



New Mexico Environment Department

Clean Water Act Section 401 Certification Requirements and Process

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Context and Authority

Clean Water Act Section 401 Certification of Federal Permits

Regulatory Overview:

- Section 401 of the CWA, 33 U.S.C. 1341, requires “state certification” of permits issued by a federal agency under the Act.
- Section 74-6-3(E) of the Water Quality Act states, “[t]he commission is the state water pollution control agency for this state for all purposes of the federal [clean water] act.”
- Section 74-6-4(F) of the Water Quality Act states “... [t]he department of environment shall provide technical services, including certification of permits pursuant to the federal act”
- The New Mexico Water Quality Control Commission (WQCC) has adopted regulations at 20.6.2 New Mexico Administrative Code (NMAC) for certification of federal permits.

When is certification required? For any federal license or permit that authorizes an activity that may result in a discharge to a water of the U.S. 40 CFR § 121.2



State Goals for Certification

- Overall goal: The purpose of such certification is to reasonably ensure that the permitted activities will be conducted in a manner that will comply with applicable State water quality standards contained in 20.6.2 NMAC and 20.6.4 NMAC in addition to:
 - the antidegradation policy,
 - applicable statewide water quality management plans, and
 - any other appropriate requirement of State law.
- When a permit is public noticed by EPA, NMED reviews for the purpose of certification.
- NMED must receive input – joint public notice with EPA Region 6.
- NMED has 15 days after the comment period closes to provide certification to EPA.



What options does NMED have?

- **Condition:**
 - ▣ certify that the discharge will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of state law upon inclusion of specified conditions in the permit and include the justification for the conditions;
- **Comment**
 - ▣ certify that the discharge will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the federal Clean Water Act and with appropriate requirements of state law;
- **Deny**
 - ▣ deny certification and include reasons for the denial.

IF THE DEPARTMENT DOES NOT ACT ON THE CERTIFICATION WITHIN THE TIME PRESCRIBED BY THE FEDERAL PERMITTING AGENCY FOR SUCH ACTION, NMED WAIVES ITS AUTHORITY TO CERTIFY.



Considerations for Conditions or Denials

- Conditions (*40 CFR § 121.7(d)*):
 - Must include a statement of why the condition is necessary to assure the discharge will comply with water quality requirements; and
 - A citation to state or federal law that authorizes the condition.

- Denials (*40 CFR § 121.7(e)*):
 - Specific water quality requirements that the discharge will not comply with;
 - A statement of why the discharge will not comply; and
 - If information is missing, a statement on what information is required to assure that the discharge meets state water quality requirements.



Typical Timelines

EPA posts notice in newspaper for “major” permits;
Website postings for general and minor permits.

EPA issues draft permit for
public comment
40 CFR § 124.10

NMED does not certify an
application – we certify
the draft permit.

EPA’s public notification is
issued jointly with NMED both
for public comment on the
draft permit and for
comments to be considered in
the 401 Certification
40 CFR § 124.10(b) and
20.6.2.2001(C) NMAC

EPA and NMED both post
information on our
websites, which is required.
NMED has in the past
typically sent out a notice
to the SWQB listserv even
though it is not legally
required.

NMED has 15 days after
the public comment
period closes to deliver
the 401 Certification to
EPA.

NMED sends a copy of the
final certification to all who
commented in addition to the
Permittee and EPA.



How to Stay Involved

- Information on draft permits and 401 Certification is posted on the following locations:
 - EPA's public notice website:
<https://www.epa.gov/publicnotices/notices-search/location/New%20Mexico>
 - EPA's listserv for public notices:
<https://www.epa.gov/nm/npdes-public-notice-mailing-list-update>
 - NMED SWQB's public notice website:
<https://www.env.nm.gov/surface-water-quality/public-notices/>
 - NMED SWQB's listserv for informal bureau notices:
https://public.govdelivery.com/accounts/NMED/subscriber/new?topic_id=NMED_4

8

Questions?

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