UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

JAN 1 7 2007

General John McMahon
Division Engineer, South Pacific Division
U.S. Army Corps of Engineers
333 Market St.
San Francisco, CA 94105

Subject: Conditional Clean Water Act (CWA) §401 certification of the 2007 Nationwide Permits (NWPs) for projects on applicable tribal lands

Dear General McMahon:

EPA Region 9 has reviewed the Corps' 26 September 2006 Federal Register notice *Proposal to Reissue and Modify Nationwide Permits* (FR Notice) pursuant to our roles and responsibilities under sections 401 and 404 of the CWA. The purpose of this letter is to provide conditional water quality certification of the NWPs for activities proceeding on tribal lands within Region 9. These conditions do not apply, however, to activities proceeding in the territories of the seven tribes within Region 9 which have been approved as certifying authorities—the Navajo Nation, Hualapai Nation, and White Mountain Apache Tribe in Arizona; and the Hoopa Valley Tribe, Bishop Paiute Tribe, Big Pine Paiute Tribe, and Twenty-Nine Palms Band in California.

As a general matter, we are concerned that the proposed changes to the NWP may lack adequate safeguards against degradation of aquatic resource functions and values, including protection of water quality and beneficial uses. A number of NWP characteristics may cause more than minimal adverse effects to aquatic resources including lack of maximum impact thresholds; authorization of broad, unrelated activities; and terminology that invites varying interpretation by permittees without Corps oversight. We believe the NWPs, as newly proposed, could weaken the program through relaxed reporting standards (*e.g.*, for applicants' explicit avoidance and minimization of discharges of pollutants), and by placing greater burdens on Corps staff to ensure permittees are in compliance.

In addition, EPA does not believe that the Corps has collected data sufficient to demonstrate that the NWP program results in minimal adverse impacts to the aquatic environment on an individual or cumulative basis. The lack of required Preconstruction Notifications (PCN)s, or any mandatory reporting for nearly half of the NWPs, is one of several factors which have precluded detailed programmatic analysis of the aerial extent, location, and type of aquatic resources impacted within a watershed context. These issues should be of paramount concern to the Corps given that Corps data indicate approximately 88% of the authorizations under the §404 program are implemented via General Permits—chiefly, the NWPs.

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To protect water quality and beneficial uses of waters of the U.S. on tribal territories under the new NWP program, EPA Region 9 hereby institutes the attached general and permit-specific conditions pursuant to section 401 of the Clean Water Act. In summary, we are programmatically certifying thirty of the NWPs with general conditions, and certifying fifteen of the NWPs with permit-specific conditions (including new NWPs A, E and F). In addition, we are requiring that all permittees submit notification to EPA Region 9 when proceeding under any of the NWPs on tribal lands.

With the implementation of the enclosed general and permit-specific conditions, we are also reducing the number of NWPs denied certification (previously twelve, we are now denying certification for four permits: NWP 43, and new NWPs B, C and D). Applicants proposing activities on tribal lands under NWPs for which certification has been denied should preferably pursue alternative forms of authorization from the Corps (*e.g.*, individual permit, Letter of Permission, etc.). If this is not practical, these applicants must pursue individual project certification from EPA. A summary table at the end of the attached certifications and conditions is provided for easy reference to the status of all NWPs on tribal lands.

This conditional certification of the NWP program will remain in effect for the authorization period of the new NWPs, and will be revisited and potentially revised when the NWPs are next revisited and potentially revised by the Corps (*i.e.*, 2011). If you have any questions regarding our conditional certification of the NWPs for activities on tribal lands, you may contact me at 415-972-3572, or Jason Brush of my staff at 415-972-3483.

Sincerely,

Alexis Strauss 17 January 2007
Alexis Strauss
Director, Water Division

Cc:
Jane Hicks, Regulatory Branch Chief, San Francisco District
Michael Jewel, Regulatory Branch Chief, Sacramento District
David Castanon, Regulatory Branch Chief, Los Angeles District
Donald Borda, Regulatory Branch Chief, Albuquerque District

General Conditions

01. Classes of Aquatic Resources

Jurisdictional aquatic resources of all hydrological regimes are explicitly included in all general and permit-specific conditions to follow. In recognition of the importance of seasonal, ephemeral and intermittent waters for the protection and maintenance of water quality and other ecosystem services in the arid southwest, this certification hereby adopts the Corps' proposed inclusion of ephemeral and intermittent streams in the impact limitations listed throughout the 2007 NWPs. If any of the final NWPs assign impact limitations differently by hydrological regime (*e.g.*, allowing ¼ acre impacts to perennial systems and ½ acre to intermittent or ephemeral under the same NWP), the more protective standard shall apply under this certification universally to all covered waters (in the example above, therefore, no more than ¼ acre of impacts would be authorized to either perennial or ephemeral/intermittent waters).

