



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

REPLY TO THE ATTENTION OF:
WW-16J

Rebecca Graser, Deputy Chief
U.S. Army Corps of Engineers St. Paul District
Brookfield Office
250 N. Sunnyslope Road, Suite 296
Brookfield, Wisconsin 53005

RE: Clean Water Act Section 401 Water Quality Certification of the proposed U.S. Army Corps of Engineers, St. Paul District-Regional General Permits as Applied in Indian country in Minnesota and Wisconsin

Dear Ms. Graser:

The enclosed Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) applies to any potential point source discharges from potential projects authorized under the proposed U.S. Army Corps of Engineers, St. Paul District (Corps) Regional General Permits (RGPs), into waters of the United States (WOTUS) 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 WOTUS 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 Minnesota and Wisconsin, there are 16 federally recognized Indian tribes that do not have treatment in the same manner as a state (TAS) authority to provide CWA Section 401 certifications for discharges occurring within their tribally held trust lands or reservations. Therefore, EPA Region 5 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
- Lower Sioux Indian Community
- Mille Lacs Band of Ojibwe
- Minnesota Chippewa Tribe
- Prairie Island Indian Community
- Shakopee Mdewakanton Sioux Community
- Upper Sioux Community

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.

- White Earth Nation

Wisconsin

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

EPA Region 5 has reviewed the Corps' Public Notice for the Proposed RGPs dated August 30, 2022, the Request for Certification dated September 20, 2022, and other relevant information provided by the Corps. The Corps is proposing to re-issue the seven existing RGPs and issue one new RGP. Based on our review of the materials provided by the Corps; EPA Region 5 has made decisions about whether the discharges from the 8 RGPs: A. Bank Stabilization & Habitat Improvement (new), B. Beach Creation & Nourishment, C. Beach Raking, D. Minor Discharges, E. Piers & Docks, F. Transportation, G. Utility, and H. Wildlife Ponds, will comply with applicable provisions of Sections 301, 302, 303, 306 and 307 of the CWA. In summary, EPA Region 5 is certifying one RGP (C) without conditions, and certifying the other seven RGPs (A, B, D, E, F, G and H) with conditions. A table summarizing the certification status for each RGP is included in the attached WQC. If a project fails to meet the enclosed conditions, the project proponent must contact EPA Region 5 at R5wetlands@epa.gov to request a project specific certification of the project. EPA Region 5 is providing the enclosed WQC for discharges that may result from the proposed RGPs 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
Manager, Watersheds and Wetlands Branch

Enclosure: EPA Region 5 Clean Water Act Section 401 Water Quality Certification of the 8 proposed St. Paul District Regional General Permits for Projects as applied in Indian country in Minnesota and Wisconsin

e-cc: Catherine J. Chavers, Chairwoman-Bois Forte Band of
Chippewa/President-Minnesota Chippewa Tribe
Robert L. Larson, President-Lower Sioux Indian Community
Melanie Benjamin, Chief Executive Officer-Mille Lacs Band of Ojibwe
Johnny Johnson, President-Prairie Island Indian Community
Keith B. Anderson, Chairman-Shakopee Mdewakanton Sioux Community
Kevin Jensvold, Chairman-Upper Sioux Community
Michael Fairbanks, Chairman-White Earth Nation
Ned Daniels, Jr., Chairman-Forest County Potawatomi Community
Marlon WhiteEagle, President-Ho-Chunk Nation of Wisconsin
Louis Taylor, Sr., Chairman-Lac Courte Oreilles Band of Lake Superior Chippewa
Indians
Ronald J. Corn, Sr., Chairman-Menominee Indian Tribe of Wisconsin
Ron "Tehassi" Hill, Jr., Chairman-Oneida Nation of Wisconsin
Christopher Boyd, Chairman-Red Cliff Band of Lake Superior Chippewa
William Reynolds, Chairman-St. Croix Chippewa Indians of Wisconsin
Shannon Holsey, President-Stockbridge-Munsee Community Band of
Mohican Indians
Meghan J. Brown, Project Manager-St. Paul District
Anthony J. Kitchen, Project Manager-St. Paul District

EPA Region 5 Clean Water Act Section 401 Water Quality Certification of the 8 proposed St. Paul District Regional General 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 7 existing and 1 new U.S. Army Corps of Engineers-St. Paul District (Corps) Clean Water Act (CWA) Section 404 Regional General Permits (RGPs) into waters of the United States (WOTUS) within the exterior boundaries of federal Indian reservations or on tribally held trust lands belonging to the applicable Minnesota² and Wisconsin Tribes³: A. Bank Stabilization & Habitat Improvement (new), B. Beach Creation & Nourishment, C. Beach Raking, D. Minor Discharges, E. Piers & Docks, F. Transportation, G. Utility, and H. Wildlife Ponds.

