

401 Water Quality Certification (WQC) Decisions Summary Table for Colorado. Below is a summary table of WQCs granted, waived, or denied in the state of Colorado. Certifying Authorities may grant a General Water Quality Certification (GWQC), a Conditional Water Quality Certification (CWQC), deny certification, or waive certification.

NWP	USEPA Region 8	Southern Ute Indian Tribe	Ute Mountain Ute Tribe	Colorado Department of Public Health and Environment
3	Denied	CWQC/Denied for PCN and impacts to special aquatic sites and perennial streams	CWQC	GWQC
4	Waived	CWQC	Waived	GWQC
5	CWQC	CWQC	CWQC	GWQC
6	CWQC	CWQC/Denied for Trenching	CWQC	GWQC
7	Denied	Denied	CWQC	GWQC
12	Denied	Denied	Denied	GWQC
13	Denied	Denied	CWQC	GWQC
14	Denied	Denied	CWQC	GWQC
15	Denied	Waived	CWQC	GWQC
16	Denied	Denied	Denied	GWQC
17	Denied	Denied	Denied	GWQC
18	CWQC	Denied	CWQC	GWQC
19	Denied	CWQC	CWQC	GWQC
20	CWQC	Denied	CWQC	GWQC
21	Denied	Denied	Denied	GWQC
22	Waived	CWQC	Waived	GWQC
23	CWQC	CWQC	CWQC	GWQC
24		CWQC	Denied	GWQC
25	CWQC	CWQC	CWQC	GWQC
27	Denied	Denied	CWQC	GWQC
29	Denied	Denied	Denied	GWQC
30	CWQC	CWQC	CWQC	GWQC
31	CWQC	Denied	CWQC	GWQC
32	CWQC	CWQC	CWQC	GWQC
33	CWQC	Denied	CWQC	GWQC
34	Denied	Waived	Denied	GWQC
36	CWQC	Waived	CWQC	GWQC
37	Denied	CWQC	Denied	GWQC
38	CWQC	Denied	CWQC	GWQC
39	Denied	Denied	Denied	GWQC
40	Denied	Denied	Denied	GWQC
41	CWQC	CWQC	CWQC	GWQC
42	Denied	Denied	Denied	GWQC
43	Denied	Denied	CWQC	GWQC
44	Denied	Denied	Denied	GWQC
45	CWQC	Denied	CWQC	GWQC
46	CWQC	CWQC	CWQC	GWQC
48	Waived	Waived	Waived	GWQC
49	Denied	Denied	Denied	GWQC
50	Denied	Denied	Denied	GWQC
51	Denied	Denied	Denied	GWQC
52	Denied	Denied	Denied	GWQC
53	Denied	Denied	Denied	GWQC
54	Waived	Waived	Waived	GWQC
57	Denied	Denied	CWQC	GWQC
58	Denied	Denied	Denied	GWQC
After-the-fact verification		Denied		

**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.



WATER QUALITY PROGRAM

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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 NWP and has examined the Army Corps' proposed NWP.

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 NWP with conditions. The Division is denying certification for 30 of the 57 NWP, all "after-the-fact NWP" (i.e., all determinations that a NWP applies when such determination is made after the discharge has occurred), all provisional NWP (i.e., all provisional verification letters from the Army Corps authorizing coverage for a project subject to individual certification by the certifying authority), and NWP 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



Ute Mountain Ute Tribe

Environmental Programs Department

P.O. Box 448

Towaoc, Colorado 81334-0448

(970) 564-5430

December 14, 2020

Kelly Allen
Albuquerque District
Regulatory Division
505-342-3216
Kelly.e.allen@usace.army.mil

DATE: 12/11/2020

**SENT VIA EMAIL
DIGITAL READ RECEIPT REQUESTED**

Re: Certification of the proposed U.S. Army Corps of Engineers 2020 Nationwide Permits pursuant to Section 401 of the Clean Water Act for lands of the Ute Mountain Ute Tribe in Colorado, New Mexico and Utah in the Albuquerque, Sacramento and Omaha Districts.

The Ute Mountain Ute Tribe (UMUT) has responsibility under Section 401 of the Clean Water Act (CWA) to evaluate and certify water quality protection for federal permits or licenses issued for work on lands within the boundary of the Ute Mountain Ute Reservation.

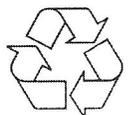
This certification is in response to the US Army Corps of Engineers Notice of Issuance of Proposed Nationwide Permits (NWP) listed in the September 15, 2020 Federal Register for Clean Water Act (CWA) Section 401 water quality certification and the CWA 401 certification request from the U.S. Army Corps of Engineers Albuquerque District on October 15, 2020.

This certification applies to any potential point source discharges from potential projects authorized under the proposed U.S. Corps of Engineers Nationwide Permit Reissuance (Federal Register September 15, 2020) into waters of the United States that occur within the Ute Mountain Ute Reservation. It is the responsibility of the applicant to determine the proper CWA Section 401 authority through coordination and recommendations of status through the UMUT or certification of land status by the Bureau of Indian Affairs (BIA).