02. Notification

To improve the government's ability to demonstrate whether the NWP program has minimal adverse impacts to the aquatic environment, individually and cumulatively, all NWP-authorized projects proceeding on tribal lands within Region 9 shall submit a form of notification to EPA Region 9.[1]

Under existing NWP rules, for the purposes of PCN notification, projects proposing to use a given NWP will fall under one of the following four categories:

1. The Corps requires a PCN, subject to criteria in the Corps' General Condition 27, because the project proposes use of an NWP that requires a PCN for <u>any</u> activities authorized by the NWP.
2. The Corps requires a PCN, subject to criteria in the Corps' General Condition 27, because the project proposes to exceed impact thresholds triggering a PCN under the NWP.
3. The Corps does <u>not</u> require a PCN, because proposed impacts <u>fall below thresholds</u> identified in the NWP for a PCN.
4. The Corps does <u>not</u> require a PCN for <u>any</u> activities authorized under the NWP the applicant is proposing to use.

To be eligible for any NWP under this certification, applicants under any of the above categories are required to submit a notice to EPA. However, **no response or approval is required from EPA for the project to proceed under the NWP.** For categories 1 and 2 above, applicants must simply forward a second copy of the PCN already required by the Corps to EPA Region 9. For applicants in categories 3 and 4, a modified PCN (MPCN) must be submitted to EPA Region 9 subject to the following criteria:

1) ***Timing.*** Applicants shall submit an MPCN to EPA Region 9 as early as possible, and in advance of any authorization letter from the Corps allowing the applicant to proceed under a given NWP. However, upon review, EPA reserves the right to make

[1] NOTE: this requirement does not modify or eliminate existing Corps requirements regarding PCNs for projects proceeding on tribal lands (or elsewhere).

after-the-fact assessments of likely direct and indirect impacts to water quality and may require mitigation. EPA shall make any such determinations, in writing, within 45 days of receipt of the MPCN.

2) ***Content.*** MPCNs must be in writing (electronic mail submittal is acceptable) and include the following information:
   a) Name, address and telephone numbers of the applicant and any agents or representatives. If available, the electronic mail address and fax numbers for these persons.
   b) Location of the proposed project.
   c) A description of the proposed project and impacts including
      i) the project's purpose;
      ii) direct and indirect adverse environmental effects the project would cause, including the proposed acreages of waters impacted, avoided, and, where applicable, created or otherwise mitigated;
      iii) 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; and
      iv) a list of other state, tribal and federal permits or authorizations necessary for the project.

      The description should be sufficiently detailed to determine compliance with NWP and EPA 401 conditions and the need for appropriate compensatory mitigation. Maps, drawings and/or photographs of the project area and aquatic resources are not mandatory, but usually help to clarify the project and allow for faster review. At minimum, a narrative description of any special aquatic sites and other waters of the United States on the project site must be included.
   d) A statement describing impact avoidance and minimization measures, as required by EPA General Condition 03 of the CWA §401 certification of the 2007 NWP program.
   e) To the extent not covered by d) above, a statement describing how the project will protect, and where practicable improve, water quality.
   f) The name(s) of any species listed as endangered or threatened under the Endangered Species Act which may be adversely affected by the proposed work, either directly or by impacting designated critical habitat.
   g) Identification of any cultural or historic properties listed in, or eligible for listing in, the National Register of Historic Places that may be adversely affected by the proposed work.

03. Mitigation

Mitigation begins with the avoidance and minimization of adverse impacts to waters, followed by compensatory measures if a loss of aquatic function or acreage is unavoidable. Proposed modifications to the NWP program include the removal of explicit reference to avoidance, minimization and compensation in the body of several permits in favor of generally less explicit, less protective language in General Condition 20. For example, in many of the proposed NWPs, mitigation activities that had been required of the permittee would become discretionary on the part of the District Engineer (and for nearly half of the NWPs, the DE does not receive a PCN from the permittee and is thus precluded from exercising this discretion).

To protect water quality and beneficial uses of U.S. waters on tribal lands, all projects using NWPs must avoid discharges to the maximum extent practicable, and utilize the best available and practicable means of minimizing the adverse impact of discharges that cannot be avoided. A statement documenting the project's avoidance and minimization methodology will be provided to EPA and the Corps with each PCN (pursuant to Corps General Condition 27, paragraphs (a)(3) and (a)(5)), or MPCN. To the extent practicable, impact sites will be returned to pre-construction contours and, if necessary, banks shall be reseeded or replanted with native vegetation. Maintenance and monitoring activities will include regular and post-storm event inspections, on a schedule determined by the applicant's discretion, but no less frequent than once per year. Inspections should include photographs of culvert conditions after any heavy rainfall as well as conditions pre- and post-construction. Any adverse impacts to water quality resulting from the gradual or immediate failure of project or mitigation components shall be reported to EPA and the Corps immediately.