Section 401(a)(1) of the CWA requires applicants for federal permits and licenses that may result in discharges into WOTUS 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 (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, EPA Region 5 is making the certification decisions for potential discharges that may result from the projects authorized under the proposed Corps CWA Section 404 RGPs listed above.

Project Description

General permits are used by the Corps to streamline review of activities it has determined to result in no more than minimal adverse effects, individually and cumulatively. On February 21, 2018, the Corps issued seven RGPs for use in Minnesota and Wisconsin, including within Indian country in the states of Minnesota and Wisconsin. These RGPs are set to expire on February 20, 2023. The Corps is proposing to re-issue the seven existing RGPs with some changes and issue one new RGP. According to the Corps, the proposed RGPs will ensure continued regional general permit coverage in the Corps' area of responsibility, improve efficiency and consistency in project reviews, and will provide appropriate and consistent protections for WOTUS.

- RGP A-Bank Stabilization & Habitat Improvement
- RGP B-Beach Creation and Nourishment
- RGP D-Minor Discharges
- RGP E-Piers & Docks
- RGP F-Transportation

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

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

⁴ See Footnotes 2 and 3.

- RGP G-Utility
- RGP H-Wildlife Ponds

General Information

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

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

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

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

- Retain this certification in their files with the applicable RGP(s) as documentation of EPA's certification decisions for the above-referenced proposed RGPs. This certification is specifically associated with the proposed RGPs described above and expires when those RGPs expire, five years from Corps' issuance date; and
- Prior to work commencing, notify the appropriate Tribal Environmental Office of projects proposed under the RGP program.

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.

If a project proposal does not meet the certification conditions in this enclosure, the project proponent must request a project-specific certification from EPA Region 5. A project-specific certification request must follow the requirements outlined in 40 CFR § 121.5 and be submitted to R5Wetlands@epa.gov.

Regional General Permits Granted

On behalf of the 16 federally recognized Indian Tribes in Minnesota and Wisconsin that do not have TAS authority to issue certifications, EPA Region 5 has determined that the discharges from the following proposed RGP will comply with water quality requirements, as defined at 40 CFR § 121.1(n).

RGP C-Beach Raking

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

On behalf of the 16 federally recognized Indian Tribes in Minnesota and Wisconsin that do not have TAS authority to issue WQCs, EPA Region 5 has determined that the discharges from the following 7 proposed RGPs will comply with water quality requirements, as defined at 40 CFR § 121.1(n), subject to the following conditions pursuant to CWA Section 401(d):

RGP A-Bank Stabilization & Habitat Improvement

RGP B-Beach Creation and Nourishment

RGP D-Minor Discharges

RGP E-Piers & Docks

RGP F-Transportation

RGP G-Utility

RGP H-Wildlife Ponds

General Conditions

1. **This certification does not apply to projects described by one or more of the categories listed here.** The project proponent shall request a project-specific WQC⁵ from EPA where a project seeking RGP authorization would result in a point source discharge into:
 - Jurisdictional waters of the following types of special aquatic sites on tribal lands in Minnesota and Wisconsin: bogs, fens, mature forested wetlands, wild rice marshes⁶ and riffle-pool complexes of streams.
 - S1 (critically imperiled) and S2 (imperiled) ranked Wisconsin wetland communities⁷ that may not be included in the previous list: coastal plain marsh, Great Lakes ridge and swale, and interdunal wetlands.
 - An active channel (e.g., flowing or open waters) of a WOTUS listed as impaired as it enters tribal boundaries 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 WOTUS 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> and <https://mywaterway.epa.gov/>.

Why this condition is necessary: RGPs 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. 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. Case-by-case review is also 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 WOTUS listed as impaired under CWA Section 303(d) and/or for which a TMDL has been approved.

By conditioning these RGPs to require applicants to contact the EPA Region 5 for project-specific WQC when these resources would be impacted, the condition will ensure that EPA Region 5 can make an informed decision on whether to grant, grant with conditions, or deny Section 401 WQC

⁵ EPA advises that project proponents identify the category(ies) listed above that make their project ineligible under this certification in a pre-filing meeting request. See 40 CFR § 121.4.

⁶ Additional information about these communities can be found at <https://dnr.wi.gov/topic/EndangeredResources/Communities.asp?mode=detail&Code=cpher057wi> and <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/2845>, last visited November 16, 2022.

⁷ 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>, last visited November 16, 2022.

on a project specific basis.

Citations that authorize this condition: 40 CFR § 230.1(d); 40 CFR § 230.10(a)(3); 40 CFR 230.10(b)(2); 40 CFR § 230.10(c); 40 CFR § 230.10(d); 40 CFR Part 230, Subpart E; 40 CFR § 230.70; CWA Section 303(d).

