

SOUTHERN UTE INDIAN TRIBE

**CLEAN WATER ACT SECTION 401 CERTIFICATION PROCEDURES FOR
NATIONWIDE PERMITS
AND REGIONAL GENERAL PERMITS ISSUED BY THE U.S. ARMY CORPS OF
ENGINEERS**

ARTICLE 1. GENERAL PROVISIONS

1-101. Applicability.

Under these procedures, the Southern Ute Indian Tribe's Environmental Programs Division will evaluate the U.S. Army Corps of Engineers ("USACE") proposed nationwide and regional general permits and, based on the Division's evaluation, the Division will grant, condition, deny, or waive certification. These procedures also apply to applications for coverage under a nationwide or regional general permit for an activity for which the Tribe has denied certification.

1-102. Effective date.

These procedures shall become effective upon approval by the Southern Ute Indian Tribal Council.

1-103. Definitions.

(1) "Best Management Practices (BMPs)" means structural and non-structural methods, measures, or practices to prevent, reduce, or mitigate adverse water quality impacts originating from nonpoint sources and resulting from construction and operation of a project.

(2) "Certification" means a letter granting certification, granting certification with conditions, or denying certification, issued by the Tribe's Environmental Programs Division.

(3) "Certification request" means a written, signed, and dated communication that satisfies the requirements of 40 C.F.R. § 121.5(b) or (c).

(4) "Days" means, unless otherwise specified, calendar days.

(5) "Division" means the Tribe's Environmental Programs Division.

(6) "Division Head" means the Division Head of the Tribe's Environmental Programs Division.

(7) "EPA" means the U.S. Environmental Protection Agency.

(8) “Permit” means a USACE-issued nationwide or regional general permit.

(9) “Permittee” means the person or entity who has obtained coverage under a permit for which a tribal water quality certification has been issued.

(10) “Project proponent” means (1) the U.S. Army Corps of Engineers, which is proposing a nationwide or regional general permit pursuant to Section 404 of the federal Clean Water Act under which persons may obtain coverage for activities that may result in a discharge of dredged or fill material into waters of the United States, or (2) any person who claims coverage under a nationwide or regional general permit for an activity for which the Tribe has denied certification.

(11) “Public” means Southern Ute Indian Tribe members; adjacent tribal member land assignees; adjacent property owners or lessees; any federal, state, or local government agencies responsible for water quality improvement on the Reservation; and other parties known to be interested in the matter.

(12) “Reservation” means the Southern Ute Indian Reservation, the exterior boundaries of which are defined in the Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201, 202.

(13) “Tribe” means the Southern Ute Indian Tribe.

(14) “USACE” means the U.S. Army Corps of Engineers.

(15) “Waters of the United States” means waters that satisfy the federal definition of “waters of the United States” and are located on trust lands within the exterior boundaries of the Southern Ute Indian Reservation and over which the Tribe has authority, pursuant to approval by EPA, for purposes of setting water quality standards.

The definitions of other terms used in these procedures shall be consistent with those used in the federal Clean Water Act and its implementing regulations.

ARTICLE 2. PRE-FILING MEETING REQUEST.

2-101. Invitation to request meeting.

Before submitting a certification request, the Division invites project proponents to request a meeting with the Division. The pre-filing meeting is for the project proponent to provide advance notice to the Division that a certification request may be forthcoming and therefore promotes early coordination, even when the Division does not hold a pre-filing meeting.

2-102. Discretion.

In its discretion, the Division will decide whether a pre-filing meeting may be necessary or appropriate for a particular project.

2-103. Topics.

At a pre-filing meeting, the project proponent and the Division may, among other topics, discuss:

- the nature of the discharges that could be authorized by the proposed permit or proposed project;
- potential water quality effects;
- a list, that the project proponent is encouraged to provide, of other required state, interstate, tribal, territorial, and federal authorizations; and
- the anticipated timeline for construction and operation of the project.

ARTICLE 3. CERTIFICATION REQUEST

3-101. Submittal. Under these procedures, the Tribe will consider USACE certification requests for proposed issuance or re-issuance of a nationwide or regional general permit. The Tribe will also consider a certification request submitted by an operator to conduct an activity under a USACE nationwide or regional general permit for which activity the Tribe has denied certification.

ARTICLE 4. DIVISION PROCEDURES AND DECISION MAKING

4-101. Internal tribal review and comment.

