



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 (NWPs), into waters of the United States that occur within Indian country<sup>1</sup> 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:

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<sup>1</sup> 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 NWRs 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 NWRs 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 NWRs 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 NWRs: 3, 4, 5, 6, 16, 18, 20, 22, 30, 31, 33, 36, 37, 38, 41, 45, E; conditionally certifying 13 NWRs: 7, 13, 19, 27, 29, 32, 39, 40, 42, 43, 51, 53, 54; and denying 6 NWRs: 17, 25, 44, 46, 48, 52. A table summarizing the certification status for each NWR, is included in the attached 401 Certification. If a project fails to meet the enclosed conditions, or if the applicable NWR is denied under the 401 Certification, the applicant must contact EPA Region 5 at [R5wetlands@epa.gov](mailto: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](mailto: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 Minnesota<sup>2</sup> and 8 Wisconsin Tribes<sup>3</sup>: 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.

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<sup>2</sup> 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

<sup>3</sup> 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](mailto: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 NWPs 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			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			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					