

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):

NWP's 3, 4, 5, 6, 7, 13, 16, 17, 18, 19, 20, 22, 25, 27, 30, 31, 32, 33, 36, 37, 38, 41, 45, 46, 53, 54, 59



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

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PFEIFER
Date: 2021.10.15
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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 NWP 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*

**The Corps has amended the wording in condition 2. Special Aquatic Sites to incorporate the EPA's Section 401 WQC modification dated March 1, 2022 and found in the Corps Special Public Notice dated March 3, 2022.*

Any activities resulting in a point source discharge⁹ into jurisdictional waters of the following types of special aquatic sites in Minnesota and Wisconsin shall require a project-specific CWA Section 401 WQC: bogs, fens, mature forested wetlands, wild rice marshes¹⁰ and riffle-pool complexes of streams. Project-specific CWA section 401 WQC will also be required for impacts to the following S1 (critically imperiled) and S2 (imperiled) ranked Wisconsin wetland communities¹¹ that may not be included in the previous list: Coastal Plain Marsh, Great Lakes Ridge and Swale, and Interdunal Wetlands.

Why this condition is necessary: General permits, including NWP 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 NWPs 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, e.g., Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983).*

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 a 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 NWPs 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.