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Regulatory Division
Corps of Engineers
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Lieutenant Colonel, U.S. Army
District Commander (SPK-2010-01409)
U.S. Army Engineer District, Sacramento
Corps of Engineers
1325 J Street
Sacramento CA 95814-2922

Re: Conditional Clean Water Act (CWA) §401 Certification of the Army Corps of Engineers (Corps) 2012 Nationwide Permits (NWPs) for projects on applicable Tribal Lands

The Ute Mountain Ute Tribe has reviewed the Corps February 21, 2012 Federal Register announcement, reissuance of the Nationwide Permits, general conditions, and definitions with some modifications, the publication of the final NWP's in the Federal Register served as the Corps application for Water Quality Certification (WQC). Under the Clean Water Act (CWA) Section 401(a)(1), a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters within the exterior boundaries of the Ute Mountain Ute Tribe until the tribe has granted or waived §401 certification.

The purpose of this letter is to provide conditional water quality certification of the NWPs for activities proceeding on Ute Mountain Ute Tribal Lands to protect water quality and beneficial uses of tribal waters under the new NWP program. This letter provides the Ute Mountain Ute Tribe's written determination necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306 and 307 as well as with appropriate and relevant requirements of Tribal law.

In summary, we are programmatically certifying all of the NWPs with the national general conditions with the Sacramento District Regional Conditions for Colorado and Utah and the Albuquerque District Regional Conditions with the following additional condition:

1. Notification and Nationwide Permit Verification:

To improve the Tribe's ability to demonstrate whether the NWP program has minimal adverse impacts individually and cumulatively, all potential NWP projects proceeding on Ute Mountain Ute Tribal lands shall submit a form of notification to the Tribe's Environmental Programs Department for review and approval from the Tribe prior to proceeding with the project[1].

Under existing NWP rules, for the purposes of preconstruction notification (PCN), projects proposing to use a given NWP will fall under one of the following four categories:

1. The Corps requires a PCN, subject to criteria in the Corps' General Condition 31, because the project proposes use of an NWP that requires a PCN for any activities authorized by the NWP.
2. The Corps requires a PCN, subject to criteria in the Corps' General Condition 31, because the project proposes to exceed impact thresholds triggering a PCN under the NWP.
3. The Corps does not require a PCN, because proposed impacts fall below thresholds identified in the NWP for a PCN.

[1] NOTE: This requirement does not modify or eliminate existing Corps requirements regarding PCNs for projects proceeding on tribal lands (or elsewhere).

4. The Corps does not require a PCN for any activities authorized under the NWP the applicant is proposing to use.

A written response from the Tribe's Environmental Programs Department (UMU-EPD) approving the proposed project must be received prior to the project proceeding under the NWP. UMU-EPD may require special conditions such as additional cultural resource survey requirements or compensatory mitigation requirements. If UMU-EPD staff reviews the verification request and determines that the proposed activity requires special conditions, the project proponent and the Corps District Engineer will be contacted to discuss additional requirements and/or applying for an individual permit. UMU-EPD will respond to NWP verification requests within 45 days of receiving a complete verification request. If the project sponsor has not received a reply from the Tribe within 45 days, he or she may assume that the project is authorized by the Tribe, consistent with the information in the verification request.

For categories 1 and 2 above, applicants must forward a second copy of the PCN already required by the Corps to UMU-EPD.

For categories 3 and 4, a modified PCN (MPCN) must be submitted to UMU-EPD using either the South Pacific Division Preconstruction Notification Checklist or in a written format including the following criteria:

1. Timing. Applicants shall submit an MPCN to UMU-EPD as early as possible, and in advance of any authorization letter from the Corps allowing the applicant to proceed under a given NWP.
2. Content. MPCNs must be in writing (electronic mail submittal is acceptable) and include, at a minimum, the following information:
    a. Name, address and telephone numbers of the applicant and any agents or representatives.
    b. Location of the proposed project.
    c. A description of the proposed project and impacts including:
        i. The project's purpose;
        ii. Direct and indirect adverse environmental effects the project would cause, including the proposed acreages of waters impacted, avoided and, where applicable, created or otherwise mitigated;
        iii. Any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and
        iv. A list of other Tribal, state, and federal permits or authorizations necessary for the project.

        The description shall be sufficiently detailed to determine compliance with NWP and the need for appropriate compensatory mitigation. Maps, drawings and/or photographs of the project area and aquatic resources are not mandatory, but usually help to clarify the project and allow for faster review. At a minimum, a narrative description of any special aquatic sites and other waters of the Tribe on the project site must be included.

    d. A statement describing how the activity has been designed to avoid and minimize adverse impacts, both temporary and permanent, to Tribal waters.

e. To the extent not covered by d) above, a statement describing how the project will protect, and where practicable improve, water quality.
f. The name(s) of any species listed as endangered or threatened under the Endangered Species Act which may be adversely affected by the proposed work either directly or by impacting designated critical habitat.
g. Identification of any cultural or historic properties listed in, or eligible for listing in, the National Register of Historic Places that may be adversely affected by the proposed work.

This conditional certification of the NWP program will remain in effect for the authorization period of the new NWPs, and will be revisited and potentially revised when the NWPs are next revisited and potentially revised by the Corps. If you have any questions regarding our conditional certification of the NWPs for activities on Ute Mountain Ute Tribal Lands, you may contact me at 970-739-3741 or Scott Clow, Director of Environmental Programs at 970-564-5432.

None of the conditions described in the new NWPs may be made less stringent without a new §401 certification from the Tribe. 40 CFR 124.53(e) (3)

The Tribe hereby conditionally certifies the new NWPs as published February 21, 2012 (40 CFR 124.53(C) (1) in accordance with the Clean Water Act §401(a) (1).

Sincerely,

4-16-2012

Scott Clow
Environmental Programs Director
Ute Mountain Ute Tribe

Colin Larrick
Water Quality specialist
Ute Mountain Ute Tribe

CC: Allan E. Steinle, Chief, Regulatory Division
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