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21-002

February 2021

## **Guidance for 2020 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 (ACOE) 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 July 13, 2020, the Environmental Protection Agency finalized the Clean Water Act Section 401 Certification Rule. This Rule went into effect on September 11, 2020. 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 [85 FR 42210](#).

- 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.
  - a. A meeting request will be evaluated and granted at the discretion of NDEE. NDEE is not required to grant the meeting request.
  - b. NDEE advises project proponents to submit a pre-filing meeting request in writing via email or hard copy.
  - c. NDEE will notify the project proponent when the request has been received.
- Certification request
  - a. A certification request is a written, signed, and dated communication that satisfies the requirements of 40 CFR 121.5(b) or (c). NDEE will accept digital copies of a certification request through email.
  - b. The certification request should be submitted a minimum of 30 days after pre-filing the meeting request.
  - c. Nine required elements of a 401 certification request for an individual license or permit required by 40 CFR 121.5(b):
    - i. Identify the project proponent(s) and point of contact
    - ii. Identify and describe the proposed project

- iii. Identify the proposed federal license or permit and include Army Corps of Engineers 404 application or other federal applications
  - iv. Identify the location and nature of any potential discharge that may result from the proposed project and the location of the receiving waters
  - v. Include a description of any methods and means proposed to monitor the potential discharge and the equipment or measures planned to treat, control, or manage the discharge
  - vi. Include a list of all federal, interstate, tribal, state, territorial, or local agency authorizations or permits required for the proposed project, including all approvals or denials already received
  - vii. Include documentation of the pre-filing meeting request submitted to the NDEE at least 30 days prior to submitting the certification request
  - viii. 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"
  - ix. 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"
- d. Seven required elements for 401 certification for a general license or permit required 40 CFR 121.5(c):
  - 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 NDEE at least 30 days prior to submitting the certification request
  - 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 sets a reasonable period of time for review
  - a. If certification is not completed or an extension is not granted within the reasonable period of time, the state's 401 certification is considered waived.
  - b. The reasonable period of time does not restart or pause for any reason.
  - c. 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.

- 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