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DEPT. OF ENVIRONMENT AND ENERGY



Pete Ricketts, Governor

Mr. John Moeschel
Nebraska Regulatory Office
U.S. Army Corps of Engineers
8901 South 154th Street, Suite 1
Omaha, NE 68138-3621

December 12, 2020

RE: Final Water Quality Certification of the 2020 Nationwide Permits

The Nebraska Department of Environment and Energy (NDEE) has completed its review of the United States Department of the Army, Corps of Engineers (Corps) Nationwide Permit (NWP) proposed Rule as published in the Federal Register (85 FR 179). As the state water pollution control agency with jurisdictional authority over Nebraska’s surface waters, NDEE is tasked, pursuant to § 401 of the Clean Water Act (CWA) of 1987, and Title 120, Nebraska Administrative Code (NAC), Rule and Regulations Pertaining to Certification by The State of Nebraska, with review and Water Quality Certification (WQC) of NWPs. In accordance with 33CFR § 330.4(c)(1), NDEE is issuing WQC with conditions for the 2020 NWPs. This letter certifies that activities which are carried out under a NWP, and in accordance with this conditional certification, will be in compliance with Title 117, NAC, – Nebraska Surface Water Quality Standards (Title 117). NDEE is the agency of the State of Nebraska charged with exercising exclusive supervision of the implementation and enforcement of the Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. §81-1501 et seq. Pursuant to the Nebraska Environmental Quality Council’s authority to adopt and promulgate rules and regulations as expressed in Neb. Rev. Stat. § 81-1505(1)(2), the Council adopted rules and regulations codified as Neb. Admin. Code, Title 117, Nebraska Surface Water Quality Standards (Title 117).

GENERAL CONDITIONS UNDER WHICH THE 2020 NWPs ARE GRANTED CERTIFICATION

The State of Nebraska hereby grants Water Quality Certification for 2020 NWPs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, ~~A, B, C, D, 55, 56,~~ -and ~~E-59~~ as published in the Federal Register, subject to the following conditions:

- A. Springs.** No filling, whether permanent or temporary, of any spring (natural artesian discharge of ground water to the surface where the point of origin is an aquifer) associated with a water body’s point of origin, or those located in a stream bed, shall be allowed under a nationwide permit prior to the issuance of individual WQC. Impacting springs may impact water quality of surface waters and violate the Antidegradation Clause in Title 117 Ch. 3., Neb. Rev. Stat. 81-1505.

B. Waivers. No individual action shall be allowed under a nationwide permit prior to the issuance of an individual WQC when such an action may result in a discharge into a special aquatic site or surface waters where the Corps District Engineer waives the impact threshold related to linear feet or width. This condition is applicable to the following NWPs: 13, 36, and 54 and ensures compliance with the Antidegradation Clause in Title 117 Ch. 3., Neb. Rev. Stat. 81-1505.

C. State Resource Waters – Class A. No individual action shall be allowed under a nationwide permit prior to the issuance of an individual WQC when such an action may result in a discharge into water bodies designated as State Resource Waters – Class A pursuant to Title 117 - Nebraska Surface Water Quality Standards (Ch. 5 -6) and Neb. Rev. Stat. 81-1505. Class A designated waters constitute outstanding State or National resources where the existing water quality shall be maintained and protected. Additional information and maps regarding State Resource Waters can be acquired by contacting the NDEE.

D. First and Second Order Streams. No individual action shall be allowed under a nationwide permit prior to the issuance of an individual WQC when such an action may result in a loss of 300 linear feet or more of stream bed determined to be a first or second order stream. Stream order will be identified utilizing the Strahler method (1957) and the mean stream widths identified by Downing et. al (2012). Impacting first and second order headwater streams may impact water quality of surface waters and violate the Antidegradation Clause in Title 117 Ch. 3., Neb. Rev. Stat. 81-1505.

E. State Endangered and Threatened Species. No individual action which may jeopardize the continued existence of a state listed Endangered or Threatened Species (pursuant to the Nebraska Nongame and Endangered Species Conservation Act, or NESCA, Neb. Rev. Stat. 37-801 to 37-811 and Title 117 Ch. 4 003.01J, Neb. Rev. Stat. 81-1505 (1)(2)), or results in the destruction or modification of habitat of such species which is determined by the commission to be critical, or results in a take of such species shall be allowed under a nationwide permit prior to the issuance of an individual WQC. Federal and state agencies conducting activities under a NWP which includes a current programmatic agreement with Nebraska Game and Parks Commission, and state agencies with to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, are exempted from this condition. A list of Nebraska T&E Species may be found at:

http://outdoornebraska.gov/wp-content/uploads/formidable/5/Nebraska-State-Species-List_May2020.pdf

The Nebraska Conservation and Environmental Review Tool (CERT) is an interactive tool for conservation planning and NGPC environmental review for proposed projects of potential impacts to threatened, endangered, and special concern species.

