



US Army Corps
of Engineers®
St. Paul District

SPECIAL PUBLIC NOTICE

Reference: 2021 Nationwide Permits (NWP)

Date: February 8, 2022

Update on the Regional Conditions, Water Quality Certification (WQC) Decisions, and Coastal Zone Management Act (CZMA) Consistency Decisions, for the 2021 NWPs in Minnesota and Wisconsin

2021 Nationwide Permits (NWP) Background and Updates

In the September 15, 2020, issue of the Federal Register (85 FR 57298), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 52 existing NWPs and issue five new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the St. Paul District issued a public notice on September 18, 2020. The St. Paul District's public notice sought to solicit comment on the District's proposal to (re)issue 43 NWPs and associated regional conditions and revoke 14 NWPs within Minnesota and Wisconsin.

In a final rule published in the Federal Register on January 13, 2021 (86 FR 2744), the Corps reissued 12 existing NWPs and issued four new NWPs. In that final rule, the Corps also reissued the NWP general conditions and definitions. Eight (8) of these 16 NWPs and the NWP general conditions and definitions went into effect in St. Paul District on March 15, 2021 and will expire on March 14, 2026. The St. Paul District's March 4, 2021 public notice provided the regional conditions, water quality certifications, and Coastal Zone Management Act (CZMA) consistency decisions applicable to these 8 NWPs in Minnesota and Wisconsin, as well as identified 8 NWPs revoked in Minnesota and Wisconsin.

In a final rule published in the Federal Register on December 27, 2021 (86 FR 73522), the Corps reissued the remaining 40 existing NWPs and issued one new NWP. The NWP general conditions and definitions in the January 13, 2021 final rule apply to the 41 NWPs that were published in the December 27, 2021 issue of the Federal Register. Thirty-four (34) of the remaining 41 NWPs will go into effect in St. Paul District on February 25, 2022 and will expire on March 14, 2026. After the issuance of the final NWPs, the St. Paul District considered the need for regional conditions for these NWPs.

As of **February 25, 2022** when the remaining 2021 NWPs go into effect, **the St. Paul District will authorize activities under the following 2021 NWPs: 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 22, 25, 27, 28, 30, 31, 32, 33, 35, 36, 37, 38, 41, 45, 46, 53, 54, and 59.** These thirty-four (34) 2021 NWPs are in addition to the 8 NWPs (NWPs 29, 39, 40, 42, 43, 44, 51, 52) that went into effect in St. Paul District on March 15, 2021. For the 2021 NWPs, the St. Paul District has revoked NWPs 8, 14, 15, 23, 24, 34, and 49, in addition to NWPs 12, 21, 48, 50, 55, 56, 57, and 58 that were revoked previously. The 2021 regional conditions, water quality certifications, and CZMA consistency decisions applicable to these 2021 NWPs are provided in this public notice and are outlined in the enclosures to this document.

Status of Existing Authorizations Under 2017 NWPs

When the Corps modifies existing NWPs, the modified NWPs replace the prior versions of those NWPs, so that there are not two sets of NWPs in effect at the same time. As long as activities verified under the 2017 NWP(s) continue to comply with the 2021 NWP(s) terms and conditions (including 2021 water quality certification conditions) those activities continue to be authorized by the applicable NWP(s) until March 18, 2022. Activities that were authorized by the 2017 NWPs but no longer qualify

for authorization under any of the 2021 NWP(s), continue to be authorized by the 2017 NWP(s) for 12 months as long as those activities have commenced (i.e. are under construction) or are under contract to commence on or prior to the NWP expiration date. New verifications or reverifications under the 2021 NWPs have an expiration date of March 14, 2026.

2021 NWPs to be Revoked

The District is revoking the following 2021 NWPs in both Minnesota and Wisconsin: 8, 14, 15, 23, 24, 34, and 49. As of March 15, 2021 the following 2021 NWPs were revoked in Minnesota and Wisconsin: 12, 21, 48, 50, 55, 56, 57, and 58. NWPs 8 (Oil and Gas Structures on the Outer Continental Shelf), 21 (Surface Coal Mining Activities), 24 (Indian Tribe or State Administered Section 404 Programs), 48 (Commercial Shellfish Mariculture Activities), 49 (Coal Remining Activities), 50 (Underground Coal Mining Activities), 55 (Seaweed Mariculture Activities), and 56 (Finfish Mariculture Activities) authorize activities that are not applicable or do not occur in either state. NWP 12 (Oil and Natural Gas Pipelines), 14 (Linear Transportation Projects), 15 (US Coast Guard Approved Bridges), 23 (Approved Categorical Exclusions), 57 (Electric Utility Line and Telecommunications Activities), and 58 (Utility Line Activities for Water and Other Substances) are currently covered by regional general permits that better balance resource protection and permit efficiency. Activities eligible for NWP 34 (Cranberry Production Activities) are more appropriate to be considered through the individual permit process.

2021 Regional Conditions

Regional conditions provide additional protection for the aquatic environment by ensuring that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. Regional conditions will also help ensure protection of high value waters within the St. Paul District. On February 4, 2022 the Mississippi Valley Division Engineer approved regional conditions for the remaining 2021 NWPs in Minnesota and Wisconsin, including within the exterior boundaries of federally recognized Indian reservations. Of these 8 regional conditions, 5 apply to all activities authorized by the 2021 NWPs and three are NWP-specific. The regional conditions for the 2021 NWPs are included in this notice and are available at the web page listed in the further information section below. These regional conditions and the WQC decisions and conditions discussed below will take effect on February 25, 2022 for the remaining 2021 NWPs published in the Federal Register on December 27, 2021 (86 FR 73522).

2021 Water Quality Certifications (WQC)

All activities authorized by the NWPs under Section 404 of the Clean Water Act require Section 401 Water Quality Certification (WQC) from the applicable Section 401 certifying authority (CA). For each NWP the CA may waive, deny, or issue the WQC (with or without conditions).

The St. Paul District received final WQC decisions from the MPCA, WDNR, EPA, Bad River Band of Lake Superior Chippewa, Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa, Lac du Flambeau Band of Lake Superior Chippewa, and Sokaogon Chippewa Community of Wisconsin (Sokaogon Mole Lake Chippewa Community) for the 2021 NWPs (see enclosed Table 1 and Water Quality Certification Decisions). These Section 401 WQC decisions were accepted by the Mississippi Valley Division.

The EPA modified their prior 2021 NWP WQC decision and the WDNR altered the cover letter of their prior 2021 NWP WQC decision (that were announced in St. Paul District's March 4, 2021 public notice) for the remaining 34 NWPs (86 FR 73522, 27 DEC 2021) that go into effect on February 25,

2022 in St. Paul District. These updated WQC decisions as well as the WQC decisions that remain the same for all 2021 NWP's in St. Paul District are provided in this public notice.

A WQC condition cannot alter the administration of the NWP's in a manner that is inconsistent with Corps requirements (e.g. change PCN or mitigation requirements in a way that is inconsistent with the Corps review). The District will continue to implement the NWP's consistent with regulations governing the regulatory program and with the rule establishing the NWP's.

2021 Coastal Zone Management Act (CZMA)

The September 15, 2020 Federal Register notice on the NWP's served as the Corps' determination that the activities authorized by these NWP's are, to the maximum extent practicable, consistent with the state CZMA program. The Minnesota Department of Natural Resources and Wisconsin Department of Administration (DOA) concurred with the CZMA consistency determination, without conditions, on December 4, 2020 and December 16, 2020, respectively, for these NWP's.

Further Information and Questions

Information concerning the nationwide permits and conditions, and additional information on the permitting process may be found on the St. Paul District's website located at: <https://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/>. Questions concerning implementation of the NWP's and conditions or the regional conditions within the St. Paul District can be directed to Meghan Brown (651) 290-5688 or Meghan.J.Brown@usace.army.mil

2021 Nationwide Permits (NWP)

St. Paul District Regional Conditions for Minnesota and Wisconsin

To qualify for NWP authorization, the prospective permittee must comply with the following regional conditions, as applicable, in addition to any case specific conditions imposed by the division engineer. The St. Paul District Regulatory website will provide current information regarding NWPs and the necessary 401 Water Quality Certifications at

<https://www.mvp.usace.army.mil/missions/regulatory/nwp/>. Every person who wishes to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

The following NWPs have been revoked and are not available for use in St. Paul District: NWPs 8, 12, 14, 15, 21, 23, 24, 34, 48, 49, 50, 55, 56, 57, and 58.

Information on other permits available for use in St. Paul District can be found at:

<https://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/>.

Any regulated activity eligible for authorization under a St. Paul District Special Area Management Plan (SAMP) general permit is not eligible for authorization by NWPs.

The following regional conditions are applicable to all NWPs:

- A. **Linear Projects**: No linear utility or linear transportation projects are eligible for authorization by NWPs. These projects will be reviewed for authorization under the St. Paul District's regional general permits or an individual permit.
- B. **Temporary Impacts**: All regulated temporary impacts to waters of the U.S. must comply with the following criteria:
 - (1) If the temporary impacts in waters of the U.S., including wetlands, that occur as a result of the regulated activity would remain in place for longer than 90 days between May 15 and November 15, a PCN is required.
 - (2) Any PCN with temporary impacts must specify how long the temporary impact will remain and include a restoration and re-vegetation plan showing how all temporary fills and structures will be removed and the area restored to preconstruction contours and elevations. Native, non-invasive vegetation must be used unless otherwise authorized by a Corps NWP verification.
- C. **PCNs for Apostle Islands National Lakeshore and Madeline Island**: A project proponent must notify the District by submitting a PCN if the regulated activity would result in excavation, fill, or the placement of a new structure within the boundaries of Apostle Islands National Lakeshore and Madeline Island in Wisconsin. Regulated activities authorized under NWP 3 (Maintenance) are not subject to this condition unless they include bank shaping or excavation.
- D. **Calcareous fens**:
 - WISCONSIN**: No work in a calcareous fen is authorized by a NWP unless the Wisconsin Department of Natural Resources (WI DNR) has approved a permit for the proposed regulated activity. Project proponents must provide evidence of an approved permit to the District.
 - MINNESOTA**: No work in a calcareous fen is authorized by a NWP unless the Minnesota Department of Natural Resources (MN DNR) has approved a calcareous fen management plan specific to a project that otherwise qualifies for authorization by a NWP. Project proponents must provide evidence of an approved fen management plan to the District. A list of known Minnesota calcareous fens can be found at: http://files.dnr.state.mn.us/eco/wetlands/calcareous_fen_list.pdf.

- E. **Special Aquatic Resources:** A project proponent must notify the District by submitting a PCN if a regulated activity would occur in any of the following aquatic resources:
- (1) State-designated wild rice waters^{1,2};
 - (2) Bog wetland plant communities^{1,3};
 - (3) Fens^{1,3};
 - (4) Coastal plain marshes^{1,4};
 - (5) Interdunal wetlands^{1,4};
 - (6) Great Lakes ridge and swale complexes^{1,4};
 - (7) Aquatic resources within Lake Superior National Estuarine Research Reserve;
 - (8) Ramsar wetland sites, including: the Horicon Marsh, Upper Mississippi River Floodplain Wetland, Kakagon and Bad River Slough, Door Peninsula Coastal Wetlands, Chiwaukee Illinois Beach Lake Plain, and Lower Wisconsin Riverway. The complete up to date Ramsar list is available at <https://rsis Ramsar.org>.

The following regional conditions are applicable to a specific NWP:

- F. **NWP 52. Water-Based Renewable Energy Generation Pilot Projects:** NWP 52 does not authorize structures or work in Lake Michigan and Lake Superior within the geographic regulatory boundaries of the St. Paul District.
- G. **NWP 3, 33, and 41. Aquatic Resource Impacts:** A project proponent must notify the District by submitting a PCN if a regulated activity, including but not limited to, filling, flooding, excavating, or drainage of waters of the U.S., involves:
- (1) A permanent loss of greater than 1/10 acre of waters of the U.S. for NWP 3 and 41; or
 - (2) over 1/2 acre of temporary impacts to waters of the U.S. for NWP 3, 33, and 41.
- H. **NWP 27. Aquatic Habitat Restoration, Establishment and Enhancement Activities:** NWP 27 does not authorize the permanent conversion of forested, bog, fen, sedge meadow, or shrub-carr wetlands to other plant communities. A project proponent may request, in writing, a waiver from this condition from the District. The waiver will only be issued if it can be demonstrated that the conversion would restore wetland plant communities to the pre-settlement condition or a watershed approach and that the current landscape and hydrologic conditions would sustain the targeted community.

¹ Information about Wisconsin plant community types for 1-6 above may be obtained from: <http://dnr.wi.gov/topic/EndangeredResources/Communities.asp?mode=group&Type=Wetland>

² Information regarding wild rice waters and their extent may be obtained from: <https://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html> and <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld> in Minnesota, <https://dnr.wisconsin.gov/topic/wildlifehabitat/rice.html> in Wisconsin, and an interactive map is provided at: <http://maps.glifwc.org/> (under Treaty Resources – Gathering).

³ Additional information on bog and fen communities can be found at: <http://www.mvp.usace.army.mil/missions/regulatory.aspx> and in Minnesota at <http://www.dnr.state.mn.us/npc/classification.html>.

⁴ Coastal plain marshes, interdunal wetlands, and Great Lakes ridge and swale complexes are specific to Wisconsin

Table 1: 2021 Section 401 Water Quality Certification (WQC) Decision Status in Minnesota and Wisconsin

Nationwide Permit Number and Name	2021 Federal Register Reference	District Status	Statutory Authority	MPCA	WDNR	EPA*	Bad River Band	Fond du Lac Band	Grand Portage Band	Lac du Flambeau Band	Sokaogan Chippewa Community
NWP 1 – Aids to Navigation	86 FR 73522, 27 DEC 2021	reissued	10	-	-	-	D	-	-	-	C
NWP 2 – Structures in Artificial Canals	86 FR 73522, 27 DEC 2021	reissued	10	-	-	-	D	-	-	-	C
NWP 3 – Maintenance	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	D
NWP 4 – Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	C
NWP 5 – Scientific Measurement Devices	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	D
NWP 6 – Survey Activities	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	D
NWP 7 – Outfall Structures and Associated Intake Structures	86 FR 73522, 27 DEC 2021	reissued	10/404	P**	P	P	D	P	P	D	D
NWP 8 – Oil and Gas Structures on the Outer Continental Shelf	86 FR 73522, 27 DEC 2021	revoked	10	-	-	-	-	-	-	-	-
NWP 9 – Structures in Fleeting and Anchorage Areas	86 FR 73522, 27 DEC 2021	reissued	10	-	-	-	D	-	-	-	C
NWP 10 – Mooring Buoys	86 FR 73522, 27 DEC 2021	reissued	10	-	-	-	D	-	-	-	C
NWP 11 – Temporary Recreational Structures	86 FR 73522, 27 DEC 2021	reissued	10	-	-	-	D	-	-	C	D
NWP 12 – Oil or Natural Gas Pipeline Activities	86 FR 2744, 13 JAN 2021	revoked	10/404	-	-	-	-	-	-	-	-
NWP 13 – Bank Stabilization	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	P	D	P	P	D	D
NWP 14 – Linear Transportation Projects	86 FR 73522, 27 DEC 2021	revoked	10/404	-	-	-	-	-	-	-	-
NWP 15 – U.S. Coast Guard Approved Bridges	86 FR 73522, 27 DEC 2021	revoked	404	-	-	-	-	-	-	-	-
NWP 16 – Return Water From Upland Contained Disposal Areas	86 FR 73522, 27 DEC 2021	reissued	404	P**	P**	C	D	P	P	D	D
NWP 17 – Hydropower Projects	86 FR 73522, 27 DEC 2021	reissued	404	P	D	D	D	P	P	D	D
NWP 18 – Minor Discharges	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P**	C	D	P	P	D	D
NWP 19 – Minor Dredging	86 FR 73522, 27 DEC 2021	reissued	10/404	P**	P	C	D	P	P	D	D
NWP 20 – Response Operations for Oil or Hazardous Substances	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	CWC	P	P	P	C
NWP 21 – Surface Coal Mining Activities	86 FR 2744, 13 JAN 2021	revoked	10/404	-	-	-	-	-	-	-	-
NWP 22 – Removal of Vessels	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	D
NWP 23 – Approved Categorical Exclusions	86 FR 73522, 27 DEC 2021	revoked	10/404	-	-	D	-	-	-	-	-
NWP 24 – Indian Tribe or State Administered Section 404 Program	86 FR 73522, 27 DEC 2021	revoked	10	-	-	-	-	-	-	-	-
NWP 25 – Structural Discharges	86 FR 73522, 27 DEC 2021	reissued	404	P	P	D	D	P	P	D	D
NWP 27 – Aquatic Habitat Restoration, Enhancement, and Establishment Activities	86 FR 73522, 27 DEC 2021	reissued	10/404	P**	P	P	D	P	P	D	D
NWP 28 – Modifications of Existing Marinas	86 FR 73522, 27 DEC 2021	reissued	10	-	-	-	D	-	-	-	C
NWP 29 – Residential Developments	86 FR 2744, 13 JAN 2021	reissued	10/404	P	D	CWC	D	P	P	D	D
NWP 30 – Moist Soil Management for Wildlife	86 FR 73522, 27 DEC 2021	reissued	404	P	P	C	D	P	P	D	D
NWP 31 – Maintenance of Existing Flood Control Facilities	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	C
NWP 32 – Completed Enforcement Actions	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	D	D	P	P	D	D
NWP 33 – Temporary Construction, Access, and Dewatering	86 FR 73522, 27 DEC 2021	reissued	10/404	P	D	C	D	P	P	D	D
NWP 34 – Cranberry Production Activities	86 FR 73522, 27 DEC 2021	revoked	404	-	-	-	-	-	-	-	-
NWP 35 – Maintenance Dredging of Existing Basins	86 FR 73522, 27 DEC 2021	reissued	10	-	-	-	D	-	-	-	C
NWP 36 – Boat Ramps	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	D
NWP 37 – Emergency Watershed Protection and Rehabilitation	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	CWC	P	P	D	C
NWP 38 – Cleanup of Hazardous and Toxic Waste	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	C
NWP 39 – Commercial and Institutional Developments	86 FR 2744, 13 JAN 2021	reissued	10/404	P	D	CWC	D	P	P	D	D
NWP 40 – Agricultural Activities	86 FR 2744, 13 JAN 2021	reissued	404	P	D	CWC	D	P	P	D	D
NWP 41 – Reshaping Existing Drainage and Irrigation Ditches	86 FR 73522, 27 DEC 2021	reissued	404	P	P	C	D	P	P	D	D
NWP 42 – Recreational Facilities	86 FR 2744, 13 JAN 2021	reissued	404	P	P**	CWC	D	P	P	D	D
NWP 43 – Stormwater Management Facilities	86 FR 2744, 13 JAN 2021	reissued	404	P	P**	CWC	D	P	P	D	D
NWP 44 – Mining Activities	86 FR 2744, 13 JAN 2021	reissued	10/404	P	D	D	D	P	P	D	D
NWP 45 – Repair of Uplands Damaged by Discrete Events	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	C	D	P	P	D	D
NWP 46 – Discharges in Ditches	86 FR 73522, 27 DEC 2021	reissued	404	P	P**	D	D	P	P	D	D
NWP 48 – Commercial Shellfish Mariculture Activities	86 FR 2744, 13 JAN 2021	revoked	10/404	-	D	D	D	-	-	-	C
NWP 49 – Coal Remining Activities	86 FR 73522, 27 DEC 2021	revoked	10/404	-	-	-	-	-	-	-	-
NWP 50 – Underground Coal Mining Activities	86 FR 2744, 13 JAN 2021	revoked	10/404	-	-	-	-	-	-	-	-
NWP 51 – Land-Based Renewable Energy Generation Facilities	86 FR 2744, 13 JAN 2021	reissued	10/404	P	P**	CWC	D	P	P	D	D
NWP 52 – Water-Based Renewable Energy Generation Pilot Projects	86 FR 2744, 13 JAN 2021	reissued	10/404	P	D	D	D	P	P	D	D
NWP 53 – Removal of Low-Head Dams	86 FR 73522, 27 DEC 2021	reissued	10/404	P**	P**	D	D	P	P	D	D
NWP 54 – Living Shorelines	86 FR 73522, 27 DEC 2021	reissued	10/404	P	P	D	D	P	P	D	C
NWP 55 – Seaweed Mariculture Activities	86 FR 2744, 13 JAN 2021	revoked	10	-	-	-	-	-	-	-	-
NWP 56 – Finfish Mariculture Activities	86 FR 2744, 13 JAN 2021	revoked	10	-	-	-	-	-	-	-	-
NWP 57 – Electric Utility Line and Telecommunications Activities	86 FR 2744, 13 JAN 2021	revoked	10/404	-	-	-	-	-	-	-	-
NWP 58 – Utility Line Activities for Water and Other Substances	86 FR 2744, 13 JAN 2021	revoked	10/404	-	-	-	-	-	-	-	-
NWP 59 – Water Reclamation and Reuse Facilities	92 FR 73522, 27 DEC 2021	reissued	10/404	P	P**	C	D	P	P	D	D

*EPA provides WQC decisions for 18 tribes in Minnesota and Wisconsin that do not or did not have Treatment as a State (TAS) status. The EPA's Dec 18, 2020 WQC decision is applicable to the 2021 NWP's referenced in the 13 Jan 2021 FR. The EPA's Oct 15, 2021 WQC decision is applicable to the 2021 NWP's referenced in the 27 DEC 2021 FR.

