



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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January 11, 2022

Colonel Alexander Bullock
District Engineer
Seattle District, Corps of Engineers
PO Box 3755
Seattle, Washington 98124-3755

RE: Modified State of Washington Clean Water Act Section 401 Water Quality Certification Decision on the 41 Nationwide Permits in the Final Rule.

Dear Colonel Bullock:

The Department of Ecology (Ecology) has requested to modify our programmatic Section 401 Water Quality Certification decision for the U.S. Army Corps of Engineers Nationwide Permit Program (NWP) per 40 CFR 121.2(b)¹. The EPA notified the Corps of their agreement to this request December 17, 2021.

The attached programmatic Section 401 Water Quality Certification decision applies to the 41 NWPs finalized December 27, 2021. This mutually agreed upon modification supersedes any decision for these NWPs previously issued by Ecology.

If you have any questions or would like additional information, please contact Loree' Randall (Loree.Randall@ecy.wa.gov) or Erin Hanlon Brown (Erin.HanlonBrown@ecy.wa.gov)

Sincerely,

Joenne McGerr
Program Manager
Shorelands and Environmental Assistance Program
Washington State Department of Ecology

¹ State Certification of Activities Requiring a Federal Permit or License, 40 CFR Part 121.2(b), (1971).

Enclosure – State of Washington Section Programmatic 401 Water Quality Certification Decisions and State Conditions for the U.S Army Corps of Engineers 41 Nationwide Permits. This document fully outlines Ecology’s Section 401 Certification decisions for activities which may result in a discharge and are carried out under a NWP for either Corps Section 404 and/or Section 10 permits.

Table 1 – Summary of State of Washington Section 401 Programmatic Water Quality Certification Decisions for the U.S. Army Corps of Engineers 41 Nationwide Permits Finalized December 27, 2021.

NWP	Activity	401 Decision	Applicable Conditions
1	Aids to Navigation	Granted	State General Conditions
2	Structures in Artificial Canals	Granted	State General Conditions
3	Maintenance	Grant with Conditions	State General and Specific
4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Granted	State General Conditions
5	Scientific Measurement Devices	Granted	State General Conditions
6	Survey Activities	Grant with Conditions	State General and Specific
7	Outfall Structures and Associated Intake Structures	Granted	State General Conditions
8	Oil and Gas Structures on the Outer Continental Shelf	Denied. Individual 401 WQC required.	NA
9	Structures in Fleeting and Anchorage Areas	Granted	State General Conditions
10	Mooring Buoys	Granted	State General Conditions
11	Temporary Recreational Structures	Granted	State General Conditions
13	Bank Stabilization	Grant with Conditions	State General and Specific
14	Linear Transportation Projects	Grant with Conditions	State General and Specific

NWP	Activity	401 Decision	Applicable Conditions
15	U.S. Coast Guard Approved Bridges	Grant with Conditions	State General and Specific
16	Return Water from Upland Contained Disposal Areas	Granted	State General Conditions
17	Hydropower Projects	Denied. Individual 401 WQC required.	NA
18	Minor Discharges	Granted	State General Conditions
19	Minor Dredging	Grant with Conditions	State General and Specific
20	Response Operations for Oil and Hazardous Substances	Granted	State General Conditions
22	Removal of Vessels	Granted	State General Conditions
23	Approved Categorical Exclusions	Grant with Conditions	State General and Specific
25	Structural Discharges	Granted	State General Conditions
27	Aquatic Habitat Restoration, Establishment, and Enhancement Activities	Grant with Conditions	State General and Specific
28	Modifications of Existing Marinas	Grant with Conditions	State General and Specific
30	Moist Soil Management for Wildlife	Granted	State General Conditions
31	Maintenance of Existing Flood Control Facilities	Granted	State General Conditions
32	Completed Enforcement Actions	Denied. Individual 401 WQC required.	NA
33	Temporary Construction, Access, and Dewatering	Granted	State General Conditions
34	Cranberry Production Activities	Grant with Conditions	State General and Specific
35	Maintenance Dredging of Existing Basins	Grant with Conditions	State General and Specific
36	Boat Ramps	Grant with Conditions	State General and Specific

