

## **North Dakota Protocol for Clean Water Act Section 401 Certification**

**Authority 33 U.S.C. 1251**

**North Dakota Department of Environmental Quality**

**Division of Water Quality**

**Last Updated, December 2024**

### **Section 1: General (40 CFR §121.1-.3)**

Section 401 (§401) of the Clean Water Act (CWA) authorizes the state of North Dakota to review and certify any federal<sup>1</sup>, federally permitted, or federally licensed project will support the states Standards of Quality for waters of the State (ND Administrative Code: 33.1-16-02.1).

The State of North Dakota's Department of Environmental Quality (NDDEQ) is authorized to issue §401 Clean Water Certifications (certification).

An owner/proponent of a federal, federally permitted or federally licensed project "must" request certification if the activity will or has the potential to discharge to waters of the state.

A federal agency must not begin a project, issue a permit or license for an activity that has the potential to result in a discharge into any waters in North Dakota, without a certification or waiver from the NDDEQ. The certification ensures that that the discharge complies with all applicable water quality requirements. Upon review of a certification request, the state may issue certification, certification with conditions, waive certification, or deny certification.

**Reasonable Time:** The CWA provides that the NDDEQ must act on a certification request "within a reasonable time". The default reasonable time for the NDDEQ is 60 days following a receiving a written request. The NDDEQ may waive certification voluntarily, or by failing to act within the established reasonable time.

In making decisions to certify, certify with conditions, or deny certification, the NDDEQ considers whether the federal project, federally licensed or permitted project will comply with applicable water quality standards, effluent limitations, new source performance standards, toxic pollutants restrictions and other appropriate water quality requirements of state law.

**Public Notice:** A public notice of intent to certify, certify with conditions, or waiver is required. A federal agency public notice that links, requests, or implies a §401 certification is required from the NDDEQ is considered noticed<sup>2</sup>.

In cases where there is no Federal notice<sup>3</sup> the NDDEQ will notice. The NDDEQ notification will be on the department website and distributed to the individuals on the department's list-serve. The NDDEQ will consider all comments for improvement to or denial of clean water certification.

The NDDEQ may but is not required to provide responses to comments.  
The NDDEQ may but is not required to hold a public hearing.

Notification must include:

1. Project description,
2. A time limit to reply of not less than 20 days from date of publication, and
3. A contact within the NDDEQ for questions and/or comments.

**Section 2: Process (40 CFR §121.4-10)**

**Step 1:** A project owner, proponent, or contractor needing a section 401 Clean Water Certification (Certification) must submit a request for a pre-filing meeting or waiver with the NDDEQ at least 30 days prior to submitting a water quality §401 certification request. Send request to:

Peter N. Wax  
North Dakota Department of Environmental Quality  
Division of Water Quality  
4201 Normandy Street  
Bismarck, ND 58503-1324  
[pwax@nd.gov](mailto:pwax@nd.gov)  
701-328-5268

Pre-filing requests must be in the form of a letter. Either US post or Email. Note that documentation of the pre-filing request will be required when applying for Section 401 certification and with any Federal permit or license.

Pre-filing requests must include:

1. A statement requesting “section 401 clean water certification pre-filing meeting or waiver”,
2. The name of the project, list the proponent/owner and the appropriate point of contact,
3. The planned project location, including identification of waters where potential discharges would occur (maps are always good),
5. A list of any other necessary licenses/permits,
6. The project type and a brief description of anticipated project construction and operation activities, and
7. The anticipated work start date and work completion date.

Prefiling meetings may be accepted, waived, or shortened in time at the discretion of the NDDEQ.

The pre-filing meeting may be conducted in person or remotely at the NDDEQ’s discretion.

**Step 2:** After the pre-filing meeting request has been made, a meeting held or waived, a request for certification may be made.

The certification request must be made concurrently with the federal permit or license application.

**Certification requests must:**

1. Be in writing, signed, and dated (US Post or Email) and include,
2. a copy of the federal permit or license application,
3. any readily available water quality-related materials (not already supplied) that is used in the development of the application and separately or in the federal permit/license.
4. a description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity,
5. the specific location of any discharge(s) that may result from the proposed activity,
6. a map or diagram of the proposed activity site,
7. a description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation,
8. the date(s) on which the proposed activity is planned to begin, the approximate date(s) when any discharge(s) may commence, and
9. documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures.

**Step 3:** The NDDEQ will provide certification, certification with conditions, or waive certification within 60 days of receiving a “complete” request and public notice.

***<sup>1</sup>All Federal Agencies including but not limited to the US Army Corps of Engineer, Bureau of Land Management, U.S. Fish and Wildlife Service and Bureau of Reclamation projects.***

***<sup>2</sup>A US Army Corps of Engineers public notice for Section 404 that mention a Clean Water Certification is required is considered noticed.***

***<sup>3</sup>US Coast Guard on Section 10 Waters (i. e., Missouri River) will not notice.***