**in addition to the WQC general conditions, NWP-specific WQC conditions exist

C = Certified without Conditions
CWC = Certified with Conditions
P = Partial Certification with Conditions and Partial Denial of Certification
D = Denial of Certification

401 Water Quality Certification Decisions within the States of Minnesota and Wisconsin for the 2021 NWP

Issued by:

- A. Minnesota PCA for the 2021 NWP**
- B. Wisconsin DNR for the 2021 NWP announced in the January 13, 2021 issue of the *Federal Register* (86 FR 2744)**
- C. Wisconsin DNR for the 2021 NWP announced in the December 27, 2021 issue of the *Federal Register* (86 FR 73522)**
- D. EPA for the 2021 NWP announced in the 13 Jan 2021 issue of the *Federal Register* (86 FR 2744)**
- E. EPA for the 2021 NWP announced in the December 27, 2021 issue of the *Federal Register* (86 FR 73522)**
- F. Bad River Band for the 2021 NWP**
- G. Fond du Lac Band for the 2021 NWP**
- H. Grand Portage Band for the 2021 NWP**
- I. Lac du Flambeau Band for the 2021 NWP**
- J. Sokaogan (Mole Lake) Chippewa Community for the 2021 NWP**

A.

**401 Water Quality Certification
Decision for the State of Minnesota**

Issued by the Minnesota Pollution
Control Agency

Applicable to 2021 NWP's

December 21, 2020

Chad Konickson
U.S. Army Corps of Engineers
Regulatory Branch Chief, St. Paul District
180 Fifth Street East, Suite 700
St. Paul, MN 55101-1678

RE: Nationwide Permits – Clean Water Act Section 401 Water Quality Certification

Dear Chad Konickson:

This letter is submitted by the Minnesota Pollution Control Agency (MPCA) under authority of Section 401 of the Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.), Minn. Stat. chs. 115 and 116 and Minn. R. chs. 7001.1400-7001.1470, 7050, 7052, and 7053. The MPCA examined the information furnished by the U.S. Army Corps of Engineers (USACE), including the proposed Nationwide Permits (NWP) issued by USACE Headquarters on September 15, 2020, and regional conditions proposed by USACE St. Paul District September 18, 2020, and proposes requiring conditions through the 401 Water Quality Certification (401 Certification or Certification).

Exclusion from 401 Certification of NWPs

1. Physical Alterations of 300 or More Linear Feet of a Stream or River

The MPCA's antidegradation standard (Minn. R. 7050.0270) requires that the MPCA issue control documents that protect and maintain existing and beneficial uses. For this reason, the MPCA denies certification without prejudice for projects resulting in permanent degradation (impacts longer than 12 months) for projects that will cause a physical alteration of 300 or more linear feet of a stream or river that are not covered under NWP 13, Bank Stabilization or projects that will result in a functional lift of waters impacted by the projects activities. Minn. R. ch. 7050.0255 subp. 30, defines "physical alteration" as "a physical change that degrades surface waters such as the dredging, filling, draining, or permanent inundation of a surface water." *The MPCA Authority: Minn. R. ch. 7050.0255. Physical alterations to smaller streams can potentially have significant impact on overall water quality. The MPCA must individually review these projects for compliance with Water Quality Standards (WQS).*

2. Exceptional Aquatic Life Use Waters (Attachment 1)

The MPCA's antidegradation standard (Minn. R. 7050.0270) requires that the MPCA issue control documents that protect and maintain existing and beneficial uses. For this reason, the MPCA denies certification without prejudice for projects resulting in permanent degradation (impacts longer than 12 months) for projects that will cause a physical alteration of Exceptional Aquatic Life Use Waters. Exceptional Aquatic Life Use Waters are very susceptible to disturbance. An increase in water temperature or sedimentation can effectively destroy this unique water habitat. Projects that will potentially impact Exceptional Aquatic Life Use Waters directly or indirectly by impacting stream hydrology, connectivity, chemistry and habitat are required to

obtain an individual Certification. *The MPCA Authority: Minn. R. ch. 7050.0222 subps. 2c, 3c and 4c.*

Because Exceptional Aquatic Life Use Waters are very susceptible to disturbance, the MPCA must individually review projects for compliance with WQS for the following water bodies:

More information on the water bodies is located at the 401 webpage:

<https://www.pca.state.mn.us/water/clean-water-act-section-401-water-quality-certifications>.

	Water Body Name	Miles	Reach
1	Cross River	14.84	Fourmile Cr. To Lk Superior
2	Greenwood River	7.29	Greenwood Lk to Brule R
3	Irish Creek	7.07	Headwaters to Swamp River Reservoir
4	Kimball Creek	8.98	Headwaters to Lk Superior
5	Manitou River	11.07	S Br Manitou R to Lk Superior
6	Mistletoe Creek	4.56	Halls Pond to Poplar R
7	Two Island River	11.44	Unnamed Cr to Lk Superior
8	Little Devil Track River	2.71	Unnamed Cr to Devil Track R
9	Heartbreak Creek	3.79	Unnamed Cr to Temperance R
10	Houghtaling Creek	1.7	Unnamed Cr to Unnamed Cr
11	Caribou River	5.51	Amenda Cr to Unnamed Cr
12	Caribou River	1.18	Unnamed Cr to Unnamed Cr
13	Crown Creek	1.68	Fry Cr to Unnamed Cr
14	Cascade River	14.46	N Br Cascade R to Lk Superior
15	Spruce Creek (Deer Yard Creek)	3.21	Unnamed Cr (Ward Lk outlet) to Lk Superior
16	Bluff Creek	2.68	East Twin Lk (16-0145-00) to South Brule R
17	Elbow Creek	0.81	Unnamed Cr to Devil Track R
18	Wanless Creek	2.73	Headwaters (Dam Five Lk 38-0053-00) to Houghtaling Cr
19	Lullaby Creek	1.82	Headwaters (Lullaby Lk 16-0100-00) to Brule R
20	Manitou River, South Branch	5.42	Junction Cr to Manitou R
21	Sixmile Creek	3.32	Unnamed Cr to Temperance R
22	Swamp River	1.91	Stevens Lk to T63 R4E S20, east line
23	Brule River	12.58	BWCA boundary to South Brule R
24	Baptism River, West Branch	2.68	-91.3381 47.4702 to Crown Cr
25	Kadunce River (Kadunce Creek)	2.69	-90.1484 47.8261 to Lk Superior
26	Portage Brook	5.85	CSAH 16 to Pigeon R
27	Temperance River	15.05	T61 R4W S4, north line to Sixmile Cr
28	Baptism River, East Branch	3.28	Lk Twenty-three to Blesner Cr
29	Woods Creek	1.84	-90.2650 47.7964 to Devil Track R
30	Devil Track River	6.66	Devil Track Lk to Unnamed cr

31	Humphrey Creek	3.67	Headwaters to Boulder Cr
32	Coyote Creek	1	Unnamed Cr to Pequaywan Lk
33	Cloquet River	13.95	Headwaters (Katherine Lk 38-0538-00) to T57 R10 S32, south line
34	Cloquet River	26.44	T56 R10 S5, north line to W Br Cloquet River
35	Cloquet River	28.82	W Br Cloquet R to Island Lake Reservoir
36	Schoolcraft River	7.78	Frontenac Cr to Plantagenet Lk
37	Prairie River, West Fork	2.31	Hartley Lk to Prairie R
38	Willow River Ditch	3.3	Willow River Flowage to Moose R
39	Tamarack River	7.52	Little Tamarack R to Prairie R
40	Prairie River	11.31	Day Bk to Balsam Cr
41	Bee Creek (Waterloo Creek)	3.45	T101 R6W S29, north line to MN/IA border
42	Tulaby Creek	5.08	Tulaby Lk to McCraney Lk
43	Little Isabella River	11.02	Headwaters to Flat Horn Lk
44	Snake River	1.71	T61 R9W S7, south line to T61 R10W S12, north line
45	Jack Pine Creek	7.24	Headwaters to Mitawan Cr
46	Mitawan Creek	8.18	Kitigan Lk to T61 R9W S13, north line
47	Denley Creek	3.13	Nira Cr to Stony R
48	Cross River	3.79	Ham Lake Outlet to Gunflint Lk
49	Bezhik Creek	0.9	BWCA boundary to Moose R

3. Prohibited Outstanding Resource Value Waters (Attachment 2)

The MPCA's antidegradation standard (Minn. R. 7050.0270) requires that the MPCA issue control documents that "prohibit a net increase in loading or other causes of degradation to prohibited outstanding resource values waters" For this reason, the MPCA denies certification without prejudice for projects resulting in permanent degradation (impacts longer than 12 months) to prohibited outstanding resource value waters (ORVWs). The MPCA does not find that NWP authorizations for broad categories of activities, where specific impacts may vary, is appropriate for activities in these waters. Therefore, the MPCA excludes from this general 401 Certification of the NWPs any project taking place in whole or in part in a listed prohibited ORVW in Minnesota, as identified in Minn. R. 7050.0335, subp. 3, and listed below. Such projects, though authorized by the NWPs, require individual 401 Certification from the MPCA. *The MPCA Authority: Minn. R. ch. 7050.0255 – 7050-0335. The MPCA needs to be able to individually review projects for compliance with WQS.*

Minn. R. 7050.0335 DESIGNATED OUTSTANDING RESOURCE VALUE WATERS.

Subp. 3. **Prohibited outstanding resource value waters.** For the purposes of parts 7050.0250 to 7050.0335, the following surface waters are prohibited outstanding resource value waters:

More information on the water bodies is located at the 401 webpage:

<https://www.pca.state.mn.us/water/clean-water-act-section-401-water-quality-certifications>.

A. Waters within the Boundary Waters Canoe Area Wilderness;

- B. Those portions of Lake Superior north of latitude 47 degrees, 57 minutes, 13 seconds, east of Hat Point, south of the Minnesota-Ontario boundary, and west of the Minnesota-Michigan boundary;
- C. Waters within Voyageurs National Park;
- D. The following scientific and natural areas:
 - 1) Boot Lake, Anoka County;
 - 2) Kettle River in Sections 15, 22, 23, T.41, R.20, Pine County;
 - 3) Pennington Bog, Beltrami County;
 - 4) Purvis Lake-Ober Foundation, Saint Louis County;
 - 5) Waters within the borders of Itasca Wilderness Sanctuary, Clearwater County;
 - 6) Iron Springs Bog, Clearwater County;
 - 7) Wolsfeld Woods, Hennepin County;
 - 8) Green Water Lake, Becker County;
 - 9) Black Dog Preserve, Dakota County;
 - 10) Prairie Bush Clover, Jackson County;
 - 11) Black Lake Bog, Pine County;
 - 12) Pembina Trail Preserve, Polk County; and
 - 13) Falls Creek, Washington County; and
- E. The following state and federal designated wild river segments:
 - 1) Kettle River from the site of the former dam at Sandstone to its confluence with the Saint Croix River; and
 - 2) Rum River from Ogechie Lake spillway to the northernmost confluence with Lake Onamia.

4. Restricted ORVWs (Attachment 2)

The MPCA's antidegradation standard (Minn. R. 7050.0270) requires that the MPCA issue control documents that "restrict net increases in loading or other causes of degradation as necessary to maintain the exceptional characteristics for which the restricted outstanding resource value waters...were designated." The MPCA does not find that NWP authorizations for broad categories of activities, where specific impacts may vary, is appropriate for activities in these waters. Therefore, the MPCA excludes from this general 401 Certification of the NWPs any project taking place in whole or in part in a listed restricted ORVW in Minnesota, as identified in Minn. R. 7050.0335, subp. 1, and listed below. Such projects, though authorized by the NWPs, require individual 401 Certification from the MPCA. *The MPCA Authority: Minn. R. ch. 7050.0255 – 7050-0335. The MPCA needs to be able to individually review projects for compliance with WQS.*

NOTE: Projects that will potentially impact calcareous fens identified as restricted ORVWs in Minn. R. 7050.0335, subp. 1, are also required to have an approved Fen Management Plan from the Minnesota Department of Natural Resources (DNR) which is sufficient to ensure maintenance of the exceptional characteristics for which the fens were designated as restricted ORVWs.

Minn. R. 7050.0335 DESIGNATED OUTSTANDING RESOURCE VALUE WATERS.

Subpart 1. **Restricted outstanding resource value waters.** For the purposes of parts 7050.0250 to 7050.0335, the following surface waters are restricted outstanding resource value waters:

More information on the water bodies is located at the 401 webpage:

<https://www.pca.state.mn.us/water/clean-water-act-section-401-water-quality-certifications>.

- A. Lake Superior, except those portions identified in subpart 3, item B, as a prohibited outstanding resource value waters.
- B. Those portions of the Mississippi River from Lake Itasca to the southerly boundary of Morrison County that are included in the Mississippi Headwaters Board comprehensive plan dated February 12, 1981.
- C. Lake trout lakes, both existing and potential, as determined by the Commissioner in conjunction with the DNR, outside the boundaries of the Boundary Waters Canoe Area Wilderness and Voyageurs National Park and identified in parts 7050.0460 to 7050.0470.
- D. The following state and federal designated scenic or recreational river segments:
 - 1) Saint Croix River, entire length;
 - 2) Cannon River from northern city limits of Faribault to its confluence with the Mississippi River;
 - 3) North Fork of the Crow River from Lake Koronis outlet to the Meeker-Wright county line;
 - 4) Kettle River from north Pine County line to the site of the former dam at Sandstone;
 - 5) Minnesota River from Lac qui Parle dam to Redwood County State-Aid Highway 11; Mississippi River from County State-Aid Highway 7 bridge in Saint Cloud to northwestern city limits of Anoka; and
 - 6) Rum River from State Highway 27 bridge in Onamia to Madison and Rice Streets in Anoka.

401 Certification of NWP

The MPCA proposes to certify the referenced general NWPs because there is reasonable assurance that the activities identified within them will be conducted in a manner that will not violate applicable water quality standards provided the work is done in accordance with the following conditions, which shall become conditions of the NWPs:

Conditions for All NWP Activities

- 1. Mitigation required by an NWP must comply with Minn. R. ch. 7050.0186. *The MPCA Authority: Minn. R. ch. 7050.0186, Minn. R. 7050.0155. This condition is needed to ensure unavoidable physical alterations are properly mitigated.*
- 2. The applicant must ensure that all surface waters in or bordering the construction areas that are not authorized to be impacted by the project are clearly identified prior to construction. This may be done through demarcation of the construction area on plan sheets or through marking boundaries in the field, for example construction staking, flagging, or the use of silt fences along

boundaries. The applicant must not impact any non-construction areas while conducting activities under this permit. *The MPCA Authority: Minn. R. ch. 7001.0150). This condition is needed to protect surface waters not within the project boundaries.*

3. Applicants must install in-water best management practices (BMPs) necessary to minimize total suspended solids (TSS) and sedimentation for any work conducted below the ordinary high water level (OHWL) as defined in Minn. Stat. 103G.005, subd. 14 of any surface water.
4. The applicant must document the in-water BMPs to be used during the authorized work prior to disturbing any land at the site; this documentation may be stand-alone or part of an Erosion Control Plan, Construction Plan, or other relevant construction document. This documentation is not required to be submitted to the MPCA for the purpose of the 401 Certification, but must be kept on-site during active construction by the applicant or the applicant's contractor until the project is complete. Proper installation of BMPs is required before conducting the authorized in-water activities and properly maintained throughout the duration of the project's in-water work. While conducting the authorized work, the applicant must visually monitor the BMPs to ensure that the BMPs are working as intended to reduce TSS or sedimentation. Visual inspection should occur every seven days and within 24 hours after a rainfall event greater than ½ inch in 24 hours. If the project activities cause an observable increase in TSS or sedimentation as described in Minn. R. ch. 7050.0210, subp. 2 outside or downstream of the authorized defined working area, the project activities must immediately cease and any malfunctioning BMPs must be repaired, or alternative BMPs must be implemented. This Certification does not authorize the violation of applicable water quality standards outside or downstream of the defined work area. *The MPCA Authority: Minnesota water quality standards are defined in Minn. R. ch. 7050 and 7052. BMPs need to be installed function properly in order to ensure compliance with state water quality standards.*

Information on BMPs that may be suitable for in-water work is located in the Minnesota DNR Manual titled *Best Practices for Meeting DNR General Public Waters Work Permit GP 2004-0001*, located at:

https://www.dnr.state.mn.us/waters/watermgmt_section/pwpermits/gp_2004_0001_manual.html.

The MPCA is responsible for interpretation of the requirements of this condition, determining compliance with the requirements of this condition, and may enforcement this condition independent of the general permit. The point of contact at the MPCA for questions regarding this condition is: 401Certification.pca@state.mn.us.

5. The applicant must ensure that any dewatering activities do not create nuisance conditions as defined in Minn. R. ch. 7050.0210, subp. 2. BMPs must be used that minimize TSS and sedimentation by removing solids in the water before discharging the water. If discharging to an upland area, the discharge must be directed to an onsite sediment basin prior to discharging and the discharge shall not cause erosion, and must not cause inundation, or sedimentation to the receiving water. The applicant must document the in-water BMPs prior to beginning any dewatering, this includes the point of withdrawal and the point of discharge; this documentation may be stand-alone or part of an Erosion Control Plan, Construction Plan, or other relevant construction document. This documentation is not required to be submitted to

the MPCA for the purpose of the 401 Certification. The applicant must ensure that properly installed BMPs are in place before conducting the authorized activities and maintained throughout the duration of the dewatering work. *The MPCA Authority: Minn. R. ch. 7050.0210, subp. 2 and 7050.0150. BMPs need to be installed function properly in order to ensure compliance with state water quality standards.*

The MPCA is responsible for interpretation of the requirements of this condition, determining compliance with the requirements of this condition, and may enforcement this condition independent of the general permit. The point of contact at the MPCA for questions regarding this condition is: 401Certification.pca@state.mn.us.

6. The applicant must ensure any earthen material used to construct or improve temporary or permanent dikes or dams, including cofferdams, or any roads, is contained and stabilized in a manner that will prevent any of the earthen material from eroding. The applicant must completely remove temporary structures and restore original bathymetry, or contours at project completion. *The MPCA Authority: Minn. R. ch. 7050.0270 and 7050.0150. BMPs need to be installed function properly in order to ensure compliance with state water quality standards.*
7. It is the applicant's responsibility to ensure that the authorized activities do not exacerbate any existing impairments of a CWA 303-(d) listed impaired waters. The following MPCA webpages contain more information and search tools available to determine which waters in Minnesota are impaired: <http://www.pca.state.mn.us/lupg1125> and <http://www.pca.state.mn.us/mvri1126>. *The MPCA Authority: Applicable water quality standards are located in Minn. R. ch. 7050. This condition is needed to ensure compliance with state water quality standards.*

The MPCA is responsible for interpretation of the requirements of this condition, determining compliance with the requirements of this condition, and may enforcement this condition independent of the general permit. The point of contact at the MPCA for questions regarding this condition is: 401Certification.pca@state.mn.us.

8. Projects permitted under any NWP must implement planning and prewashing of equipment, prior to entering the site, to minimize the spread of invasive or noxious species. Fill used in any surface water must be clean fill that is free of any solid waste, toxic or hazardous contaminants, and invasive species as defined in Minn. Stat. ch. 84D and Minn. R. ch. 6216, and noxious weeds as defined in Minn. Stats. 18.75-18.91. *The MPCA Authority: Minn. R. ch. 7050.0270 and 7050.0150. This condition is needed to ensure compliance with state water quality standards.*
9. The applicant must provide: a) a copy of this Certification; b) documentation of any required BMPs under condition 3 above; and c) any written demarcation of waters of the United States under condition 2; to any prime contractor responsible for completing the project's authorized activities. The applicant must also ensure that there is a mechanism in place requiring each prime contractor to provide the same information to all subcontractors, at any level, responsible for fabricating or providing any material for the project or performing work at the project site. In addition, copies of these documents and any other relevant regulatory authorizations related to impacts of surface waters, must be available at or near the project site for use by contractors or staff responsible for completing the project work and must be available within 72 hours when

requested by the MPCA staff. *The MPCA Authority: Minn. R. ch. 7050.0270 and 7050.0150. This condition is needed to ensure that all contractor activities meet State water quality standards.*

10. The applicant is responsible for compliance with all applicable conditions of this Certification. *The MPCA Authority: Minn. R. chs. 7050.0270 and 7050.0150. This condition is needed to ensure that all contractor activities meet State water quality standards.*
11. This Certification includes and incorporates by reference the general conditions of Minn. R. 7001.0150, subp.3. *The MPCA Authority: Minn. R. ch. 7001.0150. This condition is needed to ensure the applicant follows state permitting requirements.*

Conditions Specific to Individual NWP Activities

In addition to all other applicable Certification conditions, the following activities must also comply with the activity-specific conditions below. *The MPCA Authority: Minn. R. ch. 7050.0270.*

- **NWP 7, Outfall Structures and Associated Intake Structures**
The applicant must ensure that impacts associated with outfall and intake structures do not harm aquatic life outside of the permitted project area and do not result in an unauthorized loss of surface waters. *The MPCA Authority: Minn. R. ch. 7001.0150). This condition is needed to protect surface waters not within the project boundaries.*
- **NWP 16, Return Water from Upland Contained Disposal Areas**
The applicant must ensure that return water from Upland Contained Disposal Areas, that is returned to the original source water, meet the same water quality standards that apply to the original source water. If the return water is discharged into a receiving water that is not the original source water, then the applicant must ensure that the discharge water will meet the more stringent water quality standard of the receiving water and the original source water. *The MPCA Authority: Discharges of return water must not violate the state water quality standard identified in Minn. R. 7050.0210, subp.2. This condition is needed to protect surface water from excess sediment in the form of TSS and any contaminants contained in the TSS.*
- **NWP 19 Minor Dredging**
Projects exceeding 50 CY of impacts are not certified and require an individual review and 401 Certification. *The MPCA Authority: Minn. R. ch. 7050.0305, and 7050.0270. This condition is needed to protect the beneficial and existing uses of surface waters.*
- **NWP 27 Wetland and Riparian Restoration and Creation Activities**
For restoration and creation activities, the applicant must meet the following conditions:
 - Manage sediment to minimize downstream effects.
 - Use low-flow and winter construction when appropriate.
 - Provide mitigation for any conversion of surface waters to uplands.*The MPCA Authority: Minn. R. ch. 7050.0305, and 7050.0270. This condition is needed to protect the beneficial and existing uses of surface waters.*
- **NWP 53 Removal of Low-Head Dams**
Projects involving the removal of low-head dams must meet the following conditions:

- Manage sediment to minimize downstream effects.
- Use low-flow and winter construction when appropriate.

