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April 11, 2011

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Subject: Comments on the Proposed 2012 Nationwide Permit Regional Conditions

Dear Todd Tillinger:

Thank you for the opportunity to review and comment on the Proposed 2012 Nationwide Permit Regional Conditions for the State of Montana. We also appreciate the consideration you gave to our December 2010 comments on the Draft Regional Conditions. We are pleased to see that some of our previous comments were incorporated. In cases where our previously provided comments were not incorporated, we have re-iterated our concerns below.

As an agency that generally secures over 100 permits from the Corps each year, we are pleased to share our comments, based on our experiences working with the 2007 Regional Conditions. Our comments are offered in an effort to facilitate our mutual goal of environmental stewardship in a streamlined and efficient manner. We hope you find our input helpful and we welcome further discussion on any topic.

Proposed Regional Condition 1. Peatlands

This condition indicates that any type of peat-covered terrain, including fens, bogs, and muskegs are all peatlands. We understand the Corps to mean that shrub covered peatlands would also be included in this condition. If that is the case, we suggest that for clarity the term "shrub carr wetlands" be added to the itemized list.

Proposed Regional Condition 4. Forested Wetlands

This condition provides an explanation of the term 'forested wetlands' as being characterized by woody vegetation that is 20 feet tall or taller. This characterization is different from the 1987 Federal Delineation and current Regional Supplement criteria. According to the 1987 manual and Regional Supplements, where either Routine or Comprehensive Determinations of wetlands can be utilized to delineate wetlands, a tree is defined as any nonclimbing, woody plant that has a Diameter at Breast Height (DBH) of >3.0 inches, regardless of height. This inconsistency between the regional condition and the delineation manuals could prove to be problematic.

In Montana it is possible to encounter a bog birch or willow community where saplings may be 20 feet in height, but do not meet the 3.0" DBH, and thus would not be considered a forested wetland under the current criteria within the delineation manuals but would be considered forested wetland for purposes of applying this regional condition. MDT respectfully requests that the Corps modify the regional condition to be consistent with the delineation manuals. Similarly MDT requests that the Corps strike the sentence that references "relatively abundant moisture".

Proposed Regional Condition 8. Temporary Vegetation Impacts

Although your agency is proposing no change to the 2007 version of this condition, MDT respectfully suggests that some minor text modification would be helpful. In attempting to explain this condition to our designers, field staff, and contractors, we have had difficulty interpreting the phrase, "absolute minimum necessary." We request the Corps modify the phrase to more clearly communicate the Corps' expectation and the metric by which compliance should be measured. Consider use of the phrase "maximum extent practicable", which is defined in other areas and commonly understood by personnel that work with 404 permits.

Additionally, this condition requires, "utilizing native species in areas where native species were impacted." MDT agrees that native species are the most desirable species in the majority of situations; however, occasions occur when MDT's qualified botanist concludes that native species may not provide for adequate vegetative cover. MDT respectfully requests a caveat to this condition to allow use of alternative plants species in instances where native species will not provide the desired cover.

Proposed Regional Condition 9. Erosion Control Blanket

Of all the 2007 regional conditions, this one has been the most difficult for MDT to interpret and to communicate to our field staff and contractors. We have sought guidance and interpretation from the Corps' on several occasions, yet we still have many questions and areas of uncertainty. We have attempted to outline our concerns and recommendations below. We welcome further discussion with your agency to ensure our concerns have been properly communicated.

First, the condition states that it applies "in and adjacent to waters of the US". MDT respectfully questions the Corps' authority to regulate areas adjacent to waters of the US.
In 33 CFR 328.4 the limits of the Corps' jurisdiction in non-tidal waters are described as follows:

> *(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or*
> *(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.*
> *(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.*

Although not allowed under the regulations, MDT understands that there may be rare cases that the Corps can order removal of material placed outside the ordinary high water mark under the seldom used authority of Section 13 of the Rivers and Harbors Act of 1899. However, MDT concludes that the authority afforded by Section 13 pertains to deposition of refuse and impediments or obstructions to navigation. As a result this authority is irrelevant to activities regulated under Regional Condition 9. Additionally, MDT asserts that application of the Section 13 Authority to MDT projects is specifically prohibited by the Act since MDT projects are "construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work" (FHWA).

