

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE NEVADA DIVISION OF ENVIRONMENTAL PROTECTION  
AND  
THE UNITED STATES ARMY CORPS OF ENGINEERS  
SACRAMENTO DISTRICT, REGULATORY DIVISION

SUBJECT: Certification under Section 401 of the Clean Water Act for Activities Requiring Department of the Army Permits

1. BACKGROUND:

The U.S. Army Corps of Engineers (USACE) issues Department of the Army (DA) permits for discharges of dredged or fill material into waters of the United States under section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344) and for work or structures in or affecting navigable waters of the United States under section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403). Section 401(a)(1) of the CWA (33 U.S.C. § 1341(a)(1)) requires a certification or waiver before any Federal permit can be issued “to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge...” The CWA further defines a “discharge” (defined at 33 U.S.C. § 1362(16)) to include a “discharge of a pollutant” (defined at 33 U.S.C. § 1362(12)).

As the certifying authority, the Nevada Division of Environmental Protection (NDEP), through its Bureau of Water Quality Planning, determines whether a specific discharge resulting from an activity that requires a federal permit or license needs a certification (Nevada Revised Statutes 445A.620). Under the authority of the Clean Water Act Section 401 (33 U.S.C. §1341) and its implementing regulations (40 CFR Parts 121, 122 and 124), NDEP evaluates proposed activities for compliance with federal and state water quality requirements pursuant to the Nevada Water Pollution Control Law and regulations (Nevada Revised Statutes 445A.300-.730; Nevada Administrative Code 445A.070-.2234). The NDEP is the certifying authority for taking all actions connected with requests for certification, including issuance and denial of certification.

On September 27, 2023, the U.S. Environmental Protection Agency (USEPA) finalized the Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule), which revised and replaced the 2020 Rule. The 2023 Rule took effect November 27, 2023.

2. REFERENCES:

- a. Section 401 of the CWA (33 U.S.C. § 1341);
- b. USEPA water quality certification regulations (40 C.F.R. § 121.1, et seq.).

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- c. USACE Regulatory Program regulations (33 C.F.R. Parts 320-332);
- d. Nevada Water Pollution Control Law (Nevada Revised Statutes 445A.300-.730)
- e. Nevada Water Pollution Control regulations (Nevada Administrative Code 445A.070-.2234)

3. PURPOSE:

The purpose of this Memorandum of Understanding (MOU) is to enable NDEP and the Regulatory Division of the U.S. Army Corps of Engineers' Sacramento District (Corps) to work together more effectively and efficiently by establishing regional procedures and alternative timeframes for water quality certification (certification) under Section 401 of the CWA for DA permits. The procedures and timeframes are intended to improve predictability, consistency, and transparency and allow NDEP to comply with state law and regulations.

This MOU establishes procedures for water quality certifications for activities requiring DA permits, including categorical reasonable periods of time, and extensions of those periods of time, for NDEP to act on certification requests.

4. UNDERSTANDINGS OF THE PARTIES:

a. Pre-Filing/Pre-Application

- 1) NDEP or the Corps will invite the other agency to any planned project pre-filing or pre-application meeting (in-person, virtual, or on-site). Email invitations to the NDEP Certification Program Coordinator ([ndep401@ndep.nv.gov](mailto:ndep401@ndep.nv.gov)) and the Corps Regulatory Project Manager ([spkregulatorymailbox@usace.army.mil](mailto:spkregulatorymailbox@usace.army.mil)) are preferred. Invitation to a planned project pre-filing meeting or pre-application meeting does not obligate the agency scheduling the meeting to coordinate the meeting date or time in advance with the other agency, nor does it obligate the other agency to attend such meeting.
- 2) The Corps will invite NDEP to any planned site visit needed to complete a jurisdictional determination or aquatic resource delineation verification. Email invitations are preferred. Invitation to a planned site visit does not obligate the Corps to coordinate the site visit date or time in advance with NDEP, nor does it obligate NDEP to attend such site visit.
- 3) The Corps will copy NDEP on all final approved jurisdictional determinations, preliminary jurisdictional determinations, and aquatic resource delineation verifications.

