

**Enclosure**  
**U.S. Environmental Protection Agency Region 10's**  
**Clean Water Act Section 401 Water Quality Certification for the Remaining**  
**41 U.S. Army Corps of Engineers 2021 Nationwide Permits on Tribal Lands**  
**where Tribes Do Not Have Treatment in a Similar Manner as a State and**  
**Lands with Exclusive Federal Jurisdiction in Alaska, Idaho, Oregon, and**  
**Washington**

This CWA Section 401 water quality certification (WQC) applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following Corps NWP into waters of the U.S. that occur within tribal lands where tribes do not have treatment in a similar manner as a state and lands with exclusive federal jurisdiction in the states of Alaska, Idaho, Oregon, and Washington and corresponding Corps Districts<sup>1</sup>: NWP 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 27, 30, 31, 32, 33, 34, 36, 37, 38, 41, 45, 46, 49, 53, 54, and 59. The Corps is not requesting CWA Section 401 WQC for nine NWP: 1, 2, 8, 9, 10, 11, 24, 28, and 35.

Section 401(a)(1) of the CWA requires applicants for federal permits and licenses that may result in discharges into waters of the U.S. to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency (EPA) is the certifying authority. In this case, certain tribes do not have the authority to provide CWA Section 401 WQC for discharges occurring on applicable tribal lands and the states of Alaska, Idaho, Oregon, and Washington do not have authority to provide CWA Section 401 WQC on exclusive federal jurisdiction lands. Therefore, EPA is making CWA Section 401 WQC decisions for potential discharges into waters of the U.S. where tribes do not have treatment in a similar manner as a state and lands with exclusive federal jurisdiction that may result from projects authorized under the proposed NWP listed above.

**Project Description**

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) published in the Federal Register its proposal to reissue the Nationwide Permits (NWP).<sup>2</sup> On January 13, 2021, the Corps published in the Federal Register its final rule reissuing 12 NWP and issuing 4 new NWP, as well as the NWP general conditions and definitions.<sup>3</sup> The Corps is now proposing to re-issue 40 existing NWP and one new NWP and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWP, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWP authorize only activities with no more than minimal individual and cumulative adverse environmental effects.”<sup>4</sup> For the 41 proposed NWP that have not been issued, the Corps has extended the reasonable period of time within which CWA Section 401 certifying authorities must act and has provided the opportunity for those

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<sup>1</sup> This programmatic CWA Section 401 WQC applies where tribes do not have treatment in a similar manner as a state (see Attachment 1) and lands with exclusive federal jurisdiction in EPA's Region 10. EPA's Region 10 covers the states of Alaska, Idaho, Oregon, and Washington, which correspond to the Alaska District, Walla Walla District, Portland District, and Seattle District of the Corps, respectively.

<sup>2</sup> See 85 FR 57298.

<sup>3</sup> See 86 FR 2744.

<sup>4</sup> See 85 FR 57298.

U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2021 Nationwide Permits CWA Section 401 certifying authorities to revise or reconsider their prior CWA Section 401 WQC decisions.<sup>5</sup> For more details: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

### **General Information**

The general information provided in this section does not constitute a certification condition(s).

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

Project proponents for potential projects authorized under the NWP should retain this certification in their files with the applicable NWP as documentation of EPA CWA Section 401 WQC for the above-referenced proposed final NWP. This CWA Section 401 WQC is specifically associated with the NWP described above and expires when those NWP expire.

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

If a project proposal does not meet either the general or NWP-specific CWA Section 401 WQC conditions, or if CWA Section 401 WQC is denied for a specific NWP, the project proponent must request an individual CWA Section 401 WQC from EPA Region 10 if the potential discharges are to waters of the U.S. where tribes do not have treatment in a similar manner as a state or lands with exclusive federal jurisdiction. A project proponent must request a pre-filing meeting from EPA Region 10 at least thirty (30) days prior to submitting an individual CWA Section 401 WQC request. An individual CWA Section 401 WQC request must include the specific requirements outlined in 40 C.F.R. § 121.5.<sup>6</sup>

The project proponents for potential projects authorized under a NWP are encouraged to contact EPA Region 10 during the project planning phase if there are any questions about relevant best management practices (e.g., bioengineering techniques, biodegradable erosion control measures, revegetation using native plant species, suitable fill materials, and disposal of debris/construction materials preventing runoff) and resources that can assist with compliance.

