



US Army Corps  
of Engineers®  
San Francisco District

Regulatory Division  
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SAN FRANCISCO DISTRICT

# PUBLIC NOTICE

## FINAL 2021 NATIONWIDE PERMIT REGIONAL CONDITIONS FOR THE STATE OF CALIFORNIA

PUBLIC NOTICE DATE: March 8, 2021

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On January 13, 2021, the U.S. Army Corps of Engineers (Corps) published the notice in the *Federal Register* announcing the reissuance of 12 existing nationwide permits (NWP), general conditions, and definitions with some modifications. The Corps also issued four new NWPs, one new general condition, and five new definitions. These 16 NWPs will go into effect on **March 15, 2021**, and will expire on March 14, 2026. The 2021 NWPs are available at: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>. The remaining 40 NWPs and one additional new NWP that were included in the proposed rule published on September 15, 2020, are not being issued at this time. The Corps will continue to use the 2017 NWPs for these remaining 40 NWPs. It is anticipated these remaining NWPs will be reissued prior to their March 18, 2022, expiration date.

### Regional Conditions

The South Pacific Division has approved the 2021 NWP regional conditions for the State of California (enclosure 1). These regional conditions for the 2021 NWPs were developed by the Sacramento, San Francisco, and Los Angeles Districts (Districts) in order to ensure that, when combined with the terms and conditions of the 2021 NWPs, the final regional conditions will ensure no more than minimal individual and cumulative adverse environmental effects will result from the 2021 NWP program. The existing 2017 NWP regional conditions will remain in effect for the 40 NWPs that are not being reissued.

The following 2021 NWP regional conditions for the State of California apply to the San Francisco District:

#### A. Regional Conditions for the State of California:

1. The permittee shall submit a pre-construction notification (PCN) for all 2021 NWPs, in accordance with General Condition 32, in the following circumstances:

- a. Activities involving new bank stabilization that do not incorporate bioengineering techniques. Bioengineering techniques include using live plants alone or in combination with dead or inorganic materials, including rock, sand, or gravel;
- b. Activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands;
- c. Activities involving the permanent channelization, realignment, or relocation of streams; and,

d. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. The PCN shall include an EFH assessment and an analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

6. In the San Francisco District, the use of NWP 29 and 39 is prohibited within the San Francisco Bay diked baylands (see figure 1).

7. In the San Francisco District, the permittee shall submit a pre-construction notification (PCN), in accordance with General Condition 32, for all 2021 NWP activities that will take place in waters or wetlands of the U.S. that are within the San Francisco Bay diked baylands (see figure 1).

B. 401 Water Quality Certification (401 WQC) Regional Conditions for California:

1. The following conditions from the attached December 11, 2020, 401 WQC granted by the U.S. Environmental Protection Agency (EPA), shall apply to NWP 43 on tribal lands within U.S. EPA Region 93 boundaries in the State of California:

a. All applicants must provide notice to EPA Region 9 prior to commencing construction to provide EPA Region 9 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the applicant should also provide the PCN to Region 9. Within 30 days, EPA Region 9 will provide written verification to the applicant that the proposed project will not violate the water quality certification of the NWP.

b. Projects or activities are not authorized under the NWP if the project will involve point source discharge into an active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody and the discharge may result in further exceedance of a specific parameter (e.g. total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed. The current lists of 303(d) and TMDL listed waterbodies are available on EPA Region 9's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-pacificsouthwest-region-9>

### Section 401 Water Quality Certifications

Following publication of the September 15, 2020, proposed rule, the Districts requested Section 401 certifying authorities, including the State of California, Native American tribes, and the Environmental Protection Agency (EPA), to complete their water quality certification (WQC) processes for the NWPs included in the proposed rule. The following responses were received from the certifying authorities in the San Francisco District:

- California State Water Resources Control Board (SWRCB): On December 9, 2020, the SWRCB granted certification with conditions for three of the NWPs (12, 57, and 58) and denied certification for thirteen (21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, and 56). The denials meet the requirements of 40 C.F.R. § 121.7(e)(2); thus, individual certification, or waiver thereof, is required for these 13 NWPs.

For multiple reasons, the Corps has declined the conditional WQC for NWP 12, 57, and 58; thus, individual certification, or waiver thereof, is also required for these three NWPs.

- U.S. EPA: On December 12, 2020, U.S. EPA Region 9 responded to the certification request, granting WQC for one NWP (NWP 43), denying certification for nine NWPs (12, 29, 39, 40, 42, 44, 51, 57, and 58), and expressly waiving certification for four NWPs (21, 48, 50, and 52). Certification for NWP 43 would be subject to two conditions. The conditions meet the requirements of 40 C.F.R. § 121.7(d)(2) and the denials meet the requirements of 40 C.F.R. § 121.7(e)(2). There is no action to be taken on the waived NWPs. Thus, NWPs 21, 48, 50, and 52 are waived, NWP 43 is granted with condition, and NWPs 12, 29, 39, 40, 42, 44, 51, 57, and 58 are denied and will require individual certification, or waiver thereof.
- Hoopa Valley Indian Reservation: On December 14, 2020, the Hoopa Valley Indian Reservation denied certification for all NWPs. The denial meets the requirements of 40 C.F.R. § 121.7(e)(2). Thus, individual certification, or waiver thereof, is required for the 16 NWPs.
- Dry Creek Rancheria Band of Pomo Indians: On December 15, 2020, the Dry Creek Rancheria Band of Pomo Indians denied certification for twelve of NWPs (12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 57, and 58) and did not respond to the certification request for two of the NWPs (48 and 52). The denial meets the requirements of 40 C.F.R. § 121.7(e)(2). Thus, individual certification, or waiver thereof, is required for NWPs 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 57, and 58, and is waived for NWPs 48 and 52.

No responses were received from the Quartz Valley Indian Community or the Karuk Tribe within the reasonable period of time, so the 401 WQCs are waived per 40 C.F.R. § 121.9(a)(2)(i). There is no requirement to obtain project-specific WQC within these certifying authorities' areas of responsibility.

#### Coastal Zone Management Act Consistency Determination

Following publication of the September 15, 2020, proposed rule, the Districts requested that the California Coastal Commission (CCC) and the San Francisco Bay Conservation and Development Commission (BCDC) concur with our consistency determinations pursuant to Section 307(c)(1) of the Coastal Zone Management Act (CZMA). The following responses were received from the CCC and BCDC:

- The CCC responded by letter of November 12, 2020, stating their objection to the Corps' consistency determination and finding that the proposed reissuance of the NWPs is not consistent with Section 30233 of the California Coastal Act (Cal. Pub. Res. Code 30233).
- The BCDC responded by letter of December 18, 2020, providing consistency concurrence subject to the condition that the Corps adopt a regional condition stating that the NWPs will not become effective until BCDC, or a local governmental entity administering a BCDC-approved local protection plan in the Suisun Marsh, has issued a permit authorizing the activity. The Corps declined to accept BCDC's consistency concurrence since it does not advance the goal of the NWP program to streamline the permit process for proposals that have no more than minimal impacts to the environment, 33 U.S.C. 1344(e).

Therefore, applicants will be required to seek individual consistency concurrence from the CCC or BCDC for NWPs that authorize activities within or affecting the coastal zone.

## Pre-Construction Notification

In accordance with NWP General Condition 32, the NWP Pre-Construction Notification (PCN) form (ENG Form 6082) should be used for NWP PCNs (enclosure 2). A letter containing the required information may also be used.