



**US Army Corps
of Engineers®**
Albuquerque District

FINAL PUBLIC NOTICE

PUBLIC NOTICE FOR THE FINAL REGIONAL CONDITIONS IN NAVAJO NATION APPLICABLE TO THE 41 NATIONWIDE PERMITS PUBLISHED IN THE FEDERAL REGISTER ON DECEMBER 27, 2021

On December 27, 2021, the U.S. Army Corps of Engineers (Corps) published a final rule in the *Federal Register* (86 FR 73522) announcing the reissuance of 40 existing nationwide permits (NWP) and one new NWP as well as the reissuance of NWP general conditions and definitions with some modifications. These 41 NWP will go into effect on February 25, 2022, and they will expire on March 14, 2026:

- NWP 1 – Aids to Navigation
- NWP 2 – Structures in Artificial Canals
- NWP 3 – Maintenance
- NWP 4 – Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
- NWP 5 – Scientific Measurement Devices
- NWP 6 – Survey Activities
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 8 – Oil and Gas Structures on the Outer Continental Shelf
- NWP 9 – Structures in Fleeting and Anchorage Areas
- NWP 10 – Mooring Buoys
- NWP 11 – Temporary Recreational Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 15 – U.S. Coast Guard Approved Bridges
- NWP 16 – Return Water From Upland Contained Disposal Areas
- NWP 17 – Hydropower Projects
- NWP 18 – Minor Discharges
- NWP 19 – Minor Dredging
- NWP 20 – Response Operations for Oil or Hazardous Substances
- NWP 22 – Removal of Vessels
- NWP 23 – Approved Categorical Exclusions
- NWP 24 – Indian Tribe or State Administered Section 404 Programs
- NWP 25 – Structural Discharges
- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 28 – Modifications of Existing Marinas
- NWP 30 – Moist Soil Management for Wildlife
- NWP 31 – Maintenance of Existing Flood Control Facilities
- NWP 32 – Completed Enforcement Actions
- NWP 33 – Temporary Construction, Access, and Dewatering
- NWP 34 – Cranberry Production Activities

- NWP 35 – Maintenance Dredging of Existing Basins
- NWP 36 – Boat Ramps
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 38 – Cleanup of Hazardous and Toxic Waste
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 45 – Repair of Uplands Damaged by Discrete Events
- NWP 46 – Discharges in Ditches
- NWP 49 – Coal Remining Activities
- NWP 53 – Removal of Low-Head Dams
- NWP 54 – Living Shorelines
- NWP 59 – Water Reclamation and Reuse Facilities

The new NWP 59 authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities.

The December 27, 2021, *Federal Register* notice is available for viewing at <https://www.federalregister.gov/documents/2021/12/27/2021-27441/reissuance-and-modification-of-nationwide-permits>. As an alternative, interested parties can access the December 27, 2021, and January 13, 2021, final rules and related documents at: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>

It should be noted that on January 13, 2021, the U.S. Army Corps of Engineers (Corps) published a final rule in the Federal Register (86 FR 2744) announcing the reissuance of 12 existing nationwide permits (NWPs) and four new NWPs, as well as the reissuance of NWP general conditions and definitions with some modifications. These 16 NWPs went into effect on March 15, 2021 and will expire on March 14, 2026:

- NWP 12 – Oil or Natural Gas Pipeline Activities
- NWP 21 – Surface Coal Mining Activities
- NWP 29 – Residential Developments
- NWP 39 – Commercial and Institutional Developments
- NWP 40 – Agricultural Activities
- NWP 42 – Recreational Facilities
- NWP 43 – Stormwater Management Facilities
- NWP 44 – Mining Activities
- NWP 48 – Commercial Shellfish Mariculture Activities
- NWP 50 – Underground Coal Mining Activities
- NWP 51 – Land-Based Renewable Energy Generation Facilities
- NWP 52 – Water-Based Renewable Energy Generation Pilot Projects
- NWP 55 – Seaweed Mariculture Activities
- NWP 56 – Finfish Mariculture Activities
- NWP 57 – Electric Utility Line and Telecommunications Activities
- NWP 58 – Utility Line Activities for Water and Other Substances

The January 13, 2021, *Federal Register* notice is available for viewing at <https://www.federalregister.gov/documents/2021/01/13/2021-00102/reissuance-and-modification-of-nationwide-permits>.