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4) The Corps will copy NDEP on all determinations of no permit required.

b. Request for Certification

- 1) A request for certification shall include items listed in 40 C.F.R. § 121.5(a) and a completed NDEP *Clean Water Act Section 401 Water Quality Certification Application*. Complete certification requests shall comply with applicable submission procedures which are publicly available on the NDEP 401 Certification webpage (<https://ndep.nv.gov/water/rivers-streams-lakes/401-certification>). A request for certification will be determined to be submitted in accordance with NDEP's applicable submission procedures when all items in this section have been satisfied.
- 2) If NDEP finds a request for certification does not include all items in (4)(b)(1), it will notify the project proponent and the Corps in writing no later than 30 calendar days after receipt of the incomplete request for certification.

c. Reasonable Period of Time

- 1) The categorical reasonable period of time begins on the date that NDEP receives a request for certification, as defined in (4)(b)(1) of this MOU.
- 2) NDEP will send written confirmation to the project proponent and the Corps of the date a request for certification was received that includes all items in (4)(b)(1). Confirmation will be provided no later than 30 days after receipt of the certification request. (40 CFR § 121.6(a))
- 3) The categorical reasonable period of time for NDEP to act on a request for certification that includes all items in (4)(b)(1) is 180 calendar days, except for the circumstance described in (4)(c)(4) below. This includes certification requests for activities that, under certain nationwide and other general permits, do not require the project proponent to notify the Corps.
- 4) In the following circumstances, the categorical reasonable period of time is one year for NDEP to act on requests for certification that include all items in (4)(b)(1):
  - (i) Proposed projects that require a DA permit and preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act (33 U.S.C. § 4321, *et seq.*) by the Corps or another federal agency where the Corps will rely on the EIS to make its permit decision.

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- (ii) Proposed projects that require a DA permit and involve new (not maintenance) dredging or deepening of a navigation channel or dredging and disposal of contaminated sediments.
- 5) If an extension to the categorical reasonable period of time of 180 calendar days is needed, NDEP will notify the Corps by email at least 14 calendar days before the end of the reasonable period of time, if feasible.
- (i) In situations that involve the need to accommodate the NDEP public noticing procedures or a force majeure event, the notification will include the amount of additional time required and a justification or reason, consistent with 40 C.F.R. § 121.6(d).
  - (ii) In situations that do not involve public noticing procedures or a force majeure event, unless a different timeframe is specified in the notification to the Corps, the Corps will normally agree to an extension of 30 calendar days. The Corps agrees to respond in writing to NDEP's extension request within 7 calendar days of receiving the request. However, should the Corps not respond within 7 calendar days, then NDEP may rely on this MOU as the Corps' written agreement to the extension.
  - (iii) The reasonable period of time may be extended more than once.
- 6) The reasonable period of time, including any extension(s), may never exceed one year.

d. Certification Decisions

NDEP will furnish the Corps, by email, a copy of the final decision on each certification request within 3 calendar days of the decision.

e. Failure or Refusal to Act

If the Corps determines NDEP has failed to act on a request for certification within the applicable reasonable period of time, the Corps will notify NDEP and project proponent within 7 calendar days that the certification requirement has been waived.

f. Modification to a Grant of Certification Subject to 40 C.F.R. § 121.10 (a)

- 1) A reasonable period of time will not apply to modifications described in (4)(f)(2-3).

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- 2) Except for proposed modifications of a grant of certification listed in (4)(f)(3)(i-iii), NDEP will notify the Corps by email, indicating the portion(s) of the certification that may need to be modified. The Corps shall respond in writing to NDEP within 7 calendar days either agreeing or disagreeing with NDEP's proposed portions of the certification NDEP seeks to modify. However, should the Corps not respond within 7 calendar days, then the NDEP may rely on this MOU as the Corps' written agreement to modify the requested portion(s) of the certification.
- 3) The following types of modifications are considered minor, and the Corps hereby agrees with NDEP modifying a certification for any of the following:
  - (i) Those that are administrative in nature: ownership changes, typographic or non-substantive edits, time extensions.
  - (ii) Those that affect application of state law only.
  - (iii) Those that change a project's description, but do not require a change in the certification's conditions or environmental analysis.
- 4) In all cases, NDEP will copy the Corps when sending the modified certification to the project proponent.
- 5) Where NDEP determines that a certification request is required rather than a modification in accordance with 40 C.F.R. § 121.10, then this section (4)(f) does not apply, and the procedures set forth in sections (4)(a-e) of this MOU shall apply.