Upon receipt of a certification request, the Division shall initiate a proposed project notification (a/k/a PPN) process designed to solicit review and comment by interested tribal divisions and departments within the tribal organization. The duration of this process shall coincide with the duration of the public participation process.

4-102. Public notice process.

The Division will provide public notice of each certification request. This may be accomplished, depending on the potential for water quality impacts and the amount of time afforded the Tribe by the USACE by posting a notice and, if available the draft certification decision, on the Division's website, mailing notice, emailing notice, publishing notice 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. In such manner as the Division deems appropriate, the Division will provide interested parties with an opportunity to comment on such certification request.

The final certification shall be prepared following the public comment period. The final

certification shall include any changes determined appropriate by the Division based upon internal tribal division and department review and comment and based on public comments and information raised during the public comment period. Notice of the final certification shall be sent to the project proponent and to the public in the same manner and to the same persons as the notice of the draft certification was provided.

4-103. Public hearings.

The Division may, in its discretion, hold a public hearing with respect to the certification request before any determination on the certification request.

4-104. Factors considered.

In determining whether to issue certification, the Division shall consider and review the certification request submitted, and the following, as appropriate:

- (1) Antidegradation review pursuant to applicable federal or tribal procedures.
- (2) Designated uses and applicable water quality standards assigned to the waters into which discharges that could be authorized by the permit could flow.
- (3) Any applicable effluent limitations or control regulations.
- (4) Best Management Practices required by the Tribe or proposed by the project proponent.
- (5) Stormwater discharge requirements.
- (6) Comments and other information submitted during the internal tribal review process and during the public comment period.
- (7) Any project-specific conditions proposed by the project proponent and agreed to by the Division.
- (8) Any other factors the Division considers pertinent.

4-105. Water quality certification decisions.

(1) After consideration of the factors in section 4-104 and within the reasonable period of time established by the USACE within which the Tribe's certification decision is required, the Division shall notify the project proponent of its decision to grant, condition, deny, or waive certification or, alternatively, the Division may notify the project proponent that additional time is required to process the certification request and request additional time from the USACE (with the understanding the USACE may or may not grant such an extension, in their discretion).

- (a) Grant. The granting of §401 water quality certification to a project proponent for a permit signifies that the Division has determined that the activities that can obtain coverage under the permit and discharge will comply with water quality requirements as well as the other identified provisions of the federal Clean Water Act and appropriate requirements of tribal law. Any grant of certification shall be in writing and, in conformance with 40 C.F.R. § 121.7(c), shall include a statement that the discharge from the proposed project will comply with water quality requirements.
 - (b) Grant with conditions. The granting of §401 water quality certification with conditions signifies that the Division has concluded that the permit for which certification is required and the projects that can obtain coverage under the permit will comply with all applicable requirements only if one or more conditions are placed on the permit. The Division, as a part of conditional approval, may require BMPs and water quality monitoring, based on site-specific circumstances, to ensure that BMPs are performing as designed and that the covered projects comply with all applicable requirements. Before issuing a conditional certification, the Division may hold one or more meetings or conferences to inform the project proponent of the need for such conditions and to discuss options for the covered projects including redesign or modification. A grant of certification with conditions shall be in writing and shall for each condition include the information required under 40 C.F.R. § 121.7(d).
 - (c) Deny. Denial of §401 water quality certification signifies that the Division has concluded that the activities and discharges covered under the permit will not comply with the applicable requirements. Before denying certification, the Division may hold one or more meetings to inform the project proponent of the preliminary decision to deny certification and to allow the project proponent to make necessary modifications to the permit leading toward certification, if possible. A denial of a water quality certification shall be made in writing and shall set forth the reasons for the denial in conformance with 40 C.F.R. § 121.7(e).
 - (d) Waive. Waiver of the Tribe's §401 water quality certification may occur, either explicitly through notification by the Division to the project proponent, or by the Division's failure to take action on the certification request within the time allowed by the USACE. If the Division fails to act on a certification request within the "reasonable period of time" established by the USACE (which cannot exceed one year), the certification requirement shall be waived with respect to the request for certification.
- (2) The certification shall be mailed to the project proponent. The notice shall advise the project proponent of the appeal rights and procedures provided in these procedures.
- (3) Any water quality certification approved by the Division shall be made in writing, signed by the Division Head, and include:

- (a) The name and address of the project proponent;
- (b) Findings that projects covered under the permit will not cause or contribute to a violation of applicable federal or tribal water quality standards or any other appropriate requirements of tribal law relating to water quality;
- (c) Conditions that the Division deems necessary to ensure that projects covered under the permit will not cause or contribute to a violation of applicable federal or tribal water quality standards or other appropriate tribal requirements relating to water quality. Such conditions may include but are not limited to restrictions on effluent discharge, effluent monitoring and reporting, minimum flow requirements, consent to tribal inspections, requirements for decommissioning or closure of the facility, and a one-time or periodic fee sufficient to reimburse the Tribe for all costs, fees, and expenses reasonably incurred to administer project compliance.