The regional conditions for these 16 NWP's remain in effect and can be found at <https://www.spa.usace.army.mil/Missions/Regulatory-Program-and-Permits/NWP/>.

In accordance with the U.S. Environmental Protection Agency's (EPA's) current water quality certification (WQC) regulations at 40 Code of Federal Regulations (CFR) Part 121, the Albuquerque District has reviewed Clean Water Act Section (CWA) 401 WQC decisions received from certifying authorities. The Albuquerque District has determined that all accepted granted and denied WQC decisions in Navajo Nation satisfied the requirements set forth in 40 CFR 121.7. For a list of WQC decisions in Navajo Nation see the summary spreadsheet attached to this public notice.

If a permittee conducts activities under the terms and conditions of a NWP, the permittee must also comply with any applicable regional conditions. In Navajo Nation, the following regional conditions apply to the 41 NWP's listed above:

1. Pre-Construction Notification (PCN) for Dredge and Fill Activities in Lakes, Intermittent and Perennial Streams, and Special Aquatic Sites.

Notification to the District Engineer in accordance with general condition (GC) 32 is required for all proposed activities in lakes, intermittent and perennial streams, and special aquatic sites (including wetlands, riffle and pool complexes, and sanctuaries and refuges).

a. The permittee shall notify the U.S. Army Corps of Engineers (Corps) in accordance with GC 32 using either the South Pacific Division PCN or application form (ENG Form 4345) with an attachment providing information on compliance with all general and regional conditions. In addition, the application shall include:

- 1) A written statement describing how the activity has been designed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States (U.S.); and
- 2) Drawings, including plan and cross-section views, clearly depicting the location, size, and dimensions of the proposed activity, as well as the location of delineated waters of the U.S. on the site. The drawings shall contain a title block, legend and scale, amount (in cubic yards) and area (in acres) of fill in Corps jurisdiction, including both permanent and temporary fills/structures. The ordinary high-water mark or, if tidal waters, the mean high-water mark and high tide line, should be shown (in feet), based on National Geodetic Vertical Datum (NGVD) or other appropriate referenced elevation. Unless specifically waived by a specific Corps District, all drawings shall follow the South Pacific Division February 2016, *Updated Map and Drawing Standards for the South Pacific Division Regulatory Program*, or most recent update (available on the South Pacific Division website: <http://www.spd.usace.army.mil/Missions/Regulatory/PublicNoticesandReferences.aspx/>)

2. Timing and Dewatering

Unless determined to be not practicable by the Corps, no dredged and/or fill material shall be discharged within standing or flowing waters. For perennial or intermittent drainages (e.g., natural or relocated streams, creeks, rivers), this may be accomplished through construction during periods of low flow (winter months) or during the dry season.

When work is required to occur in flowing water, a dewatering plan is required to constitute a complete PCN. All dewatering structures and/or fills shall be removed within 30 days following completion of construction activities in WOTUS.

a. For all dewatering activities that propose structures or fill in WOTUS, a dewatering plan must contain the following:

- 1) Information on why it is not practicable to conduct construction activities during periods of low flow or during the dry season;
- 2) The proposed methods for dewatering;
- 3) The equipment that would be used to conduct the dewatering;
- 4) The length of time the area is proposed to be dewatered;
- 5) The area (in acres) and length (in linear feet) and locations of all structure(s) and/or fill in waters of the U.S.;
- 6) The expected extent of temporary impacts to downstream waters;
- 7) The method for removal of the structures and/or fill;
- 8) The method for how the proposed work shall be conducted to allow safe fish and wildlife passage during construction; and
- 9) The method for restoration of the waters of the U.S. affected by the structure or fill following construction.

