

**Response to Comments and Final Determinations on Public Notice
Section 401 Water Quality Certification (WQC) for
Certain 2012 Department of the Army (DA) Nationwide Permits (NWP)
File No. WQC0804
August 14, 2015**

On April 21, 2015, the Department of Health (DOH) issued and published a “NOTICE OF PROPOSED SECTION 401 WATER QUALITY CERTIFICATION BY THE HAWAII STATE DEPARTMENT OF HEALTH, File No. WQC0804 “DOCKET NO. WQC0804” in the *“Honolulu Star-Advertiser, The Maui News, West Hawaii Today, Hawaii Tribune-Herald, and The Garden Island.”* The public notice indicated that all written comments and requests received on time will be considered. The comment period ended on May 21, 2015. Comments were received from the State Department of Transportation (DOT), Highways Division (HWYS).

AECOS, Inc. submitted comments to the DOH Clean Water Branch (CWB) on May 22, 2015 through an e-mail. Although these comments were submitted after the 30-day comment period, responses have been provided below.

The following are responses provided by DOH-CWB in responding to all comments received.

Comments received from DOT-HWYS, Oahu District

“We respectfully submit the following comments on the proposed Section 401 Water Quality Certification for Certain 2012 Department of Army (DA) Nationwide Permits (NWP), File No. WQC 0804, dated April 21, 2015:

1. Section 4. Special Conditions, f. NWP 14 - Linear Transportation Projects, Item (1)

Item (1): Replacement structure required for any linear transportation project shall not exceed the existing structure foot print.

Comment: HDOT bridge replacement projects often exceed the foot print of the existing structure. Therefore, our bridge projects would not be eligible for coverage under NWP 14. Since most HDOT projects requiring a WQC are bridge replacement projects, we suggest to revise the special conditions in NWP 14 to ensure coverage under the blanket Section 401 WQC. Another suggestion is to ensure that bridge replacement projects are covered under a combination of other NWPs. HDOT bridge replacement projects often include hardening with grouted rubble paving and/or concrete lining of the up and downstream embankments. The blanket coverage should ensure that this type of work be covered under one or more of the NWPs.”

Response:

The determination of whether DOT’s proposed projects could be verified under one or more of the NWPs falls within the jurisdiction of the Regulatory Office of the Honolulu Engineering District, Pacific Ocean Division (POH) of the U.S. Army Corps of Engineers (COE), not DOH-CWB. The conditional blanket WQC

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certifies project related discharges to be verified by POH under each specified NWP. Cumulative impacts are required to be re-evaluated through the processing of an individual Section 401 WQC Application if multiple NWPs are to be used to verify a single and complete project.

POH's 2012 Nationwide Permit Honolulu District Regional Conditions (RC) contains additional restrictions and conditions to DA NWP 14. RC 7 (Bank Stabilization) requires that "[V]ertical walls and/or non-permeable rigid structures such as pre-cast concrete, concrete rubble masonry, and cast-in-place structures may not be used for bank stabilization authorized under NWPs 13 & 14." Based on RC 7, the bridge replacement project (described in Comment No. 1) that hardens the upstream and downstream embankments with grouted rubble paving and/or concrete lining may not qualify for coverage under DA NWP 14. As a result, a bridge replacement project of this type will not qualify for coverage under the conditional blanket WQC. **Note:** From previous Section 401 WQC application processing experiences, similar bridge construction projects with in-stream structure foot print modifications require additional review to address the potential adverse impacts to the affected stream section such as stream flow velocity, direction, downstream bank and/or bed erosion, etc. It should be emphasized that the conditional blanket WQC0804 is designed to expedite the processing of Federal Clean Water Act (CWA) mandated Section 401 WQC Application for projects that are ready-to-go with minimal or no impacts. It is the discharger's responsibility to ensure that the e-Permitting NWP Blanket WQC Notification Form contains all applicable information sufficient to address all project construction and operations related potential adverse impacts (such as short/long term; upstream/downstream; on land/in-water, etc.); all standard operational procedures (SOPs); and the contractors' inputs (means and methods). If the discharger cannot provide all of this information, it is recommended that they consider seeking WQC coverage through an individual Section 401 WQC application.

