

**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

Table of Contents

I. Definitions	3
II. Acronyms.....	4
III. Executive Summary	4
IV. Background.....	5
V. Certification Conditions	5
VI. Condition Justification and Citations.....	7
VII. Denials.....	16
VIII. Disclaimers.....	17
IX. Public Notice and Comments.....	17
X. Water Quality Certification	18
XI. References.....	19

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 (NWP) 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 NWP. 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 NWP: 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 Report¹ 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

¹ <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 Report¹ 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

¹ <https://documents.deq.utah.gov/water-quality/monitoring-reporting/integrated-report/DWO-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 R317-15-6.1A.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 R317-15-6.1A.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).



Erica Brown Gaddis PhD, Director

12/08/2020

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>

Attachment 1: Project Proponent Resources

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

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