3. Suitable Fill

Use of broken concrete as fill or bank stabilization material is prohibited unless the applicant demonstrates that its use is the only practicable material (with respect to cost, existing technology, and logistics). Any applicant who wishes to use broken concrete as bank stabilization must provide a PCN to the District Engineer in accordance with GC 32 along with justification for such use. Use of broken concrete with rebar, used tires (loose or formed into bales), or car bodies is prohibited in all WOTUS.

4. Compliance

The permittee shall allow Corps representatives to inspect the authorized activity and any avoidance, preservation and/or compensatory mitigation areas at any time deemed necessary to determine compliance with the terms and conditions of the NWP verification. The permittee will be notified by the Corps in advance of an inspection.



Navajo Nation Environmental Protection Agency
Surface and Ground Water Protection Department

P. O. Box 339, Window Rock, AZ 86515
Phone: 928-871-7701 • Fax: 928-871-7996



JONATHAN NEZ
President

MYRON LIZER
Vice-President

November 16, 2020

Kelly E. Allen
Chief, Regulatory Division
Albuquerque District
U.S. Army Corps of Engineers
4101 Jefferson Plaza, NE
Albuquerque, NM 87109

Re: U.S. Army Corps of Engineers request for water quality certification under § 401 of the CWA

Dear Kelly E. Allen:

The Navajo Nation Environmental Protection Agency (NNEPA) thanks the U.S. Army Corps of Engineers (Corps) for its October 15, 2020, letter, which states: "The Albuquerque, Los Angeles, and Sacramento Districts (Districts) request water quality certification under Section 401 of the Clean Water Act for the proposed issuance of those NWP's that may result in a discharge in waters of the United States in the Navajo Nation." The letter further states: "The Districts hereby request that the certifying authority review and take action on this Section 401 water quality certification request within the applicable reasonable period of time of 60 days from the date of receipt of this request." For procedural purposes, NNEPA will consider October 15, 2020, as the date of the Corps' request; sixty days from this date is December 14, 2020.

The United States Environmental Protection Agency (USEPA), Region IX, approved the Navajo Nation's eligibility for treatment as a state (TAS) on January 20, 2006, under the Clean Water Act (CWA) sections 303 and 401. Accordingly, NNEPA has assumed authority for all lands within (1) the formal Reservation, including the former Bennett Freeze area and excluding lands leased to the power plants, (2) the three satellite reservations of Alamo, Tohajiilee, and Ramah, and (3) all tribal trust lands in the Eastern Navajo Agency. On October 5, 2020, USEPA approved the Navajo Nation Surface Water Quality Standards of 2015 (NNSWQS 2015).

The Navajo Nation has reviewed the Corps' September 15, 2020, Federal Register notice: *Proposed to Reissue and Modify Nationwide Permits; Proposed Rule* (FR Notice). The purpose of this letter is to notify the Corps that the Navajo Nation does not waive water quality certification for any of the Nationwide Permits and therefore will require that the Navajo Nation certify each individual permit. Accordingly, each individual applicant will need to apply for a § 401 permit from NNEPA's Surface and Ground Water Protection Department's Water Quality Program (WQP). By reviewing and certifying each individual permit request, the Navajo Nation ensures that individuals that apply for a Nationwide Permit will comply with § 301, § 302, § 303, § 306, and § 307 of the CWA, the NNSWQS 2015, and other applicable Navajo Nation requirements. These certifications will provide reasonable assurance that the permitted activities will be conducted in a manner that will not violate NNSWQS 2015 or any provisions of the CWA. Therefore, we respectfully DENY water quality certification for ALL Nationwide Permits.

Anyone requesting to perform such activities must first obtain a project-specific Section 401 water quality certification from the NNEPA WQP before proceeding under a Nationwide Permit. NNEPA WQP staff will be available to work with your office regarding this matter.

If you have any questions, please contact Patrick Antonio, Program Manager/Principal Hydrologist, with the NNEPA Water Quality/NPDES Program at (928) 871-7185.