Prior to work commencing where tribes do not have treatment in a similar manner as a state, project proponents should notify the appropriate office for the applicable tribe that manages environmental affairs where the work will occur.

Pursuant to CWA Section 308(a), EPA representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP and this CWA 401 WQC.

If you have any questions regarding this certification, please contact [R10-401-Certs@epa.gov](mailto:R10-401-Certs@epa.gov) and Linda Storm at (206) 437-2293 or via email at [storm.linda@epa.gov](mailto:storm.linda@epa.gov) or Becky Garnett at (206) 553-5122 or via email at [garnett.becky@epa.gov](mailto:garnett.becky@epa.gov).

### **Grant with Conditions (40 C.F.R. § 121.7(d)(2)):**

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<sup>5</sup> [https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation\\_508.pdf](https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation_508.pdf).

<sup>6</sup> See 85 FR 42210.

On behalf of the 28 tribes that do not have treatment in a similar manner as a state and for exclusive federal jurisdiction lands (e.g., Denali National Park and Preserve and Willamette Falls) located within the states of Alaska, Idaho, Oregon and Washington, EPA Region 10 has determined that CWA Section 401 WQC for the following proposed NWP is granted with conditions. EPA Region 10 has determined that any discharge authorized under the following proposed NWP will comply with water quality requirements, as defined at 40 C.F.R. § 121.1(n), subject to the following conditions pursuant to CWA Section 401(d).

**General Conditions apply to the following: NWP 4, 5, 7, 15, 18, 20, 22, 25, 30, 31, 32, 33, 34, 37, 38, 45, and 54**

**Both General Conditions & Specific Conditions apply to the following: NWP 3, 6, 13, 14, 16, 17, 19, 23, 27, 36, 41, 46, 49, 53 and 59**

### **General Conditions:**

#### **EPA General Condition 1 – Aquatic Resources of Special Concern**

Activities resulting in a point source discharge in the following types of aquatic resources of special concern shall request an individual project-specific CWA Section 401 WQC: mature forested wetlands; bogs, fens and other peatlands; vernal pools; aspen-dominated wetlands; alkali wetlands; camas prairie wetlands; wetlands in dunal systems along the Oregon or Washington Coast; riffle-pool complexes of streams; marine or estuarine mud-flats; salt marshes; marine waters with native eelgrass or kelp beds; or marine nearshore forage fish habitat. To identify whether a project would occur in any of these aquatic resources of special concern, project proponents shall use existing and available information to identify the location and type of resources, including using the U.S. Fish and Wildlife Service’s online digital National Wetland Inventory maps, identifying project location on topographical maps, and/or providing on-site determinations as required by the Corps. When a project requires a Pre-Construction Notification (PCN) to the Corps, project proponents shall work with the Corps to identify whether the project is in any of these specific aquatic resources of special concern.

#### ***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

Aquatic resources of special concern include special aquatic sites<sup>7</sup> and other aquatic resources that are specific waters of the U.S. that are difficult to replace, are unique, and/or have high ecological function. General permits, including NWP, are only allowed for those discharges and associated activities that will cause no more than minimal adverse impacts to the aquatic environment. However, point source discharges to the types of aquatic resources of special concern listed above could have more than minimal adverse impacts on an individual or cumulative basis, because the discharge of dredged or fill material would impair and degrade the chemical, physical and biological conditions of these systems. As noted in 40 C.F.R. § 230.1(d), “[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.” Discharge of dredged or fill material into these systems can alter water circulation patterns and hydroperiods, which in turn can release nutrients causing shifts in native to non-native species composition; release chemicals that adversely impact biota (plants and animals), increase turbidity levels, reduce light penetration and photosynthesis, and ultimately change the capacity of these systems to support aquatic life uses and other beneficial uses of these special aquatic sites, including impairing their diverse and

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<sup>7</sup> See 40 C.F.R. Part 230 Subpart E.

U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2021 Nationwide Permits unique communities of aquatic organisms, including fish, wildlife and the habitats upon which they depend. Thus, this condition is established to ensure a case-by-case review of any actions or activities proposed in these specific aquatic resource site types which are inherently difficult to replace, have high ecological functions and values, and for which degradation cannot be determined to meet water quality requirements on a general permit basis.

