



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
BOISE REGULATORY OFFICE  
720 EAST PARK BOULEVARD, SUITE 245  
BOISE, IDAHO 83712-7757

September 17, 2024

WALLA WALLA DISTRICT  
REGULATORY DIVISION

SUBJECT: NWW-2023-00339, Skyline Ranch Box Culvert

Dustin Kuttler  
Skyline Holdings Group, LLC



Dear Mr. Kuttler:

We have determined that your proposed project Skyline Ranch Box Culvert is authorized in accordance with Department of the Army (DA) **Nationwide Permit (NWP) No. 29: Residential Developments**. This project is located on Mahogany Creek near 2250 S 5000 W, within Section 12 of Township 4 North, Range 44 East, near coordinates 43.693801° N latitude and -111.207567° W longitude, near Driggs, Teton County, Idaho. Please refer to File Number NWW-2023-00339 in all future correspondence with our office regarding this project.

Project activities include the discharge of approximately 42 cubic yards of material into Mahogany Creek, associated with the excavation and backfill and bedding of 440 square feet for the installation of a 40 foot 7' by 11' box culvert. All work shall be done in accordance with the drawings enclosed within the Joint Application.

DA permit authorization is necessary because your project may involve the discharge of fill material into waters of the U.S. This authorization is outlined in Section 404 of the Clean Water Act (33 U.S.C. 1344).

You must comply with all general and regional conditions for this verification letter to remain valid and to avoid possible enforcement actions. The general and regional permit conditions for *NWP No. 29: Residential Developments* are attached and also available online<sup>1</sup>.

You must also comply with the conditions detailed in the attached Section 401 Water Quality Certification (WQC) issued by the Idaho Department of Environmental Quality (IDEQ) on December 4, 2020. If you have any questions regarding the conditions set forth in the WQC, please contact IDEQ directly at 208-528-2650, Idaho Falls Regional

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<sup>1</sup> <http://www.nww.usace.army.mil/Business-With-Us/Regulatory-Division/Nationwide-Permits/>

Office.

Nationwide Permit General Condition 30 (Compliance Certification) requires that every permittee who has received NWP verification must submit a signed certification regarding the completed work and any required mitigation. This Compliance Certification form is enclosed for your convenience and must be completed and returned to us within 30 days of your project's completion.

This letter of authorization does not convey any property rights, or any exclusive privileges and does not authorize any injury to property or excuse you from compliance with other Federal, State, or local statutes, ordinances, regulations, or requirements which may affect this work.

This verification is valid until **March 14, 2026**, unless the NWP is modified, suspended or revoked. If your project, as permitted under this NWP verification, is modified in any way you must contact our office prior to commencing any work activities. In the event that you have not completed construction of your project by March 14, 2026, please contact us at least 60-days prior to this date. A new application and verification may be required.

We actively use feedback to improve our delivery and provide you with the best possible service. If you would like to provide feedback, please take our online survey<sup>2</sup>. If you have questions or if you would like a paper copy of the survey, please contact the Walla Walla District Regulatory. For more information about the Walla Walla District Regulatory program, you can visit us online<sup>3</sup>.

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<sup>2</sup> <https://regulatory.ops.usace.army.mil/customer-service-survey/>

<sup>3</sup> <http://www.nww.usace.army.mil/Business-With-Us/Regulatory-Division/>

If you have any questions or need additional information about this permit authorization, you can contact me by phone at 208-522-1676, by mail at the address in the letterhead, or email at Caleb.J.Williams@usace.army.mil. For informational purposes, a copy of this letter has been sent to: Aaron Golart (IDWR), Alex Bell (IDEQ), and Teton County Planning and Zoning.

Sincerely,

Caleb Williams  
Project Manager, Regulatory Division

Encls

Joint Application for Permits  
NWP 29 General Conditions  
IDEQ General Water Quality Certification

## TRANSFER OF NATIONWIDE PERMIT

When the structures or work authorized by this Nationwide Permit, **NWW-2023-00339**, are still in existence at the time the property is transferred. The terms and conditions of this Nationwide Permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this Nationwide Permit, the associated liabilities and compliance with the terms and conditions the transferee must sign and date below.

Name of New Owner:

Street Address:

Mailing Address:

City, State, Zip:

Phone Number:

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*Signature of TRANSFEREE*

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*DATE*

# COMPLIANCE CERTIFICATION



**US Army Corps of Engineers  
Walla Walla District**



Permit Number: NWW-2023-00339

Name of Permittee: Dustin Kuttler

Date of Issuance: September 5, 2024

Upon completion of the activity authorized by this permit and any mitigation required by the permit, please sign this certification and return it to the following address:

U.S. Army Corps of Engineers  
Walla Walla District  
Idaho Falls Regulatory Office  
900 North Skyline Rd., Suite A  
Idaho Falls, Idaho 83402-1718

Please note that your permitted activity is subject to a compliance inspection by a U.S. Army Corps of Engineers representative. If you fail to comply with all terms and conditions of this permit, the permit is subject to suspension, modification, or revocation and you are subject to an enforcement action by this office.

I hereby certify that the work authorized by the above-referenced permit has been completed in accordance with the terms and conditions of the said permit. The required mitigation was also completed in accordance with the permit conditions.

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*Signature of PERMITEE*

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*DATE*

# NATIONWIDE PERMIT 29

## **Residential Developments:**

Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

*Subdivisions:* For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

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**WATER QUALITY CERTIFICATION, NWP 29:**

Agency responsible for administration of water quality, based on project location is listed below. If **DENIED**, then an Individual Water Quality Certification or Waiver of Certification is required, prior to the commencement of any work activities and/or issuance of a DA verification, authorization and/or permit.

**State of Idaho: PARTIALLY DENIED;**

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in a loss in excess of ½ acre of jurisdictional wetlands

**Coeur d'Alene Tribal Lands: DENIED**

**Shoshone-Bannock Tribal Lands: DENIED**

**U.S. Environmental Protection Agency for all other Tribal Lands: DENIED**

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**2021 Nationwide Permits  
Regional Conditions  
Walla Walla District Regulatory Division (State of Idaho)**

March 15, 2021

The following Nationwide Permit (NWP) regional conditions are required in the state of Idaho and apply to all 2021 NWPs<sup>1</sup>. Regional conditions are established by individual Corps Districts to ensure projects result in no more than minimal adverse impacts to the aquatic environment and to address local resources concerns. This document also includes regional additions to the NWP General Conditions, notification procedures pertaining to certain NWP's, and regional additions to the definitions.

**REGIONAL CONDITIONS**

A. Watersheds Requiring Pre-Construction Notification, Specific to Anadromous Fish

This Regional Condition applies to all 2021 NWPs.

- Pre-construction notification (PCN) will be required for the above listed nationwide permits in the geographic area as shown on Figure 1: *Watersheds Requiring Pre-Construction Notification*, dated January 6, 2021.

B. Vegetation Preservation and Replanting

- To avoid impacts to aquatic habitat and to reduce sedimentation and erosion, permittee shall avoid and minimize the removal of vegetation in waters of the U.S. to the maximum extent practicable. Areas subject to temporary vegetation removal in waters of the U.S. during construction shall be replanted with appropriate native<sup>2</sup> species by the end of the first growing season, unless conditioned otherwise. Permittee shall avoid introducing or spreading noxious or invasive plants<sup>3</sup>.
- Replanted vegetation that does not survive the first growing season shall be replanted before the end of the next growing season. Re-plantings shall continue to occur until desired vegetation densities are achieved. Re-vegetation densities should be based on reference conditions.