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.

These requirements will protect water quality and help ensure that the NWP program minimizes adverse impacts on the aquatic environment on tribal lands, both individually and cumulatively, as required by CWA Section 404(e).

Project applicants will need to request an individual certification from UMUT for NWP that are denied. If a project is unable to meet the enclosed conditions, or if certification is denied for an applicable NWP, the applicant may request an individual certification from UMUT. An individual certification request must follow the requirements outlined in §121.5 of EPA's CWA § 401 Certification Rule, effective September 11, 2020.



Projects failing to meet the enclosed conditions, despite qualifying for use of a NWP are not eligible for coverage under this programmatic certification and must contact UMUT for individual project certification. Projects qualifying for use of a NWP and meeting the enclosed conditions must notify UMUT pursuant to General Condition #1, but may proceed after verifying that notification has been received and without further written verification from UMUT.

General Information

The general information provided in this cover letter section does not constitute a certification condition(s). The Applicant is responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state or tribal authorities where applicable, including an EPA general construction CWA Section 402 stormwater permit notice of intent. This certification must be retained in your files with the applicable NWPs as documentation of UMUT certification for the above-referenced proposed NWPs. This certification is specifically associated with the proposed NWPs and expires when these NWPs expire.

UMUT has not received the final nationwide permits, national or regional conditions from the Corps. Therefore, if nationwide permits, national conditions and/or regional conditions are modified significantly, UMUT expects notifications of these modifications and that the Corps of Engineers will follow the spirit of 40 CFR Part 121 and request new or revised 401 certifications to reflect the significant changes in the permits.

The Corps and applicants should consider contacting UMUT Environmental Programs Department as early as possible for potential permits and actions that may be complicated and when early discussions may be beneficial to all parties. UMUT requests notification when the Corps District Engineer intends to exert discretionary authority or waive the acreage, linear feet or cubic yard limits of any of the 2020 proposed Nationwide Permits. We would like the opportunity to discuss the rationale and finding of DeMinimus impact in these instances. The Corps should be aware of UMUT lands outside of commonly known reservation boundaries including but not limited to tribal trust lands that are outside of reservation boundaries. A state certification is not valid on these waters, and without a valid 401 certification, a permit is not valid.

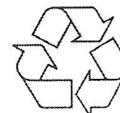
For NWPs or projects that do require an individual 401 certification, a request for certification must follow the requirements outlined in Section 121.5 of EPA's final 401 regulation, effective September 11, 2020. Inquiries, pre-filing meeting requests and certification requests should be sent to clarrick@utemountain.org. Suggested minimum information needed by UMUT is available by request. If minimum information is not included, the information will be requested after receipt of the certification request. UMUT may decide to Public Notice certification requests and offer the public an opportunity to request a public hearing on all individually requested certifications. This additional time should be considered in setting the reasonable time period for certifications.

If there are any questions or if any clarification is necessary please contact Colin Larrick, Water Quality Program Manager, at 970-564-5430 or clarrick@utemountain.org

Sincerely,



Scott Clow
Environmental Programs Director
Ute Mountain Ute Tribe



**Ute Mountain Ute Tribe 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 the Ute Mountain Ute Reservation within the Albuquerque, Omaha and Sacramento Corps Districts: 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, and D.

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.

This Certification does not apply to the following NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B. If any activity authorized by these listed NWPs may result in a discharge into a water of the United States, the Corps must seek CWA section 401 certification from the Ute Mountain Ute Tribe for discharges that occur in the boundaries of the Ute Mountain Ute Tribe within the Albuquerque, Omaha and Sacramento Corps Districts. In addition, this certification does not apply to NWPs applied "after-the-fact" (i.e., after the discharge has occurred) or to NWPs where a waiver on limits has been granted by the District or Division Engineer.

General Information

The general information provided in this section is intended to provide context for UMUT's certification decision and does not itself constitute a certification condition(s). The information in this section is being provided to help ensure applicants comply with the terms and conditions of the CWA § 401 certifications of the NWPs on applicable UMUT lands.

- The Applicant and applicants for projects authorized under the NWPs should obtain 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 Applicant may request an individual certification from UMUT. 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.
- If the project is constructed and/or operated in a manner not consistent with the applicable NWP, general conditions, or regional conditions, the permittee may be in violation of this certification.
- UMUT representatives may inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP. CWA Section 308(a).

UMUT is expressly waiving its authority to act on the CWA § 401 certification request for the following proposed NHPs: **NHPs Waived (121.9(a)(1))**

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
22. Removal of Vessels
48. Commercial Shellfish Mariculture
54. Living Shorelines

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

CWA Section 401 certification is granted with the following conditions for NHPs 3, 5, 6, 7, 13, 14, 15, 18, 19, 20, 23, 25, 27, 30, 31, 32, 33, 36, 38, 41, 43, 45, 46, C, and E. UMUT has determined that any discharge authorized under these proposed NHPs will comply with water quality requirements, including applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, and tribal regulatory requirements for point source discharges into waters of the United States, subject to the following conditions pursuant to Section 401(d).

