

401 WQC IMPROVEMENT RULE & REGIONAL GENERAL PERMIT 7 REISSUANCE OVERVIEW

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BACKGROUND ON THE 2023 RULE



Effective November 27, 2023, projects requiring water quality certification from the State of Nevada must comply with the Clean Water Act Section 401 Certification regulations U.S. Environmental Protection Agency promulgated in 2023, codified as 40 CFR 121.

The final rule is only the second time the EPA has updated the water quality certification regulations (first promulgated in 1971, updated in 2020)



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CERTIFYING AUTHORITIES (CA) IN NEVADA



- Nevada Division of Environmental Protection (NDEP) is the CA for non-Tribal land in Nevada
 - Mr. Zachary Carter, NDEP
 - zcarter@ndep.nv.gov
 - 775-687-9456
- Pyramid Lake Paiute Tribe, Walker River Paiute Tribe, Yerington Paiute, and 22 other tribes are the CA on their reservation lands within Sacramento District's AOR.
- USEPA Region 9 is the CA for all other tribal land and areas of exclusive federal jurisdiction in Nevada.
 - Per our 2021 Regional Conditions, some Nationwide Permit projects qualify for a conditional 401 WQC granted by US EPA Region 9 on October 21, 2021.



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2021 NWPS - GENERAL 401 WQC

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- USEPA Region 9 granted general Section 401 WQC for some of the 2021 Nationwide Permits
 - Granted with conditions: NWP 3, 5, 6, 7, 13, 14, 18, 19, 20, 23, 25, 27, 31, 32, 33, 36, 37, 38, 41, 43, 45, 46, and 59
 - Expressly waived: NWP 4, 15, 16, 17, 22, 30, 34, 49, 53, and 54
 - Not certified: NWP 1, 2, 8 – 12, 21, 24, 28, 29, 35, 39, 40, 42, 44, 48, 50, 51, 52, and 55 – 58
- NDEP granted general Section 401 WQC for some of the Corps' General Permits
 - Granted with conditions: Regional General Permit (RGP) 8, Emergency Repair and Protection Activities; RGP 6, U.S. NATIONAL PARK SERVICE CATEGORICALLY EXCLUDED ACTIVITIES IN GLEN CANYON AND LAKE MEAD NATIONAL RECREATION AREAS
 - Expressly waived: None
 - Not certified: ALL 2021 NATIONWIDE PERMITS
- Treatment as State (TAS) tribes did not grant general Section 401 WQC for any of the 2021 Nationwide Permits or other General Permit



Certification



Post-Certification





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PRE-FILING MEETING REQUEST



- Project proponents must request a pre-filing meeting from a certifying authority at least 30 days before requesting certification.
- The certifying authority may waive or shorten the time for this requirement.
- This requirement encourages early engagement between project proponents, federal agencies, and certifying authorities.
- The Corps makes a concerted effort to join the pre-filing meetings, can provide input on federal permit type, Corps' Regulatory process, etc.

1

Pre-filing
Meeting
Request





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RECEIPT OF 401 CERT. REQUEST



Certifying authorities are required to send **written confirmation** to the project proponent and the federal agency of the date that the request for certification was received.

*** The request for certification is not considered “received” unless it is a complete 401 request per all rules and requirements of the certifying authority**



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REQUEST FOR CERTIFICATION

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All certification requests must include the following two elements:

1. Any readily available water quality-related materials such as: water quality baseline conditions, sediment and erosion control plans, restoration plans, alternatives analyses, mitigation plans, modeling, and/or other materials that have been developed for the license or permit application. **A lot of overlap with the Corps' Regulatory process** List of specific requirements on NDEP's webpage.
2. A copy of the federal license or permit application submitted to the federal agency (for individual permits or a PCN under NWP) or a copy of a draft license or permit (for the issuance of general licenses or permits). **Specific General Permit, not just "Nationwide Permit" or "Regional General Permit"**

2

Request for
Certification



days



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SETTING THE REASONABLE PERIOD OF TIME (RPOT)



3a

Setting RPT

Federal Agency & Certifying Authority set it, otherwise it defaults to **6 months**



EPA encourages the establishment of Memorandums of Understanding (MOU) between the Federal Permitting Agencies and Certifying Authorities to jointly agree on categorical RPOTs for all federally permitted activities or only for specific types of activities (e.g., activities covered by general permits).