**Citation(s) that authorizes this condition:** 40 C.F.R. § 230.1(d); 40 C.F.R. § 230.10(c); 40 C.F.R. § 230.21; 40 C.F.R. § 230.23; 40 C.F.R. § 230.32; 40 C.F.R. Part 230, Subpart E.

**EPA General Condition 2 – Soil Erosion and Sediment Controls**

Turbidity shall not exceed background turbidity by more than 50 Nephelometric Turbidity Units (NTU) above background instantaneously or more than 25 NTU above background for more than ten consecutive days.<sup>8</sup> Projects or activities that are expected to exceed these levels require an individual project-specific CWA Section 401 WQC.

The turbidity standard shall be met at the following distances from the discharge:

<b>Wetted Stream Width at Discharge Point</b>	<b>Approximate Downstream Point to Sample to Determine Compliance</b>
Up to 30 feet	50 feet
>30 to 100 feet	100 feet
>100 feet to 200 feet	200 feet
>200 feet	300 feet
Lake, Pond, Reservoir	Lesser of 100 feet or maximum surface distance

<b>For Marine Water</b>	<b>Point of Compliance for Temporary Area of Mixing</b>
Estuaries or Marine Waters	Radius of 150 feet from the activity causing the turbidity exceedance

Measures to prevent and/or reduce turbidity shall be implemented and monitored prior to, during, and after construction. Turbidity monitoring shall be done at the point of compliance within 24 hours of a precipitation event of 0.25 inches or greater. During monitoring and maintenance, if turbidity limits are exceeded or if measures are identified as ineffective, then additional measures shall be taken to come into compliance and EPA shall be notified within 48 hours of the exceedance or measure failure.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

The discharge of dredged or fill material and associated activities authorized by NWP's can result in turbidity (e.g., total suspended and settleable solids) that can impair water quality. Construction activities that result in one acre or more of disturbance require authorization under a National Pollutant Discharge Elimination System (NPDES) permit (see EPA General Condition 3 below). However,

<sup>8</sup> 1986. Quality Criteria for Water (the "Gold Book"). U.S. Environmental Protection Agency, Office of Water. EPA Publication #440/5-86-001.

U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2021 Nationwide Permits turbidity can also occur from activities authorized under NWP that result in less than one acre of construction disturbance. Concentrations of suspended solids above the turbidity criteria impair aquatic life uses by reducing the availability of food for fish and preventing the development of insect larvae, impeding fish migration and other aquatic life movement, preventing the development of fish eggs, and decreasing fish and other aquatic organisms' resistance to disease. Therefore, this condition is necessary to require that all methods to prevent and control the discharge of total suspended solids into waters of the U.S., such as BMPs, be implemented, evaluated/monitored, and maintained to meet water quality requirements.

**Citation(s) that authorizes this condition:** 40 C.F.R. § 230.10(c)-(d); 40 C.F.R. § 230.11(e); 40 C.F.R. § 230.21; 40 C.F.R. § 230.73.

### **EPA General Condition 3 - Compliance with Stormwater Pollution Prevention and the National Pollutant Discharge Elimination System Permit Provisions**

For land disturbances during construction that 1) disturb one or more acres of land, or 2) will disturb less than one acre of land but are part of a common plan of development or sale that will ultimately disturb one or more acres of land, the permittee shall obtain and implement Construction Stormwater General Permit requirements,<sup>9</sup> including:

1. The permittee shall develop a Stormwater Pollution Prevention Plan (SWPPP)<sup>10</sup> and submit it to EPA Region 10 and appropriate Corps District; and
2. Following construction, prevention or treatment of ongoing stormwater runoff from impervious surfaces that includes soil infiltration shall be implemented.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

This condition ensures that the project proponent is aware of and complies with all CWA Section 402 stormwater management permit requirements. Available to project proponents are compliance assistance tools such as SWPPP guide and a template for project proponents at:

<https://www.epa.gov/npdes/swpppguide>.

EPA Region 10 encourages project proponents to develop SWPPPs to ensure prevention of water quality impairment from stormwater runoff during construction and operation of projects permitted by NWPs.