4-106. Certification requirements.

- (1) The following requirements shall apply to all certifications unless specifically authorized by the 401 certification issued by the Division:
 - (a) A water quality certification shall require the project owner and operator to notify the Division Head of all changes in the project subsequent to certification.
 - (b) A water quality certification shall not be transferable without the written approval of the Division Head.
 - (c) Authorized representatives from the Division shall be permitted to enter upon the site where the construction activity or operation of the project is taking place for purposes of inspection of compliance with BMPs and certification conditions.
 - (d) In the event of any changes in control or ownership of facilities where the construction activity or operation of the project is taking place, the successor shall be notified in writing by his predecessor of the existence of the BMPs and certification conditions. The permittee shall provide a copy of such notification to the Division.
 - (e) If the permittee discovers that certification conditions are not being implemented as designed, or are not operating or functioning as designed, or if there is an exceedance of water quality standards despite compliance with the certification conditions by the permittee, the permittee shall verbally notify the Division of such failure or exceedance within two working days of becoming aware of the same. Within ten working days of such notification, the permittee shall provide to the Division, in writing, the following:

- i. In the case of the failure to comply with the certification conditions, a description of (i) the nature of such failure, (ii) any reasons for such failure, (iii) the period of non-compliance, and (iv) the measures to be taken to correct such failure to comply; and
 - ii. In the case of the exceedance of water quality criteria, (i) an explanation, to the extent known after reasonable investigation, of the relationship between the project and the exceedance, (ii) the identity of any other known contributions to the exceedance, and (iii) a proposal to modify the certification conditions so as to remedy the contribution of the project to the exceedance.
- (f) Any anticipated change in discharge location, quantities, or composition associated with the project must be reported to the Division by submission of a written notice by the permittee no less than ten days before the change. If the change is determined to be significant, the permittee will be notified within ten days, and the change will be acknowledged and approved or disapproved.
- (g) Any diversion from or bypass of facilities necessary to maintain compliance with the terms and conditions herein is prohibited, except (i) where unavoidable to prevent loss of life or severe property damage, or (ii) where excessive storm drainage or runoff would damage any facilities necessary for compliance with limitations and prohibitions herein. The Division shall be notified immediately in writing of each such diversion or bypass.
- (h) At least 5 days before commencement of a project in a watercourse, which the Division has certified, or conditionally certified, the permittee shall notify the Division.
- (i) Immediately upon discovery of any spill or other discharge to waters of the United States not authorized by the applicable license or permit, the permittee shall notify the Division.
- (j) Construction operations within watercourses and water bodies shall be restricted to only those project areas specified in the federal license or permit.
- (k) No construction equipment shall be operated below the existing water surface.
- (l) Work should be carried out diligently and completed as soon as practicable. To the maximum extent practicable, discharges of dredged or fill material shall be restricted to those periods when impacts to designated uses are minimal.
- (m) The project shall incorporate provisions for operation, maintenance, and replacement of BMPs to assure compliance with the conditions identified in this section, and any other conditions placed in the permit or certification. All such provisions shall be identified and complied with in an operation and maintenance

plan which will be retained by the project owner and available for inspection within a reasonable timeframe upon request by any authorized representative of the Division.

- (n) The use of chemicals during construction and operation shall be in accordance with the manufacturers' specifications. There shall be no excess application and introduction of chemicals into waters of the United States.
- (o) All solids, sludges, dredged or stockpiled materials and all fuels, lubricants, or other toxic materials shall be controlled in a manner so as to prevent such materials from entering waters of the United States.
- (p) All seed, mulching material and straw used in the project shall be certified weed-free.
- (q) Discharges of dredged or fill material in excess of the permit associated with the water quality certification are not permitted.
- (r) Discharges to waters of the United States not identified in the license or permit and not certified in accordance therewith are not allowed.
- (s) No discharge shall be allowed which causes non-attainment of federal or tribal narrative water quality or biological criteria.
- (t) Before any equipment touches the water, the project proponent must provide to the Division (i) a certification that (a) the equipment has not been used in waters with the possibility of aquatic nuisance species infestation and (b) the equipment has been thoroughly decontaminated using water that is heated to a temperature necessary to kill aquatic nuisance species, (ii) evidence that the equipment has passed a Colorado Parks and Wildlife invasive species inspection, or (iii) a certification in a form that is acceptable to the Division, signed by a third-party consultant, certifying that the equipment has undergone a waters of the United States-specific preventative decontamination using water that is heated to a temperature necessary to kill aquatic nuisance species.

