



Oregon

Kate Brown, Governor

Department of Environmental Quality
Northwest Region
700 NE Multnomah Street, Suite 600
Portland, OR 97232
(503) 229-5263
FAX (503) 229-6945
TTY 711

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Colonel Michael D. Helton, Portland District Commander
U.S. Army Corps of Engineers
P.O. Box 2946
Portland, Oregon 97208-2946

RE: Denial: Intent to issue Individual Nationwide 401 Water Quality Certifications (WQCs) for the 2021 US Army Corps of Engineers (USACE) Nationwide Permit Program Directly to Applicants

Background: On September 15, 2020, the USACE published a notice in the Federal Register (85 FR 57298) to reissue 54 existing Nationwide Permit categories and issue five new permit categories. At that time DEQ issued a public notice of the draft template 401 WQC for all Nationwide permit categories. In a final rule published in the January 13, 2021, the USACE reissued 12 of the 52 existing Nationwide Permit categories and four of the five new permit categories, as well as the Nationwide Permit general conditions and definitions.

On December 27, 2021, the USACE published a notice in the Federal Register (86 FR 73522) proposing reissuance of 40 existing Nationwide Permit categories and the issuance of one new permit category, which were not included in the January 13, 2021 decision. On January 10, 2022 the Portland District issued a public notice to solicit comments on the proposed regional conditions for the 2022 Nationwide Permits. DEQ issued a 35-day public notice of this letter of intent and draft Nationwide 401 WQC from January 26, 2022 to March 2, 2022 and received comments which were considered in drafting the final Nationwide 401 WQC.

Applicable Water Quality Regulations and DEQ Evaluations: Oregon Department of Environmental Quality (DEQ) is the agency in the State of Oregon designated by the Oregon Legislature to carry out the certification functions prescribed by Section 401 of the Clean Water Act (CWA). In Oregon, statutory authority for Section 401 WQCs is contained in the Oregon Revised Statutes (ORS) Chapter 468B. Oregon Administrative Rules (OAR Chapter 340, Division 48) prescribe the procedures for Section 401 WQC. Oregon's water quality standards are contained in OAR Chapter 340, Division 41 entitled "Water Quality Standards: Beneficial Uses, Policies, and Criteria for Oregon." The requirements and standards set forth in Division 41 were adopted to comply with the surface water quality protection provisions of both state and federal law. The water quality standards in Division 41 are composed of three elements: beneficial uses, water quality criteria (both narrative and numeric), and the antidegradation policy.

DEQ has determined that certain 2021 Nationwide Permit categories authorized under Section 404 of the CWA include activities that may result in a discharge to waters of the state and are subject to the certification requirements of Section 401.

Status of Affected Waters: Activities proposed as part of the Nationwide Permits could affect any water of the state, defined in ORS 468B.005 as lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters that do not combine or effect a junction with natural surface or underground waters) that are located wholly or partially within or bordering the state or within its jurisdiction.

DEQ has three Outstanding Resource Waters; the North Fork Smith River (OAR 340-041-0004(8)). Waldo Lake and Crater Lake are both currently under consideration as Outstanding Resource Waters. High Quality Waters include the Clackamas River, the North Santiam River, and the McKenzie River (above river mile 15), as described in DEQ’s Three Basin Rule (OAR 340-041-0350). Water Quality Limited Waters include all waterbodies listed as impaired, including those for which a Total Maximum Daily Load (TMDL) has been developed to address impairments.

Beneficial Uses: Both Oregon law and the federal CWA require that water quality be protected and maintained so that existing designated and potential beneficial uses of public waters are not impaired or precluded by degraded water quality. Designated beneficial uses of Oregon’s waters are available at: <https://www.oregon.gov/deq/wq/Pages/WQ-Standards-Uses.aspx>. In general, it is assumed that achieving a water quality criteria that fully protects the most sensitive beneficial use, fully protects all beneficial uses.

Potential Modification of Waters of the State and Antidegradation Evaluation: In consideration of the activities proposed for authorization under the USACE 2021 Nationwide Permit package, DEQ has determined that impacts to waters of the state could be reasonably expected to occur.

The proposed 401 WQC decisions addressed in this document apply to activities that DEQ has determined could result in water quality and beneficial use impacts. Activities must be evaluated separately in order to provide conditions or denial of certification protective of water quality.

As in 2017 and 2021, DEQ will have an expedited review process for projects which fit under the thresholds of the 2021 Nationwides, with exceptions noted below. Projects that exceed these thresholds will undergo a standard individual 401 WQC review.