**Citation(s) that authorizes this condition:** CWA Section 301; 40 C.F.R. § 122.26.

### **EPA General Condition 4 – Projects or Activities Discharging to Impaired Waters**

Projects or activities are not authorized under the NWPs if the project will involve point source discharges into an active channel (e.g., flowing or open waters) of a water of the U.S. listed as impaired under CWA Section 303(d) and/or if the waterbody has an approved Total Maximum Daily Load (TMDL) and the discharge may result in further exceedance of a specific parameter (e.g., total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed or has an approved TMDL. The current lists of impaired waters of the U.S. under CWA Section 303(d) and waters of the U.S. for which a TMDL has been approved are available on EPA Region 10's web site at:

<https://www.epa.gov/tmdl/impaired-waters-and-tmdls-region-10>.

***Why the condition is necessary to assure that any discharge authorized under the general license or***

<sup>9</sup> See <https://www.epa.gov/npdes/2017-construction-general-permit-cgp> and/or any subsequently re-issued construction stormwater general permit.

<sup>10</sup> <https://www.epa.gov/npdes/developing-stormwater-pollution-prevention-plan-swppp>

***permit will comply with water quality requirements:***

A water of the U.S. that is listed as impaired under CWA Section 303(d) and/or for which a TMDL has been approved is threatened or impaired due to the cumulative effects of discharges of pollutants. The NWP's do not provide necessary activity-specific information to determine compliance with specific water quality requirements, such as limits on total suspended solids, temperature, dissolved oxygen, nutrients, or pH for which a specific water of the U.S. could be listed as impaired and/or for which a TMDL has been approved. Site specific analysis is required to determine whether point source discharges from activities comply with water quality requirements in the active channel (e.g., open or flowing water) of a water of the U.S. listed as impaired under CWA Section 303(d) and/or for which a TMDL has been approved.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b)(2); CWA Section 303(d).

**EPA General Condition 5 – Notice to EPA**

All project proponents shall provide notice to EPA Region 10 prior to commencing construction activities authorized by a NWP. This will provide EPA Region 10 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this CWA Section 401 WQC. Where the Corps requires a PCN for an applicable NWP, the project proponent shall also provide the PCN to EPA Region 10. EPA Region 10 will provide written notification to the project proponent if the proposed project will violate the water quality certification of the NWP.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

This condition is necessary to provide EPA Region 10 with notice and information to allow for a pre-operation inspection to determine if the proposed discharge will violate this CWA Section 401 WQC. If the project scope changes during the Corps review prior to initiation of the activity, it is also critical for EPA Region 10 to be provided any changes in the project design, scope, amount, and location of discharges to inform the pre-operation inspection opportunity as provided by 40 C.F.R. § 121.11(a).

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 121.11(a).

**EPA General Condition 6 – Unsuitable Materials**

The project proponent shall not use wood products treated with leachable chemical components (e.g., copper, arsenic, zinc, creosote, chromium, chloride, fluoride, pentachlorophenol), which result in a discharge to waters of the U.S., unless the wood products meet the following criteria:

1. Wood preservatives and their application shall be in compliance with EPA label requirements and criteria of approved EPA Registration Documents under the Federal Insecticide, Fungicide, and Rodenticide Act;
2. Use of chemically treated wood products shall follow the Western Wood Preservatives Institute (WWPI) guidelines and BMPs to minimize the preservative migrating from treated wood into the aquatic environment;
3. For new or replacement wood structures, the wood shall be sealed with non-toxic products such as water-based silica or soy-based water repellants or sealers to prevent or limit leaching. Acceptable alternatives to chemically treated wood include untreated wood, steel (painted, unpainted or coated with epoxy petroleum compound or plastic), concrete and plastic lumber; and

4. All removal of chemically treated wood products (including pilings) shall follow the most recent “EPA Region 10 Best Management Practices for Piling Removal and Placement in Washington State.”<sup>11</sup>

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

This condition provides further specification for project proponents regarding discharges of certain materials into waters of the U.S. In the aquatic environment the chemicals and metals in certain materials are toxic and contribute to adverse biological and human health impacts. This condition details the requirements necessary to minimize leaching, to consider the use of alternative materials, and details the actions taken to affect the method of dispersion (piling removal practices).

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b); 40 C.F.R. § 230.10(d); 40 C.F.R. § 230.73; CWA Sections 301, 303, 307; 40 C.F.R. § 401.15.

