



ENVIRONMENTAL PROGRAMS DIVISION

ENVIRONMENTAL PROGRAMS DIVISION
SOUTHERN UTE INDIAN TRIBE
PO BOX 737 MS #81, IGNACIO, CO 81137
(970) 563 – 0135 (Office) • (970) 563 – 0384 (Fax)

April 7, 2021

Via Electronic Mail

Trisha Oeth
Director of Environmental Boards and Commissions and
Acting Environmental Programs Policy Advisor
Colorado Department of Public Health and Environment
Trisha.oeth@state.co.us

Re: Responses to State of Colorado Comments Following Advance Notice of and Request for Review and Comment on the Tribe's (1) Proposed Water Quality Standards and (2) Proposed Clean Water Act Section 401 Certification Procedures

Dear Director Oeth,

By a letter dated November 17, 2020 (transmitted November 23, 2020), the Southern Ute Indian Tribe provided the State of Colorado with an advance opportunity to review and comment on the Tribe's proposed water quality standards and Clean Water Act Section 401 certification procedures. Initially, the comment period was approximately 30 days until December 30, 2020. At the State's request, the Tribe extended the comment period until January 29, 2021. The Tribe received twenty-six comments from the State. This document provides the Tribe's responses to all comments received from the State.

For convenience and clarity, the State's comments or paraphrases of the State's comments are set forth below, in the same order they were received. The State's comments are italicized to distinguish them from the Tribe's specific responses.

Comments in State's January 29, 2021 Transmittal Letter

1. *CDPHE requests that the Tribe modify the applicability language in its proposed water quality standards to limit the applicability of the Tribe's standards to water bodies for which the Tribe is eligible to set water quality standards pursuant to EPA's approval of the Tribe's application for a determination of eligibility to be treated in the same manner as a state (i.e. water bodies on currently held trust lands only).*

Response: The Tribe understands the State's request that the Tribe limit its standards to water bodies located on trust lands only. In the second paragraph of its transmittal letter, however, the CDPHE's concern regarding the Tribe's applicability language is unfounded. The Tribe's

language does not mean that, if the Tribe applied for and received an EPA delegation of authority to administer its standards on water bodies located on non-trust lands with the exterior boundaries of the Southern Ute Indian Reservation, that the Tribe's standards would automatically apply with no opportunity for public review and comment. In its *Decision Document: Approval of the Southern Ute Indian Tribe's Application for Treatment in a Similar Manner as a State for the Clean Water Act Sections 303(c) Water Quality Standards and 401 Certification Programs (March 28, 2018)* ("Decision Document"), EPA made clear that its approval did not include any land not currently held in trust for the Tribe and that, as required by EPA's TAS regulation (40 C.F.R. 131.8), the processing of any supplemental TAS application would include "appropriate governmental and public notification and participation." Decision Document at 15. EPA also emphasized that "any water quality standards adopted by the Tribe and submitted to the EPA for action under the CWA would need to satisfy all CWA and regulatory requirements, including requirements for public involvement in the adoption process." *Id.* at 19. The Tribe points out that the State appears to be asking the Tribe to limit its applicability language in a manner that the State itself has not limited the State's water quality applicability language. The State has not limited its language describing the applicability of the State's water quality standards to the areas for which it has received EPA approval (i.e., areas within the State that are outside of Indian country). See Water Quality Control Commission Regulation 34.5(4); see also, EPA's *Direct Implementation of Federal Environmental Programs in Indian Country* <https://www.epa.gov/sites/production/files/2016-09/documents/epa-direct-implementation-indian-country.pdf> (Feb. 25, 2016) (stating EPA's policy that, in the absence of an EPA-approved program, EPA directly implements environmental programs in Indian country).

2. *CDPHE suggestion that the Tribe limit its definition of "tribal waters" to "waters over which the Tribe has authority for establishing water quality standards under its treatment as a state status approved by EPA on March 28, 2018."*

Response: See response to comment number 1 above.

3. *CDPHE would be interested in resurrecting discussions about a joint water quality commission or other possible solution for coordinated water quality regulation and management of waters within the exterior boundaries of the Reservation.*

Response: As demonstrated by the Tribe affording the State an advance opportunity for reviewing and commenting on the Tribe's proposed water quality standards and Clean Water Act Section 401 certification procedures, the Tribe remains committed to communicating and coordinating with the State regarding the Tribe's approach to regulating water quality on the Reservation. At this time, the Tribe respectfully declines the invitation to resurrect discussions regarding an intergovernmental agreement concerning regulation of water quality on the Reservation.

