

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

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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.

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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:

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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

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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).

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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

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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

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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,

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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

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David R. Siebert
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