

**MEMORANDUM OF AGREEMENT (MOA) BETWEEN
THE SOUTHERN UTE INDIAN TRIBE
AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8**

Background

The EPA issues Clean Water Act (CWA) section 402 National Pollutant Elimination System (NPDES) permits for discharges of pollutants into waters of the United States located within the exterior boundaries of the Southern Ute Reservation and other Indian country lands associated with the Southern Ute Indian Tribe, such as off-reservation Tribal trust lands.¹ Consistent with CWA section 401 and its implementing regulations at 40 CFR Part 121, the EPA cannot issue such NPDES permits unless a Section 401 water quality certification is issued or certification is waived. The Southern Ute Indian Tribe has been approved by the EPA as the CWA section 401 certifying authority for all discharges on Tribal trust lands within Southern Ute Reservation in Colorado (but not for non-Tribal trust lands within the reservation), and on one off-reservation Tribal trust parcel bordering and near the southeast corner of the reservation, pursuant to the CWA section 518(e) treatment in the same manner as state (TAS) process.

Ordinarily, in accordance with CWA section 401 and 40 CFR Part 121, applicants for federal permits or licenses seek water quality certifications from states or authorized Tribes². However, pursuant to the EPA's NPDES permitting regulations, the EPA Regional Administrator may forward NPDES individual permit applications to the certifying agency of the State or authorized Tribe with a request to act on the request for certification consistent with 40 CFR Part 121. 40 CFR § 124.53(b). If the State or authorized Tribe certification has not been requested by the time the draft permit is prepared, the Regional Administrator shall send the certifying State or authorized Tribe certifying agency a request for certification consistent with 40 CFR Part 121 and include a copy of the draft permit. 40 CFR § 124.53(c).

State or authorized Tribe certification shall be granted or denied within the reasonable period of time as required by CWA section 401(a)(1). 40 CFR § 124.53(d). The State or authorized Tribe shall send a notice of its action, including a copy of any certification, to the applicant and the EPA Regional Administrator. *Id.* State or authorized Tribe certification on a draft permit may include a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State or authorized Tribal law, including water quality standards. 40 CFR § 124.53(e). Pursuant to 40 CFR § 121.3, the certifying authority's

¹ Indian country is defined in 18 U.S.C. Section 1151. Indian country generally includes (1) lands within the exterior boundaries of Indian reservations; (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.

² CWA Section 518(e) explicitly authorizes the EPA to treat eligible Indian Tribes in the same manner as states for purposes of CWA Section 401.

evaluation is limited to the water quality-related impacts from the activity subject to the federal license or permit, including the activity's construction and operation.

Purpose of the MOA

The Southern Ute Indian Tribe (hereinafter referred to as the Tribe) and the U.S. EPA Region 8 (hereinafter referred to as the EPA) (collectively, the Parties) enter into this Memorandum of Agreement (MOA) to establish procedures by which the EPA and the Tribe intend to request and make water quality certification decisions pursuant to Clean Water Act (CWA) section 401, 40 CFR Part 121, and 40 CFR § 124.53 for NPDES permits drafted by the EPA. This MOA addresses the certification of EPA-issued NPDES permits only and is not applicable to any other federal permits and licenses that may require certification pursuant to CWA section 401.

Accordingly, this MOA sets forth roles, responsibilities and communication procedures for the EPA to work with the Tribe, as water quality certifying authority, to address requirements under CWA section 401, and 40 CFR Part 121 and 40 CFR § 124.53.

Authority to Enter MOA

CWA sections 104(a) and (b) grant the EPA authority to encourage, cooperate with and render technical services to individuals, including the general public, as well as public and private sector entities to promote the coordination and acceleration of demonstrations, studies and training relating to the causes, effects, prevention and elimination of water pollution. 33 U.S.C. 1254(a) and (b). The EPA is using this authority to promote the coordination of efforts among all parties to satisfy collective responsibilities under CWA section 401, in the form of this MOA.

Furthermore, federal agencies and certifying authorities are encouraged to enter into MOAs to establish notification protocols and standardize the reasonable period of time for certification decisions about permits and licenses. 88 Fed. Reg. at 66586 and 66624.

Roles and Responsibilities Pursuant to MOA

The Tribe and the EPA agree to the following items regarding water quality certification for draft NPDES permits when the EPA is requesting certification consistent with 40 CFR § 124.53.

A) Pre-filing Meeting Requests (see 40 CFR § 121.4) – The EPA intends to request a pre-filing meeting with the Tribe at least 30 days prior to submitting a request for certification in accordance with the Tribe's applicable submission procedures. In order for a pre-filing meeting to occur, the Tribe must respond to the pre-filing meeting request prior to their receipt of the EPA's written certification request. Consistent with 40 CFR § 121.4, the Tribe agrees to maintain the requirement for a pre-filing meeting request.

B) Request for Certification (see 40 CFR § 121.5) – When requesting certification in accordance with 40 CFR § 124.53(b) or (c), the EPA will make the request in writing and include the following information as required by 40 CFR § 121.5:

- Permit application;
- Any readily available water quality-related materials that informed the development of the application.
- Public notice versions of the draft permit and statement of basis for the discharge.

C) Reasonable Period of Time (see 40 CFR § 121.6) – Upon receipt of the EPA’s request for certification, the Tribe will notify the EPA of its receipt via email or any future agreed upon means. The EPA and Tribe agree that a reasonable period of time for the Tribe to transmit a certification decision for EPA-drafted NPDES permits is sixty (60) days. If the Tribe needs more time to finalize a certification decision about a particular draft NPDES permit, the Tribe may:

1. Submit a written notification to the EPA for the additional amount of time needed in accordance with 40 CFR § 121.6(d) if a longer period of time is necessary to accommodate public notice procedures or force majeure events (including, but not limited to, government closure or natural disasters), in which case the reasonable period of time is automatically extended to time necessitated by the procedure or event, or
2. For other reasons, submit a request for more time to the EPA indicating the reason for request and the amount of time requested, in which case the EPA may agree to the extension in writing in accordance with 40 CFR §§ 121.6(e).