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<sup>1</sup> For the list of 2017 Nationwide Permits please see: <https://www.nww.usace.army.mil/Business-With-Us/Regulatory-Division/Nationwide-Permits/>

<sup>2</sup> Idaho Department of Transportation, Native Plants for Idaho Roadside Restoration and Revegetation Programs: [https://itd.idaho.gov/wp-content/uploads/2016/06/RP171Roadside\\_Revegetation.pdf](https://itd.idaho.gov/wp-content/uploads/2016/06/RP171Roadside_Revegetation.pdf)

<sup>3</sup> U.S. Department of Agriculture, Natural Resource Conservation Service Plant Database of introduced, invasive, and noxious plants for Idaho: <https://plants.usda.gov/java/noxious?rptType=State&statefips=16>.



### C. De-watering & Re-watering (as applicable)

- Cofferdams shall be constructed of non-erosive material such as concrete jersey barriers, bulk bags, water bladders, sheet pile, and other similar non-erosive devices. Cofferdams may not be constructed by using mechanized equipment to push streambed material through flowing water.
- Diversion channels constructed to bypass flow around the construction site shall be lined with plastic, large rock, pipe or otherwise protected from erosion prior to releasing flows into or through the diversion channel.
- Water removed from within the coffered area shall be pumped to a sediment basin or otherwise treated to remove suspended sediments prior to its return to the waterway.
- To prevent unwanted passage of state or federally-protected fish, if present, from the coffered area, Water pipe intakes shall be screened with openings measuring < 3/32 inch to prevent entrainment of fish trapped in the coffered area.
- Should fish be present within the coffered areas contact your local Idaho Department of Fish and Game (IDFG) office prior to performing fish removal or salvage. Fish shall be collected by electrofishing, seining or dip net, or otherwise removed and returned to the waterway upstream of the project area. If electrofishing is used, the National Marine Fisheries Service (NMFS) guidelines for electrofishing should be followed<sup>4</sup>, unless conditioned otherwise.
- Stream channels that have been dewatered during project construction shall be re-watered slowly to avoid lateral and vertical erosion of the de-watered channel, prevent damage to recently reclaimed work areas and/or damage to permitted work.
- Temporary stockpiles in waters of the United States shall be removed in their entirety so as not to form a berm or levee parallel to the stream that could confine flows or restrict overbank flow to the floodplain.

### D. In-Water Structures and Complexes

- PCN notification in accordance with General Condition 32 is required for all non-federal applicants with activities involving gabion baskets placed below the ordinary high water mark.
- Stream meanders, riffle and pool complexes, pool stream structures, rock/log barbs, rock J-hooks, drop structures, sills, engineered log jams or similar structures/features when used shall be site specifically designed by an appropriate professional with experience in hydrology or fluvial geomorphology.

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<sup>4</sup> Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act (June 2000)  
[https://archive.fisheries.noaa.gov/wcr/publications/reference\\_documents/esa\\_refs/section4d/electro2000.pdf](https://archive.fisheries.noaa.gov/wcr/publications/reference_documents/esa_refs/section4d/electro2000.pdf)

#### E. Temporary Sidecasting

- Materials from exploratory trenching and installation of utility lines may be temporarily side cast into a de-watered coffered area for up to 30 days but not within flowing waters. Material from exploratory trenching and installation of utility lines in wetlands may be temporarily side cast for up to 30 days.

#### F. Suitability of Sediments for Open Water Disposal and us as Fill

- Sampling for determination of suitability of sediments for open water disposal or for use as fill, must comply with the Sediment Evaluation Framework for the Pacific Northwest (SEF)<sup>5</sup>.

#### G. Avoidance and Minimization

- In addition to information required under General Condition 32(b), the applicant shall include information about previous discharges of fill material into waters of the United States within the project area. This is only for non-federal applicants where a PCN is required.
- Discharges of dredged or fill material into waters of the U.S., including wetlands, to meet set back requirements are not authorized under NWP.

#### H. Erosion Control

- Erosion control blanket or fabric used in or adjacent to waters of the U.S. shall be comprised of biodegradable material, to ensure decomposition and reduced risk to fish, wildlife and public safety, unless conditioned otherwise. If the applicant proposes to use materials other than as indicated above they must demonstrate how the use of such materials will not cause harm to fish, wildlife and public safety.

#### I. Reporting Requirement for Federal Permittees

- Federal Agencies with projects that require compensatory mitigation for loss of waters of the U.S. and who propose to purchase credits from an approved wetland and/or stream mitigation bank must provide proof of purchase within 30 days of when the credits were purchased. Purchase of credits from an approved mitigation bank must be IAW the Mitigation Banking Instrument of Record.

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<sup>5</sup> Northwest Regional Sediment Evaluation Team (RSET) 2016. Sediment Evaluation Framework for the Pacific Northwest. Prepared by the RSET Agencies, July 2016, 160 pp plus appendices. <http://nwd.usace.army.mil/Missions/Civil-Works/Navigation/RSET/SEF>

## REGIONAL ADDITIONS TO THE GENERAL CONDITIONS

General Condition 4. Migratory Bird Breeding Areas. Regional Addition: For additional information please contact the US Fish and Wildlife Service at the following field office locations: State Office (Boise) at (208) 387-5243; Northern Idaho Field Office (Spokane) at (509) 891-6839; or the Eastern Idaho Field Office (Chubbuck) at (208) 237-6975.  
<https://www.fws.gov/idaho/promo.cfm?id=177175802>

General Condition 6. Suitable Material. Regional Addition: Erosion control blanket or fabric used in or adjacent to waters of the U.S. shall be comprised of biodegradable material, to ensure decomposition and reduced risk to fish, wildlife and public safety, unless conditioned otherwise. If the applicant proposes to use materials other than as indicated above they must demonstrate how the use of such materials will not cause harm to fish, wildlife and public safety.

General Condition 9. Management of Water Flows. Regional Addition: To obtain information on State of Idaho definition of high water refer to Idaho Department of Water Resources (IDAPA 37.03.07. Rule 62.03.04.a). For culverts or bridges located in a community qualifying for the national flood insurance program, the minimum size culvert shall accommodate the 100-year flood design flow frequency (IDAPA 37.03.07. Rule 62.03.04.c).

General Condition 12. Soil Erosion and Sediment Controls. Regional Addition: For additional information refer to the Idaho Department of Environmental Quality Catalog of Stormwater Best Management Practices for Idaho Cities and Counties, available online at: <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/guidance/>.

General Condition 18. Endangered Species. Regional Addition: For additional information on ESA listed species in north Idaho please contact the US Fish and Wildlife Service (USFWS) Northern Idaho Field Office (Spokane) at (509) 893-8009, for all other counties in Idaho contact the USFWS State Office (Boise) at (208) 378-5388.

General Condition 20. Historic Properties. Regional Addition: Property is generally considered "historic" if it is at least 50 years old, and is not limited to buildings. For additional information on the potential for cultural resources in proximity to the project site, contact the Idaho State Historic Preservation Office at (208) 334-3847 located in Boise, Idaho.

## NOTIFICATION PROCEDURES BY THE CORPS FOR CERTAIN NATIONWIDE PERMITS

**Waivers:** For nationwide permits with a waiver provision, District coordination with Idaho Department of Environmental Quality (IDEQ) and Environmental Protection Agency (tribal lands) will be conducted prior to the District Engineer making a waiver determination to ensure the proposed activity is in compliance with Section 401 Water Quality Standards.

**Select Waters and Wetlands:** The Corps will coordinate with the Idaho Department of Fish and Game (IDFG) for activities in the following waters and wetlands that require notification and are authorized by NWP:

- Waters: Anadromous waters as shown on Figure 1: *Watersheds Requiring Pre-Construction Notification*, dated January 6, 2021; Henry's Fork of the Snake River and its tributaries; South Fork Snake River and its tributaries; Big Lost River and its tributaries upstream of the US 93 crossing; Beaver, Camas, and Medicine Lodge Creeks; Snake River; Blackfoot River above Blackfoot Reservoir; Portneuf River; Bear River; Boise River including South Fork, North Fork and Middle Fork; Payette River including South Fork, North Fork and Middle Fork; Coeur d'Alene River, including the North Fork; St. Joe River; Priest River; Kootenai River; Big Wood River; and Silver Creek and its tributaries.
- Wetlands identified in Idaho Department of Fish and Game, Wetland Conservation Strategy as Class I, Class II and Reference Habitat Sites<sup>6</sup>.
- Wetlands identified in the Idaho Wetland Conservation Prioritization Plan-2012<sup>7</sup>.

