

STATE OF NEBRASKA



Mike Johanns
Governor

Mike Rabbe
Nebraska Regulatory Office
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March 12, 2002

DEPARTMENT OF ENVIRONMENTAL QUALITY

Michael J. Linder

Director

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RE: Part II of the Federal Register (Vol. 67, Number 10, 2019 - 2095) announcing the reissuance of all the existing Nationwide Permits (NWP's), General Conditions, and definitions with some modifications and one new General Condition.

Dear Mr. Rabbe,

On January 15, 2002, the U.S. Army Corps of Engineers published a notice in Part II of the Federal Register (Vol. 67, Number 10, 2019 - 2095) announcing the reissuance of all the existing Nationwide Permits (NWP's), General Conditions, and definitions with some modifications and one new General Condition.

In accordance with Section 401 of the federal Clean Water Act (33 U.S.C. par.1251 et seq.), the Nebraska Department of Environmental Quality has reviewed the proposed modifications and addition to the CWA Section 404 program for compliance with State water quality standards (Title 117, Nebraska Administrative Code). The Nebraska Water Quality Certification will require the following conditions:

General, program-wide conditions:

A. Vegetated buffer strips shall not be acceptable as mitigation for wetlands impacts, except when using credits from an established and certified wetland mitigation bank where such buffers are incorporated into the bank's original calculated credits. The basis for this prohibition is found in Nebraska Water Quality Standards (Title 117), Ch. 3 § 001, the Antidegradation Clause, which states, "The water quality of surface waters, consistent with uses applied in these Standards, shall be maintained and protected. Water quality degradation which would adversely affect existing uses will not be allowed." While upland buffers provide benefits in terms of water quality, they are not the same benefits as those provided by wetlands, and NDEQ feels that allowing upland buffers to be counted as mitigation for wetland impacts would violate this clause.

B. None of these nationwide permits shall be applicable in waterbodies designated as State Resource Waters - Class A in Title 117 - Nebraska Surface Water Quality Standards. The basis for this prohibition is found in Nebraska Water Quality Standards

(Title 117), Ch. 3 § 002, the Antidegradation Clause, which states, "These are surface waters, whether or not they are designated in these Standards, which constitute an outstanding State or National resource, such as waters within national or state parks, national forests or wildlife refuges, and waters of exceptional recreational or ecological significance. Waters which provide a unique habitat for federally designated endangered or threatened species and rivers designated under the Wild and Scenic Rivers Act are also included. The existing quality of these surface waters shall be maintained and protected."

C. No individual action under these nationwide permits shall be allowed if it jeopardizes the continued existence, or results in a take, of State- or Federally-listed threatened or endangered species described as Key Species in Title 117, Ch. 5, § 003.

D. Stream channelization projects must satisfy the general channelization criteria in the NRCS-COE Nebraska Bulletin No. 180-8-36, dated May 14, 1998: CPA-Food Security Act Wetland Minimal Effect Determinations, Condition A or B:

Condition A. The effects of channelization will usually be considered minimal if all three of the following criteria are met:

1. The channel length will be shortened by less than 100 feet and
2. Channelization is needed to prevent significant property damage and
3. After evaluating other alternatives, channelization is determined to be the best option.

Condition B. A determination of minimal effect may also be considered if all three of the following criteria are met:

1. Channel lengths after the conversion will be equal to or greater than the channel length prior to the conversion or where maintenance of the channel length is not possible, a grade stabilization structure will be installed to control channel degradation (the grade stabilization structure will meet the NRCS Field Office Technical Guide 410 standard.) and
2. The cross section of the new stream channel will be the same as or will be more stable than the condition and shape of the original channel and
3. Measures to replace lost wetland values such as fish or wildlife habitat, water quality improvement, or stream bank stabilization will be installed.

In addition, any stream channelization activity will be subject to NDEQ's standard channelization conditions:

Construction activities should employ controls to reduce the erosiveness of land adjacent to the waterway. This includes construction of a channel wide enough so that the new stream bottom area is equal to or greater than that of the channel to be filled. These controls also include side slopes no steeper than 3 feet horizontal

to 1 foot vertical, and 30-foot-wide buffer strips on each side of the new channel measuring outward from the top of each bank. If slopes steeper than 3 to 1 are proposed, their stability must be assured by a registered professional engineer; however, in no case will unarmored slopes steeper than 2 to 1 be acceptable. Stream bottom, side slopes, and the buffer strips should be placed in appropriate permanent native wetland or upland vegetation.

Additional conditions particular to certain nationwide permits:

Note: the following conditions are in addition to the general, program-wide conditions.

E. Nationwide permits (NWP) 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 41 are certified as written.

F. NWPs 12, 39, 40, 41, 42, 43 and 44 shall not be applicable in the historical, traditional Rainwater Basin wetlands situated on Fillmore, Scott, Olbut, Massie or Marsh soils in the 17-county Rainwater Basin area of south central Nebraska. Counties included in whole or in part in the Rainwater Basin are: Gosper, Harlan, Phelps, Franklin, Kearney, Adams, Hall, Nuckolls, Clay, Hamilton, Thayer, Fillmore, York, Polk, Saline, Seward, and Butler counties.

G. NWPs 12, 39, 40, 41, 42, 43 and 44 shall not be applicable to Category I Eastern Saline Wetlands in Lancaster and Saunders counties. Where a nationwide permit authorizes activities in other categories of Eastern Saline Wetlands, mitigation shall be required as listed in the document, "Mitigation Guidelines for Nebraska's Eastern Saline Wetlands," issued June 1997.

H. NWPs 3, 12, 14, 39, 40, 42 and 43: Losses greater than 1/10th acre of wetland shall be mitigated. Such mitigation may be accomplished by restoring or creating equivalent wetland either on-site or at a suitable off-site location, at a minimum ratio of 1.5 acres restored or created wetland for every 1.0 acre of affected area. If the impacts are mitigated by using credits from an established and certified wetland mitigation bank, 1.0 acre of wetland credit will be required for every 1.0 acre of affected area. Other mitigation ratios may be allowed if the applying entity has previously entered into a negotiated agreement with NDEQ. Temporary fills in special aquatic sites including wetlands authorized under this NWP shall not require mitigation but shall be removed in their entirety with the affected areas returned to their pre-existing elevation.

I. NWP 14: No more than 200 linear feet of fill for the roadway can occur in special aquatic sites, including wetlands.

J. NWP 3: In the case of maintaining structures (3(ii)) the activity is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 100 feet in any direction from the structure.

K. NWP 40 (c): Water quality certification is denied for NWP 40 (c).

L. NWP 43: Mitigation for impacts under this Stormwater NWP must be located outside the storm water detention facility.

M. NWP 44: Applications for any mining activities designed such that water is returned to the stream or river must obtain a National Pollutant Discharge Elimination System permit from NDEQ.

We therefore, by this letter, provide Section 401 Water Quality Certification for these Nationwide Permits. If you have any questions, please feel free to call Terry Hickman on my staff, at (402) 471-2875.

Sincerely,



for

Patrick W. Rice
Assistant Director

cc: Steve Anschutz, US Fish & Wildlife Service
Frank Albrecht, Nebraska Game & Parks Commission
Tom Taylor, US Environmental Protection Agency
Jerry Jasmer, Natural Resources Conservation Service