

PART 13. CERTIFICATION OF COMPLIANCE WITH STANDARDS

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[**Authority:** This part is based on Subtitle B of the Code and takes effect upon approval by the Tribal Council.]

SECTION 13.1 APPLICABILITY

(a) Required Compliance. Compliance with the procedures set out this Part is required for the following two categories of activities:

(1) Federal licenses and permits. Section 401 of the Clean Water Act imposes a certification requirement on any person proposing to engage in any activity that is subject to a requirement to apply for a federal license or permit if such an activity will result in a discharge into reservation surface waters. This certification requirement, commonly known as "Section 401 Certification," provides that an applicant for such a federal license or permit must also obtain certification from the Tribe that the discharge will be in compliance with the Tribe's water quality standards. Under section 401 of the Act, a federal license or permit for an activity that will result in a discharge into reservation surface waters may be granted only if the Tribe has granted or waived section 401 certification; if the Tribe has denied certification, a federal license or permit may not be granted. Section 13.4.4 of the Tribal Water Code delegates authority to the Director to issue or deny Section 401 Certifications, subject to appeal to the Commission. Thus, for purposes of all federal licenses and permits that are subject to Section 401 Certification by the Tribe, the Director is the "certifying agency" for purposes of EPA regulations (40 C.F.R. part 121).

(2) Tribal permits. Any person proposing to engage in any activity that is subject to the permit requirements established by Subtitle A of the Tribal Water Code must apply to the Director for certification of compliance with Tribal water quality standards in conjunction with an application for a permit to be issued by the Commission. Section 12.2.5 of the Tribal Water Code requires the Commission to include in each permit issued such conditions as may be necessary to ensure compliance with water quality standards. The Commission has determined that a certification procedure similar to the procedure established for Section 401 Certification will facilitate compliance with this requirement of the Tribal Water Code.

(b) Voluntary Compliance. In the event that any person is engaged in, or plans to engage in, an activity that might result in a discharge into surface waters but such activity does not appear to be covered by a permit or license requirement under either tribal or federal law, such a person may voluntarily apply to the Director for certification that such activity will not result in a violation of tribal water quality standards. In any such case the Director may use an informal review procedure similar to the procedure set out in this Part for tribal permits. By applying for voluntary certification, a person may obtain clarification regarding the coverage of federal and tribal permit requirements as well as guidance on avoiding or controlling impacts on water quality. If the Director determines that a proposed activity is subject to a permit or license requirement under federal or tribal law, the Director will so advise the applicant and certification will be governed under the appropriate procedure as set forth in this Part.

SECTION 13.2 PROCEDURE FOR CERTIFICATION

This Part establishes two procedures for certification, one procedure for permits issued by the Commission and a separate procedure for licenses and permits issued by federal agencies.

(a) Federal licenses and permits. For federal licenses and permits, Section 401 Certification by the Tribe is subject to procedures set out in EPA's regulations (40 C.F.R. part 121). If the federal permit that triggers the need for Section 401 Certification is a permit under section 401 of the Clean Water Act (NPDES), additional provisions of EPA's regulations apply as well (40 C.F.R. §§ 124.53-124.55). Section 13.3 of these Rules sets forth the procedure for applicants for federal licenses and permits to apply to the Director for Section 401 Certification.

(b) Tribal permits. For permits issued by the Commission, each application to the Commission for a permit shall include an application to the Director for certification. The procedure for certification for tribal permits is set forth in section 13.3 of these Rules. Normally, certification by the Director shall precede the issuance of a permit -- the Commission will not normally issue a permit until the Director has certified compliance. As provided in section of 12.2.4 of the Tribal Water Code, the denial of certification by the Director may be appealed to the Commission. In any such appeal, the Commission may issue an Order reversing the denial of certification and scheduling the consideration of the applicant's permit application for a subsequent meeting of the Commission. The Commission shall not grant the underlying permit in the same meeting in which it has reversed the denial of certification for the permit.

