CALIFORNIA
Water Boards

EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIQUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

APR 19 2012

Colonel William J. Leady, P.E.
District Commander
U.S. Army Engineer District, Sacramento
Corps of Engineers
1325 J Street
Sacramento, CA 95814-2922

Dear Colonel Leady:

CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION OF 2012 NATIONWIDE PERMITS

The previous U.S. Army Corps of Engineers (Corps) Nationwide Permits (NWPs) became effective on March 19, 2007, and expired on March 18, 2012.

In your letter of February 23, 2011, the State Water Resources Control Board (State Water Board) was informed of the notification in the Federal Register regarding proposed NWPs for 2012. (76 Fed. Reg. 9174-01 (Feb. 16, 2011).) The State Water Board subsequently received notice of the final NWPs on February 21, 2012. (77 Fed. Reg. 10184-01 (Feb. 21, 2012).) This notice served as the Corps' complete application for a water quality certification (certification). In your letter of February 29, 2012, you requested that the State Water Board review the newly issued NWPs and determine whether to certify, certify with conditions, or deny certification pursuant to Clean Water Act section 401 (33 U.S.C. § 1341).

In addition to the Corps' notice in the Federal Register, the State Water Board also posted notice of the Corps' application for certification of the NWPs on our 401 Program web page at: http://www.waterboards.ca.gov/water_issues/programs/ cwa401/notices.shtml on February 27, 2012, for a 45 day noticing period which ended on April 12, 2012.

State Water Board staff reviewed the newly issued NWPs, considered comments received, and determined whether to certify, certify with conditions, or deny certification for each of the NWPs. California's certification decision is required within 60 days, according to the notice in the Federal Register; i.e., by Monday, April 23, 2012.

For this action, the State Water Board is Lead Agency for the purposes of compliance with the California Environmental Quality Act (CEQA) and is required to analyze the environmental impacts and make a determination for each NWP. In considering this task and the timeframe

allowed, the State Water Board elects to issue certifications for those NWPs covering activities that are categorically exempt from CEQA at this time.

As authorized by the State Water Board, I am issuing a certification for 13 of the 50 NWPs on this basis. The enclosed certification identifies those NWPs and the associated conditions. I request that you notify the State Water Board if any of these conditions do not comport with your regulations in title 33, sections 325.4 and 330.4 of the Code of Federal Regulations. In addition, the Corps has the right to petition the State Water Board for reconsideration of this certification in accordance with California Code of Regulations, title 23, section 3867 et seq.

If you would like to discuss these matters further, please contact Ken Harris, Assistant Deputy Director, Division of Water Quality, at (916) 341-5500 (kharris@waterboards.ca.gov), or Vicky Whitney, Deputy Director, Division of Water Quality, at (916) 341-5568 (vwhitney@waterboards.ca.gov).

Sincerely,

Thomas Howard

Thomas Howard
Executive Director

Enclosures (1): Water Quality Certification Order

cc: see next page

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cc: Continued (see next page)

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cc: Continued

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CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION OF U.S. ARMY CORPS OF ENGINEERS 2012 NATIONWIDE PERMITS

PROJECT: U.S. Army Corps of Engineers 2012 Nationwide Permits

APPLICANT: Colonel William Leady, P.E.
District Commander
U.S. Army Engineer District, Sacramento
Corps of Engineers
1325 J Street
Sacramento, CA 95814-2922

This Certification responds to your request on behalf of U.S. Army Corps of Engineers for the 2012 Nationwide Permits.

ACTION:

- ☐ Order for Standard Certification
- ☑ Order for Technically Conditioned Certification
- ☐ Order for Denial of Certification
- ☐ Order for Waiver of Waste Discharge Requirements

Pursuant to title 23, section 3838 of the California Code of Regulations, the Executive Director hereby makes the following Clean Water Act (CWA) Section 401 Water Quality Certification (Certification) determination for the U.S. Army Corps of Engineers' (Corps) Nationwide Permits (NWP) which became effective on March 19, 2012, and which will expire on March 18, 2017.