Evaluation of Other Water Quality Related Requirements of State Law: In consideration of state statutes and rules promulgated pursuant to statutes with explicit references to water quality, factors necessary for maintenance of, or evaluation of water quality, or reasonably expected impacts to water quality that could be applicable to the actions authorized by the USACE 2020 Nationwide Permit, DEQ has identified the following potential water quality related requirements of state law:

TABLE 1: OTHER POTENTIAL WATER QUALITY RELATED REQUIREMENTS OF STATE LAW	
STATUTE (ORS) OR RULE (OAR)	SUMMARY
ORS 196.795 to 196.990	Requires that permits be obtained from DSL prior to any fill and removal of material from the bed or banks of any stream. Such permits, when issued, may be expected to contain conditions to assure protection of water quality so as to protect fish and aquatic habitat.
ORS 496.012	Sets wildlife policy for prevention of depletion of indigenous species and toward wildlife resource decisions to be made in the best social, economical and recreational interests of all user groups.
ORS 496.164	Provides for cooperation and technical assistance to other agencies with regard to wildlife resource management.

ORS 496.170 to 496.192	Requires collection and analysis of scientific data to determine and inventory biological status of species, develop conservation strategies, and provide recommendations to other agencies regarding actions affecting threatened or endangered species.
OAR 635-007-0502 et. seq.	Native fish conservation policy – protection of natural ecological communities and habitats tailored to individual watersheds and situations.
OAR 635-059-0000 et. seq.	Aquatic invasive species control.
OAR 635-100-0150	Requires consultation with ODFW on affects to endangered species.
OAR 635-410-0000	Natural resource losses.
OAR 635-412-0005 et. seq.	Addresses fish passage.
OAR 635-413-0000 et. seq.	Fish habitat mitigation policy.
OAR 635-500-0002 et. seq.	Addresses fish management plans.
ORS 468B.155	Prevention of groundwater contamination.
ORS 468B.160 (5)	Triggers action to prevent groundwater contamination or restore acceptable levels.
OAR 340-040-0030	Permitted operation (5) action requirements and (6) remedial action requirements.
OAR 340-041-0350	Prohibits new or increased wastewater discharge in the McKenzie, Clackamas and North Santiam rivers.
OAR 340-045	Pertaining to NPDES and WPCF permits.
ORS 466.635 to 466.645	Requirements for reporting and cleanup of spills of petroleum products and hazardous materials.
ORS 197.180	State agencies are required to make decisions in programs affecting land use that comply with Statewide Goals and that are compatible with those local land use plans and regulations that have been determined to comply with the Goals. Plans and regulations that comply with the Goals are referred to as “acknowledged.”
ORS 541-351 et. seq.	Oregon Plan for Salmon and Watersheds.
OAR 690-009	Groundwater interference with surface water.
OAR 690-010	Appropriation and use of groundwater.
OAR 690- 012	Out-of-basin diversion.
OAR 690-020	Dam safety.
OAR 690-28	Surface water registrations.
OAR 690-033	Standards for new appropriations.
OAR 690-051	Standards for appropriation and use of water for hydroelectric projects.
OAR 690-077	In-stream water rights.
OAR 690-086	Water management and conservation plans.

Issuance of a 401 WQC does not obviate the need for any applicable permits, licenses, or other permissions required by local, state, or federal laws as interpreted by the agency charged with implementing the laws.

Evaluation of Compliance with Clean Water Act Sections 301, 302, 303, 306, and 307: Sections 301, 302, 306, and 307 of the federal CWA establish the framework for effluent limitations, water quality related effluent limitations, national standards of performance for new sources, and toxic and pretreatment standards, respectively. These requirements relate to point source discharges and are the foundation for conditions to be incorporated in National Pollutant Discharge Elimination System (NPDES) permits issued to the point sources. Activities authorized under USACE Nationwide Permit categories, must also apply for, obtain, and implement all required NPDES permits.

Section 303 of the Act relates to Water Quality Standards and Implementation Plans. The Environmental Protection Agency (EPA) has adopted regulations to implement CWA Section 303. Oregon’s Environmental Quality Commission (EQC) has adopted water quality standards consistent with the requirements of Section 303 and the applicable EPA rules. The EQC standards are codified in OAR Chapter 340, Division 41. The EPA has approved the Oregon standards pursuant to the requirements of Section 303 of the Act.

