



WATER QUALITY PROGRAM

ENVIRONMENTAL PROGRAMS DIVISION
SOUTHERN UTE INDIAN TRIBE
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December 15, 2020

Delivered via email only: Kelly.e.allen@usace.army.mil

Kelly E. Allen
Chief, Regulatory Division
Albuquerque District
Kelly.e.allen@usace.army.mil

Re: Southern Ute Indian Tribe's Clean Water Act Section 401 Water Quality Certification for U.S. Army Corps of Engineers' Proposed 2020 Nationwide Permits

Dear Regulatory Division Chief Allen:

In response to the U.S. Army Corps of Engineers' (Army Corps) letter received October 15, 2020 that requested the Tribe's Clean Water Act section 401 certification for the Army Corps' proposed 2020 Nationwide Permits (NWP), the Tribe's Environmental Programs Division (Division) has examined the Army Corps' request for water quality certification for the proposed NWPs and has examined the Army Corps' proposed NWPs.

In 2018, the U.S. Environmental Protection Agency (EPA) approved the Tribe's application for treatment as a state to administer the Clean Water Act's water quality standards and section 401 certification programs for water bodies on tribal trust land on the Southern Ute Indian Reservation (Reservation). Under Resolution No. 2015-15, adopted on February 17, 2015, the Southern Ute Indian Tribal Council delegated authority to the Division to exercise the Tribe's Clean Water Act section 401 certification authority. The Division's Clean Water Act section 401 actions set forth below are based on whether there is reasonable assurance that the permitted or licensed activity will be conducted in a manner which will not violate applicable water quality requirements.

For all projects that occur on tribal trust lands on the Reservation, the Division is certifying 13 of the 57 NWPs with conditions. The Division is denying certification for 30 of the 57 NWPs, all "after-the-fact NWPs" (i.e., all determinations that a NWP applies when such determination is made after the discharge has occurred), all provisional NWPs (i.e., all provisional verification letters from the Army Corps authorizing coverage for a project subject to individual certification by the certifying authority), and NWPs where the District or Division Engineer has granted a

waiver on limits. The Division is waiving certification for 5 of the 57 NWP's. Certification was not requested for 11 of the 57 NWP's.

Water Quality Standards

The Tribe adopted water quality standards (WQS) in 1996. For your information and in support of the Division's certification actions on the Army Corps' proposed NWP's, I am attaching a copy of the Tribe's 1996 WQS (Tribe's WQS).¹

Narrative Water Quality Standards

The narrative water quality criteria set forth in section V(A) of the Tribe's WQS provide that:

Reservation surface waters except constructed wetlands shall be free from substances attributable to human caused point source or nonpoint source discharge in amounts, concentrations or combinations which:

- (1) settle to form bottom deposits detrimental to the existing beneficial uses;
- (2) form floating debris, scum, or other surface materials sufficient to harm existing beneficial uses;
- (3) produce color, odor, or other conditions in such a degree as to create a nuisance or harm existing beneficial uses or impart any undesirable taste to significant edible aquatic species or to the water;
- (4) are harmful to existing beneficial uses or toxic to humans, animals, plants, or aquatic life;
- (5) produce a predominance of undesirable aquatic life or animals which are detrimental to existing beneficial uses; or
- (6) cause a film on the surface or produce a deposit on shorelines which is detrimental to existing beneficial uses.

¹ The Tribe is currently in a process of revising its water quality standards (WQS). When the revised WQS are adopted by the Tribal Council and when the revised WQS are approved by the EPA, those revised WQS will be used in all future individual certifications.

The narrative biological criteria set forth in section VI(A) the Tribe's WQS provide that:

Reservation waters shall be free from substances, whether attributable to human-induced point source discharge or nonpoint source activities, in concentrations or combinations which would impair the aquatic community.