The MPCA Authority: Minn. R. ch. 7050.0305, and 7050.0270. This condition is needed to protect the beneficial and existing uses of surface waters.

NOTIFICATIONS: The following notifications are not conditions of the MPCA CWA 401 Certification of NWPs. They provide practices that can help reduce the potential environmental impacts or they provide notification to the public in Minnesota, that certain discharges in Waters of the State, as defined in Minn. Stat. § 115.01, subd. 22, or activities associated with discharges into Waters of the State, are also regulated under rules administered by the MPCA:

1. It is the applicant's responsibility to fully comply with all MPCA rules governing waters of the state, including MPCA rules governing wetlands (Minn. R. 7050.0186) which require an applicant to provide compensatory mitigation for the project's unavoidable physical alterations to wetlands, including those not subject to federal jurisdiction under section 404 of the CWA.
2. Minnesota water quality standards found in Minn. R. ch. 7050, apply in all water of the state, defined in Minn. Stats. 115.01 subd. 22, "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.
3. Applicants should review Total Maximum Daily Load (TMDL) / Watershed Restoration and Protection Strategy (WRAPS) projects to determine if they are applicable to their project. A list of WRAPS/TMDL projects is available at: <https://www.pca.state.mn.us/water/total-maximum-daily-load-tmdl-projects>.
4. Any projects in Cold Water Habitat waters, not excluded in Exceptional Aquatic Life Use Waters above and identified as class 2A, 2Ae, or 2Ag in part Minn. R. ch. 7050.0470, are required by the Code of Federal Regulations, title 40, section 131.10, to reflect an existing beneficial use or a feasibly attainable beneficial use, that permits propagating and maintaining a healthy community of cold water aquatic biota and their habitats. Existing beneficial use for cold water habitats means a beneficial use that was attained in a water body on or after November 28, 1975. Any project that impacts a Cold Water Habitat water must ensure that the Beneficial and Existing Uses are maintained.
5. Minn. R. chs. 7001 and 7090 requires any activity that will disturb one acre or more of land must first acquire a National Pollutant Discharge Elimination System Permit (NPDES)/State Disposal System (SDS) General Stormwater Permit from the MPCA for discharging stormwater during construction activity. Both the owners and operators of construction activity disturbing one acre or more of land are responsible for obtaining and complying with the conditions of the NPDES/SDS General Stormwater Permit prior to commencing construction activities. Sites disturbing less than one acre within a larger common plan of development or sale that is more

than one acre also need permit coverage. A detailed Stormwater Pollution Prevention Plan (SWPPP), containing both temporary and permanent erosion and sediment control plans, must

be prepared prior to submitting an application for the NPDES/SDS General Stormwater Permit. In addition, any project that will result in over 50 acres of disturbed area and has a discharge point within one mile of a special or impaired water is required to submit their SWPPP to the MPCA for a review at least 30 days prior to the commencement of land disturbing activities. If the SWPPP is out of compliance with the terms and conditions of the NPDES/SDS General Stormwater Permit, further delay may occur. For more information, please visit the following webpage: <https://www.pca.state.mn.us/water/construction-stormwater>.

6. Minn. R. ch. 7001.0030 requires that, prior to testing the structural integrity of any newly installed pipeline or any existing pipeline maintained or repaired that is authorized by NWPs, the applicant must obtain NPDES/SDS Permit coverage from the MPCA. The NPDES/SDS Permit regulates the discharge of water and trench waters associated with this activity.
7. Chloride from winter road salt affects water quality. The MPCA encourages public road authorities pursuing projects under the general permit to consider the use of BMPs to reduce the use of chloride. General information about chloride and water quality, including the Twin Cities Metropolitan Area Chloride Management Plan, is located at: <https://www.pca.state.mn.us/water/salt-applicators>.
8. When riprap is used, the applicant should consider placing riprap in the following manner:
 - a. Use natural rock (average between 6 inches and 30 inches in diameter) that is free of debris that may cause pollution or siltation.
 - b. A filter of crushed rock, gravel, or filter fabric material can be placed underneath the rock.
 - c. The riprap should be no more than 6 feet waterward of the OHWL as defined in Minn. Stat. § 103G.005, subd.14.
 - d. The riprap should conform to the natural alignment of shore and should not obstruct navigation or the flow of water.
 - e. The minimum finished slope waterward of the OHWL should be no steeper than 3 to 1 (horizontal to vertical).
9. Section 401 Certification does not release the applicant from obtaining all necessary federal, state, and local permits. It does not limit any other permit where requirements may be more restrictive. It does not eliminate, waive, or vary the applicant's obligation to comply with all other laws and state water statutes and rules through the construction, installation, and operation of the project. This Certification does not release the applicant from any liability, penalty, or duty imposed by Minnesota or federal statutes, regulations, rules, or local ordinances, and it does not convey a property right or an exclusive privilege.
10. This Certification does not replace or satisfy environmental review requirements, including those under the Minnesota Environmental Policy Act (MEPA). In accordance with MEPA, Minn. Stat. § 116D.04, subd. 2b, and related rules, projects that are required to complete an Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS), may not be started, and final governmental decisions to grant a permit, approve a project, or begin a project may not be made, until:
 - A petition for an EAW is dismissed.
 - A negative declaration on the need for an EIS has been made.
 - An EIS has been determined to be adequate.

- A variance has been granted by the state Environmental Quality Board.

11. The MPCA reserves the right to modify this Certification or revoke this Certification as provided in Minn. R. 7001.0170.

12. Pursuant to Minn. R. 7001.1450, failure to comply with any of the conditions in this Certification may result in the MPCA invalidating or revoking this 401 Water Quality Certification on a project-by-project basis.

If you have any questions on this Certification, please contact Jim Brist at jim.brist@state.mn.us or 401Certification.pca@state.mn.us.

Sincerely,



Anna Hotz
Supervisor
Agency Rules Unit
Resource Management and Assistance Division

AH/JB:ds

Attachments

cc: Melissa Blankenship, EPA
Dave Pfeifer, EPA
Dana Rzeznik, EPA
Dawn Marsh, USFWS
Sarah Quamme, USFWS
Tom Hovey, DNR
Steve Colvin, DNR
Kerryann Weaver, EPA
Todd Vesperman, USACE
Meghan Brown, USACE

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**401 Water Quality Certification
Decision for the State of Wisconsin**

Issued by the Wisconsin
Department of Natural Resources

Applicable to 2021 NWP's 29, 39, 40, 42, 43, 44, 51, 52

BEFORE THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Application of the United States Department of the Army,)
Corps of Engineers, for Water Quality Certification for the)
Final Regulations Pertaining to the Issuance, Reissuance,)
and Modification of Nationwide Permits

On September 15, 2020, the United States Department of the Army, Corps of Engineers (COE), published its notice regarding the Issuance of Nationwide Permits (NWP) in the Federal Register (agency docket number COE–2020–0002). The publication includes new, existing, and modified NWPs. Publication of these NWPs serves as the Corps' application to the State for water quality certification (WQC) under Section 401 of the Federal Clean Water Act (CWA).

The Wisconsin Department of Natural Resources (WDNR) has examined the regulations promulgated by the COE and United States Environmental Protection Agency pursuant to Section 401, CWA, and Chapters NR 102, 103, and 299, Wisconsin Administrative Code (Wis. Adm. Code).

The WDNR has determined the following conditions for the NWPs are required to ensure compliance with state water quality standards enumerated in s. 299.04, Wis. Adm. Code. The certification shall expire once the nationwide permits expire unless substantial changes are made to the final NWPs which could have an impact on water quality to Wisconsin's waters.

Section 401 Certification does not release the permittee from obtaining all other necessary federal, state, and local permits, licenses, certificates, approvals, registrations, charters, or similar forms of permission required by law. It does not limit any other state permit, license, certificate, approval, registration, charter, or similar form of permission required by law that imposes more restrictive requirements. It does not eliminate, waive, or vary the permittee's obligation to comply with all other laws and state statutes and rules throughout the construction, installation, and operation of the project. This Certification does not release the permittee from any liability, penalty, or duty imposed by Wisconsin or federal statutes, regulations, rules, or local ordinances, and it does not convey a property right or an exclusive privilege.

This Certification does not replace or satisfy any environmental review requirements, including those under the Wisconsin Environmental Policy Act (WEPA) or the National Environmental Policy Act (NEPA).

water quality certification

STATE CONDITIONS AND LIMITATIONS OF CERTIFICATION

GENERAL CONDITIONS:

1. The permittee shall allow the WDNR reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.

Justification: On-site inspection is a critical element to gather necessary information for water quality certification decisions and quality control and assurance of data provided by the applicant. This authorization is required pursuant to s. NR 299.05(3)(d)2.c, Wis. Adm. Code.

2. Water quality certification is denied without prejudice for activities involving the temporary stockpiling of dredged or fill material in waters of the state, including wetlands.

Justification: Physical alterations can degrade surface waters through the filling, dredging or stockpiling of materials. Pursuant to ss. NR 102.05 and NR 103.03, Wis. Adm. Codes, no waters of the state including wetlands shall be lowered in quality unless it has been affirmatively demonstrated to the department that such a change is justifiable. To satisfy these antidegradation and water quality protection requirements, individual certification is warranted to properly demonstrate that temporary stockpiling of dredged or fill material is warranted.

3. Water quality certification is denied without prejudice for activities that have the potential to adversely impact Area of Special Natural Resource Interest (ASNRI) waters designated under to s. NR 1.05, Wis. Adm. Code.

Justification: Pursuant to ch. NR 207, Wis. Adm. Code, Wisconsin's antidegradation standards prohibit degradation of outstanding resource waters and limits degradations to exceptional resource waters. Additionally, formal consultation with the Voigt Task Force is needed on projects which could have impacts on wild rice or wild rice habitat. For these reasons, all projects that have the potential to degrade ASNRI waters designated under s. 30.01(1am), Wis. Stat. are denied without prejudice. ASNRI waters are available on the DNR's surface water data viewer at <https://dnr.wisconsin.gov/topic/SurfaceWater/swdv>.

4. Water quality certification is denied without prejudice for activities that have the potential to adversely impact Public Rights Features (PRFs) designated under to s. NR 1.06, Wis. Adm. Code.

Justification: Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable deposits or debris shall not be present in such amounts as to interfere with public rights in waters of the state. Public Rights Features are most sensitive to these types of deposits and warrant individual water quality

water quality certification

certification to ensure that wildlife, recreation, and fish and aquatic life standards under ch. NR 102, Wis. Adm. Code are satisfied.

PRFs are available on the DNR's surface water data viewer at <https://dnr.wisconsin.gov/topic/SurfaceWater/swdv>.

5. No discharges of dredged or fill material below the ordinary high water mark of a navigable stream as defined by s. 310.03(5), Wis. Adm. Code, may take place during fish spawning periods or times when nursery areas would be adversely impacted. These periods are:

- September 15th through May 15th for all trout streams and upstream to the first dam or barrier on the Root River (Racine County), the Kewaunee River (Kewaunee County), and Strawberry Creek (Door County). To determine if a waterway is a trout stream, you may use the WDNR website trout maps at <http://dnr.wi.gov/topic/fishing/trout/streammaps.html>.
- September 15th through June 15th on all Great Lakes tributaries upstream to the first dam or barrier.
- November 1st through June 15th for Lake Michigan waters surrounding Door County including Green Bay and all harbors and bays.
- September 15th through July 1st for Lake Superior waters surrounding Douglas County including St. Louis River and all harbors and bays.
- March 1st through June 15th for ALL OTHER waters.

Justification: Pursuant to s. NR 102.04(3), Wis. Adm. Code, aquatic life designations include spawning areas for cold water and warm water fish and aquatic life habitat. Water quality criteria are derived to ensure spawning activities in Wisconsin are protected.

6. The permittee must install in-water best management practices (BMPs) to minimize total suspended solids (TSS), sedimentation and nutrient loadings for any work conducted below the ordinary high water mark (OHWM). Any visual increase in turbidity outside of the approved impact area shall result in the project operations ceasing until BMPs have been modified to address the issue.

Justification: Pursuant to ss. NR 102.04(1) and NR 102.06, Wis. Adm. Code, objectionable deposits and nutrients may not be present in amounts that interfere with public rights and interests or exceed state standards for surface water. In-water BMPs also help ensure excessive sedimentation, TSS, and nutrient loadings will not result in a violation of state wetland water quality standards under s. NR 103.03, Wis. Adm. Code.

7. The permittee may not use any materials that contains toxic substances in toxic amounts. This may include materials used for structure placement, beneficially reused materials, or fill.

Justification: Pursuant to chs. NR 102, NR 103, NR 105 and s. NR 299.04(1)(b), Wis. Adm. Codes, water quality criteria and limitations must be satisfied to grant water quality certification.

water quality certification

8. The permittee must ensure that any material used to construct a project is properly contained and stabilized in a manner that will prevent the material from being eroded.

Justification: Pursuant to ss. NR 102.04(1)(a) and (b) and NR 103.03, Wis. Adm. Code, objectionable deposits or debris shall not be present in amounts that interfere with public rights and interests in waterways or the functions and values of wetlands in Wisconsin.

9. Projects permitted under any NWP must implement planning and pretreatment of equipment to minimize spread of invasive or noxious species, designated under ch. 40, Wis. Adm. Code.

Justification: Pursuant to s. NR 103.03(2)(f)3., Wis. Adm. Code, water quality certification must prevent conditions conducive to the establishment or proliferation of nuisance organisms in order to protect existing wetland habitat and ecosystems. Invasive species threaten the “protection and propagation of a balanced fish and other aquatic life community” under the “Fish and other aquatic life” designated use in ch. NR 102.04(3), Wis. Adm. Code.

10. Whenever an applicant is completing sediment sampling and analysis, monitoring or disposal of materials from any dredging project, proper sampling and quality assurance methods shall be implemented in alignment with ch. NR 347, Wis. Adm. Code.

Justification: In order to protect the public rights and interests in the waters of the state and to ensure that data quality is representative of site conditions to make informed water quality certification decisions, all data gathering, sampling, monitoring, data analysis and disposal shall be completed using proper sampling and quality assurance methods in alignment with ch. NR 347, Wis. Adm. Code.

Conditions Applicable to Specific Nationwide Permits Granted Water Quality Certification:

NWP 16 — Return Water From Upland Contained Disposal Areas:

The permittee must ensure that return water from dredging that is directly returned to the original source water meets the same water quality standards that apply to the original source water. If the return water is discharged into a receiving water that is not the original source water, then the permittee must ensure that the discharge water will meet the more stringent water quality standard of the receiving water and the original source water.

Justification: The return water shall not violate state water quality standards established under chs. NR 102, 103 and 105, Wis. Adm. Code.

NWP 18 — Minor Discharges:

water quality certification

The permittee must ensure that direct and secondary impacts to wetlands do not exceed 400 sq. ft.

Justification: Pursuant to s. NR 103.03(2)(d), Wis. Adm. Code, wetlands shall be protected from cumulative impacts of discharges which may result in concentrations or combinations of substances which are toxic or harmful to human, animal, or plant life. Ensuring that the eligibility standard for wetland impacts encompasses primary and secondary impacts will ensure adequate protection from cumulative impacts.

The project scope shall not include installation of nonperforated drain tile which would have a hydrologic impact to a waterway or wetland.

Justification: Sections NR 103.03(1)(a) and (b), Wis. Adm. Code, require that wetland hydrology and storm and flood water storage be adequately protected.

NWP 42 — Recreational Facilities:

The permittee must remove temporary fill within 60 days of placing the material in a waterway or wetland unless mitigation is provided for the temporary loss of function.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

The permittee shall ensure that the project will not result in a conversion of navigable waters, pursuant to s. NR 310.03(5), Wis. Adm. Code, to uplands or an enclosure of navigable waters that would result in an interference with the public rights in those waters.

Justification: Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable deposits or debris shall not be present in such amounts as to interfere with public rights in waters of the state.

NWP 43 — Stormwater Management Facilities:

The permittee may not convert navigable waterways pursuant to s. 310.03(5), Wis. Adm. Code, or wetlands to treat stormwater.

Justification: Pursuant to s. NR 103.03(1)(a), Wis. Adm. Code, state wetland water quality standards require that wetlands are maintained within natural variation from storm and flood water storage and retention and the moderation of water level fluctuation extremes. Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable

water quality certification
deposits or debris shall not be present in such amounts as to interfere with public rights
in waters of the state.

NWP 46 — Discharges in Ditches:

The permittee must remove temporary fill within 60 days of placing the material in a waterway
or wetland unless mitigation is provided for the temporary loss of function.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus
to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

NWP 51 – Land-Based Renewable Energy Generation Facilities

The permittee must remove temporary fill within 60 days of placing the material in a waterway
or wetland unless mitigation is provided for the temporary loss of function.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus,
to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

The permittee may not convert wetlands to stormwater treatment facilities.

Justification: Pursuant to s. NR 103.03(1)(a), Wis. Adm. Code, state wetland water
quality standards require that wetlands are maintained within natural variation from
storm and flood water storage and retention and the moderation of water level
fluctuation extremes.

The project shall not impact more than 300 linear feet.

Justification: Pursuant to s. NR 207.12, antibacksliding requirements must be satisfied
before a relaxation of a standard could be applied. This analysis requires individual
water quality certification.

NWP 53 - Removal of Low-Head Dams

The permittee shall ensure that accumulated sediment is adequately controlled to ensure that
downstream water quality is protected once the dam is removed.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus
to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

water quality certification

NWP E- Water Reclamation and Reuse Facilities

The permittee shall only use native plantings or, for the purposes of short-term stabilization, early successional non-invasive plantings for the purposes of short-term stabilization followed by native plantings.

Justification: Pursuant to s. NR 103.03(2)(f)3., Wis. Adm Code, water quality certification must prevent conditions conducive to the establishment or proliferation of nuisance organisms in order to protect existing wetland habitat and ecosystems. The invasive species rule, ch. NR 40, Wis. Adm. Code, makes it illegal to possess, transport, transfer or introduce certain invasive species in Wisconsin.

Nationwide Permits Granted Water Quality Certification:

- 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 13 — Bank Stabilization
- NWP 19 — Minor Dredging
- NWP 20 — Response Operations for Oil or Hazardous Substances
- NWP 22 — Removal of Vessels
- NWP 25 — Structural Discharges
- NWP 27 — Aquatic Habitat Restoration, Enhancement, and Establishment Activities
- NWP 30 — Moist Soil Management for Wildlife
- NWP 31 — Maintenance of Existing Flood Control Facilities
- NWP 32 — Completed Enforcement Actions
- 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 54 — Living Shorelines

Nationwide Permits Denied Water Quality Certification Without Prejudice At This Time:

- NWP 17 – Hydropower Projects

water quality certification

Justification: The NWP is overly broad and can include a wide range of activities. The broad category of activities covered could significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 29 — Residential Developments

Justification: The NWP is overly broad and can include a range of residential development density and can also include a wide array of other integral development pieces. The density of the development can significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 33 – Temporary Construction, Access, and Dewatering

Justification: Site-specific WQC is appropriate to ensure that site-specific dewatering plans are developed and address sediment-laden materials, which may contain potentially contaminated materials, discharged from dewatering disposal. Oily sheens, odors or colors can be observed in some dewatering activities which may violate water quality standards under ch. NR 102, Wis. Adm. Code.

- NWP 39 — Commercial and Institutional Developments

Justification: The NWP is overly broad and can include a range of commercial and institutional development types and density. These can significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 40 — Agricultural Activities

water quality certification

Justification: The NWP is overly broad and can include a wide range of agricultural activities. These can significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 44 — Mining Activities

Justification: The NWP is overly broad and can include a range of activities. Given the proximity of these activities to mining activities there is an increase risk that heavy metals or other toxic substances regulated in ch. NR 105 and 106, Wis. Adm. Code, may be discharged in surface waters at levels that may not comply with state standards.

- NWP 48 — Commercial Shellfish Mariculture Activities

Justification: Nutrient discharges from commercial shellfish activities can be significant depending on the size, placement, and treatment of waters from these areas. Given the range of concentration and placement, individual water quality certification is appropriate for these activities to ensure that state nutrient standards pursuant to s. NR 102.06, Wis. Adm. Code are satisfied. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 52 — Water-Based Renewable Energy Generation Pilot Projects

Justification: Impacts to fish and aquatic life uses and criteria such as temperature from water-based energy generation projects can be significant depending on the size and placement of these projects. Given the broad range of waterways this NWP could apply to, an individual WQC is appropriate to ensure that state water quality standards for fish and aquatic life uses and criteria under NR 102.04, Wis. Adm. Code are satisfied.

Nationwide Permits For Which Water Quality Certification Is Not Required:

This water quality certification decision reflects the NWPs for which certification was requested on November 12, 2020. As stated in the notice, NWPs 1, 2, 9, 10, 11, 28, and 35 do not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. Additionally, the notice stipulated that the St. Paul District is proposing to revoke the following NWPs in both Minnesota and Wisconsin: 8, 12, 14, 15, 21, 23, 24, 34, 49, 50, A, B, C,

water quality certification

and D. WDNR is not taking action on these NWP's for these reasons and concludes that a new notification and pre-filing meeting would be required for these NWP's should the position of the St. Paul District change.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin Statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

To request a contested case hearing pursuant to section 227.42, Wisconsin Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources.

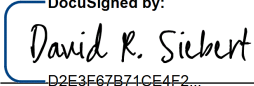
This determination becomes final in accordance with the provisions of s. NR 299.05(7), Wisconsin Administrative Code, and is judicially reviewable when final. For judicial review of a decision pursuant to Sections 227.52 and 227.53, Wisconsin Statutes, you have 30 days after the decision becomes final to file your petition with the appropriate circuit court and to serve the petition on the Secretary of the Department of Natural Resources. The petition must name the Department of Natural Resources as the respondent.

Reasonable accommodation, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request.

This notice is provided pursuant to section 227.48(2), Wisconsin Statutes.

Dated at Madison, Wisconsin 12/8/2020 | 5:46 PM CST

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

DocuSigned by:
By 
D2E3F67B71CE4F2...
David R. Siebert

C.

