

SOUTHERN UTE INDIAN TRIBE

CLEAN WATER ACT SECTION 401 CERTIFICATION PROCEDURES FOR:

- 1) PROJECTS SUBMITTED FOR COVERAGE UNDER INDIVIDUAL SECTION 404 AND 402 PERMITS**
- 2) PROJECTS SUBMITTED FOR COVERAGE UNDER NATIONWIDE PERMITS OR REGIONAL GENERAL PERMITS ISSUED BY THE U.S. ARMY CORPS OF ENGINEERS FOR WHICH THE TRIBE HAS DENIED CERTIFICATION**
- 3) FEDERAL ENERGY REGULATORY COMMISSION LICENSES FOR HYDROPOWER PROJECTS**

(Procedures for Project Proponents)

ARTICLE 1. GENERAL PROVISIONS.

1-101. Purpose.

The Southern Ute Indian Tribal Council has determined that it is in the Tribe's best interest, acting through its Water Quality & Remediation Division ("Division"), to determine whether activities that may result in any discharge into waters of the United States, for which a Federal license or permit must be obtained, will comply with certain enumerated sections of the Federal Clean Water Act including applicable water quality standards as well as any other applicable Tribal water quality requirements or other appropriate requirements of Tribal law. The purpose of this document, therefore, is to describe the procedures by which the Tribe, through the Division, will exercise its certification activities pursuant to Section 401 of the Federal Clean Water Act (33 U.S.C. § 1341).

Under these procedures the Division implements its 401 certification authority for activities requiring individual Section 404 or 402 permits and applications by project proponents for coverage under nationwide permits or regional general permits issued by the U.S. Army Corps of Engineers ("Army Corps") for which the Tribe has denied certification. Based on the Division's evaluation, the Division will grant, condition, deny, or waive certification. For Federal permitting agencies seeking certification for issuance or reissuance of a nationwide permit or regional general permit, please use the Tribe's "Procedures for Permitting Agencies" on the following webpage: [\(https://www.southernute-nsn.gov/government/departments/epd/water-quality/401-certification/\)](https://www.southernute-nsn.gov/government/departments/epd/water-quality/401-certification/).

1-102. Effective date.

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

1-103. Applicability.

These procedures are applicable to all projects occurring on Tribal Trust lands that have the potential to discharge pollutants into waters of the United States and that require a project proponent to obtain (1) an individual permit issued by the Army Corps pursuant to Section 404 of the Clean Water Act, (2) an individual permit issued by the Environmental Protection Agency (“EPA”) pursuant to Section 402 of the Clean Water Act, or (3) approval of an application for coverage under a nationwide permit or regional general permit issued by the Army Corps pursuant to Section 404 of the Clean Water Act for which the Division has denied certification. A list of certification decisions for nationwide permits can be found within the “SUIT 401 Certifications for Army Corps of Engineers NWP” document on the Division’s 401 certification webpage: (<https://www.southernute-nsn.gov/government/departments/epd/water-quality/401-certification/>).

For purposes of these procedures, the Tribe’s Section 401 certification authority applies only to activities where the point of discharge is located on Tribal trust lands within the exterior boundaries of the Southern Ute Indian Reservation. For activities where the point of discharge is located on fee lands within the Reservation, EPA Region 8 retains Section 401 certification authority.

1-104. 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 or individual permit.

(9) “Permittee” means the person or entity who is the holder of the Federal or tribal permit or license for which a tribal water quality certification has been issued.

(10) “Project proponent” means (1) any person or entity who applies for an individual permit issued by the Army Corps pursuant to Section 404 or for an individual permit issued by the EPA pursuant to Section 402 of the Federal Clean Water Act to conduct an activity that may result in a discharge of a pollutant to waters of the United States or (2) any person who applies for coverage under a nationwide permit or regional general permit for which the Tribe has denied certification or (3) any person or entity who applies for a Federal Energy Regulatory Commission license for hydropower projects.

(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 project proponents 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 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. EPD requires Project Proponents 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 maintains 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 project proponent and the Division may, among other topics, discuss:

- The nature of the 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.

A project proponent 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 and any supporting documents to the Division Head by email at: wqs@southernute-nsn.gov. Failure to provide a certification request or provide additional information reasonably requested by the Division or payment of a certification request fee required by the Division shall be grounds for denial of certification. In accordance with 40 C.F.R. § 121.6(a), the Division shall send

written confirmation to the project proponent of the date that the request for certification was received.

3-102. Additional information.