All conditionally certified NHPs, including those with additional permit-specific conditions, must comply with the following conditions:

Conditions Applicable to all NHPs	Why the condition is necessary to assure the proposed project will comply with water quality requirements	Citation that authorizes the condition
<p>All applicants, including federal agencies, must notify UMUT’s Tribal Environmental Department of the use of all NHPs for which certification has been granted prior to commencing work on the project.</p>	<p>Notification will ensure that UMUT is aware of all Corps-authorized activities potentially affecting Indian country lands. It also will ensure the Corps and UMUT can demonstrate that the NHP program has no more than minimal impacts to the aquatic environment, individually and cumulatively, and that the activities will not adversely impact cultural and historic uses of tribal waters.</p>	<p>CWA sections 301, 302, 303, 306, and 307¹ CWA 308(a)</p>
<p>Notifications must include:</p> <ul style="list-style-type: none"> • project location (lat. Long., exact point on map); • NHP that will be used and the specific activity that will be authorized under the NHP; • amount of permanent and temporary fills; • a short summary of the proposed activity, and all other federal, state, tribal or local permits or licenses required for the project; • complete contact information of both the applicant and contractor (name, name of the company or property if applicable, telephone, mobile, and email); and, • summary of best management practices that will be used. 	<p>In order to ensure that UMUT has the opportunity to inspect the project prior to the onset of operations, the applicant must notify the tribal government in a timely manner of the status of the project construction.</p>	<p>40 CFR 121.11(a) Endnotes (ii-iv)</p>

- Notify UMUT at least 7 days before the completion of construction and operations begin.

Point source discharges may not occur: (1) in fens, bogs or other peatlands; (2) within 100 feet of the point of discharge of a known natural spring source; or (3) hanging gardens or (4) culturally sensitive waters.

This condition is necessary to ensure activities that may result in point source discharges into waters of the United States do not degrade these unique and difficult to replace wetland types, which play an importation role in maintaining water quality and hydrologic function in mountain and prairie ecoregions.

40 CFR 230 Subpart E; Ute Mountain (iv)
Endnotes (i-iv)

Except as specified in the application, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes shall be allowed to enter into or be stored where it may enter into waters of the U.S.

This condition is necessary to ensure water quality is not degraded by toxic pollutants in toxic amounts, raw materials, oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project.

40 CFR 230.10(d); 40 CFR 230.71; Ute Mountain (iv)
Endnotes (i-iv)

Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect waters of the U.S. from sedimentation and other pollutants.

This condition minimizes turbidity and sediment caused by construction activities, minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination), and allows for clean-up of potential spills before entering waters. It is necessary to ensure that water quality is not degraded, and biology of the waters are not negatively impacted by the project.

40 CFR 230.10(d) and 230.72 Ute Mountain (iv)

Water used in dust suppression shall not contain contaminants that could violate water quality standards.

This condition is necessary to ensure water quality is not degraded by toxic material in toxic amounts, raw materials, oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project.

40 CFR 230.10(d); 40 CFR 230.71; Endnotes (i-iv) Ute Mountain (iv)

Erosion control matting that is either biodegradable blankets or loose-weave mesh must be used to the maximum extent practicable.

Condition is necessary to provide clarity on how to meet "appropriate soil erosion and sediment controls," as required by NWP's General Condition 12. Use of other "appropriate" measures is not prohibited, but the inclusion of this condition ensures that water quality impacts of dredged or fill material are minimized.

40 CFR 230.10(d); 40 CFR 230.72 Ute Mountain (iv)

All equipment used in waters of the U.S. must be inspected for fluid leaks and invasive species prior to use on a project. All fluid leaks shall be repaired and cleaned prior to use or when discovered, or if the fluid leak can't be

This condition is necessary to ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project. This condition helps protect the native