(2) Best Management Practices.

- (a) BMPs are required for all projects for which Division certification is issued except for section 402 permits. Project proponents must select and propose BMPs to the Division to be employed in their project.
- (b) All certification requests which require BMPs shall include a map of project location, a site plan, and a listing of the selected BMPs chosen for the project. At a minimum, each project must provide for the following:

- i. Temporary erosion and sediment control measures that shall be coordinated with permanent measures to assure economical, effective, and continuous control throughout the construction phase and during the operation of the project
- ii. Permanent erosion and sediment control measures that shall be installed at the earliest practicable time consistent with good construction practices and that shall be maintained and replaced as necessary throughout the life of the project.

4-107. Requesting individual certification for projects authorized by nationwide or regional general permits, which permits the Tribe has certified.

The Division will notify persons who apply for certification for projects authorized by nationwide or regional general permits that the Tribe has already certified, that no separate individual certification is necessary.

4-108. Requesting Individual Certification for Activities Authorized by Nationwide or Regional General Permits, But Certification For Which Activities the Tribe Has Denied.

(1) For nationwide permits and regional general permits for which certification has been denied that require the submittal of a pre-construction notification to the USACE, the project proponent shall provide a complete copy of the pre-construction notification to the Division at the same time it is submitted to the USACE. In these cases, the pre-construction notification shall also serve as the certification request. Any additional information submitted to USACE, such as cultural resources reports or summaries, biological assessment for endangered species, etc., must also be included in the certification request. The pre-construction notification should clearly indicate that it is also being used as a certification request. The copy of the pre-construction notification should be provided via email to: wqs@southernute-nsn.gov.

(2) For nationwide permits for which certification has been denied that do not require the submittal of a pre-construction notification to USACE the project proponent shall provide a certification request to the Division via email at wqs@southernute-nsn.gov.

(3) The Division will evaluate requests for certification under this section in accordance with the procedures set forth herein.

ARTICLE 5. PRE-OPERATION INSPECTION.

5-101. Inspection opportunity.

In accordance with 40 C.F.R. § 121.11, for certified projects, the project proponent must afford the Division an opportunity to inspect the facility or activity for the purpose of determining whether the discharge from a certified project will violate the certification.

5-102. Notice that certified project will violate the certification.

If the Division, after an inspection pursuant to section 5-101, determines that the discharge from the certified project will violate the certification, the Division will notify the project proponent and the federal licensing or permitting agency in writing, and recommend remedial measures necessary to bring the certified project into compliance with the certification.

ARTICLE 6. IMPLEMENTATION AND ENFORCEMENT OF CERTIFICATIONS.

(1) Upon receipt of information that water quality requirements are not being met as a consequence of a project's construction or operation, the Division, after consultation with the permittee and notification of the USACE, may ask the USACE to take enforcement action.

(2) Upon receipt of information indicating that one or more certification conditions have not been complied with during the construction or operation of a project, the Division shall notify the USACE in writing and request that necessary action be taken to implement such conditions as contemplated in Sections 401(a)(5) and 401(d) of the federal Clean Water Act. A copy of any such notification and request shall be sent to the permittee. The Division shall remain in communication with the federal permitting agency and the permittee regarding the progress towards implementation of the conditions until satisfactory compliance has been obtained, or until the federal agency has completed enforcement action.

(3) If necessary and if not preempted by federal law, and if authorized under tribal law, the Division may take action to enforce its certifications or certification conditions in Southern Ute Indian Tribal Court or another court of competent jurisdiction.

ARTICLE 7. JUDICIAL REVIEW.

Within 30 days of a Division decision to grant, grant with conditions, deny a water quality certification, or waive certification, 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 Division 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 Division's decision or action. Otherwise, the decision of the Division shall be affirmed. Upon request by the court, the Division 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.