

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
THE REGIONAL WATER QUALITY CONTROL BOARDS
AND
THE REGULATORY DIVISIONS OF THE LOS ANGELES, SACRAMENTO, AND
SAN FRANCISCO DISTRICTS OF THE
UNITED STATES ARMY CORPS OF ENGINEERS

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 (Corps) 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 water quality certification (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)).

The State Water Resources Control Board (State Water Board) and the Regional Water Quality Control Boards (collectively Regional Water Boards and individually Regional Water Board) (the State Water Board and Regional Water Boards jointly are the “Water Boards”), as the certifying authorities, determine whether a specific discharge resulting from an activity that requires a federal permit or license needs a certification. Certifications are issued by the Regional Water Board where the discharge takes place, unless the discharge falls under the jurisdiction of more than one Regional Water Board or involves an appropriation of water, a hydroelectric facility where the proposed activity requires a Federal Energy Regulatory Commission (FERC) license or amendment to a FERC license, or any other diversion of water for beneficial use, in which case the State Water Board takes jurisdiction. The “certifying Water Board” is the board with the primary authority for taking all actions connected with requests for certification, including issuance and denial of certification.

In addition to the CWA’s requirements, project proponents must comply with California laws, regulations, plans and policies, including the Porter-Cologne Water Quality Control Act, applicable provisions of the California Code of Regulations¹ (CCR), and the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Dredge or Fill Procedures). The California Code of Regulations (CCR § 3856) and the Dredge or Fill Procedures list items required to be submitted with

¹ Unless otherwise indicated, all further references to the CCR are to title 23.

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applications, and define procedures for the submittal, review, and approval of applications for water quality certifications and waste discharge requirements for dredge or fill activities.

On April 28, 2023, the Water Boards and the Corps' Los Angeles, Sacramento, and San Francisco Districts' Regulatory Divisions (collectively, the Corps Districts and individually, Corps District) executed a Memorandum of Understanding (MOU) concerning reasonable periods of time to act on requests for certifications. The MOU was intended to improve coordination and implementation of the United States Environmental Protection Agency's (USEPA) July 13, 2020, CWA Section 401 Certification Rule (2020 Rule).

On September 27, 2023, the USEPA finalized a rule, 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.);
- c. USACE Regulatory Program regulations (33 C.F.R. Parts 320-332);
- d. Porter-Cologne Water Quality Control Act (Cal. Wat. Code § 13000, et seq.);
- e. State Water Board certification regulations (CCR § 3830, et seq.);
- f. Dredge or Fill Procedures (CCR, § 3013); and
- g. Permit Streamlining Act (Cal. Gov. Code, § 65920, et seq.).

3. PURPOSE:

The purpose of this MOU is to enable the Corps Districts and the Water Boards to work together more effectively and efficiently by establishing regional procedures and timeframes for certification under section 401 of the CWA for DA permits. The procedures and timeframes are intended to improve predictability, consistency, and transparency and allow the Water Boards to comply with state laws and regulations.

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4. UNDERSTANDINGS OF THE PARTIES:

a. Pre-Filing/Pre-Application

1) The certifying Water Board or Corps District will invite the other agency to any planned project pre-filing or pre-application meeting (in-person, virtual, or on-site). Email invitations 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 District will normally invite the certifying Water Board 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 District to coordinate the site visit date or time in advance with the certifying Water Board, nor does it obligate the certifying Water Board to attend such site visit.

3) The Corps District will copy the certifying Water Board on all final approved jurisdictional determinations, preliminary jurisdictional determinations, and aquatic resource delineation verifications.

4) The Corps District will copy the certifying Water Board on all determinations of no permit required.

b. Request for Certification

1) The Water Boards have determined a request for certification shall include items listed in 40 C.F.R. § 121.5(a) and the California Code of Regulations (CCR § 3856), and, where applicable, all items required by the Dredge or Fill Procedures (sections IV.A and IV.B), which are listed in the Water Board's Checklist for Contents of a Complete Dredge or Fill Application on the State Water Board's 401 Program Website.

2) If the certifying Water Board finds a request for certification does not include all the items in (4)(b)(1), it will notify the project proponent and the Corps District in writing no later than 30 calendar days after receipt of the incomplete request for certification.