Actions on 401 Certification Request for Proposed 2020 NWP

The Southern Ute Indian Tribe, by and through its Environmental Programs Division, takes the following water quality certification actions under Section 401 of the Clean Water Act on the Army Corps' proposed NWP:

After-the-Fact NWP – Deny

Provisional NWP – Deny

NWP where the District or Division Engineer has granted a waiver on limits – Deny

- 1 Aids to Navigation – Certification not requested
- 2 Structures in Artificial Canals - Certification not requested
- 3 Maintenance – Certify with conditions; Deny for activities which require a Pre-Construction Notice (PCN) or results in a discharge into perennial streams or special aquatic sites
- 4 Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities – Certify with Conditions
- 5 Scientific Measurement Devices – Certify with Conditions
- 6 Survey Activities - Certify with Conditions; Deny when there is a trenching activity
- 7 Outfall Structures and Associated Intake Structures – Deny
- 8 Oil and Gas Structures on the Outer Continental Shelf - Certification not requested
- 9 Structures in Fleeting and Anchorage Areas - Certification not requested
- 10 Mooring Buoys - Certification not requested
- 11 Temporary Recreational Structures - Certification not requested
- 12 Oil or Natural Gas Pipeline Activities - Deny
- 13 Bank Stabilization - Deny
- 14 Linear Transportation Projects - Deny
- 15 U.S. Coast Guard Approved Bridges - Waive
- 16 Return Water From Upland Contained Disposal Areas - Deny
- 17 Hydropower Projects - Deny
- 18 Minor Discharges - Deny
- 19 Minor Dredging - Certify with Conditions
- 20 Response Operations for Oil or Hazardous Substances - Deny
- 21 Surface Coal Mining Activities - Deny
- 22 Removal of Vessels - Certify with Conditions
- 23 Approved Categorical Exclusions - Certify with Conditions
- 24 Indian Tribe or State Administered Section 404 Programs - Certification not requested

- 25 Structural Discharges - Certify with Conditions
- 26 [Reserved]
- 27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities - Deny
- 28 Modifications of Existing Marinas - Certification not requested
- 29 Residential Developments - Deny
- 30 Moist Soil Management for Wildlife - Certify with Conditions
- 31 Maintenance of Existing Flood Control Facilities - Deny
- 32 Completed Enforcement Actions - Certify with Conditions
- 33 Temporary Construction, Access, and Dewatering - Deny
- 34 Cranberry Production Activities - Waive
- 35 Maintenance Dredging of Existing Basins - Certification not requested
- 36 Boat Ramps - Waive
- 37 Emergency Watershed Protection and Rehabilitation - Certify with Conditions
- 38 Cleanup of Hazardous and Toxic Waste - Deny
- 39 Commercial and Institutional Developments - Deny
- 40 Agricultural Activities - Deny
- 41 Reshaping Existing Drainage Ditches - Certify with Conditions
- 42 Recreational Facilities - Deny
- 43 Stormwater Management Facilities - Deny
- 44 Mining Activities - Deny
- 45 Repair of Uplands Damaged by Discrete Events - Deny
- 46 Discharges in Ditches - Certify with Conditions
- 47 [Reserved]
- 48 Commercial Shellfish Mariculture Activities - Waive
- 49 Coal Remining Activities - Deny
- 50 Underground Coal Mining Activities - Deny
- 51 Land-Based Renewable Energy Generation Facilities - Deny
- 52 Water-Based Renewable Energy Generation Pilot Projects - Deny
- 53 Removal of Low-Head Dams – Deny
- 54 Living Shorelines – Waive
 - A Seaweed Mariculture Activities - Certification not requested
 - B Finfish Mariculture Activities - Certification not requested
 - C Electric Utility Line and Telecommunications Activities - Deny
 - D Utility Line Activities for Water and Other Substances - Deny
 - E Water Reclamation and Reuse Facilities – Deny

Certification Conditions

On projects that qualify for the use of a NWP for which the Division has granted certification with conditions, the project proponent must abide by the following conditions:

- 1) A copy of the certification documentation (i.e., a copy of this letter) must be on-site.

Justification – This condition is necessary because, under the Tribe’s narrative biological criteria, Reservation waters must be free from substances, whether attributable to human-induced point source discharge or nonpoint source activities, in concentrations or combinations which would impair the aquatic community. The Tribe has a Tribe-only interest in ensuring that the project proponent adheres to that water quality requirement during the project. This condition ensures the project proponent knows of the Tribe’s narrative biological criteria.