If a discharger wants to cover their bridge projects under a DA NWP and the DOH-CWB conditional blanket WQC, it is recommended that the discharger incorporates into the project design all DA NWP and DOH-CWB conditional blanket WQC requirements and conditions.

For your convenience, the following are some of the restrictions contained in DA 2012 – 2017 NWP's RC in the State of Hawaii.

- RC 1 - Exclusions - Item 2 (Kihei Wetlands) – NWP 14 “may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded

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- by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west.
- RC 1 - Exclusions – Item 4 (Anchialine pools, montane bogs, natural freshwater lakes and saline lakes) – NWP 14 “may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes.”
 - RC 1 - Exclusions - Item 7 (Stream Modification) stated that NWP 14 “may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States.”
 - RC 4 - Length Limitation - requires that “Any discharge of dredged or fill material in any stream, including intermittent and ephemeral streams, may not exceed 200 linear feet if authorized by NWPs 12, 13 & 14.
 - RC 6 - Road Crossings – requires that “Use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed, for any activity authorized under the NWPs 3 & 14.”
 - RC 7 - Bank Stabilization – requires that “[V]ertical walls and/or non-permeable rigid structures such as pre-cast concrete, concrete rubble masonry, and cast-in-place structures may not be used for bank stabilization authorized under NWPs 13 & 14.”
 - RC 9 - Runways and Taxiways requires that “NWP 14 may not be used to authorize runways or taxiways.”

During a June 3, 2015 telephone conference amongst DOT-HWYS, POH, and DOH-CWB, DOT indicated that bridge width widening and stream channel width widening are frequently required to meet current bridge standards to address stream hydraulic conditions, and upstream and downstream abutments extension are frequently needed to protect the improved bridge. DOT also indicated that the extension/expansion of these structures could be constructed above the ordinary high water mark (OHWM) or outside the stream channel and outside POH’s DA NWP jurisdiction. DOH-CWB clarified that WQC0804, Condition 4.f.(1) was intended for only the existing structure foot print within State waters.

For clarification purposes, Condition 4.f.(1) has been revised to:

(1) Replacement structure required for any linear transportation project shall not exceed the existing structure foot print **within State waters**.

2. Section 5. Notification Requirements, Item b.(8)

“Item b.(8): Specification of the during construction monitoring frequency based on the duration of the in-water work and when BMPs will be changed/moved as

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the in-water work is performed. The minimum during construction monitoring frequency is as follows:

Comment: Are the minimum during construction monitoring frequencies listed intended to be consistent with the monitoring frequencies shown in the General Monitoring Guideline for Section 401 Water Quality Certification Projects table provided in the Guidelines for CWB-WQC Application? If so, please check for consistency.”

Response: Yes, the minimum during construction monitoring frequencies listed were intended to be consistent with the existing Section 401 WQC monitoring guidelines. They have also been checked for consistency.

Comments received from AECOS, Inc.

3. “AECOS Inc. is an environmental consulting firm based in Hawaii. Over the last 30 years, one of our primary services has been to assist clients in obtaining and complying with Clean Water Act (CWA) Section 401 Water Quality Certifications (WQCs). We feel that the proposed blanket WQC for seven CWA Section 404 Nationwide Permits (NWPs) published on April 21, 2015 is inadequate as proposed, though a very big step in the right direction, especially in regard to time limits.

Delays in processing 401 WQC applications have resulted in large losses of time and money for many project owners, and in some cases, environmental degradation has occurred while applicants wait for their applications to be reviewed. Often we advise our clients to design their project in such a way that they avoid conducting any work at all within stat (*sic*) waters because the process to obtain a WQC is too long and burdensome – even if it makes ecological and economic sense to design he (*sic*) project such that it is within state waters.”