**401 Water Quality Certification
Decision for the State of Wisconsin**

Issued by the Wisconsin Department
of Natural Resources

Applicable to 2021 NWPs announced in the December
27, 2021 issue of the *Federal Register* (86 FR 73522)

BEFORE THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Application of the United States Department of the Army,)
Corps of Engineers, for Water Quality Certification for the)
Final Regulations Pertaining to the Issuance, Reissuance,)
and Modification of Nationwide Permits

On September 15, 2020, the United States Department of the Army, Corps of Engineers (COE), published its notice regarding the Issuance of Nationwide Permits (NWP) in the Federal Register (agency docket number COE-2020-0002). The publication includes new, existing, and modified NWP. Publication of these NWP serves as the Corps' application to the State for water quality certification (WQC) under Section 401 of the Federal Clean Water Act (CWA).

The Wisconsin Department of Natural Resources (WDNR) has examined the regulations promulgated by the COE and United States Environmental Protection Agency pursuant to Section 401, CWA, and Chapters NR 102, 103, and 299, Wisconsin Administrative Code (Wis. Adm. Code).

The WDNR has determined the following conditions for the NWP are required to ensure compliance with state water quality standards enumerated in s. 299.04, Wis. Adm. Code. Water quality in Wisconsin will be adequately protected so long as these conditions are met and the requirements of the final NWP are consistent with the public noticed drafts. This certification shall expire when the nationwide permits expire.

Section 401 Certification does not release the permittee from obtaining all other necessary federal, state, and local permits, licenses, certificates, approvals, registrations, charters, or similar forms of permission required by law. It does not limit any other state permit, license, certificate, approval, registration, charter, or similar form of permission required by law that imposes more restrictive requirements. It does not eliminate, waive, or vary the permittee's obligation to comply with all other laws and state statutes and rules throughout the construction, installation, and operation of the project. This Certification does not release the permittee from any liability, penalty, or duty imposed by Wisconsin or federal statutes, regulations, rules, or local ordinances, and it does not convey a property right or an exclusive privilege.

The conditions of this Certification cannot be used for other permit decisions, permit types or licenses that are not expressly listed in the agency docket number COE-2020-0002. Pursuant to 40 CFR 121.5, a certification request must be submitted to the state of Wisconsin for all individual license or permit requests. This includes projects undertaken by federal agencies including U.S. Army Corp of Engineer projects.

This Certification does not replace or satisfy any environmental review requirements, including those under the Wisconsin Environmental Policy Act (WEPA) or the National Environmental Policy Act (NEPA).

STATE CONDITIONS AND LIMITATIONS OF CERTIFICATION

GENERAL CONDITIONS:

1. The permittee shall allow the WDNR reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.

Justification: On-site inspection is a critical element to gather necessary information for water quality certification decisions and quality control and assurance of data provided by the applicant. This authorization is required pursuant to s. NR 299.05(3)(d)2.c, Wis. Adm. Code.

2. Water quality certification is denied without prejudice for activities involving the temporary stockpiling of dredged or fill material in waters of the state, including wetlands.

Justification: Physical alterations can degrade surface waters through the filling, dredging or stockpiling of materials. Pursuant to ss. NR 102.05 and NR 103.03, Wis. Adm. Codes, no waters of the state including wetlands shall be lowered in quality unless it has been affirmatively demonstrated to the department that such a change is justifiable. To satisfy these antidegradation and water quality protection requirements, individual certification is warranted to properly demonstrate that temporary stockpiling of dredged or fill material is warranted.

3. Water quality certification is denied without prejudice for activities that have the potential to adversely impact Area of Special Natural Resource Interest (ASNRI) waters designated under to s. NR 1.05, Wis. Adm. Code.

Justification: Pursuant to ch. NR 207, Wis. Adm. Code, Wisconsin's antidegradation standards prohibit degradation of outstanding resource waters and limits degradations to exceptional resource waters. Additionally, formal consultation with the Voigt Task Force is needed on projects which could have impacts on wild rice or wild rice habitat. For these reasons, all projects that have the potential to degrade ASNRI waters designated under s. 30.01(1am), Wis. Stat. are denied without prejudice. ASNRI waters are available on the DNR's surface water data viewer at <https://dnr.wisconsin.gov/topic/SurfaceWater/swdv>.

4. Water quality certification is denied without prejudice for activities that have the potential to adversely impact Public Rights Features (PRFs) designated under to s. NR 1.06, Wis. Adm. Code.

Justification: Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable deposits or debris shall not be present in such amounts as to interfere with public rights in waters of the state. Public Rights Features are most sensitive to these types of deposits and warrant individual water quality

water quality certification

certification to ensure that wildlife, recreation, and fish and aquatic life standards under ch. NR 102, Wis. Adm. Code are satisfied.

PRFs are available on the DNR's surface water data viewer at <https://dnr.wisconsin.gov/topic/SurfaceWater/swdv>.

5. No discharges of dredged or fill material below the ordinary high water mark of a navigable stream as defined by s. 310.03(5), Wis. Adm. Code, may take place during fish spawning periods or times when nursery areas would be adversely impacted. These periods are:

- September 15th through May 15th for all trout streams and upstream to the first dam or barrier on the Root River (Racine County), the Kewaunee River (Kewaunee County), and Strawberry Creek (Door County). To determine if a waterway is a trout stream, you may use the WDNR website trout maps at <http://dnr.wi.gov/topic/fishing/trout/streammaps.html>.
- September 15th through June 15th on all Great Lakes tributaries upstream to the first dam or barrier.
- November 1st through June 15th for Lake Michigan waters surrounding Door County including Green Bay and all harbors and bays.
- September 15th through July 1st for Lake Superior waters surrounding Douglas County including St. Louis River and all harbors and bays.
- March 1st through June 15th for ALL OTHER waters.

Justification: Pursuant to s. NR 102.04(3), Wis. Adm. Code, aquatic life designations include spawning areas for cold water and warm water fish and aquatic life habitat. Water quality criteria are derived to ensure spawning activities in Wisconsin are protected.

6. The permittee must install in-water best management practices (BMPs) to minimize total suspended solids (TSS), sedimentation and nutrient loadings for any work conducted below the ordinary high water mark (OHWM). Any visual increase in turbidity outside of the approved impact area shall result in the project operations ceasing until BMPs have been modified to address the issue.

Justification: Pursuant to ss. NR 102.04(1) and NR 102.06, Wis. Adm. Code, objectionable deposits and nutrients may not be present in amounts that interfere with public rights and interests or exceed state standards for surface water. In-water BMPs also help ensure excessive sedimentation, TSS, and nutrient loadings will not result in a violation of state wetland water quality standards under s. NR 103.03, Wis. Adm. Code.

7. The permittee may not use any materials that contains toxic substances in toxic amounts. This may include materials used for structure placement, beneficially reused materials, or fill.

Justification: Pursuant to chs. NR 102, NR 103, NR 105 and s. NR 299.04(1)(b), Wis. Adm. Codes, water quality criteria and limitations must be satisfied to grant water quality certification.

water quality certification

8. The permittee must ensure that any material used to construct a project is properly contained and stabilized in a manner that will prevent the material from being eroded.

Justification: Pursuant to ss. NR 102.04(1)(a) and (b) and NR 103.03, Wis. Adm. Code, objectionable deposits or debris shall not be present in amounts that interfere with public rights and interests in waterways or the functions and values of wetlands in Wisconsin.

9. Projects permitted under any NWP must implement planning and pretreatment of equipment to minimize spread of invasive or noxious species, designated under to ch. 40, Wis. Adm. Code.

Justification: Pursuant to s. NR 103.03(2)(f)3., Wis. Adm. Code, water quality certification must prevent conditions conducive to the establishment or proliferation of nuisance organisms in order to protect existing wetland habitat and ecosystems. Invasive species threaten the “protection and propagation of a balanced fish and other aquatic life community” under the “Fish and other aquatic life” designated use in ch. NR 102.04(3), Wis. Adm. Code.

10. Whenever an applicant is completing sediment sampling and analysis, monitoring or disposal of materials from any dredging project, proper sampling and quality assurance methods shall be implemented in alignment with ch. NR 347, Wis. Adm. Code.

Justification: In order to protect the public rights and interests in the waters of the state and to ensure that data quality is representative of site conditions to make informed water quality certification decisions, all data gathering, sampling, monitoring, data analysis and disposal shall be completed using proper sampling and quality assurance methods in alignment with ch. NR 347, Wis. Adm. Code.

Conditions Applicable to Specific Nationwide Permits Granted Water Quality Certification:

NWP 16 — Return Water From Upland Contained Disposal Areas:

The permittee must ensure that return water from dredging that is directly returned to the original source water meets the same water quality standards that apply to the original source water. If the return water is discharged into a receiving water that is not the original source water, then the permittee must ensure that the discharge water will meet the more stringent water quality standard of the receiving water and the original source water.

Justification: The return water shall not violate state water quality standards established under chs. NR 102, 103 and 105, Wis. Adm. Code.

NWP 18 — Minor Discharges:

water quality certification

The permittee must ensure that direct and secondary impacts to wetlands do not exceed 400 sq. ft.

Justification: Pursuant to s. NR 103.03(2)(d), Wis. Adm. Code, wetlands shall be protected from cumulative impacts of discharges which may result in concentrations or combinations of substances which are toxic or harmful to human, animal, or plant life. Ensuring that the eligibility standard for wetland impacts encompasses primary and secondary impacts will ensure adequate protection from cumulative impacts.

The project scope shall not include installation of nonperforated drain tile which would have a hydrologic impact to a waterway or wetland.

Justification: Sections NR 103.03(1)(a) and (b), Wis. Adm. Code, require that wetland hydrology and storm and flood water storage be adequately protected.

NWP 42 — Recreational Facilities:

The permittee must remove temporary fill within 60 days of placing the material in a waterway or wetland unless mitigation is provided for the temporary loss of function.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

The permittee shall ensure that the project will not result in a conversion of navigable waters, pursuant to s. NR 310.03(5), Wis. Adm. Code, to uplands or an enclosure of navigable waters that would result in an interference with the public rights in those waters.

Justification: Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable deposits or debris shall not be present in such amounts as to interfere with public rights in waters of the state.

NWP 43 — Stormwater Management Facilities:

The permittee may not convert navigable waterways pursuant to s. 310.03(5), Wis. Adm. Code, or wetlands to treat stormwater.

Justification: Pursuant to s. NR 103.03(1)(a), Wis. Adm. Code, state wetland water quality standards require that wetlands are maintained within natural variation from storm and flood water storage and retention and the moderation of water level fluctuation extremes. Pursuant to s. NR 102.04(1)(a) and (b), Wis. Adm. Code, objectionable

water quality certification
deposits or debris shall not be present in such amounts as to interfere with public rights
in waters of the state.

NWP 46 — Discharges in Ditches:

The permittee must remove temporary fill within 60 days of placing the material in a waterway
or wetland unless mitigation is provided for the temporary loss of function.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus
to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

NWP 51 – Land-Based Renewable Energy Generation Facilities

The permittee must remove temporary fill within 60 days of placing the material in a waterway
or wetland unless mitigation is provided for the temporary loss of function.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus,
to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

The permittee may not convert wetlands to stormwater treatment facilities.

Justification: Pursuant to s. NR 103.03(1)(a), Wis. Adm. Code, state wetland water
quality standards require that wetlands are maintained within natural variation from
storm and flood water storage and retention and the moderation of water level
fluctuation extremes.

The project shall not impact more than 300 linear feet.

Justification: Pursuant to s. NR 207.12, antibacksliding requirements must be satisfied
before a relaxation of a standard could be applied. This analysis requires individual
water quality certification.

NWP 53 - Removal of Low-Head Dams

The permittee shall ensure that accumulated sediment is adequately controlled to ensure that
downstream water quality is protected once the dam is removed.

Justification: This material can be a source of TSS and nutrients, particularly phosphorus
to the receiving water (chs. NR 102 and 103, Wis. Adm. Code).

water quality certification

NWP E- Water Reclamation and Reuse Facilities

The permittee shall only use native plantings or, for the purposes of short-term stabilization, early successional non-invasive plantings for the purposes of short-term stabilization followed by native plantings.

Justification: Pursuant to s. NR 103.03(2)(f)3., Wis. Adm Code, water quality certification must prevent conditions conducive to the establishment or proliferation of nuisance organisms in order to protect existing wetland habitat and ecosystems. The invasive species rule, ch. NR 40, Wis. Adm. Code, makes it illegal to possess, transport, transfer or introduce certain invasive species in Wisconsin.

Nationwide Permits Granted Water Quality Certification:

- 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 13 — Bank Stabilization
- NWP 19 — Minor Dredging
- NWP 20 — Response Operations for Oil or Hazardous Substances
- NWP 22 — Removal of Vessels
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- NWP 30 — Moist Soil Management for Wildlife
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- NWP 32 — Completed Enforcement Actions
- NWP 36 — Boat Ramps
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- NWP 41 — Reshaping Existing Drainage Ditches
- NWP 45 — Repair of Uplands Damaged by Discrete Events
- NWP 54 — Living Shorelines

Nationwide Permits Denied Water Quality Certification Without Prejudice At This Time:

- NWP 17 – Hydropower Projects

water quality certification

Justification: The NWP is overly broad and can include a wide range of activities. The broad category of activities covered could significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 29 — Residential Developments

Justification: The NWP is overly broad and can include a range of residential development density and can also include a wide array of other integral development pieces. The density of the development can significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 33 – Temporary Construction, Access, and Dewatering

Justification: Site-specific WQC is appropriate to ensure that site-specific dewatering plans are developed and address sediment-laden materials, which may contain potentially contaminated materials, discharged from dewatering disposal. Oily sheens, odors or colors can be observed in some dewatering activities which may violate water quality standards under ch. NR 102, Wis. Adm. Code.

- NWP 39 — Commercial and Institutional Developments

Justification: The NWP is overly broad and can include a range of commercial and institutional development types and density. These can significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 40 — Agricultural Activities

water quality certification

Justification: The NWP is overly broad and can include a wide range of agricultural activities. These can significantly impact phosphorus and thermal impacts to waterways. Because Wisconsin has numeric standards for phosphorus and temperature pursuant to ch. NR 102, Wis. Adm. Code, individual water quality certification is required to determine thermal and nutrient loadings from these areas. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 44 — Mining Activities

Justification: The NWP is overly broad and can include a range of activities. Given the proximity of these activities to mining activities there is an increase risk that heavy metals or other toxic substances regulated in ch. NR 105 and 106, Wis. Adm. Code, may be discharged in surface waters at levels that may not comply with state standards.

- NWP 48 — Commercial Shellfish Mariculture Activities

Justification: Nutrient discharges from commercial shellfish activities can be significant depending on the size, placement, and treatment of waters from these areas. Given the range of concentration and placement, individual water quality certification is appropriate for these activities to ensure that state nutrient standards pursuant to s. NR 102.06, Wis. Adm. Code are satisfied. Individual water quality certification will also help ensure that state wetlands standards under ch. NR 103, Wis. Adm. Code are satisfied.

- NWP 52 — Water-Based Renewable Energy Generation Pilot Projects

Justification: Impacts to fish and aquatic life uses and criteria such as temperature from water-based energy generation projects can be significant depending on the size and placement of these projects. Given the broad range of waterways this NWP could apply to, an individual WQC is appropriate to ensure that state water quality standards for fish and aquatic life uses and criteria under NR 102.04, Wis. Adm. Code are satisfied.

Nationwide Permits For Which Water Quality Certification Is Not Required:

This water quality certification decision reflects the NWPs for which certification was requested on November 12, 2020. As stated in the notice, NWPs 1, 2, 9, 10, 11, 28, and 35 do not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. Additionally, the notice stipulated that the St. Paul District is proposing to revoke the following NWPs in both Minnesota and Wisconsin: 8, 12, 14, 15, 21, 23, 24, 34, 49, 50, A, B, C,

water quality certification

and D. WDNR is not taking action on these NWP's for these reasons and concludes that a new notification and pre-filing meeting would be required for these NWP's should the position of the St. Paul District change.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin Statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

To request a contested case hearing pursuant to section 227.42, Wisconsin Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources.

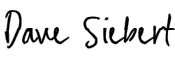
This determination becomes final in accordance with the provisions of s. NR 299.05(7), Wisconsin Administrative Code, and is judicially reviewable when final. For judicial review of a decision pursuant to Sections 227.52 and 227.53, Wisconsin Statutes, you have 30 days after the decision becomes final to file your petition with the appropriate circuit court and to serve the petition on the Secretary of the Department of Natural Resources. The petition must name the Department of Natural Resources as the respondent.

Reasonable accommodation, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request.

This notice is provided pursuant to section 227.48(2), Wisconsin Statutes.

Dated at Madison, Wisconsin 10/11/2021 | 11:26 AM CDT

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

DocuSigned by:

By D2E3E67B71CE4E2
David R. Siebert

D.

401 Water Quality Certification Decision for:

- Bois Forte Band of Chippewa, MN
 - Mille Lacs Band of Ojibwe, MN
- Prairie Island Indian Community, MN
- Red Lake Band of Chippewa Indians, MN
 - Leech Lake Band of Ojibwe, MN
- Shakopee Mdewakanton Sioux Community, MN
 - Upper Sioux Community, MN
 - Lower Sioux Indian Community, MN
 - White Earth Band of Ojibwe, MN
 - Minnesota Chippewa Tribe, MN
- Forest County Potawatomi Community, WI
 - Ho-Chunk Nation, WI
- Lac Courte Oreilles Band of Lake Superior Chippewa Indians, WI
 - Menominee Indian Tribe of Wisconsin, WI
 - Oneida Nation of Wisconsin, WI
- St. Croix Band of Lake Superior Chippewa Indians, WI
 - Stockbridge-Munsee Community, WI
- Red Cliff Band of Lake Superior Chippewa, WI

Issued by the U.S. Environmental Protection Agency, Region 5

Applicable to 2021 NWP's: 29, 39, 40, 42, 43, 44, 51, 52



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF: WW-16J

December 18, 2020

Todd Vesperman, Chief
Wisconsin East Branch
U.S. Army Corps of Engineers St. Paul District
211 North Broadway Street, Suite 221
Green Bay, Wisconsin 54303

RE: Clean Water Act Section 401 Water Quality Certification of the proposed 2020 U.S. Army Corps of Engineers Nationwide Permits as they Apply in Indian country in Minnesota and Wisconsin

Dear Mr. Vesperman:

The enclosed Clean Water Act (CWA) Section 401 Water Quality Certification (401 Certification) applies to any potential point source discharges from potential projects authorized under the proposed 2020 U.S. Army Corps of Engineers (Corps) Nationwide Permits (NWP), into waters of the United States that occur within Indian country¹ within the States of Minnesota and Wisconsin. 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 potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. In Minnesota and Wisconsin, there are 18 federally recognized Indian tribes that do not have treatment in the same manner as a state (TAS) for CWA Section 401, and therefore, do not have the authority to provide CWA Section 401 Certifications for discharges occurring within their tribally held trust lands or reservations. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency is the certifying authority.

The following 18 federally recognized Indian tribes in Minnesota and Wisconsin currently are not approved for CWA 401 TAS:

¹ Indian country is defined at 18 U.S.C. 1151 and includes all lands within the boundaries of federally recognized Indian reservations and all lands held in tribal trust status, whether located within or outside the boundaries of federally recognized Indian reservations.

Minnesota

- Bois Forte Band of Chippewa
- Leech Lake Tribe of Ojibwe
- Lower Sioux Community
- Mille Lacs Band of Ojibwe
- Minnesota Chippewa Tribe
- Prairie Island Indian Community
- Red Lake Band of Chippewa
- Shakopee Mdewakanton Sioux Community
- Upper Sioux Community
- White Earth Band of Chippewa

Wisconsin


- Forest County Potawatomi Community
- Ho-Chunk Nation
- Lac Courte Oreilles Band of Chippewa
- Menominee Indian Tribe of Wisconsin
- Oneida Nation of Wisconsin
- Red Cliff Band of Lake Superior Chippewa
- St. Croix Chippewa Tribe of Wisconsin
- Stockbridge-Munsee Community

The U.S. Environmental Protection Agency (EPA) Region 5 has reviewed the proposed NWP published in the *Federal Register* on September 15, 2020 and the proposed St. Paul District Regional Conditions for the States of Minnesota and Wisconsin public notice issued on September 18, 2020. The St. Paul District is not requesting certification of 11 NWPs in Minnesota and Wisconsin: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B. In addition, the St. Paul District is proposing to revoke the following NWPs in both Minnesota and Wisconsin: 8, 12, 14, 15, 21, 23, 24, 34, 49, 50, A, B, C, and D; this means that they will not apply in Minnesota and Wisconsin.

Based on EPA Region 5's review of the materials provided by the Corps, EPA Region 5 Region 5 is certifying without conditions 17 NWPs: 3, 4, 5, 6, 16, 18, 20, 22, 30, 31, 33, 36, 37, 38, 41, 45, E; conditionally certifying 13 NWPs: 7, 13, 19, 27, 29, 32, 39, 40, 42, 43, 51, 53, 54; and denying 6 NWPs: 17, 25, 44, 46, 48, 52. A table summarizing the certification status for each NWP, is included in the attached 401 Certification. If a project fails to meet the enclosed conditions, or if the applicable NWP is denied under the 401 Certification, the applicant must contact EPA Region 5 at R5wetlands@epa.gov to request individual 401 Certification of the project.

EPA Region 5 is providing the enclosed 401 Certification decision for discharges that may result from the proposed NWP's for the 18 tribes designated above. If you have any questions, or if we can be of further assistance, please contact Melissa Blankenship of my staff, at (312) 886-9641 or blankenship.melissa@epa.gov.