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c. Reasonable Period of Time

- 1) The reasonable period of time begins on the date that the certifying Water Board office receives a request for certification that includes all of the items in (4)(b)(1).
- 2) The certifying Water Board will send written confirmation to the project proponent, the Corps District, and the USEPA of the date a request for certification that includes all of the times in (4)(b)(1) was received no later than 30 calendar days after receipt of the certification request. (40 C.F.R. § 121.6(a); CCR § 3835(c).)
- 3) Except for the circumstances described in (4)(c)(4) below, the categorical reasonable period of time for the certifying Water Board to act on a request for certification is 180 calendar days. This includes certification requests for activities that, under certain nationwide permits and other general permits, do not require the project proponent to notify the Corps District.
- 4) The categorical reasonable period of time is one year for the certifying Water Board to act on requests for certification in the following circumstances:
 - (i) Proposed projects that require a DA permit and preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act (42 U.S.C. § 4331, *et seq.*) by the Corps District or by another federal agency where the Corps District will rely on the EIS to make its permit decision.
 - (ii) Proposed projects where California Environmental Quality Act (CEQA) (Public Resources Code § 21000, *et seq.*) requires preparation of an Environmental Impact Report, which is not complete when the certification request is received by the certifying Water Board.
 - (iii) 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.
 - (iv) Proposed projects that require a DA permit and are processed by the State Water Board's Division of Water Rights.
- 5) If an extension to the categorical reasonable period of time of 180 calendar days is needed, the certifying Water Board will notify the Corps District by email at least 14 calendar days before the end of the reasonable period of time if feasible.

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(i) In situations that involve the need to accommodate the certifying Water Board's 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 District, the Corps District will normally agree to an extension of 30 calendar days. The Corps District agrees to respond in writing to the certifying Water Board's extension request within 7 calendar days of receiving the request. However, should the Corps District not respond within 7 calendar days, then the certifying Water Board may rely on this MOU as the Corps District's 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

The certifying Water Board will furnish by email the Corps District a copy of the final decision on each certification request within 3 calendar days of the decision (CCR § 3859).

e. Failure or Refusal to Act

If the Corps District determines the certifying Water Board has failed to act on a request for certification within the applicable reasonable period of time, the Corps District will notify the certifying Water Board and project proponent within 7 calendar days that the certification requirement has been waived in accordance with 40 C.F.R. § 121.8.

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).

2) Except for proposed modifications of a grant of certification listed in (4)(f)(3)(i-iii), the certifying Water Board will notify the Corps District by email, indicating the portions of the certification that may need to be modified. The Corps District shall respond in writing to the certifying Water Board within 7 calendar days

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either agreeing or disagreeing with the certifying Water Board's proposed portions of the certification the certifying Water Board seeks to modify. However, should the Corps District not respond within 7 calendar days, then the certifying Water Board may rely on this MOU as the Corps District's written agreement to modify the requested portions of the certification.

3) The following types of modifications are considered minor and the Corps Districts hereby agree with the certifying Water Board 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 under CEQA.

4) In all cases, the certifying Water Board will copy the Corps District when sending the modified certification to the project proponent.

5) Where the certifying Water Board determines that a certification request is required rather than a modification in accordance with 40 C.F.R. section 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, the Water Boards and the Corps Districts will train their respective staff to ensure consistent implementation of this MOU.

b. The Water Boards and Corps Districts will set up and maintain email inboxes to facilitate communications.

c. The Water Boards and Corps Districts will, annually and as needed, update and share organization charts, email inboxes, and staff lists with contact information.

d. The Corps District will furnish by email the certifying Water Board a copy of the final decision for each DA permit application within 15 calendar days.

e. The Corps District will copy the certifying Water Board on any provisional notification sent to a project proponent within 15 calendar days.

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6. GENERAL PROVISIONS:

a. Points of Contact:

1) The Water Boards point of contact will be the Watersheds and Wetlands Section Chief in the State Water Board's Division of Water Quality.

2) The Corps Districts point of contact will be the Chief, Regulatory Division, Sacramento District.

3) Points of contact are responsible for overall coordination, implementation of, and any revisions to this MOU.

b. Revision: Due to the dynamic nature of state and federal law and regulations, the Corps Districts and the Water Boards 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 Districts and Water Boards.

c. Disputes: Issues concerning implementation of this MOU may be addressed through a dispute resolution process (see Appendix A).

d. Termination: Any signatory may terminate its participation in this MOU, with or without cause, after providing 60 days written notice to the other signatories. The State Water Board may terminate the MOU on behalf of all the signatory Water Boards.

