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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

Atlanta Federal Center

61 Forsyth Street S.W.

Atlanta, Georgia 30303-8960

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APR 20 2012

Colonel Steven A. Baker
District Engineer
U.S. Army Corps of Engineers
Wilmington District, Regulatory Division
69 Darlington Avenue
Wilmington, NC 28403

Subject: Tribal Section 401 Certification of Nationwide Permits (NWP)

Dear Colonel Baker:

The U.S. Environmental Protection Agency, Region 4, has reviewed the U.S. Army Corps of Engineers Federal Register notice dated February 21, 2012, announcing reissuance of the Clean Water Act Section 404 Nationwide Permits (NWP). Enclosed you will find the EPA's Conditional Certification of the NWP for Section 404 discharges to waters located within Region 4's Indian Country, including the tribal lands of the Eastern Band of Cherokee Indians.

If you have any questions regarding the conditional certification, please contact me at (404) 562-9351, or Diana Woods of my staff at (404) 562-9404.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Cox".

William L. Cox

Chief

Wetlands, Coastal and Oceans Branch

Enclosure



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USEPA Region 4 Clean Water Act (CWA) Section 401 Water Quality Certification for Corps of Engineers CWA Section 404 Nationwide Permits for Activities/Projects located in Indian Country in Region 4

Section 404 Nationwide Permits (NWP)

- Description: NWPs are a type of general permit issued by the Corps of Engineers for CWA Section 404 discharge activities (dredge and fill) having minimal impacts.
- Indian Country: Mississippi Band of Choctaw Indians, Choctaw, MS (Phyllis Anderson, Chief); Eastern Band of Cherokee Indians, Cherokee, NC (Michell Hicks, Chief); Poarch Band of Creek Indians, Atmore, AL (Buford Rollin, Chairman).

Background:

Section 401 of the Clean Water Act (CWA), as amended in 1977, requires that an applicant for a federal permit such as a CWA Section 404 nationwide permit must obtain certification that the discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the CWA. All Nationwide Permits (NWP) require certification prior to issuance; therefore, this certification is a condition of these federal permits.

Presently, the above-listed tribes in Region 4 do not have the EPA-approved water quality standards or Section 401 certification programs for issuing water quality certification. In the absence of such programs, the EPA makes the certification determination on behalf of the tribe. In issuing certification for the NWP, the EPA considers applicable tribal, adjacent state, and the EPA guidance for water quality standards, such as the water quality criteria published under Section 304(a) of the CWA and the Water Quality Standards Handbook.

Determination:

On the basis of the final NWP, and as provided under Section 401(a)(1) of the CWA, the EPA certifies that when the general conditions are met, the NWP (*except* those denied certification herein), will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306, and 307. This Certification reasonably ensures that discharges in compliance with the limitations and conditions of the NWP and the conditions herein will not violate applicable water quality standards or any applicable effluent guidelines or standards.

This NWP Certification includes two types of determinations:

- Denied – Certification is denied for certain proposed projects/activities. These projects/activities which will require an individual review and certification determination from the EPA, and the EPA's individual certification may result in additional conditions and/or mitigation requirements. Note: If the EPA fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of a complete, formal notification requesting certification, the certification requirements shall be waived with respect to such proposed permit, see CWA Section 401 (a)(1).
- Granted With Conditions – Certification is granted with conditions detailed below in addition to the Corps' general terms and conditions.

Denied:

The following activities are denied water quality certification:

- Any proposed activity/project that involves constructing a dam or other impoundment within a stream
- Any proposed activity/project that would require a waiver under the following NWPs: 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, and 52.
- Applicants proposing projects that would exceed a limit of one or more of these NWPs are encouraged to pursue alternative forms of authorization from the Corps, such as an individual Section 404 permit, or further reduce and minimize impacts within the proposed activities/projects areas.
- Any proposed activity/project that will discharge to, or within ½ mile upstream, of a Section 303(d)-listed impaired waterbody (see state 303(d) lists), where the discharge may result in increased impairment. The state 303(d) lists within Region 4 (including North Carolina, Mississippi, and Alabama) can be found at: www.epa.gov/region4/water/tmdl/tmdlstates.html

Granted With Conditions:

All remaining NWPs (not denied water quality certification) are hereby granted certification with conditions. The EPA Region 4 approves NWPs proposed activities/projects *provided* they comply with the general conditions described in this certification, and where there is reasonable assurance that the proposed activities/projects will comply with the applicable provisions of the CWA.

