NWPs. With each five-year revision of the program, the NWPs generally become more protective of the environment, and we commend the many Corps and EPA staff across the nation who worked to further improve the 2012 NWPs. This conditional certification will remain in effect for the authorization period of the 2012 NWPs, and will be revisited and potentially revised when the NWPs are next proposed for reissuance and revisions in 2017.

Thank you for your ongoing partnership in implementing the regulatory programs of the CWA. Please contact me at (415) 972-3572 with any questions regarding this conditional certification, or have your staff contact Paul Amato at (415) 972-3847 or amato.paul@epa.gov.

Sincerely,

for Alexis Strauss
Director
Water Division

Enclosure:
General and Permit-Specific Conditions of EPA's Programmatic Clean Water Act Section 401 certification of the 2012 Nationwide Permits for tribal lands in California, Nevada and Arizona

cc:
All federally recognized Indian Tribes within EPA Region 9
Jane Hicks, Regulatory Branch Chief, San Francisco District
Michael Jewel, Regulatory Branch Chief, Sacramento District
David Castanon, Regulatory Branch Chief, Los Angeles District
Allan Steinle, Regulatory Branch Chief, Albuquerque District
Wade Eakle, Corps, South Pacific Division
Debra Daniel, Arizona Department of Environmental Quality
Kelly Wolff-Krauter, Arizona Department of Game and Fish
Thor Anderson, Arizona Department of Transportation
Bill Orme, California State Water Resources Control Board
Sarah Rains, California Department of Fish and Game
Jay Norvell, California Department of Transportation
John Heggeness, Nevada Division of Environmental Protection
Brad Hardenbrook, Nevada Department of Wildlife
Steve Cooke, Nevada Department of Transportation

General Conditions

Projects that are unable to comply with the general conditions of this programmatic certification are denied certification without prejudice and the applicant must apply to EPA for an individual certification. Applicants can apply for an individual certification by providing the same content required in a MPCN described in General Condition 01. *Notification*, of this programmatic certification, but EPA may request additional project information for individual certifications after receiving notification materials. When an individual certification is required, EPA will strive to issue, deny, or waive certification within sixty days of receipt of complete project information, but our review shall not exceed one year, the statutory limit beyond which certification is considered waived.[2]

01. Notification

To improve the government's ability to demonstrate whether the NWP program has minimal adverse impacts to the aquatic environment, individually and cumulatively, all NWP-authorized projects proceeding on tribal lands within Region 9 shall submit a form of notification to EPA Region 9 as described below.[3] Notification is required in order to be eligible for any NWP under this certification.

Projects seeking authorization under this certification will fall under one of the following two notification categories:

Pre-Construction Notification (PCN):

- The Corps already requires a PCN, subject to criteria in the Corps' General Condition 31, because the project proposes use of a NWP that requires a PCN automatically or for specific activities authorized by the NWP. Applicants must simply forward a second copy of the PCN already required by the Corps to EPA Region 9 for notification. If a PCN is already required by the Corps and a waiver of impact limits is proposed beyond what is approved under this certification, applicants must include written determinations specified in General Condition 02. *Waivers* for EPA approval.

Modified Pre-Construction Notification (MPCN):

- The Corps does not require a PCN for any activities authorized under the NWP proposed for use, or for impacts below limits identified in the NWP for a PCN. Applicants must forward a MPCN to EPA Region 9 for notification, subject to the criteria below. If a waiver of impact limits is proposed beyond what is approved under this certification, applicants must include written determinations specified in General Condition 02. *Waivers* for EPA approval.

1) ***Timing.*** Applicants shall submit an MPCN to EPA Region 9 as early as possible, and in advance of any authorization letter from the Corps allowing the applicant to proceed under a given NWP. When an EPA approval is required by condition of this certification, EPA will act within sixty days of receiving a complete MPCN.

2) ***Content.*** MPCNs must be in writing (electronic mail submittal is acceptable) and include the following information:

[2] Clean Water Act Section 401 Certification (a): http://water.epa.gov/lawsregs/guidance/wetlands/sec401.cfm

[3] NOTE: this requirement does not modify or eliminate existing Corps requirements regarding PCNs for projects proceeding on tribal lands (or elsewhere).

a) Name, address and telephone numbers of the applicant and any agents or representatives. If available, the electronic mail address and fax numbers for these persons;
b) Location of the proposed project;
c) A description of the proposed project and impacts including
   i) the project's purpose;
   ii) direct and indirect adverse environmental effects the project would cause, including the proposed acreages and linear feet (for streams) of waters impacted, avoided, and where applicable, created or otherwise mitigated;
   iii) any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity.