Citation – The following federal and tribal laws authorize this condition: (1) The Clean Water Act’s recognition, in section 518, of the interest of Indian tribes, subject to applicable eligibility requirements, in the administration of Clean Water Act regulatory programs on their reservations; (2) Article VII, Sections 1(n) of the Tribe’s Constitution under which the Southern Ute Indian Tribal Council is empowered to protect and preserve the property, wildlife, and natural resources (including water resources) of the Tribe; (3) Section IV of the Tribe’s WQS (Antidegradation Policy); (4) Section V(A) of the Tribe’s WQS (Narrative Water Quality Criteria); and (5) Section VI(A) of the Tribe’s WQS (Narrative Biological Criteria).

- 2) The Division’s grant with conditions does not authorize construction of on-site septic systems in waters of the U.S.

Justification – This condition is necessary because Reservation waters must be free from substances attributable to human-caused point source discharges or nonpoint source activities, in concentrations or combinations which would impair the aquatic community. Construction of an on-site septic system in waters of the U.S. may result in form floating debris, scum or other surface materials in amounts, concentrations or combinations that; produce color, odor or other conditions in such a degree as to create a nuisance; may be harmful or toxic to humans, animals, plants or aquatic life; may impair the aquatic community; and may harm existing beneficial uses. To ensure that water quality does not degrade due to the project being in violation of these standards, the Division’s grant with conditions does not authorize construction of on-site septic systems in waters of the U.S.

Citation – The following federal and tribal laws authorize this condition: (1) The Clean Water Act’s recognition, in section 518, of the interest of Indian tribes, subject to applicable eligibility requirements, in the administration of Clean Water Act regulatory programs on their reservations; (2) Article VII, Sections 1(n) of the Tribe’s Constitution under which the Southern Ute Indian Tribal Council is empowered to protect and preserve the property, wildlife, and natural resources (including water resources) of the Tribe; (3) Tribe’s WQS Section IV; (4) Tribe’s WQS Sections (V)(A)(2), (V)(A)(3), and (V)(A)(4); and (5) Tribe’s WQS Section (VI)(A).

- 3) Before use on a project, the project proponent must inspect all equipment for fluid leaks. Before equipment is used on a project and upon discovery of any fluid leaks, all fluid leaks must be repaired. If a fluid leak cannot be repaired, the equipment shall not be used on site. Before any equipment touches the water, the project proponent must provide to

the Division (1) a certification that (a) the equipment has not been used in waters with the possibility of aquatic nuisance species infestation and (b) the equipment has been thoroughly decontaminated using water that is heated to a temperature necessary to kill aquatic nuisance species, (2) evidence that the equipment has passed a Colorado Parks and Wildlife invasive species inspection, or (3) a certification in a form that is acceptable to the Division, signed by a third-party consultant, certifying that the equipment has undergone a tribal waters-specific preventative decontamination using water that is heated to a temperature necessary to kill aquatic nuisance species.

Remove all plants, animals, or mud and thoroughly washing equipment that have come in contact with the water before leaving a lake or stream.

1. Drain water from areas on equipment that might hold water. Allow equipment to dry completely. If draining and drying are not possible, wash equipment carefully and completely with high-pressure hot water (140° F).
2. For general disinfection, soak/treat equipment for 15 minutes with a bleach solution (6 oz. household bleach per 5 gal. water), a solution of Sparquat 256 (4 oz. per 1 gal. water) or a solution of potassium chloride (1 tsp per 2 gal. water).

Requested information can be provided by email to the Division at wqs@southernutensn.gov.

Justification – The Army Corps’ 2017 Regional Conditions to the Nationwide Permits in the State of Colorado required permittees to submit certain information and recommended certain best management practices to minimize the impact to waters of the U.S., including recommendations for BMPs to prevent the spread of invasive nuisance species. Requiring project proponents complete the steps included in the above condition is necessary to ensure that water quality is not degraded, and to ensure that the biology of Reservation waters are not negatively impacted by the project, and to prevent the infestation of Reservation waters and downstream watersheds from damaging invasive species. The use of equipment that contains fluid leaks or potentially invasive species in waters of the U.S. may result in form floating debris, scum or other surface materials; produce color, odor or other conditions in such a degree as to create a nuisance; may be harmful or toxic to humans, animals, plants or aquatic life; may produce a predominance of undesirable aquatic life or animals; may cause a film on the surface or produce a deposit on shorelines; and may leave Reservation waters subject to substances that in concentrations or combinations would impair the aquatic community.