NWP	Activity	401 Decision	Applicable Conditions
37	Emergency Watershed Protection and Rehabilitation	Denied. Individual 401 WQC required.	NA
38	Cleanup of Hazardous and Toxic Waste	Grant with Conditions	State General and Specific
41	Reshaping Existing Drainage and Irrigation Ditches	Denied. Individual 401 WQC required.	NA
45	Repair of Uplands Damaged by Discrete Events	Grant with Conditions	State General and Specific
46	Discharges in Ditches	Grant with Conditions	State General and Specific
49	Coal Remining Activities	Denied. Individual 401 WQC required.	NA
53	Removal of Low-Head Dams	Denied. Individual 401 WQC required.	NA
54	Living Shorelines	Denied. Individual 401 WQC required.	NA
59	Water Reclamation and Reuse Facilities	Denied. Individual 401 WQC required.	NA

State of Washington Department of Ecology
Programmatic Section 401 Water Quality Certification
Decisions and Conditions for the U.S. Army Corps of Engineers
41 Nationwide Permits in the Final Rule
Modified January 11, 2022

Pursuant to Section 401 of the Clean Water Act (CWA), as the state water pollution control agency with jurisdictional authority of Washington's surface waters, the Department of Ecology (Ecology) is tasked with issuance of Section 401 Water Quality Certification (Water Quality Certification) of the Nationwide Permits (NWP) in Washington, with the exception of those lands where the U.S. Environmental Protection Agency (EPA) or a tribe has authority to give such Water Quality Certification.

Ecology provided Water Quality Certification decisions and conditions on December 13, 2020 based on information received during a public comment period, review of documentation provided by the U.S. Army Corps of Engineers (Corps), and Ecology's determination as to whether the NWP comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the CWA, state water quality standards, and other applicable provisions of state law. Ecology is hereby modifying our December 13, 2020 Water Quality Certification decision and conditions pursuant to 40 CFR 121.2(b).

Ecology programmatic Section 401 Water Quality Certification decisions for Nationwide Permits (NWP)

Ecology's Water Quality Certification decisions and conditions apply to projects or activities authorized under Section 404 of the Clean Water Act and/or Section 10 of the River and Harbors Act, where Ecology is the certifying authority. These Water Quality Certification decisions and conditions below supersede any previously issued Water Quality Certification decisions and conditions.

A. State General Conditions for all Nationwide Permits

In addition to all of the U.S. Army Corps of Engineers' (Corps) national and Seattle District's regional permit conditions, the following state general Water Quality Certification (WQC) conditions **apply to all NWP whether granted or granted with conditions** in Washington where Ecology is the certifying authority.

Due to the lack of site specific information on the discharge types, quantities, and specific locations, as well as the condition of receiving waters and the quantity of waters (including wetlands) that may be lost, Ecology may need to review the project if one of the following state general conditions is triggered.

This case-by-case review may be required, and additional information regarding the project and associated discharges may be needed, to verify that the proposed project would comply with state water quality requirements and if an individual WQC is required or if the project meets this programmatic WQC.

1. **In-water construction activities.** Ecology WQC review is required for projects or activities authorized under NWPs where the project proponent has indicated on the Joint Aquatic Resource Permit Application (JARPA) question 9e that the project or activity will not meet State water quality standards, or has provided information indicating that the project or activity will cause, or may be likely to cause or contribute to an exceedance of a State water quality standard (Chapter 173-201A WAC) or sediment management standard (Chapter 173-204 WAC).

Note: In-water activities include any activity within a jurisdictional wetland and/or waters.

2. **Projects or Activities Discharging to Impaired Waters.** Ecology WQC review is required for projects or activities that will occur in a 303(d) listed segment of a waterbody or upstream of a listed segment and may result in further exceedances of the specific listed parameter to determine if the project meets this programmatic WQC or will require individual WQC.

To determine if your project or activity is in a 303(d) listed segment of a waterbody, visit Ecology's Water Quality Assessment webpage for maps and search tools.