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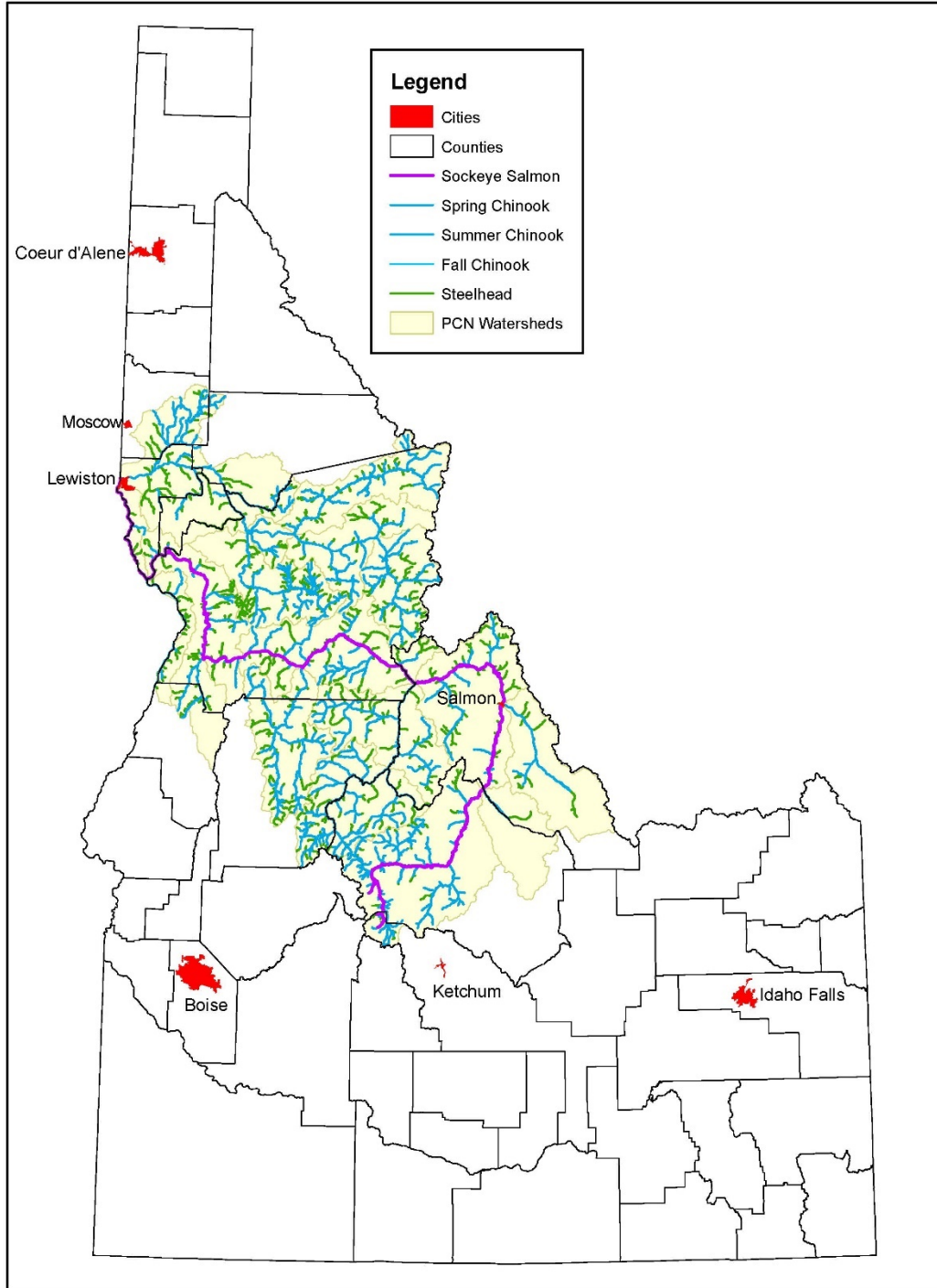
<sup>6</sup> Idaho Department of Fish and Game (IDFG) Wetland Conservation Strategies have been developed for the Henrys Fork Basin, Northern Idaho, Big Wood River, Southeast Idaho, East-Central Idaho and Spokane River Basin, Middle and Western Snake River and tributaries, and the Upper Snake River-Portneuf Drainage, Weiser River Basin, and West Central Mountain Valleys and adjacent wetlands. Closed basins of Beaver-Camas Creeks, Medicine Lodge Creek, Palouse River and lower Clearwater River sub-basins, Middle Fork and South Fork Clearwater Basins and Camas Prairie in northern Idaho. Refer to the internet site at: <http://fishandgame.idaho.gov/content/page/wetlands-publications-idaho-natural-heritage-program#reports>

<sup>7</sup> Murphy, C., J. Miller and A. Schmidt. 2012. <https://idfg.idaho.gov/species/bibliography/project/wetlands>

Figure 1



# Watersheds Requiring Pre-Construction Notification



## **2021 Nationwide Permit General Conditions**

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

## **1. Navigation**

(a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his or her authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

## **2. Aquatic Life Movements**

No activity may substantially disrupt the necessary life

cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

## **3. Spawning Areas**

Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

## **4. Migratory Bird Breeding Areas**

Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

## **5. Shellfish Beds**

No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

## **6. Suitable Material**

No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

## **7. Water Supply Intakes**

No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

## **8. Adverse Effects From Impoundments**

If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

### **9. Management of Water Flows**

To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

### **10. Fills Within 100-Year Floodplains**

The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

### **11. Equipment**

Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

### **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.

### **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 pre-construction elevations. The affected areas must be revegetated, as appropriate.

### **14. Proper Maintenance**

Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district

engineer to an NWP authorization.

### **15. Single and Complete Project**

The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

### **16. Wild and Scenic Rivers**

(a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency



with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

#### **17. Tribal Rights**

No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

#### **18. Endangered Species**

(a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a

species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of "effects of the action" for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding "activities that are reasonably certain to occur" and "consequences caused by the proposed action."

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate

documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be

affected by the proposed activity. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation or conference with the FWS or NMFS the district engineer may add species-specific

permit conditions to the NWP.

(e) Authorization of an activity by an NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should

provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at

<http://www.fws.gov/> or  
<http://www.fws.gov/ipac>  
and  
[http://www.nmfs.noaa.gov/  
pr/species/esa/](http://www.nmfs.noaa.gov/pr/species/esa/) respectively.

### **19. Migratory Birds and Bald and Golden Eagles**

The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

### **20. Historic Properties**

(a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own

procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the

potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)).

Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106

consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects

properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

#### **21. Discovery of Previously Unknown Remains and Artifacts**

Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by an NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

#### **22. Designated Critical Resource Waters**

Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment,

additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWP 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

### **23. Mitigation**

The district engineer will consider the following

factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-

construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of

streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a

riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)).

However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14)

must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of

components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no

mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

#### **24. Safety of Impoundment Structures**

To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state or federal, dam safety criteria or have

been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

### **25. Water Quality**

(a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a

water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

### **26. Coastal Zone Management.**

In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence

in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

### **27. Regional and Case-By-Case Conditions**

The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

### **28. Use of Multiple Nationwide Permits**

The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated



bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

**29. Transfer of Nationwide Permit Verifications**

If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached

to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

\_\_\_\_\_  
\_\_\_\_\_  
(Transferee)

\_\_\_\_\_  
\_\_\_\_\_  
(Date)

**30. Compliance Certification**

Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of

ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory

mitigation, whichever occurs later.