(c) Forms and instructions; fees. The Director shall prepare instructions and standardized forms for use in applying for certification. The Director shall establish a schedule of reasonable fees to be charged to applicants for processing applications. Where the analysis involved in processing an application for certification involves outside technical assistance or additional research by Department staff, the Director may assess an additional processing fee, consistent with the expenses incurred and collect the fee from the applicant. An application shall not be considered complete until all fees assessed by the Director have been paid.

SECTION 13.3 PROCEDURE FOR TRIBAL PERMITS

[Note: The adoption of this section as drafted would require some corresponding revisions in section 2.5 of the Commission's Rules, regarding the procedure for acting on applications for water use and surface water management permits.]

(a) Information to be provided by applicant. An applicant proposing to carry out an activity which requires a water use or surface water management permit under Subtitle

A of the Tribal Water Code, must submit an application to the Department providing the information specified in section 2.5 of the Commission's Rules. The Director shall develop a revised application form, or an addendum to the existing application form, requesting the applicant to provide such additional information as may be needed to enable the Director to determine whether the planned activity is consistent with Subtitle B of the Water Quality Code (hereinafter referred to as "the Code") and the water quality standards contained in Part 12 of the Commission's Rules. In addition to such other information as the Director may request, an applicant shall provide the following information:

(1) A description of any discharge, or pollution from nonpoint sources, which may result from the activity (construction as well as operation) for which a tribal permit is sought, including the biological, chemical, thermal, and other characteristics of any discharge, and the location or locations at which such discharge may enter Reservation surface waters;

(2) A description of the function and operation of equipment or facilities to treat wastes or other effluents which may be discharged, including specifications of the degree of treatment expected to be attained;

(3) A description of best management practices and other measures to control pollutants from nonpoint sources;

(4) The date or dates on which the activity will begin and end, if known, and the date or dates on which the discharge or pollutants from nonpoint sources will take place; and

(5) A description of the methods and means being used or proposed to monitor the quality and characteristics of the discharge and the operation of equipment or facilities employed in the treatment or control of wastes or other effluents or pollutants from nonpoint sources.

(b) Supplemental information. If the information submitted by the applicant is not sufficient to enable the Director to certify that the activity for which the permit is sought will be in compliance with the Tribe's water quality standards, or to specify conditions that will ensure such compliance, the Director may require the applicant to submit supplemental information, as provided in section 2.5(b) of the Commission's Rules. An application for a permit from the Commission shall not be considered complete until any such required supplemental information has been submitted.

(c) Action by Director. After considering the completed application and such other information and data as the Director deems relevant, the Director shall determine whether there is reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards. If the Director determines that there is such reasonable assurance, he shall sign a certification of compliance with water quality standards, which shall include the information specified in section 13.5 of these Rules

(including any conditions the Director deems necessary to ensure compliance). If the Director determines otherwise, he shall deny certification. In either case, the signed certification or signed denial of certification shall become a part of the file of the application for a permit from the Commission.

(d) Time limits. The Director shall act on applications for certification received from applicants within:

(1) 90 days if the applicant seeking certification is required to apply for a permit pursuant to Subtitle A of the Tribal Water Code; and

(2) 60 days if the applicant seeking certification is doing so voluntarily.

If no action is taken within the applicable time period, a presumption arises that the proposed activity is consistent with the water quality standards set forth in these rules. At the request of the Director, the Chairman of the Commission may grant a reasonable extension of the time periods specified in this section.

(e) Notice of certification or denial. The Director shall make a decision on whether to grant or deny certification before placing the permit application on the agenda for the Commission, pursuant to section 2.5 of the Commission's Rule. Both the notice to the applicant and the public notice shall indicate the Director's decision on certification.

(f) Action by the Commission. If the Director grants certification, the Commission normally will include any conditions specified by the Commission if the Commission decides to issue the requested permit. The Commission may deny the permit on other grounds. If the Director denies certification, or if the applicant declines to accept one or more of the conditions imposed by the Director, the applicant may appeal to the Commission. The Commission will not take action on the underlying permit application at the same meeting in which it hears an appeal of a certification decision.

