



Clean Water Act Section 401 Water Quality Certifications

What activities require a Section 401 water quality certification?

According to the federal Clean Water Act, anyone who wishes to obtain a federal permit for any activity that may result in a discharge to navigable waters of the U.S. must first obtain a state Section 401 water quality certification to ensure the project will comply with state water quality standards. Federal permits include Coast Guard Section 10 permits, Federal Energy Regulatory Commission permits and U.S. Army Corps of Engineers (Corps) Section 404 permits. For example, if someone proposes to discharge dredged or fill material into navigable waters of the U.S., including wetlands, they must obtain a Section 404 permit from the U.S. Army Corps of Engineers and a Section 401 water quality certification from the Minnesota Pollution Control Agency. The Section 404 Corps permit is by far the most common federal permit issued in Minnesota that requires a Section 401 determination from the MPCA.

ON THIS PAGE

What activities require a Section 401 water quality certification?

How MPCA evaluates applications

How to apply for a permit and certification

More information

During 2001-2006, the MPCA predominantly waived its Section 401 determination on projects required to obtain a Section 404 Corps permit, due to budget constraints. In late 2006, however, the MPCA determined it would no longer systematically waive its Section 401 authority on all Section 404 applications, and criteria were established to itemize the type of projects the MPCA would review in the future. In early 2007, the MPCA provided resources for this and the staff is now implementing the criteria. More specifically, the MPCA is now using its Section 401 authority to review Section 404 Corps Individual Permit applications for projects that:

1. Are within areas that directly drain to Impaired Waters (or those close to being impaired), Outstanding Resource Value Waters (ORVWs), or trout waters;
2. Affect more than 3 acres of private project or 5 acres of public road-wetlands within ½ mile of listed Impaired Waters (smaller projects with special concerns may also be considered);
3. Have the potential to inundate or deepen by excavation greater than 2 acres of wetland or otherwise not regulated by the Wetlands Conservation Act (WCA); and
4. Result in typically large wetland fills or drainage (e.g., linear projects, mining activities, multi-purpose roads with new bed alignments, new judicial ditching that have the potential to affect downstream waters, flood impoundment or diversion projects, large development and projects that may have adverse impacts on the watershed)

Projects that fit these criteria are now being reviewed by the MPCA to ensure they will be in compliance with state water-quality standards. In particular, the MPCA intends to ensure that no prudent and feasible alternatives to impacting wetlands are available, the project's impact on wetlands is minimized, and adequate compensatory mitigation will be implemented to protect the designated uses of the wetland and the water quality standards of the affected watershed. Projects in these areas that will be in compliance with the standards will receive an MPCA 401 Certificate, the conditions of which will be incorporated into the Corps 404 Permit and must be adhered to by the Permittee. Projects that will not be in compliance with state water quality standards cannot be certified. The projects for which none of the above criteria applies will likely be waived by the MPCA; however, there may be circumstances

when that will not be the case. On average, the MPCA receives approximately 60-70 applications for a Section 404 Corps Individual Permit each year.

Examples of activities that may require a Section 404 permit and a Section 401 water quality certification include: placing fill or excavating in a wetland, building in a wetland, construction of boat ramps, placement of riprap for erosion protection, construction of dams, dikes or bridges, stream channelization and stream diversion.

How does the MPCA evaluate water quality certification applications?

A Section 401 water quality certification may be granted if the applicant demonstrates that an activity, such as discharge of dredged or fill materials, will not violate Minnesota's water quality standards or result in adverse long-term or short-term impacts on water quality. Such impacts can be direct or cumulative with other indirect impacts.

Minnesota's water quality standards are comprised of four parts:

1. **Beneficial use designations:** Waters in Minnesota have been assigned beneficial use designations. Examples of beneficial uses for all waters include: domestic consumption, aquatic life and recreation, industrial consumption, agricultural, wildlife uses, aesthetic enjoyment and navigation. Additionally, designated uses for wetlands include: maintaining biological diversity, preserving wildlife habitat, and providing recreational opportunities, erosion control, groundwater recharge, low flow augmentation, stormwater retention, stream sedimentation, and aesthetic enjoyment.
2. **Numerical standards and criteria:** Water quality standards and site-specific criteria define the level of water quality that will be protective of a water's designated uses.
3. **Narrative standards:** Water quality standards include general narrative statements that apply to all surface waters, including wetlands. These standards say that water shall be free from deleterious sludge deposits, floating solids, oil, scum, odor-producing materials, substances that are harmful to human, animal or aquatic life, and nutrients in concentrations which may cause algal blooms (massive growths of algae). Narrative standards are nonprescriptive and are intended to protect designated uses. Wetland designated uses shall be protected from chemical, physical, biological, or radiological changes to prevent significant adverse impacts.
4. **Nondegradation policy:** Nondegradation generally refers to the concept of maintaining water quality at its existing condition when the quality is better than applicable water quality standards. In Minnesota, the nondegradation policy is designed to protect all waters from significant degradation from point and nonpoint sources and to maintain existing water uses and aquatic habitats. The wetland mitigation sequence must be satisfied by an applicant in order to maintain nondegradation of wetland designated uses. The wetland mitigation sequence incorporates the following principles in descending order of priority:
 1. avoid the impact altogether by not taking a certain action or parts of an action;
 2. minimize the impact by limiting the degree or magnitude of the action and its implementation, and by taking affirmative actions to rectify the impact and reduce or eliminate the impact over time; and
 3. mitigate the unavoidable impact to the designated uses of a wetland by compensation. Compensatory mitigation shall be accomplished in the following descending priority order for replacement:
 1. restoration of a previously diminished wetland; and
 2. creation of a wetland where one previously did not exist.

In addition, greater protection is given to a category of waters listed as Outstanding Resource Value Waters (ORVW). These waters have received this designation because of their exceptional recreational, cultural, aesthetic, or scientific resource value. Included in the list of ORVWs are waters within the Boundary Waters Canoe Area Wilderness, Voyageur's National Park, designated scientific and natural areas, wild, scenic and recreational river segments, Lake Superior, portions of the Mississippi River, lake trout lakes, and calcareous fens (a rare wetland plant community).

The MPCA considers the following when evaluating Section 401 certification applications:

- **Compliance:** Applicants must comply with the Clean Water Act and state water quality standards and rules. For example, non-water dependent projects do not need to be located in wetlands or other waters to fulfill their basic project purpose. Examples of non-water dependent projects include shopping centers, parking lots, roads, and housing developments. No person may cause or allow a physical alteration which has the potential for a significant adverse impact on one or more designated uses of a wetland, unless there is not a prudent and feasible alternative that would avoid impacts to the designated uses of the wetland. Prudent and feasible alternatives that do not involve wetlands are presumed to be available unless clearly demonstrated otherwise by the permit or certification applicant.
- **Fills, drainage, excavation or inundation of wetlands:** All wetlands are included in the definition of waters of the state and thus are protected by water quality standards. Wetland impacts resulting from fill, drainage, excavation or inundation of wetlands may be allowed provided they comply with the wetland mitigation sequence to the Agency's satisfaction of adequacy.

How do I apply for a Section 404 permit and a Section 401 certification?

You should contact the appropriate Local Unit of Government for a Combine Project Application form or the Corps District Office so the permitting process for the type and scope of your project can be determined. The applicant submits the proposed project location and details of information to satisfy the federal requirements and state water quality requirements to the Corps. If an individual permit is warranted, the Corps incorporates this information into a public notice that announces the official receipt of the application, describes the project and serves as the notice for the Section 401 water quality certification. If the project proposal qualifies for a Corps General Permit or Letter of Permission (GP/LOP) which the MPCA has precertified, no further certification action by the MPCA is required.

The public notice is sent to the MPCA, U.S. EPA, the U.S. Fish and Wildlife Service, Minnesota Department of Natural Resources, and others on the mailing list. The public may comment directly to the Corps on any aspect of the project during the comment period. The public may comment directly to the MPCA on any water quality issue.

If the MPCA grants a 401 water quality certification, the Corps will complete the public interest review before granting or denying the Section 404 permit. Any conditions required to meet water quality standards included in the Section 401 water quality certification become conditions of the Section 404 permit. If the MPCA denies the Section 401 water quality certification, the Corps must then deny the Section 404 permit.

- [Combined Project Application that the MPCA uses for a 401 Water Quality Certification application](#)
- [Flow Chart Illustrating 401 Certification Process](#)

More Information

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