Default RPOTs are 180 days for general and standard permits (40 CFR 121.6(c)). General dynamic of RPOTs with NDEP are 180 days for general permits.

The Corps' Sacramento District and NDEP are in the process of developing a MOU. More info to come soon!



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EXTENSIONS OF THE RPOT

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Extensions can occur for **any reason** as long as the federal agency and certifying authority agree, or if there is a force majeure event (**government closure or natural disaster**) and when the state or tribal public notice procedures necessitate a longer reasonable period of time.

*RPOTs cannot exceed 1 year, including all extensions



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CERTIFYING AUTHORITY'S ANALYSIS



The CA conducts their analysis within the specified RPOT timeline to process the 401 WQC request. This process is independent from the Corps' Regulatory process.

Questions about the 401 WQC process during this analysis period should be directed towards the CA, not the Corps.

3b

Certifying
Authority's
Analysis





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CERTIFICATION DECISION

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Certifying Authority may certify (with or without conditions), waive, or deny the 401 WQC process. The decision by the Certifying Authority is coordinated with the project proponents and federal agencies.

- If the decision is:

4

Certification
Decision



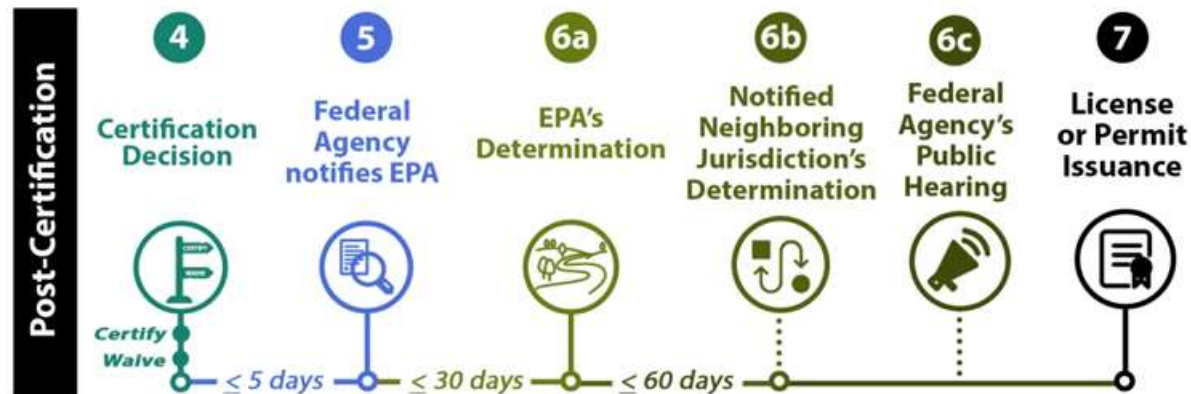
- » **Certified** – Corps would coordinate with the EPA to initiate the neighboring jurisdiction process (explained in next slide). The Corps would incorporate the 401 WQC into the Corps' permit authorization or verification as a special condition.
- » **Waived** – Corps would now coordinate with EPA for neighboring jurisdiction. This is new to the 2023 Rule
- » **Denied** – The Corps would not be able to authorize or verify the specified federal permit type and would be denied without prejudice. Could reapply and reinitiate the 401 WQC process.



POST CERTIFICATION



- Federal permitting agency must notify EPA within 5 days of receiving (having) BOTH an application for a federal license or permit AND a 401 certification or written waiver of certification. This has changed from the old rule, which required the Neighboring Jurisdiction process for certifications only, and not waivers.
- EPA determines whether a discharge from the project may affect the water quality of a neighboring jurisdiction
- The neighboring jurisdiction then determines if the discharge will affect their water quality IF EPA issues a 'may affect' determination.





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CONSTRUCTIVE WAIVER



If the Federal agency reviews for timeliness and determines that the reasonable period of time has passed without the certifying authority acting on the request for certification, then the Federal agency may determine that a **constructive waiver** has occurred.



MODIFICATION PROCESS



When can it happen?

- At any point after certification issuance, until the expiration of the federal license or permit

How does it happen?

- The certifying authority and federal agency must agree that modification is appropriate, but do not require agreement on the substance of the modification.
- One modification that does not qualify is changing the federal permit type (e.g., NWP 18 requesting to be modified to NWP 13) after the certification action is issued.