Response:

As defined in Hawaii Administrative Rules (HAR), §11-54-9.1, “Water quality certification” or “certification” means a statement which asserts that a proposed discharge resulting from an activity will not violate applicable water quality standards and the applicable provisions of sections 301, 302, 303, 306 and 307 of the CWA.

CWA, Section 401(a)(1) requires that “[A]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from

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the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate ...” “... to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request ...” The State shall certify that “...any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this Act ...” (Emphasis added)

CWA, Section 301(a) requires that “SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.” Basically, complying with the permit conditions contained in DA NWPs issued under CWA, Section 404 is only one of the key elements that enables the DOH-CWB to continue the processing and consideration of an Application for a Section 401 WQC for project related water pollutant discharges. CWA, Section 404(b)(1) guidelines shall be used to process DA CWA, Section 404 NWPs to place dredged or fill material into State waters. Depending on the project location, purposes of placing dredged or fill material in State waters (including “wetlands”), and the potential adverse impacts to State waters (i.e., impacts to existing uses, beneficial uses etc.), not all DA CWA, Section 404 NWPs authorized projects will comply with State water quality standards (WQS, HAR, Chapter 11-54) established pursuant to CWA, Section 303 and Hawaii Revised Statutes (HRS), §342D-5. Compliance with NWPs conditions does not necessarily mean that the project related discharges will comply with State WQS. “Avoidance” is the key element under the CWA, 404(b)(1) guidelines. During the project design, applicants are required to first consider the alternatives that do not require placement of dredged or fill material into State waters. Placement of dredged or fill material will only be permitted when the “avoidance” alternative is not available or infeasible and the project has incorporated measures to “minimize and mitigate” the potential adverse impacts.

Besides authorization under CWA, Section 404, DA 2012 – 2017 NWPs also authorizes those projects/activities located within tidally influenced waters under the Rivers and Harbors Act of 1899 (RHA) (33 U.S.C. 403.). Section 10 of the RHA requires “[T]hat the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other

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water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.” Project activities authorized under RHA, Section 10 do not include the placement of dredged or fill material or any other types of water pollutants.

Conditional blanket Section 401 WQCs were previously issued by the DOH-CWB for 16 selected DA 1997 - 2002 NWPs (File No. WQC0335) and 15 selected DA 2002 – 2007 NWPs (File No. WQC0543), respectively, for projects authorized under CWA, Section 404 only.

The processing of an Application for a Section 401 WQC for DA 2012 – 2017 NWPs was previously terminated due to the following: 1) Information required to demonstrate that NWPs comply with Federal (40 CFR 131.12) and State (HAR, §11-54-1.1) anti-degradation policy requirements; 2) Applicable monitoring and assessment plan (AMAP) requirements required to demonstrate compliance with HRS, §342D-53 and HAR, Chapter 11-54; Hawaii’s “no discharge” policy (HAR, §11-54-5); and 3) The State’s “no new industrial discharges” and “no new sewerage discharges” in estuaries and embayments (HAR, §11-54-3) and other applicable requirements were not properly addressed. On February 24, 2015, the ACOE submitted a letter to DOH-CWB requesting re-initiation processing of the terminated Section 401 WQC Application for seven (7) selected DA 2012 – 2017 NWPs.

WQC0804 incorporates best management practices (BMPs), AMAP requirements, as well as other applicable WQS requirements, that are designed to supplement the requirements that were missing from the seven (7) NWPs and the DA 2012 – 2017 NWP’s RC in the State of Hawaii. WQC0804 is applicable to most projects eligible to be verified by POH under the seven (7) selected NWPs that will either be authorized under CWA, Section 404 and/or RHA, Section 10, or both.

