

***Final 2021 Nationwide Permit (NWP) Regional Conditions  
for the States of Nevada and Utah***

*(NWPs 12, 21, 29, 39, 40, 42-44, 48, 50-52, and 55-58,  
Effective March 15, 2021 until March 15, 2026)*

**A. Regional Conditions for the States of Nevada and Utah:**

1. The permittee shall submit a pre-construction notification (PCN) for all 2021 NWPs, in accordance with General Condition 32, in the following circumstances:

a. Activities involving new bank stabilization that do not incorporate bioengineering techniques. Bioengineering techniques include using live plants alone or in combination with dead or inorganic materials, including rock, sand, or gravel;

b. Activities resulting in a discharge of dredged or fill material in waters of the U.S. (WOTUS) on Tribal Lands; and,

c. Activities involving the permanent channelization, realignment, or relocation of streams.

2. The use of any 2021 NWP is prohibited for the following:

a. Activities in peatlands<sup>1</sup> containing histosols, including bogs and fens; and,

b. Discharges of dredged and/or fill material below the ordinary high water mark of the Great Salt Lake containing bioherms (microbialites).

**B. 401 Water Quality Certification (401 WQC) Regional Conditions for Nevada:**

1. The following conditions from the attached December 11, 2020, 401 WQC granted by the U.S. Environmental Protection Agency (EPA), shall apply to NWP 43 on tribal lands within U.S. EPA Region 9<sup>2</sup> boundaries in the State of Nevada:

a. All applicants must provide notice to EPA Region 9 prior to commencing construction to provide EPA Region 9 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality

<sup>1</sup>A peatland is defined as a wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at:  
[http://www.nrcs.usda.gov/Internet/ DOCUMENTS/nrcs142p2\\_053171.pdf](http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf)

<sup>2</sup>The EPA 401 WQC does not apply to activities proceeding in the territories of the 23 tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk and White Mountain Apache Tribe. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

certification. Where the Corps requires a PCN for the applicable NWP, the applicant should also provide the PCN to Region 9. Within 30 days, EPA Region 9 will provide written verification to the applicant that the proposed project will not violate the water quality certification of the NWP.

b. Projects or activities are not authorized under the NWP if the project will involve point source discharge into an active channel of a WOTUS identified as a section 303(d) or Total Maximum Daily Load (TMDL) listed impaired waterbody and the discharge may result in further exceedance of a specific parameter (e.g. total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed. The current lists of 303(d) and TMDL listed waterbodies are available on EPA Region 9's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-pacific-southwest-region-9>.

### **C. 401 Water Quality Certification (401 WQC) Regional Conditions for Utah:**

1. The following conditions from the attached December 8, 2020, 401 WQC granted by the State of Utah, Department of Environmental Quality, shall apply to all 2021 NWPs on non-tribal land in the State of Utah:

a. The Project Proponent shall provide Director Notification and Review for the following projects in order to protect designated beneficial uses and assure that Utah Water Quality Standards (WQS) are not violated:

i. Any project proposed under Nationwide Permits 3 (Maintenance) and 37 (Emergency Watershed Protection and Rehabilitation) and any project proposed under NWP 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities) where PCN is required;

ii. Any proposed project that will be within 500 feet of the existing waters' edge of the Great Salt Lake, Utah Lake, and Bear Lake;

iii. Any project with a potential discharge into an impaired waterbody with an approved TMDL, where the project has the potential to discharge a pollutant identified/addressed by the TMDL;

iv. Any project with a potential discharge to Category 1 or Category 2 waters;  
and,

v. Any project with a potential discharge where federal agencies are exempted from PCN normally required under the general permit in question.

b. All activities with a potential discharge to WOTUS must implement and maintain best management practices (BMPs) to fully protect the waterbodies assigned beneficial use(s).

c. All activities shall not cause further degradation of impaired waterbodies- as defined in the State of Utah, Division of Water Quality's most recent 303(d) list, regardless of

whether a TMDL has been completed. The project proponent must review impairments on the waterbodies where the projects have potential to discharge and is responsible for ensuring that WQS are not exceeded and designated beneficial uses are not impaired.

d. Hazardous and otherwise deleterious materials (e.g. oil, gasoline, chemicals, trash, sawdust, etc.) shall not be stored, disposed of, or accumulated or conveyed through adjacent to, or in immediate vicinity of, WOTUS unless adequate measures and controls are provided to ensure those materials will not enter WOTUS in the State of Utah. Any spill or discharge of oil or other substance which may cause pollution to WOTUS in the State of Utah, including wetlands, must be immediately reported to the Utah DEQ Hotline at (801) 536-4123, a 24-hour phone number.

e. All project proponents conducting activities in, or immediately adjacent to, WOTUS in the State of Utah with assigned class 1C (domestic drinking water) that are upstream 2 miles or less from any intake supply must notify the water supply operator and the local health department prior to commencement of work. If the water supply operator or the local health department recommends additional BMPs or monitoring, the project proponent must consider those recommendations in their project design.

f. All activities conducted in, or immediately adjacent to, WOTUS in the State of Utah with assigned beneficial use class 3A (cold water fishery) or has blue ribbon fishery designation must avoid removal of native riparian vegetation that provides stream shading to the maximum extent practicable. Any projects that approve removal of riparian vegetation that provides shade must require reestablishment of native vegetation that provides equal or greater shade. The project proponent shall provide successful reestablishment of native vegetation.

g. All activities conducted in WOTUS in the State of Utah shall be conducted in the "dry" to the maximum extent practicable, by diverting flow utilizing cofferdams, berms constructed of sandbags, clean rock (containing no fine sediment) or other non-erodible, non-toxic material. All diversion materials shall be removed at the completion of the work. Project proponent shall consider conducting instream work during low flow conditions and work shall not be conducted during spawning season. Additionally, construction machinery shall not be operated within WOTUS in the State of Utah unless it is unavoidable, in which case it shall be conducted in the "dry" as stated above. The work shall be conducted in a manner to minimize the duration of the disturbance, turbidity increases, substrate disturbance, and minimize the removal of riparian vegetation. Construction machinery shall be clean to prevent the transfer of aquatic invasive species.

2. The following conditions from the attached December 11, 2020, 401 WQC granted by Ute Mountain Ute Tribe (UMUT) shall apply to NWP's 43, 57, and 58, on the Ute Mountain Ute Reservation in the State of Utah:

a. All applicants, including federal agencies, must notify UMUT's Tribal Environmental Department of the use of all NWP's for which certification has been granted prior to commencing work on the project. Notification must include:

- i. project location (lat. and long., exact point on map);
- ii. NWP that will be used and the specific activity that will be authorized under the NWP;
- iii. amount of permanent and temporary fills;
- iv. a short summary of the proposed activity, and all other federal, state, tribal or local permits or licenses required for the project;
- v. complete contact information of both the applicant and contractor (name, name of the company or property if applicable, telephone, mobile, and email);
- vi. summary of best management practices that will be use; and,
- vii. notify UMUT at least 7 days before the completion of construction and operations begin.

b. 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; (3) hanging gardens; or (4) culturally sensitive waters.

c. 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 WOTUS.

d. Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect WOTUS from sedimentation and other pollutants.

