



US Army Corps
of Engineers
Seattle District

Special Public Notice

Regulatory Branch
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**FINAL REGIONAL CONDITIONS,
401 WATER QUALITY CERTIFICATION CONDITIONS,
COASTAL ZONE MANAGEMENT CONSISTENCY RESPONSES,
FOR
NATIONWIDE PERMITS
FOR THE SEATTLE DISTRICT CORPS OF ENGINEERS
FOR THE STATE OF WASHINGTON**

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Introduction: This is a joint special public notice (SPN) issued by the U.S. Army Corps of Engineers (Corps) Seattle District, the U.S. Environmental Protection Agency (EPA), the Puyallup Tribal Nation (Puyallup Tribe), the Chehalis Confederated Tribe (Chehalis Tribe), and the Washington State Department of Ecology (Ecology) to announce final regional conditions, Section 401 Water Quality Certification (401 Certification) decisions, and Coastal Zone Management (CZM) Consistency Responses for the Corps Nationwide Permits. This public notice also explains how the Nationwide Permit (NWP) program will operate within the State of Washington (State). Regional conditions limit the use of certain nationwide permits such that they individually and cumulatively result in minimal adverse impacts.

The permittee considering use of a NWP must compare the proposed project's features with the national specific and general conditions of the particular NWP, the regional specific and general conditions, and whether or not the 401 Certification and/or CZM Consistency Response have been denied. If the project is within the national conditions, regional conditions, 401 Certification limits, and CZM concurrence for waters under State jurisdiction, the permittee may proceed with the project subject to any notification requirements.

Abbreviations Used in this Special Public Notice:

- 401 Certification - Section 401 Water Quality Certification
- BE - Biological Evaluation
- Chehalis Tribe - Chehalis Confederated Tribe
- Corps - U.S. Army Corps of Engineers
- CBSA - Commencement Bay Study Area
- CZM - Coastal Zone Management
- Ecology - Washington State Department of Ecology
- EPA - U.S. Environmental Protection Agency
- ESA - Endangered Species Act
- HPA - Hydraulic Project Approval
- JARPA - Joint Aquatic Resource Permit Application
- NMFS - National Marine Fisheries Service (now NOAA Fisheries)
- NOAA Fisheries - National Oceanic and Atmospheric Administration Fisheries
- NPDES - National Pollution Discharge Elimination System
- NRCS - Natural Resources Conservation Service
- NWP - Nationwide Permit
- PCN - Pre-Construction Notification
- Puyallup Tribe - Puyallup Tribal Nation
- SPN - Special Public Notice
- SPIF - Specific Project Information Form (ESA)
- State - State of Washington
- TMDL - Total Maximum Daily Load
- USFWS - U.S. Fish and Wildlife Service
- WDFW - Washington State Department of Fish and Wildlife
- WDNR - Washington Department of Natural Resources
- WDOT - Washington State Department of Transportation

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Background: The Clean Water Act states, "No general permit . . . shall be issued for a period of more than five years . . ." On January 15, 2002, at the national level, the Corps published in the *Federal Register*, Part II, the Notice of Issuance of Nationwide Permits. These NWP's became effective on March 18, 2002, and will expire on March 18, 2007. This final issuance was preceded by a proposal published in the *Federal Register* of August 9, 2001, to reissue all of the existing NWP's and General Conditions with some modifications, and add a new General condition 27.

On August 23, 2001, and January 25, 2002, Seattle District published special public notices to obtain public comments on proposed regional specific and regional general conditions applicable in the State of Washington. Seattle District also met many times as a group with representatives of several Federal, State, and tribal representatives to discuss proposed conditions. The purpose of the public review process was to create conditions that would be reasonable and enforceable, make sense to the regulated public, provide the necessary level of resource protection, and be sensitive to the workloads of all parties involved.

