REGION 8
DENVER, CO 80202

May 19, 2025

SENT VIA EMAIL

Michael S. Jewell
Chief, Regulatory Division
U.S. Army Corps of Engineers, Sacramento District
Michael.S.Jewell@usace.army.mil

RE: Clean Water Act Section 401 Water Quality Certification for U.S. Army Corps of Engineers (USACE) Regional General Permit (RGP) 16, for work associated with aquatic habitat restoration and enhancement activities in waters of the United States that occur within Indian country in the state of Utah and lands of exclusive federal jurisdiction in relevant respects (SPK-2014-00534)

Dear Mr. Jewell:

The U.S. Environmental Protection Agency (EPA) reviewed the Clean Water Act (CWA) Section 401 water quality certification (WQC) request for the U.S. Army Corps of Engineers (USACE) Regional General Permit (RGP) 16 for aquatic species habitat restoration and enhancement in waters of the United States.

Section 401 of the CWA requires applicants for Federal licenses or permits to conduct any activity that may result in any discharge into waters of the United States to obtain a certification or waiver from the certifying authority where the discharge originates or will originate. Where no state agency or Tribe has authority to give such certification, the EPA is the certifying authority. 33 U.S.C. 1341(a)(1). In this case, the Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute Indians of Utah, the Northwestern Band of the Shoshone Nation, the Ute Mountain Ute Tribe,[1] and the Ute Indian Tribe do not have the authority to provide CWA Section 401 certification for projects occurring on Indian

[1] The Ute Mountain Ute Tribe has been approved to implement CWA section 401 under the Treatment as a State / Treatment in a Similar Manner as a State program for some, but not all, of Indian country lands in Utah associated with the Tribe or individual Tribal members.

country[2] lands within the state of Utah, and the state of Utah does not have the authority to provide CWA section 401 certification for projects within lands of exclusive federal jurisdiction in relevant respects. Therefore, the EPA is making the certification decision for RGP 16 within Indian country lands associated with the above-referenced Tribes within the state of Utah. Additionally, the EPA is making the certification decision for RGP 16 for lands of exclusive federal jurisdiction in relevant respects.[3]

Project Description

RGP 16 authorizes certain discharges of dredged or fill material into waters of the United States in California, Nevada, and Utah associated with work performed in accordance with terms and conditions as specified in the permit for construction and maintenance activities associated with aquatic habitat restoration and enhancement. Activities to be authorized include, but are not limited to, fish passage and screening improvements; bioengineered bank stabilization; engineering/designing with nature; nature-based solutions; water conservation; aquatic habitat restoration and enhancement of streams, wetlands, and other waters; and removal of pilings, small dams, flood gates, and other in-water structures. Compensatory mitigation is not required for activities authorized under this RGP since these activities must be restoration or enhancement in nature, resulting in no net loss of aquatic resource functions and services. The conversion of waters from one type to another is authorized as long as there is an overall no net loss of aquatic resource functions and services.

The EPA's Public Notice Process

On November 21, 2024, the EPA Region 8 received a request for certification from the project proponent. The EPA Region 8 issued a public notice on December 11, 2024, and provided the opportunity for the public to submit comments until January 10, 2025. No comments were received on the public notice.

General Information

The general information provided in this section does not constitute certification conditions.

- The project proponent is responsible for obtaining all other permits, licenses, and certifications

[2] Indian country is defined in 18 U.S.C. Section 1151. Indian country in Utah generally includes (1) lands within the exterior boundaries of the following Indian reservations located within Utah: the Goshute Reservation, the Navajo Indian Reservation, the reservation lands of the Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes), the Skull Valley Indian Reservation, the Uintah and Ouray Reservation (subject to federal court decisions removing certain lands from Indian country status within the Uintah and Ouray Reservation), and the Washakie Reservation; (2) any land held in trust by the United States for an Indian Tribe (including but not limited to the Ute Mountain Ute Tribe); and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. Section 1151.

[3] An inventory report compiled by the U.S. General Services Administration for federal properties as of 1962 identifies properties that may contain exclusive federal jurisdiction. This document is accessible at https://www.congress.gov/116/meeting/house/110088/documents/HHRG-116-II13-20191017-SD044.pdf. The EPA notes that this inventory report is not all-inclusive and that the information contained within it has not been recently confirmed and/or updated. Please contact EPA Region 8 at R8CWA401@epa.gov with questions regarding the jurisdictions where this certification decision applies.

that may be required by federal, state, or Tribal authorities.