The description should be sufficiently detailed to determine compliance with NWP and EPA 401 conditions and to determine whether compensatory mitigation may be necessary. Maps, drawings and/or photographs of the project area and aquatic resources are not mandatory, but usually help to clarify the project and allow for quicker review. At minimum, a narrative description of any special aquatic sites and other waters of the United States on the project site must be included;

d) Consistent with General Condition 02. *Waivers*, a written demonstration that any proposed impact limit waiver that may be allowable under this certification will result in minimal impacts to aquatic resource functions;
e) Consistent with General Condition 03. *Avoidance, Minimization, and Mitigation*, a written statement documenting measures taken to avoid and minimize temporary and permanent impacts to waters of the U.S.;
f) Consistent with General Condition 04. *Prohibition on the Multiple Use of One NWP for a Single Project*, for proposed utility or transportation projects where the same NWP is proposed at multiple locations, a written determination will be provided describing independent utility of each impact location and how the project will not contribute to more than minimal direct, indirect and cumulative impacts to waters of the U.S., either at the impact site or to upstream, downstream, or adjacent aquatic resources;
g) The name(s) of any species listed as endangered or threatened under the Endangered Species Act which may be adversely affected by the proposed work, either directly or by impacting designated critical habitat;
h) Identification of any cultural or historic properties listed in, or eligible for listing in, the National Register of Historic Places that may be adversely affected by the proposed work.

Written notification should be mailed to USEPA Region 9, WTR-8, 75 Hawthorne Street, San Francisco, CA 94105.

02. Waivers

For certain NWPs, Corps District Engineers may waive impact thresholds for intermittent and ephemeral drainages by making a written determination that the discharge will result in minimal adverse effects. To ensure that these waters, commonly found on tribal lands in the arid southwest, receive an adequate level of protection, and to prevent the NWP Program from having more than minimal adverse impacts to the aquatic environment, all proposed impact limit waivers are denied under this certification unless EPA approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions.

For some NWPs where the Corps does not include an impact limit, EPA has added an impact limit as a permit-specific condition. Some of these NWPs also include a condition that a waiver may be provided when EPA approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions.

Impacts to special aquatic sites are not permitted under this certification unless EPA approves a written determination that impacts to aquatic resource functions will be minimal. "Special aquatic sites" include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

When EPA approval is required for a waiver, EPA will act within sixty days of receiving a complete PCN or MPCN.

03. Avoidance, Minimization, and Mitigation

To protect water quality and beneficial uses of U.S. waters on tribal lands, all projects using NWPs must avoid discharges to the maximum extent practicable, and utilize the best available and practicable means of minimizing the adverse impact of discharges that cannot be avoided.

A written statement documenting measures taken to avoid and minimize temporary and permanent impacts to waters of the U.S. will be provided to EPA and the Corps with each PCN or MPCN.

To the extent practicable, temporary impact sites will be returned to pre-construction contours and substrate. Where applicable, banks shall be reseeded or replanted with native vegetation.

EPA shall make a written determination, within sixty days of receipt of a complete PCN or MPCN, whether compensatory mitigation measures are required to ensure the activity will have only minimal adverse effects, but no such determination is required for a project to begin work if otherwise in compliance with the NWP, this programmatic certification, and any applicable tribal or local authorities' requirements. Nevertheless, should compensatory mitigation be determined necessary by EPA, the mitigation becomes a condition of water quality certification and thus a condition of the Corps' permit. Failure to address an EPA mitigation requirement would therefore place a permitee out of compliance with their NWP and potentially subject to a range of Corps and EPA enforcement actions.

The need for post-project performance and/or mitigation monitoring and reporting (if applicable) will be determined by EPA on a case-by-case basis.