Note: It should be emphasized that the conditional blanket WQC0804 is designed to expedite the processing of the CWA mandated Section 401 WQC Application for projects that are ready-to-go with minimal or no adverse impacts. WQC0804 requires DOH-CWB to review the notification information, provide comments (if any), and/or render initial blanket WQC coverage verification

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determination within 30 calendar days and the owner of the discharge to respond to DOH-CWB comments and submit the complete e-Permitting NWP Blanket WQC Notification Form within 30 calendar days. It is the discharger’s responsibility to ensure that the e-Permitting NWP Blanket WQC Notification Form contains all applicable information sufficient to address all project construction and operations related potential adverse impacts (such as short/long term; upstream/downstream; on land/in-water, etc.); all standard operational procedures (SOPs); and the contractors’ inputs (means and methods). The owner of the discharge may contact the DOH-CWB if they have questions on the completeness of their e-Permitting NWP Blanket WQC Notification Form. If the discharger cannot provide all of this information, it is recommended that they consider seeking WQC coverage through an individual Section 401 WQC application.

4. “Pg. 2 item 2.a and 2.b(1) – Only seven of the 40 Nationwide permits are covered under this proposed WQC. Why only seven? There seem to be more that should be covered. Is there a document with the rationale on why these were chosen?”

Response:

The seven (7) selected NWPs are the most frequently used by ACOE in the State of Hawaii. Also, many of the potential adverse impacts associated with Contractors’ means and methods for work authorized under these seven (7) NWPs have already been disclosed.

During an October 28, 2011 presentation, the COE indicated that approximately 85% of NWP work authorizations under CWA, Section 404 over the past five (5) years were authorized under the selected seven (7) NWPs. In a February 24, 2015 letter, the COE provided the following update which shows the NWP authorizations verified between fiscal years 2010 and 2014 under the selected seven (7) NWPs:

<u>NWP #</u>	<u>404</u>	<u>404/10</u>	<u>Sec 10 only</u>	<u>Total</u>
3	6	13	70	89
5			28	28
6		2	20	22
12	3		20	23
13	5	2		7
14	14	5	5	24

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33	2	1		3
Total:	30	23	143	196

As shown in the table above, there was a total of 196 NWP authorizations under the selected seven (7) NWPs between fiscal years 2010 and 2014. COE has indicated that there was a total of 290 authorizations for all NWPs during this time period. Based on this data, the seven (7) selected NWPs would have potentially covered approximately 68% ($196/290 \times 100 = 68\%$) of the NWP authorization verifications issued by ACOE in the past five (5) years (2010 – 2014).

5. “Pg. 3 item 2.b(2) – what is the rationale for excluding “after the fact” NWPs?”

Response: A Section 401 WQC certifies that a proposed discharge activity (as described and certified in the owner of the discharge’s Section 401 WQC application) will not violate applicable Water Quality Standards (WQS) in HAR, Chapter 11-54 and the applicable provisions of Sections 301, 302, 303, 306, and 307 of the CWA. In most “after the fact” situations, a Section 401 WQC should never be issued as the discharge activity has already violated WQS and the CWA. If there are remaining portions of the “after the fact” activity or portions that have not commenced yet, in depth evaluation under an individual Section 401 WQC application is needed to ensure compliance with HAR, § 11-54-9.1.02(f) which requires: “No water quality certification or waiver shall be issued which allows the retroactive permitting or licensing of projects or activities before the date the water quality certification or waiver was issued. A water quality certification or waiver may be issued if the following criteria are met: (1) The project or activity is not the subject of an ongoing enforcement action by the federal, state or county government; (2) Any adverse impacts upon water quality resulting from the project or activity have been mitigated to the maximum extent feasible; and (3) The project or activity will not cause or contribute to any lack of attainment of water quality standards set forth in this chapter.”

6. ‘Pg. 3 item 2.b(5) – Applicants will be excluded from obtaining this 401 WQC “When the Director finds that it is more appropriate to evaluate the project impacts under an individual application for a Section 401 WQC.” If an applicant follows all pertinent guidelines for the 401 WQC and the NWP then 401 WQC 0804 should apply. How is “more appropriate” defined? Conditions and guidance are available, if a client meets NWP conditions and 401 WQC conditions and guidance, why would this “more appropriate” clause apply?’

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Please also see response to Comment No. 3 above.