- This certification is based on materials provided in the certification request, including a copy of the RGP.
- Project proponents should ensure that activities that may result in a point source discharge occur during seasonal low flow or no flow periods. If dewatering is necessary, the RGP requires that a dewatering/diversion plan be included in the preconstruction notice (PCN).
- Project proponents should coordinate with Tribal governments regarding the presence of sensitive aquatic wildlife species. The RGP states all work to be conducted in accordance with work windows identified by the U.S. Fish & Wildlife Service (USFWS).
- Copies of this certification should be kept on the job site and readily available for reference.
- Pursuant to CWA section 308(a), the EPA Region 8 is authorized to inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the USACE permit, including those conditions contained in this certification.
- Project proponents should notify the EPA Region 8 and the appropriate Tribal contacts, listed below, when submitting a pre-construction notification to the USACE for use of this RGP on Tribal lands and, prior to construction, provide the EPA Region 8 and Tribal contacts with the most up-to-date construction timeframe and plans:
    - Paiute Indian Tribe of Utah: Keitti Jake (kjake@pitu.gov; 435-586-1112 x801)
    - Skull Valley Band of Goshute Indians of Utah: Daniel Moon (danielm@svgoshutes.com; 435-831-4079)
    - Northwestern Band of the Shoshone Nation: Jason Walker (jswalker@ida.net; 208-406-6774)
    - Ute Mountain Ute Tribe: Scott Clow (sclow@utemountain.org; 970-564-5432) and Adrian Bishop (abishop@utemountain.org; 970-570-0154)
    - Ute Indian Tribe: Bart Powaukee (bartp@utetribe.com; 435-725-4821)

Conditions of Certification

The EPA has determined that the activity will comply with the applicable water quality requirements, including, consistent with 40 CFR § 121.1(j), any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the CWA; any Federal and state or Tribal laws or regulations implementing those sections; and any other water quality-related requirement of state or Tribal law, subject to the following conditions pursuant to CWA section 401(d)[4]:

Condition 1 – Notification to EPA and Tribes

Project proponents shall provide notice to EPA Region 8 and the appropriate Tribal government at least 30 days prior to commencing work in waters of the United States to provide EPA with the opportunity to review and inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. The project proponent shall include a project monitoring and adaptive management plan in the notice to document that the project results in a net increase in aquatic functions and services. The plan shall include:

[4] See attachment for condition rationale and citations.

- Goals and objectives of the project;
- Specific performance metrics that will be used to evaluate the success of meeting those goals and objectives;
    - This section shall include management of disturbed vegetation and a corresponding restoration plan that indicates the project proponent will use appropriate native vegetation in a manner that optimizes plant establishment for the specific site (e.g., stockpiling of existing topsoil that is weed-seed free).
- Monitoring methods or techniques (including timing and duration) used to evaluate the progress towards achieving the desired increase in aquatic functions and services; and
- Adaptive management techniques and reporting processes to be implemented if the project is not meeting net increase performance metrics.

The project proponent shall provide the authorizing USACE District with a copy of the project monitoring and adaptive management plan described above.

Additionally, for any activities on Tribal lands the project proponent shall include a summary of communications with the affected Tribe's water quality staff regarding the project, including any concerns or issues, in its notification to EPA Region 8.

Condition 2 – Projects or Activities Discharging to Impaired Waters

Project proponents must request an individual water quality certification consistent with 40 CFR 121.5 from EPA Region 8 for projects or activities that involve a point source discharge into an active channel of a water of the United States identified as a section CWA section 303(d) listed impaired waterbody or waterbody with a total maximum daily load (TMDL) where the discharge may result in further exceedance of a specific parameter (e.g., total suspended solids, dissolved oxygen, temperature). The current CWA section 303(d) list and waterbodies with established TMDLs are available at: https://www.epa.gov/tmdl/impaired-waters-and-tmdls-region-8.

Condition 3: Special Aquatic Resources

Project proponents shall not allow point source discharges into jurisdictional waters of these special aquatic resources: (1) fens, bogs, or other peatlands; (2) within 100 feet of the point of discharge of a known natural spring source; (3) riffle-pool complexes of streams; (4) water sources above hanging gardens; or (5) vernal pools. Project proponents must request an individual water quality certification consistent with 40 CFR 121.5 from EPA Region 8 for projects or activities expected to have potential point sources discharges into these areas.

A peatland is defined by the U.S. Forest Service as any type of peat covered terrain with an accumulation of at least 20 to 40 centimeters of peat within the upper 80 centimeters of the soil profile. More resources on peatlands and hanging gardens can be found here:

https://www.fws.gov/mountain-prairie/es/fen/FWSRegion6FenPolicy1999.pdf
https://cnhp.colostate.edu/cnhpblog/2009/08/11/hanging-gardens/
https://springstewardshipinstitute.org/hanging-garden

Condition 4: Extent of Impacts to Waters of the United States

Project proponents must request an individual water quality certification consistent with 40 CFR 121.5 from EPA Region 8 for projects or activities that involve greater than 1-acre of impacts to waters of the United States and/or impact greater than 500 linear feet of waters of the United States.

