

SOUTHERN UTE INDIAN TRIBE

CLEAN WATER ACT SECTION 401 CERTIFICATION PROCEDURES FOR:

- 1) ISSUANCE OR REISSUANCE OF NATIONWIDE PERMITS AND REGIONAL GENERAL PERMITS BY THE U.S. ARMY CORPS OF ENGINEERS**
- 2) GENERAL PERMITS ISSUED BY THE ENVIRONMENTAL PROTECTION AGENCY**

(Procedures for Federal Permitting Agencies)

ARTICLE 1. GENERAL PROVISIONS

1-101. Purpose.

Under these procedures, the Southern Ute Indian Tribe's Water Quality & Remediation Division will evaluate requests from the U.S. Army Corps of Engineers ("Army Corps") for issuance or reissuance of nationwide or regional general permits, or the Environmental Protection Agency ("EPA") for issuance or reissuance of general permits. The Division will grant, grant with conditions, deny, or waive certification for issuance or reissuance of these permits.

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 point or nonpoint sources that are associated with the proposed project's activities.

(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(a), (c), or (d) as applicable.

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

(5) "Division" means the Tribe's Water Quality & Remediation Division.

(6) “Division Head” means the Division Head of the Tribe’s Water Quality & Remediation Division.

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

(8) “Permit” means an Army Corps-issued nationwide or regional general permit or an EPA-issued 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) “Federal permitting or licensing agency” means (1) the U.S. Army Corps of Engineers, which is proposing a nationwide or regional general permit pursuant to Section 404 of the Clean Water Act (CWA), or (2) the Environmental Protection Agency, which is proposing a general permit pursuant to Section 402 of the CWA, under which persons may obtain coverage for activities that may result in a discharge into waters of the United States.

(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) “Reasonable period of time” means the period between the date on which the Division receives a request for certification and the date the Federal agency and the Division have agreed in writing by which the Division must act on the request for certification, provided the reasonable period of time may not exceed one year from the date that the Division received the request for certification. If the Federal agency and the Department have not agreed in writing on the length of the reasonable period of time, the reasonable period of time shall be six months.

(13) “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.

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

(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 requires the Federal permitting or licensing agency to request a pre-filing meeting with the Division. A project proponent should refer to the “Instructions for Project Proponents Seeking 401 Pre Filing Meeting with SUIT” document posted on the Divisions 401 certifications webpage (<https://www.southernute-nsn.gov/government/departments/epd/water-quality/401-certification/>). The pre-filing meeting is for the Federal permitting or licensing agency to provide advance notice to the Division that a certification request may be forthcoming and therefore promotes early coordination. The Division requires Federal permitting or licensing agency 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 Federal permitting or licensing agency’s written certification request. Consistent with 40 CFR § 121.4, the Tribe agrees to maintain the requirement for a pre-filing meeting request. Upon request, the Tribe may consider waiving the 30-day period or establishing a different period of time between the date of the pre-filing meeting and the certification request.

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 Federal permitting or licensing agency and the Division may, among other topics, discuss:

- The nature of the discharges that could be authorized by the proposed permit;
- Potential water quality effects;

ARTICLE 3. CERTIFICATION REQUEST

3-101. Submittal. The Federal permitting or licensing agency shall refer to the “Instructions for Project Proponents Seeking a Section 401 Certification with SUIT” document posted on the Divisions 401 certifications webpage (<https://www.southernute-nsn.gov/government/departments/epd/water-quality/401-certification/>), and submit a certification request to the Division Head by email to: wqs@southernute-nsn.gov.

3-102. Written Confirmation of Receipt.

In accordance with 40 C.F.R. § 121.6(a), the Division shall send written confirmation to the

Federal permitting or licensing agency of the date that the request for certification was received.

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 process designed to solicit review and comment by interested Tribal divisions and departments within the tribal organization.

4-102. Public notice process.

