

## RESPONSE TO 2020 USACE NWP CERTIFICATION REQUESTS

**Date:** December 15, 2020

**Permits Affected:** 2020 Army Corps of Engineers Nationwide Permits

**Applicant:** Department of Army, Corps of Engineers  
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### CERTIFICATION DECISIONS:

#### I. Background

The Dry Creek Rancheria Band of Pomo Indians (“Dry Creek”) obtained treatment as a state status under the Clean Water Act (“CWA”) for purposes of Section 401 water quality certification on October 17, 2011. Dry Creek has a responsibility to exercise this authority to protect and preserve waters within its jurisdiction for the sake and use of its members. The quality of waters and aquatic habitat are particularly significant to Dry Creek because of the central importance of on-reservation streams as homeland-sustaining resources.<sup>1</sup>

On September 15, 2020, the United States Army Corps of Engineers (“Army Corps”) published notice of its proposal to reissue the Clean Water Act Nationwide Permits (“NWP”) with certain modifications. 85 Fed. Reg. 57298. On October 16, 2020, James Mazza, Chief of the Army Corps’ Regulatory Division wrote to Dry Creek requesting water quality certification of “those NWP that may result in a discharge in waters of the United States on Dry Creek Rancheria,” within 60 days. Dry Creek requested additional time to review the proposed NPWs, but Chief Mazza promptly denied the request without explanation on December 4, 2020.

The 60-day time period established by the Army Corps for review of the NWP is significantly shorter than the Army Corps’ usual practice.<sup>2</sup> The Army Corps has not yet completed

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<sup>1</sup>See Letter from John Terrell, Special Indian Agent, to Cato Sells, Commission of Indian Affairs (1915), attachment to Dry Creek Articles of Association at 6 (recognizing importance of on-reservation streams for establishing tribal homeland).

<sup>2</sup>In issuing the 2017 NWP, the Corps first published its draft proposal on June 1, 2016, allowed time for public comment, issued the final proposal on January 6, 2017, and requested certification from tribes and states by March 19, 2017 for a total review time of over eight months. 81 Fed. Reg. 35186, 35189 (June 1, 2016); 82 Fed. Reg. 1860, 1863 (Jan. 6, 2017). In issuing the 2012 NWP, the Corps first issued its draft proposal on February 16, 2011, allowed time for public comment, issued the final proposal on February 21, 2012, and requested certification from tribes and states by March 19, 2012 for a total review time of over fourteen months. 76 Fed. Reg. 9174 (Feb. 16, 2011); 77 Fed. Reg. 10184, 10184 (Feb. 21, 2012). The Corps justified its 60-day time period for action on the 2020 NWP by referring to 33 C.F.R. § 330.4(c)(6) and 325.2(b)(1)(ii), 85 Fed. Reg. 57298, 57305 (Sept. 15, 2020); however, these regulations appear to contemplate individual permit requests from single applicants for specific permits, not NWP. The Corps also claimed that the 60-day time period is consistent with the EPA’s Clean Water Act Section 401 Rule,

its analysis of or incorporated any public comments to the September 15 draft proposal and has not issued a final proposal.

The expedited review period has deprived Dry Creek of the opportunity for full investigation into the NWP's and their likely impacts to Dry Creek's jurisdictional waters, for consultation with neighboring jurisdictions, and to receive meaningful input from its members. The expedited procedure employed by the Army Corps is also inconsistent with the federal government's unique trust relationship with Indian tribes, under which the federal government must work with tribes on a government-to-government basis to meaningfully address tribes' concerns relating to tribal resources. *See* U.S. Army Corps of Engineers Tribal Consultation Policy, § 5(b), (c); Executive Order 13175, § 2(b). Executive Order 13175 requires each federal agency to "ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." *Id.* at § 5(a). In implementing this requirement, the Army Corps issued its Tribal Consultation Policy which explicitly provides, "potentially affected Tribes, as determined by the Corps, including Tribes whose aboriginal territories extend to the lands where an activity would occur, will be contacted by letter, telephone or e-mail sufficiently early to allow a timely review of the proposed action." *Id.* at § 5(d)(1). Moreover, the Consultation Policy requires the Army Corps to "ensure it addresses Tribal concerns regarding protected tribal resources" and "protect and allow access to protected tribal resources under USACE jurisdiction to the extent practicable." *Id.* at § 5(b)(3), (4). To that end, the Corps must ensure that tribes whose tribal resources may be affected by a particular activity "are contacted and their comments taken into consideration." *Id.* at § 5(d)(4). None of this has occurred with respect to the present certification request.

## **II. Permitting Decisions**

### **A. Permits Certified**

Dry Creek certifies the following NWP's: 5, 6, 13, 20, 22, 24, 27, 30, 32, 37, 38.