In some cases, compensatory mitigation may be required in addition to the avoidance and minimization measures outlined above. When required, compensatory mitigation will be implemented on a minimum 2:1 basis (acres created and/or enhanced: acres impacted) for impacts to special aquatic sites, and 1:1 (no net loss) for all other waters of the U.S. Except under unusual circumstances as approved by EPA, upland buffers, vegetated where practicable, shall be maintained around impacted and restored, created or enhanced waters, and will extend a minimum of 50 feet laterally from the Ordinary High Water Mark of each bank, or perimeter of a jurisdictional wetland. Representatives of EPA and the Corps must be allowed access to the site to inspect the project area and any mitigation areas upon reasonable notice.

Should EPA determine that compensatory measures are required, said determination shall not delay a project proceeding under a NWP, nor is a determination on this matter in response to an applicant's MPCN required to begin work (see General Condition 02. Notification, above). When they are appropriate, these determinations for compensatory mitigation will therefore likely be after-the-fact, but nevertheless will remain a condition of water quality certification and thus a condition of the Corps' permit. Failure to address an EPA mitigation requirement would therefore place a permittee out of compliance with their NWP and potentially subject to a range of Corps and EPA enforcement actions.

04. Prohibition on Multiple Use of One NWP for a Single Project

Permittees may not use the same NWP multiple times for one single and complete project; to do so effectively eliminates acreage limitations of the NWPs and may result in more than minimal adverse impacts to water quality and other ecosystem services. For example, under this certification, linear transportation projects on tribal lands must sum the impacts of each proposed crossing of individual waters of the U.S. and use that total to determine eligibility for NWP 14 (Linear Transportation Projects). If the acreage or linear foot impacts exceed the thresholds of the applicable NWP (or combination of applicable *different* NWPs), minimal adverse impacts to water quality may be exceeded and 401 certification is automatically denied without prejudice. In this event, the NWP in question is not available to the applicant on tribal lands. Applicants in these circumstances may need to apply to the Corps for authorization under a different General Permit, a Letter of Permission, or Individual Permit as appropriate and

determined by the Corps. EPA would review these other proposed permit actions for case-by-case certification. However, EPA may waive this requirement and allow the use of multiple NWPs on a case-by-case basis if the applicant so appeals, and demonstrates in their PCN or MPCN that authorization under the NWP will result in minimal and/or completely mitigated impacts to the aquatic environment, individually and cumulatively. EPA's discretionary waiver of this requirement may be accomplished informally via electronic mail to the Corps and applicant.

05. Use of Appropriate Fill Material

To the extent practicable, local, native materials should be used as fill material. (*e.g.*, soil, sand, or rock from the site or near the site; clean building materials or clean imported earthen fill). Inappropriate and unauthorized fill materials include, but are not limited to: tires, junked or abandoned vehicles, appliances, or other equipment; garbage; debris; oil drums or other chemically contaminated vessels; artificial turf; non-native vegetation; etc. If an applicant has any doubts or questions about the suitability of a proposed fill material, they should consult with the Corps and/or EPA prior to discharging into waters of the U.S. Such consultation may be via phone, or written letter, fax or electronic mail.

06. Dewatered Conditions

In-channel work will not be performed proximate in time to high flow events or rainy periods; discharges must occur and be completed prior to a minimum 5-day clear weather forecast. To the extent practicable, discharges below the ordinary high water mark or within jurisdictional wetlands should occur when the discharge site is naturally dewatered (*e.g.*, seasonally dry), or artificially dewatered by the permittee, thereby avoiding direct discharge of pollutants into the water column. If the site is artificially dewatered, permittees shall, to the extent practicable, avoid dewatering techniques that require additional temporary or permanent discharges of fill material within jurisdictional waters (*e.g.* coffer dams) in favor of temporary, structural techniques (*e.g.*, sheet pile or "porta-dams").

07. Fills Within 100-Year Floodplains

Projects requiring NWP authorization for discharges of fill material within 100-year floodplains shall comply with Executive Order 11988 (Floodplain Management). Such projects shall include a statement of compliance in the PCN. However, discharges within the FEMA-mapped 100-year floodplain that would result in permanent, above-grade structures are not certified for use under the NWP program on tribal lands.