A. CERTIFICATION:

Commencing on the date of this certification, the 13 NWPs listed in Table A are hereby granted certification subject to the Conditions and the Notification Requirements described below. The activities authorized by these 13 NWPs are exempt from California Environmental Quality Act (CEQA) review since their activities should not have a significant effect on the environment, either individually or cumulatively. Because these 13 NWPs are exempt from CEQA, for purposes of the following conditions, the term "project" means "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Cal. Code Regs., tit. 14, § 15378.)

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TABLE A Certified Nationwide Permits

NWP No.	Nationwide Permit Description	Decision	Title 14 of the California Code of Regulations Section/Exemption
1	**Aids to Navigation:** Allows the placement of USCG-approved navigational aids.	Certify subject to conditions	§15304 /Minor Alterations to Land; and §15311 /Accessory Structures
4	**Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities:** Allows fish and wildlife harvesting devices and activities.	Certify subject to conditions	§15304 /Minor Alterations to Land
5	**Scientific Measurement Devices:** Allows the placement of scientific gages, recording devices, water quality testing and improvement devices, and similar structures; allows the construction of weirs and flumes constructed primarily to record water quantity and velocity.	Certify subject to conditions and notification requirements	§15306 /Information Collection
6	**Survey Activities:** Allows core sampling, seismic exploration, and plugging of exploration bore holes.	Certify subject to conditions and notification requirements	§15304 /Minor Alterations to Land
9	**Structures in Fleeting and Anchorage Areas:** Allows placement of structures to facilitate mooring of vessels within anchorage areas established by the USCG.	Certify subject to conditions	§15301 /Existing facilities; and §15304 /Minor Alterations to Land
10	**Mooring Buoys:** Allows non-commercial, single-boat mooring buoys.	Certify subject to conditions	§15304 /Minor Alterations to Land
11	**Temporary Recreational Structures:** Allows the temporary placement of buoys, markers, small floating docks, and similar structures placed during special water events.	Certify subject to conditions and notification requirements	§15304 /Minor Alterations to Land
12	**Utility Line Activities:** Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities.	Certify subject to conditions and notification requirements	§15301 Existing Facilities; and §15304 /Minor Alterations to Land.

TABLE A (Continued) Certified Nationwide Permits

NWP No.	Nationwide Permit Description	Decision	Title 14 of the California Code of Regulations Section/Exemption
20	**Response Operations for Oil and Hazardous Substances:** Allows cleanup of oil and hazardous substances provided the work activity is done in accordance with federal regulations and any existing State contingency plans, and has the concurrence of the federal Regional Response Team.	Certify subject to conditions and notification requirements	§15307 /Actions by Regulatory Agencies for Protection of Natural Resources; §15308/ Action by Regulatory Agencies for Protection of the Environment; and §15330/Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances
22	**Removal of Vessels**: Allows minor discharges of fill in connection with removal of disabled or abandoned vessels or manmade obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or river snagging.	Certify subject to conditions	§15301 /Existing Facilities; and §15303/ New Construction or Conversion of Small Structures
28	**Modifications of Existing Marinas**: Allows the reconfiguration of existing dock space in an authorized marina. No dredging or expansion of any kind would be permitted.	Certify subject to conditions and notification requirements	§15301 /Existing Facilities; and §15303/ New Construction or Conversion of Small Structures
32	**Completed Enforcement Actions**: Allows any structure, work, or discharge that is in compliance with a final federal court decision, consent decree, or settlement agreement resulting from a federal enforcement violation action under Section 404 or Section 10.	Certify subject to conditions and notification requirements	§15321 / Enforcement Action by Regulatory Agencies
36	**Boat Ramps:** Activities required for the construction of boat ramps,	Certify subject to conditions and notification requirements	§15303 /New Construction or Conversion of Small Structures; and §15304 /Minor Alterations to Land

CONDITIONS:

1. Subject to Review: This Certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to the Water Code, section 13330, and the California Code of Regulations (Cal. Code Regs.), title 23, section 3867 and following.