40 CFR 230.10(d); 40 CFR 230.74 Ute Mountain (iv)

<p>repaired, the equipment shall not be used on site. Equipment used in waters with the possibility of aquatic nuisance species infestation must be thoroughly cleaned before they are used on the project.</p>	<p>biology of the impacted waters by preventing the spread of invasive or nuisance species.</p>	
<p>Vegetation should be protected except where its removal is necessary for completion of the work. Locations disturbed by construction activities should be revegetated with appropriate native vegetation in a manner that optimizes plant establishment for the specific site. Revegetation may include topsoil replacement, planting, seeding, fertilization, liming, and weed-free mulching, as necessary. Where practical, stockpile weed-seed-free topsoil and replace it on disturbed areas. All revegetation materials, including plants and plant seed shall be on site or scheduled for delivery prior to or upon completion of the earth moving activities.</p>	<p>Condition is necessary to provide the project proponent with clarity on what meets the requirement for appropriate revegetation as required by NWP's General Condition 13. Revegetation maintains and improves water quality because riparian vegetation acts as buffer to reduce the amount of sediment and pollutants that enter waterways. Native vegetation, because it is adapted to local conditions (e.g., soil types and temperature) provided this function most efficiently. Native vegetation also protects the biology of waters by providing habitat for semi-aquatic organisms and other organisms that are a food source to aquatic life.</p>	<p>40 CFR 230.10(d); 40 CFR 230.75; Ute Mountain (iv)</p>
<p>Activities may not result in any unconfined discharge of liquid cement into waters of the U.S. Grouting riprap must occur under dry conditions with no exposure of wet concrete to the waterbody.</p>	<p>This condition is necessary to ensure water quality is not degraded and the biology of the waters are not negatively impacted by toxic compounds.</p>	<p>40 CFR 230.10(d); 40 CFR 230.71; CWA 307 ("No toxics in toxic amounts") Ute Mountain (iv)</p>
<p>Activities that may result in a point source discharge shall occur during seasonal low flow or no flow periods to the extent practicable.</p>	<p>This condition minimizes turbidity and sediment caused by construction activities, minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination), and allows for clean-up of potential spills before entering waters. It is necessary to ensure that water quality is not degraded, and biology of the waters are not negatively impacted by the project.</p>	<p>40 CFR 230.10(d); 40 CFR 230.72(d); 40 CFR 230.23; 40 CFR 230.24; Ute Mountain (iv)</p>
<p>The placement of material (discharge) for the construction of new dams is not certified, except for stream restoration projects.</p>	<p>This condition is necessary to ensure impacts to water quality as a result of flow alterations are minimized to the maximum extent practicable, as required by NWP's General Condition 8.</p>	<p>40 CFR 230.23; 40 CFR 230.24; Ute Mountain (iv)</p>

****SEE NEXT PAGE FOR LIST OF NWPS GRANTED WITH CONDITIONS****

NWPs Granted with Permit-Specific Conditions in addition to the Conditions listed above. (121.7(d)(2)):

NWP #	Permit-Specific Conditions	Why the condition is necessary to assure the proposed project will comply with water quality requirements	Citation that authorizes the condition
3. Maintenance	<p>1) No more than 25 cubic yards of new or additional riprap may be placed to protect the structure or fill;</p> <p>2) Bridge replacements must span the bankfull width and/or the ordinary highwater mark of the affected waters of the U.S.</p> <p>3) Fill or dredged material shall not result in an increase in land contour height beyond the original dimensions for the repair of low water crossings, or loss of stream cross section dimensions.</p> <p>4) Silt and sediment removal associated with low water crossings shall not exceed 50 linear feet.</p> <p>5) Silt and sediment removal associated with bridge crossings shall not exceed 100 linear feet.</p>	<p>1) The placement of new or additional riprap without limiting the amount of impacts authorized could result in more than minimal adverse effects on water quality. Limiting the placement of additional riprap to no more than 25 cubic yards will help ensure that the placement provides localized erosion control without causing undesirable consequences to water quality and degradation of physical habitat.</p> <p>2) The placement of a bridge/structure within bankfull width and/or the ordinary high water mark of a water of the U.S. would alter the hydrologic characteristics of the waterbody which could lead to an increased erosional force, scour around the bridge/structure during bankfull flows, high sediment loads to the waterbody, abandonment of the primary channel, and undermining of the structure itself.</p> <p>3) The discharge of dredged or fill material which alters the contours of a waterbody and/or its riparian zone can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem.</p> <p>Without a linear foot limit associated with silt and sediment removal in waters of the U.S., excess removal can result in varying degrees of change in the complex</p>	<p>40 CFR 230.10(d); 40 CFR 230.73; 40 CFR 230.75 Ute Mountain (iv)</p>

7. Outfall Structures

- 1) Construction of the outfall structure shall be placed at the streambed elevation and, at a minimum, the pipe should be sized to prevent high pressure discharge of stormwater.
- 2) Outfall structures shall not be constructed in wetlands.
- 3) Controls shall be put in place to stabilize all areas of the bed and bank around and adjacent to the outfall structure and associated intake structures that may be affected by outfall or stream flows, respectively.
- 4) Structures shall not result in a loss of waters of the U.S. (e.g. tile systems).

physical, chemical, and biological characteristics. Excess silt and sediment removal may alter the direction or velocity of water flow or otherwise change the dimensions of a water body which can result in adverse changes to structure and dynamics of aquatic communities, erosion rates, and increases in suspended particulates. This justification applies to conditions 4 and 5.

This justification covers condition 1 and 2. By specifying conditions on outfalls sizing, placement, and stabilization, these measures will help ensure that outfall structures are constructed such that they provide localized erosion control at the point(s) of discharge while minimizing habitat degradation and undesirable downstream impacts.

3) Erosion from outfall structures can be caused by several factors, such as uncontrolled stormwater runoff, inadequate energy dissipation structures, nick point migration, poor slope stabilization, or extreme storm events that exceed design capacities. Without stabilization controls in place, construction of outfall structures can lead to changes in erosion and deposition rates, increases in suspended particulates in the waterbody, and undermining of the outfall structure itself.

