

401 WATER QUALITY CERTIFICATION FREQUENTLY ASKED QUESTIONS

What is section 401 Water Quality Certification and how do I know if I need it?

Section 401 of the Clean Water Act requires that any person applying for a federal permit or license, which may result in a discharge of pollutants into waters of the United States, must obtain a state water quality certification that the activity complies with all applicable water quality standards, limitations, and restrictions. No license or permit may be issued by a federal agency until certification required by section 401 has been granted. Further, no license or permit may be issued if certification has been denied.

The following permits or licenses are subject to section 401 of the Clean Water Act:

- Clean Water Act section 404 permits and authorizations;
- Permits issued under sections 9 and 10 of the Rivers and Harbors act;
- Licenses for hydroelectric power plants issued by the Federal Energy Regulatory Commission under the Federal Power Act; and
- Licenses issued by the Nuclear Regulatory Commission.

Water quality standards, according to the Clean Water Act (40 CFR 131), include:

- **Beneficial Uses** - defined as the uses of water necessary for the survival or wellbeing of man, plants, and wildlife. Beneficial uses are designated in the Basin Plan for water bodies within the region. Examples include agricultural supply, water contact recreation, wildlife habitat, and warm freshwater habitat.
- **Water Quality Objectives** - are the constituent concentrations, levels, or narrative statements (aka., water quality standards or criteria) representing a quality of water that supports a particular use. When water quality objectives are met, water quality will generally protect the designated beneficial use.
- **Antidegradation Policy** - consists of the following three principles to protect water bodies: the first principle requires all existing in-stream water uses shall be maintained and protected; the second principle protects waters whose water quality exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water; and the third principle requires maintenance and protection of all high quality waters which constitute an outstanding national resource.

If you have a waters of the United States (e.g., creek, drainage with or without water flow, wetland) on your property, and you intend to dredge or fill waters of the United States (waters of the U.S.), then 401 water quality certification is necessary. If you are not sure if you have waters of the U.S. on your property, consult an expert; do not assume that you do not, as you may be subject to civil and criminal penalties if a waters of the U.S. is dredged or filled without authorization.

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I have been told that the surface water on my property is “isolated”. What does this mean and do I need a 401 certification?

The *Solid Waste Association of Northern Cook Counties v. United States Corps of Engineers* (hereinafter “SWANCC”), U.S. Supreme Court decision was issued on January 9th, 2001 and addressed a section of the Clean Water Act known as the “Migratory Bird Rule”. As a result of the court ruling, certain waters of the State are no longer considered waters of the U.S. Please contact the U.S. Army Corps of Engineers (ACOE) to determine if a surface water body is “isolated” in accordance with the SWANCC ruling. If the ACOE determines that the water body is isolated, and you are not subject to a federal permit, you do not need to apply for 401 certification; however, this does not exempt you from complying with state regulations.

The SWANCC decision does not affect the State’s authorities under the California Water Code to regulate discharges to isolated, non-navigable waters of the state.

If anything definitive can be said about the SWANCC decision, it is that the Supreme Court believes regulating inland waters, including isolated wetlands, vernal pools, etc., are the primary (and probably now the exclusive) province of the state. California has numerous authorities that require these waters to be protected. None of those state authorities are affected by the U.S. Supreme Court’s decision. Accordingly, the SWANCC decision has no impact upon the San Diego Water Board’s authority to act under state law.

The State protects and regulates isolated waters through the California Water Code. California Water Code section 13260 requires “any person discharging waste, or proposing to discharge waste, within any region that could affect the waters of the state to file a report of discharge (an application for waste discharge requirements).” [Water Code section 13260(a)(1) (emphasis added).]

The term “waters of the state” is defined as “any surface water or groundwater, including saline waters, within the boundaries of the state.” [Water Code section 13050(e).] The U.S. Supreme Court’s ruling in SWANCC has no bearing on the Porter-Cologne definition. While all waters of the

United States that are within the borders of California are also waters of the state, the converse is not true—waters of the United States are a subset of waters of the state. Thus, since Porter-Cologne was enacted, California always had and retains authority to regulate discharges of waste into any waters of the state, regardless of whether the ACOE has concurrent jurisdiction under section 404. The fact that often Water Boards opted to regulate discharges to, e.g., vernal pools, through the 401 program in lieu of or in addition to issuing waste discharge requirements (WDRs) (or waivers thereof) does not preclude the regions from issuing WDRs (or waivers of WDRs) in the absence of a request for 401 certification.

Under state law, the duty to file a report of waste discharge is mandatory; if the project site has a surface water that is “isolated” you **must apply** for and obtain waste discharge requirements prior to impacting that water body.

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What was the Rapanos case about? How does it affect my application for water quality certification?

The *Rapanos v. the United States* (hereinafter “*Rapanos*”) U.S. Supreme Court decision was issued on June 19, 2006. This decision addressed whether wetlands adjacent to, and have a hydrologic connection with, non-navigable tributaries of traditional navigable waters are waters of the U.S. The significance of this decision is that the ACOE may now establish jurisdiction of wetlands under one of two standards:

- If the water body is “relatively permanent” and its adjacent wetlands directly abut that water body.
- If a water body, in combination with all wetlands adjacent to that water body, has a “significant nexus” with traditional waters of the U.S. (The effect on the physical, chemical, and biological integrity of the traditional navigable water must be significant.)

