

## Clean Water Act Section 401 water quality certification

Section 401 of the Clean Water Act is designed to ensure that the federal government does not issue a permit or license for a project that will cause a violation of state water quality standards. States are required to set water quality standards under the Clean Water Act. State water quality standards set the conditions that must exist in order to protect beneficial uses, such as drinking water, a healthy aquatic community, and recreational uses such as swimming and fish consumption.

When a project that will impact waters within Minnesota requires a federal permit or license, the Minnesota Pollution Control Agency (MPCA) reviews the project under Section 401 to ensure that it will not violate the water quality standards that the MPCA has established for that water body.

The federal agency cannot issue the permit or license until the MPCA has either certified that the project will comply with water quality standards, or waived its review. This review of federally permitted projects gives the 401 certification program a unique role in water quality protection.

### When does a project need a 401 Certification?

If a project meets the following four conditions, it triggers the need for an MPCA 401 Certification:

- 1) The project requires federal authorization.** Most commonly, this means the project needs a federal permit or license, such as a dredge and fill permit issued by the U.S. Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act or a Federal Energy Regulatory Commissioner hydropower license. It also includes projects carried out by a federal agency.
- 2) A potential for a discharge exists.** The project must have the potential to create a discharge. This may be a discharge of pollutants, dredge material, or other discharges including an increase or decrease in flow.
- 3) The discharge is into “Waters of the United States”.** The Clean Water Act only applies to a potential discharge to “Waters of the U.S.” Consequently, the MPCA’s 401 Certification is only required if the potential discharge is to a “Water of the U.S”.
- 4) The discharge is from a point source.** The potential discharge must come from a point source, which simply means that it must be from a distinct and discernible source.

A project that meets all four of the requirements cannot move forward without a 401 certification or waiver. If the potential discharge originates in Minnesota, the MPCA has the authority to issue, waive, or deny a Section 401 certification. Once a project has triggered the requirement for a 401 certification, the MPCA is not limited to addressing only the discharge into the Waters of the U.S. The MPCA may look at the impact of the project on any waters or wetlands protected by state water quality standards or other rules, even if those are not subject to the Federal Clean Water Act.

### What is the 401 Certification process?

#### Individual 404 permits

The most common federal projects that require a 401 Certification are individual 404 permits. The MPCA prioritizes reviewing projects with higher potential for impact to water quality. Individual authorizations of small projects, called Letters of Permission, are currently waived; the MPCA focuses on standard individual permits.

The Section 401 Certification uses a joint state/federal application form.<sup>1</sup> When a project proposer applies to the federal agency for a permit, the federal agency reviews the application and ensures the MPCA receives a copy.

The USACE issues a public notice of application for all individual permits. In most cases, the public notice triggers the MPCA's review process, and an internal team will meet to review the basics of the project and determine what certification outcomes are required. For more complex projects, the MPCA's focuses on early involvement and discussion with the federal agency, the applicant, and related agencies. If the MPCA plans to issue a certification, it will issue a separate public notice after it has developed the draft certification. If the MPCA includes project-specific conditions in its certification, they will become conditions of the federal 404 permit upon issuance.

## General 404 permits

The USACE issues Section 404 general permits, which provide coverage for a large number of smaller projects that have the potential for only minor water quality impacts. The MPCA issues a 401 certification that includes conditions that become part of the general permit and apply to all projects authorized under the general permit.

## Other permits

The MPCA may also issue Section 401 Certifications for permits issued by the USACE or U.S. Coast Guard under Sections 9 or 10 of the Rivers and Harbors Act. These projects relate to the placing of obstructions – such as dams, bridges, and bulkheads – in or over navigable waters or excavation and fill in navigable waters. The MPCA also issues Section 401 Certifications for Federal Energy Regulatory Commission hydropower licenses. These actions are less frequent and are handled on a case-by-case basis.

## What are potential 401 Certification outcomes?

**Waive.** A waiver means that the state is waiving its authority to review the project or impose conditions. The MPCA often waives review of small projects that appear to have minimal environmental impacts. Under the Clean Water Act, the USACE can assume that the MPCA has issued a waiver if we do not act within one year of the public notice.

**Certify.** When there is reasonable assurance that a project will comply with applicable water quality standards, the MPCA may certify the project. Most certifications include conditions that must be followed in order to ensure water quality standards are met. Common conditions include compensatory mitigation for the loss of wetlands or streams, use of best management practices to prevent pollutant discharges, and monitoring of wetlands or waters with associated reporting. Like a typical permit, the project proposer must comply with the conditions in the certification, which are incorporated into the federal permit or license.

**Deny.** The MPCA may deny a certification, in which case the federal agency cannot issue the related permit. A denial may mean that the MPCA believes that the project is unlikely to comply with water quality standards, or that there is not enough information to certify the project. The most common reason for a denial is an incomplete state environmental review, and the one year deadline is approaching. The MPCA cannot issue a 401 Certification before completion of environmental review.

## How does the MPCA coordinate within MPCA and with other agencies?

The MPCA 401 program coordinates with other MPCA programs (such as NPDES and stormwater) and other state and federal agencies that have regulatory authority over a particular project (such as the Minnesota Department of Natural Resources, Board of Water and Soil Resources, USACE, etc.). This coordination ensures a common understanding of each project and its potential impacts, helps to identify concerns held by multiple agencies so that the project proposer can ensure that all regulatory concerns are addressed simultaneously, and results in efficient and effective permitting.

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<sup>1</sup> *Joint Application Form for Activities Affecting Water Resources in Minnesota* [http://www.bwsr.state.mn.us/wetlands/forms/MN\\_joint\\_appl\\_form.pdf](http://www.bwsr.state.mn.us/wetlands/forms/MN_joint_appl_form.pdf)