Available Resources

One-page Fact sheet (in [English](#) and [Spanish](#))

[Rule Provision Comparison](#)

Overview Fact sheet (in [English](#) and [Spanish](#))

Clean Water Act Section 401 Water Quality Certification Improvement Rule

Under Clean Water Act (CWA) section 401, Congress provides states, territories, and Tribes with a tool to protect water from adverse impacts that could result from federally licensed or permitted projects. The final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule) restores the fundamental authority granted by Congress to states, territories, and Tribes to protect water resources that are essential to healthy people and thriving communities. The 2023 rule will support clean, efficient, and focused water quality reviews of infrastructure and development projects that also tie to economic growth.

Overview of the Final 2023 Rule:
The final rule provides stakeholders with a clear and consistent certification process while ensuring protection of vital state, territory, and Tribal water resources by:

- Supporting flexible, early coordination with stakeholders – The 2023 Rule provides states, territories, and Tribes with the flexibility to engage with project proponents and state of approval before the certification process begins. States, territories, and Tribes **certifying activities may decide** when a pre-filing meeting request will lead to a **streamlined certification process**.
- Clearly defining the contents necessary to start the certification process – The 2023 Rule creates a **high-level approach** to defining the required contents in a request for certification, **limiting details** for project proponents, while still allowing states, territories, and Tribal certifying authorities to define the water quality-related information necessary to start the certification process.
- Ensuring actions occur within the 1-year statutory deadline – The 2023 Rule allows certifying authorities to collaborate with federal agencies to determine the timeframe for review, up to the one-year statutory maximum. To ensure timely action and negotiations, the 2023 Rule provides a 6-month **default deadline** (unless a full or voluntary extension of the certifying authority and federal agency do not agree on a deadline).
- Focusing on the water quality-related impacts of federal projects – The 2023 Rule narrows the scope of section 401 certification with nearly 50 years of established practice that preceded the 2020 Rule. Nonetheless, the 2023 Rule addresses **substantial concerns** regarding past practice and provides **regulatory certainty** by clarifying regulatory concerns such as emphasizing that states, territories, and Tribes **may only consider the adverse water quality impacts** from the activity.
- Allowing projects to start early and predictably to starting projects – The 2023 Rule does not allow states, territories, and Tribes to unilaterally modify certification, but instead allows them to collaborate with federal agencies to do so. This balances certifying authorities' needs for **flexibility** to protect water quality over the life of a project and the potential for project delays.

For more information:
To learn more about the CWA section 401 water quality rule, please visit the [CWA Section 401 website](#). Available resources include Frequently Asked Questions, and fact sheets in English and Spanish. The EPA-401-04-263-9238 can be found at [EPA.gov](#).

Appendix A. Rule Provision Comparison

Table A-1 compares major rule provisions, in plain language, under the 1971 Rule, the 2020 Rule, and the final rule.

1971 Rule and Practice	2020 Rule	Final Rule
<ul style="list-style-type: none"> A project proponent must request section 401 certification from the appropriate certifying authority if a federally licensed or permitted activity may result in a discharge into waters of the United States. While not addressed in 1971 Rule, case law from the 9th Circuit held that only a point source discharge triggers section 401 (2004 v. Dandrest, 172 F.3d 202 (9th Cir. 2008)). 	<ul style="list-style-type: none"> Same as 1971 practice, but the regulatory text explicitly provided that certification is required for any license or permit that authorizes an activity that may result in a discharge. Defined "discharge" for purposes of section 401 as a discharge from a point source into a water of the United States, consistent with DQSA. 	<ul style="list-style-type: none"> Same as 2021 practice, but the regulatory text explicitly provides that a certification or waiver is required for any license or permit that authorizes any activity which may result in a point source discharge into waters of the United States. Prerule provides that a discharge from a point source into waters of the United States, consistent with DQSA.
<ul style="list-style-type: none"> Pre-filing meeting requests were not required by rule but were encouraged by some certifying authorities. 	<ul style="list-style-type: none"> Project proponents were required to request a pre-filing meeting from a certifying authority at least 10 days before requesting certification. 	<ul style="list-style-type: none"> Project proponents are required to request a pre-filing meeting with a certifying authority at least 30 days prior to requesting certification, unless waived or shortened by the certifying authority.
<ul style="list-style-type: none"> Includes five components that must be in a certification request when EPA is the certifying authority. Did not define a certification request for other certifying authorities. 	<ul style="list-style-type: none"> Required all certification requests to be written, signed, and dated and include either seven or nine components, which are based on whether the certification request was for an individual license or permit, or the issuance of a general license or permit. 	<ul style="list-style-type: none"> Requires all requests for certification to be in writing, signed, and dated. If the request for certification is for an individual license or permit, it must include a copy of the license or permit application submitted to the federal agency and any

