



# Regional General Permit 5

U.S. ARMY CORPS OF ENGINEERS

BUILDING STRONG®

## DITCH RELATED ACTIVITIES IN THE STATE OF COLORADO

**EFFECTIVE:**

**EXPIRES:**

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The U.S. Army Corps of Engineers, Albuquerque, Sacramento, and Omaha Districts hereby issues Regional General Permit 5 for discharges of dredged or fill material into waters of the United States associated with ditch related activities in the state of Colorado.

**ISSUING OFFICE:** U.S. Army Corps of Engineers, Albuquerque, Sacramento, and Omaha Districts

**ACTION ID:** SPA-2021-00064

**AUTHORITIES:** Section 404 of the Clean Water Act for the discharge of dredged or fill material in waters of the U.S.

**PURPOSE:** The purpose of this Regional General Permit (RGP) is to authorize discharges into ditches that have minimal individual or cumulative adverse effects on the aquatic environment but that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2) (see 33 CFR 323.4). For additional information regarding the application of exemptions, please refer to the *Memorandum to the Field on Exemptions from Regulation under Section 404(f)(1)(C) of the CWA for the Construction or Maintenance of Irrigation Ditches and for the Maintenance of Drainage Ditches* (Attachment A).

**LOCATION:** This RGP is applicable to waters of the U.S. within the state of Colorado, including tribal lands.

**ACTIVITIES COVERED:** The types of activities covered under this permit are those that result in discharges of dredged or fill material into jurisdictional irrigation and drainage ditches (ditches). Irrigation ditches convey irrigation water to or away from irrigated lands. Drainage ditches increase the drainage of a particular land area. To the extent that a Corps permit is required, activities authorized by this RGP include, but are not limited to:

- Construction of irrigation ditches,
- Relocation/realignment of existing irrigation ditches,
- Converting existing ditches into pipes, and
- Filling of existing ditches.

In accordance with 33 CFR 322.2(f)(1), this RGP authorizes activities that are substantially similar in nature that would result in no more than minimal individual and cumulative adverse effects on the aquatic environment, when conducted under the terms and conditions of this permit.

**TERMS:** For activities requiring preconstruction notification (PCN), the discharge must not cause the loss of greater than one acre of waters of the U.S., unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (see general conditions 1h and 10). This RGP does not authorize discharges of dredged or fill material into ditches that either relocates a tributary or is constructed in a tributary unless the activity will result in a net benefit to the aquatic environment.

**NOTIFICATION PROCEDURES:** Per general condition 1 below, you must submit a PCN to the Corps, except for the following:

- (1) activities that result in the loss of less than 0.1 acre of wetland;
- (2) activities that result in the loss of less than 1 acre of tributary; and
- (3) activities conducted per a binding agreement with U.S. Bureau of Reclamation (USBR) or U.S. Department of Agriculture (USDA). See general conditions 6, 7, and 8 for additional notification requirements.

For activities requiring a PCN, you cannot perform any work until the Corps provides written verification that the activity may proceed under the RGP with any special conditions imposed or 45 days has elapsed from the date of a complete PCN submittal, unless any consultation required under Section 7 of the Endangered Species Act (33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation Act (33 CFR 330.4(g)) has been completed by the Corps.

For those activities conducted per a binding agreement with the USBR or USDA, a PCN is not required but you must submit to the Corps a copy of: (1) The binding agreement, (2) of the respective agency's regulatory compliance documentation related to the Endangered Species Act and National Historic Preservation Act, (3) a project description, (4) project plans, and (5) a location map. These documents must be submitted to the local Corps office at least 30 days prior to commencing activities in waters of the U.S. authorized by this RGP. Compensatory mitigation will not be required for activities conducted per a binding agreement with the USBR or USDA, since the purpose of such projects is to improve water quality and these activities would result in a net increase in aquatic resource functions and services.

For assistance in determining the appropriate Corps office, please contact one of the offices below or visit the Colorado Regulatory website at:

<https://www.nwo.usace.army.mil/Locations/District-Offices/Colorado/>.