2. Hydroelectric Facilities Requiring a Federal Energy Regulatory Commission (FERC) **License:** This Certification action is not intended and shall not be construed to apply to any activity involving a hydroelectric facility requiring a Federal Energy Regulatory Commission (FERC) license or an amendment to a FERC license, unless the pertinent Certification application was filed pursuant to Cal. Code Regs., title 23, section 3855, subdivision (b), and the application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.

3. Fees: This Certification is conditioned upon total payment of any fee required under California Code Regulations, title 23, section 3830 et seq., and owed by the applicant.

4. Porter-Cologne Water Quality Control Act: All activities shall comply with all requirements of California's *Porter-Cologne Water Quality Control Act* (Wat. Code, §13000, et seq.) and applicable State or Regional Water Quality Control Plans.

5. Unenforceable Conditions: If any conditions are found to be invalid or unenforceable, certification for all activities to which that condition applies is denied.

6. Water Diversion and Use: Certification is denied for any activity involving a new or modified diversion or impoundment of water, unless the State Water Resources Control Board (State Water Board) has already approved a water rights permit, or such diversion or impoundment is solely for the purpose of drainage or flood control.

7. Other Federal Permits and Licenses: This Certification action is not intended and shall not be construed to apply to any discharge from any activity requiring the issuance or amendment of any other federal license or permit, including enrollment under two or more NWPs.

8. Endangered Species: Certification is denied for any project that would result in the taking of any candidate, threatened, or endangered species or any other violation of the federal Endangered Species Act (16 U.S.C. §1531, et seq.) and the California Endangered Species Act (Fish and G. Code, §2050, et seq.).

9. Compensatory Mitigation: No project that requires compensatory mitigation is eligible for enrollment under this certification.

10. Hazardous Waste Sites: Certification is denied for any project located on a site which is included on any list compiled pursuant to section 65962.5 of the Government Code (i.e., "Cortese List").

11. Enforcement:

a) In the event of any violation or threatened violation of the conditions of this certification, the violation or threatened violation shall be subject to any remedies, penalties, process, or sanctions as provided for under state law. For purposes of

§401(d) of the CWA, the applicability of any state law authorizing remedies, penalties, process, or sanctions for the violation or threatened violation constitutes a limitation necessary to assure compliance with the water quality standards and other pertinent requirements incorporated into this Certification.

b) In response to a suspected violation of any condition of this Certification, the State Water Board or a Regional Water Quality Control Board (Regional Water Board) may require the holder of any permit or license subject to this certification to furnish, under penalty of perjury, any technical or monitoring reports the State Water Board deems appropriate, provided that the burden, including cost, of the reports shall be a reasonable relationship to the need for the reports and the benefits to be obtained from the report.

c) In response to any violation of the conditions of this Certification, the State Water Board may add to or modify the conditions of this certification as appropriate to ensure compliance.

12. NWP 4 – Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities: No activities that could be permitted under NWP 48 - Commercial Shellfish Aquaculture Activities, shall be permitted under this certification of NWP 4.

13. NWP 6 – Survey Activities: No survey activities involving directional drilling which may cause a discharge of drilling fluids, compounds, or "muds" due to ground fractures (i.e., "frac-outs") to waters of the state are permitted under this certification of NWP 6.

14. NWP 12 – Utility Line Activities: Because of the number, geographic scale, and variety of potential environmental impacts that are possible under NWP 12, permanent impacts due to any activities under this certification of NWP 12 are prohibited. Routine utility line construction and maintenance activities in waters of the state are permitted when the proposed activity qualifies for a CEQA exemption, and when all of the following conditions are met:

a. Location Restrictions

Lake Tahoe Basin: Any project work occurring in the Lake Tahoe Basin is prohibited.

