



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

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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