4) Structures that result in a loss of waters of the U.S. can degrade and/or eliminate aquatic habitat and adversely affect bottom-dwelling organisms at the site by smothering immobile forms or forcing mobile forms to migrate.

These conditions are necessary to ensure that physical habitat and hydrologic characteristics of waters are not

Ute Mountain (iv) 303(a); 40 CFR 230.7; 40 CFR 230.10; 40 CFR 230.10(d); 40 CFR 230.73; 40 CFR 230.70

13. Bank Stabilization

1) Activities shall use of native vegetation or other bioengineered design techniques (e.g. willow plantings, root wads, large woody debris, etc.) or a combination of hard-armoring (e.g. rock) and native vegetation or bioengineered design techniques. Artificial soil stabilizing material (e.g. mulch, matting, netting, etc.) shall be used to reduce soil erosion. These materials, to include all plants and plant seed, shall be on site or scheduled for delivery prior to or upon completion of the earth moving activities. Sediment control measures shall be maintained in good working order at all times.

2) The slopes of disturbed banks should be configured to mimic a stable reach of the same stream within ½ mile in either direction of the project and not reduce the bottom width of the stream.

3) If flow conditions dictate the use of hardened structures, only appropriately sized angular rock may be used. Soil cement, concrete, grouted riprap, etc. may not be used.

14. Linear Transportation Projects

1) Stormwater from the construction and operation of these projects must be routed into constructed runoff water quality control systems (e.g. sediment basins, wet ponds, etc.)

degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.

This justification applies to conditions 1-3. While effective at preventing localized erosion, hard armoring used as streambank stabilization can have a number of negative downstream effects such as increasing flow velocities, impeding hydrologic interaction with the floodplain, and degrading physical habitat. Specifying the methods and techniques which can be used under NWP 13 will help prevent habitat degradation and minimize negative downstream impacts while also achieving localized streambank stabilization and erosion control.

This justification applies to conditions 1 - 3. Constructed water quality control systems sequester sediments and other pollutants from runoff, as well as reduce velocity of those flows, prior to entry into waters of the United States. Maintaining natural stream bottom widths and elevations limits increases in streamflow velocity and

Ute Mountain (iv) 303(a) 40 CFR 230.7;40 CFR 230.10(d); 40 CFR 230.72

Ute Mountain (iv) 303(a) 40 CFR 230.7 and 230.10

15. Bridges

2) Affected streambanks must be sloped such that the stream bottom width is not reduced, and bottom elevations are restored to original elevations. In general, stream bank slopes should not be steeper than 3:1 unless there is a compelling reason.

3) Crossings must be placed as close to perpendicular to the water course as possible.

1) Stormwater from the construction and operation of these projects (including runoff from bridge decks) must be routed into constructed runoff water quality control systems (e.g. sediment basins, wet ponds, etc.)

2) Affected streambanks must be sloped such that the stream bottom width is not reduced, and bottom elevations are restored to original elevations.

3) Crossings must be placed as close to perpendicular to the watercourse as possible.

4) Bridge decks must be designed such that they do not drain directly into the waterbody.

5) Bridges must span the bankfull width and/or ordinary high water mark of the affected waters of the U.S. Bridges may not impair flow under normal circumstances, should not produce eddies or unintended scour holes and should be designed to prevent accumulation of sediment that may block flows.

reduces the potential for streambed scouring and bank incising. Limiting bank slope reduces the potential for erosion, undercutting and slumping, which add sediment to streams. Perpendicular stream crossings minimize the length of stream bed and bank impacts for a project. Collectively, these controls will ensure that physical habitat and hydrologic characteristics of waters are not degraded, will maintain the habitat and biology of the waters and will ensure the hydrogeomorphology is not negatively impacted by the project.

This justification applies to conditions 1 - 3. Constructed water quality control systems sequester sediments and other pollutants from runoff, as well as reduce velocity of those flows, prior to entry into waters of the United States. Maintaining natural stream bottom widths and elevations limits increases in streamflow velocity and reduces the potential for streambed scouring and bank incising. Limiting bank slope reduces the potential for erosion, undercutting and slumping, which add sediment to streams. Perpendicular stream crossings minimize the length of stream bed and bank impacts for a project. Collectively, these controls will ensure that physical habitat and hydrologic characteristics of waters are not degraded, will maintain the habitat and biology of the waters and will ensure the hydrogeomorphology is not negatively impacted by the project.

4) Drainage directly from the bridge decks may cause erosion, and introduce additional pollutants, such as oil, gas, sediment, and toxics. Directing bridge deck drainage into constructed runoff water quality control systems will help prevent erosion and keep pollutants from directly entering the waterway.