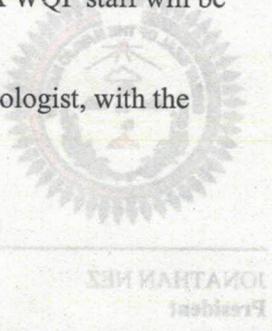
Sincerely,

naile

Ronnie Ben, Department Director
Navajo Nation Environmental Protection Agency
Surface and Ground Water Protection Department

Copy furnished:

- USEPA, Region IX – Thomas Torres, Director, Water Division, 75 Hawthorne Street, San Francisco, CA 94105.
- NNEPA/WQP & NPDES Programs, Post Office Box 339, Window Rock, AZ 86515 .
- file



Jonathan Nez
President
November 16, 2020
Kelly E. Allen
Chief, Regulatory Division
Abundance District
U.S. Army Corps of Engineers
4101 Jefferson Plaza, NE
Abundance, NM 87006
Re: U.S. Army Corps of Engineers request for water quality certification under § 401 of the CWA
Dear Kelly E. Allen:

The Navajo Nation Environmental Protection Agency (NNEPA) thanks the U.S. Army Corps of Engineers (Corps) for its October 12, 2020, letter, which states: "The Abundance, Los Angeles, and Sacramento Districts (Districts) request water quality certification under Section 401 of the Clean Water Act for the proposed issuance of those NWP's that may result in a discharge in waters of the United States in the Navajo Nation." The letter further states: "The Districts hereby request that the certifying authority review and take action on this Section 401 water quality certification request within the applicable reasonable period of time of 90 days from the date of receipt of this request." For procedural purposes, NNEPA will consider October 12, 2020, as the date of the Corps' request; sixty days from this date is December 14, 2020.

The United States Environmental Protection Agency (USEPA), Region IX, approved the Navajo Nation's eligibility for treatment as a state (TAS) on January 20, 2006, under the Clean Water Act (CWA) sections 303 and 401. Accordingly, NNEPA has assumed authority for all lands within (1) the former Reservations, including the former Bostwick Forest area and excluding lands leased to the power plants, (2) the three satellite reservations of Alamo, Tobiatic, and Kanjan, and (3) all tribal trust lands in the Eastern Navajo Agency. On October 2, 2020, USEPA approved the Navajo Nation Surface Water Quality Standards of 2012 (NNSWQS 2012).

The Navajo Nation has reviewed the Corps' September 12, 2020, Federal Register notice, Proposed to Reissue and Modify Nationwide Permits; Proposed Rule (R Notice). The purpose of this letter is to notify the Corps that the Navajo Nation does not waive water quality certification for any of the Nationwide Permits and therefore will require that the Navajo Nation certify each individual permit. Accordingly, each individual applicant will need to apply for a § 401 permit from NNEPA's Surface and Ground Water Protection Department's Water Quality Program (WQP). By reviewing and certifying each individual permit request, the Navajo Nation ensures that individuals that apply for a Nationwide Permit will comply with § 301, § 302, § 303, § 306, and § 307 of the CWA, the NNSWQS 2012, and other applicable Navajo Nation requirements. These certifications will provide reasonable assurance that the permitted activities will be conducted in a manner that will not violate NNSWQS 2012 or any provisions of the CWA. Therefore, we respectfully DENY water quality certification for ALL Nationwide Permits.



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

Brigadier General Paul E. Owen
Division Engineer, South Pacific Division
U.S. Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103-1398

Subject: Programmatic Clean Water Act, Section 401 Certification of the Draft 2020 Nationwide Permits for Tribal Lands within the Region 9 coverage area of the U.S. Environmental Protection Agency

Dear General Owen,

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 tribal lands (40 CFR 121.13(a)). We have reviewed the U.S. Army Corps of Engineers (Corps) Federal Register notice dated September 15, 2020, announcing the proposed issuance of the Corps' CWA Section 404 Nationwide Permits (NWP). We have also reviewed the regional conditions proposed for each District within the South Pacific Division and hereby transmit our programmatic water quality certification of these general permits. The enclosed conditions of the NWPs become binding requirements of NWPs issued for work on tribal lands within EPA Region 9.^{1,2} Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable projects.