08. Best Management Practices

Any excess material from construction, demolition wastes, wastewater, or any other pollutant must be appropriately disposed of outside jurisdictional waters. Water used in dust suppression shall not contain contaminants that could violate surface water or aquifer standards. Permittees and their contractors shall take necessary steps to minimize channel and bank erosion within waters of the United States during and after construction. Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect waters of the U.S. from sedimentation and other pollutants. A copy of these permit conditions shall be provided to all contractors and subcontractors, and will be posted visibly at project construction sites.

09. Transportation Projects

Permittees shall implement State transportation agencies' guidelines for construction sites to protect water quality and aquatic habitat. In California, CALTRANS has guidance in the *CALTRANS Storm Water Quality Manuals and Handbooks*[2]; in Nevada, NDOT has guidance in their *NDOT 2006 Water Quality Manuals*[3]; and in Arizona, ADOT has guidance in their *Erosion and Pollution Control Manual.*

10. Utility Line Projects

Permittees shall implement BMPs established by the Office of Pipeline Safety and recommended for permit streamlining of pipeline maintenance and repair projects.[4] Projects include below and above grade utility installation and maintenance and repair.

Specific Nationwide Permits

NWP-01 Aids to Navigation

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-02 Structures in Artificial Canals

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-03 Maintenance

"Existing serviceable structures" which may be maintained under this permit do not include undersized culverts or structures that cause or exacerbate channel incision, bank destabilization, and/or prevent fish passage due to inadequate design or construction standards. Such structures continuously impair the hydrologic, sediment transport, and habitat functions of waters by remaining in place, and their maintenance under this NWP would discourage applicants from replacing inappropriately designed structures that require frequent maintenance and degrade water quality. Certification of this permit is granted <u>only</u> if the existing structure proposed to be maintained demonstrably preserves (via design, flow modeling or other information in the PCN) the natural functions of the affected aquatic resource when the structure is fully operational. Otherwise, an alternative permit should be utilized as appropriate (*e.g.*, NWP 13 Bank Stabilization). Where bank stabilization structures are to be maintained, bioengineered structures shall be utilized to the extent practicable in lieu of "rip-rap" or other hardscape engineered materials. This permit shall not authorize the enlargement of, or increase in, the footprint of a structure within waters of the U.S., unless that enlargement consists of the replacement of existing artificial channel armoring materials (*e.g,* rip-rap, soil cement, etc.) with low-impact bioengineered natural channel design structures (*e.g.*, log revetments, geotextile rolls/mats, root wads, brush mattresses, willow wattling, etc.[5]).

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[2] http://www.dot.ca.gov/hl/construc/stormwater/manuals.htm

[3] http://www.nevadadot.com/reports_pubs/Water_Quality/

[4] http://environment.ops.dot.gov

[5] See, *e.g.*, Allen, H. A., and Leech, J. R. (1997). "Bioengineering for Streambank Erosion Control-Report 1: Guidelines," Technical Report EL-97-8, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

NWP-04 Fish and Wildlife Harvesting, Enhancement and Attraction

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-05 Scientific Measurement Devices

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-06 Survey Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-07 Outfall Structures and Maintenance

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-08 Oil and Gas Structures

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-09 Structures in Fleeting and Anchorage Areas

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-10 Mooring Buoys

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-11 Temporary Recreational Structures

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-12 Utility Line Activities

According to the cumulative impact analysis in the Corps' Draft Environmental Assessment (DEA), this permit is the second most commonly used of the Nationwides, and use of this permit results in a net loss of aquatic resources (estimated at 684 acres/year with zero acres of compensation). Proposed changes to this NWP include the removal of PCN requirements for a broad range of activities. In compliance with EPA General Condition 02. Notification above, applicants will provide a PCN for all activities under this NWP, and will clearly indicate the impacts proposed to be temporary, permanent, or secondary (*e.g.*, conversion of one type of aquatic resource to another). No more than ½ acre or 300 linear feet of permanent loss of waters is authorized under this certification.

NWP-13 Bank Stabilization

The Corps provides no rationale for the proposed 500-foot limitation on this permit (the programmatic standard is otherwise 300 feet). Under this certification, the 300-foot limit is retained. The proposed modification to allow use of NWP-13 in special aquatic sites is counter to the purposes of the permit (bank protection), as it would contribute to losses of riparian fringe wetlands important for maintenance of natural channel geomorphology, flood attenuation, and water filtration services. Under this certification, this permit is not available for projects in special aquatic sites. Traditionally, this NWP, used multiple times at the same site or in combination with other NWPs, has frequently resulted in the armoring of many miles of streambank. However, with adherence to EPA general condition 04. above, this problem should be reduced or eliminated. Bank stabilization must incorporate use of planting and/or seeding of

native vegetation; bioengineered solutions should be employed to the maximum extent practicable. Hard channel armoring is discouraged under this certification, and is more likely to require compensatory mitigation. In their PCN, applicants should pay particular attention to describing avoidance, minimization and/or compensation measures.