2. Sediment and Erosion Control Measures

During the length of the permit, project proponents shall not discharge sediment into a WOTUS. To achieve this, project proponents shall implement and maintain erosion and siltation control measures prior to, during and after project construction. Prior to beginning work, the project proponent shall:

- Demarcate 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 to pre-disturbance or reference site levels, in all disturbed areas after construction.
- Demarcate the locations of storage areas. Storage areas for stockpiled soil shall be set at least 50 feet away from WOTUS. Project proponents shall plan for storage and disposal of all trash and construction debris found onsite during active construction. Trash and construction debris storage areas shall also be set back at least 50 feet away from WOTUS.
- Document the inspection and maintenance protocols. At a minimum, within 12 hours of rainfall events, project proponents shall inspect and conduct maintenance on erosion control measures. If any measures fail and sediment migrates into WOTUS, the project proponent shall fix the measures that failed and take additional adaptive management steps to prevent discharges into WOTUS within 24 hours of detection of the failure. Photo-documentation with descriptions of all failures and adaptive management efforts shall be included in a post-construction operations report provided to EPA Region 5 at R5Wetlands@epa.gov within 30 days of the removal of all temporary sediment and erosion control measures.

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. 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.

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

3. Pollutant Release Prevention

Project proponents shall not allow any discharge of oil, gas, grease, diesel, anti-freeze, hydraulic fluid, construction materials, non-native species, and trash, into a WOTUS. To achieve this:

- Work shall be completed during dry conditions, unless authorized by the Department of the Army permit.
- All equipment shall be cleaned in a decontamination area away from the project site to prevent leaks and introduction of non-native invasive species, prior to arriving on the project site.

- All equipment shall be inspected daily and prior to entering any WOTUS for oil, gas, diesel, anti-freeze, hydraulic fluid, and other petroleum leaks.
- All heavy equipment shall be staged in uplands at least 50 feet away from a WOTUS, when not in use.
- Spill response measures shall include:
 - 1) Protocols for documentation of spills and unauthorized discharges. The project proponent shall include documentation of spills and unauthorized discharges in a post-construction operations report to EPA Region 5 at R5Wetlands@epa.gov, U.S. Army Corps of Engineers, St. Paul District, and the appropriate Tribal Environmental Program Manager, including photo-documentation and a description of any spills or unauthorized discharges, photo-documentation and a description of subsequent response and remediation efforts, photo-documentation and a description of adaptive management efforts. The post-construction operations report shall be submitted to EPA within 30 days of completion of work on site, including revegetation and removal of temporary erosion control measures.
 - 2) All contaminated areas shall be cleaned within 12 hours of spill detection, and contaminated soil removed from the site within 24 hours of detection or contained in enclosed containers. Containers shall be located no closer than 50 feet to a WOTUS. All equipment detected with leaks shall be immediately removed from waters, including wetlands, and within 24 hours of detection of a leak, any equipment shall be repaired in the staging areas or moved off site.
 - 3) Containment booms and/or absorbent material shall be available onsite. In the case of spills, containment booms and/or absorbent materials shall be deployed immediately to prevent discharges from reaching WOTUS. Any spills of petroleum products shall be reported to EPA's National Response Center (1-800-424-8802, <https://www.epa.gov/emergency-response/national-response-center>), EPA Region 5 at R5Wetlands@epa.gov, U.S. Army Corps of Engineers, St. Paul District, and the appropriate Tribal Environmental Program Manager, within 24 hours of detection.

Why this condition is necessary: This condition will ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment. This condition protects the water quality and native biology of the impacted waters by preventing the spread of invasive or nuisance species when equipment is cleaned prior to arriving on site and prior to entering a WOTUS.

Citations that authorize this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.74.

Specific Condition that applies to RGP A-Bank Stabilization & Habitat Improvement Activities

This certification does not apply to projects consisting entirely of riprap or similar rock techniques for more than 500 linear feet at one location. The project proponent shall request a project-specific water quality certification⁸ from EPA where a project seeking RGP authorization would include riprap hard armoring methods for more than 500 linear feet at one location.

Why this condition is necessary: Projects under this certification are limited to no more than 500 linear feet of continuous hard armoring due to the potential negative water quality and habitat impacts of hard

⁸ EPA recommends that the project proponent uses bioengineering techniques (e.g., willow plantings, root wads, large woody debris, etc.) for bank stabilization activities instead of or in combination with hard armoring.

armoring; thus, this condition is established to ensure a case-by-case review of any actions or activities proposed which would exceed this threshold. 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. 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 certification 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 when installed properly under the right conditions.⁹

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

⁹ https://files.dnr.state.mn.us/publications/waters/understanding_our_streams_and_rivers_resource_sheet_2.pdf, last visited November 16, 2022.

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

RGP	Certification Status		
	Certified	Certified with General Conditions	Certified with Specific Conditions
A		X	X
B		X	
C	X		
D		X	
E		X	
F		X	
G		X	
H		X	