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

f. This MOU does not alter the Corps Districts' or the Water Boards' obligations under the CWA, Porter-Cologne Water Quality Control Act, CEQA, or any other law or regulation. If this MOU conflicts with any state or federal law or regulation, the law or regulation is controlling.

g. This MOU does not limit the Water Boards' or the Corps Districts' discretion with respect to their regulatory authority, nor does it imply that the signatories will act in a particular manner.

h. Nothing in this MOU creates any legal rights, obligations, benefits, or responsibilities, substantive or procedural, enforceable at law or in equity.

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i. Nothing in this MOU infringes upon the Water Boards' authority to deny requests for certification.

j. 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. The April 28, 2023, MOU, unless revised or terminated, shall apply to any certification decisions to which the 2020 Rule applies.



ERIC OPPENHEIMER
Executive Director
State Water Resources Control Board

April 22, 2024

[Date]

VALERIE QUINTO
Executive Officer
North Coast
Regional Water Quality Control Board

[Date]

EILEEN WHITE
Executive Officer
San Francisco Bay
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[Date]

RYAN E. LODGE
Executive Officer
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Regional Water Quality Control Board

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SUSANA ARREDONDO
Executive Officer
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PATRICK PULUPA
Executive Officer
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April 29, 2024

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April 22, 2024

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April 22, 2024

[Date]

VALERIE QUINTO
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Ryan E. Lodge
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April 22, 2024

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Susana Arredondo
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April 23, 2024

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JAYNE JOY
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DAVID J CASTANON
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SUBJECT: Certification under Section 401 of the Clean Water Act for Activities Requiring Department of the Army Permits

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Water Boards

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April 12, 2024

[Date]

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Appendix A: Dispute Resolution

Any disagreements or disputes regarding implementation of this MOU that cannot be resolved by staff of the Corps District and staff of the certifying Water Board will be addressed through a dispute resolution process available under this MOU and as described in this section. In keeping with the spirit of collaboration, nothing in this section precludes any other traditional or nontraditional approaches to dispute resolution.

Dispute resolution is intended to be expeditious, practical, respectful, and accessible. All methods of dispute resolution, including elevation, are available at any point on a voluntary basis. Elevation, as necessary, is encouraged. The elevation process is intended to help resolve issues quickly and to maintain constructive working relationships.

Elevation Process

The Corps District and certifying Water Board should communicate pending problems and potential issues as early and often as possible. If an elevation is triggered, but resolution is reached prior to an elevation meeting, the Corps District or the certifying Water Board will send written notification to the other agency that the issue is resolved, and the elevation meeting is not required. Completion of the dispute resolution process, including mid-level and executive-level elevation, should be within 30 calendar days of receipt of written notification to initiate elevation.

Level of Elevation

The Corps District and certifying Water Board should strive to resolve disputes at the lowest level possible. Unresolved disputes shall be elevated one level at a time and include the following representatives at each level (legal representation to be included as necessary):

Level 1: Staff and first level supervisors from the Corps District and the certifying Water Board.

Level 2: Regulatory Division Branch Chiefs from the Corps District and Program Managers from the certifying Water Board.

Level 3: Regulatory Division Chiefs from the Corps District, Assistant Executive Officer or Deputy Director from the certifying Water Board, and if not already included as the certifying Water Board, the State Water Board as facilitator.

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Representatives for Elevation

When the Corps District or the certifying Water Board initiate an elevation, the Corps District and the certifying Water Board should provide the name(s) and contact information of the personnel who have been identified to speak for their respective agency.

Briefing Summary

If resolution at Level 1 or 2 is not successful and an elevation to Level 3 appears likely, the certifying Water Board and the Corps District shall coordinate to develop a briefing summary and schedule the Level 3 elevation meeting. The briefing summary shall briefly summarize the dispute, the principal facts or issues on which there is agreement between the agencies, and the principal facts or issues that are disputed. The certifying Water Board will send the briefing summary to the Level 3 representatives along with a draft agenda at least 5 calendar days prior to the elevation meeting.