



# SPECIAL PUBLIC NOTICE

U.S. ARMY CORPS OF ENGINEERS  
SAN FRANCISCO DISTRICT

BUILDING STRONG®

## Clean Water Act Section 401 Certification Rule

### NOTICE ANNOUNCING THE CLEAN WATER ACT SECTION 401 CERTIFICATION RULE

This public notice is provided to inform stakeholders and prospective applicants for U.S. Army Corps of Engineers, San Francisco District, permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of new procedural requirements established by the Environmental Protection Agency's newly promulgated regulation implementing Section 401 of the federal Clean Water Act.

Effective September 11, 2020, the "Clean Water Act (CWA) Section 401 Certification Rule" (85 Fed. Reg. 42,210 (July 13, 2020)) is being implemented nationwide. The Rule (promulgated by the Environmental Protection Agency, EPA, and to be codified at 40 C.F.R. Part 121) establishes procedures that promote both consistent implementation of CWA Section 401 and regulatory certainty in the federal permitting process. Section 401 of the CWA provides states and authorized tribes with an important tool to help protect the water quality of federally regulated waters within their borders, in collaboration with federal agencies. Section 401 of the CWA requires that, for any federally licensed or permitted project that may result in a discharge into waters of the United States, a water quality certification be issued to ensure that the discharge complies with applicable water quality requirements. The Rule addresses some key areas of the CWA Section 401 certification process, including timelines for review and action, the scope of certification review, and early engagement (pre-filing meetings). More information on the Rule is available at the following website: <https://www.epa.gov/CWA-401>. All stakeholders and prospective permit applicants are encouraged to carefully read and be familiar with the requirements of the new rule.

#### **Definitions:**

**Project proponent:** applicant for a federal license or permit or the entity seeking certification

**Federal licensing or permitting agency:** any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act section 401

**Certifying authority:** the agency responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401. May include: 1) States,

2) Authorized tribes with “treatment as a state” for section 401, and 3) EPA when a state or tribe does not have authority to act on a request for certification.

### **1. Important Considerations for Project Proponents:**

a. Before submitting a request for an individual Section 401 water quality certification (WQC) to the certifying authority, a project proponent must request a pre-filing meeting with the certifying authority at least 30 days prior to submitting the WQC request. The certifying authority will determine whether the meeting will be held, but submittal of the request for a pre-filing meeting is required.

b. Project Proponents must submit their requests for WQC to the certifying authority and to San Francisco District, Regulatory Division (RG) concurrently. Project Proponents are encouraged to copy RG on WQC requests submitted to a certifying authority for a project within RG’s geographic area of responsibility.

c. The Rule defines what a “request for 401 certification” entails. It specifies that a request must contain the following information:

- (1) The project proponent(s) and a point of contact;
- (2) identification of the proposed project;
- (3) the applicable federal license or permit;
- (4) the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
- (5) a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;
- (6) a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
- (7) documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
- (8) a certification statement as follows: “The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief”; and
- (9) a statement as follows: “The project proponent hereby requests that the certifying authority review and take action on this CWA Section 401 certification request within the applicable reasonable period of time”.

d. The following Nationwide Permits (NWP) are covered under an existing general WQC and are not required to go through the new Section 401 WQC process. However, the Corps of Engineers Regulatory Program is in the process of revising and reissuing all of the Nationwide Permits and as part of that process Corps Districts will be requesting Section 401 certification from certifying authorities. So, at present it is not known the extent to which certifying authorities will grant general certifications for the new Nationwide Permits.

NWPs 1, 4, 5, 6, 9, 10, 11, 12, 20, 22, 28, 32, 36, and 54

Regional General Permits (RGPs) - See the following website to determine 401 WQC requirements for each RGP.

<https://www.spn.usace.army.mil/Missions/Regulatory/Regulatory-Overview/Regional-General-Permits/>

## **2. WQC Request Timeframes:**

The Rule requires that action on a WQC request must be taken by the certifying authority within a reasonable period of time, but in no case later than one year after receipt of a certification request. RG will establish the reasonable period of time on either a categorical or case-by-case basis, according to criteria prescribed by the Rule. The criteria used to establish the reasonable period of time are: (1) the complexity of the proposed project; (2) the nature of any potential discharge; and (3) the potential need for additional study or evaluation of water quality effects from the discharge. RG will work with each certifying authority in our area of responsibility to establish a reasonable period of time on a categorical basis for projects that do not require complex evaluations or additional study/evaluation.

Within 15 days of receipt of a request for WQC, RG will notify the certifying authority of the following information: (1) the date of receipt; (2) the applicable reasonable period of time to act on the certification request; and (3) the date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request. Once the certifying authority has received RG's notice of the reasonable period of time, it may make a written request for extension, if necessary. If RG agrees to extend the reasonable period of time, the certifying authority and project proponent shall be notified in writing. However, the reasonable period of time may not exceed one year.

The procedures outlined in this public notice are for the San Francisco District, Regulatory Division only. If submitting paperwork for another District's Regulatory Division, please contact them first to determine their requirements. These procedures were effective on September 11, 2020, the effective date of EPA's CWA Section 401 Certification Rule. If you have any questions, please contact Kasey Sirkin I.k. [sirkin@usace.army.mil](mailto:sirkin@usace.army.mil) (707) 443-1398

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**SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS**  
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