Sincerely,

 Digitally signed by Tera L. Fong
Date: 2020.12.18
10:35:31 -06'00'

Tera L. Fong
Division Director, Water Division

Enclosures: EPA Region 5 Clean Water Act Section 401 Certification of the proposed 2020 Nationwide Permits for Projects in Applicable Indian country in Minnesota and Wisconsin

e-cc: Catherine Chavers, Chairwoman-Bois Forte Band of Chippewa
Faron Jackson, Chairman-Leech Lake Tribe of Ojibwe
Robert J. Larson, President-Lower Sioux Indian Community
Melanie Benjamin, Chief Executive Officer-Mille Lacs Band of Ojibwe
Catherine Chavers, President-Minnesota Chippewa Tribe
Shelley Buck, President-Prairie Island Indian Community
Derrell Seki, Chairman-Red Lake Band of Chippewa
Keith Anderson, Chairman-Shakopee Mdewakanton Sioux Community
Kevin Jensvold, Chairman-Upper Sioux Community
Michael Fairbanks, Chairman-White Earth Band of Chippewa

Ned Daniels, Jr., Chairman-Forest County Potawatomi Community
Marlon WhiteEagle, President-Ho-Chunk Nation
Louis Taylor, Sr., Chairman-Lac Courte Oreilles Band of Chippewa
Joan Delabreau, Chairwoman-Menominee Indian Tribe of Wisconsin
Ron "Tehassi" Hill, Jr., Chairman-Oneida Nation of Wisconsin
Richard Peterson, Chairman-Red Cliff Band of Lake Superior Chippewa
Susan Lowe, Chairwoman-St. Croix Chippewa Tribe of Wisconsin
Shannon Holsey, President-Stockbridge-Munsee Community
Meghan J. Brown, Project Manager-St. Paul District

EPA Region 5 Clean Water Act Section 401 Certification of the proposed 2020 Nationwide Permits for Projects in Applicable Indian Country in Minnesota and Wisconsin

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 Permit (NWP) into waters of the United States within the exterior boundaries of federal Indian reservations or on tribally held trust lands belonging to 10 Minnesota² and 8 Wisconsin Tribes³: 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, D and E. The Corps is not requesting certification for 11 NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B. In addition, the St. Paul District is proposing to revoke the following NWPs in both Minnesota and Wisconsin: 8, 12, 14, 15, 21, 23, 24, 34, 49, 50, A, B, C, and D; this means that they will not apply in Minnesota and Wisconsin.

Section 401(a)(1) of the Clean Water Act requires applicants for federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency is the certifying authority. In this case, the 18 tribes listed in footnotes 2 and 3 do not have the authority to provide CWA Section 401 Certification for discharges occurring within the exterior boundaries of their federal Indian reservations or on tribally held trust lands, therefore, the EPA is making the certification decisions for potential discharges that may result from the projects authorized under the proposed Corps CWA 404 NWPs listed above.

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 *Fed. Reg.* 57298. For more details see: <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 certification conditions.

² Minnesota Tribes: Bois Forte Band of Chippewa; Leech Lake Tribe of Ojibwe; Lower Sioux Community; Mille Lacs Band of Ojibwe; Minnesota Chippewa Tribe; Prairie Island Indian Community; Red Lake Band of Chippewa; Shakopee Mdewakanton Sioux Community; Upper Sioux Community; White Earth Band of Chippewa

³ Wisconsin Tribes: Forest County Potawatomi Community; Ho-Chunk Nation; Lac Courte Oreilles Band of Chippewa; Menominee Indian Tribe of Wisconsin; Oneida Nation of Wisconsin; Red Cliff Band of Lake Superior Chippewa; St. Croix Chippewa Tribe of Wisconsin; Stockbridge-Munsee Community

If a project proposal does not meet the Corps' NWP requirements, the NWP certification conditions, or if certification is denied for a specific NWP, the project proponent must request an individual certification from EPA Region 5. An individual certification request must follow the requirements outlined in 40 C.F.R. § 121.5.

The project proponents for potential projects authorized under the NWPs 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.

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

The project proponents for potential projects authorized under a NWP are encouraged to contact EPA Region 5 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.

The project proponents for potential projects authorized under the NWPs should:

- retain this certification in their files with the applicable NWPs as documentation of EPA's certification decisions for the above-referenced proposed NWPs. This certification is specifically associated with the proposed NWPs described above and expires when those NWPs expire, five years from Corps' issuance date;
- prior to work commencing, notify the appropriate Tribal Environmental Office of projects proposed under the NWP program to ensure that projects will comply with General Condition 17 Tribal Rights; and
- notify the appropriate Tribal Office and EPA Region 5 if spills or unauthorized discharges occur during the project.

It is the responsibility of the project proponent to review the EPA Region 5 condition below (Notification to EPA) and to contact EPA Region 5 with any questions by emailing R5Wetlands@epa.gov.

Nationwide Permits Granted

On behalf of the 18 federally recognized Indian Tribes designated above, EPA Region 5 has determined that the discharges from the following 17 proposed NWPs will comply with water quality requirements, as defined at 40 C.F.R. § 121.1(n).

NWP 3, 4, 5, 6, 16, 18, 20, 22, 30, 31, 33, 36, 37, 38, 41, 45, E

Nationwide Permits Granted with Conditions (40 CFR 121.7(d)(2))

On behalf of the 18 federally recognized Indian Tribes designated above, EPA Region 5 has determined that the discharges from the following 13 proposed NWP's will comply with water quality requirements, as defined at 40 C.F.R. § 121.1(n), subject to the following condition pursuant to CWA Section 401(d):

NWP 7, 13, 19, 27, 29, 32, 39, 40, 42, 43, 51, 53, 54

Notification to EPA

All applicants must provide notice to EPA Region 5 prior to commencing construction to provide EPA Region 5 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 Pre-construction Notification (PCN) for the applicable NWP, the applicant should also provide the PCN to Region 5. EPA Region 5 will provide written notification to the applicant if the proposed project will 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 5 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 5 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 C.F.R. § 121.11(a).

Citation(s) that authorizes this condition: 40 C.F.R. § 121.11(a).

Nationwide Permits Denied (40 CFR 121.7(e)(2))

On behalf of the 18 federally recognized Indian Tribes designated above, EPA Region 5 cannot certify that the range of discharges from potential projects authorized under the following proposed NWP's will comply with water quality requirements, as defined in 40 C.F.R. § 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWP's 17, 25, 44, 46, 48, and 52, and applicants must request an individual water quality certification, consistent with 40 C.F.R. § 121.5.

Certification denial is due to insufficient information. 40 C.F.R. § 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 18 federally recognized Indian Tribes designated above, EPA Region 5 lacks sufficient information on sensitive resources that may exist on tribal land, potential impaired waters on tribal land, and potential cultural importance of the water resources on tribal land. Additional information on

these specific subjects would be needed for EPA Region 5 to assure that the range of discharges from potential projects authorized under NWP's 17, 25, 44, 46, 48, and 52 will comply with water quality requirements, as defined in 40 C.F.R. § 121.1(n).

This information would also be necessary for EPA Region 5 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 C.F.R. § 121.7(b). Lacking this information, EPA Region 5 is therefore denying certification.

Summary Table – EPA Region 5 CWA 401 Certification Decision for applicable Indian Country in Minnesota and Wisconsin

NWP	Certification Status				Conditions	Notes
	Certified	Certified with Conditions	Denied	Corps is not requesting Certification or District will revoke		
1				X		
2				X		
3	X					
4	X					
5	X					
6	X					
7		X			All applicants must provide notice to EPA Region 5 prior to commencing construction to provide EPA Region 5 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate the water quality certification.	
8				X		
9				X		
10				X		
11				X		
12				X		Applicant must refer to the St. Paul District Utility RGP
13		X			Same as above	
14				X		Applicant must refer to the St. Paul District Transportation RGP
15				X		Applicant must refer to the St.

						Paul District Transportation RGP
16	X					
17			X			Applicant must obtain individual 401 Certification
18	X					
19		X			Same as above	
20	X					
21				X		
22	X					
23				X		
24				X		
25			X			Applicant must obtain individual 401 Certification
26						Reserved. This NWP is no longer in use.
27		X			Same as above	
28				X		
29		X			Same as above	
30	X					
31	X					
32		X			Same as above	
33	X					
34				X		Applicant must obtain individual 401 Certification
35				X		
36	X					
37	X					
38	X					
39		X			Same as above	
40		X			Same as above	
41	X					
42		X			Same as above	
43		X			Same as above	
44			X			Applicant must obtain individual 401 Certification
45	X					

46			X			Applicant must obtain individual 401 Certification
47						Reserved. This NWP is no longer in use.
48			X			Applicant must obtain individual 401 Certification
49				X		
50				X		
51		X			Same as above	
52			X			Applicant must obtain individual 401 Certification
53		X			Same as above	
54		X			Same as above	
A				X		
B				X		
C				X		Applicant must refer to the St. Paul District Utility RGP
D				X		Applicant must refer to the St. Paul District Utility RGP
E	X					

E.

401 Water Quality Certification Decision for:

- Bois Forte Band of Chippewa, MN
 - Mille Lacs Band of Ojibwe, MN
- Prairie Island Indian Community, MN
- Red Lake Band of Chippewa Indians, MN
 - Leech Lake Band of Ojibwe, MN
- Shakopee Mdewakanton Sioux Community, MN
 - Upper Sioux Community, MN
 - Lower Sioux Indian Community, MN
 - White Earth Band of Ojibwe, MN
 - Minnesota Chippewa Tribe, MN
- Forest County Potawatomi Community, WI
 - Ho-Chunk Nation, WI
- Lac Courte Oreilles Band of Lake Superior Chippewa Indians, WI
 - Menominee Indian Tribe of Wisconsin, WI
 - Oneida Nation of Wisconsin, WI
- St. Croix Band of Lake Superior Chippewa Indians, WI
 - Stockbridge-Munsee Community, WI
- Red Cliff Band of Lake Superior Chippewa, WI

Issued by the U.S. Environmental Protection Agency, Region 5

Applicable to 2021 NWP's announced in the December 27,
2021 issue of the *Federal Register* (86 FR 73522)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:
WW-16J

Todd Vesperman, Chief
Wisconsin East Branch
U.S. Army Corps of Engineers St. Paul District
211 North Broadway Street, Suite 221
Green Bay, Wisconsin 54303

RE: Revised Clean Water Act Section 401 Water Quality Certification of the proposed 2021 U.S. Army Corps of Engineers Nationwide Permits as Applied in Indian country in Minnesota and Wisconsin

Dear Mr. Vesperman:

On August 18, 2021, the U.S. Army Corps of Engineers St. Paul District (Corps) sent the U.S. Environmental Protection Agency Region 5 (EPA Region 5) a letter stating that for the 41 proposed Nationwide Permits (NWP) that are in the draft final rule that was submitted to the Office of Management and Budget on June 11, 2021, the Corps decided to provide certifying authorities with the opportunity to revise or reconsider their Clean Water Act (CWA) Section 401 water quality certification (401 WQC) decisions for the original 401 WQC request that was provided to EPA Region 5 on November 12, 2020. The Corps has extended the reasonable period of time for EPA Region 5 and other certifying authorities in Minnesota and Wisconsin to act on the 401 WQC request for the 41 NWP that have not yet been finalized.

The 41 proposed NWP subject to the extension of the reasonable period of time are: NWP numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 45, 46, 49, 53, 54 and E/59. In the draft final rule, proposed new NWP E is designated as NWP 59. NWP numbered 1, 2, 8, 9, 10, 11, 24, 28 and 35 do not require section 401 WQC because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. In the case of NWP 8, it only authorizes activities seaward of the territorial seas. The St. Paul District proposed to revoke the following NWP in both Minnesota and Wisconsin: 8, 14, 15, 23, 24, 34 and 49.

Because the Corps has not yet made a final decision on whether to issue the 41 proposed NWP, and the one-year limit for a certifying authority to act on a request for 401 WQC has not yet expired, the Corps has provided certifying authorities an opportunity to revise or reconsider their decision on the 401 WQC request for these 41 NWP. Any new or revised 401 WQC will supersede the original actions taken on the 401 WQC request for the 41 proposed NWP. Any

action by a certifying authority during this extended reasonable period of time will not affect the 401WQC action for the 16 NWP's that were finalized on January 13, 2021 and effective March 15, 2021. The 16 finalized NWP's are: 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58.

The enclosed CWA 401 WQC applies to any potential point source discharges from projects authorized under the proposed 41 U.S. Army Corps of Engineers (Corps) Nationwide Permit Reissuances, into waters of the United States that occur within Indian country¹ within the States of Minnesota and Wisconsin. 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 potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. In Minnesota and Wisconsin, there are 18 federally recognized Indian tribes that do not have treatment in the same manner as a state (TAS) for CWA Section 401, and therefore, do not have the authority to provide CWA Section 401 certification for discharges occurring within their tribally held trust lands and reservations. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency is the certifying authority.

The following federally recognized Indian tribes in Minnesota and Wisconsin do not have TAS eligibility for CWA Section 401 at this time:

Minnesota

- Bois Forte Band of Chippewa
- Leech Lake Band of Ojibwe
- Lower Sioux Indian Community
- Mille Lacs Band of Ojibwe
- Minnesota Chippewa Tribe
- Prairie Island Indian Community
- Red Lake Band of Chippewa
- Shakopee Mdewakanton Sioux Community
- Upper Sioux Community
- White Earth Band of Chippewa

Wisconsin

- Forest County Potawatomi Community
- Ho-Chunk Nation of Wisconsin
- Lac Courte Oreilles Band of Lake Superior Chippewa
- Menominee Indian Tribe of Wisconsin
- Oneida Nation of Wisconsin
- Red Cliff Band of Lake Superior Chippewa

¹ Indian country is defined at 18 U.S.C. 1151 and includes all lands within the boundaries of federally recognized Indian reservations and all lands held in tribal trust status, whether located within or outside the boundaries of federally recognized Indian reservations.

- St. Croix Chippewa Indians of Wisconsin
- Stockbridge-Munsee Community

EPA Region 5 has reviewed the “Text of 41 Nationwide Permits in the Draft Final Rule” attached to your August 18, 2021 letter and other relevant information previously provided by the Corps. Based on our review of the materials provided by the Corps, EPA Region 5 has made decisions about whether the discharges from the proposed 41 NWP’s will comply with applicable provisions of Sections 301, 302, 303, 306 and 307 of the CWA. In summary, EPA Region 5 is certifying without conditions 18 NWP’s: 3, 4, 5, 6, 16, 18, 19, 20, 22, 30, 31, 33, 36, 37, 38, 41, 45, and E/59; conditionally certifying 3 NWP’s: 7, 13, and 27; and denying 6 NWP’s: 17, 25, 32, 46, 53 and 54. A table summarizing the certification status for each NWP (including those that have been finalized) and noting any revisions to our 401 WQC Decision dated December 18, 2021, is included in the attached 401 WQC decision. If a project fails to meet the enclosed conditions, or if the applicable NWP is denied under the 401 WQC, the applicant must contact EPA Region 5 at R5wetlands@epa.gov to request a project-specific 401 WQC of the project.

EPA Region 5 is providing the enclosed 401 WQC decision for discharges that may result from the proposed NWP’s in Indian country in the states of Minnesota and Wisconsin. If you have any questions, or if we can be of further assistance, please contact Melissa Blankenship of my staff, at (312) 886-9641 or blankenship.melissa@epa.gov.

Sincerely,

DAVID
PFEIFER

Digitally signed by DAVID
PFEIFER
Date: 2021.10.15
08:20:23 -05'00'

David Pfeifer
Chief, Watersheds and Wetlands Branch

Enclosure: EPA Region 5 Clean Water Act Section 401 Water Quality Certification of the 41 proposed 2021 Nationwide Permits for Projects as applied in Indian country in Minnesota and Wisconsin

e-cc: Catherine Chavers, Chairwoman-Bois Forte Band of Chippewa
Faron Jackson, Chairman-Leech Lake Band of Ojibwe
Robert J. Larson, President-Lower Sioux Indian Community
Melanie Benjamin, Chief Executive Officer-Mille Lacs Band of Ojibwe
Catherine Chavers, President-Minnesota Chippewa Tribe
Shelley Buck, President-Prairie Island Indian Community
Derrell Seki, Chairman-Red Lake Band of Chippewa
Keith Anderson, Chairman-Shakopee Mdewakanton Sioux Community
Kevin Jensvold, Chairman-Upper Sioux Community
Michael Fairbanks, Chairman-White Earth Band of Chippewa
Ned Daniels, Jr., Chairman-Forest County Potawatomi Community
Marlon WhiteEagle, President-Ho-Chunk Nation
Louis Taylor, Sr., Chairman-Lac Courte Oreilles Band of Lake Superior Chippewa
Gunnar Peters, Chairman-Menominee Indian Tribe of Wisconsin

Ron "Tehassi" Hill, Jr., Chairman-Oneida Nation of Wisconsin
Richard Peterson, Chairman-Red Cliff Band of Lake Superior Chippewa
William Reynolds, Chairman-St. Croix Chippewa Indians of Wisconsin
Shannon Holsey, President-Stockbridge-Munsee Community
Meghan J. Brown, Project Manager-St. Paul District

EPA Region 5 Clean Water Act Section 401 Water Quality Certification of the 41 proposed 2021 Nationwide Permits for Projects as applied in Indian Country in Minnesota and Wisconsin

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 within the exterior boundaries of federal Indian reservations or on tribally held trust lands belonging to the applicable Minnesota² and Wisconsin Tribes³: NWP 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 27, 30, 31, 32, 33, 34, 36, 37, 38, 41, 45, 46, 49, 53, 54, and E/59. The Corps is not requesting certification for 9 NWP: 1, 2, 8, 9, 10, 11, 24, 28, and 35. In addition, the St. Paul District is proposing to revoke the following NWP in both Minnesota and Wisconsin: 8, 14, 15, 23, 24, 34, and 49. This means that they will not apply in the states of Minnesota and Wisconsin.

Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency is the certifying authority. In this case, tribes do not have the authority to provide CWA Section 401 water quality certification (401 WQC) for discharges occurring within the exterior boundaries of federal Indian reservations or on tribally held trust lands belonging to the applicable Minnesota and Wisconsin Tribes⁴, therefore, the EPA is making the certification decisions for potential discharges that may result from the projects authorized under the proposed Corps CWA 404 NWP listed above.

Project Description

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) published in the *Federal Register* its proposal to reissue the Nationwide Permits (NWP).⁵

On January 13, 2021, the Corps published in the *Federal Register* its final rule reissuing 12 NWP and issuing 4 new NWP, as well as the NWP general conditions and definitions.⁶ The Corps is now proposing to re-issue 40 existing NWP and one new NWP and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWP, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWP authorize only activities with

² Minnesota Tribes: Bois Forte Band of Chippewa; Leech Lake Tribe of Ojibwe; Lower Sioux Community; Mille Lacs Band of Ojibwe; Minnesota Chippewa Tribe; Prairie Island Indian Community; Red Lake Band of Chippewa; Shakopee Mdewakanton Sioux Community; Upper Sioux Community; White Earth Band of Chippewa

³ Wisconsin Tribes: Forest County Potawatomi Community; Ho-Chunk Nation; Lac Courte Oreilles Band of Chippewa; Menominee Indian Tribe of Wisconsin; Oneida Nation of Wisconsin; Red Cliff Band of Lake Superior Lake Superior Chippewa; St. Croix Chippewa Indians of Wisconsin; Stockbridge-Munsee Community

⁴ See Footnotes 2 and 3.

⁵ See 85 FR 57298.

⁶ See 86 FR 2744.

no more than minimal individual and cumulative adverse environmental effects.”⁷ For the 41 proposed NWPs that have not been issued, the Corps has extended the reasonable period of time within which CWA Section 401 certifying authorities must act and has provided the opportunity for those CWA Section 401 certifying authorities to revise or reconsider their prior CWA Section 401 WQC decisions.⁸ For more details: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

General Information

The general information provided in this section does not constitute certification conditions.

If a project proposal does not meet certification conditions, or if certification is denied for a specific NWP, the project proponent must request a project-specific CWA Section 401 WQC from EPA Region 5. A project-specific 401 WQC request must follow the requirements outlined in 40 CFR § 121.5 and be submitted to R5Wetlands@epa.gov.

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

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

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

The project proponents for potential projects authorized under the NWPs should:

- Retain this certification in their files with the applicable NWPs as documentation of EPA’s certification decisions for the above-referenced proposed NWPs. This certification is specifically associated with the proposed NWPs described above and expires when those NWPs expire, five years from Corps’ issuance date; and
- Prior to work commencing, notify the appropriate Tribal Environmental Office of projects proposed under the NWP program to ensure that projects will comply with General Condition 17 Tribal Rights.

It is the responsibility of the project proponent to review the conditions below and to contact EPA Region 5 with any questions by emailing R5Wetlands@epa.gov.

⁷ See 85 FR 57298.

⁸ https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation_508.pdf

Nationwide Permits Granted

On behalf of the 18 federally recognized Indian Tribes in Minnesota and Wisconsin that do not have TAS authority to issue 401 WQCs, EPA Region 5 has determined that the discharges from the following 18 proposed NWP's will comply with water quality requirements, as defined at 40 CFR § 121.1(n).

NWP 3, 4, 5, 6, 16, 18, 19, 20, 22, 30, 31, 33, 36, 37, 38, 41, 45, and E/59

Nationwide Permits Granted with Conditions (40 CFR § 121.7(d)(2))

On behalf of the 18 federally recognized Indian Tribes in Minnesota and Wisconsin that do not have TAS authority to issue 401 Certification, EPA Region 5 has determined that the discharges from the following 3 proposed NWP's will comply with water quality requirements, as defined at 40 CFR § 121.1(n), subject to the following General Conditions pursuant to CWA Section 401(d):

NWP 7, 13, 27

General Conditions

1. Notification to EPA

All project proponents for coverage under the specified NWP must provide notice to EPA Region 5 via R5Wetlands@epa.gov prior to commencing construction to provide EPA Region 5 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 Pre-construction Notification (PCN) for the applicable NWP, the project proponent shall also provide the PCN to Region 5. EPA Region 5 will provide written notification to the project proponent if the proposed project will violate the water quality certification of the NWP. Project proponents shall send a copy to the Tribal government of the proposed project location on the notification to the EPA.