Projects covered under the selected NWPs do not necessarily meet State WQS requirements in properly addressing public interests as required by HAR, § 11-54-1.1 and 11-54-9.1.03. Each single and complete project to be verified under DA NWP is not required to go through a public interest review process. The public participation process does not apply to those projects that qualify for coverage authorized under DOH-CWB's conditional blanket WQC (File No. WQC0804). For those projects that impact the public interest due to water quality issues, coverage authorized under the conditional blanket Section 401 WQC shall not apply. Instead the public participation provision as required in HAR, §11-54-9.1.03 shall be properly conducted.

However, public participation for any project related discharges is required to comply with the State's "General policy of water quality antidegradation" requirements as specified in HAR, §11-4-1.1(b), which states that:

(b) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the director finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the director shall assure water quality adequate to protect existing uses fully. Further, the director shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control." (Emphasis added)

7. "Pg. 4 item 2.b(6) – If conditions under the covered NWP are followed, the US Army Corps of Engineers (USACE), has already determined that there will be minimal individual and cumulative adverse effects on the environment. Therefore, why would these exclusions be necessary?"

Response:

Please see response to Comment No. 3 above.

8. "Pg. 4 item 2.d – If conditions under the covered NWP are followed, USACE, has already determined that there will be minimal individual and cumulative adverse

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effects on the environment. Therefore, why would these exclusions be necessary?”

Response:

Please see response to Comment No. 3 above.

9. “Pg. 5 item 5.3(1) – Is 30 days sufficient time for DOH CWB to review the application and provide detailed comments that clearly indicate why an application may not be complete? A 45-day time period may be more realistic or DOH CWB may need to hire more staff in order to process applications within 30 days. Applications in process now are taking an inordinate amount (6 to 12 months or longer) of time prior to initial review by DOH CWB and if deemed incomplete, several resubmissions of revised documents are required taking up to one to three years to complete the processing of the application. DOH CWB comments on why a project application is incomplete must be detailed and clearly stated in order for an applicant to have reasonable assurance that their responses will result in a complete application upon resubmission.”

Response:

Yes, 30 days would be sufficient time if the notification contains complete information which supports the project and project related discharges for a coverage authorized under WQC0804. Individual Section 401 WQC Application processing have taken a long time. Many times, this was due to applicants submitting incomplete information, not knowing the final project design, submitting information that conflicts with the federal agency application, submitting the application without knowing their WQS requirements, and/or not knowing how certain portions of the discharge activity will be conducted. This has caused backlogs in the overall application processing queue, which unfortunately, is always blamed on DOH-CWB.

This blanket Section 401 WQC (WQC0804) is only meant for projects that are ready-to-go and designed to comply with the WQC0804 conditions. These types of projects allow for the submittal of a complete NWP Blanket WQC Notification Form which will make the 30 day turn-around time very possible. **Note:** DOH-CWB will enforce WQC0804 Condition No. 5.d(4) which will terminate the processing of the NWP Blanket WQC Notification Form if the owner of the discharge fails to properly address DOH-CWB comments by the response deadline.

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10. “Pg. 7 item 2.e(5) – “Cannot be modified.” Does this mean that BMPs or construction methods cannot be modified? The nature of construction, particularly when working in variable or energetic environments such as the ocean, is that things will be different in the field than on paper. Since a new individual application would start the process over, unreasonable delays to projects that are underway or soon to be underway could occur. This restriction could result in the contractor continuing under less than ideal conditions, rather than making effective improvements. This restriction seems to make this application meaningless.”

