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21-002

November 2023

## **Guidance for 2023 Clean Water Act Section 401 Certification Rule as applied to Clean Water Act Section 404 permits**

Section 401 of the Clean Water Act (CWA) requires applicants for a federal CWA 404 dredge and fill permit to provide the U.S. Army Corps of Engineers (USACE) with a certification from the State (unless waived by the State) that the proposed activity complies with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirement of state law. The State of Nebraska's water quality standards can be found in Nebraska Administrative Code *Title 117 – Nebraska Surface Water Quality Standards*. In addition to granting or denying certification, the State may grant certification with conditions which assure compliance with water quality requirements. These conditions are incorporated into the federal permit.

On September 27, 2023, the Environmental Protection Agency finalized the Clean Water Act Section 401 Certification Rule. This Rule went into effect on November 27, 2023. The following guidance helps project proponents (those who intend to apply for a CWA 404 permit) comply with the new requirements of the federal rule. For the official rule, please refer to the federal register at 88 FR 66558.

- Required pre-filing meeting: 40 CFR 121.4 requires a project proponent to request a pre-filing meeting with the Nebraska Department of Environment and Energy (NDEE) a minimum of 30 days prior to submitting the certification request. The Department can waive the requirement for a pre-filing meeting and waive or shorten the 30-day requirement. **The Department has established a general policy that the pre-filing meeting request will be required and the 30-day waiting period will be waived, unless otherwise stated.**
  - a. NDEE advises project proponents to submit a pre-filing meeting request in writing via email or hard copy.
  - b. NDEE will notify the project proponent when the request has been received.
  - c. Project proponents **may not** submit a pre-filing meeting request and a certification request concurrently.
- Certification request
  - a. A certification request is a written, signed, and dated communication. NDEE will accept digital copies of a certification request through email.
  - b. Twelve required elements of a 401 certification request for an individual license or permit (nationwide permits requiring individual 401 certification and individual permits):
    - i. Project proponents and points of contact, including phone number and email address

- ii. The 401 certification request should include the following statement: “The project proponent hereby certifies that all the information contained herein is true, accurate, and complete, to the best of my knowledge and belief”
  - iii. The 401 certification request should include the following statement: “The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time”
  - iv. 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
  - v. The specific location of any discharge(s) that may result from the proposed activity
  - vi. A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways (kmz and shapefile formats are preferred)
  - vii. 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
  - viii. The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) of any discharge(s) may commence
  - ix. 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
  - x. Documentation that a pre-filing meeting request was submitted to the Department in accordance with applicable submission procedures unless the pre-filing meeting request requirement was waived
  - xi. A copy of the Federal license or permit application submitted to the Federal agency and the Federal agency’s point of contact
  - xii. A CERT report issued by the NE Game and Parks Commission, if available
- c. Seven required elements for 401 certifications for a general license or permit:
- i. Identify the project proponent(s) and point of contact
  - ii. Identify the proposed categories of activities to be authorized by the general license or permit for which the certification is requested
  - iii. Include the draft or proposed general license or permit
  - iv. Estimate the number of discharges expected to be authorized by the proposed general license or permit each year
  - v. Include documentation of the pre-filing meeting request submitted to the Department

- vi. The 401 certification request including the following statement: “The project proponent hereby certifies that all the information contained herein is true, accurate, and complete, to the best of my knowledge and belief”
  - vii. The 401 certification request including the following statement: “The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time”
- The federal permitting agency and the Department determine a reasonable period of time for review
  - a. If certification is not completed within the reasonable period of time, the state’s 401 certification is considered waived.
  - b. If the NDEE requests additional information from the project proponent and it is not received within the reasonable time allotted, NDEE may deny the certification due to insufficient information.
  - c. The default reasonable period of time established by the Department and the USACE Omaha Regulatory District for Section 404 permits in Nebraska is 90 days
  - d. The reasonable period of time begins on the date that the NDEE receives a complete request for certification (as defined in this guidance) from the project proponent
- NDEE’s possible responses to the 401 certification request include:
  - a. Grant certification
  - b. Grant certification with conditions
  - c. Deny certification
  - d. Waive its opportunity to provide certification