Why the condition is necessary: This condition is necessary to provide EPA Region 5 with notice and information to allow for an efficient and effective pre-operation inspection to determine if the certified discharge will violate the water quality certification. If the project scope changes during the Corps' review prior to initiation of the activity, it is also critical for EPA Region 5 to be notified of 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 that authorizes this condition: 40 CFR § 121.11(a).

2. Special Aquatic Sites

Any activities resulting in a point source discharge⁹ into jurisdictional waters of the following types of special aquatic sites shall require a project-specific CWA Section 401 WQC: bogs, fens, mature forested wetlands and wild rice marshes¹⁰ in Minnesota and S1 and S2 ranked wetland communities and wild rice marshes in Wisconsin.¹¹ Project-specific CWA 401 WQC will also be required for impacts to riffle-pool complexes of streams in both Minnesota and Wisconsin.

Why this condition is necessary: General permits, including NWP's are only allowed for those discharges and associated activities that will cause no more than minimal adverse impacts to the aquatic environment. However, point source discharges to the types of special aquatic sites listed above could have more than minimal adverse impacts on an individual or cumulative basis because the discharge of dredge or fill material can impair and degrade the chemical, physical, and biological integrity of these systems. As noted in 40 CFR § 230.1(d), “[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.” Discharge of dredged or fill material into these systems can alter water circulation patterns and hydroperiods, which in turn can release nutrients causing shifts in native to non-native species composition; release chemicals that adversely impact biota (plants and animals), increase turbidity levels, reduce light penetration and photosynthesis, and ultimately change the capacity of these systems to support aquatic life uses and other beneficial uses of these special aquatic sites, including impairing their diverse and unique communities of aquatic organisms, including fish, wildlife and the habitats upon which they depend. Thus, this condition is established to ensure a case-by-case review of any actions or activities proposed in these specific special aquatic site types which are inherently difficult to replace or restore, have high ecological functions and values, and for which degradation cannot be determined to meet water quality requirements on a general permit basis. By conditioning the NWP's to require applicants to contact the EPA for project-specific 401 WQC when these resources would be impacted, the condition will ensure that EPA can make an informed decision on whether to grant, grant with conditions, or deny 401 WQC on a project specific basis. Furthermore, this condition is in alignment with NWP Regional General Condition G: Special Aquatic Resources.

Citations that authorize this condition: 40 CFR § 230.1(d); 40 CFR § 230.10(c); 40 CFR § 230.21; 40 CFR § 230.23; 40 CFR § 230.32; 40 CFR Part 230, Subpart E.

⁹ CWA section 502(14) defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” In the CWA section 404 context, point sources include bulldozers, mechanized land clearing equipment, dredging equipment, and the like. See Clean Water Act Section 401 Certification Rule. 85 FR 42210, 42234 (July 13, 2020).

¹⁰ Additional information about these communities can be found at <https://www.dnr.state.mn.us/npc/classification.html> and <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/2845>.

¹¹ Additional information about these communities can be found at <https://dnr.wi.gov/topic/endangeredresources/Communities.asp> and <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/2845>.

3. Sediment and Erosion Control Measures

The project proponent shall implement and maintain erosion and siltation control measures prior to, during and after project construction. Prior to beginning work, the project proponent shall develop a sediment and erosion control plan. The plan, at a minimum, shall include:

- The types and locations of sediment and erosion control features that shall be used onsite. Examples of erosion control measures include sediment barriers such as straw bales, silt screens, temporary vegetation and/or mulching. Temporary erosion control measures shall be left in place until permanent native vegetative cover has been established. The project proponent shall actively maintain these features during construction.
- Processes for separation and storage of topsoil. Stockpiles shall be at least 100 feet away from a jurisdictional wetland or waterbody. If it is not possible to site the stockpile 100 feet away, project proponent shall explain additional measures in their sediment and erosion control plan. The project proponent shall demonstrate that there is no sediment migration into a jurisdictional wetland or waterbody. All clean, topsoil (free from invasive species) shall be reused in restoration. Stockpiles shall not be placed or stored within a jurisdictional wetland. Spoil piles shall be placed on landscaping fabric or some other material to separate the spoil material and allow retrieval of the spoil material with minimal impacts. Wetland topsoil and vegetation shall be stored separately from other spoils.
- Monitoring and maintenance schedules, and adaptive management processes. The sediment and erosion control measures shall be evaluated prior to construction and within 24 hours of rain events until the site is restored; if any measures are determined to be ineffective at preventing sediment migration or erosion, additional measures shall be taken to ensure there is no further sediment migration or erosion that may cause excess turbidity in the waters of the United States.

Why this condition is necessary: The condition is necessary to ensure that the project proponent has erosion controls in place prior to construction and that temporary erosion control measures are left in place until permanent native vegetative cover has been established. These requirements are not included in NWP General Condition 12.¹² This condition ensures that the project proponent is using planning and construction practices that will maintain the integrity of the site hydrology, minimize runoff impacts, and maintain the aquatic resource functions and values. Adaptive management planning ensures that the monitoring efforts are informing implementation efforts where discharges have the potential to adversely affect the water quality.

¹² *Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.*

Citation that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.73; 40 CFR § 230.74

4. Pollutant Release Prevention

Except as specified in the permit application, the project proponent shall not allow debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes to enter into or be stored within 100 feet of where it may enter into waters of the United States. The project proponent shall take measures to prevent pollutants from entering jurisdictional wetlands and waterways. These measures shall include:

- All equipment shall be cleaned prior to arriving on the project site. All equipment shall be inspected daily and prior to entering any streams or wetlands, for oil, gas, diesel, anti-freeze, hydraulic fluid and other petroleum leaks. All equipment detected with leaks shall be repaired promptly or moved offsite within 24 hours.
- Containment booms and/or absorbent material shall be available onsite. In the case of spills, containment booms and/or absorbent materials shall be employed immediately to prevent discharges from reaching waters of the United States.
- All contaminated areas shall be cleaned immediately, and contaminated soil removed from the site or contained in enclosed containers. Containers shall be located no closer than 100 feet to a jurisdictional wetland or waterbody. If it is not possible to site the storage area 100 feet away, the project proponent shall explain additional measures in their sediment and erosion control plan (see Condition 3).
- Project proponents shall notify the appropriate Tribal government and EPA Region 5 within 24 hours if spills or unauthorized discharges occur during the project. As part of the notice, the project proponent shall provide plans for remedying the spill or unauthorized discharge.

Why this condition is necessary: The condition is necessary to prevent the unauthorized release of pollutants into waters of the United States and identify to whom the project proponent must report any unauthorized release of pollutants under this certification. This condition is necessary to ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project. The condition minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination) and allows for clean-up of potential spills before entering waters. This condition also helps protect the water quality and native biology of the impacted waters by preventing the spread of invasive or nuisance species.

Citations that Authorize this Condition: 40 CFR § 230.10(d); 40 CFR § 230.70; 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.74

5. Projects or Activities Discharging to Impaired Waters

Projects or activities are not authorized under the NWP's if the project will include point source discharges into an active channel (e.g., flowing or open waters) of a water of the United States listed as impaired under CWA Section 303(d) and/or if the waterbody has an approved Total Maximum Daily Load (TMDL) 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 or has an approved TMDL. The current lists of impaired waters of the United States under CWA Section 303(d) and waters of the U.S. for which a TMDL has been approved are available on EPA Region 5's website at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-region-5>

Why this condition is necessary: A water of the United States that is listed as impaired under CWA Section 303(d) and/or for which a TMDL has been approved is threatened or impaired due to the cumulative effects of discharges of pollutants. The NWP's do not provide necessary activity-specific information to determine compliance with specific water quality requirements, such as limits on total suspended solids, temperature, dissolved oxygen, nutrients, or pH for which a specific water of the United States could be listed as impaired and/or for which a TMDL has been approved. Site specific analysis is required to determine whether point source discharges from activities comply with water quality requirements in the active channel (e.g., open or flowing water) of a water of the United States listed as impaired under CWA Section 303(d) and/or for which a TMDL has been approved.

Citation(s) that authorizes this condition: 40 C.F.R. § 230.10(b)(2); CWA Section 303(d).

6. Revegetation of Disturbed Areas

The project proponent shall revegetate disturbed jurisdictional areas with perennial, native vegetation and return affected areas to pre-disturbance conditions. Non-native and invasive species shall not be used for restoration activities. Therefore, prior to commencing work, the project proponent shall develop a restoration plan that includes photo-documenting the entire site, and ensuring that pre-disturbance site conditions, such as riparian/wetland vegetation percent cover and native species diversity, are recorded for future proof of revegetation success. The pre- and post-construction photographs and information on the pre-disturbance site conditions shall be submitted to EPA, the correlating Tribal government, and the correlating Corps District within 2 weeks after construction. Revegetation monitoring is required at least once during the growing season, or annually until revegetation success criteria are achieved.

Why this condition is necessary: The condition is necessary to verify that the project proponent returns the affected areas to pre-disturbance conditions and water quality impacts from erosion are minimized. These requirements are in alignment with the NWP's and are intended to provide direction as the specific details of this condition were not included in NWP General Condition

13.¹³ Revegetation maintains and improves water quality because riparian vegetation acts as buffer to reduce the amount of sediment and pollutants that enter waterways. Native vegetation, because it is adapted to local conditions (e.g., soil types and temperature) provides this function most efficiently. Native riparian vegetation is important for the health of waterways, contributing to the balance of oxygen, nutrients, and sediment, and providing habitat and food for fauna. This condition is necessary to ensure minimization of adverse effects on populations of plants and animals and to preserve the water quality and flood protection benefits provided by vegetation in riparian areas adjacent wetlands and waterbodies. Monitoring for at least one growing season, or annually until replanted areas meet monitoring success criteria, will adequately demonstrate that the restoration effort is successful. This condition is necessary to sustain aquatic resource functions and values, to measure the progress of channel restoration, revegetation, and to ensure that non-native and invasive species do not become established.

Citations that authorize this condition: 40 CFR § 230.10(d); 40 CFR § 230.75

7. Bank Stabilization Activities

For any activities that include bank stabilization efforts, the project proponent shall use bioengineering techniques for bank stabilization activities instead of or in combination with hard armoring; this may be either the sole use of native vegetation or other bioengineered design techniques (e.g., willow plantings, root wads, large woody debris, etc.), or a combination of hard-armoring (e.g., rock) and native vegetation or bioengineered design techniques. If it is not possible to solely rely on bioengineering techniques, the project proponent shall submit project plans to EPA Region 5, the correlating Tribal government, and the correlating Corps District. Projects consisting entirely of riprap or similar rock techniques are limited to 300 linear feet under this conditional certification; project proponents with riprap or similar rock activities over 300 linear feet shall request a project-specific water quality certification. For both partially bioengineered projects, and those composed of riprap, the project plans shall describe the design techniques and stabilization methods assessed to determine the final project design. The use of soil cement, concrete, and grouted rip-rap hard armoring methods are not authorized under this certification and project proponents shall submit a request for a project-specific 401 WQC.

Why this condition is necessary: The use of native vegetation and bioengineering is necessary to ensure the activity incorporates appropriate measures that will minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Planning and construction practices can be used to minimize adverse impacts to plants and animals and can compensate for habitat loss. This condition is necessary to provide the project proponent with clarity on how to meet appropriate soil erosion and sediment controls, as required by NWP's General Condition 12. These appropriate and practicable alternatives often include more ecologically beneficial soft or bioengineering techniques. In conjunction with other bank stabilization practices, this condition will ensure water quality impacts from potential discharges of dredged or fill material are minimized. As a result, this condition is necessary to require project-specific CWA Section 401

¹³ Removal of Temporary Structures and Fills. *Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to preconstruction elevations. The affected areas must be revegetated, as appropriate.*

WQC review so EPA Region 5 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements. Native vegetation and natural materials and structures, such as biodegradable erosion control blankets, staking and live cutting, biologs, coir fiber rolls, brush mattresses, etc. can be effective erosion control measures are when installed properly under the right conditions.¹⁴ Projects without bioengineering are limited to 300 linear feet due to the negative impacts of hard armoring on aquatic habitat functions and water quality. 300 linear feet is the previous restriction in the NWP's without waiver by the District Engineer and is supported by years of data on minimal adverse impacts to the aquatic environment.

Citations that authorize this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.75

Nationwide Permits Denied (40 CFR § 121.7(e)(2))

On behalf of the 18 federally recognized Indian Tribes in Minnesota and Wisconsin that do not have TAS authority for 401 WQCs, EPA Region 5 cannot certify that the range of discharges from potential projects authorized under the following proposed NWP's will comply with water quality requirements, as defined in 40 CFR § 121.1(n). Therefore, CWA Section 401 WQC is denied for NWP's 17, 25, 32, 46, 53 and 54 and applicants must request a project-specific 401 WQC, 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 18 federally recognized Indian Tribes in Minnesota and Wisconsin that do not have TAS authority for 401 WQC, EPA Region 5 lacks sufficient information on sensitive resources that may exist on tribal land, potential impaired waters on tribal land, and potential cultural importance of the water resources on tribal land. Additional information on these specific subjects would be needed for EPA Region 5 to assure that the range of discharges from potential projects authorized under NWP's 17, 25, 32, 46, 53 and 54 and will comply with water quality requirements, as defined in 40 CFR § 121.1(n).

This information would also be necessary for EPA Region 5 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 5 is therefore denying certification.

¹⁴ https://files.dnr.state.mn.us/publications/waters/understanding_our_streams_and_rivers_resource_sheet_2.pdf

Summary Table – EPA Region 5 CWA 401 Certification Decision for applicable Indian Country in Minnesota and Wisconsin (shaded boxes indicate NWP's finalized in January 2021)

NWP	Certification Status			Corps is not requesting Certification or District will revoke	Conditions	Notes
	Certified	Certified with Conditions	Denied			
1				X		
2				X		
3	X					
4	X					
5	X					
6	X					
7		X				* Originally subject only to Condition 1. Notification Condition. Revised to add General Conditions 2-7.
8				X		
9				X		
10				X		
11				X		
12				X		Applicant must refer to the St. Paul District Utility RGP
13		X				* Originally subject only to Condition 1. Notification Condition. Revised to add General Conditions 2-7.
14				X		Applicant must refer to the St. Paul District Transportation RGP
15				X		Applicant must refer to the St. Paul District Transportation RGP
16	X					
17			X			Applicant must obtain project-specific 401 WQC
18	X					

19	X	✕			Notification Condition	*Revised to Certified because Corps did not increase dredging limits as originally proposed
20	X					
21				X		
22	X					
23			X			Applicant must obtain project-specific 401 WQC
24				X		
25			X			Applicant must obtain project-specific 401 WQC
26						Reserved. This NWP is no longer in use.
27		X				* Originally subject only to Condition 1. Notification Condition. Revised to add General Conditions 2-7.
28				X		
29		X			Notification Condition	
30	X					
31	X					
32		✕	X			*Revised to Denial- Originally subject to the Notification Condition. Applicant must obtain individual 401 Certification
33	X					
34				X		Applicant must obtain project-specific 401 WQC
35				X		
36	X					
37	X					
38	X					
39		X			Notification condition	
40		X			Notification condition	
41	X					

42		X			Notification condition	
43		X			Notification condition	
44			X			Applicant must obtain project-specific 401 WQC
45	X					
46			X			Applicant must obtain project-specific 401 WQC
47						Reserved. This NWP is no longer in use.
48			X			Applicant must obtain project- specific 401 WQC
49				X		
50				X		
51		X			Notification condition	
52			X			Applicant must obtain project-specific 401 WQC
53		✕	X			*Revised to Denial- Originally subject to the Notification Condition . Applicant must obtain project-specific 401 WQC.
54		✕	X			*Revised to Denial- Originally subject to the Notification Condition . Applicant must obtain project-specific 401 WQC.
A/55				X		
B/56				X		
C/57				X		Applicant must refer to the St. Paul District Utility RGP
D/58				X		Applicant must refer to the St. Paul District Utility RGP
E/59	X					

***Notification Condition-** All project proponents for coverage under the specified NWP must provide notice to EPA Region 5 via R5Wetlands@epa.gov prior to commencing construction to provide EPA Region 5 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate the water quality certification. Where the Corps requires a Pre-construction Notification (PCN) for the applicable NWP, the applicant should also provide the PCN to Region 5. EPA Region 5 will provide written notification to the applicant if the proposed project will violate the water quality certification of the NWP.

F.

**401 Water Quality Certification
Decision for the Bad River Band of
Lake Superior Chippewa in
Wisconsin**

Applicable to 2021 NWP's

BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS

CHIEF BLACKBIRD CENTER

P.O. Box 39 • Odanah, Wisconsin 54861

Resolution No. 12-09-20-433

Authorization of Conditional Clean Water Act Section 401 Certification of Select Nationwide Permits Issued by the U.S. Army Corps of Engineers and Denial Without Prejudice of Clean Water Act Section 401 Certification of Specific Nationwide Permits

WHEREAS, the Bad River Band of Lake Superior Tribe of Chippewa Indians is a federally recognized Indian tribe with a Constitution enacted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 476; and

WHEREAS, Article VI, Section 1(a) of the Constitution authorizes the Tribal Council to negotiate with Federal, State, and local government on behalf of the Band; and

WHEREAS, Article VI, Section 1(n) of the Constitution directs the Tribal Council to encourage and foster the arts, crafts, traditions, culture, wildlife, and natural resources of the Band, which necessarily includes enhancement and protection of the water resources within the boundaries of the Reservation; and

WHEREAS, there is a need for the Tribe to protect the health and welfare of its members, maintain its political integrity and the economic security of the Tribe and its present and future members; and

WHEREAS, the water resources of the Tribe are integral to its members' health and welfare, as well as the economic security and political integrity of the Tribe itself, and

WHEREAS, the Tribe obtained treatment in a manner similar to a state for Clean Water Act Section 303, and 401 program authority from the U.S. Environmental Protection Agency on June 26, 2009;

WHEREAS, the Tribe has taken all steps required under Tribal law and federal law to issue Clean Water Act Section 401 certification decisions of the Nationwide Permit;

WHEREAS, the Tribe, after consultation with the Band's Natural Resource Department, finds that the certification decisions of the Nationwide Permits are necessary to protect (a) the health and welfare of the Band, its members, and others living on its Reservation, and (b) the present and future use of Reservation waters for propagation of fish and aquatic like and wildlife, cultural, and other legitimate uses;

NOW, THEREFORE, BE IT RESOLVED that the Tribal Council hereby approves the 401 Certifications of Nationwide Permits #20 and #37, with the conditions attached hereto as Exhibit "A" of select Nationwide Permits as identified in Exhibit A.

AND BE IT FURTHER RESOLVED that the Tribal Council hereby denies without prejudice the 401 Certifications of select Nationwide Permits as identified in Exhibit A, resulting in the requirement of individual 401 Certifications to be issued by the Tribe before an activity is eligible for coverage under these specific Nationwide Permits.

AND BE IT FURTHER RESOLVED that the Tribal Council directs the Natural Resources Department to submit the certification decisions to the US Army Corps of Engineers.

Certification

I, the undersigned, as Secretary of the Bad River Band of Lake Superior Tribe of Chippewa Indians, an Indian Tribe organized under Section 16 of the Indian Reorganization Act, hereby certify that the Tribal Council is composed of seven members, of whom 7 members, constituting a quorum, were present at a meeting hereof duly called, noticed, convened, and held on the 9th day of December, 2020; that the foregoing resolution was duly adopted at said meeting by an affirmative vote of 6 members; 0 against; and 0 abstaining, and that the said resolution has not been rescinded or amended.

Jay McFee
Jay McFee, Secretary
Bad River Tribal Council

***Exhibit A: Clean Water Act Section 401 Certification Decisions of the Army Corps of Engineers’
Nationwide Permits***

Clean Water Act Section 401 Certification of the Army Corps of Engineers’ Nationwide Permits

In compliance with the provisions of the Clean Water Act (CWA), as amended (33 U.S.C. 1251 *et seq.*), the U.S. Army Corps of Engineers (hereafter, the Corps) has posted notice of the issuance of nationwide permits (NWP) applicable within Minnesota and Wisconsin, including within the exterior boundaries of Indian Reservations. These general permits authorize activities under the Army Corps’ CWA Section 404 authority and their authority under Section 10 of the Rivers and Harbors Act.

In accordance with Section 401 of the CWA, the Bad River Band of Lake Superior Tribe of Chippewa Indians (hereafter, the Tribe) has examined the application for these general permits and determined that:

- (a) there is reasonable assurance—with the conditions listed below—that the activities associated with NWPs 20 (Response Operations for Oil and Other Hazardous Substances) and 37 (Emergency Watershed Protection and Rehabilitation) will be consistent with relevant water quality considerations;
- (b) There is not reasonable assurance that the activities associated with NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 16, 17, 18, 19, 20, 22, 25, 27, 28, 29, 30, 31, 32, 33, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 51, 52, 53, 54, and E will be consistent with relevant water quality considerations, including tribal laws. Accordingly, the Tribe will deny without prejudice CWA Section 401 certification of these NWPs without prejudice and require individual certifications issued by the Tribe for these NWPs.