MDT cannot find the Corps' authority to regulate outside the ordinary high water mark in either the code or in the Rivers and Harbors Act of 1899. Please provide citation for this regulatory authority so that we can share it with our Contractors and use it as justification for the necessity of adhering to this condition. If citation cannot be provided, we respectfully request that this condition be stricken or limited to applicability within the ordinary high water mark.

Second, if this condition is in fact implementable within the Corps' existing regulatory authorities, please define the term "adjacent" for purposes of this condition. MDT is unable to find an appropriate definition for "adjacent" within the Corps' regulations. Without clear understanding of the Corps' expectations, MDT faces challenges with implementing this condition.

Third, the title of the condition implies it is only applicable to erosion control blanket. Personnel who are very familiar with erosion and sediment control best management practices (BMPs) and BMP terminology point out the fact that some of the materials the Corp references are actually sediment control, rather than erosion control. If the Corps intends the condition to apply to a variety of materials in addition to erosion control blanket, we suggest a title modification so that the requirement it is not inadvertently overlooked.

Fourth, as written, the exclusion can be misinterpreted to apply to Reno mattresses, gabion baskets, woven geotextile, temporary plastic fencing used to preserve existing vegetation and even silt fence, since those products can include a synthetic mesh material. We understand that the Corps does not intend to disallow those types of products. As a result, we request that the language be modified for clarity and simplicity. MDT recommends including a caveat to acknowledge that synthetic mesh material in some products is so closely woven that it does not include openings large enough to entangle small animals, birds, amphibians, and fish. MDT also recommends including a caveat to acknowledge that open mesh in some products (Reno mattress or gabian basket) is so sturdy that it does not have potential to entangle small animals.

Fifth, the condition allows for use of materials that will break down within 24 months. Based on this tolerance for some degree of short-term risk associated with trapping small animals, MDT respectfully requests that the Corps include a caveat allowing temporary use of synthetic mesh products that will be removed once the project site is stabilized or once project construction is complete. That said, the Corps should be aware that in some cases coir fabrics used for soil wraps in stream bank restoration projects break down well beyond a 24-month period, in spite of the fact that they are 100% biodegradable. Breakdown times of available and accepted biodegradable fabrics vary considerably depending on type, thickness, site and weather conditions, flow regimes, etc.

Sixth, while MDT appreciates the Corps' willingness to allow use of some synthetic materials, we are concerned about the practical application of the condition. As you are aware, there is no clear way to distinguish synthetic materials that do degrade from synthetic materials that do not degrade. We seek your guidance on how to best implement this condition. Please define in the condition the criteria with which the Corps will distinguish degradable from non-degradable materials.

Seventh, MDT questions the Corps' authority to regulate erosion/sediment controls when they are regulated under Section 402(a)(1) of the Clean Water Act, which specifies that the Environmental Protection Agency has the authority to issue permits for the discharge of any pollutant except those authorized under Section 404. EPA (or the delegated state) currently issues permits for the control of storm water discharges. EPA's general permit for small and large construction activities defines stormwater discharge-related activities as, "activities that cause, contribute to, or result in storm water point source pollutant discharges, including but not limited to: excavation, site development, grading and other surface disturbance activities, and measures to control stormwater including the siting, construction and operation of BMPs to control, reduce or prevent stormwater pollution." MDT concludes that since the installation of erosion control materials adjacent to waters of the US, as well as any erosion control materials in waters of the US that do not change the bottom elevation are not considered discharges of dredged or fill material, they are not regulated under Section 404 of the Clean Water Act. Therefore, in instances where a Section 402 storm water construction permit is needed (or

the state equivalent under an EPA-delegated program), EPA (or the delegated state agency) is the regulatory authority for the installation/restrictions related to erosion control BMPs. As a result, MDT respectfully requests that this condition be stricken.

If the condition is not stricken, MDT requests that the condition as written be modified to reflect MDT's concerns expressed above or replaced with the following suggested text.

"In waters of the US, exposed erosion and sediment control materials that contain a netting that has potential to entangle small animals must either be biodegradable or break down within 24 months, be buried beneath fill or riprap, or be removed within 24 months."