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

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

g. All equipment used in WOTUS 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 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.

h. 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.

i. Activities may not result in any unconfined discharge of liquid cement into WOTUS. Grouting riprap must occur under dry conditions with no exposure of wet concrete to the waterbody.

j. Activities that may result in a point source discharge shall occur during seasonal low flow or no flow periods to the extent practicable.

k. The placement of material (discharge) for the construction of new dams is not certified, except for stream restoration projects.

l. For NWP 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 linear feet (lf) of stream or 1/10 acre of WOTUS.

m. For NWP 57, *Electric Utility Line and Telecommunications 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.

n. For NWP 58, *Utility Line Activities for Water and Other Substances*, activities shall not impact (e.g., fill, relocate, realign, or straighten) more than 300 lf of stream channel for a single and complete project.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

Brigadier General Paul E. Owen  
Division Engineer, South Pacific Division  
U.S. Army Corps of Engineers  
1455 Market Street  
San Francisco, CA 94103-1398

Subject: Programmatic Clean Water Act, Section 401 Certification of the Draft 2020 Nationwide Permits for Tribal Lands within the Region 9 coverage area of the U.S. Environmental Protection Agency

Dear General Owen,

The U.S. Environmental Protection Agency Region 9 (EPA) has responsibility under section 401 of the Clean Water Act (CWA) to evaluate and certify water quality protections for federal permits or licenses issued for work on tribal lands (40 CFR 121.13(a)). We have reviewed the U.S. Army Corps of Engineers (Corps) Federal Register notice dated September 15, 2020, announcing the proposed issuance of the Corps' CWA Section 404 Nationwide Permits (NWP). We have also reviewed the regional conditions proposed for each District within the South Pacific Division and hereby transmit our programmatic water quality certification of these general permits. The enclosed conditions of the NWPs become binding requirements of NWPs issued for work on tribal lands within EPA Region 9.<sup>1,2</sup> Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable projects.

Based on a thorough review of the materials provided by the Corps, EPA made a determination as to whether potential discharges authorized by the proposed NWPs will comply with applicable provisions of Sections 301, 302, 303, 306 and 307 of the CWA. In summary, of the 57 proposed active permits, EPA is conditionally certifying 19 NWPs, denying 12 NWPs, and waiving certification for 15 NWPs. The Corps is not requesting certification for 11 NWPs.<sup>3</sup> The 401 certification conditions are necessary to assure that potential discharges authorized by the NWPs will comply with applicable water quality requirements. A table summarizing the certification status for each NWP, is included in the attached certification. The attached programmatic 401 certification will remain in effect for the authorization

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<sup>1</sup> This water quality certification does not apply to activities proceeding in the territories of the 23 tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk and White Mountain Apache Tribe. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

<sup>2</sup> Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, EPA sent a letter dated September 29, 2020, offering to consult with tribes in Region 9 on this certification. EPA did not receive any formal requests for consultation or any written comments on the draft certification.

<sup>3</sup> The 11 NWPs are as follows: 1, 2, 8, 9, 10 11, 24, 28, 35, A, B.

period of the 2020 NWP's and will be re-evaluated when the NWP's are next proposed for reissuance and revisions in 2025.

If a project fails to meet the enclosed conditions, the applicant must contact EPA Region 9 for individual project certification. Please advise project proponents who seek authorization under the NWP's for individual project certification on tribal lands within EPA Region 9 to submit their questions, pre-filing meeting requests, and subsequent 401 certification requests when required to: R9-401-Certs@epa.gov.

Thank you for your ongoing partnership in implementing the regulatory programs of the CWA. Please contact me at (415) 972-3337 with any questions regarding this conditional certification, or have your staff contact Elizabeth Goldmann at (415) 972-3398 or goldmann.elizabeth@epa.gov.

Sincerely,

Tomás Torres  
Director  
Water Division

Enclosure:

U.S. Environmental Protection Agency Region 9's Programmatic Clean Water Act Section 401  
Certification of the 2020 Nationwide Permits for Projects on Applicable Tribal Lands in California,  
Nevada, Arizona and Navajo Allottee Lands

cc:

All federally recognized Indian Tribes within EPA Region 9  
James Mazza, Regulatory Branch Chief, San Francisco District  
Michael Jewel, Regulatory Branch Chief, Sacramento District  
David Castanon, Regulatory Branch Chief, Los Angeles District  
Kelly Allen, Regulatory Branch Chief, Albuquerque District  
Wade Eakle, Corps, South Pacific Division  
Trevor Baggione, Arizona Department of Environmental Quality  
Paul Hann, California State Water Resources Control Board  
Birgit Widegren, Nevada Division of Environmental Protection

## **Enclosure**

### **U.S. Environmental Protection Agency Region 9's Programmatic Clean Water Act Section 401 Certification of the 2020 Nationwide Permits for Projects on applicable Tribal Lands in California, Nevada, Arizona and Navajo Allottee Lands**

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 (Corps) CWA 404 Nationwide Permits (NWP) into waters of the United States that occur within applicable tribal lands in California, Nevada, Arizona and Navajo Allottee land in the corresponding Sacramento, San Francisco, Los Angeles and Albuquerque 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, 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 CWA requires applicants for Federal permits and licenses that may result in discharges into waters of the United States, to obtain certification that any such 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, U.S. Environmental Protection Agency (EPA) Region 9 is the certifying authority. In this case, the EPA is making the certification decision for potential discharges that may result from the projects authorized under the proposed Corps CWA 404 NWPs listed above.<sup>1</sup>

## **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

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<sup>1</sup> This water quality certification does not apply to activities proceeding in the territories of the 23 tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk and White Mountain Apache Tribe. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.



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 authorities.

Copies of this certification shall be kept on the job site and readily available for reference.

The project proponent for potential projects authorized under the NWP are encouraged to contact EPA Region 9 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.

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 9 if spills or unauthorized discharges occur during the project.

Pursuant to CWA section 308(a), EPA Region 9 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 9 at: [R9-401-Certs@epa.gov](mailto:R9-401-Certs@epa.gov).

## **Granted with Conditions (121.7(d)(2)):**

On behalf the 125 federally recognized tribes with tribal lands within Region 9, CWA Section 401 certification, for the following proposed NWPs, is granted with conditions. EPA Region 9 has determined that any discharge authorized under the following proposed NWPs will comply with water quality requirements, as defined at 40 CFR 121.1(n), subject to the following conditions pursuant to Section 401(d).

NWPs 5, 6, 7, 18, 19, 20, 23, 25, 27, 32, 33, 36, 37, 38, 41, 43, 45, 53, and E.

### **Condition 1 – Notification to EPA**

All applicants must provide notice to EPA Region 9 prior to commencing construction to provide EPA Region 9 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 9. Within 30 days, EPA Region 9 will provide written verification to the applicant that the proposed project will not 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 9 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 9 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(s) that authorizes this condition:*** 40 CFR 121.11(a)

**Condition 2 – Projects or Activities Discharging to Impaired Waters**

Projects or activities are not authorized under the NWP if the project will involve point source discharge into an active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody and the discharge may result in further exceedance of a specific parameter (e.g. total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed. The current lists of 303(d) and TMDL listed waterbodies are available on EPA Region 9's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-pacific-southwest-region-9>.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

A 303(d) listed waterbody is impaired due to the cumulative effects of discharges of pollutants. The NWP does 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.<sup>2</sup>

***Citation(s) that authorizes this condition:*** CWA section 303(d)

**Denied (121.7(e)(2))**

On behalf of the 125 federally recognized tribes with tribal lands within EPA Region 9, EPA Region 9 cannot certify that the range of discharges from potential projects authorized under the following proposed NWP will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWP 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C and D, and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

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 125 federally

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<sup>2</sup>For example, Granite Creek in Arizona, a 303(d) listed as impaired for *e. coli*, runs through Yavapai Prescott Indian Reservation.

recognized tribes with tribal lands within EPA Region 9, EPA Region 9 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 9 to assure that the range of discharges from potential projects authorized under NWPs 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C, and D will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 9 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 9 is therefore denying certification.