04. Prohibition on the Multiple Use of One NWP for a Single Project

Permittees may not use the same NWP multiple times (more than once) for one single and complete project at locations that do not have independent utility; to do so circumvents acreage limitations of the NWPs and may result in more than minimal adverse impacts to water quality and other ecosystem services. For example, under this certification, linear transportation projects on tribal lands must sum the impacts of each proposed crossing of individual waters of the U.S. and use that total to determine eligibility for NWP 14 (Linear Transportation Projects). If the acreage or linear foot impacts exceed the limits of the applicable NWP (or combination of applicable *different* NWPs), minimal adverse impacts to water quality may be exceeded and the project is not eligible for 401 certification under this programmatic action. Under these circumstances, projects must seek individual certification from EPA, and EPA may grant, grant with conditions, waive, or deny 401 certification of the project under the NWP. In the event of a denial, the NWP would not be available to the project proponent and therefore

applicants may need to apply to the Corps for authorization under a different General Permit, Letter of Permission, or Individual Permit as appropriate and determined by the Corps. EPA would review these other proposed permit actions for case-by-case certification. Note that, on a case-by-case basis, EPA may waive this General Condition and allow the use of multiple NWPs if the applicant so appeals, and demonstrates in their PCN or MPCN that authorization under the NWP will result in minimal and/or completely mitigated impacts to the aquatic environment, individually and cumulatively.

05. Use of Appropriate Fill Material

To the extent practicable, local, native materials should be used as fill material. (*e.g.*, soil, sand, or rock from the site or near the site; clean building materials or clean imported earthen fill). Inappropriate and unauthorized fill materials include, but are not limited to: tires, junked or abandoned vehicles, appliances, or other equipment; garbage; debris; oil drums or other chemically contaminated vessels; artificial turf; non-native vegetation; etc. If an applicant has any doubts or questions about the suitability of a proposed fill material, they should consult with the Corps and/or EPA prior to discharging into waters of the U.S. Such consultation may be via phone, or written letter, fax or electronic mail.

06. Dewatered Conditions

Discharges below the ordinary high water mark or within jurisdictional wetlands are not approved under this certification unless the discharge site is naturally dewatered (*e.g.,* seasonally dry), or dewatering has been authorized by the Corps, thereby avoiding direct discharge of pollutants into the water column. If the site is artificially dewatered, permitees shall, to the extent practicable, avoid dewatering techniques that require additional temporary or permanent discharges of fill material within jurisdictional waters (*e.g.,* coffer dams).

07. Fills Within Floodplains

Projects requiring NWP authorization for discharges of fill material within 100-year floodplains shall include in their PCN or MPCN a statement of compliance with Executive Order 11988 (Floodplain Management). However, discharges within the FEMA-mapped 100-year floodplain associated with residential and commercial development are not certified for use under the NWP program on tribal lands. The 100-year floodplain is based on hydrologic conditions prior to permit issuance.

08. Best Management Practices

Except as specified in the application, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes shall be allowed to enter into or be stored where it may be washed by rainfall or runoff into waters of the U.S.

Silt fences, straw wattles, and other techniques shall be employed as appropriate 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.

Permitees and their contractors shall take necessary steps to minimize channel and bank erosion within waters of the United States during and after construction.

A copy of the permit conditions shall be provided to all contractors and subcontractors, and will be posted visibly at project construction sites.

09. Transportation Projects
Permittees shall implement State transportation agencies' guidelines for construction sites to protect water quality and aquatic habitat. In California, CALTRANS has guidance in the *CALTRANS Stormwater Quality Manuals and Handbooks*[4]; in Nevada NDOT has guidance in their *NDOT Water Quality Manuals*[5]; and in Arizona, ADOT has guidance in their *Erosion and Pollution Control Manual*[6].

10. Inspections
The permittee shall allow EPA representatives to inspect the authorized activity and any mitigation areas at any time deemed necessary to determine compliance with the terms and conditions of the NWP verification.

11. Buffers
Unless specifically determined to be impracticable by the Corps and EPA, for NWPs 29, 39, 40, and 42, the permittee shall establish and maintain upland buffers in perpetuity between upland structures constructed as part of the project approved by the NWP and all preserved open waters, streams and wetlands, including created, restored, enhanced or preserved waters of the U.S. Buffers should be vegetated whenever practicable. Plantings in buffers should be dominated by native species, and not include any federal or state listed invasive or noxious weed species[7]. Except in unusual circumstances, as determined by the Corps and EPA, buffers shall be at least 50 feet in width from the lateral limits of the Corp's jurisdiction[8].

12. ***Protected Lands***
The permittee shall record the NWP verification with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title of interest in real property for areas designated to be preserved as part of compensatory mitigation for authorized impacts, including any associated covenants or restrictions.