Proposed Regional Condition 11. Counter-Sinking Riprap Associated with Culvert Installation

This condition requires that riprap inlet and outlet protection, where used, must be placed to match the culvert flowline elevations. This condition is in direct conflict with multiple Hydraulic Engineering Circulars published by both the Army Corps of Engineers and Federal Highway Administration. Two examples would be the use of riprap to ensure the natural substrate is maintained in a counter sunk culvert after a flood event (HEC-26) and the design of energy dissipation pools at a culvert outlets (HEC-14). As a result, MDT expects that we will regularly be seeking Individual Permits for low impact projects that include measures for scour protection and/or permanent erosion and sediment control. The change of practice will contribute to project delays and additional workload to the staff of both of our agencies without real benefit to the environment.

Additionally, MDT suggests that the Corps has inadvertently precluded the use of Nationwide Permits for activities that are intended to benefit the aquatic resource and promote aquatic life movement. MDT designs frequently use grade controls to create step pools and increase backwater in an effort to promote fish passage opportunities. If this proposed condition is left as written, MDT will be forced to seek Individual Permits for projects that incorporate those design features. The uncertain timeframe and additional processing associated with an Individual Permit (which in MDT's experience varies from approximately 60 days to over a year) could render those design features impracticable and could drive their elimination from project proposals. Also, the condition as currently written seems to contradict the purpose of the "Aquatic Life Movements" Nationwide General Condition.

MDT respectfully requests that this condition be rescinded.

Proposed Regional Condition 12. Minimum Culvert Size

This condition requires culverts installed in ephemeral, intermittent, and perennial streams to completely span the bankfull width of the stream channel (width of the channel where over-bank flow begins during a runoff event). In 33 CFR 328.4 the limits of the Corps' jurisdiction in non-tidal waters are described as follows:

> *(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or*
> *(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.*
> *(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.*

Based on the authority outlined in the code, MDT respectfully questions the Corps' authority to make or enforce this condition. MDT suggests that it is more appropriate for the Corps to limit its requirements to the area within the ordinary high water mark where jurisdictional authority is clear.

Secondly, MDT is unclear on the magnitude of event that the Corps is referencing by the term "runoff event". Did the Corps have a specific magnitude of event in mind or was the condition written to be intentionally nebulous?

Thirdly, MDT suggests that this condition will be inappropriate in many situations. Montana has many incised ephemeral and intermittent channels that are incapable of collecting enough runoff to ever result in over-bank flow and many channels where bankfull will not be reached until at least an event greatly exceeding a 100-year event. Additionally, Montana has multiple drainage channels that are no longer associated with a drainage basin due to land use changes that have modified the surrounding topography. Sizing a culvert to "completely span the bankfull width of the stream channel" in those circumstances would increase costs that must be borne by the taxpayer without providing an environmental benefit. In the interest of the taxpayer, MDT must use sound engineering judgment to size culverts for our projects. As a result, if this condition is left in place, we expect that MDT will regularly be seeking Individual Permits for low impact projects. This change of practice would contribute additional workload to the staff of both of our agencies without real benefit to the environment.

We respectfully request this proposed condition for "Minimum Culvert Size" be rescinded. If the condition is not rescinded, we ask that a caveat phrase be added to limit applicability of this condition to perennial streams with fisheries value.

Proposed Regional Condition 13. Nationwide Permits 3 and 45

This condition specifies that "Discrete Event," as used in the nationwide permits, does not include runoff or stream flow events equal to or less than the bankfull discharge. For the reasons outlined in comments on Regional Condition 12 above, MDT suggests bank full is an inappropriate criterion to determine a "Discrete Event". Additionally, MDT requests clarification on this requirement as channel instability is not limited to "Discrete Events" but is derived from a variety of variables including soil type and bank slope. If the intent is to require an Individual Permit for maintenance requirements that occur in the absence of a "Discrete Event", MDT expects that we will regularly be seeking Individual Permits for low impact maintenance projects. We further speculate that the additional timeframes associated with application processing could turn low impact maintenance activities into hastily rectified exigency situations necessary to protect the travelling public and infrastructure.

Proposed Regional Condition 15. Bank and Shoreline Stabilization Activities

This condition eliminates the non-notification status for bank stabilization activities less than 300 linear feet. MDT respectfully suggests that this more stringent requirement will create extra workload for both Corps and MDT staff with no real environmental benefit. MDT requests that some non-notification threshold be left in place (even if it is less than 300 feet) to allow for minimal impact maintenance activities that may not qualify for a Nationwide Permit 3.