With this SPN, the Seattle District, EPA, Puyallup Tribe, Chehalis Tribe, and Ecology set forth the parameters and conditions through which the agencies will implement the NWP's within the State. This SPN will be the basis through which the NWP program will operate until revised, rescinded, or revoked. Any such actions will be announced through future public notices.

401 Certification: Applicants wanting to perform work involving discharges of dredged or fill material into waters of the U.S. must apply for a Section 404 permit from the Corps. Section 401 of the Clean Water Act requires applicants for those permits to also receive 401 Certification from the appropriate certifying agency. Issuance of a certification means that the certifying agency anticipates that the applicant's project will comply with applicable Federal or State effluent limitations and water quality standards, and other aquatic resource protection requirements under that certifying agency's authority. The 401 Certification can cover both the construction and operation of the proposed project. Conditions of the 401 Certification become conditions of the Corps 404 permit. After the Corps has issued a NWP for the proposed work, the applicant may not do the work until the 401 Certification is approved, conditioned, or waived by the certifying agency.

The four certifying agencies are: Ecology (for the State), EPA, and the Puyallup and Chehalis Tribes. Each of the certifying agencies has reviewed the NWP's and determined their decisions for the time period NWP's are in effect (5 years). If approved, no further 401 Certification review by the agencies is required. If partially denied without prejudice, an individual certification or Letter of Verification from the certifying agency is required when the project does not meet the restrictions. If denied without prejudice, an individual certification is required for all activities under that NWP.

Definitions of 401 Water Quality Certification and Coastal Zone

Management Consistency Response Decisions: The 401 Certification and the CZM Consistency Response statements in this public notice take three forms:

1. "**Approved**" (or "**Concur**") means a project is authorized under the NWP and must meet the terms and conditions of the nationwide permit. For such permits, the 401 Certification and/or the CZM Consistency Response have been approved for all actions authorized by that NWP. The applicant does not need to contact the certifying agency.
2. "**Denied without prejudice**" means that the 401 Certification and/or the CZM Consistency Response have been denied for that NWP and all activities potentially authorized under that particular NWP. Applicants must submit an application (JARPA) to the certifying agency to obtain an individual 401 Certification and/or CZM Consistency Response, or waiver, before work can be done under the NWP. Ecology addresses are shown on page 18. Contact the Corps for EPA and Tribal addresses. For example, a permittee proposing a hydropower project (see NWP 17) would need an individual 401 Certification or waiver and, if located within a coastal zone county, an individual CZM Consistency Response or waiver (both from Ecology) before this NWP could be used. These would be required since the EPA, Puyallup Tribe, Chehalis Tribe, and the State have denied 401 Certification and CZM Consistency Response for NWP 17 - Hydropower Projects.
3. "**Partially denied without prejudice**" means that the 401 Certification, or the CZM Consistency Response, or both have been denied for some of the activities that could be authorized under a particular NWP. A discussion of these limitations is found after each NWP in their 401 Certification and/or CZM Consistency Response sections. Applicants must submit an application (JARPA) to the certifying agency to obtain an individual 401 Certification and/or CZM Consistency determination Letter of Verification, or waiver, before work can be done under the NWP *if* the proposed activity might exceed the limitations of the 401 Certification and/or the CZM Consistency Response approval. For example, in NWP 12, a permittee proposing a utility line trench would need an individual 401 Certification Letter of Verification, or waiver, or CZM Consistency Response, or waiver from Ecology if:
 - a. The proposed work might cause a violation of State water quality standards for sediment or other parameter. Projects which already have received a National Pollution Discharge Elimination System Permit, or were constructed and maintained in accordance with Ecology's Stormwater Manual or Ecology-approved equivalent would be presumed to comply with State standards.
 - b. The proposed work might contribute to the continued exceedance of the water quality standard for a listed parameter (e.g. dissolved oxygen, temperature, nitrates) in a waterbody the State has listed as impaired. Information concerning whether a waterbody is State-listed for certain parameters is provided in 401 Certification information stated after NWPs where this information is relevant.