**31. Activities Affecting Structures or Works Built by the United States**

If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a "USACE project"), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

**32. Pre-Construction Notification**

(a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined

to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

- (1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or
- (2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that

listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:*  
The PCN must be in writing and include the following information:

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;
- (3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;
- (4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of

the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually

clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining

why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on,

determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the “study river” (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request

for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity’s compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity’s adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii)

NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via e-mail, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or e-mail that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's

compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery

Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.



**STATE OF IDAHO**  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

1410 N Hilton Street, Boise, ID 83706  
(208) 373-0502

Brad Little, Governor  
Jess Byrne, Director

December 4, 2020

Kelly J. Urbanek, Chief  
U.S. ACOE Regulatory Division  
Walla Walla District  
720 East Park Boulevard, Suite 245  
Boise, Idaho 83712-7757

Subject: Final §401 Water Quality Certification for 2020 Nationwide Permits in Idaho

Dear Ms. Urbanek:

Enclosed please find the Idaho Department of Environmental Quality (DEQ) final water quality certification for the 2020 Nationwide Permits in Idaho. DEQ offered a 21-day public comment period, beginning on November 2, 2020, and ending on November 23, 2020.

DEQ received a single comment letter. After review of the comments received, minor modifications were made to the final certification in order to provide additional clarity.

If you have any questions or concerns regarding this certification, please contact Jason Pappani at (208) 373-0515 or via email at [jason.pappani@deq.idaho.gov](mailto:jason.pappani@deq.idaho.gov).

Sincerely,

A handwritten signature in blue ink that reads "Mary Anne Nelson".

Mary Anne Nelson, PhD  
Surface and Wastewater Division Administrator

MAN:JP:lf

cc: Jason Pappani, DEQ State Office  
DEQ Regional Administrators  
James Joyner, ACOE Walla Walla District  
Brent King, Idaho Attorney General's Office



## Idaho Department of Environmental Quality Final §401 Water Quality Certification

December 4, 2020

*2020 U.S. Army Corps of Engineers §404 Nationwide Permits (NWPs)*

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Pursuant to the provisions of Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), as amended; 33 U.S.C. Section 1341(a)(1); and Idaho Code §§ 39-101 et seq. and 39-3601 et seq., the Idaho Department of Environmental Quality (DEQ) has authority to review activities receiving Section 404 dredge and fill permits and issue water quality certification decisions.

Based upon its review of the proposed 2020 Nationwide Permits published in the Federal Register on September 15, 2020, DEQ certifies that if the permittee complies with the terms and conditions imposed by the permits, including the Regional Conditions set forth by the Army Corps of Engineers (ACOE), along with the conditions set forth in this water quality certification, then activities will comply with the applicable water quality requirements of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, the Idaho Water Quality Standards (WQS) (IDAPA 58.01.02), and other appropriate water quality requirements of state law.

This certification does not constitute authorization of the permitted activities by any other state or federal agency or private person or entity. This certification does not excuse the permit holder from the obligation to obtain any other necessary approvals, authorizations, or permits, including without limitation, the approval from the owner of a private water conveyance system, if one is required, to use the system in connection with the permitted activities.

### **1 Antidegradation Review**

The WQS contain an antidegradation policy providing three levels of protection to water bodies in Idaho (IDAPA 58.01.02.051).

- **Tier I Protection.** The first level of protection applies to all water bodies subject to Clean Water Act jurisdiction and ensures that existing uses of a water body and the level of water quality necessary to protect those existing uses will be maintained and protected (IDAPA 58.01.02.051.01; 58.01.02.052.01). Additionally, a Tier I review is performed for all new or reissued permits or licenses (IDAPA 58.01.02.052.07).
- **Tier II Protection.** The second level of protection applies to those water bodies considered high quality and ensures that no lowering of water quality will be allowed unless deemed necessary to accommodate important economic or social development (IDAPA 58.01.02.051.02; 58.01.02.052.08).

- Tier III Protection. The third level of protection applies to water bodies that have been designated outstanding resource waters and requires that activities not cause a lowering of water quality (IDAPA 58.01.02.051.03; 58.01.02.052.09).

DEQ is employing a water body by water body approach to implementing Idaho's antidegradation policy. This approach means that any water body fully supporting its beneficial uses will be considered high quality (IDAPA 58.01.02.052.05.a). Any water body not fully supporting its beneficial uses will be provided Tier I protection for that use, unless specific circumstances warranting Tier II protection are met (IDAPA 58.01.02.052.05.c). The most recent federally approved Integrated Report and supporting data are used to determine support status and the tier of protection (IDAPA 58.01.02.052.05).

### **1.1 Pollutants of Concern**

The primary pollutant of concern, for projects permitted under the 2020 NWP's administered by the ACOE, is sediment. In locations where heavy metals are present due to mining activities, or where high concentrations of nutrients may be associated with sediments, additional considerations may be necessary. If the project reduces riparian vegetation, then temperature (thermal loading) may also be of concern.

The procedures outlined in the Sediment Evaluation Framework for the Pacific Northwest<sup>1</sup> may be applied to assess and characterize sediment to determine the suitability of dredged material for unconfined aquatic placement, to determine the suitability of post dredge surfaces, and to predict effects on water quality during dredging (See Section 2.4 for more details).

As part of the Section 401 water quality certification, DEQ is requiring the applicant to comply with various conditions to protect water quality and to meet Idaho WQS, including the criteria applicable to sediment.

### **1.2 Receiving Water Body Level of Protection**

The ACOE NWP's authorize construction activities in waters of the United States. In Idaho, jurisdictional waters of the state can potentially receive discharges either directly or indirectly from activities authorized under the NWP's. DEQ applies a water body by water body approach to determine the level of antidegradation protection a water body will receive. (IDAPA 58.01.02.052.05).

All waters in Idaho that receive discharges from activities authorized under a NWP will receive, at minimum, Tier I antidegradation protection because Idaho's Tier I antidegradation policy applies to all state waters (IDAPA 58.01.02.052.01). Water bodies that fully support their aquatic life or recreational uses are considered *high quality waters* and will receive Tier II antidegradation protection (IDAPA 58.01.02.051.02). Because of the statewide applicability, the antidegradation review will assess whether the NWP permit complies with both Tier I and Tier II antidegradation provisions (IDAPA 58.01.02.052.03).

Although Idaho does not currently have any Tier III designated outstanding resource waters (ORWs), it is possible for a water body to be designated as an ORW during the life of the NWP's.

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<sup>1</sup> Northwest Regional Sediment Evaluation Team (RSET). 2018. Sediment Evaluation Framework for the Pacific Northwest. Prepared by the RSET Agencies, May 2018, 183 pp plus appendices.



Because of this potential, the antidegradation review also assesses whether the permit complies with the outstanding resource water requirements of Idaho’s antidegradation policy (IDAPA 58.01.02.051.03).

To determine the support status of the receiving water body, the most recent EPA-approved Integrated Report, available on Idaho DEQ’s website, is to be used:

<http://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report/>. (IDAPA 58.01.02.052.05).

High quality waters are identified in Categories 1 and 2 of the Integrated Report. If a water body is in either Category 1 or 2, it is a Tier II water body.

Unassessed waters are identified in Category 3 of DEQ’s Integrated Report. These waters require a case by case determination to be made by DEQ based on available information at the time of the application for permit coverage (IDAPA 58.01.02.052.05.b). For activities occurring on unassessed waters under this certification, DEQ has determined that complying with the conditions of the NWP, the regional conditions, and this certification will ensure the provisions of IDAPA 58.01.02.052 are met.