4. *The Water Quality Control Division ("division") offers to coordinate on appropriate standards implementation, harmonizing any misalignment of standards, and adoption of nutrient standards, and to share information and resources concerning topics such as antidegradation, variances, and ephemeral systems.*

Response: The Tribe appreciates the division's offer and looks forward to learning from the division's experience, sharing information, and working cooperatively.

5. *CDPHE requests that the Tribe's "draft [401 certification] Procedures be revised to indicate that the Tribe will either: (1) consistently publish notice of 401 certification applications/draft certifications in a location that is readily accessible to CDPHE, such as a public website, or (2) directly notify CDPHE of draft 401 certifications via email."*

Response: The Tribe understands CDPHE's interest in ensuring there is adequate public notice of the Tribe's proposed Clean Water Act Section 401 certifications. Under Clean Water Act Section 401(a)(1) (codified at 33 U.S.C. 1341(a)(1)), the Tribe must "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." Consistent with Clean Water Act requirements and CDPHE's request, the Tribe has committed to providing public notice of its proposed action on certification requests. The term "public" is defined in the Tribe's proposed 401 certification procedures to include any state government agencies responsible for water quality improvement on the Reservation, and other parties known to be interested in the matter. The manner by which the Tribe will provide notice includes "by posting a notice and the draft certification decision on the Division's website, mailing notice and the draft certification decision, emailing notice and the draft certification, and publishing notice and the draft certification decision in *The Southern Ute Drum* or another newspaper of general circulation in the area in which the activity is proposed to be conducted."

6. *CDPHE asks the Tribe to specify a timeframe for public comments on proposed Clean Water Act Section 401 certification actions.*

Response: EPA's new Clean Water Act Section 401 certification rule requires certifying authorities to act on a certification request within the reasonable period of time set by the federal permitting or licensing agency. 40 C.F.R. 121.7. That limitation constrains the Tribe's ability to commit to a certain timeframe for public review and comment. Consistent with CDPHE's request, however, the Tribe's proposed Clean Water Act Section 401 procedures provide for public notice of each certification request:

depending on the potential for water quality impacts and the amount of time afforded the Tribe by the federal permitting or licensing agency, by posting a notice and the draft certification decision on the Division's website, mailing notice and the draft certification decision, emailing notice and the draft certification, publishing notice and the draft certification decision in *The Southern Ute Drum* or another newspaper of general circulation in the area in which the activity is proposed to be conducted, and/or holding one or more public meetings or hearings. Interested parties shall be provided an opportunity to comment on certification requests in such manner as the Division deems appropriate.

7. *CDPHE recommends that the Tribe clarify its intention regarding procedures for acting on certification requests for nationwide or regional general 404 permits.*

Response: CDPHE must have overlooked the Tribe's proposed "Clean Water Act Section 401 Certification Procedures for Nationwide Permits and Regional General Permits Issued by the U.S. Army Corps of Engineers" that the Tribe transmitted to the State for review and comment. The Tribe has made revisions to all three of its sets of procedures for acting on certification requests to conform to the EPA's new Clean Water Act Section 401 certification rule. A copy of the Tribe's revised proposed procedures is available upon request to the Tribe's Environmental Programs Division.

Comments of the Water Quality Control Division on the Tribe's Draft Proposed Water Quality Standards Package

I. Water Quality Standards Applications and Values

1. Comment:

In Table 15 of the Water Quality Standards for Surface Waters on the Southern Ute Indian Reservation, it may be helpful to indicate that the dissolved oxygen standards are minimum values, for clarity.

Tribe's Response:

The requested change has been made.

2. Comment:

Where relevant, it is recommended that the duration of standards be included. In some cases it may be specific, such as with temperature (Daily Maximum and Monthly Weekly Average), but in other cases, it may be enough to include whether the value is considered to be protective of acute or chronic toxicity. For example, what are the durations for dissolved oxygen and specific conductance in Table 15? The Colorado Department of Public Health and Environment Water Quality Control Division (division) is in the process of proposing changes to our regulations to make such similar clarifications, in order to more clearly demonstrate the intent of standards for implementation purposes.

Tribe's Response:

The Tribe is continuing to investigate the use of duration to establish the most reliable and protective standard.

3. Comment:

Has the Tribe considered whether or not there may be a need to include water quality standards for radionuclides?

Tribe's Response:

The Tribe has not considered including radionuclides in the water quality standards. However, the Tribe may investigate these pollutants during the triennial review of its standards.

