



ENVIRONMENTAL PROGRAMS DEPARTMENT

SOUTHERN UTE INDIAN TRIBE
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Delivered via email only: stone.kenley@epa.gov

Kenley Stone
Permit Specialist
US EPA Region 8, Water Division
10 West 15th Street Suite 3200,
Helena, MT 59626
406-457-5035

Re: 401 Certification Request – 2026 NPDES Pesticide General Permit.

Dear Ms. Stone:

The Southern Ute Indian Tribe's (Tribe) Environmental Programs Department (Department) is authorized to conduct 401 water quality certification reviews and make decisions on federally permitted activities in tribal waters within the exterior boundary of the Reservation. The Environmental Protection Agency (EPA) and the Department have not established a Reasonable Period of Time agreement for 401 certification reviews with individual or general National Pollutant Discharge Elimination System permits issued by the EPA under Section 402 of the Clean Water Act.

The EPA's draft [2026 Pesticide General Permit](#) (PGP) contains permit requirements for point source discharges of biological pesticides or chemical pesticides that leave a residue in waters of the U.S. On November 17, 2023, the EPA submitted a request for a 401 certification review and decision letter for the PGP by January 16, 2024, which was later extended until June 13, 2024. The Department's 401 certification decision for the PGP applies discharges to tribal waters within the exterior boundaries of the Southern Ute Reservation.

On February 1, the Department requested clarification from EPA on the permit conditions that may be added to the PGP after Endangered Species Act (ESA) consultations with the National Marine Fisheries Service and U.S. Fish & Wildlife Service ("Services"). Specifically, in Section 1.1.2.4, the PGP states, "*based on the results of this consultation with the Services, EPA may include additional or altered conditions to the final permit.*" The EPA responded on March 6, 2024 that the Agency, "*cannot fully predict the outcome of ESA consultation, [and] the draft permit encompasses what we anticipate will be the result.*"

The Department has reviewed the draft PGP and has decided to deny certification. The Department is unable to determine if discharges under the PGP will comply with the Tribe's

water quality standards because the Department cannot evaluate the cumulative water quality impacts from multiple pesticide applications in a year and treatment of multiple streambanks for certain linear features using the Annual Treatment Area Threshold for Weed and Algae Control and Animal Pest Control formula (Appendix A).

The Department cannot verify if discharges under the PGP will comply with narrative water quality criteria (Section 6.1) and biological criteria (Section 7.1) in the [Tribes' Water Quality Standards](#) because permit activities may discharge substances that leave a residue; form floating debris, scum, or other floating material; or produce a color, turbidity, or other conditions to a degree that impairs a waterbody's designated uses or harms aquatic life or human health. Furthermore, the unique characteristics and seasonal fluctuations of temperature, flow, and chemical and physical conditions of waterbodies within the Reservation may have diminished assimilative capacity for discharges under the PGP.

The 401 water quality certification decision letter was posted on the Department's Public Notice and Comments webpage for a minimum of two weeks. All Tribal reviews and public notice periods were completed. _____ public comments were received. [Note this section will be adjusted based on public comments received.]

Before use of the PGP on Tribal lands and waters within the Southern Ute Indian Reservation, a project proponent/permittee must apply for and obtain an individual 401 certification from the Tribe's Environmental Programs Department. An individual 401 certification review of each project utilizing a PGP will allow the Department to ensure that discharges on the Reservation will result in no more than minimal impacts to water quality and aquatic life.

Within 30 days of the Department's 401 certification decision, any person aggrieved by the decision may seek judicial review in the Southern Ute Indian Tribal Court. The review shall be on the record without taking additional evidence. If the court finds that the Department exceeded its authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse or modify the Department's decision or action. Otherwise, the decision of the Department shall be affirmed. Upon request by the court, the Department shall provide the court with a certified copy of all documents, records, transcripts, or other information which formed the basis for any decision or action for which an aggrieved party seeks judicial review.

Thank you for the ongoing partnership in the implementation of the regulatory programs of the Clean Water Act. If you have questions about the Department's certification, please contact me at (970) 563-2206 or Geoffrey Hensgen ghensgen@southernute-nsn.gov, 970-563-2805.

Sincerely,

Mark A. Hutson
Environmental Programs Department Director

cc: Chelsea Durant, EPA Region 8, durant.chelsea@epa.gov
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Attached: Excerpt from draft 2026 Pesticide General Permit: Appendix A

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Annual Treatment Area Threshold – an area (in acres) or linear distance (in miles) in a calendar year to which a Decision-maker is authorizing and/or performing pesticide applications in that area for activities covered under this permit.

For calculating annual treatment areas for Mosquitoes and Other Flying Insect Pest Control and Forest Canopy Pest for comparing with any threshold in Table 1-1, count each pesticide application activity to a treatment area (*i.e.*, that area where a pesticide application is intended to provide pesticidal benefits within the pest management area) as a separate area treated. For example, applying pesticides three times a year to the same 3,000 acre site should be counted as 9,000 acres of treatment area for purposes of determining if such an application exceeds an annual treatment area threshold. The treatment area for these two pesticide use patterns is additive over the calendar year.

For calculating annual treatment areas for Weed and Algae Control and Animal Pest Control for comparing with any threshold in Table 1-1, calculations should include either the linear extent of or the surface area of waters for applications made to waters of the United States or at water's edge adjacent to waters of the United States. For calculating the annual treatment area, count each treatment area only once, regardless of the number of pesticide application activities performed on that area in a given year. Also, for linear features (*e.g.*, a canal or ditch), use the length of the linear feature whether treating in or adjacent to the feature, regardless of the number of applications made to that feature during the calendar year. For example, whether treating the bank on one side of a ten-mile long ditch, banks on both sides of the ditch, and/or water in that ditch, the total treatment area is ten miles for purposes of determining if an NOI is required to be submitted. Additionally, if the same 10 miles area is treated more than once in a calendar year, the total area treated is still 10 miles for purposes of comparing with any threshold in Table 1-1. The treatment area for these two pesticide use patterns is not additive over the calendar year.

Figure 1. Appendix A: Definitions, Abbreviations, and Acronyms (page 45).