NWP-14 Linear Transportation Projects

According to the DEAs, this NWP authorizes activities that result in a net loss of aquatic resources. The Corps' proposed removal of language in the permit regarding compensatory mitigation will exacerbate these losses, especially given the lack of a linear foot limitation and lack of any programmatic estimate of indirect and secondary effects or mitigation for those impacts. In our experience, many permittees use multiple NWP-14 permits for one project, thus impacting substantially more than a ½ acre of waters in sum. Due to the significant secondary adverse effects often caused by culverts (*e.g.*, upstream deposition and bank erosion, downstream bed and bank erosion) lower-impact techniques (*e.g.*, bottomless and embedded culverts) are encouraged. Consistent with other NWPs, this permit is limited under this certification to the lesser of ½ acre or 300 linear feet of impacts. Applicants' PCNs or MPCNs should specifically address sequencing avoidance and minimization of impacts in project design, and address potential indirect effects up and downstream of the proposed discharges.

NWP-15 U.S. Coast Guard Approved Bridges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-16 Return Water from Upland Contained Disposal Areas

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-17 Hydropower Projects

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-18 Minor Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-19 Minor Dredging

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-20 Oil Spill Cleanup

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-21 Surface Coal Mining Activities

We are concerned that the lack of impact limitations under this NWP results in a net loss of aquatic resources (the Corps' cumulative impact analysis in the DEA indicates this permit results in 81 acres of impact per year without compensation). A review of activities authorized by this permit would likely show that many of these impacts are permanent and occur in important and sensitive headwater streams. Consistent with other NWPs, impacts authorized by this permit shall be limited to the greater of ½ acre or 300 linear feet of waters under this certification. Before an applicant may use this permit, EPA must approve a compensatory

mitigation plan meeting all of the criteria set forth in the national *Mitigation Action Plan*[6] including a minimum replacement-to-impact ratio of one-to-one (minimum two-to-one for special aquatic sites). Similar plans which may be required by the Interior Department's Office of Surface Mining under the Surface Mining Control and Reclamation Act may be presented for EPA approval as functionally equivalent.

NWP-22 Removal of Vessels

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-23 Approved Categorical Exclusions

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-24 Indian Tribe or State Administered Section 404 Program

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-25 Structural Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-26 --Reserved--

This NWP is no longer in use. No certification is necessary.

NW-27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities

We are concerned that the lack of reporting, impact limits, and clear language in this permit contribute to its misuse and authorization of more than minimal adverse impacts to the aquatic ecosystem. Corps data indicate this permit accounts for the greatest level of impacts in the entire program, exceeding the next highest permit's impacts by a factor of 2.5, and experience has shown that permittees may use this permit for activities that are not truly restoration projects and/or do not result in a net benefit to aquatic functions. Recreational aquatic features are not authorized under this NWP (*e.g.*, water parks such as kayak courses). This permit may not be used to authorize stormwater control structures for the purpose of reducing downstream erosion, water quality degradation or flooding, and grade control structures may not exceed one linear foot vertical drop unless it is clearly demonstrated that a greater drop is necessary to restore aquatic resource functions. Concrete and grout are not acceptable fill materials under this NWP and certification. Any structures placed within waters will allow the passage of aquatic organisms and preserve existing human navigational needs, unless removal of such existing navigational uses is part of the project purpose.

Consistent with other NWPs, use of this permit shall be limited to the lesser of ½ acre or 300 linear feet of waters under this certification. This requirement may frequently be waived upon petition in the applicant's PCN, but these limits will ensure the added level of scrutiny required to eliminate misuse of this permit and greatly reduce the impact of the program as a whole.

NWP-28 Modification of Existing Marinas

Subject to the General Conditions above, this NWP is hereby programmatically certified.

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[6] http://www.mitigationactionplan.gov/

NWP-29 Single-family Housing

Much of NWP 39's residential components are proposed to be moved to NWP 29. EPA does not believe the activities currently authorized under NWP-29 are similar enough to multi-unit commercial/residential development to warrant this combination. This move would combine relatively modest activities, such as expanding a single-family home or constructing attendant features (*e.g.*, a garage, driveway, storage shed, septic field) with much larger residential developments that are generally new, include a change in land-use, and are much larger in scope and purpose. If these permits are combined as proposed, then the impact threshold for single-family homes shall remain ¼ acre under this certification (not increase to ½ acre, as proposed).

In addition to avoidance and minimization requirements explained above under EPA General Condition 03., paragraph "f" from NWP-39 shall also attach under this certification, explaining that compensatory mitigation will "normally" be required for unavoidable losses. Existing text regarding maintenance of vegetated buffers shall remain. Finally, "recreational facilities such as playgrounds, playing fields, and golf courses" are not authorized under this certification. These projects are separate and distinct from housing, are not required to be included in a housing project for it to be practicable, and their construction within waters is normally avoidable. This NWP shall not authorize the channelization or relocation of any stream or wetland, regardless of size or rate of flow.