Due to these new analytical standards, it may be more difficult to document and justify ACOE jurisdiction if an ephemeral tributary has few or no adjacent wetlands. As with the *SWANCC* decision, the *Rapanos* decision has no impact upon the San Diego Water Board’s authority to protect waters of the state or to act under state law.

Where can I find the 401 application?

Applications can be picked up at the San Diego Water Board office, downloaded from the San Diego Water Board’s web site, or be received via fax. To request an application by fax, please contact the San Diego Water Board at 619-519-1990. Applications may be picked up at the San Diego Water Board office at 2375 Northside Drive, Suite 100; San Diego, CA 92108. Applications can be found online at:

http://www.waterboards.ca.gov/sandiego/water_issues/programs/401_certification/index.shtml.

Please be aware that each Regional Water Board and the State Water Resources Control Board (State Water Board) have different application forms for 401 certification. It is your responsibility to use the correct form. If an application is submitted using another region’s form, we may ask you to complete this region’s form as well; this may result in delays in processing your application. Also, failure to completely and accurately respond to all items on the application form may result in your application being determined incomplete and can result in delays in processing your application. Additionally, be aware that the application form is updated regularly; use of an outdated application form will result in processing delays.

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What are the timelines for processing a 401 application?

The San Diego Water Board has 30 days following receipt of an application to notify the applicant if their application is complete or incomplete. If the application is incomplete, the San Diego Water Board has another 30 days to review submitted material and determine if the application is complete. The applicant does not have a time line for submittal of materials, but delays in submitting the required material can result in delays in processing the 401 application. If the San Diego Water Board fails to notify the applicant regarding the completeness of an application, the application is deemed complete 30 days following receipt by the San Diego Water Board, per the Permit Streamlining Act.

Once an application has been deemed complete, the San Diego Water Board can request materials to clarify impacts, mitigation, or other aspects of the application. The San Diego Water Board has between 60 days and 1 year in which to make a decision. If processing and review of the 401 application will take more than 60 days, the San Diego Water Board may request additional time from the ACOE or, if an extension is denied, issue a Denial without Prejudice. This generally occurs when an applicant has not supplied requested information or the project is complex and issues have not been resolved. A denial without prejudice is not a reflection on the technical aspect project, but a means to stop the clock until the required information has been provided.

The San Diego Water Board also has a public comment period that lasts a minimum of 21 days. The Public Notice for 401 applications and recently issued 401 certifications are posted at:

http://www.waterboards.ca.gov/sandiego/water_issues/programs/401_certification/index.shtml

What are the regulatory requirements for an application to be determined complete?

1. Completely filled out application form;
2. Full, technically-accurate description, including the purpose and final goal of the entire activity [23 CCR section 3856(b)];
3. Complete project description [23 CCR section 3856(h)(1-8)] including:
 - Jurisdictional Wetland Delineation,
 - Mitigation and Monitoring Plans,
 - Any other documents relating to water quality and beneficial uses, and
 - Grading Plans and/or final conceptual engineering drawings and detailed maps;
4. A detailed description of all measures to be taken to prevent the proposed project from adversely affecting the water quality and beneficial uses of the water body(ies) to be impacted;
5. Identification of the federal license/permit (i.e., agency, type, NWP number, file number) [23 CCR section 3856(c)];

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6. Copies of federal application, notification, agency-applicant correspondence, or signed statement that none is applicable [23 CCR section 3856(d)];
7. Copies of any final or (if not final) draft federal, state, or local licenses, permits, or agreements concerning the project [i.e. DFW Streambed Alteration Agreement]. If none are available, a list of those being sought. [23 CCR section 3856(e)];
8. A draft or final California Environmental Quality Act (CEQA) document. [23 CCR section 3856(f)]. Note: Per the Permit Streamlining Act, final CEQA documentation cannot be required for a complete application; however, per CEQA, a final document must be reviewed before the San Diego Water Board can take an action on your project; and
9. The correct fee deposit. [23 CCR section 3856(g)].

Please note that this information is required for your application to be determined complete. Once the San Diego Water Board has determined that an application is complete, it may request further information from the applicant. Such information must clarify, amplify, correct, or otherwise supplement the contents of a complete application in order for the certifying agency to determine whether a certification should be issued. Supplemental information may include evidence of compliance with appropriate requirements of a water quality control plan.

What other permits might be necessary for impacting waters of the U.S.?

The California Coastal Commission. The California Coastal Act of 1976 requires any person proposing to undertake development in the Coastal Zone to obtain a Coastal Development Permit. The Coastal Zone extends inland anywhere from approximately 500 yards in developed urban areas to five miles in undeveloped areas. If projects are proposed in or adjacent to existing or historic coastal wetland areas, they will require Coastal Development Permits issued by the Coastal Commission. To find out if your project is in the Coastal Zone you should contact the planning division of your local government.