Based on a thorough review of the materials provided by the Corps, EPA made a determination as to whether potential discharges authorized by the proposed NWPs will comply with applicable provisions of Sections 301, 302, 303, 306 and 307 of the CWA. In summary, of the 57 proposed active permits, EPA is conditionally certifying 19 NWPs, denying 12 NWPs, and waiving certification for 15 NWPs. The Corps is not requesting certification for 11 NWPs.³ The 401 certification conditions are necessary to assure that potential discharges authorized by the NWPs will comply with applicable water quality requirements. A table summarizing the certification status for each NWP, is included in the attached certification. The attached programmatic 401 certification will remain in effect for the authorization

¹ This water quality certification does not apply to activities proceeding in the territories of the 23 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, 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 the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk 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.

² Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, EPA sent a letter dated September 29, 2020, offering to consult with tribes in Region 9 on this certification. EPA did not receive any formal requests for consultation or any written comments on the draft certification.

³ The 11 NWPs are as follows: 1, 2, 8, 9, 10 11, 24, 28, 35, A, B.

period of the 2020 NWP's and will be re-evaluated when the NWP's are next proposed for reissuance and revisions in 2025.

If a project fails to meet the enclosed conditions, the applicant must contact EPA Region 9 for individual project certification. Please advise project proponents who seek authorization under the NWP's for individual project certification on tribal lands within EPA Region 9 to submit their questions, pre-filing meeting requests, and subsequent 401 certification requests when required to: R9-401-Certs@epa.gov.

Thank you for your ongoing partnership in implementing the regulatory programs of the CWA. Please contact me at (415) 972-3337 with any questions regarding this conditional certification, or have your staff contact Elizabeth Goldmann at (415) 972-3398 or goldmann.elizabeth@epa.gov.

Sincerely,

Tomás Torres
Director
Water Division

Enclosure:

U.S. Environmental Protection Agency Region 9's Programmatic Clean Water Act Section 401 Certification of the 2020 Nationwide Permits for Projects on Applicable Tribal Lands in California, Nevada, Arizona and Navajo Allottee Lands

cc:

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

Enclosure

U.S. Environmental Protection Agency Region 9's Programmatic Clean Water Act Section 401 Certification of the 2020 Nationwide Permits for Projects on applicable Tribal Lands in California, Nevada, Arizona and Navajo Allottee Lands

This Certification 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) CWA 404 Nationwide Permits (NWP) into waters of the United States that occur within applicable tribal lands 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, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, and D, and E. The Corps is not requesting certification for 11 NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B.

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, U.S. Environmental Protection Agency (EPA) Region 9 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 Corps CWA 404 NWPs listed above.¹

Project Description

The Corps is proposing to re-issue its existing NWPs 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 more

¹ This water quality certification does not apply to activities proceeding in the territories of the 23 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, 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 the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk 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.

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(s).

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

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

The project proponent for potential projects authorized under the NWP are encouraged to contact EPA Region 9 during the project planning phase if there are 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.

Prior to work commencing, project proponents should notify the appropriate Tribal Environmental Office.

Project proponents for potential projects should also notify the appropriate Tribal Office and EPA Region 9 if spills or unauthorized discharges occur during the project.

Pursuant to CWA section 308(a), EPA Region 9 representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP.

If you have questions regarding this certification, please contact EPA Region 9 at: R9-401-Certs@epa.gov.

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

On behalf the 125 federally recognized tribes with tribal lands within Region 9, CWA Section 401 certification, for the following proposed NWP, is granted with conditions. EPA Region 9 has determined that any discharge authorized under the following proposed NWP will comply with water quality requirements, as defined at 40 CFR 121.1(n), subject to the following conditions pursuant to Section 401(d).

NWP 5, 6, 7, 18, 19, 20, 23, 25, 27, 32, 33, 36, 37, 38, 41, 43, 45, 53, and E.