4. Comment:

The temperature standards presented in Table 15 of the Water Quality Standards for Surface Waters on the Southern Ute Indian Reservation include daily maximum and maximum weekly average temperature values for Cold, Cool, and Warm waters. The division commends the Tribe on including protections against both short and long-term impacts, as both have been shown to be biologically relevant. In addition, the division has found that it is important to recognize the seasonal aspect of protection of fish populations from relatively elevated temperatures. The winter is an important period for reproduction for many fish. Cold tier fish (salmonidae) have thermally sensitive eggs developing in gravels over winter and warm tier fishes (percidae, esocidae, catostomidae, etc.) require sustained cold periods of lower metabolic activity prior to successful reproduction in the following spring/summer. In the Tribe's Rationale for Designated Uses of Tribal Waters on the Southern Ute Indian Reservation and Temperature Standard Comparisons with Colorado and New Mexico, the Tribe indicates that "all segments on the Reservation are Seasonal COLD1 in the Winter: October 15- April 15"; however, the Tribe's temperature standards for all uses (including COLD1) seem to be based upon ambient temperatures observed only April through November. In which case, these values may not reflect ambient winter water temperatures. Additionally, since the temperatures reflect only the existing ambient temperatures, and not the highest attainable use, the standards may not be adequately protective of the fish species expected to occur (see also comment 5, below). Table 1, below shows the division's interpretation of the Tribe's temperature standards and Table 2 shows CDPHE's Water Quality Control Commission's (commission) temperature standards adopted in Regulation No. 31.

Table 1. Tribe Temperature Standards				
	Winter (10/15 to 4/15)		Summer (4/16 to 10/14)	
Use	Daily Maximum (°C)	Maximum Weekly Average (°C)	Daily Maximum (°C)	Maximum Weekly Average (°C)
Cold	20	17	20	17
Cool	20	17	24	21
Warm	20	17	30	27

Table 2. WQCC Temperature Standards				
Use	Winter		Summer	
	Daily Maximum (°C)	Maximum Weekly Average (°C)	Daily Maximum (°C)	Maximum Weekly Average (°C)
Cold Stream, Tier I*	13	9	21.7	17
Cold Stream Tier II**	13	9	24.3	18.3
Cold, Small Lakes and Reservoirs***	13	9	21.2	17
Cold, Large Lakes and Reservoirs***	13	9	24.2	18.3
Warm Stream, Tier I****	24.6	12.1	29	24.2
Warm Stream, Tier II****	25.2	13.8	28.6	27.5
Warm Stream, Tier III****	24.9	14.3	31.8	28.7
Warm, Lakes and Reservoirs***	24.1	13.1	29.3	26.2

*Winter = Oct-May; Summer = June-Sept

**Winter = Nov-Mar; Summer = Apr-Oct

***Winter = Jan-Mar; Summer = Apr-Dec

****Winter = Dec-Feb; Summer = Mar-Nov

Tribe's Response:

The Tribe collects temperature data beginning in February through early December. The Tribe has considered this comment and may reevaluate the winter temperature thresholds during the triennial review of its standards.

5. *Comment:*

The division understands that the Tribe's proposed temperature standards are based on measured ambient temperature data from loggers deployed in 2011 and 2012 (a severe drought year). Is this assumed to be fully protective of the highest attainable aquatic life uses? Has the Tribe considered instead using the thermal thresholds for biological species that are expected to occur to set the Tribe's standards? This is the approach used to derive the temperature standards adopted by the commission in Regulation No. 31¹. The division has provided (in Exhibit A) example use attainability analyses (UAAs) that were used to downgrade the Aquatic Life use (and associated standards) for specific waterbody segments where appropriate.

Tribe's Response:

The Tribe utilizes the most current stream temperature data to determine temperature thresholds for the various reaches. These data are collected over a period of three years to account for any drought years that may influence the temperature designations. Data collected from 2011 and 2012 were the most current temperature data collected along the La Plata River.

The Tribe has considered using the thermal thresholds for biological species but decided to use empirical water temperature data to set the temperature standards for each river's segment. The Tribe may decide, in the future, to explore using the thermal thresholds for biological species during the triennial review of its standards.

The exhibits mentioned in this comment were not included in the comments received from the State on January 29, 2021.