<https://cert.outdoornebraska.gov/>

F. Rainwater Basin Wetlands. The Rainwater Basin Wetlands of Nebraska are a unique set of wetland complexes that provide filtration buffers for water quality and assist with aquifer recharge (40 CFR part 230.41 and Neb. Rev. Stat. 81-1505 (1)(2)). With the exception of state/federal-private partnerships or state and federal agencies undertaking restoration projects under NWP 27, no individual action which may result in a discharge into traditional Rainwater Basin wetlands located in the 21-county Rainwater Basin Complex of south central Nebraska shall be allowed under a nationwide permit prior to the issuance of an individual WQC. The

following link provides a map showing the general location of the Rainwater Basin Complex geographic area:

<http://rwbjv.org/rainwater-basin-joint-venture/about-the-rainwater-basin/>

- G. Eastern Saline Wetlands.** These wetlands support an ecosystem of endangered and threatened species found only in salt marshes (Neb. Rev. Stat. 81-1505 (1)(2) and Neb. Rev. Stat. 37-801 to 37-811). With the exception of state/federal-private partnerships or local, state, and federal agencies undertaking restoration projects under NWP 27, no individual action which may result in a discharge into Category I Eastern Saline wetlands (as defined by Gilbert, M.C. and R.C. Stutheit, eds. Resource Categorization of Nebraska Eastern Saline Wetlands Interagency Study Project. U.S. Army Corps of Engineers, Omaha District and Nebraska Game and Parks Commission, 1994) shall be allowed under a nationwide permit prior to the issuance of an individual WQC.
- H. Compensatory mitigation for wetlands.** Compensatory mitigation shall be required for all unavoidable and permanent impacts to wetlands that exceed 1/10th of an acre (0.10 acres). Compensatory mitigation shall be accomplished by restoring or establishing functionally equivalent, in-kind habitat at a minimum ratio of 1.5 restored or established acres for every 1.0 acre of affected area. Wetland compensatory mitigation, through the use of credits at a certified wetland mitigation bank, at a minimum ratio of 1.0:1.0, or through the use of in-lieu fee program credits, as approved by the Corps District Engineer, will also fulfill any requirements issued by the Nebraska Department of Environment and Energy. Compensatory mitigation located in upland habitat shall not substitute for replacement of wetland habitat. Compensatory mitigation is recommended within the wetland complex boundary (based on *The Guide to Nebraska's Wetlands and Their Conservation Needs* (LaGrange 2005)), where the impact occurred. Compensatory mitigation utilizing out-of-kind habitat, and requirements established by the Corps as a condition of a NWP, may exceed the minimum ratios described above. U.S. Army Corps of Engineers 33 CRF part 230.
- I. Compensatory mitigation for rivers and streams.** When activities resulting in unavoidable and permanent impacts to rivers and streams require compensatory mitigation as set forth in NWP General Condition 23(d), mitigation should be accomplished through in-kind rehabilitation, enhancement, or preservation, if practicable. Compensatory mitigation shall be based on beneficial use(s) and assessed stream function of the impacted stream segment as described in Nebraska Title 117 (Chapter 5). Mitigation shall be implemented in a manner such that self-sustaining ecological function is established, as demonstrated by meeting Corps District Engineer-approved performance standards. U.S. Army Corps of Engineers 33 CFR part 230
- J. Reporting of project completion.** Each permittee who receives a NWP verification letter from the U.S. Army Corps of Engineers shall provide a copy of the signed compliance certification to NDEE (concurrently to submission to the Corps) documenting completion of the authorized activity and any required compensatory mitigation, as set forth in Nationwide Permit General Condition 30. The copy may be sent electronically by email to ndee.401certification@nebraska.gov, or mailed to:

Nebraska Department of Environment and Energy
Attn: CWA Section 401 Coordinator
PO Box 98922
Lincoln, NE 68509-8922

CONDITIONS FOR CERTIFICATION FOR CERTAIN ACTIVITIES AUTHORIZED BY SPECIFIC 2020 NWPs

NWPs 12, ~~43, 57~~ and ~~43-58~~ are granted WQC subject to General Conditions and under the following conditions and/or denial of certain activities:

- A. **NWP 12, ~~57C~~ and ~~58D~~, All Utility Line Activities.** Nebraska Department of Environment and Energy shall be notified within 24 hours in the event of release of muds and drilling fluids into surface waters, that occur via sub-surface fissures or fractures during horizontal directional drilling activities. The following telephone numbers are available for notification; during regular business hours please call 1-877-253-2603 (toll free) or (402) 471-2186; after hours, or on weekends and holidays, please call Nebraska State Patrol Dispatch (402) 471-4545. Antidegradation Clause in Title 117 Ch. 3., Neb. Rev. Stat. 81-1505
- B. **NWP 43 Storm Water Management Facilities.** Compensatory mitigation for permanent and unavoidable impacts shall be located outside the storm water management facility or structure. Neb. Rev. Stat. 81-1505 Title 119 Ch. 10 002.01.

CERTIFICATION FOR NWPs 26 and 47

NWP 26 has been reserved. The NDEE is not issuing a WQC for NWP 26 at this time until the Corps issues an actual permit for review.

NWP 47 has been reserved. The NDEE is not issuing a WQC for NWP 47 at this time until the Corps issues an actual permit for review.

If you have any questions please contact Laura Johnson, CWA 404 Section Supervisor ~~Steven Goans, Deputy Director of Permitting and Engineering Division~~ at 402-471-~~2580-8389~~ or by email at steve.goanslaura.r.johnson@nebraska.gov.

Sincerely,

Jim Macy
Director

ecc: Matt Wray, U.S. Army Corps of Engineers
Brooke Stansberry, U.S. Fish & Wildlife Service
Melissa Marinovich~~Shannon Sjolie~~, Nebraska Game & Parks Commission
Justin Kensinger~~Eliodora Chamberlain~~, U.S. Environmental Protection Agency
Jeannette Schafer, U.S. Environmental Protection Agency