Impaired waters are identified in Categories 4 and 5 of the Integrated Report. Category 4(a) contains impaired waters for which a TMDL has been approved by EPA. Category 4(b) contains impaired waters for which controls other than a TMDL have been approved by EPA. Category 5 contains waters which have been identified as “impaired”, for which a TMDL is needed. These waters are Tier I waters, for the use which is impaired. With the exception, if the aquatic life uses are impaired for any of these three pollutants—dissolved oxygen, pH, or temperature—and the biological or aquatic habitat parameters show a healthy, balanced biological community, then the water body shall receive Tier II protection, in addition to Tier I protection, for aquatic life uses (IDAPA 58.01.02.052.05.c.i).

DEQ’s webpage also has a link to the state’s map-based Integrated Report which presents information from the Integrated Report in a searchable, map-based format:

<http://www.deq.idaho.gov/assistance-resources/maps-data/>.

Water bodies can be in multiple categories for different causes. If assistance is needed in using these tools, or if additional information/clarification regarding the support status of the receiving water body is desired, please feel free to contact your nearest DEQ regional office or the State Office (Table 1).

**Table 1. Idaho DEQ Regional and State Office Contacts**

<i>Regional Office</i>	<i>Address</i>	<i>Phone Number</i>	<i>Email</i>
Boise	1445 N. Orchard Rd., Boise 83706	208-373-0550	<a href="mailto:kati.carberry@deq.idaho.gov">kati.carberry@deq.idaho.gov</a>
Coeur d'Alene	2110 Ironwood Parkway, Coeur d'Alene 83814	208-769-1422	<a href="mailto:chantilly.higbee@deq.idaho.gov">chantilly.higbee@deq.idaho.gov</a>
Idaho Falls	900 N. Skyline, Suite B., Idaho Falls 83402	208-528-2650	<a href="mailto:troy.saffle@deq.idaho.gov">troy.saffle@deq.idaho.gov</a>
Lewiston	1118 "F" St., Lewiston 83501	208-799-4370	<a href="mailto:sujata.connell@deq.idaho.gov">sujata.connell@deq.idaho.gov</a>
Pocatello	444 Hospital Way, #300 Pocatello 83201	208-236-6160	<a href="mailto:matthew.schenk@deq.idaho.gov">matthew.schenk@deq.idaho.gov</a>
Twin Falls	650 Addison Ave. W., Suite 110, Twin Falls 83301	208-736-2190	<a href="mailto:balthasar.buhidar@deq.idaho.gov">balthasar.buhidar@deq.idaho.gov</a>
State Office	1410 N. Hilton Rd., Boise 83706	208-373-0502	<a href="mailto:jason.pappani@deq.idaho.gov">jason.pappani@deq.idaho.gov</a>

### **1.3 Protection and Maintenance of Existing Uses (Tier I Protection)**

A Tier I review is performed for all new or reissued permits or licenses, applies to all waters subject to the jurisdiction of the Clean Water Act, and requires demonstration that existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected (IDAPA 58.01.02.051.01; 052.01 and 04). The numeric and narrative criteria in the WQS are set at levels that ensure protection of existing and designated beneficial uses.

Water bodies not supporting existing or designated beneficial uses must be identified as water quality limited, and a total maximum daily load (TMDL) must be prepared for those pollutants causing impairment (IDAPA 58.01.02.055.02). Once a TMDL is completed, discharges of causative pollutants shall be consistent with the allocations in the TMDL (IDAPA 58.01.02.055.05). Prior to the completion of a TMDL, the WQS require the application of the antidegradation policy and implementation provisions to maintain and protect beneficial uses (IDAPA 58.01.02.055.04).

The general (non-numeric) effluent limitations in the NWPs and associated Regional Conditions for the ACOE Walla Walla District address best management practices (BMPs) aimed at minimizing impacts to the aquatic environment, especially sediment and turbidity impacts including: vegetation protection and restoration, de-watering requirements, erosion and sediment controls, soil stabilization requirements, pollution prevention measures, prohibited discharges, and wildlife considerations. Although the NWPs do not contain specific (numeric) effluent limitations for sediment or turbidity, the conditions identified in the permits and in this water quality certification will ensure compliance with DEQ's water quality standards, including the narrative sediment criteria (IDAPA 58.01.02.200.08) and DEQ's turbidity criteria (IDAPA 58.01.02.250.02.e).

In order to ensure compliance with Idaho WQS, DEQ has included a condition requiring the permittee(s) to comply with Idaho's numeric turbidity criteria, developed to protect aquatic life

uses. The criterion states, “Turbidity shall not exceed background turbidity by more than 50 nephelometric turbidity units (NTU)<sup>2</sup> instantaneously or more than 25 NTU for more than 10 consecutive days” (IDAPA 58.01.02.250.02.e). DEQ is requiring turbidity monitoring when project activities result in a discharge to waters of the United States that causes a visible sediment plume (IDAPA 58.01.02.054.01) (See Section 2.5 for more details).

If an approved TMDL exists for a receiving water body that requires a load reduction for a pollutant of concern, then the project must be consistent with the provisions of that TMDL (IDAPA 58.01.02.055.05).

For authorized activities requiring a pre-construction notification (PCN), the Corps will have the opportunity to evaluate the NWP activities on a case by case basis to ensure that the activity will not cause more than a minimal adverse environmental effect, individually and cumulatively. The Corps has agreed to forward the verification letters to the appropriate DEQ regional office (Table 1) for all authorized activities including the NWP activities that require a PCN. This will better inform DEQ of the authorized activities that are occurring throughout the state and determine if additional conditions will need to be implemented when the ACOE reissues the NWPs.

### 1.3.1 DEQ’s Determination

DEQ concludes that, given the nature of the activities authorized by the 2020 NWPs, such activities will comply with Idaho’s Tier I requirements under IDAPA 58.01.02.051.01 and 58.01.02.052.07, provided the permitted activities are carried out in compliance with the limitations and associated requirements of the 2020 NWPs, Regional Conditions, and conditions set forth in this water quality certification.

## 1.4 Protection of High-Quality Waters (Tier II Protection)

Water bodies that fully support their beneficial uses are recognized as high-quality waters and will be provided Tier II protection in addition to Tier I protection (IDAPA 58.01.02.051.02; 58.01.02.052.05.a). Water quality parameters applicable to existing or designated beneficial uses must be maintained and protected under Tier II, unless a lowering of water quality is deemed necessary to accommodate important economic or social development (IDAPA 58.01.02.051.02; 58.01.02.052.08).

The ACOE does not authorize projects with more than minimal individual and cumulative impacts on the aquatic environment under a NWP (33 U.S.C.A. § 1344(e)). As required by the National Environmental Policy Act (NEPA) the Corps has analyzed the individual and cumulative effects for the NWP activities. DEQ recognizes that short term changes in water quality may occur with respect to sediment as a result of the authorized activities, but has determined that adherence to the terms and conditions imposed by the permits, including the Regional Conditions set forth by the Army Corps of Engineers (ACOE or Corps), along with the conditions set forth in this water quality certification will ensure that there are no long-term adverse changes to water quality or beneficial use support as a result of any activity authorized under this certification (IDAPA 58.01.02.052.03). As a general principle, DEQ believes degradation of water quality should be viewed in terms of permanent or long-term adverse

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<sup>2</sup>NTU is a unit of measure of the concentration of suspended particles in the water (turbidity). It is determined by shining a light through a sample and measuring the incident light scattered at right angles from the sample.

changes. Short-term or temporary reductions in water quality, if reasonable measures are taken to minimize them (such as the certification conditions in Section 2), may occur without triggering a Tier II analysis (IDAPA 58.01.02.052.03; 080.02).

To ensure proposed regulated activities will not cause more than minimal individual and cumulative impacts on the aquatic environment, certain NWPs require project proponents to notify district engineers (in the form of a PCN) of their proposed activities prior to conducting regulated activities. This level of review gives the district engineer the opportunity to evaluate activities on a case by case basis to determine whether additional conditions or mitigation requirements are warranted to ensure that the proposed activity results in no more than the minimal individual and cumulative impacts on the aquatic environment.

