



US Army Corps
of Engineers
Alaska District

Special Public Notice

Environmental Protection Agency

40 CFR Part 121

Clean Water Act Section 401 Certification Rule

Regulatory Division (1145)
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ISSUANCE DATE: September 28, 2020

The U.S. Army Corps of Engineers, Alaska District (Corps) is issuing this Special Public Notice (SPN) to announce the U.S. Environmental Protection Agency (EPA) *Clean Water Act Section 401 Certification Rule* as it applies to Department of the Army (DA) permits for activities in Alaska.

On July 13, 2020, the U.S. EPA finalized the *Clean Water Act Section 401 Certification Rule* (40 CFR Part 121) to update and clarify the procedural requirements for water quality certification under Section 401 of the Clean Water Act. Additional information, including the full text of the Final Rule, is available on EPA's website: <https://www.epa.gov/cwa-401>. The Final Rule became effective on September 11, 2020.

1. How does the Final Rule apply to Department of the Army permits?

Under Section 401 of the Clean Water Act, a federal agency, such as the Corps, may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States (U.S.) unless a certifying authority issues a Section 401 water quality certification verifying compliance with existing water quality requirements, the certifying authority waives the certification requirement, or the federal agency determines the certification requirement has been waived. An individual water quality certification or waiver is required for DA permits where the authorized activity would result in a point source discharge in a waters of the U.S., unless the discharge is for an activity where a general water quality certification has already been issued (often the case for Regional General Permits and Nationwide Permits).

2. Who are the certifying authorities for activities in Alaska?

The certifying authority is the agency responsible for certifying compliance with applicable water quality requirements in accordance with Section 401 of the Clean Water Act. The certifying authorities in Alaska are:

U.S. Environmental Protection Agency, Region 10 (EPA). EPA is the certifying authority for activities in Metlakatla Indian Community and Denali National Park.

Alaska Department of Environmental Conservation (ADEC). ADEC is the certifying authority for activities in Alaska on all other lands not under EPA's authority identified above.

3. What are the procedural changes in the certification process that affect applications for Department of the Army permits?

The procedural changes include:

- a) The requirement to submit a pre-filing meeting request to the certifying authority.

The EPA regulations at 40 CFR Part 121.4 require the project proponent (i.e., permit applicant) to request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for water quality certification. The pre-filing meeting is similar to a "pre-application" meeting, but the certifying authority is not obligated to grant or respond to the pre-filing meeting request. The Final Rule does not set a limit on how early a project proponent may submit a pre-filing meeting request, but it must be at least 30 days prior to submitting a request for water quality certification. **Permit applicants should complete the pre-filing meeting request requirement before submitting an application to the Corps for a Department of the Army permit.**

- b) The content requirements of a request for water quality certification.

The EPA regulations at 40 CFR Part 121.5 list the information that must be included to request an individual water quality certification as follows:

- 1) Identify the project proponent(s) and a point of contact;
- 2) Identify the proposed project;
- 3) Identify the applicable federal license or permit (i.e., the Department of the Army permit);
- 4) Identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
- 5) Include 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) Include 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) Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
- 8) Contain the following statement: *"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) Contain 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."*

Forms to request a pre-filing meeting request or a request for water quality certification can be found on the ADEC website at:

<https://dec.alaska.gov/water/wastewater/wetlands>. Submitting only a DA permit application will not result in a valid request for certification. During the review process, EPA/ADEC may request additional information to determine compliance with state laws. The Corps will determine the reasonable period of time for the certifying authority to take action on the certification request after submittal of a valid request.

- c) The requirement to submit the certification request to the certifying authority and the Federal permitting or licensing authority concurrently. (Please see the Final Rule for additional procedures not discussed in this notice).

The EPA regulations at 40 CFR Part 121.5 require the project proponent to submit the request for water quality certification to the certifying authority and to the Federal permitting or licensing agency concurrently. Project proponents should submit their permit application for a Department of the Army permit and their certification request to the Corps at the same time. **The Corps encourages all permit applicants to complete the pre-filing meeting request requirement prior to submitting a permit application to the Corps.**

4. How do you submit a pre-filing meeting request to the certifying authority?

The pre-filing meeting request should be submitted directly to the respective certifying authority based on the location of the activity as described in Item 2 above. A pre-filing meeting request form can be found at the ADEC website at: <https://dec.alaska.gov/water/wastewater/wetlands>. Pre-filing meeting requests may be submitted by email to the Alaska Department of Environmental Conservation at: DEC-401Cert@alaska.gov, or to the U.S. Environmental Protection Agency, Region 10 at: R10-401-certs@epa.gov. The subject line should include the words "Pre-filing meeting request", as well as the project name.

5. How do you submit a certification request related to a Department of the Army permit?

Forms to request a water quality certification can be found on the ADEC website at: <https://dec.alaska.gov/water/wastewater/wetlands>. The certification request must be submitted to the respective certifying authority and to the Corps concurrently. Certification requests should be submitted to the certifying authority by the method identified in Item 4 above. The certification request and DA permit application should be submitted to the Corps together by email at: regpagemaster@usace.army.mil.

6. What is the Corps doing to address the procedures in the *Clean Water Act Section 401 Certification Rule*?

The Corps recognizes there will be a transition period as project proponents, consultants and members of the regulated public become familiar with the requirements of EPA's Final Rule. Applications for DA permits for activities that require water quality certification submitted on or after September 11, 2020, will be subject to the 30-day pre-filing meeting request and

certification request process, which may affect the timeline for an applicant to obtain a valid DA permit. **The Corps encourages all permit applicants to complete the pre-filing meeting request requirement prior to submitting a permit application to the Corps.**

The Corps is actively coordinating with EPA and ADEC to address our procedures related to EPA's Final Rule. For additional information on the certification process, please contact the respective certifying authority as identified in Item 2 above.

For additional information on the Corps' Regulatory Program, including information on how to apply for a permit from the Alaska District, please see our website at:
<https://www.poa.usace.army.mil/Missions/Regulatory.aspx>.