Response: It means any information submitted on the NWP Blanket WQC Notification Form cannot be revised once DOH-CWB concurs that the individual verification for that project is covered under WQC0804. A Section 401 WQC certifies that a proposed discharge activity (as described and certified in the owner of the discharge’s Section 401 WQC application) will not violate applicable WQS in HAR, Chapter 11-54 and the applicable provisions of Sections 301, 302, 303, 306, and 307 of the CWA. After a Section 401 WQC is issued or once the individual verification (for a blanket Section 401 WQC) is made, any changes to the information provided by the owner of the discharge invalidates the Section 401 WQC coverage. In the past, many owners’ of discharges have provided information in Section 401 WQC applications before the final design was completed, DOH-CWB issued the Section 401 WQC, and the owners’ of these discharges asked for modifications to the information submitted. Every time a modification is made, DOH-CWB needs to reevaluate the entire process. This has caused many delays and backlogs to the Section 401 WQC processing queue, which unfortunately, has always been blamed on the DOH-CWB. DOH-CWB is no longer allowing modifications as this is unfair to other applicants. As mentioned in the response to Comment No. 9 above, this blanket Section 401 WQC (WQC0804) is only meant for projects that are ready-to-go and designed to comply with the WQC0804 conditions. DOH-CWB highly recommends that owners’ of the discharges do not submit the NWP Blanket WQC Notification Form if they do not know the final design, construction, and/or operation of the activity/facility.

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11. 'Pg. 8 item 3.a – “The owner of the discharge shall completely isolate and confine all in water work areas throughout... the entire volume of water in the in-water work area needs to be isolated and confined.” This would eliminate most NW permitted projects from obtaining 401 WQC 0804. Use of coffer dams to isolate and contain could cause more environmental degradation than the project itself. BMPs can be used to ensure that the project will have minimal individual or cumulative adverse effects, but complete isolation of work areas may be impossible due to groundwater influence, tidal influence, and stream and ocean currents.'

Response:

The purpose for the complete isolation and confinement requirement is to ensure compliance with HAR 11-54-1.1 antidegradation requirements. If the owner of the discharge cannot completely isolate and confine all in water work areas, more in depth evaluation is needed through the processing of an individual Section 401 WQC. **Note:** Individual Section 401 WQCs already require complete isolation and confinement. In the event complete isolation and confinement is not possible, social and economic evaluation of the discharge activity is permissible subject to a public comment period.

12. “Pg. 9 item 3.g – Some streams, ditches, and gulches do not have adequate habitat upstream from the project for native amphidromous animals (i.e., the stream/ditch/gulch is a biological sink for these animals). In water bodies such as these, it does not make ecological sense to not allow the entire channel to be blocked off.”

Response:

Blocking the entire channel potentially creates a flooding hazard. DOH-CWB will not certify any project/activity that intentionally creates a hazardous condition.

13. 'Page 9 item 3.j – If DOH CWB “instructs” the applicant to modify sampling locations, frequencies and/or parameters, does this contradict item 2.e(5) “cannot modify the project”?’

Response:

No. In rare instances when the DOH-CWB instructs applicants to modify their monitoring, this is for compliance issues. This is not a project modification.

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14. “Pg. 18 item 5.b(9) – MULTI INCREMENT®, (MI), an Envirostat, Inc. registered trademarked sampling method, is being required. Will other sampling methods – i.e. probes collecting timed data randomly throughout DUs, multiple samples collected from DUs and composited into one DU sample (similar to incremental soil sample collection), use of peristaltic pumps, and other methods – be allowed? Are there data showing that MI sampling provides superior quality data compared to traditional or other incremental sampling methods?”

Response:

Yes, other untested sampling methods may be considered, but for individual WQC Applications only, and on a case-by-case basis. The thirty day time limit does not allow for sufficient time to evaluate new methods.

Multi increment sampling incorporates many disciplines into the final sampling plan design and evaluation. This includes development of project objectives, Sampling Theory, sampling tools, quality control and data analysis. This combination generates representative data that directly addresses the project objectives.

Comparatively, “traditional” (e.g. grab) samples are not associated with decision units, have no statistical basis, and have no pre-established objectives. They fail the “representative” test before a single sample is collected. Much of the quality of the data lies in the design of the method, or lack thereof.