**Grand Junction Regulatory Office**

(Sacramento District)  
400 Rood Ave., Room 224  
Grand Junction, CO 81501  
Phone: (970) 243-1199

**Pueblo Regulatory Office**

(Albuquerque District)  
201 West 8<sup>th</sup> Street, Suite 350  
Pueblo, CO 81003  
Phone: (719) 543-9459

**Durango Regulatory Office**

(Sacramento District)  
1970 E 3rd Ave., Suite 109  
Durango, CO 81301  
Phone: (970) 259-1764

**Denver Regulatory Office**

(Omaha District)  
9307 South Wadsworth Blvd.  
Littleton, CO 80128-6901  
Phone: (303) 979-4120

**GENERAL CONDITIONS:**

1. When a PCN is required, the following must be submitted to the appropriate Corps office. Where required, the prospective permittee cannot commence activities under this permit until the Corps has provided written verification that the activity may proceed under the RGP or 45 days has elapsed from the date of a complete PCN submittal, unless the Corps has determined that the activity may effect federally-listed threatened or endangered species or has the potential to effect historic properties eligible for the National Register of Historic Places. The contents of your PCN must include the following:

- a. Preconstruction Notification (PCN) Form (Attachment B);
- b. For projects resulting in impacts greater than 0.1 acre to jurisdictional wetlands, a Wetland Delineation using the currently approved Corps delineation manual and any appropriate supplements to the manual;
- c. The name(s) of those federally listed species that might be affected by the proposed activity, or which utilize the designated critical habitat that might be affected by the proposed activity, or documentation demonstrating compliance with the Endangered Species Act (if other lead federal agency);
- d. If the activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property;
- e. For each general condition of this RGP, a brief narrative describing how the activity would comply with the condition, or that the condition does not apply;
- f. Project plans showing all aspects of the proposed activity and the location of avoided and impacted waters of the U.S. Plan-view and cross-section plans shall be included. Both temporary (e.g., access, staging) and permanent impacts to waters of the U.S. shall be shown. Plans may be hand-drawn as long as they include approximate dimensions of all structures or work located in waters of the U.S.;

- g. A written statement explaining how the activity has been designed to avoid and minimize adverse effects, both temporary and permanent, to waters of the U.S.; and
- h. If applicable, a request for waiver of impact thresholds (i.e., 1/10<sup>th</sup> acre wetlands or one-acre stream or open water) must include rationale for how the activity will result in only minimal individual and cumulative adverse environmental effects (see also general condition 10 below).

2. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify the Corps of what you have found. We will initiate the federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

3. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity or sell the property associated with this permit. You may make a good faith transfer to a third party. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to the Corps to validate the transfer of this authorization. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from the Corps, which may require restoration of the area.

4. Work authorized under this permit may be inspected by the Corps at any reasonable time to assure that it is being or has been completed in compliance with the terms and conditions of this permit.

5. Fill material must be clean and free of contaminants and noxious plants. Fresh cement or concrete is not allowed in waters unless it is placed in sealed forms. Unsuitable fill material includes vehicle bodies, farm machinery, appliances and other metal objects, asphalt, biodegradable construction debris, tires, and concrete with exposed rebar.

6. Endangered Species:

a. No activity is authorized under any RGP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the RGP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the RGP activity and are later in time, but still are reasonably certain to occur.

b. Federal agencies should follow their own procedures for complying with the requirements of the ESA. The federal permittee must provide the Corps with the appropriate documentation to demonstrate compliance with those requirements. The

Corps will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

c. For activities that might affect federally-listed endangered or threatened species or designated critical habitat, the non-federal applicant's notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The Corps will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-federal applicant of the Corps' determination within 45 days of receipt of a complete notification. In cases where the non-federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have "no effect" on listed species or critical habitat, or until ESA section 7 consultation has been completed.

d. As a result of formal or informal consultation with the U.S. Fish and Wildlife Service (USFWS), the Corps may add species specific permit conditions to the RGP.

e. Authorization of an activity by the RGP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the USFWS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

f. If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed RGP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the notification required by paragraph (c) of this general condition. The Corps will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed RGP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed RGP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the Corps does not need to conduct a separate ESA section 7 consultation for the proposed RGP activity. The Corps will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

g. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the USFWS or their World Wide Web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac>.