3. **Aquatic resources requiring special protection.** Certain aquatic resources are unique and difficult-to-replace components of the aquatic environment in Washington. Activities that would affect these resources must be avoided to the greatest extent practicable. Compensating for adverse impacts to high value aquatic resources is typically difficult, prohibitively expensive, and may not be possible in some landscape settings.

Ecology WQC review is required for projects or activities in areas identified below to determine if the project meets this programmatic WQC or will require individual WQC.

- a. Activities in or affecting the following aquatic resources:
 - i. Wetlands with special characteristics (as defined in the Washington State Wetland Rating Systems for western and eastern Washington, Ecology Publications #14-06-029 and #14-06-030):
 - Estuarine wetlands.
 - Wetlands of High Conservation Value.
 - Bogs.

- Old-growth forested wetlands and mature forested wetlands.
 - Wetlands in coastal lagoons.
 - Wetlands in dunal systems along the Washington coast.
 - Vernal pools.
 - Alkali wetlands.
- ii. Fens, aspen-dominated wetlands, camas prairie wetlands.
 - iii. Category I wetlands.
 - iv. Category II wetlands with a habitat score \geq 8 points.
- b. Activities in or resulting in a loss of eelgrass (*Zostera marina*) beds.

This state general condition does not apply to the following NWPs:

NWP 20 – *Response Operations for Oil and Hazardous Substances*

NWP 32 – *Completed Enforcement Actions*

NWP 48 – *Commercial Shellfish Mariculture Activities*

- 4. Loss of More than 300 Linear Feet of Streambed.** For any project that results in the loss of more than 300 linear feet of streambed Ecology WQC review is required to determine if the project meets this programmatic WQC or will require individual WQC.
- 5. Temporary Fills.** For any project or activity with temporary fill in wetlands or other waters for more than six months Ecology WQC review is required to determine if the project meets this programmatic WQC or will require individual WQC.
- 6. Mitigation.** Project proponents are required to show that they have followed the mitigation sequence and have first avoided and minimized impacts to aquatic resources wherever practicable. For projects requiring Ecology WQC review or an individual WQC with unavoidable impacts to aquatic resources, a mitigation plan must be provided.
- a. Wetland mitigation plans submitted for Ecology review and approval shall be based on the most current guidance provided in Wetland Mitigation in Washington State, Parts 1 and 2 (available on Ecology’s website) and shall, at a minimum, include the following:
 - i. A description of the measures taken to avoid and minimize impacts to wetlands and other waters of the U.S.
 - ii. The nature of the proposed impacts (i.e., acreage of wetlands and functions lost or degraded).

- iii. The rationale for the mitigation site that was selected.
- iv. The goals and objectives of the compensatory mitigation project.
- v. How the mitigation project will be accomplished, including construction sequencing, best management practices to protect water quality, proposed performance standards for measuring success and the proposed buffer widths.
- vi. How it will be maintained and monitored to assess progress toward goals and objectives. Monitoring will generally be required for a minimum of five years. For forested and scrub-shrub wetlands, 10 years of monitoring will often be necessary.
- vii. How the compensatory mitigation site will be legally protected for the long term.

Refer to Wetland Mitigation in Washington State – Part 2: Developing Mitigation Plans (Ecology Publication #06-06-011b) and Selecting Wetland Mitigation Sites Using a Watershed Approach (Ecology Publications #09-06-032 (Western Washington) and #10-06-007 (Eastern Washington)) for guidance on selecting suitable mitigation sites and developing mitigation plans.

Ecology encourages the use of alternative mitigation approaches, including credit/debit methodology, advance mitigation, and other programmatic approaches such as mitigation banks and in-lieu fee programs. If you are interested in proposing use of an alternative mitigation approach, consult with the appropriate Ecology regional staff person. Information on alternative mitigation approaches is available on Ecology's website.

- b. Mitigation for other aquatic resource impacts will be determined on a case-by-case basis.
- 7. Stormwater Pollution Prevention.** All projects involving land disturbance or impervious surfaces must implement stormwater pollution prevention or control measures to avoid discharge of pollutants in stormwater runoff to waters.
- a. For land disturbances during construction, the applicant must obtain and implement permits (e.g., Construction Stormwater General Permit) where required and follow Ecology's current stormwater manual.