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c. The applicant has not obtained a Hydraulic Project Approval for any work to be performed in streams, tidal waters, lakes and other open water.

Neither "denied without prejudice" nor "partially denied without prejudice" mean the proposed project will not be permitted. They mean the EPA, Puyallup Tribe, Chehalis Tribe, or the State have decided such projects require individual review and approval. Additional conditions and/or mitigation requirements may be part of the individual 401 Certification.

A **waiver** means the EPA, Puyallup Tribe, Chehalis Tribe, or Ecology did not make its 401 Certification Decision and/or CZM Consistency Decision within the allowable time period of 180 days from the receipt of the Corps' authorization letter. In cases where Ecology has determined to issue an individual 401 Certification, the 180-day period begins on the date Ecology issues its 401 Certification public notice.

401 Certification Decisions: Because the **State** 401 Certification jurisdiction consists of all public and private lands in the State except those under EPA, Puyallup Tribe, or Chehalis Tribe jurisdiction (see below), the certifying agency relevant to most applicants is Ecology. Ecology has reviewed each of the NWP's to determine whether a project that can be authorized under a specific NWP by the Seattle District will meet applicable State regulations. The State's decisions are as follows:

- Approved NWP's 4, 5, 6, 15, 19, 20, 22, 30 and 31; and
- Partially denied without prejudice NWP's 3, 7, 12, 13, 14, 18, 23, 25, 27, 29, 32, 33, 34, 36, 38, 39, 40, and 42; and
- Denied without prejudice NWP's 16, 17, 21, 37, 41, and 43.

For projects covered under NWP's that require individual certification, Ecology has up to 6 months after receipt of necessary project information and issuance of an Ecology public notice to make its individual certification decision. See the map on page 16 for points of contact.

The **EPA** 401 Certification jurisdiction consists of Native American Indian Tribal land (excluding that of the Puyallup Nation and Chehalis Confederated Tribe) and Federal land with exclusive jurisdiction (North Cascades, Olympic, and Rainier National Parks) within the State of Washington. EPA has reviewed each of the NWP's to determine whether a project that can be authorized under a specific NWP by the Corps will meet the applicable EPA regulations. Their responses as modified by the Northwest Division Engineer are as follows:

- Partially denied without prejudice NWP's: None

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- Denied without prejudice NWP's 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, 27, 29, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, and 43.

To obtain a 401 Certification from EPA, contact Richard Clark, US EPA, Region 10, 1200 Sixth Avenue ECO-083, Seattle, Washington 98101-1128, telephone (206) 553-6522.

The **Puyallup Tribe** 401 Certification jurisdiction consists of the tribal lands of the Puyallup Tribe. The Puyallup Tribe has denied without prejudice all 401 Certifications for all Section 404 NWP's. To obtain a 401 Certification, contact the Director of Natural Resources, Puyallup Tribe of Indians, 2002 East 28th Street, Tacoma, Washington 98404, telephone (253) 573-7850.

The **Chehalis Tribe** 401 Certification jurisdiction consists of the tribal lands of the Chehalis Tribe. The Chehalis Tribe has denied without prejudice all 401 Certifications for all Section 404 NWP's. To obtain a 401 Certification, contact the Director, Department of Natural Resources, Confederated Tribes of the Chehalis Reservation, Post Office Box 536, Oakville, Washington 98568, telephone (360) 273-5911.