The intent of the proposed conditional Section 401 WQCs is to provide a streamlined path for expediting WQC Applications for the seven (7) selected DA 2012 – 2017 NWPs. Multi increment sampling is being accepted as a part of the expedited process because it has demonstrated an ability to produce representative samples. Applicants are still free to apply for an individual WQC if other sampling protocols must be used. Applicants should be prepared to defend the rigorousness of their proposed protocols (e.g. comparability and representativeness). The expedited Section 401 WQC Application process for the selected NWPs has a very stringent turn-around time, and is not the proper place for experimentation.

15. ‘Page 20 item 5.d(4) – If the applicant is given only 30 days to “properly” address DOH CWB comments, then will comments clearly specify what is necessary so the applicant will be able to respond within 30 days with a complete application? Will the applicant be able to meet or correspond with DOH CWB asking for clarification within the 30 day period with enough time to respond within the

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30 days? Will an extension of time be allowed if DOH CWB is not able to meet or respond to applicants request for clarification in a timely manner?’

Response:

Please see the last two (2) sentences of the “Note” contained in response to Comment No. 3. Yes, if the DOH-CWB has comments on a NWP Blanket WQC Notification Form, specific comments will be provided to the owner of the discharge. Whether or not the owner of the discharge can meet the 30 day deadline to respond is up to them. No extensions will be allowed. DOH-CWB will enforce WQC0804 Condition No. 5.d(4) which will terminate the processing of the NWP Blanket WQC Notification Form if the owner of the discharge fails to properly address DOH-CWB comments by the response deadline.

16. “Pg. 22 item 6.c(4) – NWPs are issued for projects that have already been determined that there will be minimal individual and cumulative adverse effects on the environment when conducted in the manner prescribed by the conditions in the NWP. Other than downstream erosion monitoring in streams, if there will be minimal impacts, why would additional post construction monitoring be required?”

Response:

The minimal individual and cumulative impacts by the NWPs are for the dredge and fill material during construction. The purpose of the post construction requirements is to determine the long term/operational water quality impacts, including impacts on existing and designated uses. Post construction monitoring is used to show that a site was returned to pre-construction conditions, stream bank hardening is not causing long term downstream erosion, and the effectiveness/impacts of shoreline hardening through beach profile monitoring. Please also see the response to Comment No. 3 above.

17. “It is necessary to streamline the 401 WQC process and this is a step forward, though still too restrictive for permitted NW qualified projects that have minimal individual and cumulative impacts.”

Response:

Please see responses to Comments 3 through 16 above.

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Clarification

18. To clarify Condition 4.a(7) requirements, the Final WQC0804 has been revised as follows:
“(7) The owner of the discharge must have evidence that the structure(s) or fill(s) to be repaired or rehabilitated was previously authorized by the USACE and the structure(s) or fill(s) is currently serviceable, unless the activity occurred before the dates identified in 33 CFR 330.3.”

19. To clarify that BMP and construction drawings are required to be submitted, Condition 5.b.(8) of the Final WQC0804 was added to the notification requirements:
“BMPs and construction drawings for activities/discharges covered under this Section 401 WQC.”

20. To clarify the violation of HAR 11-54-4(a) requirements, Condition 3.n of the Final WQC0804 was revised to:
“Ensure that the activity will not result in non-compliance or violations to the applicable State WQS. During construction Impact Station water quality parameter levels that are greater than during construction upstream/updrift water quality parameter levels constitute a non-compliance of HAR, Subsection 11-54-4(a) requirements that prohibits substances attributable to domestic, industrial, or other controllable sources of pollutants, which includes but is not limited to materials that will settle to form objectionable sludge or bottom deposits; visible floating debris, oil, grease, scum, other floating materials; and objectionable color or turbidity plumes.”

21. To clarify the contractor and subcontractor record keeping requirement, Condition 3.u of the Final WQC0804 was revised to:
“Maintain and require all of their contractor(s) and the subcontractor(s), that are performing work covered under this Section 401 WQC, to maintain at the construction site or in the nearby field office, a copy of this letter, all Notification and Compliance Reporting Requirements in Item Nos. 5 and 6 below, and all records demonstrating that every requirement of this Section 401 WQC has been complied with.”

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