## 7. Historic Properties:

- a. In cases where the Corps determines that the activity may affect properties listed in or eligible for listing in the National Register of Historic Places (NRHP), the activity is not authorized until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.
- b. Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the NHPA. Federal permittees must provide the Corps with the appropriate documentation to demonstrate compliance with those requirements. The Corps will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under Section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with Section 106.
- c. Non-federal permittees must identify in their notification which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic properties can be sought from the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), as appropriate, and the NRHP (see 33 CFR part 330.4(g)). When reviewing notification packages, the Corps will comply with the current procedures for addressing the requirements of Section 106 of the NHPA. The Corps shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the Corps shall determine whether the proposed activity has the potential to cause an effect on historic properties. Where the non-federal applicant has identified historic properties which the federally authorized activity may have the potential to cause effects and so notified the Corps, the non-federal applicant shall not begin the activity until notified by the Corps that compliance under Section 106 of the NHPA has been completed.
- d. The Corps will notify the prospective permittee within 45 days of receipt of a complete notification package whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR part 800.3(a)). If NHPA Section 106 consultation is required and will occur, the Corps will notify the non-federal applicant that he or she cannot begin work until Section 106 consultation is completed. If the non-federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for authorization from the Corps.
- e. Prospective permittees should be aware that Section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the

circumstances, the degree of damage to the integrity of the historic property, any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

f. If any previously unknown historic, cultural or archeological remains and artifacts are discovered while accomplishing the activity authorized by this permit, the permittee must immediately notify the Corps of what was found, and to the maximum extent practicable avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The Corps will initiate the federal, tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the NRHP.

8. For projects occurring on tribal lands, Individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 320.3(a)). The Corps, State, or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.
9. No activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.
10. For losses of waters of the U.S. that require a PCN, compensatory mitigation at a minimum one-to-one ratio will be required for all wetland losses that exceed 1/10 acre or for losses of streams or open waters that exceed one acre, unless the Corps determines in writing that either some other form of mitigation would be more environmentally appropriate, or the adverse environmental effects of the proposed activity are no more than minimal, or an activity-specific waiver of this requirement is approved (see also general condition 1h above).
11. If the permittee sells the property associated with this permit, the permittee must obtain the signature and mailing address of the new owner on the permit verification letter and forward a copy to the Corps to validate the transfer.
12. You shall return a signed Compliance Certification (Attachment C) to the appropriate local Corps office within 30 days after completion of the authorized work to inform the Corps regarding the need of this RGP.

**FURTHER INFORMATION:**

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to: Section 404 of the Clean Water Act (33 U.S.C. 1344).
2. Limits of this authorization.
  - a. This permit does not obviate the need to obtain other federal, state, or local authorizations required by law.
  - b. This permit does not grant any property rights or exclusive privileges.
  - c. This permit does not authorize any injury to the property or rights of others.

- d. This permit does not authorize interference with any existing or proposed federal projects.
3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:
    - a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.
    - b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.
    - c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
    - d. Design or construction deficiencies associated with the permitted work.
    - e. Damage claims associated with any future modification, suspension, or revocation of this permit.
  4. Reliance on Applicant's Data. The determination of the Corps that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.
  5. Reevaluation of Permit Decision. The Corps may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:
    - a. You fail to comply with the terms and conditions of this permit.
    - b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (see 4 above).
    - c. Significant new information surfaces which the Corps did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by the Corps, and if you fail to comply with such directive, the Corps may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. The permit duration, as described above, establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Activities not meeting the terms and conditions of this permit may be authorized through another type of permit from the Corps, such as a Nationwide Permit or Standard Individual Permit. The Corps will determine on a case-by-case basis whether an activity has a more than



minimal impact, individually or cumulatively, on the aquatic environment or may be contrary to the public interest. The Corps may include additional special conditions to a verification under this permit to ensure the activity has minimal impact.

**PERMIT DURATION:** This permit is valid for, and will expire, three years from issuance. The Corps may re-evaluate the terms and conditions of this permit at any time deemed necessary to protect the public interest. Activities verified by the Corps under this permit are valid until the date this RGP expires. In the event that this RGP expires when the project is under construction or under contract to begin construction, the applicant will have up to one year after the permit expiration to complete the work. In such case, the applicant must notify the Corps and submit sufficient evidence such as photos of work or proof of contract.

**ATTACHMENTS:**

- A. *Memorandum to the Field on Exemptions from Regulation under Section 404(f)(1)(C) of the CWA for the Construction or Maintenance of Irrigation Ditches and for the Maintenance of Drainage Ditches, July 24, 2020*
- B. PCN Form
- C. Compliance Certification

This permit becomes effective when the federal official, designated to act for the Secretary of the Army has signed below.

\_\_\_\_\_  
 Kelly Allen  
 Regulatory Division Chief  
 Albuquerque District

\_\_\_\_\_  
Date

\_\_\_\_\_  
 Michael S. Jewell  
 Regulatory Division Chief  
 Sacramento District

\_\_\_\_\_  
Date

\_\_\_\_\_  
 Eric Laux  
 Regulatory Division Chief  
 Omaha District

\_\_\_\_\_  
Date