Citation – The following federal and tribal laws authorize this condition: (1) The Clean Water Act’s recognition, in section 518, of the interest of Indian tribes, subject to applicable eligibility requirements, in the administration of Clean Water Act regulatory programs on their reservations; (2) Article VII, Sections 1(n) of the Tribe’s Constitution

under which the Southern Ute Indian Tribal Council is empowered to protect and preserve the property, wildlife, and natural resources (including water resources) of the Tribe; (3) Tribe's WQS Section IV; (4) Tribe's WQS Sections (V)(A)(2), (V)(A)(3), (V)(A)(4), (V)(A)(5), (V)(A)(6); (5) Tribe's WQS Section (VI)(A); (6) the 2019-2020 Fishing Proclamation for the Southern Ute Indian Reservation; and (7) Tribal Wildlife Conservation Code 13-3-116.

- 4) For NWP's for which certification has been granted with conditions, the project proponent must notify the Southern Ute Indian Tribe's Environmental Program Division of the use of the NWP before commencement of the project. This notification must include a short summary of the proposed activity, complete contact information of the applicant and contractor, the NWP being used, a summary of best management practices proposed, any additional information submitted to the Army Corps of Engineers, and a summary of contacts and discussions with the Division regarding the project. Provide the requested information to the Environmental Programs Division Head at wqs@southernute-nsn.gov.

Justification – This condition is necessary so that the Tribe, as both a Clean Water Act Section 401 certifying authority and an independent authority for protecting Reservation waters, has notice of projects and activities that will be taking place in Reservation waters. The condition is also necessary to ensure that the project proponent has considered the unique characteristics of the water body that will be impacted by the project. Each water body on the Reservation is unique. Best management practices typically used in or near one river, may not be applicable to the river where a project is taking place. For example, activities allowed under certain NWP's in certain water bodies might cause discharges of substances in amounts, concentrations or combinations which settle to form bottom deposits detrimental to the existing beneficial uses; form floating debris, scum or other surface materials; produce color, odor or other conditions in such a degree as to create a nuisance; may be harmful or toxic to humans, animals, plants or aquatic life; may produce a predominance of undesirable aquatic life or animals; may cause a film on the surface or produce a deposit on shorelines; and may impair the aquatic community. Notification of the use of a NWP will allow the Division to ensure no anomalies like the example provided above exist and that all projects utilizing NWP's on the Reservation will result in no more than minimal impacts to water quality.

Citation – The following federal and tribal laws authorize this condition: (1) The Clean Water Act's recognition, in section 518, of the interest of Indian tribes, subject to applicable eligibility requirements, in the administration of Clean Water Act regulatory programs on their reservations; (2) Article VII, Sections 1(n) of the Tribe's Constitution under which the Southern Ute Indian Tribal Council is empowered to protect and preserve the property, wildlife, and natural resources (including water resources) of the Tribe; (3) Tribe's WQS Section IV; (4) Tribe's WQS Sections (V)(A)(1), (V)(A)(2), (V)(A)(3), (V)(A)(4), (V)(A)(5), and (V)(6); and (5) Tribe's WQS Section (VI)(A).

- 5) In order to reduce confusion and ensure all applicable conditions are followed for projects occurring on trust lands, all Army Corps of Engineers' Colorado Regional conditions must be met.

Justification – The condition is necessary to ensure that project proponents understand the jurisdictional status of the Reservation and that the Army Corps of Engineers' Colorado Regional conditions apply to projects that are covered under the NWP's on the Reservation. Adherence to this condition will provide reasonable assurances that water quality requirements are met.