### **Waived (121.9(a)(1)):**

On behalf of the 125 federally recognized tribes with tribal lands within U.S. Environmental Protection Agency (EPA) Region 9, EPA Region 9 is expressly waiving its authority to act on the CWA Section 401 certification request for the following proposed NWPs:

NWPs 4, 15, 16, 17, 21, 22, 30, 31, 34, 46, 48, 49, 50, 52, 54

**Summary Table – EPA Region 9 CWA § 401 Certification of NWPs**

NWP	Certification Status			NWPs the Corps is not Requesting Certification	Specific Conditions
	Certified with Conditions	Denial	Waived		
1				X	
2				X	
3		X			
4			X		
5	X				Notice to EPA, NWP not applicable to 303(d) listed waters
6	X				Notice to EPA, NWP not applicable to 303(d) listed waters
7	X				Notice to EPA, NWP not applicable to 303(d) listed waters
8				X	
9				X	
10				X	
11				X	
12		X			
13		X			
14		X			

15			X		
16			X		
17			X		
18	X				Notice to EPA, NWP not applicable to 303(d) listed waters
19	X				Notice to EPA, NWP not applicable to 303(d) listed waters
20	X				Notice to EPA, NWP not applicable to 303(d) listed waters
21			X		
22			X		
23	X				Notice to EPA, NWP not applicable to 303(d) listed waters
24				X	
25	X				Notice to EPA, NWP not applicable to 303(d) listed waters
26				Reserved. This NWP is no longer in use.	
27	X				Notice to EPA, NWP not applicable to 303(d) listed waters
28				X	
29		X			
30			X		
31			X		
32	X				Notice to EPA, NWP not applicable to 303(d) listed waters
33	X				Notice to EPA, NWP not applicable to 303(d) listed waters
34			X		
35				X	
36	X				Notice to EPA, NWP not applicable to 303(d) listed waters
37	X				Notice to EPA, NWP not applicable to 303(d) listed waters
38	X				Notice to EPA, NWP not applicable to 303(d) listed waters
39	X				Notice to EPA, NWP not applicable to 303(d) listed waters
40		X			
41	X				Notice to EPA, NWP not applicable to 303(d) listed waters
42		X			
43		X			
44		X			

USEPA Region 9 Programmatic CWA§401 Certification of the 2020 NWP for projects on applicable tribal lands

45	X				Notice to EPA, NWP not applicable to 303(d) listed waters
46			X		
47				Reserved. This NWP is no longer in use.	
48			X		
49			X		
50			X		
51		X			
52			X		
53	X				Notice to EPA, NWP not applicable to 303(d) listed waters
54			X		
A				X	
B				X	
C		X			
D		X			
E	X				Notice to EPA, NWP not applicable to 303(d) listed waters

**STATE OF UTAH  
DIVISION OF WATER QUALITY  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
SALT LAKE CITY, UTAH**

**§401 Water Quality Certification No. DWQ-2020-10001**

**Applicant:** US Army Corps of Engineers  
Michael Jewell, Chief Regulatory Division  
Sacramento District  
1325 J Street  
Sacramento, CA 95814

**Project:** **On September 15, 2020**, the U.S. Army Corps of Engineers issued **85 FR 57298 Proposal to Reissue and Modify Nationwide Permits** proposing to reissue 52 existing nationwide permits (NWP) and issue five new NWP. NWP are general permits issued by the U.S. Army Corps of Engineers on a nationwide basis to streamline the authorization of certain activities under Section 404 of the Clean Water Act that result in no more than minimal individual and cumulative adverse environmental effects. Many of the proposed NWP require notification to the district engineer before commencing activities to ensure that the activities authorized by those NWP cause no more than minimal individual and cumulative adverse environmental effects.

**Location:** State of Utah

**Watercourse(s):** Waters of the United States (WOTUS)

**Request Date:** October 13, 2020

**Effective Date:** December 8, 2020

DWQ-2020-024910

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**Attachment 1:** Applicant/Project Proponent Resources

## I. Definitions

- 1.) **Blue Ribbon Fishery:** status administered by the Utah Division of Wildlife Resources and the Blue Ribbon Advisory Council that indicates the waterbody has high quality in the following attributes: fishing, outdoor experience, fish habitat, and economic benefits.
- 2.) **Category 1 Waters** are *"Waters which have been determined by the Board to be of exceptional recreational or ecological significance or have been determined to be a State or National resource requiring protection, shall be maintained at existing high quality through designation, by the Board after public hearing, as Category 1 Waters."* UAC R317-2-3.2
- 3.) **Category 2 Waters** *"are designated surface water segments which are treated as Category 1 Waters except that a point source discharge may be permitted provided that the discharge does not degrade existing water quality."* UAC R317-2-3.3
- 4.) **Designated Beneficial Uses:** means a water's present most reasonable uses, grouped by use classes to protect the uses against controllable pollution. Beneficial uses designated within each class are described in Utah Administrative Code (UAC) R317-2-6 and waterbodies beneficial uses can be found in UAC R317-2-13. For the purposes of this document, the term "designated beneficial uses" will be used to describe all uses required to be protected by Utah Water Quality Standards and Antidegradation Policy.
- 5.) **Director Notification and Review** means submittal of the U.S. Army Corps of Engineers (USACE) application and any supplemental attachments to the Utah Department of Environmental Quality (DEQ), Director of the Utah Division of Water Quality (DWQ) for review.
- 6.) **Existing Uses** *"means those uses actually attained in a water body on or after November 28, 1975, whether or not they are included in the water quality standards."* UAC R317-1-1. *"If a situation is found where there is an existing use which is a higher use (i.e., more stringent protection requirements) than that current designated use, the Director will apply the water quality standards and anti-degradation policy to protect the existing use."* UAC R317-2-3.
- 7.) **Project Proponent** *"means the applicant for license or permit or entity seeking certification."* 40 CFR §121.1
- 8.) **Total Maximum Daily Load (TMDL)-** *"means the maximum amount of a particular pollutant that a waterbody can receive and still meet state water quality standards, and an allocation of that amount to the pollutant's sources."* UAC R317-1-1
- 9.) **Waters of the United States (WOTUS)** means waterbodies subject to the provisions of the Clean Water Act.
- 10.) **303(d) list** is a state's list of impaired and threatened waters, including but not limited to; streams, lakes, and reservoirs adopted to implement the Clean Water Act Section 303(d).