Ute Mountain
(iv)
303(a)
40 CFR 230.7;
40
CFR230.10(d);
40 CFR 230.72

19. Minor Dredging	Dredged or fill materials must be placed in uplands and controlled such that it cannot return to waters of the U.S. Dredged or fill material may not be placed on temporary islet, islands, sandbars, landmass or other area of sediment accumulation within the banks of a stream, shore of lake, edge of wetland or other type of waterbody, unless the vegetation and geomorphology signify a long term stable configuration (e.g. areas of accumulation are not formed from temporary situations such as drought conditions or temporary upstream reservoir release conditions).	5) The placement of a bridge/structure within bankfull width and/or the ordinary high water mark of a Water of the U.S. would alter the hydrologic characteristics of the waterbody which could lead to an increased erosional forces, scour around the bridge/structure during bankfull flows, high sediment loads to the waterbody, abandonment of the primary channel, and undermining of the structure itself.	Ute Mountain (iv) 40 CFR 230.10(d); 40 CFR 230.70
27. Aquatic Habitat Restoration	Activities that may result in a discharge into waters of the United States shall not result in conversion of one habitat type to another (e.g. wetlands to open water).	This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.	Ute Mountain (iv) 40 CFR 230.10(d); 40 CFR 230.75
		Aquatic habitat restorations that convert from one habitat type to another can alter the functions and services provided by the existing resources resulting in a functional loss.	
		This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.	

43. Stormwater Management Facilities	Certification is granted with conditions only for replacement and repair activities that impact (e.g., fill, relocate, realign or straighten) no more than 300 LF of stream or 1/10 acre of waters of the U.S.	Activities with more than 300 LF or 1/10 acre of waters of the U.S. of stream impact could result in more than minimal adverse environmental effects to water quality. This condition is necessary to ensure that water quality is not degraded, the biology of the waters are not negatively impacted by the project, and that no toxic compounds in toxic amounts will be used.	40 CFR 230.10(d); 40 CFR 230.73; 40 CFR 230.75; Ute Mountain (iv)
C. Electric Utility Line and Telecom Activities	Construction activities shall not impact (e.g., fill, relocate, realign or straighten) more than 300 LF of stream for a single and complete project.	Activities with more than 300 LF of stream impact could result in more than minimal adverse environmental effects to water quality. This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.	CWA sections 301, 302, 303, 306, and 307 (see endnote i); Ute Mountain (iv)
E. Water Reclamation and Reuse	Activities shall not impact (e.g., fill, relocate, realign or straighten) more than 300 LF of stream channel for a single and complete project.	Activities with more than 300 LF of stream impact could result in more than minimal adverse environmental effects to water quality. This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.	CWA sections 301, 302, 303, 306, and 307 (see endnote i); Ute Mountain (iv)

NWPs Denied (121.7(e)(2))

UMUT has determined that the discharges from the following NWPs will not comply with water quality requirements. Therefore, CWA Section 401 certification is denied, and applicants must apply for an individual water quality certification. Denials apply to all UMUT lands.

*** Reviewer NOTE: For readability of the table we have removed the column with the heading, "The following water quality data or information would be needed to assure that the range of discharges from potential projects will comply with water quality requirements." This information follows the table and is the same for all NWP's where certification is denied. ***

NWP #	Water quality requirement with which discharges that could be authorized by the general license or permit will not comply	Brief statement explaining why discharges that could be authorized by the general license or permit will not comply with this water quality requirement
12. O&G Pipeline Activities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C Section 311 and implementing regulations Ute Mountain (iv)	The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse effects to water quality individually and cumulatively. In addition, the removal of the PCN requirement for activities that involve mechanized land clearing in forested wetlands does not allow the evaluation of the functional loss from conversion of wetland type from a forested wetland, which may modify habitat and alter water levels beyond normal water fluctuations, inhibiting the existing uses of the waterbody.
16. Return Water from Upland Contained Disposal Areas	40 CFR § 230.23 307 toxics Ute Mountain (iv)	Return water from upland contained disposal areas can contain debris, sediment, and other pollutants which would be discharged into aquatic resources under this NWP. The return water itself can modify current patterns and dimensions of a waterbody while any debris or sediment in the return water can result in adverse impacts through sedimentation and oxygen depletion from nutrient adsorption of suspended material.
17. Hydropower Projects	40 CFR 230.23 40 CFR 230.24 Ute Mountain (iv)	Discharges of dredged or fill material associated with hydropower projects having less than 10,000 kW of total generating capacity can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. These alterations can change salinity patterns, alter erosion or sedimentation rates, alter water temperatures.
21. Surface Coal Mining Activities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D Ute Mountain (iv)	The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

<p>24. Indian Tribe or State Administered Section 404 Programs</p>	<p>CWA 404(g) implementing regulations</p>	<p>Discharges associated with surface coal mining activities can result in varying degrees of change in the complex physical, chemical, and biological characteristics of the substrate. These changes can adversely affect the level of water quality such that existing instream water uses will no longer be maintained and protected.</p>
<p>29. Residential Developments</p>	<p>CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D</p>	<p>The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p>
	<p>Ute Mountain (iv)</p>	<p>Discharges associated with residential developments under NWP 29 can result in significant losses to ecosystem services provided by existing aquatic resources. Adverse impacts may result from changes in water levels, flow, chemical content, substrate characteristics, or salinity and can result in losses to important breeding and nesting areas, food sources, and travel corridors for aquatic wildlife. Discharges of dredged or fill material associated with cranberry production can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. These alterations can change salinity patterns, alter erosion or sedimentation rates, and alter water temperatures which can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change surrounding areas.</p>
<p>34. Cranberry Production</p>	<p>40 CFR 230.23 40 CFR 230.24</p>	
	<p>Ute Mountain (iv)</p>	
<p>37. Emergency Watershed</p>	<p>Ute Mountain (iv)</p>	