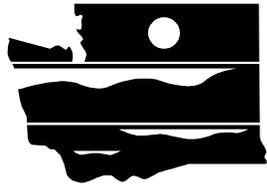
CZM Consistency Response: Washington's 15 coastal counties are as follows:

Clallam	Kitsap	Skagit
Grays Harbor	Mason	Snohomish
Island	Pacific	Thurston
Jefferson	Pierce	Wahkiakum
King	San Juan	Whatcom

The CZM Consistency Response is the State's response to the Corps' determination that non-Federal projects authorized under the NWP program would comply with the State's Coastal Zone Management (CZM) Program. The requirements most commonly applicable to activities authorized under NWP's include:

- State Environmental Policy Act, Chapter 43.21C RCW
- Federal Water Pollution Control Act, 33 U.S.C. Section 1251 et seq.
- State Water Quality Standards, Chapter 90.48 RCW
- State Shoreline Management Act, Chapter 90.58 RCW

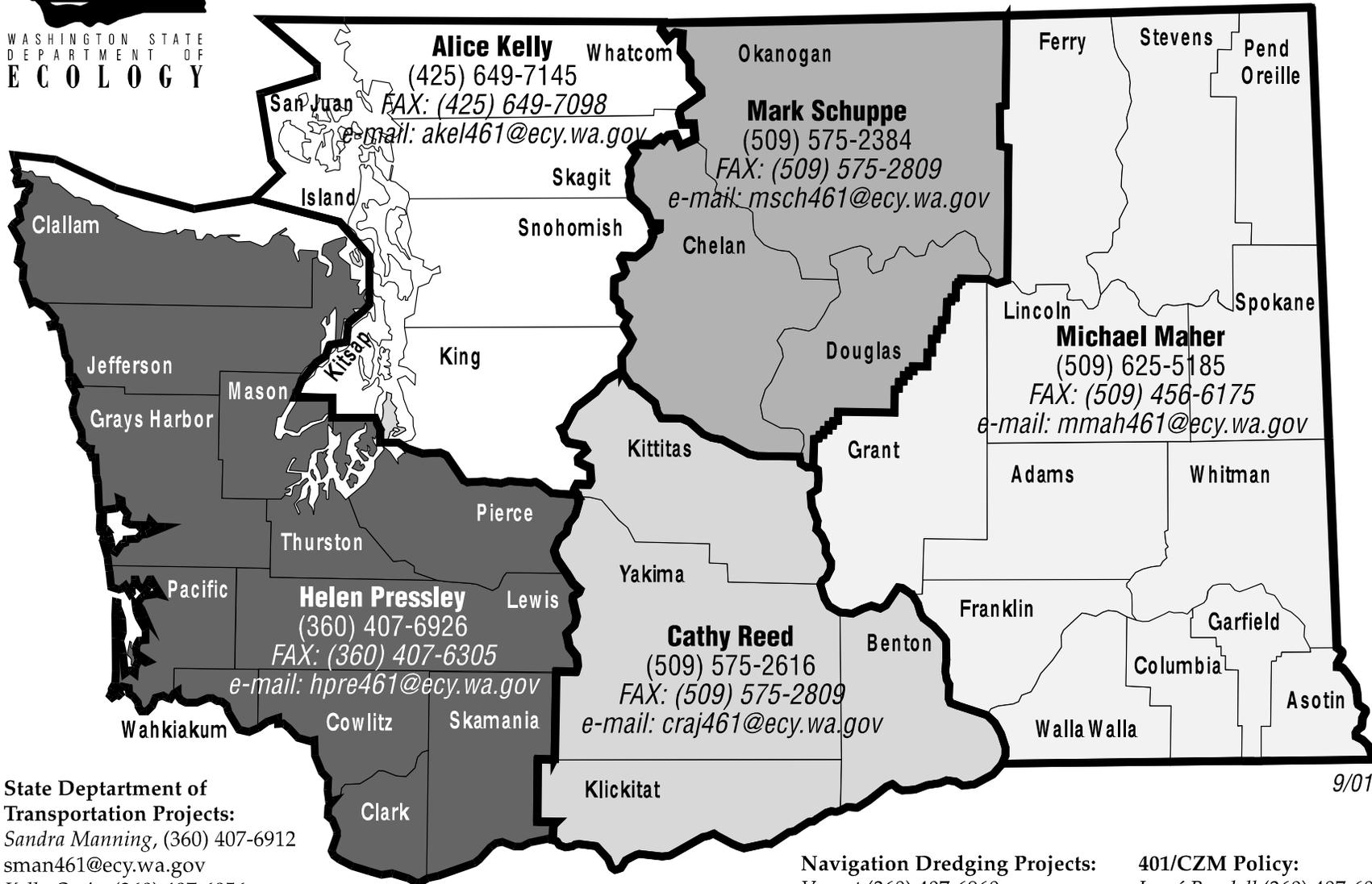
The State CZM Program also requires compliance with the Federal Clean Air Act (42 U.S.C. Section 7401 et seq.), the Washington Clean Air Act (Chapter 70.94 RCW), the state Energy Facility Site Evaluation Council (Chapter 80.50 RCW), the Ocean Resource Management Act (Chapter 43.143 RCW), and Transport of Petroleum Products – Financial Responsibility Act, (Chapter 88.40 RCW).



