



DEPARTMENT OF THE ARMY
WALLA WALLA DISTRICT, CORPS OF ENGINEERS
BOISE REGULATORY OFFICE
720 EAST PARK BOULEVARD, SUITE 245
BOISE, IDAHO 83712-7757

April 11, 2023

Regulatory Division

SUBJECT: NWW-2004-0600046, 31 March 2023 Application for US-95 Thorn Creek Road to Moscow, ITD Key No. 09294

Mr. Dan McElhinney, P.E.
Chief Deputy Director/COO
Idaho Transportation Department
P.O. Box 7129
Boise, Idaho 837-07-1129

Dear Mr. McElhinney:

This letter is in response to your letter dated March 31, 2023, submitting Idaho Transportation Department's (ITD) new request for a Preliminary Jurisdictional Determination and Section 404 Permit(s) for the US-95 Thorn Creek Road to Moscow Project (KN 09294). ITD's requests have been received by the district's Regulatory Division and will be processed accordingly.

A. Request for 30-Day Processing

In your letter, you requested that the Joint Application for Permit (a permit package for Sites 1, 5, 6, 10, 11, 12 and 13) be expedited and authorized within 30 days. I am, unfortunately, unable to grant your request and I would like to provide you information on my reasoning below.

First, under Nationwide Permit General Condition 32, "Pre-Construction Notification," the Corps requires certain information before it can finish processing ITD's application.¹ Specifically, and as previously communicated to ITD, an updated *onsite* aquatic resources delineation for *all proposed single and complete crossings* (i.e., Sites 1, 5, 6, 10, 11, 12, and 13) must be completed and provided to the Corps. Such data will be

¹ **General Condition 32(b)(4)(ii):** "For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project and does not change those non-PCN NWP activities into NWP PCNs. See <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/20099>.

used by the Corps to evaluate the total amount of anticipated losses of aquatic resources and the cumulative adverse environmental effects.

As a result of ITD's onsite delineation of Site 1 (September 26-30, 2022), additional aquatic resources were identified that had not been previously identified or documented during previous aquatic resources delineations. For example, a 2020 delineation of Site 1 found only 0.783 acres of aquatic resources; in comparison, the 2022 delineation of Site 1 found 6.011 acres of wetlands. In November 2022, the same delineation techniques used to identify and document additional aquatic resources at Site 1 were then used to revisit and confirm the aquatic resources at Sites 5, 11, and 12. The same delineation techniques should be used for all proposed sites (*i.e.*, Sites 6 and 13) for which ITD is seeking a Section 404 permit.

In reviewing the application submitted on March 31, 2023, it appears that instead of using updated onsite delineation data for Sites 6 and 13, a desktop analysis was conducted using data previously obtained between 2004 and 2011. Given the new information obtained by ITD and the Corps in 2022 for Site 1 and the other sites, use of data from 2004 to 2011 is no longer sufficient or appropriate to delineate the aquatic resources at proposed sites.

It is my understanding that ITD is in fact conducting site visits, including to Sites 6 and 13, during the week of April 10, 2023, to collect additional delineation data. Because the Corps will require that new data in order to complete processing ITD's application, the timing for when the Corps receives this data and can utilize it is dependent on ITD.

Second, the Corps would not be able to issue any Clean Water Act Section 404 authorization without the corresponding Section 401 Water Quality Certifications (WQC). As I am sure you are aware, Section 401 WQC timelines would take longer than 30 days to complete. The Section 401 WQC process is explained below:

ITD would need to request a Section 401 WQC from the Idaho Department of Environmental Quality (IDEQ) per 33 U.S.C. Section 1341. This process commences with a 30-day pre-filing meeting period. ITD would need to request a pre-filing meeting from IDEQ. Once the pre-filing period has lapsed, ITD would need to request Section 401 WQC from IDEQ and the Corps would provide a "reasonable period of time" for processing. This period is typically 60-days but may be extended up to one year. If the certification action results in the issuance of a Section 401 WQC, the Corps would have 5 days to request review by the Environmental Protection Agency (EPA) and determine if the project may affect neighboring jurisdictions (401(a)(2) process). EPA would have

30 days to complete that process and make that determination. See the link below for more information about this process:

<https://www.epa.gov/cwa-401/2020-rule-implementation-materials>

B. Project Concerns

I also understand from your letter that you are concerned with delays and increased costs to ITD associated with obtaining appropriate permits prior to restarting construction of the project.

As you know, in July 2022, the Corps received new information from the Paradise Ridge Defense Coalition (PRDC) (obtained via a court order in Case No. 1:22-cv-00122-BLW, U.S. District Court, District of Idaho) showing that there were at least 1.16 acres of aquatic resources at Site 1 that had not been previously identified or accounted for by ITD or the Corps. On August 1, 2022, the Corps conducted an independent verification of the sample points within Site 1 and determined that additional aquatic resources indeed existed. Due to this new information regarding unaccounted for aquatic resources that would be impacted by ITD's project, the USACE suspended the Nationwide Permit verification for Site 1 and, subsequently, Sites 2-13.

At meetings and in communications between the Corps and ITD from August 2022 through February 2023, the Corps, early and repeatedly, urged ITD to conduct site visits and re-delineate the aquatic resources at Sites 1-13. This request was made at our meetings in Boise on August 17, 2022, and September 1, 2022, where the Corps advised ITD that additional data would likely be needed for all the sites. Again, in October 2022, the Corps specifically requested that ITD complete a comprehensive re-delineation of aquatic resources at sites for which ITD would be seeking Section 404 authorization. Yet again, in February 2023, the Corps informed ITD that a new application for permits would need to include updated, onsite delineation information for all sites for which ITD would be requesting authorization. For this reason, ITD scheduled the upcoming sites visits for the week of April 10, 2023.

I would like to reiterate that providing the Corps with appropriate, thorough, and timely information to evaluate and process ITD's application will help ensure that the Corps can process ITD's application without further delay.

C. Professional Response

In January 2023, Paradise Ridge Defense Coalition provided ITD and the Corps with a report from its consultants, Dr. Nate Hough-Snee and Dr. William Kleindl, in which the consultants asserted that “a more comprehensive, geomorphic approach to mapping wetlands and delineating their boundaries” along ITD’s proposed project corridor should be undertaken.

During a meeting in February 2023, the Corps requested that ITD review the report and provide a professional response, in particular explaining whether the recommendations or assertions made by the consultants should be applied to ITD’s application. ITD’s response to the report will be used by the Corps in evaluating ITD’s application and completing its review. The Corps has not yet received ITD’s response to PRDC’s January 2023 submission to the Corps referenced above.

If you have any questions or need additional information, you can contact Shane Skaar at shane.k.skaar@usace.army.mil (Regulatory Specialist), James Joyner at James.M.Joyner@usace.army.mil (Upper Snake and Idaho Panhandle Branch Chief), or myself at Shailin.Y.Kingslack@usace.army.mil. For informational purposes, a copy of this letter will be sent to Mr. Shawn Smith of the Idaho Transportation Department (ITD), Ms. Aimee Hill of the ITD, Mr. Brent Inghram of the Federal Highways Administration, Ms. Sujata Connell of the IDEQ.

Sincerely,

ShaiLin Y. KingSlack
Lieutenant Colonel, Corps of Engineers
District Commander