Protection and
Rehabilitation

39. Commercial
Development

CWA sections 301, 302, 303, 306, and 307
(see endnote i); 40 CFR 230 Subpart C,
Subpart D

Ute Mountain (iv)

The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

Discharges of dredged or fill material associated with commercial development activities permitted under NWP 39 can result in degradation of water quality such that existing instream water uses are no longer maintained. These activities can result in changes to the physical, chemical, and biological characteristics of the aquatic ecosystem that may result in water quality which does not support the propagation of fish, shellfish, and wildlife and recreation in and on the water.

40. Agricultural
Activities

CWA sections 301, 302, 303, 306, and 307
(see endnote i); 40 CFR 230 Subpart C,
Subpart D

Ute Mountain (iv)

The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

Agricultural activities under NWP 40 which may result in the discharge of dredged or fill material can change the material chemistry and physical characteristics of a waterbody through the introduction of chemical constituents in suspended or dissolved form. These changes may reduce or eliminate the suitability of waterbodies for aquatic organisms, human consumption, or recreation.

42. Recreational
Facilities

CWA sections 301, 302, 303, 306, and 307
(see endnote i); 40 CFR 230 Subpart C,
Subpart D

Ute Mountain (iv)

The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

Discharges of dredged or fill material associated with recreational facilities permitted under NWP 42 can result in degradation of water quality such that existing instream water uses are no longer maintained. These activities can result

44. Mining Activities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D	<p>in changes to the physical, chemical, and biological characteristics of the aquatic ecosystem that may result in water quality which does not support the propagation of fish, shellfish, and wildlife and recreation in and on the water. The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p>
	Ute Mountain (iv)	<p>Discharges associated with mining activities may result in an increase in turbidity to the extent which reduces the water quality necessary to support the propagation of fish, shellfish, wildlife, and recreation in and on the water. The biological and chemical context of the suspended material may also react with the dissolved oxygen in the water which can result in oxygen depletion. Toxic compounds absorbed or adsorbed to fine-grained particulates in suspended material may become biologically available to organisms either in the water column or on the substrate. Discharges from these activities may increase the availability of contaminants in the aquatic ecosystem which may lead to the bioaccumulation of such contaminants in wildlife.</p>
49. Coal Remining	40 CFR 230.23 40 CFR 230.24	<p>Discharges associated with the remining and reclamation of lands that were previously mined for coal may result in an increase in turbidity to the extent which reduces the water quality necessary to support the propagation of fish, shellfish, wildlife, and recreation in and on the water. The biological and chemical context of the suspended material may also react with the dissolved oxygen in the water which can result in oxygen depletion. Toxic compounds absorbed or adsorbed to fine-grained particulates in suspended material may become biologically available to organisms either in the water column or on the substrate.</p>
50. Underground Coal Mining	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D	<p>The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p>
	Ute Mountain (iv)	

Discharges associated with underground coal mining activities may result in an increase in turbidity to the extent which reduces the water quality necessary to support the propagation of fish, shellfish, wildlife, and recreation in and on the water. The biological and chemical context of the suspended material may also react with the dissolved oxygen in the water which can result in oxygen depletion. Toxic compounds absorbed or adsorbed to fine-grained particulates in suspended material may become biologically available to organisms either in the water column or on the substrate. Discharges from these activities may increase the availability of contaminants in the aquatic ecosystem which may lead to the bioaccumulation of such contaminants in wildlife.

51. Land-based Renewable Energy CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D

Ute Mountain (iv)

The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

Land-based renewable energy activities may result in an increase in suspended particulates entering waterbodies as a result of land runoff and direct dredging or filling. Suspended particulates may remain in the water column for varying amounts of time, reducing light penetration and lowering photosynthesis rates for aquatic vegetation.

52. Water-based Renewable Energy CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D

Ute Mountain (iv)

The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

Discharges associated with water-based renewable resources can have adverse impacts on water-related recreation including both consumptive and non-consumptive uses. Impacts from these activities may impair or water use by

53. Removal of Low Head Dams	40 CFR 230.23 40 CFR 230.24	changing turbidity, increasing suspended particulates, altering water temperature, changing habitat, and other changes to the aquatic ecosystem. The removal of low head dams in the arid and semi-arid west, where natural recovery can be slow, many times requires active restoration to achieve a net increase in ecological functions and services. Otherwise, the removal of the dam can lead to adverse impacts including significant increases in suspended particulate levels and sedimentation downstream which may cause oxygen depletion and destruction of habitat.
	Ute Mountain (iv)	
D. Utility Line Activities for Water and other Substances	40 CFR 230.20 40 CFR 230.23 40 CFR 230.24	Discharges resulting from the numerous activities permitted under this NWP may directly impact bottom-dwelling organisms by limiting aquatic organism movement, by smothering immobile forms, or by forcing mobile forms to migrate to potentially unsuitable habitat. Erosion, slumping, or lateral displacement of surrounding bottom can adversely affect areas of the substrate outside of discharge location by changing or destroying habitat. These changes may degrade water quality such that the waters no longer support the propagation of fish, shellfish, wildlife, and recreation in and on the waterbody.
	Ute Mountain (iv)	

