

**U.S. Environmental Protection Agency Region 8 Clean Water Act Section 401
Water Quality Certification for the U.S. Corps of Engineers CWA Section 404
2020 Nationwide Permits Reissuance**

This Certification applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers CWA 404 Nationwide Permit (NWP) into waters of the United States that occur within Indian country lands within the state of Colorado: NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, D, and E. The Corps is not requesting certification for 11 NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B.

Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency is the certifying authority. In this case, the Southern Ute Indian Tribe does not have the authority to provide CWA § 401 certification for discharges occurring within any lands on the Southern Ute Indian Reservation that are not held in trust by the United States for that Tribe, and neither the Southern Ute Indian Tribe nor the Ute Mountain Ute Tribe have that authority for discharges occurring within the State of Colorado on any other Indian country lands outside of their reservations (except for one parcel held in trust for Southern Ute Indian Tribe contiguous to the Tribe's Reservation), therefore, the EPA is making the certification decisions for discharges that may result from potential projects authorized under the proposed Corps CWA 404 NWPs listed above.

Project Description

The Corps is proposing to re-issue its existing NWPs and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects.” 85 FR 57298. For more details: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

General Information

The general information provided in this section does not constitute a certification condition(s).

- The project proponents for potential projects authorized under the NWPs are responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state, or tribal authority.

- If a project is unable to meet the enclosed conditions, or if certification is denied for an applicable NWP, the project proponent may request an individual certification from EPA. An individual certification request must follow the requirements outlined in 40 CFR 121.5 of EPA's CWA § 401 Certification Rule, effective September 11, 2020.
- Copies of this certification should be kept on the job site and readily available for reference.
- Prior to work commencing, project proponents should notify the appropriate Tribal Environmental Office.
- Project proponents for potential projects should also notify the appropriate Tribal Office and EPA Region 8 if spills or unauthorized discharges occur during the project.
- The project proponent for potential projects authorized under the NWP are encouraged to contact EPA Region 8 during the project planning phase if there are any questions about relevant best management practices (e.g., bioengineering techniques, biodegradable erosion control measures, revegetation using native plant species, suitable fill materials, and disposal of debris/construction materials preventing runoff) and resources that can assist with compliance.
- Pursuant to CWA section 308(a), EPA Region 8 representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP.
- If you have questions regarding this certification, please contact EPA Region 8 at: R8CWA401@epa.gov.

NWPs Granted with Conditions (121.7(d)(2))

On behalf of the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, CWA Section 401 certification is granted with the following condition for NWPs 5, 6, 18, 19, 20, 23, 25, 30, 31, 32, 33, 36, 38, 41, 45, and 46. EPA Region 8 has determined that any discharge authorized under these proposed NWPs will comply with water quality requirements, as defined in 40 C.F.R. 121.1(n), subject to the following condition pursuant to Section 401(d).

Condition: All project proponents must provide notice to EPA Region 8 prior to commencing construction to provide EPA Region 8 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the applicant should also provide the PCN to Region 8. EPA Region 8 will provide written notification to the applicant if the proposed project will violate the water quality certification of the NWP.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: This condition is necessary to provide EPA Region 8 with notice and information to allow for an efficient and effective pre-operation inspection to determine if the certified discharge will violate the certification. If the project scope changes during the Corps review prior to initiation of the activity, it is also critical for EPA Region 8 to be provided any changes in the project design, scope, amount and location of discharges to inform the pre-operation inspection opportunity as provided by 40 CFR 121.11(a).

Citation that authorizes the condition: 40 CFR 121.11(a)

NWPs Denied (121.7(e)(2))

On behalf of the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, EPA Region 8 cannot certify that the range of potential discharges from potential projects authorized under the following proposed NWPs will comply with water quality requirements, as defined in 40 C.F.R. 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWPs 3, 7, 12, 13, 14, 15, 16, 17, 19, 21, 27, 29, 34, 37, 39, 40, 42, 43, 44, 49, 50, 51, 52, 53, C, D and E, and applicants must apply for an individual water quality certification.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). In EPA's unique role certifying on behalf of a tribe, in a tribal jurisdiction where EPA is not the regulator, EPA lacks important information about tribal water resources. In the case of the Northern Arapaho and Eastern Shoshone Tribes, EPA Region 8 lacks sufficient information on sensitive resources that may exist on these tribal lands, potential impaired waters on these tribal lands, and potential cultural importance of the water resources on these tribal lands. Additional information on these specific subjects would be needed for EPA Region 8 to assure that the range of discharges from potential projects authorized under NWPs 3, 7, 12, 13, 14, 15, 16, 17, 19, 21, 27, 29, 34, 37, 39, 40, 42, 43, 44, 49, 50, 51, 52, 53, C, D and E will comply with water quality requirements, as defined in 40 C.F.R. 121.1(n).

This information would also be necessary for EPA Region 8 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 8 is therefore denying certification.

NWPs Waived (121.9(a)(1))

On behalf of the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, EPA Region 8 is expressly waiving its authority to act on the CWA § 401 certification request for proposed NWPs: 4, 22, 48, and 54.