NWP-30 Moist Soil Management for Wildlife

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-31 Maintenance of Existing Flood Control Facilities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-32 Completed Enforcement Actions

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-33 Temporary Construction, Access and Dewatering

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-34 Cranberry Production Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-35 Maintenance Dredging of Existing Basins

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-36 Boat Ramps

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-37 Emergency Watershed Protection and Rehabilitation

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-38 Cleanup of Hazardous and Toxic Waste

Subject to the General Conditions above, this NWP is hereby programmatically certified.

NWP-39 Residential, Commercial, and Institutional Developments

As with NWP 29 above, existing requirements for "avoidance and minimization," "single and complete project," "maintenance of buffers," and "compensatory mitigation," which the Corps now proposes to remove, shall be retained for purposes of this certification. This NWP shall not authorize the channelization or relocation of any stream or wetland, regardless of size or rate of flow.

NWP-40 Agricultural Activities

We are concerned that the text of NWP-40 and proposed modifications will cause more than minimal impacts to aquatic resources. Consistent with the other NWPs, ephemeral and intermittent waters shall not be subject to waiver of the 300 foot limitation under this certification. Activities authorized by this NWP, such as construction of drainage tiles, ditches, and relocation of existing serviceable structures, may be used to convert wetlands to uplands in preparation for future development. These activities could have a considerable indirect impact on aquatic resources that would go undetected under the proposed NWP terms. Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters to eliminate federal regulatory jurisdiction.

NWP-41 Reshaping Existing Drainage Ditches

We are concerned that the text of this NWP and proposed modifications will result in more than minimal impacts to aquatic resources. The cumulative impact analysis provided in the DEA suggests that this permit results in a net loss of waters. Consistent with other NWPs, impacts under this certification are limited to the lesser of ½ acre or 300 feet of waters. As with NWP-C below, allowing sidecasting of dredged material into waters of the United States will cause and contribute to degradation of water quality as sediment is re-suspended in the water column. Sediment problems are among the most common water quality problems in the nation. This NWP assumes that returning a drainage ditch to its original configuration will improve water quality, but lacks guidance or standards that describe methods for demonstrating an improvement in water quality. All "sidecast" materials from excavation must be stored and/or disposed of within non-jurisdictional uplands under this certification. A statement must be included in the notification as to how the applicant's activities will improve water quality.

As with NWP-40 above, we are concerned that this NWP will have significant indirect adverse affects on waters of the U.S. by draining wetlands upstream in an attempt to convert large wetland areas to developable uplands through relatively small regulated discharges. These activities could have a considerable indirect impact on aquatic resources that would go undetected under the NWP terms. Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters to eliminate federal regulatory jurisdiction.

NWP-42 Recreational Facilities

As a general matter, recreational facilities such as those listed by the Corps in discussion of this NWP (FR Notice p. 56272-3) are not water-dependent (*e.g.*, golf courses, playing fields, basketball courts), and impacts to waters of the U.S. should be avoidable. This is especially true in the most common cases (according to the Corps) where "the proposed project area is predominantly uplands." However, given the notification requirements herein, and subject to a 300 foot or ½ acre limit, this NWP is hereby programmatically certified. Under this certification, waiver of the impact limits for ephemeral streams is not permitted.

NWP-43 Stormwater Management Facilities

NWP authorization of constructing stormwater facilities within waters of the U.S. discourages applicants from using practicable construction options that locate stormwater retention and detention facilities "off line" from streams. For example, retention facilities are often built as sediment (or debris) basins within a stream. This practice includes constructing a dam in the stream, excavating out a basin, and regular sediment removal to maintain the structure. These facilities cause considerable and unnecessary damages to stream functions as retention facilities can be located "off line" by constructing a high flow diversion channel above the ordinary high water mark. If applicants can continue to use the traditional, more damaging practices that are sanctioned by this NWP, there is no incentive for these management practices to improve. Although maintenance of existing facilities may be necessary, we do not believe NWP-43 for new facilities complies with the CWA Section 404(b)(1) Guidelines.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-44 Mining Activities

We are concerned that activities authorized by this NWP will have a more than minimal adverse effect on aquatic resources. As proposed, this NWP could authorize in-stream mining operations impacting more than a mile of a 4-foot wide stream, exacerbated by indirect effects up and downstream of the discharges such as headcutting and downcutting. This permit is certified only for impacts up to 300 linear feet or ½ acre, consistent with other NWPs. When used for in-stream aggregate mining activities, compensatory mitigation is likely to be required due to extensive indirect impacts and temporal losses typical of this type of impact.

