



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region8

December 12, 2020

Ref: 8WD-CWB

**SENT VIA EMAIL
DIGITAL READ RECEIPT REQUESTED**

Colonel James J. Handura
U.S. Army Corps of Engineers
Sacramento District
1325 J Street, Room 1480
Sacramento, California 95814

Re: Clean Water Act § 401 Certification of the U.S. Army Corps of Engineers proposed 2020 Nationwide Permits for Indian country in Utah (except Indian country lands of the Navajo Nation and the Confederated Tribes of the Goshute Reservation)

Dear Col. Handura:

The U.S. Environmental Protection Agency, Region 8 (EPA) received the U.S. Army Corps of Engineers, Sacramento District, request for water quality certification under § 401 of the Clean Water Act (CWA) for the proposed 2020 Nationwide Permits (NWP) that may result in a discharge in waters of the United States on Indian country¹ lands within the state of Utah.² We have reviewed the September 15, 2020, Federal Register notice announcing the reissuance of the NWP, along with the regional conditions proposed for Sacramento District. This letter transmits our certifications for these general permits.

This certification applies to any potential point source discharges from potential projects authorized under the proposed 2020 NWP into waters of the United States that occur on the reservations of the following tribes, or any other Indian country lands within the State of Utah where EPA is the certifying authority (except Indian country lands of the Navajo Nation and Valley Band of Goshute Indians of Utah, the Northwestern Band of the Shoshone Nation, the Ute Mountain Ute Tribe (except as described in footnote 4), and the Ute Indian Tribe. Section

¹ Indian country is defined at 18 U.S.C. § 1151.

² Indian country in Utah generally includes: (1) lands within the exterior boundaries of the following Indian reservations located within Utah, in part or in full: the Goshute Reservation, the Navajo Indian Reservation, the reservation lands of the Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes), the Skull Valley Indian Reservation, the Uintah and Ouray Reservation (subject to federal court decisions removing certain lands from Indian country status within the Uintah and Ouray Reservation), and the Washakie Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. section 1151.

401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, EPA is the certifying authority. Presently, the Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute Indians of Utah, the Northwestern Band of the Shoshone Nation, the Ute Mountain Ute Tribe (except as noted in the footnote below),³ and the Ute Indian Tribe do not have the authority to provide CWA § 401 certification for discharges occurring within Indian country lands of those Tribes; therefore, the EPA is making the certification decisions for discharges that may result from the proposed NWP.⁴

In summary, EPA is certifying 16 of the 57 NWPs with conditions. We are waiving 4 NWPs, denying certification for 27 NWPs, and taking no action on 11 NWPs. These requirements will protect water quality and help ensure that the NWP program minimizes adverse impacts on the aquatic environment on Indian country lands, both individually and cumulatively, as required by CWA Section 404(e). 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 EPA. An individual certification request must follow the requirements outlined in §121.5 of EPA's CWA § 401 Certification Rule, effective September 11, 2020.

Thank you for your ongoing partnership in implementing the regulatory programs of the CWA. Please contact me at (303) 312-6395 if you have any questions, or your staff may contact Toney Ott at 303-312-6909, ott.toney@epa.gov, or Aaron Blair at 303-312-6883, blair.aaron@epa.gov, if there are any questions or if clarification is necessary.

Sincerely,

Judy Bloom, Branch Manager
Clean Water Branch

Enclosure

³ The Ute Mountain Ute Tribe has been approved by EPA to administer the Clean Water Act section 401 water quality certification program on most, but not all, of the lands held in trust by the United States for the Tribe in the State of Utah. Therefore, the Tribe (not EPA) is the certifying authority for those approved tribal trust lands. Please contact EPA Region 8 for further identification of those lands.

⁴ It is the responsibility of the applicant to determine the proper CWA § 401 authority through coordination and recommendations of land status through EPA or certification of land status by the U.S. Department of the Interior Bureau of Indian Affairs.

CC:

Luke Duncan, Chairman, Ute Indian Tribe, luke@utetribes.com
Jerry Big Eagle, Natural Resources Director, Ute Indian Tribe, jerryb@utetribes.com
Bart Powaukee, Water Quality Coordinator, bartp@utetribes.com

Manuel Hart, Chairman, Ute Mountain Ute, manuel.hart@utemountain.org
Scott Clow, Environmental Director, Ute Mountain Ute, sclow@utemountain.org
Colin Larrick, Water Quality Coordinator, Ute Mountain Ute, sclow@utemountain.org

Candace Bear, Chairwoman, Skull Valley Band of the Goshute Indians of Utah,
cbsvgoshute@gmail.com

Alex Dennis, Chairman, Northwestern Band of the Shoshone, banner02@gmail.com
Jason Walker, Environmental Director, Northwestern Band of the Shoshone,
jwalker@nwbsoshone.com

Tamra Borchardt-Slayton, Chairperson, Paiute Indian Tribe of Utah, tslayton@utahpaiutes.org
Charlotte Domingo, Environmental Director, Paiute Indian Tribe of Utah,
cdomingo@utahpaiutes.org

U.S. Corps of Engineers

Mike Jewell – Sacramento District, Michael.S.Jewell@usace.army.mil
Leah M. Fisher – Sacramento District, leah.m.fisher@usace.army.mil
Jason Gipson – Bonneville, UT, Jason.A.Gipson@usace.army.mil

U.S. Environmental Protection Agency Region 9

Sam Ziegler, Wetlands Section Manager, Ziegler.Sam@epa.gov

**U.S. Environmental Protection Agency Region 8 Clean Water Act Section 401
Water Quality Certification for the U.S. Corps of Engineers CWA Section 404
2020 Nationwide Permits Reissuance**

This Certification applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers CWA 404 Nationwide Permit (NWP) into waters of the United States that occur within Indian country lands within the state of Utah¹: NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, D, and E. The Corps is not requesting certification for 11 NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B.

Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency is the certifying authority. In this case, the Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute Indians of Utah, the Northwestern Band of the Shoshone Nation, the Ute Mountain Ute Tribe (except as noted in the footnote below²), and the Ute Indian Tribe do not have the authority to provide CWA § 401 certification for discharges occurring within Indian country lands of those Tribes, therefore, the EPA is making the certification decisions for discharges that may result from potential projects authorized under the proposed Corps CWA 404 NWPs listed above.

Project Description

The Corps is proposing to re-issue its existing NWPs and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects.” 85 FR 57298. For more details:

<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

General Information

The general information provided in this section does not constitute a certification condition(s).

¹ EPA Region 9 implements EPA programs, such as the Clean Water Act section 401 water quality certification program, for the Indian country lands of the Navajo Nation and the Confederated Tribes of the Goshute Reservation, and therefore this certification do not pertain to those Indian country lands.

² The Ute Mountain Ute Tribe has been approved by EPA to administer the Clean Water Act section 401 water quality certification program on most, but not all, of the lands held in trust by the United States for the Tribe in the State of Utah. Therefore, the Tribe (not EPA) is the certifying authority for those approved tribal trust lands. Please contact EPA Region 8 for further identification of those lands.

- The project proponents for potential projects authorized under the NWP are responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state, or tribal authority.
- If a project is unable to meet the enclosed conditions, or if certification is denied for an applicable NWP, the project proponent may request an individual certification from EPA. An individual certification request must follow the requirements outlined in 40 CFR 121.5 of EPA's CWA § 401 Certification Rule, effective September 11, 2020.
- Copies of this certification should be kept on the job site and readily available for reference.
- Prior to work commencing, project proponents should notify the appropriate Tribal Environmental Office.
- Project proponents for potential projects should also notify the appropriate Tribal Office and EPA Region 8 if spills or unauthorized discharges occur during the project.
- The project proponent for potential projects authorized under the NWP are encouraged to contact EPA Region 8 during the project planning phase if there are any questions about relevant best management practices (e.g., bioengineering techniques, biodegradable erosion control measures, revegetation using native plant species, suitable fill materials, and disposal of debris/construction materials preventing runoff) and resources that can assist with compliance.
- Pursuant to CWA section 308(a), EPA Region 8 representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP.
- If you have questions regarding this certification, please contact EPA Region 8 at: R8CWA401@epa.gov.

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

On behalf of the tribes listed above, CWA Section 401 certification is granted with the following condition for NWPs 5, 6, 18, 19, 20, 23, 25, 30, 31, 32, 33, 36, 38, 41, 45, and 46. EPA Region 8 has determined that any discharge authorized under these proposed NWPs will comply with water quality requirements, as defined in 40 C.F.R. 121.1(n), subject to the following condition pursuant to Section 401(d).

Condition: All applicants must provide notice to EPA Region 8 prior to commencing construction to provide EPA Region 8 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the applicant should also provide the PCN to Region 8. EPA Region 8 will provide written notification to the applicant if the proposed project will violate the water quality certification of the NWP.

Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements: This condition is necessary to provide EPA Region 8 with notice and information to allow for an efficient and effective pre-operation inspection to determine if the certified discharge will violate the certification. If the project scope changes during the

Corps review prior to initiation of the activity, it is also critical for EPA Region 8 to be provided any changes in the project design, scope, amount and location of discharges to inform the pre-operation inspection opportunity as provided by 40 CFR 121.11(a).

Citation that authorizes the condition: 40 CFR 121.11(a)

NWPs Denied (121.7(e)(2))

On behalf of the tribes listed above, EPA Region 8 cannot certify that the range of discharges from potential projects authorized under the following proposed NWPs will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWPs 3, 7, 12, 13, 14, 15, 16, 17, 19, 21, 27, 29, 34, 37, 39, 40, 42, 43, 44, 49, 50, 51, 52, 53, C, D and E, and applicants must 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 Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute Indians of Utah, the Northwestern Band of the Shoshone Nation, the Ute Mountain Ute Tribe, and the Ute Indian Tribe, EPA Region 8 lacks sufficient information on sensitive resources that may exist on these tribal lands, potential impaired waters on these tribal lands, and potential cultural importance of the water resources on these tribal lands. Additional information on these specific subjects would be needed for EPA Region 8 to assure that the range of discharges from potential projects authorized under NWPs 3, 7, 12, 13, 14, 15, 16, 17, 19, 21, 27, 29, 34, 37, 39, 40, 42, 43, 44, 49, 50, 51, 52, 53, C, D and E will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 8 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 8 is therefore denying certification.

NWPs Waived (121.9(a)(1))

On behalf of the tribes listed above, EPA Region 8 is expressly waiving its authority to act on the CWA § 401 certification request for proposed NWPs: 4, 22, 48, and 54.