13. ***Impaired Water Bodies***
If a proposed activity would result in dredge or fill in water bodies listed as impaired under Section 303(d) of the CWA, the PCN or MPCN must include specific measures that will be used to avoid exacerbating the impairment(s).[9]

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[4] http://www.dot.ca.gov/hq/construc/stormwater/manuals.htm
[5] http://www.nevadadot.com/About_NDOT/NDOT_Divisions/Engineering/Hydraulics/Water_Quality_BMP_Manuals.aspx
[6] http://www.azdot.gov/inside_adot/OES/Water_Quality/Stormwater/Manuals.asp
[7] http://plants.usda.gov/java/noxiousDriver
[8] ordinary high water mark in non-tidal and the mean higher high water line in tidal waters
[9] EPA Region 9 lists of impaired water bodies: http://www.epa.gov/region9/water/tmdl/303d.html

Specific Nationwide Permits

NWP-01 Aids to Navigation
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-02 Structures in Artificial Canals
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-03 Maintenance
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

"Currently serviceable structures" which may be maintained under this permit do not include undersized culverts or structures that cause or exacerbate channel incision, bank destabilization, and/or prevent fish and wildlife passage due to inadequate design or construction standards.

Certification of this permit is granted only if the existing structure proposed to be maintained demonstrably preserves (via design, flow modeling or other information in the PCN) the natural functions of the affected aquatic resource when the structure is fully operational. Otherwise, an alternative permit should be utilized as appropriate (*e.g.*, NWP 13 Bank Stabilization).

Where existing bank stabilization structures are to be maintained, bioengineered methods shall be utilized to the extent practicable in lieu of "rip-rap" or other hardscape engineered materials.

This permit shall not authorize the enlargement of, or increase in, the footprint of a structure within waters of the U.S., unless that enlargement consists of the replacement of existing artificial channel armoring materials (e.g., rip-rap, soil cement, etc.) with low-impact bioengineered natural channel design structures (e.g., log revetments, geotextile rolls/mats, root wads, brush mattresses, willow wattling, etc.)

NWP-04 Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-05 Scientific Measurement Devices
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-06 Survey Activities
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-07 Outfall Structures and Associated Intake Structures
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-08 Oil and Gas Structures on the Outer Continental Shelf
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-09 Structures in Fleeting and Anchorage Areas
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-10 Mooring Buoys
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-11 Temporary Recreational Structures
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-12 Utility Line Activities
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of waters of the U.S., including intermittent and ephemeral streams. Only the 300 linear foot limit may be waived by EPA upon approval, consistent with General Condition 02. *Waivers*.

Under this certification, NWP 12 can only be used once for a single and complete project having independent utility. When NWP 12 is proposed for multiple locations a written determination will be provided describing independent utility of each impact location for approval by EPA, consistent with General Condition 01. *Notification*.

Permittees are required to ensure that the construction of utility lines does not result in the draining of any water of the U.S., including wetlands. This may be accomplished through the use of clay blocks, bentonite, or other suitable material (as approved by EPA) to seal the trench.

For utility line trenches, during construction, the permittee shall remove and stockpile, separately, the top 6 – 12 inches of topsoil. Following installation of the utility line(s), the permittee shall replace the stockpiled topsoil on top and seed the area with native vegetation.

NWP-13 Bank Stabilization
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of waters of the U.S., including intermittent and ephemeral streams.

All bank stabilization activities under this permit shall involve 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, unless specifically determined to be impracticable by the EPA.

NWP-14 Linear Transportation Projects
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of non-tidal waters of the U.S., including intermittent and ephemeral streams, and 1/3 acre or 300 linear feet of tidal waters of the U.S.

NWP 14 can only be used once for a single and complete project having independent utility. When NWP 14 is proposed for multiple locations a written determination will be provided describing independent utility of each impact location for approval by EPA, consistent with General Condition 01. *Notification.*

All bank stabilization activities under this permit shall involve 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, unless specifically determined to be impracticable by the EPA.

NWP-15 U.S. Coast Guard Approved Bridges
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-16 Return Water from Upland Contained Disposal Areas
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-17 Hydropower Projects
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-18 Minor Discharges
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-19 Minor Dredging
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-20 Response Operations for Oil and Hazardous Substances
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-21 Surface Coal Mining Activities
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Before an applicant may use this permit, EPA must approve a compensatory mitigation plan sufficient to ensure impacts to aquatic resource functions are minimal.

NWP-22 Removal of Vessels
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-23 Approved Categorical Exclusions
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-24 Indian Tribe or State Administered Section 404 Programs
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-25 Structural Discharges
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-26 [Reserved]
This NWP is no longer in use. No certification is necessary.

NWP-27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities
Subject to the General Conditions above, and the following permit-specific condition, this NWP is hereby programmatically certified.