Proposed New Permits

NWP-A Emergency Repair Activities

This permit as proposed places no limits on project scale or scope of impacts, discharge or excavation volumes, or length of banks that may be "reconstructed." The ambiguous language of the proposed permit may be read to authorize repeated excavation activities within waters and permanent stabilization of stream banks, both of which will frequently entail more

than minimal adverse impacts to the aquatic resource. The proposed permit may be used following "recent storms, floods, or other discrete events." Clearly, the lack of a definition of "other discrete events" invites wide and varying interpretation. Flashy events with significant flows are routine in much of the arid southwest. Under this permit, regular invasive hydrological modification of ephemeral or intermittent streams could be authorized after each of these normal storm events. We believe this NWP is inappropriate and should not be issued; in our experience, "Emergency Repairs" are best handled via Regional General Permits through local Corps Districts.

Under this certification, impacts shall be limited to 300 linear feet or ½ acre, consistent with other NWPs, and the permittee's MPCN must contain a description of the CWA permitting history of the site. We understand that certain emergencies (*e.g.* rapidly eroding banks during a storm event) may require the immediate placement of hard materials such as riprap into waters of the U.S. to protect public safety or property. However, if these materials are placed on an immediate emergency basis in lieu of bioengineered structures that maintain natural channel geomorphology (see NWP 13 and footnote 5 for examples), applicants are required to submit a restoration plan for the project site, to ensure that the aquatic functions and values of the site are ultimately restored.[7] This permit does not authorize the permanent discharge, retention or maintenance of riprap or other hardscape bank armoring, unless the applicant clearly demonstrates that these materials are appropriate and protect biological and hydrological functions. The MPCN must include an analysis explaining the reasons for site failure (i.e., the "emergency" situation). If restoration is impracticable, the MPCN must include documentation that the proposed repair is an appropriate long-term solution for the project site.

NWP-B Discharges in Ditches and Canals

From the discussion in the FR Notice (p. 56274), the purpose of this NWP is to "allow a landowner to return his or her land to its prior condition" if the ditches in question are "(1) constructed in uplands; (2) receive water from another water of the United States; and (3) divert water to another water of the United States." Thus, restoration to the "prior condition" is to convert a water of the U.S. to non-jurisdictional uplands (per criterion one), and eliminate hydrological connectivity and/or isolate down- and up-stream waters (per criteria two and three). As with NWPs 40 and 41 above, we believe it prudent to apply the same conditions that such effects are prohibited, but as they appear to be the purpose of the permit, it is difficult to place appropriate conditions on this permit outside the context of a specific project proposal.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-C Pipeline Safety Program Designated Time-Sensitive Inspections and Repairs

According to the DEA, Corps' surveys suggest that this permit would result in the loss of ~320 acres of waters of the United States over the next 5 years. There is no anticipated compensation for these losses. It is unclear how this NWP advances the programmatic "no net loss/net gain" goals or results in minimal impacts, individually or cumulatively. Criteria "b" allows material from trench excavation to be temporarily sidecast, threatening water quality for

[7] Additional permit authorization (*e.g.*, NWP 27) may be required.

at least three months. The Corps is not requiring PCNs for this permit, thereby preventing the Corps from determining how often it is used, what its impacts are, and when or if sidecast material has been removed. It is not clear that Corps will have access to the Pipeline Repair and Environmental Guidance System (PREGS) that records post construction reports. This NWP is also unique in that it proposes a prohibition on issuance of regional conditions, but there is no explanation or data supporting this dramatic policy change.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-D Commercial Shellfish Aquaculture Activities

As proposed, this permit would deviate from existing NWPs 4, 19, and 36 which prohibit activities in Submerged Aquatic Vegetation (SAV), with no explanation as to why this deviation would not result in minimal adverse impacts to SAV. The nature and types of discharges covered by this permit are not defined, inviting completely unrestricted use of the permit. Similarly, limits such as "existing project area" can be interpreted many ways and it is not clear from the proposed NWP text how the Corps intends the regulated public to understand the phrase.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-E Coal Remining Activities

Although efforts to restore lands disturbed by mining are encouraged, limiting impacts authorized under NWP 21 is preferable to creating a new NWP for remining and restoring these areas. Indeed, the perceived necessity of NWP-E suggests that NPW 21 may have more than minimal adverse effects on aquatic resources as proposed. If this permit is issued, its use is limited under this certification to ½ acre or 300 feet of waters, and limited to application at abandoned mine sites. Applicants must provide information in the PCN illustrating that activities authorized under NWP-E will result in a net increase in aquatic resource functions.