SECTION 13.4 PROCEDURE FOR FEDERAL LICENSES AND PERMITS

(a) Procedural options. EPA regulations governing the Section 401 Certification process (40 C.F.R. part 121) provide that an applicant for a federal license or permit may proceed in either of two ways:

(1) The applicant may apply directly to the certifying agency (the Director) prior to filing an application for a federal license or permit. Under this approach, the applicant may include the certification with the application for the license or permit, or the applicant may file for the license or permit before the Director has made a decision on whether to grant or deny certification.

(2) The applicant may apply to the federal licensing or permitting agency first, including such information as the federal agency requests to facilitate Section

401 Certification. Under this approach, the federal agency will either provide the relevant documentation directly to the certifying agency or will transmit the documentation to the Regional Administrator of EPA who in turn will forward one set of the documentation to the Director (as the certifying agency).

Under either approach, the federal licensing or permitting agency is not authorized to grant the license or permit until the certifying agency has either granted or waived certification.

(b) Applications to the Director. If the applicant for a federal license or permit files an application for certification with the Director (rather than choosing to let the federal licensing or permitting agency forward the relevant documentation), the Director may require the applicant to supplement the application by submitting copies of other documents which must be submitted to the federal permitting agency as part of the federal permitting program. At a minimum, the applicant must submit the following information:

(1) The name and address of the applicant, and a request for certification signed by the applicant;

(2) A description of the proposed facility or activity for which a federal license or permit is being sought, the federal licensing or permitting agency(ies), and the name, address and phone number of a contact person within the federal agency(ies);

(3) A description of any discharge, or pollution from nonpoint sources, which may result from the facility or activity for which certification is sought, including, but not limited to, the construction or operation of a facility, including the biological, chemical, thermal, and other characteristics of the discharge, and the location or locations at which such discharge may enter Reservation surface waters;

(4) A sufficient description to locate the site of the proposed activity and any related facilities on aerial photographs maintained by the Department;

(5) A description of the function and operation of equipment or facilities to treat wastes or other effluents which may be discharged, including specifications of the degree of treatment expected to be attained;

(6) The date or dates on which the activity will begin and end, if known, and the date or dates on which the discharge will take place;

(7) A description of the methods and means being used or proposed to monitor the quality and characteristics of the discharge and the operation of equipment or facilities employed in the treatment or control of wastes or other effluents; and

(8) Any other necessary information requested by the Director.

(c) Action by Director. After considering the completed application and such other information and data as the Director deems relevant, the Director shall determine whether there is reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards. If the Director determines that there is such reasonable assurance, he shall sign a certification of compliance with water quality standards, which shall include the information specified in section 13.5 of these Rules (including any conditions the Director deems necessary to ensure compliance). If the Director determines otherwise, he shall deny certification. The Director shall provide a copy of the certification or denial to the federal licensing or permitting agency, to the Regional Administrator of EPA, and to the applicant.

(d) Time limits. The Director shall act on applications for certification received from applicants within a reasonable time in accordance with a time frame to be determined by the federal licensing or permitting agency, as provided in EPA regulations (40 C.F.R. § 121.16). This "reasonable time" deadline specified by the federal licensing or permitting agency will generally be six (6) months, but in no case will be longer than one (1) year. The Director will keep the Commission informed of all pending requests for certification. In order to allow for appeals to the Commission, the Director shall issue decisions on certification applications no less than 45 days before the expiration of the deadline established by the federal licensing or permitting agency.

(e) Waiver. If the Director has not issued a certification or a denial within the specified time period, EPA regulations treat the certification requirement as having been waived by the certifying agency. In addition, EPA regulations provide that the Director may expressly waive the authority to grant or deny certification. The Director shall not expressly waive certification unless the specific application has been brought to the attention of the Commission, in a regular or special meeting, and the Commission has concurred in the Director's recommendation to expressly waive certification.

(f) Notice of certification or denial. When the Director has a decision on whether to grant or deny certification the Director shall post notice on the affected Reservation. Any aggrieved person, including the applicant, may file an appeal pursuant to Part 3 of the Commission's Rules.