Condition 5: Spill Prevention and Remediation

When a project requires a Construction General Permit (CGP)/Stormwater Pollution Prevention Plan (SWPPP), the project proponent shall submit the SWPPP and a copy of the Notice of Intent (NOI) for permit coverage under the EPA CGP to EPA Region 8 (R8CWA401@epa.gov) and the appropriate Tribal representative at least two weeks prior to beginning construction activities.

If spills or unauthorized discharges occur during the project, the project proponent shall notify EPA Region 8 (R8CWA401@epa.gov) within 8 hours from discovery. In the notification to the EPA, the project proponent shall identify the material spilled and approximate volume, and describe the measures being taken to remedying the spill or unauthorized discharge.

For emergency spills, contact the EPA's National Response Center at 1-800-424-8802, the appropriate Tribal representative identified in the General Information section of this certification, and the appropriate personnel identified in the project's Stormwater Pollution Prevention Plan (SWPPP).

When a project does not require a CGP/SWPPP, the project proponent shall comply with the following: When operating equipment or otherwise undertaking construction activities in aquatic resources, the project proponent shall:

- Include in the project plan/design drawings the locations of:
    - the project site with all waters, including wetlands, clearly demarcated;
    - staging areas;
    - construction access points; and
    - disturbance limits.
- Clean all equipment prior to the equipment arriving on the project site.
- Have containment booms and/or absorbent material available onsite prior to the commencement of work. In the case of spills, the project proponent shall immediately employ containment booms and/or absorbent material to prevent discharges from reaching waters of the United States.
- Inspect all equipment daily and prior to entering any waters of the United States for oil, gas, diesel, anti-freeze, hydraulic fluid, and other petroleum leaks. If the project proponent detects a leak from any equipment, they shall immediately remove the equipment from waters of the United States; and within 24 hours of detection of a leak, the project proponent shall repair the equipment in a staging area or move it offsite.
- Clean all contaminated areas within 8 hours of spill detection and remove contaminated soil from the site within 24 hours or contain it in enclosed containers until it is removed from the site.

If spills or unauthorized discharges occur during the project, the project proponent shall notify EPA Region 8 (R8CWA401@epa.gov) within 8 hours from discovery. In the notification to the EPA, the project proponent shall identify the material spilled and approximate volume, and describe the

measures being taken to remedying the spill or unauthorized discharge. For emergency spills, contact the EPA's National Response Center at 1-800-424-8802 and the appropriate Tribal representative.

Condition 6: Sediment and Erosion Control

The project proponent shall:

- Develop and implement an erosion and sediment control plan. The plan shall be in writing and include:
    - The types and locations of erosion and sediment control features that shall be used onsite, including sediment control fences, haybales, heavy mud mats, or other structures. Biodegradable blankets and/or loose-weave mesh shall be used for erosion control matting.
    - Inspection and maintenance protocols. The project proponent shall conduct maintenance on erosion and sediment control measures daily during project implementation and within 12 hours of precipitation events. If any erosion control measures fail (i.e., sediment migrates into waters of the United States), the project proponent shall repair the measures that failed within 24 hours of detection of failure to prevent discharges into waters of the United States.
- Ensure erosion and sediment control measures are in place prior to the onset of construction and maintained in effective operating condition during construction and following construction until vegetation is established based on performance metrics documented in the project monitoring and adaptive management plan (see Condition 1).
- Ensure erosion and sediment control measures are removed once vegetation is established.

Condition 7: Removal of Small Dams/Structures

For the purpose of this water quality certification, a small water control structure (including dams) is defined as any earth or concrete structure less than 15 feet in height, and with low hazard potential. This includes structures such as those associated with farm ponds, weirs, check dams, silt retention dams, and earthen reservoirs.

For removal of small water control structures authorized under RGP 16, to ensure that effective implementation measures are employed for the prevention of uncontrolled discharges and water quality violations, the project proponent shall conduct pre-disturbance site assessment and submit project plans to EPA Region 8, the appropriate Tribal government, and the authorizing USACE District. The project plans shall include:

- Methods to analyze, remove and dispose of any accumulated sediments stored behind the structure;
- Methods to ensure that the channel bed and banks are stabilized to prevent head-cutting and failure after the structure is removed;
- Stabilization methods that will be implemented to minimize secondary impacts to waters resulting from the removal of the structure; and
- Adaptive management and reporting processes if an unauthorized discharge or water quality violation were to occur.