6. Comment:

The draft standards outline a process to establish ambient based standards. In the Tribe's Water Quality Standards for Surface Waters on the Southern Ute Indian Reservation, 8.1(3), the Tribe states that:

"For tribal waters where ambient water quality levels of one or more pollutants are higher than applicable numeric criteria but designated uses are nevertheless supported, the Tribe may adopt site-specific or seasonal ambient criteria. Ambient chronic criteria shall be set at the 90th percentile of the available representative data. Ambient acute criteria shall be based on the default values in this document. In no case may an ambient chronic criterion be more lenient than the acute criterion."

This approach for setting site-specific ambient-based standards doesn't appear to consider whether ambient conditions are natural or irreversible, or whether there are feasible improvements that could be made to attain the highest attainable water quality condition. Has the Tribe considered including regulatory language that would consider this? For example, Colorado's Regulation No. 31, includes the following language at 31.7(1)(b):

"(ii) Ambient Quality-Based Standards

(A) Where ambient water quality levels are worse than specific numeric levels contained in tables I, II, and III, but are determined adequate to protect the highest attainable uses, the Commission may adopt one of the two following types of site-specific ambient quality-based standards:

(I) Feasibility-based Ambient Standard: Where water quality can be improved, but not to the level required by the current numeric standard, a feasibility-based numeric ambient standard may be adopted based on available representative data.

(II) Natural or Irreversible Ambient Standard: Where no improvement is feasible, or sources and causes are natural, a site-specific numeric standard may be adopted at existing quality based on available representative data. Site-specific acute standards for parameters in Table III shall be based on the 95th percentile value of the available representative data.

(B) Ambient quality-based standards are authorized only where a comprehensive analysis and review is conducted:

(I) Which identifies the sources and causes of the elevated levels and characterizes existing conditions, including spatial and temporal variation;

(II) Where sources and causes are not natural, a comprehensive alternatives analysis identifies the improved water quality conditions (if any) that could result from feasible pollution control alternatives;

(III) Which includes a rationale for either retaining or revising the current use classification(s); and

(IV) Which characterizes the highest attainable use.”

These concepts are also included in the federal rule at 131.3(m) and through consideration of the factors at 131.10(g).

Tribe's Response:

The Tribe has considered the comment. However, Section 8.3(4) of the draft standards describes setting site specific numerical criteria when the exceedance is based on natural background levels or other factors that may warrant modification of the default criteria.

II. Uses and Use Protection

1. Comment:

The division commends the Tribe on including designated uses for aquatic life on ephemeral drainages. There is considerable evidence regarding the importance, diversity, and sensitivity of aquatic communities in nonperennial waters (see Exhibit B).

Tribe's Response:

The Tribe appreciates the division's stance on the importance of ephemeral drainages.

The exhibits mentioned in this comment were not included in the comments received from the State on January 29, 2021.

2. Comment:

The division has found that generally there is not a significant distinction between aquatic life use class 1 and 2 regarding organisms' sensitivity to pollution and the need for varying levels of protection. Where issues arise, the Tribe may consider using site-specific standards refinements instead of changes to the aquatic life use classification.

Tribe's Response:

The Tribe may investigate using site-specific standards refinement during the triennial review of its standards.

3. Comment:

The division has found the use of qualifiers to be confusing and not specifically helpful. The tribe may consider whether or not this is a useful tool or consider clarifying how they may be used.

Tribe's Response:

The Tribe appreciates the division sharing its experience in the use of qualifiers. Upon consideration of the comment, the Tribe has removed the qualifier section in the standards.

4. Comment:

Protection of private wells is an important consideration when evaluating uses (Exhibit C). It seems that the Tribe has not included protection for public/domestic water supply for ephemeral systems. If this is the case, the Tribe may consider if this is its intended approach to water quality protection.

Tribe's Response:

In consideration of the comment, the Tribe has included public water supply in the designated uses for ephemeral drainages.

The exhibits mentioned in this comment were not included in the comments received from the State on January 29, 2021.

III. Permitting Implementation

1. Comment:

For waters where tribal standards apply, the division understands EPA will retain the authority to write National Pollution Discharge Elimination System (NPDES) permits for the purposes of the Clean Water Act. The division notes that critical elements such as whole effluent toxicity testing, mixing zones, and antidegradation rules are included in the tribe's standards package to facilitate appropriate protection of tribal waters through discharge permits written by EPA.

Tribe's Response:

The Tribe appreciates the division noting these elements in the draft water quality standards.