WASHINGTON STATE
DEPARTMENT OF
E C O L O G Y

Department of Ecology Federal Permits Unit

Water Quality Certification, Nationwide Permits, Coastal Zone Consistency Determination



9/01

State Department of
Transportation Projects:
Sandra Manning, (360) 407-6912
sman461@ecy.wa.gov
Kelly Craig, (360) 407-6056
kcra461@ecy.wa.gov
FAX (360) 407-6904

Navigation Dredging Projects:
Vacant (360) 407-6960;
FAX (360) 407-6904

401/CZM Policy:
Loreé Randall (360) 407-6068
lora461@ecy.wa.gov

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Ecology reviews proposed projects for consistency with the above laws and generally includes its CZM Consistency Response with its 401 Certification. The CZM Consistency Response must be made within 180 days from Ecology's receipt of the Corps authorization letter, or it is considered waived and the permittee may proceed if the NWP and 401 Certification requirements are met.

Ecology has reviewed the Corps' determination that the NWP Program is consistent with the State's CZM Program and made the following determinations:

- Concurs with the Corps' determination for NWPs 1, 2, 4, 5, 9, 10, 11, 15, 19, 20, 22, 30, and 31.
- Partially denied without prejudice the Corps' determination for NWPs 3, 6, 7, 12, 13, 14, 23, 25, 27, 28, 29, 32, 33, 34, 36, 38, 39, 40, and 42; and
- Denied without prejudice the Corps' determination for NWPs 8, 16, 17, 18, 21, 35, 37, 41, and 43.

Shoreline Management Act: Any work or activity authorized by NWPs and undertaken within shorelines of the State is subject to review under the Shoreline Management Act, 90.58 RCW. Such work or activity must be conducted in accordance with the requirements of the shoreline master program of the applicable local government.

Hydraulic Project Approval: The Washington State Department of Fish and Wildlife (WDFW) requires a Hydraulic Project Approval (HPA) (under 75.20 RCW) for work in waters of the State. To ensure compliance with HPA requirements, persons planning to conduct work under a NWP should contact WDFW at:

Washington Department of Fish and Wildlife
600 Capitol Way North
Olympia, WA 98501-1091
(360) 902-2200

For further information on HPA requirements and WDFW contacts, visit the following respective web pages: <http://www.wa.gov/wdfw/hab/hpapage.htm> ,
<http://www.wa.gov/wdfw/depinfo.htm>

State Aquatic Land: Projects proposed on State aquatic land may require separate authorization from the Washington Department of Natural Resources. Applicants should call (360) 902-1100 for additional permit information.

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For further information on state and local permit requirements, you may contact Ecology's Permit Assistance Center at 1-800-917-0043 or by email at ecypac@ecy.wa.gov.

Wetland Delineations: Wetland Delineations must be done in accordance with the currently acceptable methodology. At present, this is the Corps 1987 Wetlands Delineation Manual and all applicable guidance. For agricultural lands continuing in agricultural use, the Natural Resources Conservation Service (NRCS) has the lead for verifying and/or conducting wetland delineations and determinations. For agricultural lands being converted for other uses, the Seattle District has the lead for verifying and/or conducting wetland delineations and determinations.