Any notification or request must be received before the reasonable period of time expires. In no circumstances may the reasonable period of time for a certification decision be extended to more than one year from the Tribe’s receipt of the request from the EPA. CWA Section 401(a)(1) and 40 CFR § 121.6(b).

D) Certification Decisions (see 40 CFR § 121.7) – The four ways that the Tribe may act on a request for certification are as follows:

1. Grant certification. A grant of certification means that the Tribe has determined that the permitted activity will comply with water quality requirements. 88 Fed. Reg. 66558, 66607 (Sept. 27, 2023). A grant of certification must be in writing and should include the information identified in 40 CFR § 121.7(c). Additionally, if the Tribe determines that no water quality requirements are applicable to the activity, the Act requires it to grant certification. 40 CFR § 121.7(g). Granting certification means that the EPA may issue the NPDES permit. CWA section 401(a)(1); 88 Fed. Reg. at 66607.
2. Grant certification with conditions. A grant of certification with conditions means that the Tribe has determined that the permitted activity will comply with applicable water quality requirements, but only if certain conditions are met. 88 Fed. Reg. at 66607. A grant of certification with conditions must be in writing and should include the information identified in 40 CFR § 121.7(d). Pursuant to CWA Section 401(d), if a grant of certification includes conditions, the EPA must include those conditions in the NPDES permit. 88 Fed. Reg. at 66607.

3. Deny certification. A denial of certification means that the Tribe is not able to certify that the permitted activity will comply with applicable water quality requirements. 88 Fed. Reg. at 66607. The denial of certification must be in writing and should include the information identified in 40 CFR § 121.7(e). If a certifying authority denies certification, the EPA cannot issue the NPDES permit. CWA section 401(a)(1).
4. Expressly waive certification. CWA section 401 explicitly provides for a constructive waiver of certification if the certifying authority fails or refuses to act on a request for certification within the reasonable period of time. 88 Fed. Reg. at 66608. 40 CFR § 121.7(f) provides for an express waiver of certification. An express waiver does not mean that the Tribe has determined that the permitted activity will comply with applicable water quality requirements. 88 Fed. Reg. at 66608. Instead, an express waiver indicates only that the certifying authority has chosen not to act on a request for certification. *Id.* An express waiver must be in writing and should include the information identified in 40 CFR § 121.7(f). Consistent with the CWA, an express waiver enables the EPA to proceed to issue the NPDES permit without a certification. CWA section 401(a)(1); 88 Fed. Reg. at 66608.

E) How to Proceed in Absence of a Certification Decision (“constructive waiver,” see 40 CFR § 121.9) – If the Tribe does not act on a request for certification within the reasonable period of time defined in section C above, the EPA intends to promptly notify the Tribe and the NPDES permit applicant in writing that the certification requirement has been constructively waived in accordance with 40 CFR § 121.9. This notification satisfies the requirement to obtain certification. 40 CFR § 121.9.

F) Modification to a Grant of Certification (see 40 CFR § 121.10) – If the EPA and Tribe agree in writing that the Tribe may modify a grant of certification (with or without conditions), the Tribe may modify only the agreed-upon portions of the certification. The Tribe is not required to obtain the EPA’s agreement on the language of the modification. The Tribe cannot, through a modification, revoke a grant of certification (with or without conditions) or change a grant of certification (with or without conditions) into a denial or waiver of certification. 40 CFR § 121.10.

G) Other Provisions

1. Authorities not altered: Nothing in this MOA alters, limits, or supersedes the authorities and responsibilities of any Party on any matter within its respective jurisdiction. Nothing in this MOA shall require any of the Parties to perform beyond its respective authority.
2. Financial obligations: Nothing in this MOA shall require any of the Parties to assume any obligation or expend any sum in excess of authorization and appropriations available.
3. Immunity and Defenses Retained: Each Party retains all immunities and defenses provided by law with respect to any action based on or occurring as a result of this MOA. This MOA does not create any right or benefit, substantive or procedural, enforceable by

law or equity, by persons who are not party to this agreement, against the Southern Ute Indian Tribe or the EPA, their officers or employees, or any other person. This MOA does not apply to any person outside of the Southern Ute Indian Tribe and the EPA.

4. Management of information: The parties to this MOA understand that certain records and information developed as a result of this MOA may be subject to the requirements of the Freedom of Information Act (FOIA) and other federal statutes.
5. Each of the signatories warrants that he or she is authorized to enter this MOA on behalf of the Party on whose behalf the signatory has executed the MOA.
6. This MOA may be executed in counterpart originals and each copy will have the same force and effect as signed by all Parties.

Administration of the MOA

1. Approval. This MOA becomes effective upon signature by the authorized officials designated below.
2. Amendment. Either the EPA or the Tribe may modify this MOA at any time through written agreement with the other party.
3. Termination. Any Party may end its participation in this MOA by providing written notice to the other Party sixty days prior to termination. CWA Section 401, 40 CFR Part 121 and 40 CFR § 124.53 requirements remain applicable to all parties in the event of termination of this MOA.
4. Signatures. The parties hereto have executed this MOA on the dates shown below.

The parties execute this MOA by virtue of their signatures below.

Mark Hutson, Environmental Programs
Department Director
Southern Ute Indian Tribe

Date

Sarah Bahrman, Acting Director
Water Division, U.S. EPA Region 8

Date