Multiple Regional Water Boards: Any project which may discharge to the jurisdiction of more than one Regional Water Board is prohibited.

b. Overall Project Size Restrictions

Total Area: The total ground disturbance of any project is limited to a maximum of 5 acres.

Total Length: The total utility line length of any project is limited to a maximum of 5 miles.

c. Restrictions on Project Impacts to Waters of the State

Area: Not more than one-half (½) acre of temporary impacts to waters of the state are permitted under this certification for any project.

Length: Not more than a total of 400 linear feet of temporary impacts to waters of the state for any project is permitted under this certification.

Project footprint: Maintenance of existing facilities which replaces but does not increase the size or impact of the existing facility is permitted, if the impact area and length requirements above are observed.

Duration: Temporary impacts permitted by this certification shall be as short as practicable, but in no case more than 90 days, during the construction phase of the project. The construction phase commences with the first activity involving the movement of earth or the discharge of dredged or fill material (e.g., site grading). Site restoration activities for temporary impacts to waters of the state must be completed as soon as possible after completion of construction, and in no case shall conclude more than 30 days after of the completion of construction activities.

d. Permitting Restrictions

Stacking: For any project subject to this certification, the project may not receive more than one NWP 12.

Rivers and Harbor Act Section 10: Projects requiring a permit under section 10 of the federal Rivers and Harbors act are prohibited.

e. In-Waters Work Restrictions

Work Sites: Placement of work areas, including pull sites, laydown yards and staging areas, in waters of the state is prohibited.

Hydrology: Applicants excavating with any water of the state shall, upon completion of construction, restore hydrologic functions of the site to comport with the requirements of the applicable water quality control plan (Basin Plan)..

Construction activity shall not result in the draining of any water of the state, including wetlands. This may be accomplished through the use of clay blocks, bentonite, or other suitable material (as approved by the Regional Water Boards) to seal the trench.

Trenching: Trenching across streams with flowing water is prohibited.

Directional Drilling: Utility line activities involving directional drilling are prohibited to avoid potential impacts from the discharge of drilling fluids, compounds, or "muds" due to ground fractures (i.e., "frac-outs") to any waters of the state.

Overhead Crossings: Construction, replacement, or maintenance of overhead utility lines (e.g., telephone or electric lines) spanning any water of the state is permitted when such spans require no more than minor trimming of existing vegetation at the site. Any span which removes or substantially alters existing mature riparian trees is prohibited.

Hardscape: Installation of any new or expanded stream channel or bank armor, including: riprap; concrete channel liners; geotextile liners; in-stream armor over or surrounding a utility line or pipes; or, similar artificial structural components placed to prevent channel or bank erosion or movement is prohibited.

f. Construction Activity Restrictions

Topsoil: For any excavation, including utility line trenches, during construction, the top 6 to 12 inches of topsoil shall be removed and stockpiled separately. Following installation of the utility line(s), the topsoil shall be replaced and seeded with native vegetation.

Forested Wetlands: Land clearing of forested wetlands or riparian areas for installation or maintenance of utility lines is prohibited.

Roads: New road construction is prohibited. Maintenance of utility line access roads under this NWP shall be confined to the previously existing road prism. Grading of throughcut roads, including any road having a running surface lower than the surrounding terrain on both sides of the road, is prohibited.

Facilities: Construction or expansion of substations is prohibited. Construction of any new intake or outfall structure is prohibited. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or the shores thereof is prohibited.

