STATE OF NEBRASKA

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John Moeschen
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U.S. Army Corps of Engineers
8901 South 154th Street
Omaha, NE 68138-3621

RE: Part III of the Federal Register (Vol. 77 Number 34, pp 10184-10290) announcing the reissuance of all the existing Nationwide Permits (NWPs), General Conditions and definitions, with some modifications.

Dear Mr. Moeschen:

On February 21, 2012, in Part III of the Federal Register (Vol. 77 FR 10184), the U.S. Army Corps of Engineers (Corps) announced the reissuance of all existing Nationwide Permits (NWPs), general conditions and definitions with some modifications. The Corps also issued two new NWPs, three new general conditions and three new definitions.

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 additions to the Clean Water Act (CWA) Section 404 program for compliance with State water quality standards (Title 117, Nebraska Administrative Code). The Nebraska Water Quality Certification is as follows:

A. Vegetated buffer strips shall not be acceptable as mitigation for wetland 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 Surface Water Quality Standards (Title 117), Chapter 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 water quality benefits, they are not the same benefits as wetlands, and counting upland buffers as replacement mitigation for wetland impacts would violate this clause.

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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 Surface Water Quality Standards (Title 117), Chapter 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, Chapter 5 §003.

D. Activities that result in the straightening and/or shortening of a stream segment shall require mitigation according to fluvial geomorphological principles. The design and implementation of the mitigation shall incorporate the parameters of pattern, profile and dimension such that erosion of bed and/or banks shall be prevented. Dimensions of the riparian buffers and a mix of riparian vegetation appropriate to the site's ecoregion shall be established and maintained so that the functions and values of the permanent riparian corridor will become self-maintaining within three to five growing seasons. Progress toward achieving the success criteria for the biological, chemical and physical integrity of the stream shall be monitored and reported annually to the Corps until the monitoring period is over. Contingency plans for actions necessary if the biological, chemical, or physical integrity criteria of the segment fail shall be submitted to the reviewing agencies along with the mitigation plan at the time of application review.

E. Nationwide Permits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 45, 46, 48, 49, and 50 are certified as written in the February 21, 2012 Federal Register.

F. Activities granted water quality certification under NWP 40 are limited to: the relocation of up to 300 linear feet of an existing serviceable drainage ditch constructed in waters of the United State; and construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agriculture purposes. All other activities under this NWP are denied water quality certification.

G. NWPs 12, 29, 39, 41, 42, 43, 44, 51, 52 and/or the certified activities under 40 shall not be applicable to Category I Eastern Saline Wetlands in Lancaster and Saunders counties. When any other 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 by the U.S. Environmental Protection Agency, Region VII, and the U.S. Army Corps of Engineers, Omaha District.

H. NWPs 12, 29, 39, 41, 42, 43, 44, 51, 52 and/or the certified activities under 40 shall not be applicable in the historical, traditional Rainwater Basin wetlands. These wetlands are 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.

I. There shall be compensatory mitigation for losses greater than 1/10-acre of wetland. 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 under this NWP shall not require mitigation but shall be removed in their entirety with the affected areas returned to their pre-existing elevation.

J. NWP 14: No more than 200 linear feet of fill for the roadway can occur in special aquatic sites, including wetlands. The length along each shoulder is to be considered in the total area impacted.

K. NWP 43: Mitigation for impacts under this Stormwater NWP must be located outside the stormwater detention facility.

L. NWP 44, 49, and/or 50: Applications for any mining activities designed such that water is returned to the stream or river must obtain a National Pollution Discharge Elimination System permit from Nebraska Department of Environment Quality 1200 N Street, Lincoln, NE 68509.

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

Sincerely,

Marty Link
Acting Administrator
Water Quality Division

cc: Carey Grell, Nebraska Game & Parks Commission
Eliodora Chamberlain, US Environmental Protection Agency
Lourdes Mena, US Fish & Wildlife Service