## **II. Acronyms**

BMPs- Best Management Practices  
CWA- Clean Water Act  
DEQ- Utah Department of Environmental Quality  
DWQ – Utah Division of Water Quality  
NWP(s)- Nationwide Permit(s)  
PCN- Preconstruction Notification  
UAC- Utah Administrative Code  
USACE - U.S. Army Corps of Engineers  
TMDL – Total Maximum Daily Load  
WQS- Utah Water Quality Standards  
WOTUS- Waters of the United States

## **III. Executive Summary**

Pursuant to Section 401 of the Clean Water Act (CWA) 33 U.S.C. Section 1251 et seq., DWQ grants water quality certification to all USACE nationwide permits (NWPs) proposed by 85 FR 57298 except those that involve dam maintenance/rehabilitation or reservoir dewatering. Certification is subject to the conditions outlined in this document, adherence to the Sacramento Districts Regional Conditions, and adherence to any conditions outlined in the proposed NWPs. The conditions outlined in this certification are necessary to assure compliance with effluent limitations, monitoring requirements, and other applicable laws and regulations adopted for state primacy of the CWA. Condition justification and appropriate citations of Federal and State laws that authorize the condition, as required by 30 CFR Part 121.7, can be found in the section immediately following the conditions. In order to further assure compliance, DWQ reserves the right to request an individual certification for any project that is determined to have potential for significant adverse effects on water quality, potential to cause a violation of Utah Water Quality Standards (WQS) under UAC R317-2 or potential to degrade Waters of the United States (WOTUS), causing a violation of Utah Antidegradation Policy in UAC 317-2-3 in the State of Utah.

DWQ's conditions are based on and are necessary to comply with applicable state rules. Specifically, the following Utah Rules represent overarching considerations that require the conditions outlined by this document to apply to the USACE NWPs: Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated" UAC R317-2-7.1.a. Additionally, "All actions to control waste discharges under these rules shall be modified as necessary to protect downstream designated uses." UAC R317-2-8. As stated in UAC R317-15-6.1 the Director will

ordinarily consider whether the proposed discharge “impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3

The Utah DWQ participated in a pre-filing meeting with the USACE on September 16, 2020, and received a formal 401 Certification request on October 13, 2020 from the USACE for the reissuance of the USACE NWP. Utah DWQ was informed that the reasonable period of time to make a certification decision was 60 days, which requires the DWQ to act by December 12, 2020.

The Utah DWQ requested a 19 day extension of the 60 day deadline to make a certification decision on October 15, 2020. The extension was requested because on September 11, 2020, the EPA finalized the “Clean Water Act Section 401 Certification Rule”, which had significant impact on Utah DWQ’s certification program. The DWQ requested the additional time to ensure that the certification decision met the new requirements outlined in 40 CFR Part 121.

The USACE denied Utah’s request for extension on October 23, 2020 and the DWQ was advised to act on the request by December 12, 2020.

#### **IV. Background**

NWPs authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The USACE is proposing to reissue its existing NWPs and associated general conditions and definitions, with some modifications. The USACE are also proposing to issue five new NWPs. The USACE is proposing to divide the current NWP that authorizes utility line activities (NWP 12) into three separate NWPs that address the differences in how different linear projects are constructed, the substances they convey, and the different standards and best management practices that help ensure those NWPs authorize only those activities that have no more than minimal adverse environmental effects. Specifically, we are proposing to modify the current utility line NWP 12 to authorize only oil and natural gas pipeline activities. Two proposed new NWPs would authorize activities associated with the construction, maintenance, repair, and removal of electric utility lines/telecommunication lines and utility lines that convey water, sewage, and other substances with the potential to pollute. The fifth proposed new NWP would authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities. NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects.

#### **V. Certification Conditions**

- 1.) The Project Proponent shall provide Director Notification and Review for the following projects in order to protect designated beneficial uses and assure that WQS are not violated:

- (a) Any project proposed under Nationwide Permits 3 (Maintenance) and 37 (Emergency Watershed Protection and Rehabilitation) and any project proposed under NWP 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities) where PCN is required;
  - (b) Any proposed project that will be within 500 feet of the existing waters' edge of the Great Salt Lake, Utah Lake, and Bear Lake;
  - (c) Any project with a potential discharge is to an impaired waterbody with an approved Total Maximum Daily Load (TMDL), where the project has the potential to discharge a pollutant identified/ addressed by the TMDL;
  - (d) Any project with a potential discharge to *Category 1* or *Category 2* waters;
  - (e) Any project with a potential discharge where federal agencies are exempted from PCN normally required under the general permit in question.
- 2.) All activities with a potential discharge to WOTUS must implement and maintain best management practices (BMPs) to fully protect the waterbodies assigned beneficial use(s).
  - 3.) All activities shall not cause further degradation of impaired waterbodies- as defined in DWQ's most recent 303(d) list, regardless of whether a TMDL has been completed. The project proponent must review impairments on the waterbodies where the projects have potential to discharge and is responsible for ensuring that WQS are not exceeded and designated beneficial uses are not impaired.
  - 4.) Hazardous and otherwise deleterious materials (e.g. oil, gasoline, chemicals, trash, sawdust, etc.) shall not be stored, disposed of, or accumulated or conveyed through adjacent to or in immediate vicinity WOTUS unless adequate measures and controls are provided to ensure those materials will not enter WOTUS in the State of Utah. **Any spill or discharge of oil or other substance which may cause pollution to WOTUS in the State of Utah, including wetlands, must be immediately reported to the Utah DEQ Hotline at (801) 536-4123, a 24-hour phone number.**
  - 5.) All project proponents conducting activities in or immediately adjacent to WOTUS in the State of Utah with assigned class 1C (domestic drinking water) that are upstream 2 miles or less from any intake supply must notify the water supply operator and the local health department prior to commencement of work. If the water supply operator or the local health department recommends additional BMPs or monitoring, the project proponent must consider those recommendations in their project design.
  - 6.) All activities conducted in or immediately adjacent to WOTUS in the State of Utah with assigned beneficial use class 3A (cold water fishery) or has blue ribbon fishery designation must avoid removal of native riparian vegetation that provides stream shading to the maximum extent practicable. Any projects that approve removal of riparian vegetation that provides shade must require reestablishment of native vegetation that provides equal or greater shade. The project proponent shall provide successful reestablishment of native vegetation.

- 7.) All activities conducted in WOTUS in the State of Utah shall be conducted in the “dry” to the maximum extent practicable, by diverting flow utilizing cofferdams, berms constructed of sandbags, clean rock (containing no fine sediment) or other non-erodible, non-toxic material. All diversion materials shall be removed at the completion of the work. Project proponent shall consider conducting instream work during low flow conditions and work shall not be conducted during spawning season. Additionally, construction machinery shall not be operated within WOTUS in the State of Utah unless it is unavoidable, in which case it shall be conducted in the “dry” as stated above. The work shall be conducted in a manner to minimize the duration of the disturbance, turbidity increases, substrate disturbance, and minimize the removal of riparian vegetation. Construction machinery shall be clean to prevent the transfer of aquatic invasive species.

## **VI. Condition Justification and Citations**

- 1.) **Director Notification and Review** is a condition for projects identified in Part V(1) above which present an increased likelihood of jeopardizing designated beneficial uses or otherwise causing a violation of WQS, promulgated pursuant to Utah Code Sections 19-5-104, 19-5-110 and Section 303 of the Clean Water Act. Director Notification will allow the DWQ to consider water-body specific factors that are not otherwise considered by NWP. In support of cooperative federalism, the DWQ conditions approval of NWPs identified in Part V(1) above on Director notification, rather than denying all NWPs with potential adverse water quality impacts, to avoid unnecessary burden to applicants that would be associated with a blanket requirement for individual certification requests for all identified projects.