5. RESPONSIBILITIES OF THE PARTIES:

- a. Upon the effective date of this MOU and any amendments hereafter, NDEP and the Corps will train their respective staff to ensure consistent implementation of this MOU.
- b. NDEP and the Corps will set up and maintain email inboxes to facilitate communications. The dedicated inboxes are [ndep401@ndep.nv.gov](mailto:ndep401@ndep.nv.gov) and [spkregulatorymailbox@usace.army.mil](mailto:spkregulatorymailbox@usace.army.mil) respectively.
- c. NDEP and the Corps will, annually and as needed, update and share organization charts, email inboxes, and staff lists with contact information.
- d. The Corps will furnish NDEP by email a copy of the final decision for each DA permit application within 15 calendar days.

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- e. The Corps will furnish NDEP by email a copy of any provisional authorization, sent to a project proponent within 15 calendar days.

6. GENERAL PROVISIONS:

a. Points of Contact:

- 1) The NDEP point of contact is the Certification Program Coordinator of the Bureau of Water Quality Planning, Nevada Division of Environmental Protection.
- 2) The Corps point of contact is the Chief, Regulatory Division, Sacramento District.
- 3) Points of contact are responsible for overall coordination, implementation of, and any revisions to this MOU.

b. Public Records. Pursuant to Nevada Revised Statutes 239.010, and/or the Freedom of Information Act (5 U.S.C. § 552), information or documents may be open to public inspection and copying. The parties have the duty to disclose records unless a particular record is protected from release pursuant to the public records law, regulations, or policies applicable to each party.

c. Revision: Due to the dynamic nature of state and federal law and regulations, NDEP and the Corps agree to review this MOU annually and revise, as necessary. This MOU may be revised by mutual agreement. Any revision shall be through a written amendment signed and dated by authorized representatives for the Corps and NDEP.


d. Severability: If any provision of this MOU or any provision of any document incorporated by reference is stayed or held invalid, such invalidity shall not affect the other provisions of this MOU which can be given effect without the invalid provision if such remainder conforms to the requirements of applicable law and the fundamental purpose of the MOU.

e. Termination: Any signatory may terminate its participation in this MOU, with or without cause, after providing 60 days written notice to the other party.

f. The scope of this MOU is limited to individual requests for certification or requests for certification of programmatic or regional general permits.


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- g. This MOU does not alter the Corps' or the NDEP's obligations under the CWA or any other State law or regulation. If this MOU conflicts with any state or federal law or regulation, the law or regulation is controlling.
- h. This MOU does not limit NDEP's or the Corps' discretion with respect to their regulatory authorities, nor does it imply that the signatories will act in a particular manner.
- i. Nothing in this MOU creates any legal rights, obligations, benefits, or responsibilities, substantive or procedural, enforceable at law or in equity.
- j. Nothing in this MOU infringes upon NDEP's authority to deny requests for certification.
- k. Nothing in this MOU creates a financial obligation between NDEP and USACE.
- l. Effective Date: This MOU takes effect the day after all parties have signed and, unless revised or terminated, shall apply to certification decisions to which the 2023 Rule applies.

  
Jennifer Carr (Jan 24, 2025 14:15 PST)  
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JENNIFER L CARR, PE, CPM, CEM  
Administrator  
Nevada Division of Environmental Protection

24/01/2025

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[Date]

  
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MICHAEL S JEWELL  
Chief, Regulatory Division  
Sacramento District  
U.S. Army Corps of Engineers

27 January 2025

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[Date]