ⁱ CWA sections 301, 302, 303, 306, and 307 are listed in CWA section 401(a)(1) and, therefore, those sections and federal regulations implementing those sections can be considered water quality requirements and provide a legal basis for certification grants, denials or conditions. Section 303 and EPA's implementing regulations at Part 131 establish "existing uses" as "the absolute floor of water quality in all waters of the United States." 48 Fed. Reg. 51,400, 51,403 (Nov. 8, 1983). Existing uses are "those uses actually attained in the water body on or after November 28, 1975, *whether or not they are included in the water quality standards.*" 40 C.F.R. § 131.3(e) (emphasis added). As a result, States are prohibited from removing designated uses from a waterbody segment if they are existing uses unless establishing a use with even more stringent criteria, 40 C.F.R. § 131.10(h), and existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected even if degradation is allowed under a State antidegradation policy, 40 C.F.R. § 131.12(a)(1). As a result, regardless of what water quality standards may be applicable to a water of the US, no discharge may be authorized under the CWA that would be so extensive as to change or destroy an existing use of that waterbody. Additionally, Section 404 is incorporated by reference into section 401(a)(1) and 401(d) by virtue of section 301(a), which prohibits the discharge of any pollutant by any person "[e]xcept as in compliance with this section and section[] . . . 404 of this title..." Section 404(a) authorizes the permitting of discharges of dredge or fill material "into the navigable waters at specified disposal sites." Under Section 404(b), those sites must be specified "through the application of guidelines developed by the Administrator, in conjunction with the Secretary." These guidelines, the CWA 404(b)(1) Guidelines, are contained at 40 CFR Part 230, establish

requirements for all permitted Section 404 discharges, including a requirement that such discharges must comply with all State water quality standards. 40 C.F.R. § 230.10(b)(1) & (2).

ii CWA - 40 CFR § 230 Subpart C - Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

iii CWA - 40 CFR § 230 Subpart D - Potential Impacts on Biological Characteristics of the Aquatic Ecosystem

iv Water Quality Standards For Surface Waters of the Ute Mountain Ute Indian Reservation – Section 4 Anti-degradation Policy, Section 5. Narrative Water Quality Criteria, Section 6. Narrative Biological Criterion, Section 12 Designated Uses and Criteria



COLORADO

**Department of Public
Health & Environment**

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December 14, 2020

RE: Response to Request for Action on Nationwide Permits under Section 401 of the Clean Water Act

Dear Ms. Allen:

This is in response to your October 15, 2020 request for the State of Colorado to take action under Section 401 of the Clean Water Act on the renewal of certain Nationwide Permits (“NWP”) and the issuance of five new NWPs, including regional conditions where relevant, that may result in a discharge to waters of the United States in Colorado. The draft NWPs at-issue, as published in the Federal Register on September 15, 2020, are numbered 15, 16, 17, 18, 21, 25, 29, 30, 34, 39, 40, 41, 42, 43, 46, 49, 50, and E (which would authorize activities that may result in discharges) and 3, 4, 5, 6, 7, 12, 13, 14, 19, 20, 22, 23, 27, 31, 32, 33, 36, 37, 38, 44, 45, 48, 51, 52, 53, 54, C, and D (which would authorize various activities, some of which may result in a discharge). The Water Quality Control Division (Division) of the Colorado Department of Public Health and Environment submitted comments on the draft NWPs and associated regional conditions on November 8, 2020. The Division’s comments expressed concerns regarding the elimination of the 300 linear foot cap on impacts to stream channels associated with projects authorized under NWPs, the relaxation of pre-construction notification requirements for some NWPs, and proposed modifications to regional conditions that currently provide enhanced protections for sensitive aquatic resources, including small streams, fens, spawning areas, and springs.

Water quality certification of NWPs in Colorado is covered by a provision in the state’s Water Quality Control Act, which reads as follows: “General or nationwide permits under section 404 of the federal act shall be certified for use in Colorado without the imposition of any additional conditions.” C.R.S. § 25-8-302(1)(f).

We appreciate the continued efforts of the various Corps Districts to protect Colorado’s water resources. Please do not hesitate to let our staff know if we can be of help as you move forward with implementation of these NWPs. Please do not hesitate to contact Trevor Klein (trevor.klein@state.co.us), Scott Garncarz (scott.garncarz@state.co.us), or myself (aimee.konowal@state.co.us) with any questions.



COLORADO
Department of Public
Health & Environment

Sincerely,

Aimee M Konowal

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Annette Quill, Senior Assistant Attorney General