NWP-F Underground Coal Mining Activities

The lack of impact limits under this proposed NWP is likely to result in a net loss of aquatic resources. The cumulative impact estimate in the DEA indicates that NWP-F would result in 97 acres of impact per year and 11 acres of compensatory mitigation per year. A review of activities authorized by this permit would likely show that many of these impacts are permanent and occur in important and sensitive headwater streams. A 300 linear foot and ½ acre impact limit is required under this certification, consistent with other NWPs. A compensatory mitigation plan meeting all of the criteria set forth in the national *Mitigation Action Plan*, including a minimum replacement-to-impact ratio of one-to-one, is also required under this certification.

Summary Table – EPA §401 Certification of NWPs for projects on tribal lands				
NWP	**Certification Status**	**Notification required?***	**Impact Limits**	**Notes**
1	Certified, general conditions only	YES – MPCN	None	
2	Certified, general conditions only	YES – MPCN	None	
3	**Certified, permit conditions**	YES – (M)PCN	Generally no increase in fill footprint.	No maintenance of undersized structures; bioengineering used whenever practicable.
4	Certified, general conditions only	YES – MPCN	None	
5	Certified, general conditions only	YES – MPCN	25 yrd^3	
6	Certified, general conditions only	YES – MPCN	25 yrd^3	
7	Certified, general conditions only	YES – PCN	None	
8	Certified, general conditions only	YES – PCN	None	
9	Certified, general conditions only	YES – MPCN	None	
10	Certified, general conditions only	YES – MPCN	None	
11	Certified, general conditions only	YES – MPCN	None	
12	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Identify temporary impacts.
13	**Certified, permit conditions**	YES – (M)PCN	300' and <1 yrd^3 / running ft.	No use in special aquatic sites; bioengineered stabilization whenever practicable.
14	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Address indirect impacts.
15	Certified, general conditions only	YES – MPCN	None	
16	Certified, general conditions only	YES – MPCN	None	
17	Certified, general conditions only	YES – PCN	None	
18	Certified, general conditions only	YES – (M)PCN	1/10 acre or 25 yrd^3	
19	Certified, general conditions only	YES – MPCN	25 yrd^3	
20	Certified, general conditions only	YES – MPCN	None	
21	**Certified, permit conditions**	YES – PCN	½ acre or 300'	EPA approves mitigation plan before work.
22	Certified, general conditions only	YES – (M)PCN	None	
23	Certified, general conditions only	YES – (M)PCN	None	
24	Certified, general conditions only	YES – MPCN	None	
25	Certified, general conditions only	YES – MPCN	None	
26	N/A	N/A	N/A	N/A
27	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Fill material, project purpose limitations.
28	Certified, general conditions only	YES – MPCN	Authorized marina	
29	**Certified, permit conditions**	YES – PCN	¼ acre or 300'	No impact limit waivers, no recreational.
30	Certified, general conditions only	YES – MPCN	None	
31	Certified, general conditions only	YES – PCN	Corps-approved	
32	Certified, general conditions only	YES – MPCN	5 acres non-tidal, or 1 acre tidal wetlands	
33	Certified, general conditions only	YES – PCN	None	
34	Certified, general conditions only	YES – PCN	10 acres	No net loss of acreage permitted.
35	Certified, general conditions only	YES – MPCN	Lesser of previously authorized or controlling depths	
36	Certified, general conditions only	YES – (M)PCN	50 yrd^3; 20'-wide ramp	
37	Certified, general conditions only	YES – PCN	None	
38	Certified, general conditions only	YES – PCN	None	
39	**Certified, permit conditions**	YES - PCN	½ acre or 300'	
40	**Certified, permit conditions**	YES - PCN	½ acre or 300'	
41	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Water quality assessments in notification; sidecast material to uplands only.
42	**Certified, permit conditions**	YES – PCN	½ acre or 300'	No impact limit waivers.
43	**DENIED**	YES – (M)PCN	N/A	Must apply to EPA for individual cert.
44	**Certified, permit conditions**	YES – PCN	½ acre or 300'	
A	**Certified, permit conditions**	YES - PCN	½ acre or 300'	Site permit history, restoration plan required
B	**DENIED**	YES – (M)PCN	N/A	Must apply to EPA for individual cert.
C	**DENIED**	YES - MPCN	N/A	Must apply to EPA for individual cert.
D	**DENIED**	YES – (M)PCN	N/A	Must apply to EPA for individual cert.
E	**Certified, permit conditions**	YES – PCN	½ acre or 300'	
F	**Certified, permit conditions**	YES – PCN	½ acre or 300'	Compensatory mitigation plan required.

* "PCN" = Corps-required notification; "MPCN" = EPA-required notification, "(M)PCN" = either, depending on impact limits.