Certification Decision: DEQ denies the USACE’s request for a general certification of the 2021 Nationwide Permits. DEQ, will; however, offer an expedited review process much like as was done for the 2017 Nationwide Permits. DEQ will evaluate projects that the USACE determines qualify for a

Nationwide Permit and will issue an Individual expedited 401 WQC to each applicant following review of the project application and payment of the fee. If an application or pre-construction notification is required to be submitted to the USACE, the applicant must obtain 401 WQC, unless the category is one for which no certification is requested per the Table 2 below. If an application or pre-construction notification is not required to be submitted to the USACE *due to minimal impact*, the activity could not reasonably be expected to result in more than a de minimis discharge, and therefore WQC may not be required, as outlined below. If an activity not requiring an application or pre-construction notification could result in more than a de minimis discharge, 401 WQC is required. Projects authorized under Section 10 only typically do not require a 401 WQC, unless the project is located within Portland Harbor, or the project is determined to have a potential for more than minimal discharge.

Each activity considered for expedited authorization under the 2021 Nationwide Permit Program in Oregon must comply with the applicable conditions and criteria that are included in the certification template, as part of the expedited certification package. DEQ reserves the right to modify these conditions as necessary to ensure compliance with water quality standards and programs of any permit, license, or project where necessary on a case-by-case basis.

Nationwide Permit Categories and associated requirements: Table 2 lists the Nationwide Permit categories and associated requirements. Some categories will qualify for an expedited 401 WQC upon application to the USACE, submittal of the Land Use Compatibility Statement, and payment to DEQ, and some require an application for a standard individual 401 WQC. Additionally, Table 2 lists Nationwide Permit categories that do not require state 401 WQC according to 33 CFR 330.4(c)(3), footnote 1 or because no pre-construction notification or application is filed with the USACE.

For all projects with a 404 discharge that require a pre-construction notification or application, certification is denied. Additionally, for all projects where a federal agency is an applicant, that agency must submit application to DEQ, regardless of USACE pre-construction notification requirements.

Specific water quality requirements with which the discharges will not comply:

- 468B.025 Prohibited activities. (1) Except as provided in ORS 468B.050 or 468B.053, no person shall: (a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.
- Section 401 CWA "...that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title."

Statement explaining why the discharges will not comply with the identified water quality requirements:

- DEQ does not have project specific information including the location of the discharge, or the nature of the discharge. Without this information, DEQ cannot determine that the project will comply with applicable water quality requirements.
 - DEQ cannot identify specific waterways impacted by the project including wetlands and tributary streams
 - DEQ cannot confirm the status of waterways impacted by the project
 - DEQ cannot identify the potential for impact to each water quality parameter
 - DEQ cannot evaluate potential water quality standard violations or contributions to violations

**TABLE 2:
Expedited 401 WATER QUALITY CERTIFICATION REQUIREMENTS BY CATEGORY**
Application refers to a Joint Permit Application (JPA), an Application for Department of the Army Permit, or a Pre-Construction Notification (PCN)

#	CATEGORY	REQUIRMENTS
1	Aids to Navigation	No 401 WQC requested.
2	Structures in Artificial Canals	No 401 WQC requested.
3	Maintenance	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
5	Scientific Measurement Devices	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
6	Survey Activities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
7	Outfall Structures & Associated Intake Structures	Standard individual 401 WQC application required for outfalls that are: <ul style="list-style-type: none"> 1) Not subject to an NPDES permit; or 2) That do not demonstrate pollutant removal to meet water quality standards prior to discharge to waters of the state. <p>For all other projects, if Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.</p>
8	Oil & Gas Structures on the Outer Continental Shelf	No 401 WQC requested.
9	Structures in Fleeting and Anchorage Areas	No 401 WQC requested.
10	Mooring Buoys	No 401 WQC requested.
11	Temporary Recreation Structures	No 401 WQC requested.

12	Oil or Natural Gas Pipeline Activities	Standard individual 401 WQC application required.
13	Bank Stabilization	Standard individual 401 WQC application required for projects that: 1) Do <i>not</i> include bioengineering (unless a registered professional engineer identifies non-bioengineered solutions as the <i>only</i> way to protect an <i>existing</i> structure); or 2) Propose permanent fill in adjacent wetlands. For all other projects, if Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
14	Linear Transportation Projects	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
15	U.S. Coast Guard Approved Bridges	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General Conditions Appropriate.
16	Return Water from Upland Contained Disposal Areas	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
17	Hydropower Projects	Standard individual 401 WQC application required.
18	Minor Discharges	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
19	Minor Dredging	No 401 WQC requested.
20	Response Operations for Oil and Hazardous Substances	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. If loss of streambed is greater than 300 linear feet, standard individual 401 WQC is required. Specific conditions needed.
21	Surface Coal Mining Activities	Standard individual 401 WQC application required.