Clean Water Act Section 401 Water Quality Certification Improvement Rule
September 2023

EPA is finalizing a rule to support a timely and predictable water quality certification process under Clean Water Act (CWA) section 401. The final 2023 CWA Section 401 Water Quality Certification Improvement Rule (2023 Rule) is required by the fundamental authority granted by Congress to states, territories, and Tribes to protect water resources that are essential to healthy people and thriving communities over the next 50 years. For more information on the 2023 Rule, see the [CWA Section 401 website](#).

Champion: Section 401 Engineers States, Territories, and Tribes to Protect Vital Waters

Under CWA section 401, Congress provides states, territories, and Tribes with a tool to protect water from adverse impacts that could result from federally licensed or permitted projects. As required by CWA section 401, an applicant for a federal license or permit that may result in a discharge into waters of the United States must obtain a water quality certification or waiver from the certifying authority. Certifying authorities are typically a state (which includes territories) or a Tribe with treatment in a similar manner as a state (TAT).

Federal licenses and permits that may require section 401 water quality certification details, but are not limited to: CWA section 401 bridge and fill permits from the Army Corps of Engineers (ACEP), hydroelectric licenses from the Federal Energy Regulatory Commission (FERC), and CWA section 402 pollutant discharge permits from EPA. A broad range of individuals and entities seek section 401 certification for projects requiring these kinds of permits, including businesses, federal and state agencies (e.g., state departments of transportation, contractors), and individual citizens. Thousands of water quality certifications are granted each year for a wide range of projects.

Stakeholders in the process include:

- Certifying authorities:** The states, territories, or Tribes with 100 percent of the discharge from the proposed federally licensed or permitted project regulates, or EPA if a state, territory, or Tribe does not have jurisdiction over the area.
- Federal licensing or permitting agency:** The federal agency whose license or permit is subject to section 401 certification.
- Project proponents:** Those seeking a section 401 certification, including project applicants and federal applicants for the issuance of their general licenses and permits.

Many water quality certifications in 1971, which remained in effect until the CWA Section 401 Certification Rule (2020 Rule). President Biden's Executive Order 14176, in appropriate and consistent with applicable law, takes action to review or rescind the rule. The Agency announced its intention to revise the 2020 Rule for states, territories, and Tribes under section 401. The Agency's rulemaking effort will be reported.

[Recorded Webinar: Final Rule Overview](#)

Final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule

Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency

Final 2023 CWA Section 401 Water Quality Certification Improvement Rule – Overview Webinar

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[Recorded Webinar: Implementation Considerations](#)

Final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule

Implementation Considerations

Office of Wetlands, Oceans and Watersheds
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REISSUANCE OF RGP 7



- Regional General Permit 7, *Construction and Maintenance of Flood Control Facilities under the Clark County Regional Flood Control District Master Plan*. Activities requesting verification under RGP 7 are covered under an existing WRDA 214 funding agreement with CCRFCD.
 - Previous RGP 7 expired on February 18, 2024
 - New RGP 7 was reissued on March 20, 2024
- Primary changes from previous RGP 7 are definition changes conforming to the Amended 2023 Waters of the United States Rule
- Limited to Clark County, including the Las Vegas Valley, Laughlin Planning Area, Boulder City Planning Area, Mesquite Planning Area, and Muddy River Planning Area



REISSUANCE OF RGP 7



- Currently, no general 401 WQC. Awaiting response from NDEP in response to our January 5, 2024, RPOT.
- In need of RGP 7 reverification?
 - If scope of work changed from 2019 RGP 7 verification, may need to reevaluate federal scope; this may require the Corps to reinitiate consultations and/or coordination with respective agencies and tribes.
 - In any case, new 401 WQC **MAY BE** required. NV Section Staff is actively coordinating with NDEP/EPA and should have an answer soon. Requestors of RGP 7 reverification should reach out to NDEP on an as-needed basis.