(g) Special Provisions for NPDES Permits. In the case of a request for certification in connection with an application for a NPDES permit under section 402 of the Clean Water Act, EPA regulations (40 CFR § 124.53(c)) provide that, if Tribal certification has not been received by the time a draft permit is prepared by EPA, the Regional Administrator is required to send to the Department: (i) A copy of a draft permit; (ii) A statement that EPA cannot issue or deny the permit until the Department has granted or denied certification, or waived its right to certify; and (iii) A statement that the Tribe will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying Tribal agency unless the Regional Administrator finds that unusual

circumstances require a longer time. If a draft permit from the Regional Administrator is received by the Department, the Director shall grant or deny Tribal certification within the time specified by the Regional Administrator. The Tribe shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

SECTION 13.5 CONTENTS OF CERTIFICATION

(a) All certifications. Any certification issued by the Director shall include the following:

(1) The name and address of the applicant;

(2) A statement that the Department has either:

(i) examined the application made by the applicant to the Department (specifically identifying the number or code affixed to such application) and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations; or

(ii) examined other information furnished by the applicant sufficient to permit the Department to make the statement described in (a)(3) of this section;

(3) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate Tribal water quality standards;

(4) A statement of any conditions which the Director deems necessary or desirable with respect to the discharge of the activity, or with respect to controlling nonpoint source pollutants from the activity; and

(5) Such other information as the Department may determine to be appropriate.

[Note: Paragraph (a) is based on 40 C.F.R. §121.2, "Contents of certification." Paragraph (c)(1), below, is also based on this section. These content requirements seem to be sufficiently general that they are appropriate for both types of certification.]

(b) Modification. The Director may modify the certification in the following two circumstances:

(1) The Director may modify the certification in such manner as may be agreed upon by the Director, the federal licensing or permitting agency, and the Regional Administrator.

(2) If there is a change in the Tribal law or regulation upon which a certification is based, (or if a court of competent jurisdiction or appropriate Tribal board or agency stays, vacates or remands a certification), the Director shall issue a modified certification or notice of waiver and forward it to EPA.

[**Note:** Paragraph (c)(2) is based on § 124.55 under Subpart D which sets out special provisions applicable to certification for NPDES permits. This particular provision, however, seems to apply to all certifications for federal permit activities, whether they are NPDES or some other kind of federal permit.]

(c) Special Provisions for NPDES Permits. In addition to other information required under paragraph (a) of this section, a certification for an application for a NPDES permit under section 402 of the Clean Water Act shall include:

(1) Conditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 306, and 307 and with the appropriate requirements of Tribal law;

(2) When the Director certifies a draft permit instead of a permit application, such certification may include any conditions more stringent than those in the draft permit which the Director finds necessary to meet the requirements listed in paragraph (c)(1) of this section. For each more stringent condition, the Director shall cite the CWA or Tribal law references upon which that condition is based; and

(3) A statement of the extent to which each condition of the draft permit can be made less stringent without violating the Tribal law, including water quality standards.

[**Note:** Paragraph (c) of this section is based on EPA regulations, 40 C.F.R. § 124.53(e), which state that failure to provide the citation referred to in paragraph (c)(2) as the legal authority for a condition more stringent than that specified in the draft permit waives the right to certify with respect to that condition. EPA regulations also state that failure to provide the statement referred to in paragraph (c)(3) for any condition waives the right to object to any less stringent condition which may be established by EPA.]

SECTION 13.6 PROCEDURES FOR REVIEW OF OFF-RESERVATION ACTIONS WITH ON-RESERVATION IMPACTS

(a) Notice. EPA regulations provide that if the Regional Administrator of EPA determines that there is reason to believe that a discharge which originates outside the Seminole Reservations may affect the quality of the surface waters of the the Reservations, the Regional Administrator is required to notify the Department, the licensing or permitting agency, and the applicant. This notice must be provided no later than 30 days from the date of receipt of the application and certification from the federal licensing or permitting agency.

(b) Review. In any case in which the Department receives such notice from the

Regional Administrator, the Director shall review the relevant documentation in accordance with the time frames specified by EPA.

(c) Objections; requests for hearings. The Director is authorized to act on behalf of the Tribe to file an objection and/or request a hearing with respect to any such application for a federal license or permit. In any case in which the Director files an objection and/or requests a hearing, the Director shall inform the Commission as to the nature of the Director's concerns, so that the Commission can contribute to formulating a course of action through which those concerns can be resolved.