



**DENR**  
SOUTH DAKOTA

**DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES**

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December 14, 2020

Steven Naylor  
US Army Corps of Engineers  
South Dakota Regulatory Office  
28563 Powerhouse Road, Room 118  
Pierre, SD 57501

RE: 2020 Renewal Section 404 Nationwide Permits  
South Dakota 401 Water Quality Certification

Dear Mr. Naylor:

The South Dakota Department of Environment and Natural Resources (SD DENR) has reviewed the request for water quality certification under Section 401 of the Clean Water Act regarding the 2020 reissuance of the US Army Corps of Engineers' Nationwide Permits. Section 401 of the Clean Water Act requires this review before a 404 permit is granted.

SD DENR is granting water quality certification (401) for all Nationwide Permits **except** Nationwide Permit #12 (Utility Line Activities), Nationwide Permit #16 (Return Water From Upland Contained Disposal Areas), Nationwide Permit #21 (Surface Coal Mining Activities), Nationwide Permit #27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities), Nationwide Permit #29 (Residential Developments), Nationwide Permit #39 (Commercial and Institutional Developments), Nationwide Permit #40 (Agricultural Activities), Nationwide Permit #42 (Recreational Facilities), Nationwide Permit #43 (Stormwater Management Facilities), Nationwide #44 (Mining Activities), Nationwide Permit #50 (Underground Coal Mining Activities), Nationwide Permit #51 (Land-Based Renewable Energy Generation Facilities), and Nationwide Permit #52 (Water-Based Renewable Energy Generation Pilot Projects).

SD DENR will be granting water quality certification for Nationwide Permit #12 with conditions. SD DENR prohibits the Typical Open Cut Wet Crossing Method (flowing waterbody) in South Dakota waterbodies that have flowing water OR in waters specifically listed in Administrative Rules of South Dakota (ARSD) 74:51:02 or 74:51:03. Other crossing method alternatives include the Dry Flume Method, Dry Dam and Pump Method, Horizontal Directional Drill, or Horizontal Bore. Any other methods not expressly listed must receive prior written approval. The Typical Open Cut Wet Crossing Method consists of digging a trench through the waterbody. This method could cause high sediment suspension in the water body and result in high sediment transport during the digging process, while the trench is stabilizing in the waterbody, and when the trench is backfilled and the pipeline is buried. SD DENR is prohibiting this crossing method because we cannot certify that water quality will be protected if that crossing method is used. This condition is required to ensure compliance with surface water quality standards including ARSD 74:51:01:06; 74:51:01:12, and 74:51:01:45-49; and South Dakota Codified Laws (SDCL) 34A-2-10 and 34A-2-11.

SD DENR will be granting water quality certification for Nationwide Permit #16 with conditions. The project proponent must properly install, operate, and maintain sediment and erosion controls surrounding all dredged disposal areas. Best management practices must be in place to ensure that return water does not violate any surface water quality standards under ARSD 74:51:01-03. The return water shall not contain toxic pollutants in toxic amounts (ARSD 74:51:01:55), shall not cause a sheen or film on the receiving water (ARSD 74:51:01:10); shall not contain visible pollutants (74:51:01:06) , shall not contain sediment in excess of state water quality standards, (74:51:01:45-49), and shall not impact the biological integrity of the receiving waters (ARSD 74:51:01:12). These conditions are collectively required to ensure compliance with surface water quality standards and are supported under ARSD 74:51:01 and SDCL 34A-2-10, 34A-2-11, and 34A-2-21.

SD DENR is granting water quality certification for Nationwide Permit #27 with conditions. Under ARSD 74:51:01.60, department approval is required on water resource enhancement or restoration projects. In some cases, a public notice is required by ARSD 74:51:01:60 at least 10 days before the project begins to inform the public of any pesticides that will be used. The applicant must submit the required information detailed in ARSD 74:51:01:60 for the department's review and approval before the project can begin. Therefore, DENR will grant 401 certification of Nationwide Permit #27 with the condition that the project proponent gain project approval through SD DENR. Water resource enhancement and restoration project approval is necessary to ensure that the project will adequately address restoration/enhancement objectives, provide appropriate erosion control Best Management Practices to protect water quality, and provide the public the opportunity to comment on the project activities. This condition is required under ARSD 74:51:01.60 and is supported under SDCL 34A-2-10 and 34A-2-11.