The opportunity to review specifically identified projects will allow the DWQ to assure that WQS will be met without automatically requiring a certification request to the Director directly from the project proponent. Director Notification would take substantially less time than requiring an individual certification request and associated pre-filing meeting. The Director will provide one of the following responses within two weeks;

- (i) The DWQ has determined the project will likely have minimal impact to water quality, pending the project proponent’s consideration of any written comments,

or in infrequent cases

- (ii) The DWQ has determined that the project requires individual certification to adequately protect designated beneficial uses, prevent violation of WQS, or prevent antidegradation. The DWQ reserves the right to require an individual 401 certification in rare circumstances where the DWQ determines there is a potential for adverse water quality impacts.

- (a) ***Projects Proposed Under Nationwide Permits 3, 27, and 37*** are conditioned on Director Notification and Review because they often involve removing built up debris and sediment or the release of sediment and as a result have the potential to result in discharges which threaten designated beneficial uses or may cause violation(s) of WQS for turbidity.

Projects issued under NWP 3 approve maintenance projects that often involve removal of sediment and debris which could then be released to WOTUS. Projects issued under NWP 27 approve projects that allow releasing sediment for Aquatic Habitat Restoration, Enhancement, and Establishment Activities.

Projects issued under NWP 37 approve projects for Emergency Watershed Protection and Rehabilitation and have potential for significant water quality impacts. In the past the DWQ reviewed these projects which often deal with rehabilitation of a waterbody after impacts from fire. These projects can often address increased sediment loads and debris in water channels because the riparian buffer is lost and there is increased runoff from the surrounding area. Projects issued under NWP 37 pose similar risks to those permitted under NWP 3 and 27.

Without proper precautions, projects under NWPs 3, 27 and 37 could result in significant increases in turbidity in the waterbody proposed for discharge. Numeric water quality criteria for turbidity in certain use designations could be violated if the project proponent does not take proper steps to minimize the increases. WQS for turbidity will be violated if there is an increase of 10 Nephelometric Turbidity Units (NTU) in waterbodies with designated beneficial uses related to recreation and if there is an increase of 10 NTUs (3A & 3B) or 15 NTUs (3C & 3D) in waterbodies with aquatic wildlife designated beneficial uses. UAC R317-2-14.1 and UAC R317-2-14.2.

In addition to violating numeric WQS, significant turbidity spikes or sediment deposits could cause a waterbody fail to meet all its designated beneficial uses or if large quantities of sediment are transported downstream, it could impact the downstream designated beneficial uses. The DWQ acknowledges that PCN is not always required under NWP 27, and only requests the requirement of Director Notification, when a PCN is required. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge *“impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6”* UAC R317-15-6.1.A.1., *“exceeds water quality criteria, either narrative or numeric, in Section R317-2-7”* UAC R317-15-6.1.A.2. or *“fails to meet the antidegradation (ADR) requirements of Section R317-2-7”* UAC R317-15-6.1.A.3

Citations: UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-2-8. , UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- (b) ***Projects within 500 feet of the Great Salt Lake, Utah Lake, and Bear Lake*** are conditioned on Director Notification and Review. The DWQ has determined that the Great Salt Lake, Utah Lake, and Bear Lake are unique waterbodies that require special attention and are at greater risk for potential adverse impacts when projects are within 500 feet of their existing water's edge. Utah Lake is the largest freshwater lake in Utah, the Great Salt Lake is the largest saline lake in the U.S. and provides habitat to migrating birds, and Bear Lake is well known for its recreation opportunities. When projects are being completed in close vicinity to these waterbodies, it poses increased risk of impacts to the designated uses for these waterbodies. Both Utah Lake and Bear lake have recreation designated use 2A (frequent primary contact recreation) and aquatic wildlife designated uses associated with either 3A cold water species of game fish (Bear Lake) or 3B warm water species of game fish. Both types of designated uses could be impacted by turbidity increases. Water quality criteria for turbidity will be violated if there is an increase of 10 NTUs in waterbodies with designated uses related to recreation and if there is an increase of 10 NTUs in aquatic wildlife designated use classes 3A and 3B. UAC R317-2-14.1 and UAC R317-2-14.2. Significant turbidity spikes or sediment deposits could cause a waterbody not to meet all its designated beneficial uses or if large quantities of sediment are transported downstream, it could impact the downstream beneficial uses. Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated" UAC R317-2-7.1.a. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6" UAC R317-15-6.1.A.1., "exceeds water quality criteria, either narrative or numeric, in Section R317-2-7" UAC R317-15-6.1.A.2. or "fails to meet the antidegradation (ADR) requirements of Section R317-2-7" UAC R317-15-6.1.A.3. when making a certification decision.

Citation(s): UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- (c) ***Projects with potential discharge to an impaired waterbody with an approved Total Maximum Daily Load (TMDL), where the project has the potential to discharge a pollutant identified/ addressed by the TMDL*** are conditioned on Director Notification and Review. A total maximum daily load or *TMDL* "means the maximum amount of a particular pollutant that a waterbody can receive and still meet WQS, and an allocation of that amount to the pollutant's sources." UAC R317-1-1. When a waterbody is impaired and listed on the 303(d) list, states are required to create and implement TMDLs for the specific waterbody to restore water quality. Waters on Utah's most up to date 303(d) list are not currently meeting their designated beneficial uses. According to Utah's Final 2016 Integrated Report<sup>1</sup> the waters identified as impaired are not meeting their designated beneficial uses because "the concentration of the pollutant- or several pollutants- exceeds numeric water quality criteria, or quantitative biological assessments indicate that the biological designated uses are not

<sup>1</sup> <https://documents.deq.utah.gov/water-quality/monitoring-reporting/integrated-report/DWQ-2017-004941.pdf>

supported (Narrative water quality standards are violated).” TMDLs are created to limit discharges to the waterbody with the goal of meeting designated beneficial uses. If project proponents do not adhere to the BMPs and pollutant reduction requirements identified in approved TMDLs (as applicable) then there may be a violation of WQS and designated beneficial uses could be further impacted. If the potential discharge contains pollutants/parameters that are included in an approved TMDL, the project proponent must take extra precautions, as identified in the TMDL, to minimize and prevent discharges that could further degrade the waterbodies, and prevent the waterbodies from meeting its designated beneficial and existing uses. Director notification and review of projects with the potential to discharge to impaired water bodies with approved TMDLs will ensure consistency with TMDL requirements and goals.

Citation(s): UAC R317-1, UAC R317-2-7.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- (d) ***Projects with potential discharges to Category 1 and Category 2 waters*** are conditioned on Director Notification and Review in order to ensure that the Utah DWQ’s Antidegradation Policies are being implemented effectively. Category 1 waters are “waters which have been determined by the Board to be of exceptional recreational or ecological significance or have been determined to be a State or National resource requiring protection, shall be maintained at existing high quality through designation, by the Board after public hearing, as Category 1 Waters.” UAC R317-2-3.2. Category 2 waters “are designated surface water segments which are treated as Category 1 Waters except that a point source discharge may be permitted provided that the discharge does not degrade existing water quality.” UAC R317-2-3.3. Discharges may be allowed in Category 1 and Category 2 waters “where pollution will be temporary and limited after consideration of the factors in UAC R317-2-.3.5.b.4., and where best management practices will be employed to minimize pollution effects.” UAC R317-2-3.2 and UAC R317-2-3.3.