**Specific Conditions:**

**Applicable to the following NWP: NWP 17. Hydropower Projects, NWP 23. Approved Categorical Exclusions, NWP 41. Reshaping Existing Drainage and Irrigation Ditches, NWP 46. Discharges in Ditches, NWP 49. Coal Remining, NWP 53. Low Head Dam Removal, and NWP 59. Water Reclamation and Reuse Facilities.**

NWPs 17, 23, 41, 46, 49, 53, and 59 are conditionally certified, subject to the general conditions above, except that an individual project-specific WQC is required when the project will have:

1. Greater than 1/10 acre of impacts to waters of the U.S.; or
2. Greater than 300 linear feet of impacts to waters of the U.S.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

Without a 1/10 acre and 300 linear feet restriction, point source discharges from projects authorized under these NWPs could result in more than minimal adverse environmental effects and degrade water quality. Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal adverse effect on the environment. Without the 300 linear feet restriction, authorized activities could be allowed in streams or other waters of the U.S., which are already stressed and/or support multiple Endangered Species Act (ESA) listed species; would be more than minimal, or could even result in significant impacts. For example, as currently proposed, each NWP authorization could allow up to 1/2 acre of impacts, which could allow up to a mile of small width (4-foot) spring fed headwater stream loss. The 1/10 acre and 300 linear feet limits help ensure that these NWPs are protective of water quality, beneficial uses, and will result in no more than minimal individual and cumulative adverse environmental effects as required by the CWA. It is critical to protect jurisdictional waters in Alaska and the Pacific Northwest, including arid west regions which support numerous species of economically, culturally, and recreationally significant populations of salmonids, many of which are ESA listed and are protected under treaties between tribes and the United States. These thresholds for the individual project-specific 401 WQC requirement are based on EPA Region 10’s best professional judgement as

<sup>11</sup> EPA Region 10 Best Management Practices for Piling Removal and Replacement in Washington State. February 12, 2016. Made available upon request.

U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2021 Nationwide Permits well as past practice and consistency with Corps NWP General Condition 23 that requires compensatory mitigation for 1/10 acre or greater impact as well as former Corps Regional General conditions limiting impacts to 300 linear feet. The condition is necessary to allow for individual review of activities that could result in more than minimal adverse impacts.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b)-(d).

### **NWP 3. Maintenance.**

NWP 3 is conditionally certified, subject to the general conditions listed above, for all maintenance, repair or replacement activities authorized under this NWP, except that an individual project-specific WQC is required when the project involves:

1. Maintenance, repair, or replacement of shoreline stabilization using hard armoring approaches<sup>12</sup>; or
2. Extending existing infrastructure beyond its prior footprint in fish bearing waters of the U.S.; or
3. Excavation or dredging in marine waters.

### ***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

NWP 3 authorizes maintenance, repair, and replacement of existing structures and fill. Ongoing cumulative impacts of shoreline losses have been documented for multiple geographic areas, including for the Puget Sound National Estuary, the Lower Columbia River, and several freshwater lakes in urban areas. Replacement of existing hard armor bank stabilization with new hard armor extends the loss of shoreline habitat, including perpetuating losses of fish bearing stream and nearshore habitat rearing, feeding and refuge functions and extending impacts in time. This perpetuates impacts to beneficial uses, including impacts to aquatic life stages of different organisms, water quality, and other important uses such as human recreation.<sup>13</sup> In EPA Region 10 where there are multiple ESA listed runs of salmonids, any additional impacts to stream or marine nearshore habitat exacerbates impacts to those listed species, which are also impacts to tribal treaty resource rights. There are diverse types of projects authorized under this NWP and appropriate and practicable alternatives for shoreline stabilization that better protect aquatic resources are best determined on a case-by-case basis. These appropriate and practicable alternatives often include more ecologically beneficial soft or bioengineering techniques.<sup>14</sup> As a result, this condition is necessary to trigger individual CWA Section 401 WQC review so EPA Region 10 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(c)-(d); 40 C.F.R. § 230.70; 40 C.F.R. § 230.72.

### **NWP 6. Survey Activities.**

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<sup>12</sup> See these guidelines for a definition of “hard armoring of shorelines.” Johannessen, J., A. MacLennan, A. Blue, J. Waggoner, S. Williams, W. Gerstel, R. Barnard, R. Carman, and H. Shipman, 2014. Marine Shoreline Design Guidelines. Washington Department of Fish and Wildlife, Olympia, Washington.