Citation – The following federal and tribal laws authorize this condition: (1) The Clean Water Act's recognition, in section 518, of the interest of Indian tribes, subject to applicable eligibility requirements, in the administration of Clean Water Act regulatory programs on their reservations; (2) Article VII, Sections 1(n) of the Tribe's Constitution under which the Southern Ute Indian Tribal Council is empowered to protect and preserve the property, wildlife, and natural resources (including water resources) of the Tribe; (3) Tribe's WQS Section IV; (4) Tribe's WQS Sections (V)(A)(1), (V)(A)(2), (V)(A)(3), (V)(A)(4), (V)(A)(5), and (V)(6); and (5) Tribe's WQS Section (VI)(A).

Compliance with the terms and conditions of the proposed permit, as well as the conditions required under this certification, will provide reasonable assurances that the proposed NWP's will be issued in a manner which will not violate water quality requirements.

Denials of Certification

Certification is denied for all activities affecting fens, springs, hanging gardens and difficult to replace wetlands as described in 33 CFR 332(e)(3).

Specific water quality requirements with which discharges that could be authorized by the NWP will not comply: (1) Tribe's WQS IV; (2) Tribal WQS Sections (V)(A)(1), (V)(A)(2), (V)(A)(3), (V)(A)(4), (V)(A)(5), and (V)(A)(6); and (3) Tribe's WQS Section (VI)(A).

Explanation of why discharges that could be authorized by the NWP's will not comply with the identified water quality requirements: Any activity affecting fens, springs, hanging gardens and difficult to replace wetlands as described in 33 CFR 332(e)(3) may result in discharges of substances in amounts, concentrations or combinations that settle to form bottom deposits detrimental to the existing beneficial uses; form floating debris, scum or other surface materials; produce color, odor or other conditions in such a degree as to create a nuisance; may be harmful or toxic to humans, animals, plants or aquatic life; may produce a predominance of undesirable aquatic life or animals; may cause a film on the surface or produce a deposit on shorelines; and may impair the aquatic community.

Due to the lack of sufficient information to determine if the permits will comply with water quality requirements and to allow for individual review of each authorized activity, the Division is denying 401 certification for 30 of the proposed 2020 NWP's, all after-the-fact NWP's, all provisional NWP's, and NWP's where the District or Division Engineer has granted a waiver on limits. Before a project can begin, the project proponent must apply for and obtain an individual 401 certification from the Division for each project which could be authorized under a NWP but for the Division's denial of certification for that NWP.

For projects that will qualify for coverage under the NWP's for which the Division is denying 401 certification, the following water quality requirements set forth in sections IV and V(A) of the Tribe's WQS may not be satisfied:

Reservation surface waters except constructed wetlands shall be free from substances attributable to human-caused point source or nonpoint source discharge in amounts, concentrations or combinations which:

- (1) settle to form bottom deposits detrimental to the existing beneficial uses;
- (2) form floating debris, scum, or other surface materials sufficient to harm existing beneficial uses;
- (3) produce color, odor, or other conditions in such a degree as to create a nuisance or harm existing beneficial uses or impart any undesirable taste to significant edible aquatic species or to the water;
- (4) are harmful to existing beneficial uses or toxic to humans, animals, plants, or aquatic life;
- (5) produce a predominance of undesirable aquatic life or animals which are detrimental to existing beneficial uses; or
- (6) cause a film on the surface or produce a deposit on shorelines which is detrimental to existing beneficial uses.

Furthermore, the narrative biological criteria set forth in section VI(A) of the Tribe's WQS may also not be satisfied:

Reservation waters shall be free from substances, whether attributable to human-induced point source discharge or nonpoint source activities, in concentrations or combinations which would impair the aquatic community.

And, for projects that will qualify for coverage under the NWP's for which the Division is denying certification, without the additional information listed below, the Division will not have the opportunity to conduct an anti-degradation review under section IV of the Tribe's WQS.