Condition 1 – Notification to EPA

All applicants must provide notice to EPA Region 9 prior to commencing construction to provide EPA Region 9 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 applicant should also provide the PCN to

Region 9. Within 30 days, EPA Region 9 will provide written verification to the applicant that the proposed project will not violate the water quality certification of the NWP.

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 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.²

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

Denied (121.7(e)(2))

On behalf of the 125 federally recognized tribes with tribal lands within EPA Region 9, EPA Region 9 cannot certify that the range of discharges from potential projects authorized under the following proposed NWP will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWP 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C and D, and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). In EPA's unique role certifying on behalf of a tribe, in a tribal jurisdiction where EPA is not the regulator, EPA lacks important information about tribal water resources. In the case of the 125 federally

²For example, Granite Creek in Arizona, a 303(d) listed as impaired for *e. coli*, runs through Yavapai Prescott Indian Reservation.

recognized tribes with tribal lands within EPA Region 9, EPA Region 9 lacks sufficient information on sensitive resources that may exist on these tribal lands, potential impaired waters on these tribal lands, and potential cultural importance of the water resources on these tribal lands. Additional information on these specific subjects would be needed for EPA Region 9 to assure that the range of discharges from potential projects authorized under NWPs 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C, and D will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 9 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 9 is therefore denying certification.

Waived (121.9(a)(1)):

On behalf of the 125 federally recognized tribes with tribal lands within U.S. Environmental Protection Agency (EPA) Region 9, EPA Region 9 is expressly waiving its authority to act on the CWA Section 401 certification request for the following proposed NWPs:

NWPs 4, 15, 16, 17, 21, 22, 30, 31, 34, 46, 48, 49, 50, 52, 54

Summary Table – EPA Region 9 CWA § 401 Certification of NWPs

NWP	Certification Status			NWPs the Corps is not Requesting Certification	Specific Conditions
	Certified with Conditions	Denial	Waived		
1				X	
2				X	
3		X			
4			X		
5	X				Notice to EPA, NWP not applicable to 303(d) listed waters
6	X				Notice to EPA, NWP not applicable to 303(d) listed waters
7	X				Notice to EPA, NWP not applicable to 303(d) listed waters
8				X	
9				X	
10				X	
11				X	
12		X			
13		X			
14		X			

USEPA Region 9 Programmatic CWA§401 Certification of the 2020 NWP for projects on applicable tribal lands

15			X		
16			X		
17			X		
18	X				Notice to EPA, NWP not applicable to 303(d) listed waters
19	X				Notice to EPA, NWP not applicable to 303(d) listed waters
20	X				Notice to EPA, NWP not applicable to 303(d) listed waters
21			X		
22			X		
23	X				Notice to EPA, NWP not applicable to 303(d) listed waters
24				X	
25	X				Notice to EPA, NWP not applicable to 303(d) listed waters
26				Reserved. This NWP is no longer in use.	
27	X				Notice to EPA, NWP not applicable to 303(d) listed waters
28				X	
29		X			
30			X		
31			X		
32	X				Notice to EPA, NWP not applicable to 303(d) listed waters
33	X				Notice to EPA, NWP not applicable to 303(d) listed waters
34			X		
35				X	
36	X				Notice to EPA, NWP not applicable to 303(d) listed waters
37	X				Notice to EPA, NWP not applicable to 303(d) listed waters
38	X				Notice to EPA, NWP not applicable to 303(d) listed waters
39	X				Notice to EPA, NWP not applicable to 303(d) listed waters
40		X			
41	X				Notice to EPA, NWP not applicable to 303(d) listed waters
42		X			
43		X			
44		X			

USEPA Region 9 Programmatic CWA§401 Certification of the 2020 NWP for projects on applicable tribal lands

45	X				Notice to EPA, NWP not applicable to 303(d) listed waters
46			X		
47				Reserved. This NWP is no longer in use.	
48			X		
49			X		
50			X		
51		X			
52			X		
53	X				Notice to EPA, NWP not applicable to 303(d) listed waters
54			X		
A				X	
B				X	
C		X			
D		X			
E	X				Notice to EPA, NWP not applicable to 303(d) listed waters