To be consistent, MDT suggests that conditions d through i should represent the guidelines provided by the US Army Corps of Engineers, Omaha District, Waterways Experiment Station (WES), and

NRCS as documented in FHWA Hydraulic Engineering Circular 23. (HEC-23) Design Guideline 1, Bendway Weirs / Stream Barbs.

Additionally, MDT requests clarification regarding requirement "h." for bank stabilization structures that project into the stream. MDT interprets this requirement to apply to active side channels and active overflow channels, but as currently written, the condition could be interpreted to include historic side channels and overflow channels. Please add text clarifying the Corps' expectation.

Suggested text is included below with underline and strikeout edits indicating added and deleted text respectively. Italicized text is commentary.

For bank revetments within the Ordinary High Water Mark (OHWM) such as rip-rap, root wads, rock or log toes, or any bio-engineered revetment, a. through c. apply:

a. The revetment must conform to the existing bankline with the exception of infrastructure protection.
b. ~~The revetment must not extend above the elevation of the existing top of bank (i.e., no new levees).~~ *(We recommend the removal of "b" as in many cases root wad fans may actually extend above the existing top of bank)*
c. The revetment must not wholly or partially block flows from entering a side channel or an existing overflow channel that directly connects with the natural stream channel.

For bank stabilization structures that project into the stream, such as weirs, barbs, or vanes, d. through i. apply:

d. The bank-end of the structure can be no higher than ~~the ordinary high water mark~~ OHWM, unless it is designed to be buried into the restored streambank. *(HEC-23 recommends the structure height at the bankline should equal the height of the maximum design high water. The key must be high enough to prevent flow from flanking the structure.)*
e. The top of the structure must decrease in elevation as it extends away from the bank. *(HEC-23 recommends nearly flat and no steeper than 1V:5H.)*
f. The structure must angle upstream from the bank, typically between 50 to 85 degrees as measured from the bankline tangent.
g. The structure must be keyed into the bed and bank.
h. The structure must not wholly or partially block flows from entering a side channel or an existing overflow channel that directly connects with the natural stream channel.
i. The structure cannot extend out more than 25% of the bankfull channel width from the existing bank or a distance of 1.5 to 2 times the distance from the bank to the thalweg.

Proposed Additional Information - Borrow Sites

MDT appreciates the April 5 meeting with the Corps to discuss appropriate procedures for demonstrating adherence to NWO OGL 10-03 for our federal aid projects. We look forward to continuing those discussions and to coordinating a mutually satisfactory process for the future. Some of the information from the April 5 meeting is summarized below.

MDT understands that the basis for this condition is the US Army Corps Omaha District Regulatory Guidance Letter NWO OGL 10-03. As a result, we recommend including a reference to this guidance letter in the regional condition to avoid confusion and ensure consistent interpretation.

Additionally, MDT suggest that this condition as currently written is inappropriately broad. As defined in the CEQ regulations, Indirect Effects must be caused by the action. Existing and/or commercial borrow sites are not caused by the action and therefore, do not need to be reviewed as indirect effects. As a result, MDT suggests the Corps modify this provision to limit its application to circumstances when the borrow site is solely sited and utilized for the proposed project.

MDT does not mandate a borrow site to its contractors. As a result, the borrow site is not identified at the time that the preconstruction application is submitted. If this condition is intended to require documentation of ESA and 106 compliance prior to permit issuance, MDT will not be able to comply and will be required to seek Individual Permits for all projects requiring a 404 permit. US Army Corps Omaha District Regulatory Guidance Letter NWO OGL 10-03 recognizes that there will be circumstances when it is not practicable or feasible to identify the borrow site when the application is submitted. MDT recommends that the Corps modify this regional condition to provide for similar recognition and predictability in timelines for review or borrow source materials.

Thank you again for the opportunity to review and comment on the Proposed Regional Conditions. Our intention with providing these comments is for them to serve as constructive assistance for setting in place a process that will best serve the citizens of Montana. If you or your staff has any questions or concerns regarding these comments, please contact me at 406.444.7228. I will be pleased to meet with you and/or your staff to provide any additional explanation or clarification that will be useful in the development of the 2012 Regional Conditions.

Sincerely,

Tom S. Martin, P.E.
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