- b. Following construction, prevention or treatment of on-going stormwater runoff from impervious surfaces shall be provided.

Ecology's Stormwater Management and Design Manuals and stormwater permit information are available on Ecology's website.

8. **Application.** For projects or activities that will require Ecology WQC review, or an individual WQC, project proponents must provide Ecology with a JARPA or the equivalent information, along with the documentation provided to the Corps, as described in national general condition 32, Pre-Construction Notification (PCN), including, where applicable:
 - a. A description of the project, including site plans, project purpose, direct and indirect adverse environmental effects the project discharge(s) would cause, best management practices (BMPs), and proposed means to monitor the discharge(s).
 - b. List of all federal, state or local agency authorizations required to be used for any part of the proposed project or any related activity.
 - c. Drawings indicating the OHWM, delineation of special aquatic sites, and other waters of the state. Wetland delineations must be prepared in accordance with the current method required by the Corps and shall include Ecology's Wetland Rating form. Wetland Rating forms are subject to review and verification by Ecology staff.

Guidance for determining the OHWM is available on Ecology's website.

- d. A statement describing how the mitigation requirement will be satisfied. A conceptual or detailed mitigation or restoration plan may be submitted. See state general condition 5.
- e. Other applicable requirements of Corps NWP general condition 32, Corps regional conditions, or notification conditions of the applicable NWP.

B. Nationwide Permits where Ecology Grants Water Quality Certification

Ecology grants **Water Quality Certification** for the following NWPs provided that individual WQC review is not required per the state general conditions. Ecology has determined that the activities identified within the following NWPs will not violate applicable state water quality standards, provided the work is done in accordance with the Corps national, regional, and NWP specific conditions and Ecology's state general conditions.

NWP	Ecology Grants Programmatic WQC
1	Aids to Navigation
2	Structures in Artificial Canals
4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5	Scientific Measurement Devices
7	Outfall Structures and Associated Intake Structures
9	Structures in Fleeting and Anchorage Areas
10	Mooring Buoys
11	Temporary Recreational Structures
16	Return Water from Upland Contained Disposal Areas
18	Minor Discharges
20	Response Operations for Oil and Hazardous Substances
22	Removal of Vessels
25	Structural Discharges
30	Moist Soil Management for Wildlife
31	Maintenance of Existing Flood Control Facilities
33	Temporary Construction, Access, and Dewatering

C. Nationwide Permits Where Ecology Grants with Conditions Water Quality Certification

Ecology grants with conditions Water Quality Certification (WQC) for the NWPs identified in the table below provided that Ecology individual WQC review is not required per the state general conditions.

NWP	Ecology Grants with Conditions Programmatic WQC
3	Maintenance
6	Survey Activities
13	Bank Stabilization
14	Linear Transportation Projects
15	U.S. Coast Guard Approved Bridges
19	Minor Dredging
23	Approved Categorical Exclusions
27	Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28	Modifications of Existing Marinas
34	Cranberry Production Activities
35	Maintenance Dredging of Existing Basins
36	Boat Ramps
38	Cleanup of Hazardous and Toxic Waste
45	Repair of Uplands Damaged by Discrete Events
46	Discharges in Ditches

3 - Maintenance

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity involves the complete replacement of a shoreline stabilization using hard armoring.
2. The project or activity increases the original footprint of the structure by more than 1/10th acre in wetlands; or
3. The project or activity includes adding a new structure, such as a weir, flap gate/tide gate, or culvert to the site.

6 – Survey Activities

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity involves oil or natural gas exploration; or
2. The project or activity requires trenching in wetlands.

13 – Bank Stabilization

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for all projects and activities authorized under this NWP if:

1. The project or activity includes new, complete replacement, or expansion of existing, bank stabilization measures in marine and estuarine waters of the Salish Sea; or
2. The project or activity has a length greater than 500 feet (individually or cumulatively) along the bank; or
3. The project or activity has not been designed and stamped by a Professional Engineer or Engineering Geologist; or
4. The project or activity exceeds an average of one cubic yard per running foot below the OHWM or High Tide Line.