General Conditions:

The following general conditions apply to all NWPs granted water quality certification.

- Certification does not relieve the applicant of the responsibility to comply with applicable local, tribal, state, federal regulations or statutes, including regulations affecting any discharge into waters of the U.S.
- Copies of this certification shall be kept on the job site and readily available for reference by tribal members, Corps personnel, the EPA personnel, the construction supervisor, construction managers and foremen.
- If the project is constructed and/or operated in a manner not consistent with the NWP, the permittee will be in violation of this certification.
- Any emergency or otherwise future action at the project location that is not defined in the project description in the attached permit is not covered by this certification; therefore, the applicant must reapply with an updated application.
- During construction and upon completion of the project, all practicable measures and precautions must be taken to prevent pollution affecting public health, fish, shellfish, wildlife, and recreation due to turbidity, pH, temperature, nutrients, suspended solids, floating debris, visible oil and grease, or other pollutants entering waters of the U.S., including wetlands.
- All equipment operated within any water of the U.S must be cleaned away from waters of the U.S. and maintained to prevent fuel and oil leaks. These methods include, but are not limited to: off-site/upland fuel and oil storage and refueling areas, on-site spill containment equipment, a spill contingency plan, and spill prevention/contaminant training for on-site personnel.
- Should a spill of petroleum products or chemicals occur, immediately call the National Response Center at (800) 424-8802 and the appropriate Tribal Environmental Office.
- Ground disturbance shall not exceed the minimum necessary to complete the project.
- All projects using NWPs must avoid discharges to the maximum extent practicable, and utilize the best available and practicable means of minimizing the adverse impact of discharges that cannot be avoided. In some cases, compensatory mitigation may be required in addition to the avoidance and minimization measures. Compensatory mitigation projects must comply with the Corps Regulatory Program and the EPA adopted requirements and standards to improve compensatory mitigation practices for offsetting losses of aquatic resource functions [33 CFR part 332 on April 10, 2008 (73 FR 19594)]. The rule is available at:
http://www.epa.gov/owow/wetlands/pdf/wetlands_mitigation_final_rule_4_10_08.pdf
- Native vegetation, especially riparian corridors, should be protected during construction with locations disturbed by construction activities returned to pre-project conditions. This shall include restoration of surface contours, stabilization of the soil, and restoration of appropriate native vegetation lost during construction to establish permanent cover.
- Any bank stabilization activities should utilize bioengineering techniques (e.g. willow plantings, root wads, large woody debris, etc.) or a combination of hard-armoring (e.g. rock) and bioengineering techniques to the maximum extent practicable.
- Non-native plant species are NOT appropriate as revegetation plantings for erosion control measures, restoration, and/or mitigation. The use of native plant species is strongly encouraged.

- Measures shall be taken to prevent the spread of invasive species. Project locations containing invasive species should be treated using appropriate control methodologies before construction begins to reduce the potential for off-site spread. Clean and certified weed-free seed should be used for vegetative restoration projects. Plant propagation materials (seeds, plugs, bare roots, etc.) containing any Federal- or State-listed Noxious Weed and/or Watch List Plant Species should be rejected.
- All straw and/or mulch hay used for erosion control measures, restoration, and/or mitigation should be certified as weed free using North American Weed Free Forage Program standards.

If you have any questions regarding this certification, please contact Diana Woods of my staff at (404) 562-9404.

Date

4/18/12

William L. Cox

Chief

Wetlands, Coastal and Oceans Branch

Water Protection Division