Endangered Species Act: The NOAA FISHERIES and USFWS (Services) have listed 56 species of plants, fish, birds and other animals in or near Northwest waters as endangered, threatened, or proposed species under the Endangered Species Act (ESA) of 1973. In addition, the habitat for some of these species has been designated as critical for their conservation.

In accordance with Section 7 of the ESA, Seattle District consults with the Services on any work proposed in an application for a Department of the Army permit - including Nationwide Permits - that may affect a federally listed species or its designated critical habitat. Specifics of this consultation process are set forth in 50 CFR Part 402 "Interagency Cooperation— Endangered Species Act of 1973, as Amended".¹ To expedite the consultation process and comply with this law, the Seattle District Engineer is requesting that applicants prepare a Biological Evaluation (BE) of their proposed work. A BE is an assessment of the impacts a proposed project will have on listed, and/or proposed-for-listing species and designated and/or proposed critical habitat. This request is made per Department of the Army permit regulations at 33 CFR 325.1(e)] which authorizes the District Engineer to obtain additional information from permit applicants deemed essential to making a public interest determination. More detailed ESA related information including how to prepare and submit BE information is posted at Seattle District's web page, <http://www.nws.usace.army.mil> (click on Regulatory/Permits, then Endangered Species.) In the event that an applicant is unable to have a BE prepared, they should contact the Seattle District at telephone (206) 764-3495 for assistance. BE preparation requirements and procedures are summarized under each NWP in the shaded Notification Box" in the body of this special public notice. BE's are comprised of three types:

Programmatic Consultations cover specific activities which can be authorized under NWPs as well as other types of permits with little additional review by the Services.

¹ Federal applicants and Federal agencies that are funding non-Federal projects are the lead agency, rather than Seattle District, for BE preparation and ESA consultation.

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Activities potentially covered by a programmatic consultation are listed in the shaded ESA notification box under each nationwide permit in the body of the document. Applicants need only prepare and submit a Specific Project Information Form (SPIF) for the appropriate programmatic consultation showing that the proposed work meets all the listed programmatic consultation conditions.

Reference BEs are generalized BEs developed by the Corps and reviewed by the Services during consultation for specific activities and regions (e.g. piers in Lake Washington). The Reference BE contains an analysis of common aspects of these activities and regions. Applicants can expedite the consultation process for proposed projects by using a Reference BE(s) in lieu of an individual BE when the proposed project activities or circumstances are very similar to those described in the Reference BE. Applicants must complete a SPIF that provides a detailed project description, construction techniques and environmental baseline information (e.g. rearing habitat for juvenile Chinook salmon with overhanging vegetation). Applicants may also incorporate recommended conservation measures from the Reference BE into their proposal to reduce impacts on listed species. Use of Reference BEs allows applicants, the Corps, and the Services to undertake endangered species reviews with less documentation and effort than required for Individual BEs.

Individual BEs are BE's that are prepared for individual projects and then reviewed by the Services during consultation on a case-by-case basis if the proposed work may affect one or more listed species. The Corps and the Services encourage incorporation of applicable conservation measures provided in Programmatic Consultations and Reference BEs into Individual BEs.

The ESA procedures discussed above must be followed for all pending and future projects affecting or potentially affecting listed species or designated critical habitat. These procedures apply regardless of the size or potential (adverse or beneficial) impacts of a proposed project, whether a project is for new work or the repair or replacement of existing work (i.e., NWP 3), or the type of permit process utilized by the Corps. The ESA procedures must be followed for all projects that could be authorized by NWPs, including those that did not previously require prior notification to the Corps. This requires submittal of appropriate notification (JARPA application form, pre-construction notification, or letter) to the Corps including project drawings and an Individual BE or SPIF. Except for applicant/agent name, address, and telephone, information presented in the BE does not need to be repeated in the JARPA. As appropriate, JARPA entries may include the statement, "see BE".