Upon review of a PCN or MPCN, consistent with General Condition 01. *Notification*, EPA will approve or deny on a case-by-case basis whether the proposed project will result in a net increase in aquatic resource functions and services, consistent with the NWP. An individual certification may be required in the event EPA denies approval of a waiver for this NWP.

NWP-28 Modifications of Existing Marinas
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-29 Residential Developments
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to 1/4 acre of impacts to non-tidal waters of the U.S. for single family houses, and the greater of 1/2 acre or 300 linear feet of impact to waters of the U.S. for multi-unit residential developments.

Under this certification, this permit will not be used to approve residential developments and their attendant features within the 100-year floodplain. The 100-year floodplain is determined based on hydrologic conditions at the time of the NWP application.

Recreational facilities such as playgrounds, playing fields, and golf courses are not authorized under this certification. These projects are separate and distinct from residential developments, are not required to be included in a residential development project for it to be practicable, and their construction within waters is normally avoidable.

NWP-30 Moist Soil Management for Wildlife
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-31 Maintenance of Existing Flood Control Facilities
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Upon review of a PCN, consistent with General Condition 01. *Notification*, EPA will approve or deny on a case-by-case basis whether the proposed project will result in minimal impacts to waters of the U.S. for projects that include removal of levee vegetation.

NWP-32 Completed Enforcement Actions
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-33 Temporary Construction, Access, and Dewatering
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-34 Cranberry Production Activities
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-35 Maintenance Dredging of Existing Basins
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-36 Boat Ramps
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to 50 cubic yards of fill and ramps that are 20 feet wide or less.

NWP-37 Emergency Watershed Protection and Rehabilitation
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-38 Cleanup of Hazardous and Toxic Waste
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-39 Commercial and Institutional Developments
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Under this certification, this permit will not be used to approve commercial and institutional developments and their attendant features within the 100-year floodplain. The 100-year floodplain is determined based on hydrologic conditions at the time of the NWP application.

Recreational facilities such as playgrounds, playing fields, and golf courses are not authorized under this certification. These projects are separate and distinct from commercial and institutional development, are not required to be included in such developments to be practicable, and their construction within waters is normally avoidable.

NWP-40 Agricultural Activities
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Construction of farmponds under this certification is limited to those that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters and eliminate federal regulatory jurisdiction.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

NWP-41 Reshaping Existing Drainage Ditches
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

All sidecast materials from excavation must be stored and/or disposed of within non-jurisdictional uplands under this certification. A statement must be included in the notification as to how the applicant's activities will improve water quality.

Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters to eliminate federal regulatory jurisdiction.

NWP-42 Recreational Facilities
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-43 Stormwater Management Facilities
Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from EPA in all cases. NWP authorization of constructing stormwater facilities within waters of the U.S. discourages applicants from using practicable construction options that locate stormwater retention and detention facilities "off line" from streams. For example, retention facilities are often built as sediment (or debris) basins within a stream. This practice includes constructing a dam in the stream, excavating out a basin, and regular sediment removal to maintain the structure. These facilities cause considerable and unnecessary damages to stream functions as retention facilities can be located "off line" by constructing a high flow diversion channel above the ordinary high water mark. If applicants can continue to use the traditional, more damaging practices that are sanctioned by this NWP, there is no incentive for these management practices to improve. We do not believe NWP-43 for new facilities complies with the CWA Section 404(b)(1) Guidelines.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to EPA for individual certification if this NWP is proposed to be used. Applicants can apply for an individual certification by providing the same content required in a MPCN described in General Condition 01. *Notification*, of this certification.

NWP-44 Mining Activities
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Applicants must ensure that mining activities (e.g., aggregate mining) approved by this NWP will not cause upstream head cutting or downstream incision. Notification to EPA shall include a narrative description and design drawing, when applicable, of any measure that will be implemented to comply with the condition.

When used for in-stream aggregate mining activities, compensatory mitigation is likely to be required due to extensive indirect impacts and temporal losses typical of this type of impact.

NWP-45 Repair of Uplands Damaged by Discrete Events
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

NWP-46 Discharges in Ditches
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

NWP-47 [Reserved]
This NWP is no longer in use. No certification is necessary.

NWP-48 Commercial Shellfish Aquaculture Activities
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Under this certification, impacts to submerged aquatic vegetation are prohibited, consistent with NWP 19. *Minor Dredging*, and NWP 36. *Boat Ramps*.

NWP-49 Coal Remining Activities
Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Unless approved by EPA, consistent with General Condition 02. *Waivers*, impacts under this permit are limited to the greater of 1/2 acre or 300 linear feet of impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams.