California Department of Fish and Wildlife. The Fish and Game Code section 1602 requires any person, state or local governmental agency, or public utility to notify the California Department of Fish and Wildlife (DFW) before beginning any activity that will:

- substantially divert or obstruct the natural flow of any river, stream or lake; or
- substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake; or
- deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake.

You should contact the Regional DFW office in the county where the activity is to take place for notification requirements of the DFW's Lake or Streambed Alteration Program. On-line information can be found at:

<http://www.dfg.ca.gov/habcon/1600/forms.html>

If DFW determines that the activity may substantially adversely affect fish and wildlife resources, a Lake or Streambed Alteration Agreement will be required. The Lake or Streambed Alteration Agreement must comply with CEQA.

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U.S. Army Corps of Engineers. The regulatory authority of the U.S. Army Corps of Engineers (ACOE) for stream projects is based on section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. Section 404 of the Clean Water Act requires ACOE authorization for work involving placement of fill or discharge of dredged materials into any "waters of the United States". Section 10 of the Rivers and Harbors Act requires ACOE authorization for work or structures in or affecting "navigable waters". ACOE jurisdiction extends up to the ordinary high water line for non-tidal waters and up to the line of high tide (for dredge or fill), or mean high water line (for work or structures) for tidal waters.

U.S. Fish and Wildlife Service. The U. S. Fish and Wildlife Service (USFWS) reviews and comments on projects pursuant to the Fish and Wildlife Coordination Act, the Clean Water Act, and the National Environmental Policy Act. The USFWS's comments focus on the effects of projects on all fish and wildlife resources and the habitats that support those resources. Such projects may be, but not limited to, flood control, urban and industrial development, habitat restoration activities, etc. The USFWS also reviews projects for their affects pursuant to the Federal Endangered Species Act (Act). The Act, through section 9, prohibits the take of any species listed as threatened or endangered pursuant to the Act without a specific exemption. The term "take" is broadly defined and if "take" is going to occur, a permit from the USFWS is required. If there is another Federal Agency involved then exemption from the "take" provisions of the Act can be achieved through a section 7 process. If there is no Federal involvement than a permit pursuant to section 10, also known as a Habitat Conservation Plan, will be needed.

National Marine Fisheries Service. This is the federal agency responsible for the conservation and management of the nation's living marine resources. Projects or activities that may affect marine fish and related habitat within National Marine Fisheries Service (NMFS) jurisdiction are reviewed for any potentially harmful effects. These evaluations are conducted under the authorities of the Endangered Species Act (ESA), Magnuson-Stevens Fishery Conservation and Management Act, Fish and Wildlife Coordination Act, and the National Environmental Policy Act. The purpose of reviews conducted by NMFS is to ensure that sensitive populations of marine and anadromous fish (such as salmon and steelhead), as well as the aquatic and riparian habitats that supports these fish, can survive and recover in the presence of human activities. Through these reviews, the need to conserve and protect fish and habitat is balanced with the need to responsibly utilize natural resources for economic and other purposes. The types of projects and activities of interest to NMFS include streambank stabilization, streambed alteration, habitat restoration, flood control, urban and industrial development, and water resource utilization. When projects or activities require a federal permit, such as a Clean Water Act section 404 permit from the Army Corps of Engineers, then NMFS conducts a consultation with the federal agency under section 7 of the ESA. When there is no federal involvement, then for projects that incidentally "take" a listed species, a permit under section 10 of the ESA is required.

There may also be regulatory requirements associated with city and county ordinances. The applicant is responsible for knowing all the applicable rules and regulations, and for compliance with them.

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What are the fees for processing a 401 application?

A current fee schedule and fee calculator can be found at:

http://www.waterboards.ca.gov/rwqcb9/water_issues/programs/401_certification/docs/401c/dredgefillfeecalculator-v13b.xlsm

Where can I get a copy of section 401 Clean Water Act?

Copies of the current regulations can be found at:

<http://www.epa.gov/owow/wetlands/regs/sec401.html>

Who should I contact with questions regarding 401 certification?

Name	Program Assignment	Contact Information
Kelly Dorsey Senior Engineering Geologist	Program Manager	(619) 521-3357 Kelly.Dorsey@waterboards.ca.gov
Michael Porter Engineering Geologist	Caltrans, SANDAG, San Diego County Transportation Projects	(619) 521-3967 Mike.Porter@waterboards.ca.gov
Darren Bradford Environmental Scientist	Orange, Riverside Counties and Camp Pendleton	(619) 521-3356 Darren.Bradford@waterboards.ca.gov
Alan Monji Environmental Scientist	San Diego County – North*	(619) 521-3968 Alan.Monji@waterboards.ca.gov
Lisa Honma Environmental Scientist	San Diego County – South*	(619) 521-3367 Lisa.Honma@waterboards.ca.gov

*San Diego County – North is defined as the area north of the San Diego River Watershed to Camp Pendleton, while San Diego County – South is defined as the area including the San Diego River Watershed south to the border.