The project proponent shall request an individual water quality certification consistent with 40 CFR 121.5 from EPA Region 8 for any dams constructed for power generation or any water control structure that impounds more than 10 acre-feet of water.

If you have questions regarding this certification, please contact EPA Region 8 at R8CWA401@epa.gov. Thank you for your ongoing partnership and coordination in implementing CWA regulatory programs.

Sincerely,

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Watershed Section Supervisor

cc: Jason Gipson, USACE Sacramento District, Utah Regulatory Section

Attachment
Supporting Information for Certification Conditions

Numbered Condition	Why the condition is necessary to assure the activity will comply with water quality requirements	Citation that authorizes the condition
1. Notification to EPA and tribes	This condition is necessary to provide EPA 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 USACE review prior to initiation of the activity, it is also critical that EPA is also notified of 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).	40 CFR 121.11(a); 40 CFR 230.72; 40 CFR 230.75
2. Projects or Activities Discharging to Impaired Waters	A 303(d) listed waterbody is impaired due to the cumulative effects of discharges of pollutants. The NWPs do not provide necessary activity specific information to determine compliance with specific water quality requirements, such as limits on total suspended solids, temperature, dissolved oxygen, nutrients, or pH for which a specific waterbody could be listed as impaired. Site specific analysis is required to determine whether water quality requirements are met in the active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody.	33 U.S.C. 1312(d)
3. Special Aquatic Resources	Aquatic resources of special concern include special aquatic sites and other aquatic resources that are specific waters of the United States that are difficult to replace, are unique, and/or have high ecological function. General permits, including NWPs, are only allowed for those discharges and associated activities that will cause no more than minimal adverse impacts to the aquatic environment. However, point source discharges to the types of aquatic resources of special concern listed above could have more than minimal adverse impacts on an individual or cumulative basis, because the discharge of dredged or fill material would impair and degrade the chemical, physical and biological	40 C.F.R. 230.1(d); 40 C.F.R. 230.10(c); 40 C.F.R. 230.21; 40 C.F.R. 230.23; 40 C.F.R. 230.32; 40 C.F.R. Part 230, Subpart E.

	conditions of these systems. As noted in 40 C.F.R. § 230.1(d), "[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." Discharge of dredged or fill material into these systems can alter water circulation patterns and hydroperiods, which in turn can release nutrients causing shifts in native to non-native species composition; release chemicals that adversely impact biota (plants and animals), increase turbidity levels, reduce light penetration and photosynthesis, and ultimately change the capacity of these systems to support aquatic life uses and other beneficial uses of these special aquatic sites, including impairing their diverse and unique communities of aquatic organisms, including fish, wildlife and the habitats upon which they depend. Thus, this condition is established to ensure a case-by-case review of any actions or activities proposed in these specific aquatic resource site types which are inherently difficult to replace, have high ecological functions and values, and for which degradation cannot be determined to meet water quality requirements on a general permit basis.	
4. Extent of Impacts to Waters of the United States	This condition is necessary to minimize turbidity and sediment caused by construction activities, which will be exasperated by larger construction projects.	40 CFR 230.10(d); 40 CFR 230.21; 40 CFR 230.71 40 CFR 230.72
5. Spill Prevention and Remediation	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 also helps protect the water quality and native biology of the impacted waters by preventing the spread of invasive or nuisance species.	40 CFR 230.10(c)-(d); 40 CFR 230.70; 40 CFR 230.71; 40 CFR 230.72; 40 CFR 230.74
6. Sediment and Erosion Control	This condition is necessary to minimize suspended particulates/turbidity caused by construction	40 CFR

	activities. This condition helps protect water quality, particularly for the water intake, and the aquatic ecosystem from suspended particulates/turbidity and other pollutants that can significantly affect aquatic ecosystem diversity, productivity and stability as well as infrastructure and water treatment.	230.10(d); 40 CFR 230.21(a); 40 CFR 230.70; 40 CFR 230.74; 40 CFR 230.72
7. Removal of Small Dams/ Structures	This condition is necessary as Regional General Permit 16 does not define what is meant by "small dams". To ensure that the physical, chemical and biological characteristics of waters are not degraded a definition and size constrain has been included as part of the certification conditions. Uncontrolled release of accumulated sediment behind large dams may contribute to degradation of water quality due to increased turbidity and sediment could smother aquatic dependent plants and animals, therefore, removal of dams and other water control structures that not included in the definition provided require an individual certification.	40 CFR 230.10(d); 40 CFR 230.71; 40 CFR 230.72; 40 CFR 230.75