The Division will provide public notice of each certification request. The method of public notice will depend on the potential for water quality impacts and the amount of time available to the Tribe within the established reasonable period of time. Public notice will occur by either 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. 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 Federal permitting or licensing agency and to the public in the same manner and to the same recipients as the notice of the draft certification.

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 Federal permitting or licensing agency
- (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 Federal permitting or licensing agency and agreed to by the Division

Any other factors the Division considers pertinent in evaluating the activity for water-quality related impacts.

4-105. Water quality certification decisions and timeframes.

(1) The Division has established reasonable periods of time for issuing certification decisions for projects submitted under Army Corps permits and EPA Section 402 National Pollutant Elimination System (NPDES) general permits. These metrics are listed within “Established Reasonable Periods of Time between SUIT and USACE” and “Memorandum of Agreement between the Southern Ute Indian Tribe and the United States Environmental Protection Agency Region 8” on the Division’s 401 certification webpage (<https://www.southernute-nns.gov/government/departments/epd/water-quality/401-certification/>).

If the Tribe needs more time to finalize a certification decision about a particular draft NPDES permit, the Tribe may:

- (a) 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
- (b) 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.

(2) After consideration of the factors in section 4-104 and within the scope of certification allowed under 40 C.F.R. § 121.3 and within the established reasonable period of time (see below for Army Corps) within which the Tribe’s certification decision is required, the

Division shall notify the Federal permitting or licensing agency of its decision to grant, condition, deny, or waive certification or, alternatively, the Division may notify the Federal permitting or licensing agency that additional time is required to process the certification request and request additional time from the Federal permitting or licensing agency (with the understanding the USACE Federal permitting or licensing agency may or may not grant such an extension, in their discretion).

The Division agrees that the Army Corps may, on a case-by-case basis, establish a reasonable period of time for Sec. 401 permits different from the above categorical timeframes, taking into consideration the complexity of the proposed project, the nature of the potential discharge, and the possible need for additional study or evaluation of water quality effects. The Division also anticipates that written requests to extend the reasonable period of time will be infrequent. Division agreed to only submit one request per certification review at least two weeks before the initially established reasonable period of time ends. Additionally, the Division acknowledged that the Army Corps will, when deemed appropriate, grant extensions on a limited time basis, generally not more than 30 calendar days.

(3) Certification decision outcomes are listed below:

- (a) Grant. The granting of §401 water quality certification to a Federal permitting or licensing agency for a permit signifies that the Division has determined that the activities that can obtain coverage under the permit 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 the following: identification of the decision as a grant of certification; identification of the applicable Federal license or permit; a statement that the activity will comply with water quality requirements; and an indication that the Division complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).
- (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 Federal permitting or licensing agency 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, in conformance with 40 C.F.R. § 121.7(d), shall include the following: identification of the decision as a grant of certification with conditions; identification of the applicable Federal license or permit; a statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality

requirements; and an indication that the Division complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1). For purposes of clarity in enforcement, the Division may indicate which certification conditions derive from tribal law.

- (c) Deny. Denial of §401 water quality certification signifies that the Division has concluded that the activities 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 Federal permitting or licensing agency of the preliminary decision to deny certification and to allow the Federal permitting or licensing agency 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 include the following: identification of the decision as a denial of certification; identification of the applicable Federal license or permit; a statement explaining why the certifying authority cannot certify that the activity will comply with water quality requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information; and an indication that the Division complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).
- (d) Waive. Waiver of the Tribe's §401 water quality certification may occur, either explicitly through notification by the Division to the Federal permitting or licensing agency, or by the Division's failure to take action on the certification request within the time allowed by the Army Corps reasonable period of time. If the Division fails or refuses to act on a certification request within the "reasonable period of time" established by the Federal permitting or licensing agency and Tribe or default reasonable period of time (which cannot exceed one year), the certification requirement shall be waived with respect to the request for certification. An express waiver shall be in writing and should include the following: identification of the decision as an express waiver of certification; identification of the applicable Federal license or permit; a statement that the Division expressly waives its authority to act on the request for certification; and an indication that the Division complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(4) The certification shall be delivered via electronic mail to the Federal permitting or licensing agency. The notice shall advise the Federal permitting or licensing agency of the appeal rights and procedures provided in these procedures.