The Tribe has determined, however, that certain conditions are necessary to protect (a) the public health and welfare of the Tribe, its members, and others living on its Reservation, and (b) the present and future use of Reservation waters for cultural purposes, propagation of fish and aquatic life and wildlife, and other legitimate uses. Accordingly, the Tribe grants CWA Section 401 certification of NWPs 20 and 37 with the following conditions to apply to discharges made under these permits into Waters of the Bad River Reservation:

- 1) This Certification applies only to those activities specifically authorized by these Nationwide Permits 20 and 37 and, even then, only to the extent that the activity complies with the applicable conditions of this Certification. Water quality certification for any activity that is authorized by these Nationwide Permits but does not comply with the conditions of this Certification is denied without prejudice. This Certification does not obviate the need for the permittee to obtain any other applicable federal or tribal permits, authorizations, or approvals. This Certification is not and shall not be construed as Tribal concurrence under §106 of the National Historic Preservation Act or any other federal or tribal requirement as it pertains to impacts to cultural properties, or historical sites, or properties that may be eligible for listing as such; §106 in any other applicable regulatory requirements must be complied with separately.^{a,b}

***Exhibit A: Clean Water Act Section 401 Certification Decisions of the Army Corps of Engineers'
Nationwide Permits***

- 2) This project shall be implemented in such a manner that is consistent with the Tribe's Water Quality Standards (WQS).^a The Tribe's WQS can be viewed at:
http://badriver-nsn.gov/images/stories/docs/bad%20river%20wqs_final_7-6-11a.pdf
- 3) A permittee must notify the Tribe by US Mail or email of an activity within the exterior boundaries of the Bad River Reservation, which is covered under the conditional certified NWP 20 or 37.^{a,b} A permittee must submit a copy of the scope of work, proposed project location, and contact information to the following addresses within 48 hours of any activity commenced as an emergency under NWP 20 or 37:

Bad River Tribe's Natural Resources Department
Attn: Water Regulatory Specialist
P.O. Box 39
Odanah, WI 54861
waterreg@badriver-nsn.gov

Bad River Tribe's Natural Resources Department
Attn: Tribal Historic Preservation Officer (THPO)
P.O. Box 39
Odanah, WI 54861
THPO@badriver-nsn.gov
- 4) If an activity permitted under NWP 20 or 37 is deemed an emergency that would result in unacceptable threat to human health or the environment and lowers water quality (or has the potential to lower water quality) in high quality water, then the permittee must submit antidegradation materials within seven (7) days after the unacceptable threat to human health or the environment is addressed. An antidegradation demonstration template can be found at:
<http://badriver-nsn.gov/tribal-operations/natural-resources/antidegradation-demonstration-announcements-forms>.

The antidegradation demonstration materials described in provision E.4.iv. of the Tribe's WQS must be submitted to the following address:

Bad River Tribe's Natural Resources Department
Attn: Water Resources Specialist
P.O. Box 39
Odanah, WI 54861
waterreg@badriver-nsn.gov

High quality waters include waters designated as Outstanding Tribal Resource Water (OTRWs), Outstanding Resource Waters (ORWs), and Exceptional Resource Waters (ERWs) as further described below.

***Exhibit A: Clean Water Act Section 401 Certification Decisions of the Army Corps of Engineers'
Nationwide Permits***

- OTRWs, or Tier 3 waters, include the following: Kakagon Slough and the lower wetland reaches of its tributaries that support wild rice, Kakagon River, Bad River Slough, Honest John Lake, Bog Lake, a portion of Bad River, from where it enters the Reservation through the confluence with the White River, and Potato River.^{d,k}
 - ORWs, or Tier 2.5 waters, include the following: a portion of Bad River, from downstream the confluence with the White River to Lake Superior, White River, Marengo River, Graveyard Creek, Bear Trap Creek, Wood Creek, Brunsweller River, Tyler Forks River, Bell Creek, and Vaughn Creek.^{e,k}
 - ERWs, or Tier 2 waters, include the following: any surface water within the exterior boundaries of the Reservation that is not specifically classified as an Outstanding Resource Water (Tier 2.5 water) or an Outstanding Tribal Resource Water (Tier 3 water).^{f,k}
 - High quality waters can be viewed at:
<http://www.arcgis.com/apps/View/index.html?appid=6f44c371217e4ee8b5f1c2c705c7c7c5>.
- 5) A discharge to a surface water within the Bad River Reservation boundaries shall not cause or contribute to an exceedance of the turbidity criterion included in the Tribe's WQS, which states: Turbidity shall not exceed 5 NTU over natural background turbidity when the background turbidity is 50 NTU or less, or turbidity shall not increase more than 10% when the background turbidity is more than 50 NTU.^g
- 6) All activities which are eligible for coverage under any NWP within the exterior boundaries of the Bad River Reservation must comply with the Bad River Reservation Wetland and Watercourse Protection Ordinance, or Chapter 323 of the Bad River Tribal Ordinances. Provision 323.22 describes the process for a Temporary Emergency Permit. Questions regarding Chapter 323 and requests for permit applications can be directed to the Wetlands Specialist in the Tribe's Natural Resources Department at (715) 682-7123, (715) 292-8661, or wetlands@badriver-nsn.gov.
- 7) To maintain compliance with Section 106 of the National Historic Preservation Act, implementation of 36 CFR 800 – Protection of Historic Properties will be adhered. Optimally, the Tribal Historic Preservation Officer (THPO) is to be notified in the planning stages of any ground disturbing project and afforded 30-days to respond.
- Guidance for Best Practices in Consultation with Indian Tribes can be found at, URL: https://web.archive.org/web/20191220234929/http://www.nathpo.org/PDF/Tribal_Consultation.pdf
- In the event of an Emergency declared by the Bad River Tribal Council on Tribal lands, an alternative in accordance with 36 CFR 800.12, (b), (2) affords the Bad River THPO seven (7) days to comment upon notification of the proposed action. However, if the Advisory

***Exhibit A: Clean Water Act Section 401 Certification Decisions of the Army Corps of Engineers'
Nationwide Permits***

Council on Historic Preservation (ACHP) and/or THPO objects to the proposed action, implementation of 36 CFR 800.3 through 800.6 must be implemented.

In accordance with 36 CFR 800.12 (d) Immediate rescue and salvage operations conducted to preserve life or property are exempt from Section 106, part 800.12 and THPO notification is not necessary.

Optimally, a Plan of Action (POA) would be developed to address the event of an inadvertent discovery of human remains. However, in the absence of a POA, the Native American Graves Protection Act (NAGPRA) and the Bad River NAGPRA Policy must be adhered within the exterior boundaries of the Bad River Indian Reservation.

Questions concerning this section can be directed to the Bad River THPO in the Tribe's Natural Resources Department at (715) 682-7123 or THPO@badriver-nsn.gov

- 8) A permittee must implement best management practices (BMPs) on the project site to minimize erosion of the Lake Superior shoreline. BMPs include, but are not limited to, retaining vegetation on the bank, diverting surface water runoff (e.g., water from rain gutters) away from the bank, diverting discharges from sumps or grey water away from the bank, and minimizing additional paved areas or impervious surfaces on the property.^{l,m}
- 9) Upon completion of earthwork operations, all exposed slopes, fills, and disturbed areas must be given sufficient protection by appropriate means such as landscaping, or planting and maintaining vegetative cover, to prevent subsequent erosion. If coffer dams are constructed, they shall be maintained so as to prevent erosion into the water. If earthen material is used for coffer dam construction, sheet piling, riprap, or a synthetic cover must be used to prevent dam erosion.^{j,p}
- 10) The permittee shall minimize the extent and duration of soil disturbances while undertaking activities authorized by these Nationwide permits. Temporary and permanent erosion and sedimentation controls must be properly designed, installed, and maintained during construction. Permanent erosion control measures must be maintained throughout the life of the project. Temporary non-biodegradable controls must be promptly removed once soils are stabilized.^{g,j}
- 11) A permittee must limit the use of herbicides to only non-native invasive plant species control. The permittee must notify the Tribe's Natural Resources Department if non-native invasive plant species are found within the property boundaries.^{j,l} Any herbicide application within rights-of-way must comply with the Right-Of-Way Ordinance, or Chapter 421 of the Bad River Tribal Ordinances. No chemical applications of pesticides may occur during or 14 days prior to the anticipated opening of the Tribe's wild rice harvest season in accordance with the Bad River Band Sloughs Protection Ordinance (Chapter 340 of the Bad River Tribal Ordinances).

***Exhibit A: Clean Water Act Section 401 Certification Decisions of the Army Corps of Engineers’
Nationwide Permits***

- 12) A permittee must submit a series of photographs to the Tribe’s Natural Resources Department within one week of completing work on the site. The photographs must be taken from different vantage points and depict all work authorized by this certification.^{a,l}
- 13) The Tribe’s Natural Resources Department reserves the right to inspect the project throughout the project life to investigate the project’s construction, operation, maintenance, or compliance with the Tribe’s WQS.^a
- 14) Activities required for the containment and cleanup of oil and hazardous substances, which are eligible for coverage under the NWP, must comply with the Bad River Band Environmental Response and Remediation Ordinance, or Chapter 380 of the Bad River Tribal Ordinances. Questions regarding Chapter 380 can be directed to the Brownfield Specialist in the Tribe’s Natural Resources Department at (715) 682-7123, (715) 685-4440 or Brownfields@badriver-nsn.gov.
- 15) Fill material (if required) will consist of suitable material that is free of pollutants that would have an adverse effect and free of non-native invasive species.^{l,m,n}

Each condition of this Certification cannot be made less stringent without violating the requirements of tribal law.

The Tribe reserves the right to modify this Certification if any changes, modifications or deletions are made to the NWP. In addition, the Tribe reserves the right to modify, suspend, or revoke this Certification to carry out its responsibilities during the term of the NWP with respect water quality, including any revisions to the Tribe’s WQS or relevant Tribal law.

Citations and Other Relevant Footnotes:

^a Bad River Band of Lake Superior Tribe of Chippewa Indians Water Quality Standards adopted by Resolution No. 7-6-11-441 (hereafter, Tribe’s WQS).

^b 36 C.F.R. § 800.16(l)(2).

^c Tribe’s WQS: See provisions E.3.ii. and E.4.iv.

^d Tribe’s WQS: See provision E.2.iii.

^e Tribe’s WQS: See provision E.2.ii.

^f Tribe’s WQS: See provision E.2.i.

^g Tribe’s WQS: See provision E.7.iii.

^h 36 C.F.R. § 800.3(c)(4).

ⁱ 36 C.F.R. § 800.3(b).

^j Tribe’s WQS: See provision E.6.ii.e.

^k A permittee should review the applicable provision of the most recent version of the Tribe’s WQS to see the tier classification for a specific waterbody. A permittee can direct questions to the Tribe’s Water Resources Specialist.

^l Tribe’s WQS: See provision E.6.i.

^m Tribe’s WQS: See provision E.6.ii.a.

ⁿ Tribe’s WQS: See provision E.6.ii.h.

^o Tribe’s WQS: See provision E.6.ii.c.

^p Tribe’s WQS: See provision E.6.ii.d.

^q Tribe’s WQS: See provisions F and G.

G.

**401 Water Quality Certification
Decision for the Fond du Lac
Band of Lake Superior Chippewa
in Minnesota**

Applicable to 2021 NWP's

Fond du Lac Band of Lake Superior Chippewa Resource Management Division

1720 Big Lake Road
Cloquet, MN 55720
Phone (218) 878-7101
Fax (218) 878-7130



Office of Water Protection 401 Water Quality Certification

APPLICANT: USACE St. Paul District

ISSUED: 18 December 2020

Administration
Conservation Enforcement
Environmental
Fisheries
Forestry
Land Information
Natural Resources
Wildlife

Pursuant to § 401 of the Clean Water Act (33 U.S.C. 1341), the Fond du Lac Band of Lake Superior Chippewa is required to certify whether the activity described below will violate applicable water quality standards. Accordingly, the Fond du Lac Reservation Office of Water Protection requires reasonable assurance that the activity will not violate provisions of the Fond du Lac Band of Lake Superior Chippewa Water Quality Standards of the Fond du Lac Reservation, Ordinance #12/98 (Adopted by Resolution #1403/98 of the Fond du Lac Reservation Business Committee on December 10, 1998; Amended by Resolution #1286/01 of the Fond du Lac Reservation Business Committee on September 11, 2001 and by Resolution #1321/20 of the Fond du Lac Reservation Business Committee on July 8, 2020), the Fond du Lac Band of Lake Superior Chippewa Water Quality Certification, Ordinance #01/06 (Adopted by Resolution #1033/06 of the Fond du Lac Reservation Business Committee on March 28, 2006; Amended by Resolution #1513/20 of the Fond du Lac Reservation Business Committee on December 16, 2020), or of § § 301, 302, 303, 306, or 307 of the Clean Water Act.

A request for Clean Water Act (CWA) § 401 Water Quality Certification has been received from the United States Army Corps of Engineers – St. Paul District for the 2020 Nationwide Permits for certain activities in waters and wetlands in Minnesota and Wisconsin (2020 NWP). Fond du Lac's Water Quality Standards may be found at: <http://www.fdlrez.com/government/ords/12-98ord.pdf>

Applicant:

Regulatory Branch

**St. Paul District, Corps of Engineers
180 Fifth Street East, Suite 700
St. Paul, Minnesota 55101-1678**

Authorized Work: The authorized work consists of only those activities (and only to the extent of the impact limitations) specified in the 2020 Nationwide Permits where the discharge of dredged or fill material takes place within the external boundaries of the Fond du Lac Reservation.

(Certification continued):

Location(s): Construction activities authorized under these Nationwide Permits may occur anywhere permissible by the Nationwide Permits and this Certification within the exterior boundaries of the Fond du Lac Reservation.

Background: The Fond du Lac Reservation Office of Water Protection (OWP) has examined the request for Certification and the 2020 Nationwide Permits (including both General and Regional Conditions) and based upon our evaluation of the supplied information that is relevant to Water Quality Certification considerations, we certify that there is reasonable assurance that activities associated with the Nationwide Permits will be conducted in a manner that will not violate the Fond du Lac Band of Lake Superior Chippewa Water Quality Standards of the Fond du Lac Reservation Ordinance #12/98, as amended.

The §401 certification process ensures that Fond du Lac has the opportunity to establish conditions or even deny certification in order to protect our reservation water resources. The conditions that Fond du Lac believe are necessary to assure compliance with applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of tribal law (specifically, Fond du Lac Ordinance #12/98, as amended) are related to our interpretation of our narrative water quality standards and our antidegradation policies. The condition regarding turbidity (no more than 10% increase over ambient or background turbidity) defines the water quality based effluent limitation (WQBEL) and monitoring/reporting requirements necessary to assure that any applicant for this Federal permit will be in compliance with our water quality standards. Monitoring and reporting requirements allow Fond du Lac, USEPA, and USACE to confirm that the certification conditions intended to protect the existing high quality of our reservation waters are effective and being implemented. They can trigger adaptive management practices at a site, and can help inform the development of more robust certification conditions in the future. Monitoring and reporting activities help permittees to actually see and understand the impact, or avert an impact, on water quality resulting from their permitted actions. Over the five (5) years period of EPA's Construction General Permit (CGP 2012) had been in effect with the Fond du Lac turbidity limit and monitoring requirement, we have only encountered one incident of exceedance of this permit condition. This exceedance led to immediate corrective action that may not have otherwise been required without this specific condition in place.

Fond du Lac considers all waters of the reservation to be Tier 2 (higher quality, on a pollutant by pollutant basis, than the minimum quality necessary to maintain designated uses), and our primary wild rice lakes are Tier 3 or "Outstanding Reservation Resource

(Background continued):

Value” waters. It is entirely consistent with EPA guidance on antidegradation review¹, for instance, to define a significance threshold above which the effects on water quality require findings of necessity and social and economic importance to support any decision about the lowering of water quality in high quality waters. The significance threshold of 10% has been independently defined and approved by EPA through multiple processes that have included environmental groups, industry representatives, scientific experts, and public input, including Water Quality Guidance for the Great Lakes, and other states as well.

Fond du Lac believes that the turbidity-related condition cannot be made any less stringent without violating the requirements of tribal law. Section 301(h) of our water quality standards specifies “settleable and suspended solids (turbidity) should not reduce the depth of the compensation point for photosynthetic activity by more than 10% from the seasonally established norm for aquatic life”. Our comprehensive water quality monitoring data collected over the last eighteen years provides a defensible basis for defining ambient conditions and protecting the existing high quality and biological integrity in our surface waters.

Certification: Certification is **DENIED** to any new discharge to Outstanding Reservation Resource Waters (ORRW) as described in § 105 b. 3. of the Fond du Lac Water Quality Standards (Ordinance #12/98, as amended). Although additional waters may be designated in the future, currently Perch Lake, Rice Portage Lake, Miller Lake, Deadfish Lake, and Jaskari Lake are designated as ORRWs. New dischargers wishing to discharge to an ORRW must obtain a separate Water Quality Certification of such discharges. As per § 201(h) of the Water Quality Certification Ordinance #01/06 this Water Quality Certification is granted as **CERTIFICATION WITH CONDITIONS** for all other waters/wetlands within the Fond du Lac Reservation and therefore the following conditions apply:

1) A copy of the Pre-Construction Notification (PCN) MUST be sent to the Fond du Lac Office of Water Protection at the same time it is sent to the St. Paul District, Corps of Engineers. The PCN must include all applicable drawings, plans, and specifications for the project. The Fond du Lac Office of Water Protection must be invited to participate in any meetings between the St. Paul District, the Local Government Unit, Technical Evaluation Panel and the applicant. The PCN can be submitted electronically to richardgitar@FDLREZ.com or by hardcopy sent to:

**Fond du Lac Reservation
Office of Water Protection**

¹ Memorandum from Ephraim S. King, Director, EPA Office of Science and Technology, to Water Management Division Directors, Regions 1-10, “Tier 2 Antidegradation Reviews and Significance Thresholds”, August 10, 2005.

(Condition #1 continued):

**1720 Big Lake Road
Cloquet, MN 55720**

2020 Nationwide Permits applicants are encouraged to work with the FdL Office of Water Protection (OWP) in the development of their projects since most of such projects will require a Wetland Activity Permit or Exemption Certificate under provisions of the Fond du Lac Wetlands Protection and Management Ordinance (WPMO) (Ordinance #03/06). [This condition helps the Office of Water Protection stay informed of the project as it progresses and gives information to evaluate whether the project requires a Wetland Activity Permit under the provisions of the Fond du Lac Wetlands Protection and Management Ordinance. FDL Water Quality Certification Ordinance, Section 204 (a) (3)].

2) If the project will entail a discharge to any watercourse or open water body, the turbidity limit shall NOT exceed 10% of natural background within any receiving water(s) as determined by Office of Water Protection staff. For such discharges, turbidity sampling must take place within 24 hours of a ½-inch or greater rainfall event. The results of the sampling must be reported to the Office of Water Protection within 7 days of the sample collection. All sample reporting must include the date and time, location (GPS: UTM/Zone 15), and NTU. 2017 Nationwide Permits applicants are encouraged to work with the Office of Water Protection in determining the most appropriate location(s) for sampling.

Water sample data reporting should be submitted electronically to richardgitar@FDLREZ.com or by hard copy sent to:

**Fond du Lac Reservation
Office of Water Protection
1720 Big Lake Road
Cloquet, MN 55720**

[This condition helps both the Office of Water Protection and the project proponent in knowing whether or not their erosion control efforts are effective. FDL Water Quality Certification Ordinance, Section 204 (b) (1)].

3) Receiving waters with open water must be sampled for turbidity prior to any authorized discharge as determined by Office of Water Protection staff. This requirement only applies to receiving waters in which no ambient turbidity data exists.

Water sample data reporting should be submitted electronically to richardgitar@FDLREZ.com or by hard copy sent to:

(Condition #3 continued):

**Fond du Lac Reservation
Office of Water Protection
1720 Big Lake Road
Cloquet, MN 55720**

[This condition allows the Office of Water Protection to Obtain a baseline turbidity sample in which to compare to other samples. FDL Water Quality Certification Ordinance, Section 204 (b) (2)].

4) The work shall be accomplished in conformance with the accepted plans, specifications, data, permit application materials (including the PCN), and other information submitted in support of the project application and the limitations, requirements and conditions set forth herein. [This condition keeps the project proponent from changing the scope and extent of the project without requiring a new certification. FDL Water Quality Certification Ordinance, Section 204 (a) (4)].

5) The Office of Water Protection shall be notified at least 48 hours prior to the commencement of work. [This condition allows the Office of Water Protection to know when a project will begin. FDL Water Quality Certification Ordinance, Section 204 (a) (5)].

6) Impacts to waters of the Fond du Lac Reservation other than those specifically addressed in the plans, application materials, and this certification are prohibited. All lakes, streams, springs, and wetlands for which impacts are not authorized shall be fully protected prior to, during and after construction until the area is stabilized. [This condition limits the discharge to only the waters that were identified at the time of the application and subsequent certification. FDL Water Quality Certification Ordinance, Section 204 (a) (6)].

7) All work shall be carried out in such a manner as will prevent violations of water quality criteria as stated in the Water Quality Standards of the Fond du Lac Reservation, Ordinance 12/98, as amended. This includes, but is not limited to, the prevention of any discharge that causes a condition in which visible solids, bottom deposits, or turbidity impairs the usefulness of water of the Fond du Lac Reservation for any of the uses designated in the Water Quality Standards of the Fond du Lac Reservation. These uses include public water supply, wildlife, aquatic life, warm water fisheries, cold water fisheries, subsistence fishing (netting), primary contact recreation, secondary contact recreation, cultural, wild rice areas, aesthetic waters, agriculture, navigation, commercial and wetlands. It also includes the designated uses of wetlands including, but not limited to, baseflow discharge, cultural opportunities, flood flow attenuation, groundwater recharge, indigenous floral and faunal diversity and abundance, nutrient cycling, organic carbon

(Condition #7 continued):

export/cycling, protection of downstream water quality, recreation, resilience against climactic effects, sediment/shoreline stabilization, surface water storage, wild rice, and water dependent wildlife. [In addition to listing the designated uses of waters of the Fond du Lac Reservation, this condition also limits the project proponent to discharges that will not violate our Water Quality Standards. FDL Water Quality Certification Ordinance, Section 204 (a) (7)].

8) Appropriate steps shall be taken to ensure that petroleum products or other chemical pollutants are prevented from entering waters of the Fond du Lac Reservation. All spills must be reported to the appropriate emergency management Agency (National Response Center AND the State Duty Officer), and measures shall be taken immediately to prevent the pollution of waters of the Fond du Lac Reservation, including groundwater. The Fond du Lac Office of Water Protection must also be notified immediately of any spill regardless of size. [This condition helps protect water quality and also reminds project proponents of their responsibility in reporting spill events. FDL Water Quality Certification Ordinance, Section 204 (b) (3)].