<sup>13</sup> The perpetuation and extension in time of marine shoreline armoring causes deleterious effects hundreds of yards from the actual structure by cutting off the sediment source to the beach from feeder bluffs, altering movement of beach sediments both horizontally and laterally. This leads to overall beach width reduction, changing nearshore substrate, that in turn affects forage fish spawning habitat, shellfish burrowing, and eelgrass establishment. In Puget Sound from 2014 to 2020, on average each year, nearly 12,000 feet of armoring is maintained to a point where it can last another 20 to 30 years. This represents approximately 9% or 229 miles of the 2,500 miles of Puget Sound shoreline per year.

<sup>14</sup> Puget Sound Partnership. 2018. Shoreline Armoring Implementation. Available from: <https://pugetsoundestuary.wa.gov/2018/04/25/shoreline-armoring-implementation-strategy-finalized/>



U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2021 Nationwide Permits NWP 6 is conditionally certified, subject to the general conditions listed above, except that an individual project-specific WQC is required when the project involves:

1. Oil or natural gas exploration; or
2. Trenching in marine waters that could result in a discharge of greater than 25 cubic yards of material.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

The condition is necessary to allow for individual review of activities that could result in more than minimal adverse impacts from potential point source discharges of oil and gas or projects involving trenching in marine waters with a discharge of 25 cubic yards or more. The discharge limit of 25 cubic yards or greater is a commonly used threshold in other Corps nationwide permits for pre-construction notification to allow for environmental review and EPA is requiring individual project-specific WQC review for any projects that exceed this limit. The condition is necessary to allow for individual review of activities that could result in more than minimal adverse impacts from oil and gas discharges or suspension of sediment and impacts from those pollutants on the physical, chemical, and biological integrity of marine waters.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b)-(d); 40 C.F.R. § 230.21; 40 C.F.R. § 230.71.

**NWP 13. Bank Stabilization.**

NWP 13 is conditionally certified, subject to the general conditions listed above, except that an individual project-specific WQC is required when:

1. The entire scope of the project is greater than 300 linear feet; or
2. The project includes hard armoring approaches;<sup>15</sup> or
3. The project is in marine waters and has not completed the assessments set forth in the Marine Shoreline Design Guidelines (for projects proposed on tribal lands or lands of exclusive federal jurisdiction in Washington State);<sup>16</sup> or
4. The project involves permanent fill in wetlands that are waters of the U.S.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

Ongoing cumulative impacts from bank stabilization projects and shoreline losses have been documented for multiple geographic areas, including for the Puget Sound National Estuary, the Lower Columbia River, and several freshwater lakes in urban areas. Cumulative adverse impacts from the existing and current extent of bank stabilization with hard armoring is of significant concern in EPA Region 10. New hard armor bank stabilization adds to cumulative losses of fish bearing streams and nearshore habitat associated with spawning, rearing, feeding and refuge functions. In EPA Region 10 where multiple runs of anadromous salmonids are listed pursuant to the ESA, any more loss of their habitat impacts the recovery of those imperiled species and causes continued and ongoing impacts to tribal treaty resource rights as well. Construction of new or replacement of existing hard armor bank stabilization extends impacts in time, perpetuating impacts to water quality and beneficial uses,

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<sup>15</sup> See these guidelines for a definition of “hard armoring of shorelines.” Johannessen, J., A. MacLennan, A. Blue, J. Waggoner, S. Williams, W. Gerstel, R. Barnard, R. Carman, and H. Shipman, 2014. Marine Shoreline Design Guidelines. Washington Department of Fish and Wildlife, Olympia, Washington.

<sup>16</sup> Johannessen, J., A. MacLennan, A. Blue, J. Waggoner, S. Williams, W. Gerstel, R. Barnard, R. Carman, and H. Shipman, 2014. Marine Shoreline Design Guidelines. Washington Department of Fish and Wildlife, Olympia, Washington.

U.S. EPA Region 10 Clean Water Act Section 401 Water Quality Certification Conditions for the 2021 Nationwide Permits including aquatic life and human recreation.<sup>17</sup> There are diverse types of projects authorized under this NWP and appropriate and practicable alternatives for shoreline stabilization that better protect aquatic resources are best determined on a case-by-case basis. These appropriate and practicable alternatives often include more ecologically beneficial soft or bioengineering techniques.<sup>18</sup> Additionally, the threshold of 300 linear feet or greater is based on EPA Region 10's best professional judgement that impacts of 300 linear feet or greater are likely to cause or contribute to more than minimal adverse impacts. EPA is requiring individual project-specific WQC review for any projects that propose greater than 300 linear feet of bank stabilization, hard armoring (whether for new bank stabilization or for maintenance/replacement/repair activities), projects that do not comply with the Marine Shoreline Design Guidelines in Washington State tribal waters, and any permanent fill in wetlands under this NWP. This condition is necessary to trigger individual CWA Section 401 WQC review so EPA Region 10 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(c)-(d); 40 C.F.R. § 230.70; 40 C.F.R. § 230.72.