Nothing precludes a project proponent from submitting additional, relevant information or precludes the Division from requesting and evaluating additional information within the reasonable period of time within which the Tribe's certification decision is required. In many cases, it may be in the interest of the project proponent and may provide a more efficient certification process if relevant information about the activity and potential impacts to the receiving waters is provided to the Division early in the certification process.

At the Division's request, a project proponent will provide any additional water quality related information requested by the Division if the Division finds the information in the certification request insufficient to reach a certification decision. The Division may ask the project proponent for additional information after a request for certification is made, but will not alter the required contents of a request for certification after it is received. Such information may include, but not be limited to, the project proponent's name and address; the name and address of the project proponent's authorized representative; name and addresses of contiguous property owners; a complete written description of the proposed point source or activity, including maps, diagrams, and other information including the discharge's volume and biological, chemical, physical and radiological characteristics; names of affected waters, including wetlands and tributary streams; confirmation of the status of waters impacted by the project, including if they are on 303(d) lists or subject to a Total Maximum Daily Load (TMDL) calculation; a description of the proposed mixing zone, if any; a land use compatibility statement; a description of the existing environmental conditions at the site of the proposed activity; the location and duration and extent of the proposed activity; the size of the area potentially affected; the location or locations at which a discharge from the proposed activity may enter waters of the United States; any environmental impact assessment, information, maps, or photographs provided to any licensing or permitting agency; evaluation of potential water quality standard violations or contribution to violation; identified steps that will be undertaken to prevent violation of water quality standards (i.e., mitigation measures); the date or dates of the proposed activity's inception and termination; a description of the methods proposed to monitor the quality and characteristics of the discharge and operation of the facility from which the discharge will originate; and a description of the functions and operation of the activity and any practices proposed to minimize or treat pollutants or other effluent that may be discharged to waters of the United States.

3-103. Certification fee.

Project proponents shall be required to pay a fee supporting a certification request to the Tribe sufficient to compensate the Tribe for all costs, fees and expenses reasonably incurred in processing the water quality certification request. Such costs shall include, but not be limited to, the costs incurred in holding a pre-filing meeting, reviewing the certification request, prescribing terms and monitoring requirements, enforcing and evaluating compliance, completing monitoring and modeling, analyzing laboratory samples, reviewing documents, noticing and completing a public comment and/or hearing process, hiring third parties to complete any such activities, and administrative costs.

During the pre-filing meeting, project proponents must provide sufficient information for the Division to determine the fee that is applicable to the proposed project. The Division will assign a fee based on the project proponent's project information. The Division will provide the fee determination (including a cost-basis for the fee) in writing to the project proponent within two business days of holding the pre-filing meeting. The Division may revise the fee if there are significant project changes or any other circumstances that require additional tribal resources to process the request.

Fees for projects must be submitted with the certification request according to "Instructions for Project Proponents" supplied on the Division's 401 certification webpage (<https://www.southernute-nsn.gov/government/departments/epd/water-quality/401-certification/>).

Certifications requests will not proceed to review or public comment until fees are received. Guidelines supporting fee determinations can be found in the "401 Fee Guidelines" on the Division's 401 certification webpage (<https://www.southernute-nsn.gov/government/departments/epd/water-quality/401-certification/>). If the fee proves to be inadequate to compensate the Tribe for its reasonably incurred costs, fees and expenses, the Division Head shall require payment of a supplemental certification processing fee as a condition for continued processing of the certification request.

3-104. Certification.

All certification requests shall include a declaration signed by an authorized representative of the owner and operator of the proposed project attesting under penalty of perjury that to the best of his or her knowledge the proposed project will not cause or contribute to a violation of applicable water quality standards or any other requirement of Federal or tribal law relating to water quality.

3-105. Written Confirmation of Receipt.

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

Project proponents must indicate in a certification request if an internal Tribal review, such as a proposed project notification (PPN), or an Environmental Assessment (EA) in support of a Federal agency's compliance with the National Environmental Policy Act has been completed for the proposed project.

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 on the draft certification. The final certification shall include any changes determined to be 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 for the draft certification. Notice of the final certification shall be sent to the project proponent 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 affected by the project for which a Federal license or permit is required

- (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

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-nsn.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 reasonable period of time within which the Tribe's certification decision is required, the Division shall notify the project proponent of its decision to grant, grant with conditions, deny or waive certification or, alternatively, the Division may notify the project proponent that additional time (not to exceed the reasonable period of time) is required to process the certification request.