9) To prevent the introduction of invasive species, all contractors and subcontractors MUST disclose information stating prior equipment location(s) and all known invasive species potentially being transported from said location(s). All equipment MUST undergo a high-pressure wash (including timber mats) before entering the Fond du Lac Reservation. Personal equipment, such as work boots, gloves, vests, etc. must be clean of debris, dirt, and plant and animal material before entering the Fond du Lac Reservation. Equipment being transported from known infested areas MUST undergo a high pressure wash as soon as possible after leaving the infested site and again BEFORE entering the Fond du Lac Reservation to avoid transport of invasive species into areas surrounding the Reservation. Upon arrival, all contractor and sub-contractor equipment will be inspected by appointed Fond du Lac staff (or an independent inspector designated by the project proponent). If equipment is deemed unsatisfactory, the equipment must undergo a high pressure water until the equipment is cleared by the inspector, until such time, minimal travel will be allowed through the Reservation. The project proponent shall be held responsible for the control of any invasive species introduced as a result of their project. [This condition requires the project proponent to prevent the inadvertent introduction of invasive species by taking an active role in cleaning all vehicles, equipment, and equipment mats before entering the Reservation. This condition has been placed in certifications since 2012, due to the introduction of Wild Parsnip in 2011 from a pipeline contractor. It is much easier to prevent the introduction of an invasive species that it is to eradicate it once it has been introduced. Many invasive plant species form monocultures, preventing native plants from growing. This situation often leads to cases of erosion, which in turn effect water quality. FDL Water Quality Certification Ordinance, Section 204 (g) (1)].

(Conditions continued):

10) ALL seed mixes, whether used for temporary stabilization or permanent seeding, shall NOT contain any annual ryegrass (*Lolium* species). Canadian Wild Rye (*Elymus* species) or Oats (*Avena* species) may be used as a replacement in upland seed mixes. Upland seed mixes approved by the Minnesota Department of Transportation (MnDOT) may be used without Office of Water Protection approval provided they do NOT contain annual ryegrass. Seed mixes 21-111 (Oats Cover Crop) and 21-112 (Winter Wheat Cover Crop) are approved for use on the Fond du Lac Reservation. [This condition prevents the use of annual ryegrass on the Reservation. Annual ryegrass is allelopathic, which means it produces biochemical in its roots that inhibit the growth of other native plants. If used in seed mixes, annual ryegrass could contribute to erosion, especially on slopes. However, this condition also specifies substitute grasses that germinate almost as fast as annual ryegrass for use as a cover crop to help prevent erosion. FDL Water Quality Certification Ordinance, Section 204 (f) (1)].

11) Seed mixes used in wetlands MUST be approved by Office of Water Protection staff prior to use. Wetland seed mixes approved by the Minnesota Board of Water and Soil Resources (BWSR) may be used without Office of Water Protection approval if they do NOT contain annual ryegrass. Seed mixes 34-171 (Wetland Rehabilitation), 34-181 (Emergent Wetland), 34-361 (Riparian Northeast) and 34-371 (Wet Meadow Northeast) are approved and recommended for use on the Fond du Lac Reservation. The use of mulch is NOT allowed in wetlands. [This condition requires the seed mixes used in wetland be approved by the Office of Water Protection. The BWSR seed mixes list have already been reviewed by Office of Water Protection staff and are pre-approved. Mulch is not allowed in wetlands because it often reduces germination of wetland plants and also does not break down the same as in upland situations. FDL Water Quality Certification Ordinance, Section 204 (f) (2)].

12) ALL erosion and sediment control Best Management Practices (BMPs) shall be properly installed, maintained, inspected for effectiveness, replaced if not effective, and removed once the area has been properly stabilized or re-vegetated. [This condition places the burden on the project proponent to ensure that their BMPs are functioning properly to prevent erosion and sedimentation, thus preventing degradation of water quality. FDL Water Quality Certification Ordinance, Section 204 (c) (1)].

13) For temporary impacts, all appropriate steps shall be taken to ensure proper restoration of the site, including the separation, storage and replacement of soil horizons, removal of all rutting from maintenance operations, removal of all equipment, materials and construction BMPs, and returning the site to the original contours as much as possible. [This condition reminds project proponents that propose temporary impacts of their responsibilities in restoring the site so the impacts are truly temporary in nature. FDL Water Quality Certification Ordinance, Section 204 (c) (2)].

401 Certification – St. Paul District, Corps of Engineers – 2020 NWP – Page 8 of 8

(Conditions continued):

14) It is the responsibility of the applicant to convey all terms and conditions of this certification to all appropriate staff, workers, contractors and sub-contractors. [This condition requires the project proponent to inform everyone under their control of the condition of this certification so that all can aid in compliance of those conditions. FDL Water Quality Certification Ordinance, Section 204 (a) (8)].

Authorization of Certification: I, Reginald DeFoe, do grant Clean Water Act § 401 Water Quality Certification With Conditions to the U. S. Army Corps of Engineers – St. Paul District for the 2020 Nationwide Permits (2020 NWPs) on the Fond du Lac Reservation.

Signed: Reginald DeFoe Date: 12/18/20

Reginald DeFoe
Resource Management Director
Fond du Lac Reservation

H.

**401 Water Quality Certification
Decision for the Grand Portage
Band of Lake Superior Chippewa in
Minnesota**

Applicable to 2021 NWP's



Grand Portage Band of Lake Superior Chippewa

RESERVATION TRIBAL COUNCIL

83 Stevens Road, PO Box 428

Grand Portage, Minnesota 55605

Tel. (218) 475-2277 • Fax (218) 475-2284

RESOLUTION NO. 31-20

GRANTING CONDITIONAL 401 CERTIFICATION FOR THE US ARMY CORPS OF ENGINEERS NATIONWIDE GENERAL PERMITS WITH REGIONAL CONDITIONS

The Grand Portage Reservation Tribal Council, on behalf of the Grand Portage Band of Chippewa, enacts the following resolution:

WHEREAS, the governing body of the Grand Portage Band of the Minnesota Chippewa Tribe is the Reservation Business Committee (also known as the Reservation Tribal Council (“RTC”)) pursuant to Article III, Section 2 of the Minnesota Chippewa Tribe Constitution; and

WHEREAS, the Grand Portage Band of the Minnesota Chippewa Tribe (“Band”) is a federally recognized Indian tribe possessing the inherent sovereign authority of an independent government; and

WHEREAS, the RTC has determined that water pollution endangers the health and welfare of Grand Portage members and residents of the Grand Portage Reservation, and adversely impacts tribal treaty fishing rights as well as cultural, religious, domestic, recreational, agricultural and other uses of the Reservation water resources;

WHEREAS, as an exercise of the Band’s inherent authority, the RTC enacted the Grand Portage Band of Chippewa Water Resources Ordinance (“Ordinance”) on July 25, 2001 and amended it on January 15, 2004 to protect the waters of the Grand Portage Reservation; and

WHEREAS, under the Ordinance, the RTC is empowered to act as the Water Resources Board (“Board”) created by the Ordinance; and

WHEREAS, in its capacity as Board, the RTC has taken all steps required under the Ordinance and federal law to grant conditional 401 certification for the Nationwide General Permits (“NWP”), a copy of which is attached to this Resolution; and

WHEREAS, in its capacity as Board, and after consultation with the Band’s Environmental Department, the RTC finds that conditional certification of the NWPs is necessary to protect (a) the public health and welfare of the Band, its members, and others living on its Reservation, and; (b) the present and future use of Reservation waters for public and private



water supplies; propagation of fish and aquatic life and wildlife; domestic and recreational purposes and agricultural; cultural, religious, commercial, industrial and other legitimate uses; and

NOW, THEREFORE, BE IT RESOLVED, that the RTC, in its capacity as Board, adopts the attached conditional certification of the NWP, and directs the Environmental Department to submit the conditional certification to the U.S. Army Corps of Engineers for inclusion in the final permit in accordance with the Federal Clean Water Act.

CERTIFICATION

We do hereby certify that the foregoing resolution was duly adopted by a vote of 4 for, 0 against, 0 silent, at a special meeting of the Reservation Tribal Council, a quorum present, held on the 20th day of December, 2020.

A handwritten signature in black ink, appearing to read "Robert F. Deschampe".

Robert F. Deschampe, Chairman

A handwritten signature in black ink, appearing to read "April M. McCormick".

April M. McCormick, Secretary-Treasurer

Grand Portage Conditional Certification of
U.S. Army Corps of Engineers Nationwide Permits with Regional Conditions

In accordance with the Clean Water Act, 33 U.S.C. § 1344, the U.S. Army Corps of Engineers (“US ACE”) on September 15, 2020, publicly noticed reissuance of existing nationwide permits (“NWP”) with some modifications, and proposed five new NWPs necessary for work in streams, wetlands and other waters of the United States under Section 404 of the Clean Water Act. The St. Paul District of the US ACE has revoked NWPs 8,12,14,15, 21, 23, 24, 34, 49, and 50 A, B, C, and D, and; added 7 conditions.

The Grand Portage Band of Lake Superior Chippewa (the “Band”) is a federally recognized Indian tribe and has Treatment-in-the-same-Manner-As-a-State (“TAS”) for purposes of enforcement of federal water quality standards on the Band’s Reservation. Therefore, in accordance with Section 401 of the Clean Water Act, the Grand Portage Water Quality Standards (“Water Quality Standards”) and the Grand Portage Water Resources Ordinance (as amended in 2004, the “Water Resources Ordinance”), the Grand Portage Environmental Resources Board (“Board”) has examined the proposed NWPs. The Board has determined that there is reasonable assurance that the discharges authorized under the NWPs will not violate the Water Quality Standards. The Water Quality Standards and Water Resources Ordinance can be obtained at the email listed below or at: <https://www.1854treatyauthority.org/news-blog/public-notice.html>

The Board has determined that certain additional conditions are necessary to protect the following: (a) the public health and welfare of the Band, its members, and others living on the Band’s Reservation; and (b) the present and future use of Reservation Waters for public and private water supplies; propagation of fish, aquatic life, and wildlife; domestic and recreational purposes; and for agricultural, cultural, religious, commercial, industrial, and other legitimate uses. Accordingly, the following conditions apply to all NWPs which authorize the discharge of dredge or fill material into the waters of the Grand Portage Reservation. Grand Portage is responsible for interpretation of the requirements of these conditions as defined in the Water Resources Ordinance.¹

In accordance with Water Quality Standards and the 1996 Cooperative Agreement between the Grand Portage Band of Chippewa and the Minnesota Pollution Control Agency, NWPs are denied within the no discharge zone of Lake Superior designated as Outstanding Resource Value Waters-Prohibited. These waters are located in the Grand Portage Zone of Lake Superior in “that portion of the Shoreline Waters north of latitude 47 degrees, 57 minutes, 13 seconds and east of Hat Point.”²

1. This certification applies only to those activities specifically authorized by the NWPs, as limited by Regional Conditions. These include but are not limited to the following:

¹ Grand Portage Water Resources Ordinance, as amended, 2004, section 1.02 Authority.

² Cooperative Agreement between the Grand Portage Band of Lake Superior Chippewa and the Minnesota Pollution Control Agency, 1996. Attachment 1, Grand Portage Water Quality Standards.

- a. In accordance with Regional Conditions E, pre-construction notification (“PCN”) is required for temporary impacts to Waters of the Reservation (as defined in the Water Resources Ordinance) that would remain in place for more than 90 days that must be submitted to both the US ACE and the Board.³
 - b. In accordance with Regional Condition G, a pre-construction notification must be submitted to the US ACE and the Board⁴ for projects that would impact bogs or fens within the Reservation, or wild rice waters identified in Grand Portage Water Quality Standards.⁵
2. For notification purposes in situations where an applicant is required to submit a pre-construction notification (“PCN”) to the US ACE, the Band requires that a copy of the PCN is submitted to the Board at the same time.⁶ Once the applicant receives written confirmation from the US ACE that the project is authorized under this NWP, the applicant must provide a copy of the confirmation to the Board.⁷ The PCN and US ACE confirmation should be sent in hard copy and via email to:

Grand Portage Environmental Resources Board
P.O. Box 428
Grand Portage, MN 55605
Email: mwatkins@grandportage.com
3. All discharges of dredged and/or fill material authorized by the NWPs must comply with the Water Quality Standards and Water Resources Ordinance, as well as Applicable Federal Standards.⁸
4. All appropriate steps must be taken to ensure that petroleum products or other chemical pollutants are prevented from entering the Waters of the Reservation. All spills must be reported to the appropriate emergency-management agency, and measures must be taken to prevent the pollution of the Waters of the Reservation, including groundwater.⁹
5. Dewatering activities must not cause nuisance conditions as defined in Grand Portage Water Quality Standards.¹⁰
6. The burden is on the applicant to demonstrate compliance with the Water Quality Standards, the Water Resources Ordinance, and Applicable Federal Standards whether or not the application is ultimately eligible for an NWP.¹¹

³ Grand Portage Water Resources Ordinance, section 3.03(3)(a).

⁴ *Id.*

⁵ Grand Portage Water Quality Standards, section V. Designated Uses.

⁶ Grand Portage Water Resources Ordinance, as amended, 2004, Section 3.03.

⁷ *Id.*, 3.03(3)(a).

⁸ *Id.*, Section 3.03(A).

⁹ Grand Portage Water Quality Standards, section XI. General Standards. Grand Portage Water Resources Ordinance as amended, Section 3.04 General Orders, and section 3.05 Special/Emergency Orders.

¹⁰ Grand Portage Water Quality Standards, section XI. General Standards.

7. The Board retains full authority to ensure compliance with and to enforce the provisions of the Water Resource Ordinance and Water Quality Standards, Applicable Federal Standards, and these Certification conditions. Nothing herein affects the scope or applicability of other controlling tribal or federal requirements, including but not limited to impacts to cultural, historical, or archeological features or sites, or properties that may be eligible for listing on the National Register of Historic Places under the National Historic Preservation Act, 54 U.S.C. §§ 300101 *et seq.*¹²
8. Appeals related to Board actions taken in accordance with any of the preceding conditions may be heard by the Grand Portage Tribal Court.¹³

As provided by the Water Resources Ordinance, any interested party may request that a public hearing be scheduled regarding the Board's decision to grant conditional certification to the NWP's.¹⁴ Such a request must be directed to the following address within 30 days of this notice:

Grand Portage Environmental Resources Board
P.O. Box 428
Grand Portage, MN 55605

Electronic versions of the proposed NWP's are available at the US ACE's Web site at:
[federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits](https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits)

Questions regarding the NWP's and Regional Conditions for the NWP's can be directed to the US ACE District Office at Department of the Army, St. Paul District, Corps of Engineers, 180 5th St. East, Ste. 700, St. Paul, MN 55101-1678. The US ACE St. Paul District contact for the NWP's is Meghan Brown at telephone number (651) 290-5688 or e-mail at Meghan.J.Brown@usace.army.mil.

¹¹ Grand Portage Water Quality Standards, section XIV. Enforcement, Grand Portage Water Resources Ordinance, sections 4.01 and 5.01.

¹² Grand Portage Water Resources Ordinance as amended, 2004, section 1.02.

¹³ *Id.*, section 5.01.

¹⁴ *Id.*, section 3.03, (3)(d)(iv).

I.

**401 Water Quality Certification
Decision for the Lac du Flambeau
Band of Lake Superior Chippewa in
Minnesota**

Applicable to 2021 NWP's



December 9, 2020

Meghan Brown
Regulatory Division
St. Paul District Army Corps of Engineers
180 East 5th Street, Suite 700
St. Paul, MN 55101

Re: Request for water quality certification (WQC) under Section 401 of the
Clean Water Act for #COE-2020-0002 Nationwide Permits (NWP)

Dear Ms. Brown:

The Lac du Flambeau Band of Lake Superior Chippewa Indians Natural Resources Program has reviewed the Corps letter dated November 12, 2020, requesting a water quality certification under 401 of the Clean Water Act. The Lac du Flambeau Band of Lake Superior Chippewa Indians (Tribe) deny without prejudice, certification of the Corps Nationwide Permit (NWP), general conditions, and definitions.

The Tribe is unable to provide 401 Certification for the proposed categories of activities under CFR 40 §121.7 (e) (2) (iii): Information required to ensure that Water Quality Standards will be met, must identify the project location and specific waterbody(s) within the exterior boundaries of the Reservation where the proposed activities will occur.

Additionally, under CFR 40 §121.7 (e) (2) (i) (ii): The Tribe is unable to certify the proposed categories of activities due to the lack of project specific information needed to determine if Tribal Water Quality Codes 28.105 (Designated Uses) and 28.106 (Criteria) would be met.

**Lac du Flambeau Band
of Lake Superior Chippewa Indians**

P.O. Box 67 - Lac du Flambeau, Wisconsin 54538 • (715) 588-3303 • FAX (715) 588-7930

The Tribe will grant certification under 401 for:

- NWP 11 (Temporary Recreational Structures) as it applies to seasonally placed structures and according to Tribal Codes 23.402, 23.405 and 23.409
- NWP 20 (Response Operations for Oil or Hazardous Substances) as described, with the exception of "the use of temporary structures and fills in waters of the U.S. for spill response training exercises"

If you have any questions about the Tribe's denial, or if you require further information, please let us know. The contact person on the Tribe's staff regarding this matter is Jason De Vries, who can be reached at (715) 588-4162.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Johnson Sr." with a stylized flourish at the end.

John Johnson, Sr. President
Lac du Flambeau Band of Lake Superior
Chippewa Indians

J.

**401 Water Quality Certification
Decision for the Sokaogon
Chippewa Community of Wisconsin
(Sokaogon Mole Lake Chippewa
Community) in Wisconsin**

Applicable to 2021 NWP's



Sokaogon Chippewa Community

3051 Sand Lake Road, Crandon, WI 54520

Phone 715-478-7500 • Fax 715-478-5275

www.sokaogonchippewa.com



December 17, 2020

Karl D. Jansen
U.S. Army Corp of Engineers
St. Paul District
180 Fifth Street East, Suite 700
St. Paul, MN 55101-1678

Re: Request for Clean Water Act Section 401 Certification for the U.S. Army Corps of Engineers Nationwide Permits, COE-2020-0002

Dear Mr. Jansen,

The Sokaogon Chippewa Community Natural Resources Board has completed our public notice and hearing process regarding the request for 401 certification for the reissuance and modification of the nationwide permits.

At our December 17, 2020 board meeting we have decided to deny the Section 401 certification for the following Nationwide Permits:

- 1- NWP 3- Maintenance
- 2- NWP 5- Scientific Measurement Devices
- 3- NWP 6- Survey Activities
- 4- NWP 7-Outfall Structures and Associated Intake Structures
- 5- NWP 11- Temporary Recreational Structures
- 6- NWP 13- Bank Stabilization
- 7- NWP 16- Return Water from Upland Contained Disposal Areas
- 8- NWP 17- Hydropower Projects
- 9- NWP 18- Minor Discharges
- 10- NWP 19- Minor Dredging
- 11- NWP 22- Removal of Vessels
- 12- NWP 25- Structural Discharges
- 13- NWP 27- Aquatic Habitat Restoration, Enhancement and Establishment Activities
- 14- NWP 29- Residential Developments
- 15- NWP 30- Moist Soil Management for Wildlife
- 16- NWP 32- Completed Enforcement Actions

- 17- NWP 33- Temporary Construction, Access and Dewatering
- 18- NWP 36- Boat Ramps
- 19- NWP 39- Commercial and Institutional Developments
- 20- NWP 40- Agricultural Activities
- 21- NWP 41- Reshaping Existing Drainage and Irrigation Ditches
- 22- NWP 42- Recreational Facilities
- 23- NWP 43- Stormwater Management Facilities
- 24- NWP 44- Mining Activities
- 25- NWP 45- Repair of Uplands Damaged by Discrete Events
- 26- NWP 46- Discharges in Ditches
- 27- NWP 51- Land-Based Renewable Energy Generation Facilities
- 28- NWP 52- Water-Based Renewable Energy Generation Pilot Projects
- 29- MWP 53- Removal of Low Head Dams
- 30- NWP - Water Reclamation and Reuse Facilities

The above areas have the potential to impact the Sokaogon Chippewa Community Water Quality Standards, Section IV, Anti-Degradation Policy. Whenever possible, the Tribe strives for self-regulation and the general permitting would not be consistent with the way we intend to implement our water quality standards and administrative ordinance. Therefore, we prefer to evaluate all future projects on a case-by-case basis and require individual permitting. The Sokaogon Chippewa Communities water quality standards may be found at: epa.gov/sites/production/files/2014-12/documents/molelakeband-wqs.pdf

However, we will grant certification for the following because we felt these three areas were necessary for emergency purposes:

- 1- NWP 20- Response Operations for Oil and Hazardous Substances
- 2- NWP 37- Emergency Watershed Protection and Rehabilitation
- 3- NWP 38- Cleanup of Hazardous and Toxic Waste.

Additionally, we are also granting certification for the following areas because we believe these activities are unlikely to impact our tribal waters or lead to water quality standard violations:

- 1- NWP 1- Aids to Navigation
- 2- NWP 2- Structures in Artificial Canals
- 3- NWP 4- Fish and Wildlife Harvesting, Enhancement and Attraction Devices and activities.
- 4- NWP 9- Structures in Fleeting and Anchorage Areas
- 5- NWP 10- Mooring Buoys
- 6- NWP 28- Modifications of Existing Marinas
- 7- NWP 31- Maintenance of Existing Flood Control Facilities
- 8- NWP 35- Maintenance Dredging of Existing Basins
- 9- NWP 48- Commercial Shellfish Mariculture Activities
- 10- NWP 54- Living Shorelines

If you have any questions, please feel free to contact, Tina L. Van Zile, Environmental Program Director at 715-478-7605 or tina.vanzile@scc-nsn.gov.

Miigwech (Thank You),



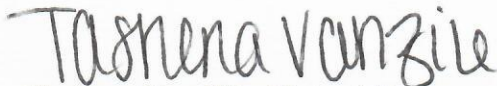
Chris Quade, Natural Resources Board Member



Gloria Toyebo II, Natural Resources Board Member



George Van Zile Jr., Natural Resources Board Member



Tashena Van Zile, Natural Resources Board Member



Leelyn Van Zile, Natural Resources Board Member

Cc: Garland McGeshick, Sokaogon Chippewa Tribal Chairman
Tina L. Van Zile, Environmental Program Director