Although NWP’s are typically issued for projects with minimal impacts to water quality, the NWP’s do not take into consideration the quality of the water affected. In order to comply with the Antidegradation Policy outlined by UAC R317-2-3.5.b.4, requiring that pollution to Category 1 and Category 2 waters be temporary and limited, the DWQ must review all projects with the potential to discharge to those waters. Without the ability to review the individual projects proposing to discharge to Category 1 and Category 2 waters, the DWQ cannot assure that they will meet the antidegradation policy or other applicable water quality requirements. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge “impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3 when making a certification decision.

Citation(s): UAC R317-2-3.2., UAC R317-2-3.3. , UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- (e) *Projects that exempt federal agencies from providing PCN where PCN is required for other entities* are conditioned on Director Notice and Review. Federal agencies that are seeking NWP, should be held to the same standards as other project proponents. Not all federal agencies have staffs that are environmental experts when it comes to water quality. The DWQ is concerned that failure for federal agencies to submit PCNs and receive oversight from the USACE or DWQ, could result in greater than minimal impacts to water quality, exceedance of WQS, and/or violation of antidegradation requirements. Federal agencies are not exempt for meeting WQS and may not always be able to ensure that WQS are met without any oversight from an entity that can provide water quality expertise.

Citation(s): UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 2.) **Implementation of Best Management Practices.** Project approval is conditioned on implementation of BMPs, which are required to be implemented by the Antidegradation Policy in UAC R317-2-3, WQS may be violated unless appropriate best management practices (BMPs) are incorporated to minimize the erosion-sediment and nutrient load. Violations of WQS could cause a waterbody to fail to meet its designated beneficial uses. As required by Utah's Antidegradation policy UAC R317-2-3.1 "Existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses." As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6" UAC R317-15-6.1.A.1., "exceeds water quality criteria, either narrative or numeric, in Section R317-2-7" UAC R317-15-6.1.A.2. or "fails to meet the antidegradation (ADR) requirements of Section R317-2-7" UAC R317-15-6.1.A.3 when making a certification decision. If appropriate BMPs are incorporated, there is assurance that the project will not violate WQS or impair a waterbody's beneficial use. See Attachment 1 for resources on identifying beneficial uses for WOTUS in the State of Utah and Construction Site BMPs.

Citation(s): UAC R317-2-3.1, UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 3.) **Protection of Impaired Waterbodies.** Waters that are impaired and conjunctively on Utah's most up to date 303(d) list are not currently meeting their designated beneficial uses. According to Utah's Final 2016 Integrated Report<sup>1</sup> the waters identified as impaired are not meeting their designated beneficial uses because "the concentration of the pollutant- or several pollutants-exceeds numeric water quality criteria, or quantitative biological assessments indicate that the biological designated uses are not supported (Narrative water quality standards are violated)." Utah's antidegradation policy states "existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses." UAC R317-2-3.1. In order to ensure that proposed activities meet Utah's antidegradation and that discharges do not further degrade water quality the project proponent needs to be aware of the waterbodies assessment, more specifically if the

<sup>1</sup> <https://documents.deq.utah.gov/water-quality/monitoring-reporting/integrated-report/DWQ-2017-004941.pdf>



waterbody is impaired and listed on Utah's most current 303(d) list. If the potential discharge contains pollutants/ parameters that the waterbody is listed as impaired for, the project proponent needs to take extra precautions to minimize and prevent discharges that could further degrade the waterbodies and prevent the waterbodies from meeting its beneficial and existing uses. Typical pollutants associated with USACE Section 404 permits (e.g. sediment), especially when a waterbodies proposed for discharge is impaired could cause applicable WQS to be violated, if appropriate measures are taken." As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6" UAC R317-15-6.1.A.1., "exceeds water quality criteria, either narrative or numeric, in Section R317-2-7" UAC R317-15-6.1.A.2. or "fails to meet the antidegradation (ADR) requirements of Section R317-2-7" UAC R317-15-6.1.A.3. when making a certification decision.

Citation(s): UAC R317-2-3.1, UAC R317-2.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 4.) **Proper Storage of Hazardous and Otherwise Deleterious Materials.** Project approval is conditioned on proper storage of hazardous and otherwise deleterious materials, and notification of any discharge of those materials, to assure that water quality and narrative standards are not violated. When projects are occurring in or around waterbodies, there is a chance for pollutants to inadvertently be spilled/discharged into waterbodies due to increased risk from project related activities (e.g. presence of machinery, onsite chemical and gas storage, improper waste storage, and failure to use proper BMPs). To prevent or reduce the possibility that hazardous and otherwise deleterious materials are inadvertently discharged into a waterbody, project proponents must not store, dispose of, or accumulated such materials adjacent to or in immediate vicinity of WOTUS unless adequate measures and controls are provided to ensure those materials will not enter waters of the state. If there is a discharge to WOTUS in the State of Utah, it must be immediately reported to the DEQ, as stated in Utah Code §19-5-114. An inadvertent discharge of pollutants can cause violations with Utah's Narrative Standards, which states "It shall be unlawful, and a violation of these rules, for any person to discharge or place any waste or other substance in such a way as will be or may become offensive such as unnatural deposits, floating debris, oil, scum or other nuisances such as color, odor or taste; or cause conditions which produce undesirable aquatic life or which produce objectionable tastes in edible aquatic organisms; or result in concentrations or combinations of substances which produce undesirable physiological responses in desirable resident fish, or other desirable aquatic life, or undesirable human health effects, as determined by bioassay or other tests performed in accordance with standard procedures; or determined by biological assessments in Subsection R317-2-7.3." UAC R317-3-7.2. Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated." UAC R317-2-7.1.a. Discharges of pollutants, even inadvertently, could cause both a violation of applicable water quality standards and possibly interfere with a waterbodies designated uses.

Citation(s): Utah Code § 19-5-114, UAC R317-3-7.2, UAC R317-2-7.1.a, UAC R317-15-6.1., UAC R317-15-6.1.A.1., UAC R317-15-6.1A.2.

- 5.) **Notification to water supply operators and local health departments** is a condition of project approval for all projects in or immediately adjacent to WOTUS with assigned class 1C for domestic drinking water upstream two miles or less from any intake supply. NWP general permit condition 7 as described in 80 FR 57298, 57386 states "no activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization." The DWQ has determined that this condition is not specific enough to protect of beneficial use class 1C (Protected for domestic purposes with prior treatment by treatment processes as required by the Utah Division of Drinking Water) because it fails to provide an exact distance. As stated in Utah's Antidegradation Policy UAC R317-2-3.5.d "depending upon the locations of the discharge and its proximity to downstream drinking water diversions, additional treatment or more stringent effluent limits or additional monitoring, beyond that which may otherwise be required to meet minimum technology standards or in stream WQS, may be required by the Director in order to adequately protect public health and the environment." "The additional treatment/effluent limits/monitoring which may be required will be determined by the Director after consultation with the Division of Drinking Water and the downstream drinking water users." UAC R317-2-3.5.d. These additional requirements are necessary to ensure that beneficial use class 1C is maintained in the waterbody proposed for discharge or in some cases, protection of the downstream waterbodies designated beneficial use, when classified as 1C. Should the project proponent refuse to work with the local health department and water supply operators, the Director may request an individual certification request and issue additional requirements in consultation with the operator, the public health departments, and the Division of Drinking water in order to maintain the designated beneficial use.