For the following reasons, discharges that could be authorized by the NWP's for which the Division is denying certification will not comply with the above-identified water quality requirements – Proposed activities may result in discharges of substances in amounts, concentrations or combinations that settle to form bottom deposits detrimental to the existing beneficial uses; form floating debris, scum or other surface materials; produce color, odor or other conditions in such a degree as to create a nuisance; may be harmful or toxic to humans, animals, plants or aquatic life; may produce a predominance of undesirable aquatic life or animals; may cause a film on the surface or produce a deposit on shorelines; and may impair the aquatic community.

For example, including but not limited to, projects utilizing NWP's 12, 14, 33, C and D are denied because of the frequency and likelihood they are utilized on the Reservation. These projects may require excavation within proximity to waters of the U.S. and depending on the location may impact water quality by forming bottom deposits detrimental to existing uses. The unique geography of the Reservation, as well as individual drainages, present challenges of which project proponents may not be aware of. These concerns can only accurately be determined if the Division is provided with the types of water quality data or information listed below.

Additionally, including but not limited to projects utilizing NWP's 7, 18, 31, and 43 are denied because of the unique characteristics of waters of the U.S. into which these projects may discharge. For example, the chemistry and seasonal temperature fluctuations of the Pine River differ from the San Juan River which may lead to a project forming floating debris, scum or other surface materials or producing color, odor or other conditions in such a degree as to create a nuisance. These differences can only accurately be assessed if the Division is provided with the types of water quality data or information listed below.

Furthermore, including but not limited to projects utilizing after-the-fact NWP's, provisional NWP's, NWP's granted waivers on limits by the District or Division Engineer, NWP 3 which require a PCN or results in a discharge into perennial streams or special aquatic sites, NWP 6 when there is a trenching activity, NWP's 13, 16, 20, 27, 29, 38, 39, 40, 42, 45, 53, and E are denied because the projects have the potential to form bottom deposits detrimental to the existing beneficial uses; form floating debris, scum, or other surface materials sufficient to harm existing beneficial uses; may be harmful to existing beneficial uses or toxic to humans, animals, plants, or aquatic life; produce a predominance of undesirable aquatic life or animals which are detrimental to existing beneficial uses; or cause a film on the surface or produce a deposit on shorelines which is detrimental to existing beneficial uses. The impacts to water quality can be determined if the Division is provided with the types of water quality data or information listed below.

Finally, including but to limited to NWP's 17, 21, 44, 49, 50, 51, and 52 are denied because discharge into waters of the U.S. for which the chemistry, agriculturally induced low flows, or high temperatures may not tolerate additional inputs from these projects. These projects have the potential to be harmful or toxic to humans, animals, plants or aquatic life; produce a predominance of undesirable aquatic life or animals; cause a film on the surface or produce a

deposit on shorelines; or leave Reservation waters subject to substance that in concentrations or combinations would impair the aquatic community. To further identify if these projects will impact specific waters of the U.S., the Division is requesting the types of water quality data or information listed below.

Types of water quality data or information that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements –

- a. The information required in Corps of Engineers Nationwide Permits General Condition 31 (b), "Contents of Pre-Construction Notification."
- b. A summary of contacts/discussions with the Tribe's water quality staff regarding the project.
- c. A summary of tribally identified aquatic resource concerns, if any.
- d. A description of best management practices (BMPs) and how the project will utilize construction BMPs to reduce or eliminate water quality degradation as a result of the project.
- e. A discussion of how the project has been designed to be resilient to the effects of climate change. Provide in the discussion a projection of future climate in the project area including a reference to how the projection was made.
- f. Any additional information submitted to the Corps, such as cultural resource reports or summaries, biological assessment for endangered species, etc., must be included in the certification application.
- g. All requested information should be sent to the Environmental Programs Division Head at wqs@southernute-nsn.gov.

Conclusion

Thank you for the ongoing partnership in the implementation of the regulatory programs of the Clean Water Act. If you have questions about the Division's certification, please contact me at (970) 563-2206, Alexandra Ratcliff at (970) 563 -2256, or Jeff Seebach at (970) 563-2272.

Sincerely,

Mark A. Hutson, Division Head

Encls: Water Quality Standards for the Southern Ute Indian Reservation – Final June 1996

cc: Sam W. Maynes, Tribal Legal Counsel
Julianne Begay, Tribal Legal Counsel