

STEP 5: WHAT TYPE OF SECTION 401 CERTIFICATION IS REQUIRED FOR THE ACTIVITY?

The fifth step is to identify the type of Section 401 water quality certification required for the activity, and prepare a certification application if required.

A. Definitions

Section 401 of the Clean Water Act states that

"Any applicant for a [f]ederal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into...[waters of the US], shall provide the licensing or permitting agency a certification from the [s]tate in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the...waters [of the US] at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title" (pertaining to effluent standards [33 U.S. Code 1341; Attachment 5-1]).

Section 401 jurisdiction is primarily determined by the classification of waters of the US to be impacted (tribal, outstanding [a.k.a. unique], or other) by an activity. As defined earlier, tribal waters occur on tribal lands. In Arizona, outstanding (unique) waters are designated by ADEQ, under Arizona Administrative Code (AAC) Article 1, Section R18-11-112— Unique Waters (Attachment 5-2). This code identifies criteria that classify a surface water as an outstanding (unique) water, pertaining to flow, water quality, recreational and ecological significance, and association with threatened or endangered species (as listed by USFWS under the Endangered Species Act [AAC Article 1, R18-11-112]). Other waters include all non-tribal and non-outstanding (non-unique) waters.

B. Certification for Activities that Qualify for a Nationwide Permit

As discussed in earlier sections, Section 401 certification requirements vary by NWP. For example, NWP 14, Linear Transportation Projects, carries the following Section 401 certification requirements in Arizona:



- Tribal Waters—Individual certification from the Navajo Nation, Hopi Tribe, Hualapai Tribe, and White Mountain Apache Tribe (WMAT); individual certification from the EPA required for all other Reservations
- Outstanding (Unique) Waters—Individual Certification required
- Other Waters—Conditional Certification

- Impaired Waters—Individual Certification required
- Lakes—Individual Certification required (the list of lakes is on every Nationwide Permit)

1. Certified

Continuing with this example, if a linear transportation project on the WMAT met all NWP 14 criteria/limitations and applicable NWP general and regional conditions, the project would need individual certification from the WMAT.

2. Individual Certification

Continuing with the example of NWP 14, if the linear transportation project was located on a Reservation other than the Navajo Nation, Hopi Tribe, Hualapai Tribe, and WMAT, or would impact an outstanding (unique) or impaired water, a Section 401 Individual Certification would be required for the project.

- On Reservation lands (other than the Navajo Nation, Hopi Tribe, Hualapai Tribe, and WMAT)—an Individual Certification is obtained through application to EPA (application components defined in later sections) and activity-specific Section 401 conditions are defined and enforced by EPA
- On non-Reservation lands—an Individual Certification is obtained through application to ADEQ (application components defined in later sections) and activity-specific Section 401 conditions are defined and enforced by ADEQ

If a NWP PCN submittal is required for the activity, a copy of the EPA or ADEQ Individual Certification approval letter must be forwarded to the Corps.

3. Conditional Certification

Continuing with the example of NWP 14, if the linear transportation project would impact other waters, the project would be Conditionally Certified under Section 401. No certification application would be required, but the project proponent would be required to comply with all Section 401 conditions listed on NWP 14 (defined and enforced by ADEQ) in order for the Conditional Certification to be valid. If the Section 401 conditions cannot be met, an Individual Certification would be required.

C. Certification for Activities that Require an Individual Permit

A Section 401 Individual Certification is required for all activities that require an Individual Permit. As with activities that qualify for NWPs, an Individual Certification for Individual Permit activities on Reservation lands (other than the Navajo Nation, Hopi Tribe, Hualapai Tribe, and WMAT) is obtained through application to EPA, and activity-specific conditions are defined and enforced by EPA. An Individual Certification for Individual Permit activities on non-Reservation lands is obtained through application to ADEQ, and activity-specific conditions are defined and enforced by ADEQ.

A copy of the EPA or ADEQ Individual Certification approval letter must be forwarded to the Corps.

D. Components of an Individual Certification Application

1. Individual Certification Application to the Environmental Protection Agency

EPA has not developed a standard Individual Certification application format. However, all applications must include the components listed in Attachment 5-3, and the general and permit-specific conditions listed in Attachment 5-4. Typically, an Individual Certification application to EPA is prepared as a stand-alone document paraphrasing and/or attaching the data provided in the NWP PCN submittal or Individual Permit application.

2. Individual Certification Application to the WMAT

Currently, there is no specific format or application form required for the WMAT, however there are specific requirements that must be included in a request for a 401 certification. These requirements are contained in Attachment 5-7. The Individual Certification application to the WMAT is prepared as a stand-alone document and mailed to the Tribe.

3. Individual Certification Application to the Navajo Nation

An online application form and application checklist is required for the Navajo Nation. The online application form is found in Attachment 5-8, and the online application checklist is Attachment 5-9.



4. Individual Certification Application to the Hopi Tribe and Hualapai Tribe

Currently, there is no specific format or application form required for the Hopi Tribe and Hualapai Tribe. To obtain specific requirements, please contact the appropriate Tribe.

5. Individual Certification Application to the Arizona Department of Environmental Quality

ADEQ has developed a standard Individual Certification application form, included in Attachment 5-5 (PDF version) and Attachment 5-6 (Word version).

Typically, ADEQ/WQD Application for Clean Water Act Section 401 Certification paraphrases and/or attaches the data provided in a NWP or Individual Permit application. It also typically paraphrases and/or attaches the activity-specific conditions and mitigation measures included in a NWP PCN submittal or Individual Permit application, as well as specifications from the ADOT Standard Specifications for Road and Bridge Construction (ADOT 2008).

All certification requirements applicable to an activity must be reviewed by design personnel and District staff and will be included in the environmental clearance and/or project specifications, as appropriate.

Individual certification applications are ultimately forwarded by EPG to the EPA, ADEQ, WMAT, Navajo Nation, Hopi Tribe or Hualapai Tribe for their consideration and approval.