(5) 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 Federal permitting or licensing agency;
- (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. Any one-time or periodic fee imposed as a condition of certification will be limited to costs that are necessary to assure compliance with project water quality requirements. Such costs may include, but are not limited to: post-certification inspections, water quality monitoring, laboratory analyses, review of compliance reports, and other activities directly related to verifying and enforcing compliance with certification conditions. Fees will not be imposed for activities that are not necessary to assure compliance with water quality requirements. The Division will provide written notice to the project proponent specifying the basis for any post-certification fee and the activities it is intended to cover.

4-106. Certification requirements.

(1) The following requirements shall apply to all certifications unless specifically authorized by the 401 certification issued by the Division. The Tribe may, at its own discretion, omit Section 4-106 conditions if the Permitting Agency has included requirements in the draft permit equal to, or more stringent than, the Tribe's listed conditions:

- (a) A water quality certification shall require the Federal permitting or licensing agency to notify the Division Head of all changes in the nationwide permit, regional general permit, or general permit subsequent to certification.
- (b) Except in the event of any changes in control or ownership of facilities as contemplated in 4-106(d), a 401 certification for projects with coverage under a nationwide permit, regional general permit, or general permit shall not be transferrable without the prior written approval of the Division Head. A 401 certification may be transferred to a new owner or operator only if the certification has been modified or revoked and reissued, or a minor modification made, to identify the new owner or operator and incorporate such other requirements as may be necessary under the CWA.
- (c) Authorized representatives from the Division shall be permitted to enter upon the site where the construction activity or operation of project with coverage under a nationwide permit, regional general permit, or general permit 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, or where the construction activity or operation of the project with coverage under a nationwide permit, regional general permit, or general permit 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 with coverage under a nationwide, regional general permit, or general permit 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:
- (f) 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
- (g) 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.
- (h) 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.
- (i) 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.
- (j) 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.
- (k) 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.

- (l) Construction operations within watercourses and water bodies shall be restricted to only those project areas specified in the Federal license or permit.
- (m) No construction equipment shall be operated below the existing water surface.
- (n) 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.
- (o) 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.
- (p) 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.
- (q) 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.
- (r) All seed, mulching material and straw used in the project shall be certified weed-free.
- (s) Discharges of dredged or fill material in excess of the permit associated with the water quality certification are not permitted.
- (t) Discharges to waters of the United States not identified in the license or permit and not certified in accordance therewith are not allowed.
- (u) No discharge shall be allowed which causes non-attainment of Tribal narrative water quality or biological criteria.
- (v) 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. For Section 404 projects, information supporting common BMPs is provided within our Stormwater Pollution Prevention Guidelines for Construction and Remediation Activities on Tribal Lands document posted on EPD's 401 certification webpage: <https://www.southernute-nnsn.gov/government/departments/epd/water-quality/401-certification/>.
- (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.

ARTICLE 5. PRE-OPERATION INSPECTION.

5-101. Inspection opportunity.

In accordance with Clean Water Act section 401(a)(4) (codified at 33 U.S.C. § 1341(a)(4)), for certified Federally licensed or permitted activities or facilities that do not require a Federal operating license to assure its operation will not violate water quality requirements, the Federal permitting or licensing agency must afford the Division an opportunity to inspect the activity or facility for the purpose of determining whether activity or facility will violate applicable water quality requirements.

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 Federal permitting or licensing agency 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 Federal permitting or licensing agency, may ask the Federal permitting or licensing agency 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 Federal permitting or licensing agency 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 or licensing 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 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.