15. NWP 36 - Boat Ramps: NWP 36 is certified for projects meeting all of the following requirements:

a) A waiver from the District Engineer allowing the project to exceed the 20 foot width or 50 cubic yard limits stated in NWP 36 shall disqualify the project or activity from this certification. Activities that proceed under NWP 36 with a waiver from the District Engineer are required to obtain an individual 401 water quality certification.

b) b. Boat ramps installed under this NWP may not excavate into banks to a depth greater than the depths of the material used to construct the ramp itself.

c) c. Any material excavated to prepare a site for placement of the permitted fill material must be properly disposed of in an upland area. The disposal area must be located at a sufficient distance away from flowing or standing water such that the excavated material does not erode or move in any way into any water of the state. The disposal area shall be identified in the required pre-construction notification.

d) d. No construction requiring the construction of cofferdams or other dewatering structures for the purpose of installing materials such as concrete ramps below existing water lines is permitted.

e) e. To prevent the release of uncured cement or cement components into water, use of concrete in areas where ramps may be submerged before the concrete is fully cured is prohibited.

f) f. Use of this certification of NWP 36 is prohibited in the Lake Tahoe Basin, Little Truckee or Truckee River watersheds.

16. Waivers by the Corps: Any waiver of the Corps' NWP conditions or regional conditions for a proposed project shall disqualify that project from enrollment under this certification.

17. Tahoe Basin: Any activity under this certification is prohibited if it occurs within the 100-year floodplain of the Little Truckee or Truckee River watersheds. Any such discharge is prohibited by the Water Quality Control Plan for the Lahontan Region.

NOTIFICATION REQUIREMENTS: Applicants are required to submit notification to the Regional Water Board and State Water Board as directed in Attachment A, *2012 Notification Procedures for Certified Nationwide Permits*. For all other NWPs, application for an individual certification is required, regardless of the Corps' PCN requirements.

B. DENIAL WITHOUT PREJUDICE:

Table B presents the remaining 37 NWPs for which State Water Board staff proposes denial of certification without prejudice. These NWPs are: 2, 3, 7, 8, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 27, 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50 and the new NWPs 51 and 52. These NWPs have a wide breadth and scope of activities such that their potential direct, indirect, and cumulative impacts could reasonably invalidate their exemption from CEQA. CWA Section 401 certification of projects authorized by these 37 NWPs will be considered on an individual, project-specific basis. Any of these 37 NWPs may be considered by the State Water Board for certification in the future.

TABLE B Nationwide Permits Denied Certification Without Prejudice

NWP No.	Nationwide Permit Description	NWP No.	Nationwide Permit Description
2	Structures in Artificial Canals	33	Temporary Construction, Access and Dewatering
3	Maintenance	34	Cranberry Production Operations
7	Outfall Structures and Associated Intake Structures	35	Maintenance Dredging of Existing Basins
8	Oil and Gas Structures on the Outer Continental Shelf	37	Emergency Watershed Protection and Rehabilitation
13	Bank Stabilization	38	Cleanup of Hazardous and Toxic Waste
14	Linear Transportation Projects	39	Commercial and Institutional Developments
15	U.S. Coast Guard Approved	40	Agricultural Activities
16	Return Water from Upland Contained Disposal Areas	41	Reshaping Existing Drainage Ditches
17	Hydropower Projects	42	Recreational Facilities
18	Minor Discharges	43	Stormwater Management Facilities
19	Minor Dredging	44	Mining Activities
21	Surface Coal Mining Activities	45	Repair of Uplands Damaged by Discrete Events
23	Approved Categorical Exclusions	46	Discharges in Ditches
24	Indian Tribe or State Administered Section 404 Programs	47	RESERVED - Not Applicable
25	Structural Discharges	48	Commercial Shellfish Aquaculture Activities
26	RESERVED – not applicable	49	Coal Remining Activities
27	Aquatic Habitat Restoration,	50	Underground Coal Mining Activities
29	Residential Developments	51	Land-Based Renewable Energy Generation Facilities.
30	Moist Soil Management for Wildlife	52	Water-Based Renewable Energy Generation Pilot Projects.
31	Maintenance of Existing Flood Control Facilities		

C. CEQA:

The state's certification of the Corps' NWPs is a discretionary action that is subject to the environmental review requirements of the California Environmental Quality Act (CEQA). (Pub. Resources Code, § 21000 et seq.) For the certification of the NWPs, the State Water Board is the public agency required to determine whether its issuance of a certification will result in a significant effect on the environment. "A significant effect on the environment" means a substantial adverse change in the physical conditions which exist in the area affected by a proposed project.

The CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) contain a listing of categories of projects which have been determined not to have a significant effect on the environment. (Pub. Resources Code, § 21084.) In order to complete the environmental review required to issue this certification within the Corps' mandated sixty-day review period, the State Water Board may only issue a conditional certification for those NWPs that clearly fit within one or more categorical exemptions.

The State Water Board finds that the NWPs authorized by this certification, when implemented in a manner consistent with the terms of the NWP and all conditions set forth herein, do not result in a significant effect on the environment. As described in Table A, each of the NWPs certified by the State Water Board qualifies for one or more categorical exemptions.

Additionally, these categorical exemptions do not apply when certain exceptions occur. (Cal. Code Regs., tit., 14, § 15300.2.) In cases where a project may fall under an exception to the CEQA categorical exemptions, the project is not eligible for coverage pursuant to this certification. In these cases, the applicant will need to apply for an individual water quality certification. Some of the CEQA exceptions are explicitly stated as a condition to this certification (e.g., Condition 10).

State and Regional Water Board staff shall verify that proposed projects under the 2012 NWPs are CEQA exempt by reviewing the information submitted in the applicant's notification. If it is determined that the proposed project activities are not exempt, then this certification shall not apply.

There are, however, four 2012 NWPs that do not require notification to the State or Regional Water Board:

1. Aids to Navigation;
4. Fish and Wildlife Harvesting, enhancement, and attraction devices and activities;
9. Structures in Fleeting and Anchorage areas; and,
10. Mooring Buoys.

The State Water Board finds that the applicant's notification information is not necessary to determine whether activities covered by any of these four NWPs qualify for the listed CEQA exemptions in Table A above.

The 2012 NWPs 1, 9 and 10 were reissued unmodified by the Corps. The routine placement or maintenance of navigational aids, buoys, moorings and structures in anchorage areas will not cause a significant environmental effect when implemented in accordance with the NWP and certification conditions. In addition, existing statutes and regulations governing those activities (e.g., the California Harbors and Navigation Code, the federal Rivers and Harbors Act, etc.)

ensure minimal environmental impacts from these activities. Therefore, notification is not needed to verify qualification for the CEQA exemption. The State Water Board finds that activities authorized by these three NWPs will not cause any significant environmental effect, including to "sensitive environments" or due to "unusual circumstances" (Cal. Code Regs., tit. 14, §15300.2, subds.(a) & (c).).

The 2012 NWP 4 was reissued unmodified by the Corps. The routine placement of devices such as crab pots and duck blinds, activities such as clam digging, and deployment of open water fish concentrators such as "sea kites" will not cause a significant environmental effect when implemented in accordance with the certification conditions. In addition, existing statutes and regulations governing those activities ensure minimal environmental impacts from those activities. Therefore, notification is not needed to verify qualification for the exemption. The State Water Board finds that the activities authorized by NWP 4 will not cause any significant environmental effect, including to "sensitive environments" or due to "unusual circumstances" (Cal. Code Regs., tit. 14, §15300.2, subds.(a) & (c).).

For those NWPs that are not being certified, Staff notes that CEQA only applies to a public agency's discretionary approval of projects. Consequently, the rejection or disapproval of a project is not subject to CEQA. (Pub. Resources Code, § 21080, subd. (b)(5).). Therefore, CEQA does not apply to any NWP not authorized pursuant to this certification.

Thomas Howard

Thomas Howard
Executive Director
State Water Resources Control Board

4/19/2012
Date

Attachments:
Attachment A: *2012 Notification Procedures for Certified Nationwide Permits*