PUYALLUP TRIBE FISHERIES DEPARTMENT POLICY
SECTION 401 CERTIFICATION AND PUBLIC NOTICE PROCEDURES

I. Purpose.

(a) Under Section 401 of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. § 1341, any applicant for a federal license or permit to conduct any activity that may result in any discharge into the waters of the United States must obtain a certification from the jurisdiction in which the discharge originates or will originate that any such discharge will comply with applicable water quality requirements.

(b) The Puyallup Tribe has authority from the United States Environmental Protection Agency (EPA) to implement the CWA Section 401 Program and take all actions necessary to meet the requirements thereof. This policy establishes the procedures by which the Puyallup Tribe, through the Puyallup Tribe Fisheries Department, exercises its certification authority pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and applicable federal regulations, 40 C.F.R., Ch. 1, Subch. D, Part 121.

II. Applicability.

(a) Certification under this policy is required for any federal license or permit that authorizes any activity which may result in any discharge into the surface waters of the Puyallup Tribe.

III. Definitions.

(a) “Certification decision” means a written statement issued by the Director granting certification, granting certification with conditions, denying a received certification request (with or without prejudice), or expressly waiving certification authority.

(b) “Department” means the Puyallup Tribe Fisheries Department.

(c) “Director” means the Director of the Puyallup Tribe Fisheries Department and personnel that are duly authorized to act on the Director’s behalf.

(d) “Federal agency” means any agency of the United States government to which application is made for a federal license or permit that is subject to CWA Section 401.

(e) “Federal license or permit” means any license or permit issued or granted by a federal agency to conduct any activity which may result in any discharge into waters of the United States.

(f) “Received certification request” means a certification request that, as determined by the Director, was submitted in accordance with the applicable submission procedures

under this policy and deemed to be complete because it includes every previously identified, required component for the certification request.

(g) "Project proponent" means the applicant for a federal license or permit, including but not limited to any agents of the applicant or federal agencies seeking certification, such as the U.S. Environmental Protection Agency or U.S. Army Corps of Engineers.

(h) "Surface waters of the Puyallup Tribe" includes rivers, ponds, streams, inland waters, wetlands and all other surface waters and water courses on trust land within the 1873 Survey Area described in the Settlement Agreement of August 27, 1988, ratified by Congress in the Puyallup Land Claim Settlement Act, 25 U.S.C. §§ 1773 *et seq*. (Pub. L. No. 101-41, 103 Stat. 83 (June 21, 1989)).

(i) "Water quality requirements" means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act (33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317); any federal or tribal law or regulation implementing those sections; and any other water quality-related requirements under tribal law.

IV. Form of Submissions.

(a) All materials relating to a certification request, including a request for a pre-filing meeting, shall be submitted to the Director in the form and manner prescribed by the Director.

V. Pre-Filing Meeting Request.

(a) The project proponent shall submit a written request for a pre-filing meeting with the Director at least 30 days prior to submitting a certification request. At the Director's discretion, the Director may waive or shorten the 30-day pre-filing meeting request by providing written and signed notice to the project proponent. The Director may also categorically waive or shorten pre-filing meeting requests for certain types of projects. If the Director does not communicate whether the pre-filing meeting request is waived or shortened, the project proponent must wait to submit its certification request for at least 30 days after the project proponent requested the pre-filing meeting.

(b) The pre-filing meeting request shall include the location of the planned project (including identification of impacted waters); a list of all necessary federal licenses or permits; list of all other necessary permits; a concise summary of the project type and project description; anticipated start work date; and anticipated discharge(s).

(c) If the Director determines a pre-filing meeting is necessary, the Director shall promptly coordinate with the project proponent. The Director is not required to

respond to the project proponent if the Director determines a pre-filing meeting is unnecessary.

(d) If a pre-filing meeting is held, the Director and project proponent may, among other topics, discuss the nature of the proposed project; potential water quality effects and discharges; and anticipated timelines for construction and operation.

VI. Certification request.

(a) Except as provided for in subsection (f), a certification request must be written, signed, dated, and submitted to the Director in a manner prescribed by this policy.

(b) A certification request shall, at a minimum, include the following:

(1) An attestation that the project proponent submitted a pre-filing meeting request in accordance with Section V;

(2) The project proponent's name, address, and contact information;

(3) A complete technically accurate narrative description of the proposed activity, including the purpose and final goal of the proposed activity;

(4) A copy of the federal license or permit application submitted to the federal agency, if the request is for an individual federal license; or, if the request is for the issuance of a general federal license or permit, a copy of the draft federal license or permit;

(5) Any water quality-related materials that informed the development of the application or the draft federal license or permit;

(6) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity, including a description of the expected volume of discharge and the biological, chemical, physical, and radiological characteristics;

(7) The specific location of any discharge(s) that may result from the proposed activity, including the types of water bodies (e.g., wetland, river, reservoir, tributary);

(8) For each water body type, the total estimated quantity of water and habitat that may be adversely impacted temporarily or permanently by a discharge;

(9) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;

(10) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

(11) The date(s) on which the proposed activity is planned to begin and end, and, if known, the approximate date(s) when any discharge(s) may commence;