Applicants must provide information in the PCN illustrating that activities authorized under NWP-49 will result in a net increase in aquatic resource functions.

NWP-50 Underground Coal Mining Activities
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-51 Land-Based Renewable Energy Generation Facilities
Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-52 Water-Based Renewable Energy Generation Pilot Projects
Subject to the General Conditions above, this NWP is hereby programmatically certified.

Summary Table – EPA Region 9 §401 Certification of NWPs for projects on tribal lands

NWP	Certification Status			*Notification	Impact Limits	Notes
	General Conditions	Specific Conditions	Denied			
1	X			MPCN	None	
2	X			MPCN	None	
3	X	X		PCN or MPCN	Generally no increase in fill footprint	-No undersized structures -Bioengineering used whenever practicable
4	X			MPCN	None	
5	X			MPCN	25 cyds	
6	X			MPCN	25 cyds	
7	X			PCN	None	
8	X			PCN	None	
9	X			MPCN	None	
10	X			MPCN	None	
11	X			MPCN	None	
12	X	X		PCN or MPCN	**1/2 acre or 300'	-Only once per single and complete project with independent utility -Waiver approval required from EPA for 300'
13	X	X		PCN or MPCN	**1/2 acre or 300'	Waiver approval required from EPA
14	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal, 1/3 acre or 300' tidal	Only once per single and complete project with independent utility
15	X			MPCN	None	
16	X			MPCN	None	
17	X			PCN	None	
18	X			PCN or MPCN	1/10 acre or 25 cyds	
19	X			MPCN	25 cyds	
20	X			MPCN	None	
21	X	X		PCN	1/2 acre or 300'	EPA approves mitigation plan first
22	X			PCN or MPCN	None	
23	X			PCN or MPCN	None	
24	X			MPCN	None	
25	X			MPCN	None	
26						Reserved
27	X	X		PCN or MPCN	None	Approval required from EPA
28	X			MPCN	None	
29	X	X		PCN or MPCN	**1/4 acre for single house, 1/2 acre or 300' for multi-unit	-Waiver approval required from EPA -No recreational impacts authorized
30	X			MPCN	None	
31	X	X		PCN	None	Approval for levee vegetation removal required from EPA

32	X			MPCN	5 acres non-tidal or 1 acre tidal	
33	X			PCN	None	
34	X			PCN	10 acres	
35	X			MPCN	Lesser of previously authorized or controlling depths	
36	X			PCN or MPCN	50 cyds, 20'-wide ramp	Waiver approval required from EPA
37	X			PCN or MPCN	None	
38	X			PCN	None	
39	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
40	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
41	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal	Waiver approval required from EPA
42	X	X		PCN	1/2 acre or 300' non-tidal	
43			X	MPCN	N/A	Must apply to EPA for individual cert.
44	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
45	X	X		PCN or MPCN	**1/2 acre or 300'	Waiver approval required from EPA
46	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal	Waiver approval required from EPA
47						Reserved
48	X	X		PCN or MPCN	**Impacts to submerged aquatic veg. prohibited	
49	X	X		PCN or MPCN	**1/2 acre or 300' non-tidal	Waiver approval required from EPA
50	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
51	X	X		PCN or MPCN	1/2 acre or 300' non-tidal	Waiver approval required from EPA
52	X	X		PCN or MPCN	1/2 acre or 300'	Waiver approval required from EPA

***Notification Category: Pre-Construction Notification (PCN):**

- The Corps already requires a PCN, subject to criteria in the Corps' General Condition 31, because the project proposes use of a NWP that requires a PCN automatically or for specific activities authorized by the NWP. Applicants must simply forward a second copy of the PCN already required by the Corps to EPA Region 9 for notification. If a PCN is already required by the Corps and a waiver is proposed for impacts beyond those approved under this certification, applicants must include a written determination that the waiver will not result in more than minimal impacts to aquatic resource functions for EPA approval.

Notification Category: Modified Pre-Construction Notification (MPCN):

- The Corps does not require a PCN for any activities authorized under the NWP proposed for use, or because proposed impacts fall below impact limits identified in the NWP for a PCN. Applicants must forward a MPCN to EPA Region 9 for notification. If a waiver is proposed for impacts beyond those approved under this certification, applicants must include a written determination that the waiver will not result in more than minimal impacts to aquatic resource functions for EPA approval, subject to the criteria below.

**Impact limits are modified by EPA