22	Removal of Vessels	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
23	Approved Categorical Exclusions	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
24	Indian Tribe or State Administered Section 404 Program	No 401 WQC requested.
25	Structural Discharges	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
26	[Reserved]	
27	Aquatic Habitat Restoration, Establishment, & Enhancement Activities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
28	Modifications of Existing Marinas	No 401 WQC requested.
29	Residential Developments	Standard individual 401 WQC application required for projects that create or replace 5,000 square feet or more of impervious surface area, and if loss of streambed is greater than 300 linear feet. For all other projects, if Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
30	Moist Soil Management for Wildlife	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
31	Maintenance of Existing Flood Control Facilities	Expedited 401 WQC denied and Standard individual 401 WQC application required for projects in streams with Temperature TMDLs that propose vegetation removal. For all other projects, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
32	Completed Enforcement Actions	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be

		granted upon review and payment. General conditions appropriate.
33	Temporary Construction, Access, and Dewatering	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
34	Cranberry Production Activities	Standard individual 401 WQC application required.
35	Maintenance Dredging of Existing Basins	No 401 WQC requested.
36	Boat Ramps	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
37	Emergency Watershed Protection and Rehabilitation	Expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
38	Cleanup of Hazardous and Toxic Waste	Expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
39	Commercial & Institutional Developments	Standard individual 401 WQC application required for projects that create or replace 5,000 square feet or more of impervious surface area, and if loss of streambed is greater than 300 linear feet. For all other projects, if Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
40	Agricultural Activities	Standard individual 401 WQC application required.
41	Reshaping Existing Drainage and Irrigation Ditches	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
42	Recreational Facilities	Standard individual 401 WQC application required for projects that result in a loss of streambed greater than 300 linear feet. Expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
43	Stormwater Management Facilities	Standard individual 401 WQC application required for projects that: 1) Propose in-stream or wetland stormwater facilities,

		<p>2) Are not subject to an NPDES permit;</p> <p>3) Those do not demonstrate pollutant removal to meet water quality standards prior to discharge to waters of the state; or</p> <p>4) Propose loss of streambed greater than 300 linear feet.</p> <p>Otherwise, if Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.</p>
44	Mining Activities	Standard individual 401 WQC application required for projects that do <i>not</i> obtain an NPDES 700-PM, and/or loss of streambed is greater than 300 linear feet. For all other projects, expedited 401 WQC will be granted upon review and payment. Specific conditions needed
45	Repair of Uplands Damaged by Discrete Events	Expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
46	Discharges in Ditches	Standard individual 401 WQC application required.
47	[Reserved]	
48	Commercial Shellfish Mariculture Activities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. General conditions appropriate.
49	Coal Remining Activities	Standard individual 401 WQC application required.
50	Underground Coal Mining Activities	Standard individual 401 WQC application required.
51	Land-Based Renewable Energy Generation Facilities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. If loss of streambed is greater than 300 linear feet, standard individual 401 WQC review is required. Specific conditions needed.
52	Water-Based Renewable Energy Generation Pilot Projects	Standard individual 401 WQC application required.
53	Removal of Low-Head Dams	Standard individual 401 WQC application required for projects that: <p>1) Do <i>not</i> go through a PSET review if sediments are to be dispersed in-water.</p>

		For all other projects, If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
54	Living Shorelines	Standard individual 401 WQC will be required for projects that: <ul style="list-style-type: none"> 1) Do <i>not</i> include bioengineering (unless a registered professional engineer identifies non-bioengineered solutions as the <i>only</i> way to protect an <i>existing</i> structure); or 2) Propose permanent fill in adjacent wetlands. For all other projects, Expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
55	Seaweed Mariculture Activities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
56	Finfish Mariculture Activities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
57	Electric Utility Line and Telecommunications Activities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
58	Utility Line Activities for Water and Other Substances	Standard individual 401 WQC will be required for projects that propose HDD installation activity. For all other projects, Expedited 401 WQC will be granted upon review and payment. Specific conditions needed.
59	Water Reclamation and Reuse Facilities	If Application filed for Nationwide coverage through the USACE, 401 WQC required; in that case, expedited 401 WQC will be granted upon review and payment. Specific conditions needed.

*Projects authorized under Section 10 only typically do not require a 401 WQC, unless the project is located within Portland Harbor, or the project is determined to have a potential for more than minimal discharge.

Please direct any questions about this 2021 Nationwide Permit 401 WQC letter of intent to Jeff Brittain, DEQ 401 Dredge and Fill Program Coordinator, at (503) 229-5395, or by email at Jeffrey.Brittain@deq.oregon.gov. Thank you for your continued cooperation in protecting Oregon's water quality and natural resources.

Sincerely,



Steve Mrazik,
Water Quality Manager
Northwest Region

ec: Bill Abadie, USACE
Melody White, USACE
Joe Brock, USACE
Patty Snow, DLCD
Joy Vaughan, ODFW