Nationwide Permits #29 and #39 allow attendant features, including the construction of on-site septic systems in wetland areas. SD DENR has determined that these attendant features conflict with state water pollution control laws and regulations. Allowing this type of activity compromises the integrity of the state's surface and ground water resources and the state's efforts to protect them. Therefore, SD DENR will grant 401 certification of Nationwide Permits #29 and #39 with the condition that the project proponent follow all rules under ARSD 74:53:01 and SDCL 34A-2-20 through 34A-2-22, and 34A-2-93. These conditions are supported by ARSD 74:53:01 and SDCL 34A-2-1, 34A-2-20 through 22, 34A-2-36, 34A-2-36.1, and 34A-2-104.

SD DENR is granting water quality certification for Nationwide Permits #21, 29, 39, 40, 42, 43, 50, 51, and 52 with the condition that a maximum 300 linear foot limit be placed on shoreline impact (as was present in the 2017 Nationwide Permits). This condition does NOT apply to shoreline restoration projects. The 300 linear foot limit is necessary to ensure that the project does not individually or cumulatively result in more than minimal adverse impacts to water quality. South Dakota has many small intermittent and perennial streams that are narrow in width. Simply using the ½ acre limit to apply to these Nationwide Permits would not adequately protect small South Dakota Streams and could potentially result in the loss of hundreds or thousands of miles of small South Dakota streams. Under SDCL 34A-2-1, the public policy is to conserve the waters of South Dakota and to protect, maintain, and improve the quality thereof for water supplies, for the propagation of wildlife, fish, and aquatic life. Not having any maximum linear limit to this Nationwide Permit does not meet the stated policy of SDCL 34-A-2-1.

SD DENR is denying water quality certification for Nationwide Permit #44 (Mining Activities). State law directs any disturbances to the prevailing hydrologic cycle, including water quality and

quantity, be minimized during mining and reclamation activities. SD DENR cannot certify that the uncontrolled use of NWP#44 would result in minimal disturbance or meet state surface water quality standards due to the potential of acid rock drainage or metal-laden waters occurring in mining areas. Nationwide Permit #44 conflicts with state water pollution control laws and regulations that require activities be permitted and follow strict guidelines. This denial is based upon ARSD 74:11, 74:12, 74:29, SDCL 45-6B-41, 45-6B-81, and the potential inability of mining operations to adequately protect surface waters under ARSD 74:51:01.

SD DENR is granting water quality certification for all other Nationwide Permits not expressly listed with conditions or denied. SD DENR has determined that any potential discharge associated with the Nationwide Permits, following the Corps' limits and notification requirements, general guidelines, and regional conditions will comply with South Dakota water quality standards.

South Dakota's water quality certification is based upon the draft 2020 Nationwide Permits published in the Federal Register. The Corps is requiring the water quality certification to be completed while the Nationwide Permits are still under public comment and prior to the final permits being published. SD DENR objects to this requirement and the Corps' disregard for policy, procedure, and cooperative federalism. This water quality certification is contingent upon the final published permits being similar to the draft and that no significant changes have occurred that could change the interpretation of the permit or affect SD DENR's decision to grant, grant with conditions, or deny certification. SD DENR reserves the right to rescind or deny this certification, if the Corps makes changes upon after final publication of the 2020 Nationwide Permits.

If you have questions pertaining to this certification, please contact Shannon Minerich at [Shannon.Minerich@state.sd.us](mailto:Shannon.Minerich@state.sd.us). Thank you for ensuring the continued protection of our natural resources.

Sincerely,

A handwritten signature in blue ink, appearing to read "Hunter Roberts", with a long horizontal line extending to the right.

Hunter Roberts  
Secretary

cc: Nolan Hahn, US EPA, Denver