#### **NWP 14. Linear Transportation Projects.**

NWP 14 is conditionally certified, subject to the general conditions listed above, except that an individual project-specific WQC is required for projects authorized under one or more NWP by the Corps that result(s) in:

1. Greater than 1/10 acre of impacts to waters of the U.S.; or
2. Greater than 300 linear feet of impacts to waters of the U.S.

#### ***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

The proposed NWP 14 would allow up to 1/2 acre of impacts for each linear transportation crossing. This means that multiple crossings for the same project could be authorized for 1/2 acre impacts each for an unlimited number of crossings as part of a single project. Without a 1/10 acre and 300 linear feet restriction on all crossings in total for a specific project, linear transportation projects could result in more than minimal adverse environmental effects and degrade water quality. Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal adverse effect on the environment. Without the 300 linear feet restriction, authorized activities to streams, many of which are already stressed or impaired, would be more than minimal, or could even result in significant impacts to water quality. The 1/10 acre and 300 linear feet limits help ensure that these NWPs are protective of water quality and will result in no more than minimal individual and cumulative adverse environmental effects as required by the CWA. It is critical to protect jurisdictional streams in Alaska and the Pacific Northwest, including arid west regions which support numerous species of economically, culturally, and recreationally significant populations of salmonids, many of which are protected under treaties between tribes and the United States. These thresholds for the individual project-specific 401 WQC requirement are based on

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<sup>17</sup> The perpetuation and extension in time of marine shoreline armoring causes deleterious effects hundreds of yards from the actual structure by cutting off the sediment source to the beach from feeder bluffs, altering movement of beach sediments both horizontally and laterally. This leads to overall beach width reduction, changing nearshore substrate, that in turn affects forage fish spawning habitat, shellfish burrowing, and eelgrass establishment. In Puget Sound from 2014 to 2020, on average each year, nearly 12,000 feet of armoring is maintained to a point where it can last another 20 to 30 years. This represents approximately 9% or 229 miles of the 2,500 miles of Puget Sound shoreline per year.

<sup>18</sup> Puget Sound Partnership. 2018. Shoreline Armoring Implementation. Available from: <https://pugetsoundestuary.wa.gov/2018/04/25/shoreline-armoring-implementation-strategy-finalized/>

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EPA Region 10's best professional judgement as well as past practice and consistency with Corps NWP General Condition 23 that requires compensatory mitigation for 1/10 acre or greater impact as well as former Corps Regional General Conditions limiting impacts to 300 linear feet. The condition is necessary to allow for individual review of activities that could result in more than minimal adverse impacts.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(c)-(d).

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

NWP 16 is conditionally certified, subject to the general conditions listed above, except that an individual project-specific WQC is required when the project or activity is in or adjoining a designated federal or state contaminated or cleanup site where:

1. Cleanup has not yet occurred; or
2. Where contamination has been left in place.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

Return water from upland contained disposal areas that are within or adjacent to contaminated or clean-up sites could result in discharges of contaminants to waters of the U.S. This condition is necessary to ensure site specific review in those instances.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b)-(d); 40 C.F.R. § 230.71.

**NWP 19. Minor Dredging.**

NWP 19 is conditionally certified, subject to the general conditions listed above, except that an individual project-specific WQC is required when the project or activity is in or adjoining a designated federal or state contaminated or cleanup site where:

1. Cleanup has not yet occurred; or
2. Where contamination has been left in place.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

The condition is necessary to ensure that contaminated sediment and cleanup sites are not disturbed. Disturbance could result in mobilization, resuspension, and deposition of contaminated sediment in the water column and water body. EPA Region 10 needs the opportunity to review individual projects that could result in resuspension and deposition of contaminants to ensure that water quality requirements will be met.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b)-(d); 40 C.F.R. § 230.21; 40 C.F.R. § 230.71.