DEQ has denied certification for NWP 16, NWP 23, and NWP 53 (see Section 3.1); and for certain activities associated with NWP 3, NWP 12, NWP 13, NWP 14, NWP 21, NWP 29, NWP 39, NWP 40, NWP 42, NWP 43, NWP 44, NWP 50, NWP 51, NWP 52, NWP C, NWP D, and NWP E (see Section 3.2). Projects seeking coverage under these NWPs will need to request individual certification from DEQ. DEQ will consider any additional conditions or denial of certification if necessary to ensure no lowering of water quality occurs for any of these projects proposed on Tier II water.

Additionally, if an authorized project causes a visible sediment plume then turbidity monitoring is required (see Section 2.5 for more details).

#### **1.4.1 DEQ's Determination**

DEQ concludes that the activities authorized by the 2020 NWPs and this certification will comply with Idaho's Tier II requirements under IDAPA 58.01.02.051.02 and 58.01.02.052.08 providing permitted activities are carried out in compliance with the limitations and associated requirements of the 2020 NWPs, Regional Conditions, and conditions of this water quality certification.

### ***1.5 Protection of Outstanding Resource Waters (Tier III Protection)***

Idaho's antidegradation policy requires that the quality of outstanding resource waters (ORWs) be maintained and protected from the impacts of point and nonpoint source activities (IDAPA 58.01.02.051.03). No water bodies in Idaho have been designated as ORWs to date. Because it is possible waters may become designated during the term of the 2020 NWPs, DEQ has evaluated whether the NWPs comply with the ORW antidegradation provision.

DEQ has denied certification for any activities on any Outstanding Resource Water (ORW) (see Section 3) and is requiring that any activities proposed on an ORW apply for individual certification (see Section 2.3).

#### **1.5.1 DEQ's Determination**

DEQ concludes that the activities authorized by the 2020 NWPs and this certification will comply with Idaho's Tier III requirements under IDAPA 58.01.02.051.03 providing permitted activities are carried out in compliance with the limitations and associated requirements of the 2020 NWPs, Regional Conditions, and conditions of this water quality certification.

## 2 Conditions Necessary to Ensure Compliance with Water Quality Standards or Other Appropriate Water Quality Requirements of State Law

For all activities covered under this certification, the following conditions are necessary to ensure that permitted projects comply with water quality requirements.

### 2.1 *Design, Implementation, and Maintenance of Appropriate Best Management Practices*

Best Management Practices (BMPs) must be designed, implemented, and maintained by the permittee to fully protect and maintain the beneficial uses and ambient water quality of waters of the state and to prevent exceedances of WQS (IDAPA 58.01.02.350.01.a).

BMPs must be selected and properly installed. Proper installation and operation of BMPs are required to ensure the provisions of IDAPA 58.01.02.052 are met. In order to ensure that BMPs are operating properly and to demonstrate that degradation has not occurred, the permittee must monitor and evaluate BMP effectiveness daily during project activities to assure that water quality standards are being met.

Approved BMPs for specific activities (mining, forestry, stream channel alteration, etc.) are codified in IDAPA 58.01.02.350. Additionally, DEQ provides a catalog of storm water best management practices, available at: <http://www.deq.idaho.gov/media/60184297/stormwater-bmp-catalog.pdf>. This catalog presents a variety of BMPs that can be used to control erosion and sediment during and after construction. Other sources of information are also available and may be used for selecting project appropriate BMPs.

*This condition is necessary meet the following water quality requirements:*

Control of erosion, sediment, and turbidity to maintain beneficial use support and compliance with the following water quality standards:

- General Surface Water Criteria for Sediment (IDAPA 58.01.02.200.08)
- Numeric Turbidity Criteria for Aquatic Life (IDAPA 58.01.02.250.02.e)
- Numeric turbidity criteria for protection of domestic water supply (IDAPA 58.01.02.252.01.b)
- Point source wastewater treatment requirements (IDAPA 58.01.02.401.02)

### 2.2 *TMDL Compliance*

If there is an approved or established TMDL, then the permittee must comply with the established loads in the TMDL. Approved TMDLs can be found on DEQ's website (<https://www.deq.idaho.gov/water-quality/surface-water/tmdls/table-of-sbas-tmdls/>) or by contacting the appropriate regional office contact (Table 1).

*This condition is necessary to meet the following water quality requirements:*

Ensure projects are consistent with waste load and load allocations established in approved TMDLs (IDAPA 58.01.02.055.04 and .05).

### **2.3 Outstanding Resource Waters**

If waters become designated as ORWs during the term of the NWP, a permittee proposing a project on an ORW must contact the appropriate DEQ regional office and apply for individual certification.

*This condition is necessary to meet the following water quality requirements:*

Ensure there is no lowering of water quality in any ORW as required by the Idaho Antidegradation Policy (IDAPA 58.01.02.051.03).

### **2.4 Fill Material**

Material subject to suspension, including suspended dredge material, shall be free of easily suspended fine material. The fill material to be placed in waters of the United States shall be clean material only. If dredged material is proposed to be used as fill material and there is a possibility the material may be contaminated, then the permittee must apply the procedures in the *Sediment Evaluation Framework for the Pacific Northwest* (RSET, 2018) to assess and characterize sediment to determine the suitability of dredged material for unconfined-aquatic placement; determine the suitability of post dredge surfaces; and to predict effects on water quality during dredging.

*This condition is necessary to meet the following water quality requirements:*

Prevent suspension of fine sediment and turbidity in order to provide beneficial use support and compliance with the following water quality standards:

- General Surface Water Criteria for Sediment (IDAPA 58.01.02.200.08)
- Numeric Turbidity Criteria for Aquatic Life (IDAPA 58.01.02.250.02.e)
- Numeric turbidity criteria for protection of domestic water supply (IDAPA 58.01.02.252.01.b)
- Point source wastewater treatment requirements (IDAPA 58.01.02.401.02)

Prevent suspension of hazardous, toxic, or deleterious materials or other pollutants that may be associated with fill material in order to ensure beneficial use support and compliance with the following water quality standards:

- General Surface Water Criteria for hazardous materials (IDAPA 58.01.02.200.01), toxic substances (IDAPA 58.01.02.200.02), deleterious materials (IDAPA 58.01.02.200.03), excess nutrients (IDAPA 58.01.02.200.06), or oxygen demanding materials (IDAPA 58.01.02.200.09)
- Numeric toxics criteria for aquatic life and human health (IDAPA 58.01.02.210)

## 2.5 Turbidity

If no visible sediment plume is present, it is reasonable to assume that there is no potential violation of the water quality criteria for turbidity (IDAPA 58.01.02.250.02.e). Therefore, turbidity monitoring is only required when activities cause a visible sediment plume.

A properly and regularly calibrated turbidimeter is required for measurements analyzed in the field, but grab samples may be collected and taken to a laboratory for analysis. When monitoring is required a sample must be taken at an undisturbed area immediately up-current from in-water disturbance or discharge to establish background turbidity levels. Background turbidity, latitude/longitude, date, and time must be recorded prior to monitoring down-current. Then a sample must be collected immediately down-current from the in-water disturbance or point of discharge and within any visible sediment plume. The turbidity, latitude/longitude, date, and time must be recorded for each sample. The downstream sample must be taken immediately following the upstream sample in order to obtain meaningful and representative results.

Results from the down-current sampling point must be compared to the up-current or background level to determine whether project activities are causing an exceedance of state WQS. If the downstream turbidity is 50 NTUs or more greater than the upstream turbidity, then the project is causing an exceedance of the WQS (IDAPA 58.01.02.250.02.e). Any exceedance of the turbidity standard must be reported to the appropriate DEQ regional office (Table 1) within 24 hours.