14 – Linear Transportation Projects

Ecology Section 401 Water Quality Certification – Granted with conditions.

1. Ecology WQC review is required if the project or activity is in a known contaminated or cleanup site to determine if an individual WQC is required or the project meets the programmatic WQC for this NWP.
2. Ecology individual WQC is required for projects or activities authorized under this NWP if:
 - a. The project or activity impacts more than 1/3 acre of waters; or
 - b. This NWP is authorized in conjunction with any other NWP.

15 – U.S. Coast Guard Approved Bridges

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity triggers an individual U.S. Coast Guard bridge permit.

Note: An Advance Approval from the U.S. Coast Guard is not considered a bridge permit and would not require Ecology individual Water Quality Certification.

19 – Minor Dredging

Ecology Section 401 Water Quality Certification – Granted with conditions.

1. Ecology WQC review is required if the project or activity is in a known contaminated or cleanup site to determine if an individual WQC is required or the project meets the programmatic WQC for this NWP.

23 – Approved Categorical Exclusions

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity has fill impacts to waters greater than ½ acre.

27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities

Ecology Section 401 Water Quality Certification – Granted with conditions.

1. Ecology WQC review is required if the project or activity is in a known contaminated or cleanup site to determine if an individual WQC is required or the project meets the programmatic WQC for this NWP.
2. Ecology individual WQC is required for projects or activities authorized under this NWP if:
 - a. The project or activity directly impacts ½ acre or more of tidal waters; or
 - b. The project or activity affects ½ acre or more of wetlands; or
 - c. The project or activity is a mitigation bank or an advance mitigation site.

28 – Modifications to Existing Marinas

Ecology Section 401 Water Quality Certification – Granted with conditions.

1. For projects or activities that have a potential to discharge to waters and/or have a potential to re-suspend sediments, Ecology WQC review is required if the project or activity is in or adjoining a known contaminated or cleanup site to determine if an individual WQC is required or the project meets the programmatic WQC for this NWP.

34 – Cranberry Production Activities

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity is a new, or expansion of existing cranberry operations.

35 – Maintenance Dredging of Existing Basins

Ecology Section 401 Water Quality Certification – Granted with conditions.

1. For projects or activities that have a potential to discharge to waters and/or have a potential to re-suspend sediments, Ecology WQC review is required if the project or activity is in or adjoining a known contaminated or cleanup site to determine if an individual WQC is required or the project meets the programmatic WQC for this NWP.

36 – Boat Ramps

Ecology Section 401 Water Quality Certification – Granted with conditions.

1. Ecology WQC review is required if the project or activity is in a known contaminated or cleanup site to determine if an individual WQC is required or the project meets the programmatic WQC for this NWP.
2. Ecology individual WQC is required for projects or activities authorized under this NWP if the project or activity involves poured- in- place concrete below the OHWM or High Tide Line.

38 – Cleanup of Hazardous and Toxic Waste

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity is not authorized through a Model Toxics Control Act (MTCA) order or a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) order.

45 – Repair of Uplands Damaged by Discrete Events

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity involves impacts to waters greater than ½ acre.

46 – Discharge in Ditches

Ecology Section 401 Water Quality Certification – Granted with conditions. Ecology individual WQC is required for projects or activities authorized under this NWP if:

1. The project or activity involves impacts to waters greater than ½ acre.

D. Nationwide Permits where Ecology Denies Water Quality Certification

Ecology **denies Water Quality Certification** for the NWPs identified in the table below and an individual WQC is required for projects or activities authorized under these NWPs.

Ecology NWP Water Quality Certification Decision

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NWP	Ecology Denies Programmatic WQC
8	Oil and Gas Structures on the Outer Continental Shelf
17	Hydropower Projects
32	Completed Enforcement Actions
37	Emergency Watershed Protection and Rehabilitation
41	Reshaping Existing Drainage and Irrigation Ditches
49	Coal Remining Activities
53	Removal of Low-Head Dams
54	Living Shorelines
59	Water Reclamation and Reuse Facilities