Certification decision outcomes are listed below:

- (a) Grant. The granting of §401 water quality certification to a project proponent for a Federal license or permit signifies that the Division has determined that the proposed activity will comply with water quality standards 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 project for which certification is required will comply with all applicable requirements only if one or more conditions are placed on the license or 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 project complies 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 project 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 activity 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 project 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 project proponent, or by the Division's failure to take action on the certification request within the reasonable period of time. If the Division fails or refuses to act on a certification request within the reasonable period of time, the certification requirement shall be waived with respect to the certification request for a Federal license or permit. 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).

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

(4) 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 owner or operator;
- (b) The name and location of the project;
- (c) A description of the project as approved;
- (d) Findings that the project 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;

- (e) Conditions that the Division deems necessary to ensure that the proposed project 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 project owner and operator to notify the Division Head of all changes in the project 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 shall not be transferrable without the prior written approval of the Division Head. Except in the event of any changes in control or ownership of facilities as contemplated in 4-106(d), a 401 certification for projects or facilities with coverage under a nationwide permit, regional general permit, individual 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 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 (i.e., assignment) 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 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) The permittee shall immediately notify the Division upon discovery of any spill or other discharge to waters of the Tribe not authorized by the applicable license or permit.
- (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 without the prior consent of the Division, and with BMPs to prevent contamination from biological sources or toxic chemicals.
- (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 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 that prevents 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 that necessary to complete the project 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 (1) 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, (2) evidence that the equipment has passed a Colorado Parks and Wildlife invasive species inspection, or (3) 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.southernutensn.gov/government/departments/epd/water-quality/401-certification/>.

(b) All certification requests which require BMPs shall include:

- i. A map of project location, including GPS coordinates.
- ii. A site plan, including the location and staging of equipment and materials
- iii. A description of the phasing and staging of construction activities
- iv. A listing of the BMPs proposed for the project. Project maps and site plans should include the affected waterway, surrounding riparian areas, and any upland areas within 50 feet of riparian areas. For purposes of mapping and site planning, 'riparian areas' are defined as the land and vegetation adjacent to streams, rivers, lakes, wetlands, or other waterbodies that directly influence and are influenced by the presence of surface water, typically extending up to 50 feet from the ordinary high water mark or as delineated by hydrophilic vegetation. 'Upland areas' are defined as lands located within 50 feet of a riparian area boundary that are not themselves classified as riparian, generally characterized by well-drained soils and vegetation adapted to

drier conditions. At a minimum, each project must provide for the following:

1. 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.
2. 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.
3. Measures to ensure water quality is not degraded by toxic pollutants in toxic amounts, raw materials, oil, grease, gasoline, sediment, soil, drilling fluids, or construction materials.
4. Measures to protect the water quality and native biology of the impacted waters by preventing the spread of invasive or nuisance species.
5. A site-specific aquatic resource reclamation and monitoring plan. Pre-construction, the project proponent shall identify mitigation measures for disturbed aquatic resources and upland areas, where they are adjacent to the aquatic resource. Post-construction, the project proponent shall undertake reclamation efforts in accordance with restoration and monitoring elements provided to the Division.

(c) The Division may require additional BMPs as conditions of 401 certification of projects that are not listed in (i-iv) above.

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

The Division will notify project proponents 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, that 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 Army Corps, the project proponent shall provide a complete copy of the pre-construction notification to the Division concurrently or promptly subsequent to their submittal to the Army Corps. In these cases, the pre-construction notification shall also serve as the certification request. Any additional information submitted to the U.S. Army Corps of Engineers, such as cultural resource reports or biological assessments, shall be included in the certification request to the Division only to the extent that such materials specifically relate to water quality or may inform the Division's evaluation of water quality-related impacts from the proposed activity. 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 Army Corps, 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.

4-109. Modification to a grant of certification.

In accordance with 40 C.F.R. § 121.10 (a), provided the Federal agency and the Division have agreed in writing that the Division may modify a grant of certification (with or without conditions), the Division may modify the agreed-upon portions of the certification. The Division is not required to obtain the Federal agency's agreement on the language of the modification. In accordance with 40 C.F.R. § 121.10 (b), the Division shall not, through the 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.

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 project proponent must afford the Division an opportunity to inspect the activity or facility for the purpose of determining whether the 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 activity 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 the project's construction or operation, the Division, after consultation with the permittee and notification of the appropriate Federal licensing or permitting 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 appropriate Federal permitting 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.