The following steps should be followed to ensure compliance with the turbidity standard:

1. If a visible plume is observed, collect turbidity measurements at 1) an upstream location; and, 2) from within the plume, and compare the results to Idaho's instantaneous numeric turbidity criterion (50 NTU over background).
2. If turbidity in the plume is less than 50 NTU instantaneously over the background turbidity continue monitoring as long as the plume is visible. If turbidity exceeds background turbidity by more than 50 NTU instantaneously then stop all earth disturbing construction activities immediately and proceed to Step 3. If turbidity exceeds background turbidity by more than 25 NTU, or if a visible plume is observed for more than 10 consecutive days, then stop all earth disturbing construction activities and proceed to Step 3.
3. Notify the appropriate DEQ regional office within 24 hours of any turbidity criteria exceedance. Take action to address the cause of the exceedance. That may include inspecting the condition of project BMPs. If the BMPs are functioning to their fullest capability, then the permittee must modify project activities and/or BMPs to correct the exceedance.
4. Earth disturbing activities may continue once turbidity readings return to within 50 NTU over background instantaneously; or, if turbidity has exceeded 25 NTU over background for more than ten consecutive days, once turbidity readings have no longer exceeded 25 NTU over background for at least 24 consecutive hours.

Copies of daily logs for turbidity monitoring must be available to DEQ upon request. The report must describe all exceedances and subsequent actions taken, including the effectiveness of the action.

*This condition is necessary to meet the following water quality requirements:*

Ensure that activities do not impair beneficial uses, and ensure and document compliance with the following water quality standards:

- General Surface Water Criteria for Sediment (IDAPA 58.01.02.200.08)
- Numeric Turbidity Criteria for Aquatic Life (IDAPA 58.01.02.250.02.e)
- Numeric turbidity criteria for protection of domestic water supply (IDAPA 58.01.02.252.01.b)

## **2.6 Mixing Zones**

No mixing zones are authorized through this certification. If a mixing zone, or alternatively, a point of compliance, is desired, the permittee must apply for an individual certification and must contact the appropriate DEQ regional office (Table 1) to request authorization for a mixing zone.

*This condition is necessary to meet the following water quality requirements:*

Ensure any mixing zone is properly authorized in accordance with the Idaho Mixing Zone Policy (IDAPA 58.01.02.060).

## **2.7 Culverts**

To prevent road surface and culvert bedding material from entering a stream, culvert crossings must include best management practices to retain road base and culvert bedding material. For perennial waters, the permittee should consider the Idaho Stream Channel Alterations rules (IDAPA 37.03.07). Another source of BMPs for culvert installation can be found in the Idaho Forest Practices Act (IDAPA 20.20.01). Examples of best management practices include, but are not limited to: parapets, wing walls, inlet and outlet rock armoring, compaction, suitable bedding material, anti-seep barriers such as bentonite clay, or other acceptable roadway retention systems.

*This condition is necessary to meet the following water quality requirements:*

Control of erosion, sediment, and turbidity to provide beneficial use support and compliance with the following water quality standards:

- General Surface Water Criteria for Sediment (IDAPA 58.01.02.200.08)
- Numeric Turbidity Criteria for Aquatic Life (IDAPA 58.01.02.250.02.e)
- Numeric turbidity criteria for protection of domestic water supply (IDAPA 58.01.02.252.01.b)

## **2.8 Wood Preservatives**

DEQ's [Guidance for the Use of Wood Preservatives and Preserved Wood Products In or Around Aquatic Environments](#) must be considered when using treated wood materials in the aquatic environment. Within this guidance document DEQ references the [Best Management Practices](#)



[\*for the Use of Treated Wood in Aquatic and Wetland Environments\*](#)<sup>3</sup>. This document provides recommended guidelines for the production and installation of treated wood products destined for use in sensitive environments.

*This condition is necessary to meet the following water quality requirements:*

Ensure that toxic chemicals are not introduced into waters and to ensure compliance with the following water quality standards:

- General Surface Water Criteria for hazardous materials (IDAPA 58.01.02.200.01), toxic substances (IDAPA 58.01.02.200.02), and deleterious materials (IDAPA 58.01.02.200.03)
- Numeric toxics criteria for aquatic life and human health (IDAPA 58.01.02.210)

## **2.9 Reporting of Discharges Containing Hazardous Materials or Deleterious Materials**

All spills of hazardous material, deleterious material or petroleum products which may impact waters (ground and surface) of the state shall be immediately reported. Call 911 if immediate assistance is required to control, contain or clean up the spill. If no assistance is needed in cleaning up the spill, contact the appropriate DEQ regional office in Table 2 during normal working hours or Idaho State Communications Center after normal working hours. If the spilled volume is above federal reportable quantities, contact the National Response Center.

For immediate assistance: Call 911

National Response Center: (800) 424-8802

Idaho State Communications Center: (800) 632-8000

**Table 2. Idaho DEQ regional contacts for reporting discharge or spill of hazardous or deleterious materials.**

<i>Regional Office</i>	<i>Toll Free Phone Number</i>	<i>Phone Number</i>
Boise	888-800-3480	208-373-0550
Coeur d'Alene	877-370-0017	208-769-1422
Idaho Falls	800-232-4635	208-528-2650
Lewiston	877-541-3304	208-799-4370
Pocatello	888-655-6160	208-236-6160
Twin Falls	800-270-1663	208-736-2190

<sup>3</sup> Western Wood Preservers Institute, Wood Preservation Canada, Southern Pressure Treaters' Association, and Southern Forest Products Association. 2011. "Best Management Practices: For the Use of Treated Wood in Aquatic and Wetland Environments" Vancouver, WA: Western Wood Preservers Institute.

*This condition is necessary to meet the following water quality requirements:*

Ensure compliance with the following water quality standards:

- Hazardous Material Spills (IDAPA 58.01.02.850)
- Petroleum release reporting, investigation, and confirmation (IDAPA 58.01.02.851)
- Petroleum release response and corrective action (IDAPA 58.01.02.852)

## **2.10 Other Conditions**

This certification is conditioned upon the requirement that if there are material modifications of the NWP or the permitted activities—including without limitation, significant changes from the draft NWP to final NWP, or significant changes to the draft Regional Conditions, then DEQ must re-evaluate the certification to determine compliance with Idaho WQS and to provide additional certification pursuant to Section 401.

This condition is necessary to ensure that DEQ can evaluate any material modification to ensure it meets water quality requirements and complies with the Idaho antidegradation policy (IDAPA 58.01.02.051) and its implementation (IDAPA 58.01.02.052), general surface water quality criteria (200), numeric toxics criteria for aquatic life and human health (IDAPA 58.01.02.210), numeric criteria for aquatic life (IDAPA 58.01.02.250), recreation (IDAPA 58.01.02.251), and water supply uses (IDAPA 58.01.02.252).

## **3 Projects for Which Certification Is Denied**

DEQ cannot certify that the following activities will comply with water quality requirements, including State WQS and other appropriate requirements of state law, and is therefore denying certification for the activities listed below.

For activities for which certification has been denied, the applicant will be required to request an individual certification before the activity can be conducted. Individual certification requests will provide DEQ with the opportunity to review project details and determine if additional conditions are necessary to ensure that water quality requirements will be met.

Upon review and evaluation of individual certification requests, DEQ may 1) certify without condition, 2) provide individual certification with conditions necessary to ensure water quality requirements will be met, or 3) deny certification for projects that will not meet water quality requirements.

### **3.1 NWP denied**

DEQ denies certification for all activities proposed to occur on waters designated as ORWs during the term of the permit. This denial is necessary to ensure compliance with the water quality requirements of Idaho's antidegradation policy (IDAPA 58.01.02.051.03) and implementation procedures (IDAPA 58.01.02.052.09.g).

In addition, the following NWP's are denied certification for all Idaho waters. Projects seeking coverage under these NWP's must request individual certification from DEQ.