Mitigation: In situations where a State of Washington government agency requires compensatory mitigation over and above any mitigation required by the Corps under a NWP, the Corps generally considers that compensatory mitigation as authorized in compliance with NWP General Condition 19 – Mitigation. Examples include additional compensatory mitigation required by a city or county as part of a building or shoreline substantial development permit, by the WDFW as part of an approved HPA, or by

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Ecology as part of a 401 Certification. The discharge of fill for the compensatory mitigation does not count against fill volume and area limits of the NWP.

Special Aquatic Sites: Special aquatic sites include wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, and sanctuaries and refuges as defined in 40 CFR 230.40 through 230.45 (EPA Guidelines for Specification of Disposal Sites for Dredged or Fill Material).

Marine Sanctuaries and Estuarine Reserves: For all projects proposed for areas within federally designated Marine Sanctuaries or Estuarine Reserves, applicants must contact the agency official responsible for the management of that sanctuary or reserve. Presently, Washington has one marine sanctuary, the Olympic Coast National Marine Sanctuary. Very generally, it extends from the southern boundary of Copalis National Wildlife Refuge north to the U.S./Canada international boundary. The coastal boundary of the Sanctuary reaches to the mean higher high waterline, except when adjacent to either Indian reservations or State-owned land where it extends only to mean lower low water, and cuts across the mouths of any rivers. Contact:

Mary Sue Brancato
Olympic Coast National Marine Sanctuary Headquarters
138 West 1st Street
Port Angeles, Washington 98362-2600
Phone: (360) 457-6622 extension 27

Padilla Bay is a National Estuarine Research Reserve. Generally, it includes Padilla Bay and the northern portion of the Swinomish Channel. Contact:

Padilla Bay National Estuarine Research Reserve
ATTN: Director
1043 Bayview Edison Road
Mount Vernon, Washington 98273

Migratory Birds: Any activity or work authorized under these NWPs does not obviate the permittee from compliance with the Migratory Bird Treaty Act. This act prohibits individuals, government agencies, or corporations from taking a migratory bird, whether the taking is intentional or unintentional. The USFWS is the primary Federal agency responsible for the conservation and management of migratory bird resources.

Conservation measures to minimize potential harm to migratory birds from overhead power lines include the installation of aviation balls or similar devices with state-of-the-art color patterns. This will help to minimize opportunities of collision with overhead wires or cables. Areas most susceptible to these injuries are aerial crossing of rivers, estuaries, open-waterbodies such as rivers, lakes, estuaries, expansive wetlands, or

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over linear geomorphological features such as canyons, valleys, etc. where migratory birds, especially waterfowl, shorebirds, and raptors are likely to migrate.

Injury is more likely to occur when birds are nesting, usually during spring and early summer. Applicants should contact USFWS at the following addresses for more information.

Western Washington:

Ken S. Berg, Manager
Western Washington Office
U.S. Fish and Wildlife Service
510 Desmond Dr. Suite 102
Lacey, Washington 98503
(360) 753-9440

For Mid-Columbia River Area:

Mark Miller, Field Supervisor
Eastern Washington Ecological Services Sub-Office
U.S. Fish and Wildlife Service
32 C Street NW
Ephrata, Washington 98823
(509) 754-8580 or 665-3508

For Upper-Columbia Area:

Rick Donaldson
Upper Columbia River Basin Field Office
U.S. Fish and Wildlife Service
11103 E. Montgomery Drive
Spokane, Washington 99206
(509) 893-8009

State Clean-Up Sites: Any activity or work authorized under these NWP's does not obviate the permittee from liabilities that may be incurred if such activity or work is undertaken within waters of the State designated as a State clean-up site under the Model Toxics Control Act (MTCA).