(12) A list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed activity, and the current status of each authorization, including copies of final or draft application documents associated with such authorizations and copies of final or draft authorizations;

(13) Documentation that a pre-filing meeting request was submitted to the Director in accordance with applicable submission procedures or that the pre-filing meeting requirement was waived;

(14) A description of the proposed methods used to monitor the quality and characteristics of the discharge(s) and operation(s) of the facility from which the discharge(s) will originate;

(15) A description of the function(s) and operation(s) of the activity and any practices proposed to avoid or minimize or treat the discharge(s), including a proposed mitigation plan;

(16) If there was a pre-filing meeting or written response to a pre-filling meeting request, any other relevant information identified by the Director; and

(17) If the project proponent is using the Joint Aquatic Resource Permit Application (JARPA) for its certification request, an addendum containing any information called for in subsections (b)(1)-(b)(16) that is not otherwise required by the JARPA.

(c) Once the project proponent submits a certification request in accordance with the procedures of this policy and any application fee imposed by the Director, the Director shall review the submission for completeness. A certification request is complete, and therefore a received certification request, if it was submitted in accordance with the applicable submission procedures and includes each required component identified in subsection (b).

(1) If the Director determines a submitted certification request is incomplete, the Director shall promptly notify the project proponent the certification request is incomplete, and therefore not received. Such notification shall identify the missing component(s) of the certification request and/or procedural error(s) in

the submission process. Such notification shall be written, dated, and signed by the Director and shall clearly state the certification request was deemed incomplete and not received. The Director may impose a deadline for the project proponent to remedy the deficiencies, which may include resubmitting the certification request in compliance with applicable submission procedures. Once the project proponent provides the missing information or resubmits the certification request, the Director shall review for completion.

(2) If the Director determines the certification request was submitted in accordance with the applicable submission procedures and includes every component identified in subsection (b), the Director shall deem such certification request complete and, therefore, received. Once the Director deems a submitted certification request as received, the Director shall promptly notify the project proponent and the applicable federal agency, in writing, of the date of receipt (i.e., the date the received certification request was submitted to the Director by the project proponent).

(d) The Director shall act on a received certification request within a reasonable period of time, as defined in Section VII of this policy.

(e) The project proponent may withdraw a submitted or received certification request at any time before the Director issues a certification decision. The project proponent must provide written, signed, and dated notice to the Director of its intent to withdraw a submitted or received certification request.

(f) As applicable, the Director may waive the procedural requirements of this policy to conform with federal agency regulations or policies for certification requests for nationwide permits or general permits submitted by a federal agency. Such certification requests may be submitted in accordance with the applicable agency's policies.

VII. Reasonable Period of Time.

(a) The reasonable period of time begins on the date that the Director receives a certification request that meets the requirements of Section VI of this policy and was submitted in accordance with the procedures in this policy, such that the request can be deemed a received certification request.

(b) The Director is authorized to coordinate with the applicable federal agency to jointly agree in writing on the reasonable period of time for the Director to act on received certification requests, provided the reasonable period of time does not exceed one year from the date the received certification request was received. If the Director and

federal agency do not agree in writing on the length of the reasonable period of time, the reasonable period of time shall be six months.

(c) If a longer period of time is necessary to accommodate the public notice proceedings associated with a received certification request or other force majeure events (including, but not limited to, government closures or natural disasters), the Director shall notify the federal agency prior to the end of the reasonable period of time. In such notification, the Director will identify how much additional time is required and provide a justification for such extension. In such event, the reasonable period of time shall be extended by the period of time necessitated by public notice procedures or the force majeure event, but such an extension shall not cause the reasonable period of time to exceed one year from the date that the received certification request was received.

(d) The Director may coordinate with the applicable federal agency to extend the reasonable period of time for any reason, provided that the extension shall not cause the reasonable period of time to exceed one year from the date that the received certification request was received.

VIII. Public Notice and Public Hearing.

(a) Unless otherwise specified, the Director shall post public notice of a received certification request on the Department's website no less than 60 days before the reasonable period of time ends. Such public notice shall provide an opportunity for written public comment and identify the deadline to provide such comments. If the Director determines that a public hearing on a received certification request is in the public interest, the Director shall schedule such hearing at an appropriate time and place and, to the extent practicable, give all interested and potentially affected parties the opportunity to present evidence or testimony in person or by other means. The Director shall promptly provide public notice of such hearing on the Department's website.

(b) If the received certification request concerns a federal permit or license for which the JARPA process is available, the Director has discretion, to the extent practicable, to utilize the JARPA public notice process facilitated by the applicable federal agency. If the JAPRA process is not utilized, the procedures in subsection (a) apply.

IX. Certification Decisions.

(a) The Director shall act on a received certification request in one of four ways: grant certification, grant certification with conditions, deny certification (with or without prejudice), or expressly waive certification.

(b) Certification decisions must be in writing, dated, signed, and clearly identify the type of certification decision chosen under subsection (a). The Director shall promptly send notice of its action, including a copy of any certification, to the project proponent and the EPA Region 10 Regional Administrator. If the Director determines that no water quality requirements are applicable to the activity, the Director shall grant certification. Failure or refusal to act on a received certification request within the reasonable period of time shall be construed as a waiver of certification requirements.