*NWP 16 - Return Water from Upland Contained Disposal Areas*

Basis for denial:

Return water from upland disposal areas has the potential to contribute turbidity, sediment, and other toxic and non-toxic pollutants to receiving waters.

To ensure that discharge from upland contained disposal areas meets water quality requirements, DEQ must evaluate the quality of the return water and evaluate the potential pollutants associated with return water on a case-by-case basis to determine compliance with general surface water quality criteria (IDAPA 58.01.02.200); numeric toxics criteria for aquatic life and human health (IDAPA 58.01.02.210); and use specific criteria for aquatic life (IDAPA 58.01.02.250), recreation (IDAPA 58.01.02.251), and water supply uses (IDAPA 58.01.02.252).

*NWP 23 - Approved Categorical Exclusions*

Basis for denial:

DEQ is unable to determine that meeting the requirements for categorical exclusion under the National Environmental Policy Act will meet state water quality requirements.

DEQ will evaluate categorically excluded activities on a case-by-case basis to determine compliance with general surface water quality criteria (IDAPA 58.01.02.200); numeric toxics criteria for aquatic life and human health (IDAPA 58.01.02.210); and use specific criteria for aquatic life (IDAPA 58.01.02.250), recreation (IDAPA 58.01.02.251), and water supply uses (IDAPA 58.01.02.252).

*NWP 53 – Removal of Low-Head Dams*

Basis for denial:

Material released from the removal of low head dams has the potential to contribute turbidity, sediment, and other toxic and non-toxic pollutants to receiving waters.

In order to ensure that release of materials from the removal of low head dams meets water quality requirements, DEQ must evaluate the potential pollutants associated with this release on a case-by-case basis to determine compliance with general surface water quality criteria (IDAPA 58.01.02.200); numeric toxics criteria for aquatic life and human health (IDAPA 58.01.02.210); and use specific criteria for aquatic life (IDAPA 58.01.02.250), recreation (IDAPA 58.01.02.251), and water supply uses (IDAPA 58.01.02.252).

### **3.2 NWP's partially denied**

The following activities have the potential to disturb significant areas and could disturb a significant fraction of entire Assessment Units, causing permanent and significant impairment of designated and existing beneficial uses. The conditions associated with the NWP, regional conditions, and the conditions associated with this certification are not sufficient to provide DEQ with assurance that projects of this magnitude would not result in impairment of existing or

designated beneficial uses in all waters, and potentially increase degradation in high quality (Tier II) waters.

In order to meet the requirements of Idaho's antidegradation implementation procedures (IDAPA 58.01.02.052), ensure that beneficial uses are not impaired, and ensure compliance with general surface water quality criteria for sediment (IDAPA 58.01.02.200.08), DEQ must evaluate these projects on a case-by-case basis and provide individual certification where applicable.

### **3.2.1 NWPs 3, 13, and 14**

The 2020 NWPs 3, 13, and 14 require preconstruction notification (PCN) for certain activities when it is necessary for the district engineer to review activities to ensure only minimal adverse environmental effects.

While the additional district engineer review is intended to ensure that activities will cause only minimal adverse environmental effects, it is not reasonable to expect that the district engineer review will consider the requirements of Idaho's antidegradation implementation procedures (IDAPA 58.01.02.052) when making their determination. Consequently, DEQ cannot certify that activities requiring PCN under these NWPs would not cause degradation of water quality, and therefore cannot certify that these activities would meet Idaho's antidegradation implementation procedures (IDAPA 58.01.02.052).

Therefore, DEQ is denying certification for the following activities that require PCN under the proposed 2020 NWPs:

#### *NWP 3 – Maintenance*

##### Activities Denied Certification

- Activities authorized by paragraph (b) of NWP 3

#### *NWP 13 – Bank Stabilization*

##### Activities Denied Certification:

- activities involving discharge into special aquatic sites;
- activities in excess of 500 linear feet;
- activities that involve discharge of greater than one cubic yard per running foot measured along the length of the treated bank below the plane of the ordinary high water mark

#### *NWP 14 – Linear Transportation Projects*

##### Activities Denied Certification:

- activities resulting in the loss of waters of the United States in excess of 1/10 acre;
- discharge in a special aquatic site, including wetlands

### **3.2.2 NWPs 12, C, and D**

The 2017 NWP 12 included activities proposed to be permitted under the 2020 NWPs C and D.

The 2017 NWP 12 required PCN for activities that, among other thresholds, involved mechanized clearing in forested wetlands, exceeded 500 linear feet, or that resulted in loss of greater than 1/10 acre of waters of the United States. The 2020 NWP proposes removal of these thresholds for PCN, and does not require additional review from the ACOE district engineer to ensure only minimal adverse environmental effects.

Without the requirement for PCN and additional review from the district engineer, DEQ cannot certify that these activities will not result in degradation. Therefore, DEQ is denying certification for the following activities:

*NWP 12 – Oil or Natural Gas Pipeline Activities*

Activities Denied Certification:

- activities that involve mechanized clearing of a wooded wetland;
- oil or natural gas pipelines in waters of the United States that exceed 500 linear feet or that run adjacent to a water body for greater than 500 linear feet;
- activities where discharge will result in loss of greater than 1/10-acre, as determined by ACOE, of waters of the United States

*NWP C – Electric Utility Line and Telecommunications Activities*

Activities Denied Certification:

- activities that involve mechanized clearing of a wooded wetland;
- electric utility line and telecommunications activities in waters of the United States that exceed 500 linear feet;
- activities where discharge will result in loss of greater than 1/10-acre, as determined by ACOE, of waters of the United States

*NWP D – Utility Line Activities for Water and Other Substances*

Activities Denied Certification:

- activities that involve mechanized clearing of a wooded wetland;
- utility line activities in waters of the United States that exceed 500 linear feet;
- activities where discharge will result in loss of greater than 1/10-acre, as determined by ACOE, of waters of the United States

### **3.2.3 NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, and E**

The 2017 NWPs for the following activities had a 300 linear foot limit for losses of stream bed. The 2020 NWP proposes removal of the 300 linear foot limit for losses of stream bed and instead rely solely on the ½ acre limit.

The median bankfull width measured from 48 wadeable streams monitored in 2010 as part of DEQ's Beneficial Use reconnaissance Program (BURP) was 19.7 feet. A loss of ½ acre at this stream width would correspond to 1,105 linear feet of loss, or the equivalent of 0.2 miles of stream. DEQ cannot certify that losses of this magnitude of stream bed, or that losses of stream

bed based solely on the ½ acre limit, would not result in permanent degradation. Therefore, DEQ is denying certification for the following activities that exceed the 300 linear foot limit previously imposed by the 2017 NWP:

*NWP 21 – Surface Coal Mining Activities*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 29 – Residential Developments*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 39 – Commercial and Institutional Developments*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 40 – Agricultural Activities*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 42 – Recreational Facilities*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 43 – Stormwater Management Facilities*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 44 – Mining Activities*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 50 – Underground Coal Mining Activities*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 51 – Land Based Renewable Energy Generation Facilities*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP 52 – Water-Based Renewable Energy Generation Pilot Projects*

Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

*NWP E – Water Reclamation and Reuse Facilities*


Activities Denied Certification:

- activities resulting in loss in excess of 300 linear feet of streambed
- activities resulting in loss in excess of ½ acre of jurisdictional wetlands

## 4 Right to Appeal Final Certification

The final Section 401 Water Quality Certification may be appealed by submitting a petition to initiate a contested case, pursuant to Idaho Code § 39-107(5) and the “Rules of Administrative Procedure before the Board of Environmental Quality” (IDAPA 58.01.23), within 35 days of the date of the final certification.

Questions or comments regarding the actions taken in this certification should be directed to Jason Pappani, State Office IDEQ, at (208) 373-0515 or via email at [jason.pappani@deq.idaho.gov](mailto:jason.pappani@deq.idaho.gov).



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Surface and Wastewater Division  
Administrator