Citation(s): UAC R317-2-3.5.d, UAC R317-2-7.1.a, UAC R317-2-8., UAC R317-15-6.1, UAC R317-15-6.1.A.1, UAC R317-15-6.1A.2., UAC R317-15-6.1.A.3

- 6.) **Vegetation Preservation and Reestablishment in fisheries.** Project approval is conditioned on avoiding vegetation removal to the maximum extent practicable in or immediately adjacent to WOTUS used as fisheries in order to maintain existing beneficial use. Waterbodies with beneficial use class 3A (cold water fishery) or waterbodies with a blue ribbon fishery designation rely heavily on the available stream cover/shade to maintain designated beneficial uses. Riparian vegetation supplies necessary shade to stabilize water temperatures in streams. Removal of riparian vegetation, without reestablishment could cause a waterbody not to maintain beneficial use 3A or its blue river fishery designation. Utah's antidegradation policy states "existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses." UAC R317-2-3.1. Failure to minimize riparian vegetation removal and failure to reestablish riparian vegetation which results in the failure to maintain beneficial use class 3A would be considered a violation of Utah's rules promulgating standards of quality for waters of the State, more specifically Utah's antidegradation policy found at UAC R317-2-3. Additionally, the loss of riparian vegetation

could cause a violation of the instream numeric criteria for temperature, which is listed as 20°C with a max temperature change of 2°C for beneficial use class 3A. UAC R317-2-14.2. If the temperature of the waterbody increases, there is a potential for instream water quality criteria for dissolved oxygen (DO) to be violated. Temperature and DO have an inverse relationship, where temperature increases then DO decreases, so an increase in temperature could cause a decrease in DO, and possibly a violation of the instream criteria for DO which for beneficial use class 3A is a minimum of 8.0 mg/L when early life stages are present and 4.0 mg/L when all other life stages are present. UAC R317-2-14.2. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge “impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3 when making a certification decision.

Citation(s): UAC R317-2-3.1., UAC R317-2-3., UAC R317-2-14.2., UAC R317-2-14.2., UAC R317-15-6.1, UAC R317-15-6.1.A.1, UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 7.) **Dry Conditions to the Maximum Extent Practicable.** Project approval is conditioned on conducting activities under dry conditions to the maximum extent practicable to assure that WQS are not exceeded. DWQ acknowledges that some of the NWP general permit conditions encourage activities to be conducted under dry conditions, but the conditions do not go far enough to provide reasonable assurance of compliance with applicable WQS, particularly in Utah where dry conditions can be reasonably achieved. NWP general permit conditions 3, 11, and 12 partially address concerns the DWQ has, but are ultimately insufficient. NWP general condition 3 as described in 80 FR 57298, 57385 states “*activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized*”, condition 11 as described in 80 FR 57298, 57386 states “*heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance*” and condition 12 as described in 80 FR 57298, 57386 states “*appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.*”

General condition 3 as written does not adequately protect fish spawning, as required by Utah WQS and Antidegradation Policy. Certain activities/discharges (e.g. sediment discharges, streambed alteration, streambank alteration (fish habitat)) permitted through a USACE Section 404 permit to waterbodies during spawning season (in a waterbody where spawning may occur), will likely impact fish spawning. Activities/ discharges approved through a USACE Section 404 permit could have significant impacts to turbidity, DO, temperature, available substrate, and available habitat, which subsequently can have significant impacts to spawning. The impairment

of fish spawning is not considered a temporary and limited impact and therefore does not meet Utah's antidegradation policy found in UAC R317-2-3.5. An impairment of fish spawning may also impact whether the waterbody can maintain its designated beneficial uses, as it relates to aquatic wildlife use classes. Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated" UAC R317-2-7.1.a.

General conditions 11 and 12, as stated above, do begin to address the use of machinery and timing of projects in WOTUS in the State of Utah, but additional conditions are necessary to meet Utah WQS. Condition 11 addresses work being conducted in wetlands that are considered WOTUS in the State of Utah, but does not address machinery use in open waterbodies or streams. Construction machinery used within a waterbody can cause significant impacts to water quality if adequate precautions are not taken. When it is unavoidable to operate construction machinery within the waterbody the project proponent should focus on minimizing the duration of the disturbance, turbidity increase, substrate disturbance, removal of riparian vegetation, and work shall be conducted in the "dry" to the maximum extent practicable. Minimizing the duration of impact reduces the chance that the impacts will accumulate and cause significant impacts to water quality. Minimizing turbidity increases is important because the State of Utah has numeric water quality criteria for turbidity in certain use designations, which could be violated if the project proponent does not take proper steps to minimize the increases. Water quality criteria for turbidity will be violated if there is an increase of 10 NTUs in waterbodies with designated uses related to recreation and if there is an increase of 10 NTUs (3A & 3B) or 15 NTUs (3C & 3D) in waterbodies with aquatic wildlife designated uses. UAC R317-2-14.1 and UAC R317-2-14.2. Conducting work in the "dry" to the maximum extent practicable will help reduce the risk of the numeric criteria for turbidity to be exceeded, as well as reduce the risk of a significant sediment load being transported downstream. Discharges of sediment can not only violate numeric criteria, but also, risk violating Utah's narrative standard "It shall be unlawful, and a violation of these rules, for any person to discharge or place any waste or other substance in such a way as will be or may become offensive such as unnatural deposits, floating debris, oil, scum or other nuisances such as color, odor or taste; or cause conditions which produce undesirable aquatic life or which produce objectionable tastes in edible aquatic organisms; or result in concentrations or combinations of substances which produce undesirable physiological responses in desirable resident fish, or other desirable aquatic life, or undesirable human health effects, as determined by bioassay or other tests performed in accordance with standard procedures; or determined by biological assessments in Subsection R317-2-7.3." UAC R317-2-7.2. Violations of numeric and narrative criteria could cause a waterbody not to meet its designated beneficial use and a transport of sediment downstream could prevent a downstream waterbody from meeting its designated beneficial uses. As required by Utah's Antidegradation policy UAC R317-2-3.1 "Existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses.". Additionally, "All actions to control waste discharges under these rules shall be modified as necessary to protect downstream designated uses." UAC R317-2-8. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated

beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3 when making a certification decision.

Citation(s): UAC R317-2-3.5. , UAC R317-2-7.1.a., UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-2-7.2. , UAC R317-2-3.1, UAC R317-2-8. , UAC R317-15-6.1, UAC R317-15-6.1.A.1, UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

## **VII. Denials**

**NWPs for Projects that involve dam maintenance/rehabilitation or reservoir dewatering are denied and must apply for individual certification from the Director** because they have the potential to discharge massive amounts of sediment if not properly regulated and administered. As stated in justification1a, the DWQ has concerns with projects that have potential to discharge large quantities of sediment into waterbodies. Projects such as dam maintenance/rehabilitation or reservoir dewatering that involve potential release of large quantities of sediment, either as part of project activities or inadvertently, have potential for catastrophic impacts to water quality. For example, in August 2016, the Tibble Fork Dam had an unplanned release of approximately 8,700 cubic yards of sediment from the Tibble Fork Reservoir into the North Fork of the American Fork River, causing a fish kill of about 5,250 fish. Samples taken revealed sediment concentrations of heavy metals (arsenic, cadmium, lead, and Zinc) in excess of EPA Region 3 Freshwater Sediment Screening Values for aquatic life and human health-based concentration for lead. The project had been permitted under a USACE Section 404 NWP; but the DWQ was unaware of the project. If the DWQ had the opportunity to review the project prior to USACE NWP issuance, impacts may have been prevented or at least minimized by adding project-specific conditions or additional oversight to the project. To avoid future violations and catastrophic releases, the DWQ is requiring individual permits for these types of projects.