**NWP 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities**

NWP 27 is conditionally certified, subject to the general conditions listed above, except that an individual project-specific WQC is required when the project:

1. Involves dam removal; or
2. Involves greater than 1 acre of impacts to waters of the U.S.; or
3. Would impact greater than 500 linear feet of waters of the U.S.; or
4. Involves greater than 1/2 acre of impacts to tidal wetlands or waters.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

The condition is necessary to provide site specific review of those actions and activities that exceed these thresholds to ensure that the project meets the requirements for net-increase in aquatic resource functions, and during construction meets all applicable and relevant water quality requirements. For example, release of accumulated sediments from behind a dam for dam removal projects will result in water quality requirement exceedances and EPA Region 10 would ensure that sediments do not contain contaminants and/or would meet appropriate sediment management requirements. Additionally, EPA Region 10 would review the project to determine if there were additional individual CWA Section 401 WQC conditions necessary to meet other water quality requirements, such as instream work-window restrictions that support ESA listed species, or BMPs to ensure that water quality discharge parameters are met for erosion control. EPA Region 10's previous size thresholds requiring individual project-specific WQC review for projects under this NWP were 1/2 acre, 300 linear feet, and any tidal waters. Based on EPA Region 10's experience reviewing multiple aquatic resource restoration projects under this NWP, EPA is increasing these thresholds to 1 acre, 500 linear feet, and 1/2 acre in tidal waters as projects under these size thresholds have generally met the NWP 27 requirement that the project results in net ecological benefit. This condition is necessary to allow for individual review of projects that exceed these thresholds to ensure they will result in an overall net-increase in beneficial uses and aquatic resource function.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b)-(d); 40 C.F.R. § 230.21; 40 C.F.R. § 230.23; 40 C.F.R. § 230.71; 40 C.F.R. § 230.72.

**NWP 36. Boat Ramps.**

NWP 36 is conditionally certified, subject to the general conditions listed above, except that an individual project-specific WQC is required when the project:

1. Exceeds 20 feet in width; or
2. Will occur in or adjoining a designated federal or state contaminated or cleanup site where:
  - a. cleanup has not yet occurred; or
  - b. where contamination has been left in place.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

These restrictions are necessary to ensure that individual CWA Section 401 WQC review occurs for those projects that may result in more than minimal adverse impacts on an individual or cumulative basis, and to ensure that contaminated sediment and cleanup sites are not disturbed and result in resuspension and deposition of contaminated sediment in the water column. EPA needs the opportunity to review projects that could result in resuspension and deposition of contaminants to ensure that water quality requirements will be met. The individual project-specific 401 WQC requirement for those boat ramps that exceed 20-foot wide or greater is based on EPA Region 10's best professional judgement, standard size boat ramps, and consistency with other certifying authority limits as well as past Corps Regional General Permit limits. This condition is necessary to allow for individual review of activities that could result in more than minimal adverse impacts.

***Citation(s) that authorizes this condition:*** 40 C.F.R. § 230.10(b)-(d); 40 C.F.R. § 230.21.

## **Attachment 1**

### **Tribes That Do Not Have Treatment in a Similar Manner as a State in Alaska, Idaho, Oregon, and Washington**

#### **Alaska**

Metlakatla Indian Community

#### **Idaho**

Kootenai Tribe of Idaho

Nez Perce Tribe

Coeur d'Alene Tribe: (EPA Region 10 writes CWA Section 401 WQC for all waters within reservation boundaries with the exception of Coeur d'Alene Lake and St. Joe River for which the Tribe has treatment in a similar manner as a state and EPA-approved water quality standards)

#### **Oregon**

Burns Paiute Tribe

Coquille Indian Tribe

Cow Creek Band of Umpqua Tribe of Indians

The Confederated Tribes of Grand Ronde

The Klamath Indian Tribe

Confederated Tribes of Siletz Indians

#### **Washington**

Cowlitz Indian Tribe

Hoh Indian Tribe

Jamestown S'Klallam Tribe

Lower Elwha Klallam Tribe

Muckleshoot Indian Tribe

Nisqually Indian Tribe

Nooksack Indian Tribe

Quileute Tribe

Samish Indian Nation

Sauk-Suiattle Indian Tribe

Shoalwater Bay Tribe

Skokomish Indian Tribe

Snoqualmie Tribe

Squaxin Island Tribe

Stillaguamish Tribe of Indians

Suquamish Indian Tribe

Upper Skagit Indian Tribe

Confederate Tribes and Bands of the Yakama Nation