



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 for the 16 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 16 NWPs finalized January 13, 2021. This 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 16 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 16 Nationwide Permits Finalized January 13, 2021.

NWP	Activity	401 Decision	Applicable Conditions
12	Oil or Natural Gas Pipeline Activities	Denied. Individual 401 WQC required.	NA
21	Surface Coal Mining Activities	Denied. Individual 401 WQC required.	NA
29	Residential Developments	Grant with Conditions	State General and Specific
39	Commercial and Institutional Developments	Grant with Conditions	State General and Specific
40	Agricultural Activities	Grant with Conditions	State General and Specific
42	Recreational Facilities	Grant with Conditions	State General and Specific
43	Stormwater Management Facilities	Grant with Conditions	State General and Specific
44	Mining Activities	Denied. Individual 401 WQC required.	NA
48	Commercial Shellfish Mariculture Activities	Granted	State General Conditions
50	Underground Coal Mining Activities	Denied. Individual 401 WQC required.	NA
51	Land-Based Renewable Energy Generation Facilities	Denied. Individual 401 WQC required.	NA
52	Water-Based Renewable Energy Generation Pilot Projects	Denied. Individual 401 WQC required.	NA
55	Seaweed Mariculture Activities	Denied. Individual 401 WQC required.	NA

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NWP	Activity	401 Decision	Applicable Conditions
56	Finfish Mariculture Activities	Denied. Individual 401 WQC required.	NA
57	Electric Utility Line and Telecommunications Activities	Grant with Conditions	State General and Specific
58	Utility Line Activities for Water and Other Substances	Grant with Conditions	State General and Specific

State of Washington Department of Ecology
Programmatic Section 401 Water Quality Certification
Decisions and Conditions for the U.S. Army Corps of Engineers
16 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 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 wetland and/or activities below the ordinary high water mark (OHWM).

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 ≥ 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 NWP provided that individual WQC review is not required per the state general conditions. Ecology has determined that the activities identified within the following NWP 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
48	Commercial Shellfish Mariculture Activities

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
29	Residential Developments
39	Commercial and Institutional Developments
40	Agricultural Activities
42	Recreational Facilities
43	Stormwater Management Facilities
57	Electric Utility Line and Telecommunications Activities
58	Utility Line Activities for Water and Other Substances

29 – Residential Developments

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 residential development has impacts to waters greater than ¼ acre; or
2. The project is a subdivision. (NOTE: “Subdivision” is the division or redivision of land into lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership); or
3. This NWP is authorized in conjunction with any other NWP.

39 – Commercial and Institutional Developments

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 affects ¼ acre or more of waters; or
2. This NWP is authorized in conjunction with any other NWP.

40 – Agricultural 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 fill or mechanized clearing impacting more than ¼ acre of waters.

42 – Recreational Facilities

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 affects ¼ acre or more of waters; or
2. This NWP is authorized in conjunction with any other NWP.

43 – Stormwater Management Facilities

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 includes a Category I or Category II, wetland as part of a stormwater or flow control system. Including a Category I or Category II wetland in a stormwater treatment or flow control system is considered an impact and will need to be mitigated; or
2. The project or activity includes a Category III (with a habitat score of ≥ 6) wetland as part of a stormwater or flow control system.

57 – Electric Utility Line and Telecommunication 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 impacts more than 1/3rd acre of waters; or

- b. The project or activity requires a Federal Energy Regulatory Commission (FERC) license; or
- c. This NWP is authorized in conjunction with any other NWP.

58 - Utility Line Activities for Water and Other Substances

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 1/3rd acre of waters; or
 - b. The project or activity requires a Federal Energy Regulatory Commission (FERC) license; or
 - c. This NWP is authorized in conjunction with any other NWP.

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.

NWP	Ecology Denies Programmatic WQC
12	Oil or Natural Gas Pipeline Activities.
21	Surface Coal Mining Activities
44	Mining Activities.
50	Underground Coal Mining Activities
51	Land-Based Renewable Energy Generation Facilities
52	Water-Based Renewable Energy Generation Pilot Projects
55	Seaweed Mariculture Activities
56	Finfish Mariculture Activities