Dry Creek has determined that discharges from the foregoing proposed permits will comply with water quality requirements.

### **B. Permits Denied**

Dry Creek denies certification for the following NWP's: 3, 4, 7, 12, 14, 16, 18, 19, 21, 23, 25, 29, 31, 33, 34, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, C, D

### **C. Bases for Denial**

Dry Creek denies certification for the NWP's identified in subsection (B) above on the basis of insufficient information pursuant to 40 CFR § 121.7(e)(2)(iii). In order to take certification action, Dry Creek would require additional project-specific information that Dry Creek was unable to obtain in the expedited time period provided by the Army Corps with respect to this certification

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which merely states that certification must be provided within a "reasonable period of time," not to exceed one year. 40 C.F.R. § 121.6(a).

request. Such information includes: the location of activities, the waters of the United States potentially affected by such activities, proposed mitigation measures, proposed best management practices, and proposed restoration plans.

In the event Dry Creek's denial due to insufficient information is not effective for any reason, Dry Creek denies certification for the NWP's identified in subsection (B) above on the basis of the specific water quality requirements and explanatory statements provided in Appendix A.

**Dry Creek Rancheria Band of Pomo Indians:**

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**APPENDIX A**

Denied NWP	Water Quality Requirements	Explanation
3, 18, 19, 25, 29, 31, 33, 41, 42, 43, 45, 46, C, D	Dry Creek Rancheria Water Quality Standards (“WQS”), §§ VI (e), (g), (i), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (H) & (I), 6(A) & (B), 7	Discharges that could be authorized under these NWPs will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable physical and hydrological conditions, creating unacceptable levels of suspended and floating materials, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
4	Dry Creek Rancheria WQS, §§ VI (i), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§ 6(A) & (B), 7	Discharges that could be authorized under this NWP will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by materially interfering with current contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs due to physical processes and adverse impacts to substrate.
7, 16, 23	Dry Creek Rancheria WQS, §§ VI (a), (b), (e), (g), (h), (i), (j), (n), (o), (p), (q), (s), & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (F), (G), (H), (I), (L)	Discharges that could be authorized under these NWPs will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable levels of suspended and floating materials, toxicity, pesticides, biostimulatory substances, bacteria, coliform, oil and grease, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational

	& (N), 6(A) & (B), 7	resident species, and impairing the biological community as it naturally occurs.
12, 50, 51	Dry Creek Rancheria WQS, §§ VI (e), (g), (h), (i), (n), (o), (p), (q), (s) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (F), (H), (I) & (N), 6(A) & (B), 7	Discharges that could be authorized under these NWP's will foreseeably result in impermissible degradation to the unnamed stream within the Tribe's jurisdiction, commonly known as "Rancheria Creek," and other surface waters within the Tribe's jurisdiction by creating unacceptable physical and hydrological conditions, creating unacceptable levels of suspended and floating materials, oil and grease, toxicity, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
14, 39	Dry Creek Rancheria WQS, §§ VI (e), (g), (h), (i), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (F), (H) & (I), 6(A) & (B), 7	Discharges that could be authorized under these NWP's will foreseeably result in impermissible degradation to the unnamed stream within the Tribe's jurisdiction, commonly known as "Rancheria Creek," and other surface waters within the Tribe's jurisdiction by creating unacceptable physical and hydrological conditions, creating unacceptable levels of suspended and floating materials, oil and grease, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
21, 44, 49	Dry Creek Rancheria WQS, §§ VI (e), (g), (i), (n), (o), (p), (q), (s) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C),	Discharges that could be authorized under these NWP's will foreseeably result in impermissible degradation to the unnamed stream within the Tribe's jurisdiction, commonly known as "Rancheria Creek," and other surface waters within the Tribe's jurisdiction by creating unacceptable physical and hydrological conditions, creating unacceptable levels of suspended and floating materials, toxicity, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish

	(D), (E), (H), (I) & (N), 6(A) & (B), 7	spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
34	Dry Creek Rancheria WQS, §§ VI (a), (b), (e), (g), (i), (j), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (G), (H), (I) & (L), 6(A) & (B), 7	Discharges that could be authorized under this NWP will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable levels of suspended and floating materials, pesticides, biostimulatory substances, bacteria, coliform, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
40	Dry Creek Rancheria WQS, §§ VI (a), (b), (e), (f), (g), (i), (j), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (G), (H), (I), (K) & (L), 6(A) & (B), 7	Discharges that could be authorized under this NWP will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable levels of suspended and floating materials, pesticides, dissolved oxygen, biostimulatory substances, bacteria, coliform, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.