2. Comment:

Though the Tribe's proposed regulations do include consideration of downstream use protections for assigning designated uses, there does not appear to be explicit direction for implementation of standards in a manner consistent with protecting downstream uses. It may be helpful to add regulatory provisions in the permitting section to ensure permit implementation evaluates downstream use protection when developing limits. For example, Colorado's Regulation No. 31, includes the following language at 31.3:

"In assigning classifications and standards, the Commission shall take into consideration the water quality classifications and standards of downstream waters and shall ensure that as implemented through its policies, the water quality classifications and standards of downstream waters will be attained and maintained."

Tribe's Response:

The Tribe appreciates the State's suggestion. The Tribe has included the following statement in section 5 (designated uses) of the draft standards to address the comment:

"In designating uses and the appropriate criteria for those uses, the Tribe must take into consideration the water quality classifications and standards of

downstream waters and ensure that as implemented through its policies, the water quality classifications and standards of downstream waters will be attained and maintained.”

3. Comment:

It appears that the Tribe is proposing to use critical flow of “4-day, 3-year biologically-based flows” to calculate effluent dilution for purposes of determining water quality-based control requirements for point source discharges to protect aquatic life (chronic). This terminology does not appear to be clearly explained anywhere, but the division assumes this refers to the use of an allowable exceedance for 4 consecutive days once every 3 years. The division defines critical flow conditions for aquatic life considerations as the empirically based 30-day average low flow with an average 1-in-3 year recurrence interval for chronic standards other than temperature. For temperature, it is defined as the empirically based 7-day average low flow with an average 1-in-3 year recurrence interval. If the Tribe ever finds that the approaches taken by the division would be more appropriate, the division would be glad to share further information about how we implement them.

Tribe’s Response:

The Tribe appreciates the division’s invitation to share information and expertise. The Tribe may consider this offer during the triennial review of its standards.

IV. Definitions and Clarifications

1. Comment:

The division commends the Tribe for including considerations of future uses and highest water quality reasonably attainable for the purposes of assigning designated uses. The division has found such provisions to be important tools for protecting water quality. To that end, the Tribe may want to consider defining more detailed expectations for considering future uses and the highest attainable conditions and possibly formally defining these terms. It may be helpful to clearly define the expectations where waters are expected to be suitable for use in the future.

Tribe’s Response:

The Tribe appreciates the division’s commendation. The Tribe may consider additional definitions during the triennial review of its standards.

2. Comment:

As suggested in our cover letter, it may also be helpful to provide a definition of the term “tribal waters” that is consistent with the scope of the Tribe’s treatment as a state to administer a water quality standards program.

Tribe’s Response:

The Tribe’s standards apply to all waters within the exterior boundary of the Southern Ute Indian Reservation over which the Tribe has authority for establishing water

quality standards. The term “tribal waters” is defined throughout the standards, including first in section 1.4 applicability and again in section 1.7 definitions.

3. Comment:

The division commends the Tribe for its inclusion of the definition of existing use, which is an important element of a standards program.

Tribe’s Response:

The Tribe appreciates the division’s commendation.

V. Other Comments

1. Comment:

The division has found it very helpful to have regulatory provisions well notated alpha numerically for reference and citation.

Tribe’s Response:

The Tribe appreciates the division’s commendation.

2. Comment:

Hyperlinks in the rule are helpful, but may be difficult to maintain depending on the frequency of and process associated with updates for the regulations.

Tribe’s Response:

The Tribe appreciates the division’s comment and has removed the hyperlinks in the draft standards.

3. Comment:

The Tribe may want to consider defining terms such as reasonably achievable that are essentially tests to justify application of provisions (such as variances in this instance).

Tribe’s Response:

The Tribe may consider additional definitions during the triennial review of its standards.

The Environmental Programs Division appreciates the State of Colorado’s review of the proposed water quality standards and Clean Water Act Section 401 certification procedures.

Please direct any questions regarding the Tribe's standards or procedures to Mark Hutson, Division Head, Environmental Programs Division, at (970) 563-2206, mhutson@southernute-nsn.gov; Alexandra Ratcliff, Environmental Programs Manager, at (970) 563-2256, aratcliff@southernute-nsn.gov; Jeff Seebach, General Assistance Program Manager, at (970)-563-2272, jseebach@southernute-nsn.gov; or tribal attorneys Julianne Begay, at (970) 563-2144, jbegay@southernute-nsn.gov or Sam Maynes, at (970) 247-1755, smaynes@mbsslpl.com.

Sincerely,

Mark A. Hutson, Division Head
Southern Ute Indian Tribe Environmental Programs Division