(c) In reviewing a received certification request, the Director shall evaluate whether the activity will comply with applicable water quality requirements, including water quality-related impacts from the activity subject to the federal license or permit, such as the activity's construction and operation.

(d) If the Director denies certification without prejudice, nothing precludes the project proponent from resubmitting a certification request in accordance with this policy.

(e) A grant of certification must include:

(1) A statement that the Director complied with the public notice procedures of this policy established pursuant to Section 401(a)(1) of the Clean Water Act;

(2) A statement that the received certification request was acted on within the reasonable period of time;

(3) A statement that the activity will comply with water quality requirements; and

(4) Identification of the applicable federal license or permit.

(f) A grant of certification with conditions must include:

(1) A statement that the Director complied with the public notice procedures of this policy established pursuant to Section 401(a)(1) of the Clean Water Act;

(2) A statement that the received certification request was acted on within the reasonable period of time;

(3) Identification of the decision as a grant of certification with conditions;

(4) Identification of the applicable federal license or permit; and

(5) Identification of the conditions.

(g) A denial of certification:

(1) Must include:

1. A statement that the Director complied with the public notice procedures of this policy established pursuant to Section 401(a)(1) of the Clean Water Act;

2. A statement that the received certification request was acted on within the reasonable period of time;

3. A statement that the decision is a denial and indication of whether the denial is with or without prejudice;

4. Identification of the applicable federal license or permit; and

(2) May include, at the Director's discretion, a statement explaining why the Director cannot certify that the activity will comply with water quality requirements. If the denial is based on insufficient information, the Director should include a description of any missing water quality-related information.

(h) An express waiver of certification must include:

(1) A statement that the Director complied with the public notice procedures of this policy established pursuant to Section 401(a)(1) of the Clean Water Act;

(2) A statement that the received certification request was acted on within the reasonable period of time;

(3) Identification that the decision is an express waiver of certification with a statement that the Director expressly waives authority to act on the received certification request; and

(4) Identification of the applicable federal license or permit.

X. Modification of Certifications.

(a) In accordance with this section, the Director may modify a grant of certification (with or without conditions) to address new information or project changes. The Director may seek to modify a grant of certification (with or without conditions) at any time after the reasonable period of time ends, including prior to and after the issuance of a federal license or permit. The Director may not modify a denial of certification (with or without prejudice) or a waiver of certification.

(b) Before modifying a grant of certification (with or without conditions), the Director and federal agency must agree in writing that the Director may modify a grant of

certification (with or without conditions), and the Director and federal agency shall specify which element or portions of the certification (with or without conditions) may be modified. After reaching an agreement with the federal agency to modify the certification, it is within the Director's sole discretion to dictate the language of the modification.

(c) The Director shall not use a modification to revoke a grant of certification (with or without conditions) or to change a grant of certification (with or without conditions) into a denial or waiver of certification. Nothing in this policy precludes the Director from requiring that a new certification request be submitted if an activity materially changes (e.g., in breadth or location) after a grant of certification (with or without conditions) has been issued.

XI. Enforcement and Inspection.

(a) The Director may review certified federally licensed or permitted activities to the extent allowable under federal and tribal law. Such review may include, but is not limited to, an inspection of the facilities or review of preliminary monitoring reports or other such records that may assist the Director in determining whether the operation of the facility or activity will comply with effluent limitations, other limitations, or other water quality requirements.

(b) Upon receipt of information indicating that effluent limitations, other limitations, or other water quality requirements are not being met as a consequence of the activity's construction or operation, the Director may request the applicable federal licensing or permitting agency to take enforcement action to the extent allowable under law.

(c) 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 Director shall notify the appropriate federal licensing or permitting agency of such noncompliance in writing and may request the federal licensing or permitting agency to take necessary action to implement such conditions as contemplated in Sections 401(a)(5) and 401(d) of the Clean Water Act, 33 U.S.C. § 1341(a)(5), (d). A copy of any such notification and request shall be sent to the permittee. The Director shall maintain 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.

(d) The Director may take any necessary action to enforce its certifications or certification conditions in Puyallup Tribal Court or another court of competent jurisdiction, to the extent allowable under federal and tribal law.

XII. Judicial Review.

(a) Within 14 days of the Director's issuance of a certification denial (with or without prejudice), the project proponent may seek judicial review in the Puyallup Tribal Court. The review shall be on the record without taking additional evidence. If the court finds that the Director 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 Director's decision or action. Otherwise, the decision of the Director shall be affirmed. Upon request by the court, the Director shall provide the court with a certified copy of all documents, records, transcripts, or other information which formed the basis of the certification denial (with or without prejudice) for which the project proponent seeks judicial review.

(b) Certification decisions made under this policy are not subject to, or judicially reviewed under, the Puyallup Tribe of Indians' Administrative Procedure Act, Chpt. 2.08.

XIII. Severability.

(a) The provisions of this policy are separate and severable from one another. If any one provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.