Citation(s): UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-2-8. , UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

## VIII. Disclaimers

- 1.) This Section 401 Certification does not preclude the applicant's responsibility to comply with all applicable Federal, State or local laws, regulations or ordinances, including WQS. Permit coverage does not release the applicant from any liability or penalty, should violations to the permit terms and conditions or Federal or State Laws occur.
- 2.) Applicants must acquire all necessary easements, access authorizations and permits to ensure they are able to implement the project. This Section 401 Certification does not convey any property rights or exclusive privileges, nor does it authorize access or injury to private property.

## IX. Public Notice and Comments

- 1.) **Public Notice Dates:** November 5, 2020 – December 7, 2020
- 2.) **Public Notice Comments, Response, and Actions:** The NWP 401 Certification received one comment.
  - (a) Comment 1
    - Comment 1: The USACE requested that "USACE" be replaced with "prospective permittee" or "project proponent" when referring to condition requirements.
    - Comment 1 Response: The USACE was advised that the request was reasonable and would be considered during finalization of the Certification.
    - Comment 1 Action: The DWQ replaced "USACE" with "project proponent" in two locations at the request of the USACE. The changes were not significant and overall did not impact the conditions. Since this change was not considered major, the Certification will not be Public Noticed again.
- 3.) During finalization of the Certification certain dates, spelling edits, and minor language or formatting corrections may have been completed. Due to the nature of these changes they were not considered major and the Certification will not be Public Noticed again.

**X. Water Quality Certification**

The Utah Division of Water Quality Certifies that if projects issued under the USACE Nationwide Permits adhere to the conditions outlined in this certification, adhere to Sacramento Districts Regional Conditions, and adhere to any conditions outlined in the proposed NWP then the projects will comply with water quality requirements and applicable provisions of the Clean Water Act sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303(Water Quality Standards and Implementation Plans), 306(National Standards of Performance), and 307 (Toxic and Pretreatment Effluent Standards).



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Erica Brown Gaddis PhD, Director

12/08/2020

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Date

## **XI. References**

Division of Water Quality. 2016. Utah's Final 2016 Integrated Report. Salt lake City, Utah. Utah Department of Environmental Quality.

Available at: <https://documents.deq.utah.gov/water-quality/monitoring-reporting/integrated-report/DWQ-2017-004941.pdf>

Proposal To Reissue and Modify Nationwide Permits, 85 FR 57298 (September 15, 2020).

Available at: <https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits>



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## Attachment 1: Project Proponent Resources

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### **Project Proponent Resources**

Best Management Practices for Construction Sites: <https://deq.utah.gov/sbeap/best-management-practices-for-construction-sites>

Utah DEQ Interactive Map: <https://enviro.deq.utah.gov/>

EPA's Final "Clean Water Act Section 401 Certification Rule" :  
[https://www.epa.gov/sites/production/files/2020-07/documents/clean\\_water\\_act\\_section\\_401\\_certification\\_rule.pdf](https://www.epa.gov/sites/production/files/2020-07/documents/clean_water_act_section_401_certification_rule.pdf)

Approved TMDLs in the State of Utah: <https://deq.utah.gov/water-quality/watershed-monitoring-program/approved-tmdls-watershed-management-program>



# *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.c.allen@usace.army.mil](mailto:Kelly.c.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](mailto: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](mailto: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 NWP: **NWPs 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

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

CWA Section 401 certification is granted with the following conditions for NWPs 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 NWPs 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 NWPs, including those with additional permit-specific conditions, must comply with the following conditions:**

<b>Conditions Applicable to all NWPs</b>	<b>Why the condition is necessary to assure the proposed project will comply with water quality requirements</b>	<b>Citation that authorizes the condition</b>
<p>All applicants, including federal agencies, must notify UMUT's Tribal Environmental Department of the use of all NWPs for which certification has been granted prior to commencing work on the project.</p> <p>Notifications must include:</p> <ul style="list-style-type: none"> <li>• project location (lat. Long., exact point on map);</li> <li>• NWP that will be used and the specific activity that will be authorized under the NWP;</li> <li>• amount of permanent and temporary fills;</li> <li>• a short summary of the proposed activity, and all other federal, state, tribal or local permits or licenses required for the project;</li> <li>• complete contact information of both the applicant and contractor (name, name of the company or property if applicable, telephone, mobile, and email); and,</li> <li>• summary of best management practices that will be used.</li> </ul>	<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 NWP 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>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>CWA sections 301, 302, 303, 306, and 307<sup>1</sup></p> <p>CWA 308(a)</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.

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.

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

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

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

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 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.

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.

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.

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.

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.

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 Subpart E; Ute Mountain (iv)

Endnotes (i-iv)

40 CFR 230.10(d); 40 CFR 230.71; Ute Mountain (iv)

Endnotes (i-iv)

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

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

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

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>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>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>biology of the impacted waters by preventing the spread of invasive or nuisance species.</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>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>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 230.75; 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 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>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 230.10(d); 40 CFR 230.71; CWA 307 ("No toxics in toxic amounts") Ute Mountain (iv)</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>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)):**

<b>NWP #</b>	<b>Permit-Specific Conditions</b>	<b>Why the condition is necessary to assure the proposed project will comply with water quality requirements</b>	<b>Citation that authorizes the condition</b>
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

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

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.

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.

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

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.)

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  
and 230.10



	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.	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.	
	3) Crossings must be placed as close to perpendicular to the water course as possible.		
15. Bridges	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.)	<u>This justification applies to conditions 1 - 3.</u> 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.	Ute Mountain (iv) 303(a) 40 CFR 230.7; 40 CFR230.10(d); 40 CFR 230.72
	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.	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.	

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.

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).

Placement of dredged or fill material in these locations may be susceptible to being washed away by high flows, which would contribute to sedimentation and potential conveyance of pollutants downstream.

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 230.70

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).

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.

Ute Mountain  
(iv)  
40 CFR  
230.10(d); 40  
CFR 230.75

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. \*\*\**

<b>NWP #</b>	<b>Water quality requirement with which discharges that could be authorized by the general license or permit will not comply</b>	<b>Brief statement explaining why discharges that could be authorized by the general license or permit will not comply with this water quality requirement</b>
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.

		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.
24. Indian Tribe or State Administered Section 404 Programs	CWA 404(g) implementing regulations	
29. Residential Developments	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 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.
34. Cranberry Production	40 CFR 230.23 40 CFR 230.24  Ute Mountain (iv)	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.
37. Emergency Watershed	Ute Mountain (iv)	

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. 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.

40. Agricultural  
Activities

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

Ute Mountain (iv)

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  Ute Mountain (iv)	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.  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.
49. Coal Remining	40 CFR 230.23 40 CFR 230.24  Ute Mountain (iv)	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.
50. Underground Coal Mining	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 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)	

<sup>i</sup> 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).

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

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

<sup>iv</sup> 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

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