

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: Reasonable Periods of Time to Act on Certification Requests under Section 401 of the Clean Water Act for Department of the Army Permits

1. BACKGROUND:

The U.S. Army Corps of Engineers (USACE) 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) and for work or structures in or affecting navigable waters of the United States under section 10 of the Rivers and Harbors Act. Section 401(a)(1) of the CWA (33 U.S.C. § 1341(a)(1)) requires a 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 authority, determines 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<sup>1</sup> must comply with California laws, regulations, plans and policies, including the Porter-Cologne Water Quality Control Act, applicable provisions of the California Code of Regulations<sup>2</sup> (CCR), and the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Dredge or Fill Procedures). These California state law requirements establish procedures and timeframes for Water Boards’ action. Per CCR

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<sup>1</sup> Project proponent means the applicant for a license or permit or the entity seeking certification.

<sup>2</sup> Unless otherwise indicated, all further references to the CCR are to title 23.

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§ 3835 and the Dredge or Fill Procedures, the certifying agency has 30 days to review initial requests for certification and determine whether the certification request is complete.<sup>3</sup> Where the project proponent must submit additional information per the Dredge or Fill Procedures, the Water Boards have an additional 30 days to review the subsequent submittal and determine whether the certification request is complete. The Water Boards must also comply, as applicable, with California's Permit Streamlining Act, Cal. Gov. Code, § 65920, et seq., which establishes timelines for approving or disapproving a development project dependent on whether the Water Board is the lead or responsible agency under the California Environmental Quality Act (CEQA) and the adoption of the applicable CEQA document or the date on which the complete certification request was received.

In addition to procedures and timeframes listed above, the Water Boards are required to comply with public noticing requirements. CCR § 3858 requires the Water Boards to provide public notice of a request for an individual certification at least 21 days before taking certification action on the request. If a request for certification also includes discharges to non-federal waters and waste discharge requirements are issued alongside or with the certification action, California Water Code § 13167.5 requires a draft of the respective requirements be made available for public comment for a minimum of 30 days prior to adoption. In addition, the Regional Water Board must adopt waste discharge requirements at a duly noticed meeting. (Cal. Wat. Code, § 13323, subd. (a).)

On August 19, 2021, the U.S. Environmental Protection Agency Assistant Administrative for the Office of Water (EPA-OWA) and the Department of the Army, Acting Assistant Secretary of the Army (Civil Works) issued a joint memorandum titled Clean Water Act Section 401 Certification Implementation (Section 401 Memorandum). The Section 401 Memorandum and its enclosures provide guidance to United States Environmental Protection Agency (USEPA) and USACE field offices regarding certification process under Section 401 of the CWA associated with DA permits to promote improved implementation of USEPA's 2020 regulations regarding CWA Section 401 certifications (2020 Rule) and address implementation challenges with the 2020 Rule. Among other things, the Section 401 Memorandum encouraged USACE field staff "...to develop Memorandums of Understanding with certifying authorities, including with respect to setting longer reasonable periods of time."

As described above, California state laws and regulations impose additional requirements and timeframes that regularly exceed the 60-day timeframe described in the USACE regulations at 33 Code of Federal Regulations (C.F.R.) § 325.2(b)(1), Regulatory Guidance Letter (RGL) 19-02, and Section 401 Memorandum.

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<sup>3</sup> California Code of Regulations, title 23, Chapter 28 allows the permitting authority to request information in addition to what is required for a certification request as defined by federal regulations.

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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. USACE RGL 19-02 dated August 7, 2019;<sup>4</sup>
- e. Joint USEPA-OWA/ASA(CW) Memo, Clean Water Act Section 401 Certification Implementation dated August 19, 2021;
- f. Porter-Cologne Water Quality Control Act (Cal. Wat. Code § 13000, et seq.);
- g. State Water Board certification regulations (CCR § 3830, et seq.);
- h. Dredge or Fill Procedures (CCR, § 3013); and
- i. Permit Streamlining Act (Cal. Gov. Code, § 65920, et seq.).

3. PURPOSE:

The purpose of this Memorandum of Understanding (MOU) is to enable the USACE Los Angeles, Sacramento, and San Francisco Districts' Regulatory Divisions (collectively, the Corps and individually, Corps District) and the Water Boards to work together more effectively and efficiently by establishing regional procedures and alternative timeframes for water quality certification (certification) under Section 401 of the CWA for DA permits. The procedures and timeframes are intended to increase predictability and transparency and improve coordination and consistency, and allows the Water Boards to comply with state law and regulations.

This MOU establishes reasonable periods of time, and extensions of those periods of time, for the Water Boards to act on certification requests for certain categories of activities, taking into consideration the complexity of the proposed project, the nature of any potential discharge, and/or the potential need for additional study or evaluation of water quality effects from the discharge.

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<sup>4</sup> The Section 401 Memorandum supersedes RGL 19-02 where the RGL conflicts with the memo. RGL 19-02 is no longer applicable where it speaks to reasonable period of time. In other cases where RGL 19-02 conflicts with USEPA's 2020 Rule, USEPA's 2020 Rule takes precedence.

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#### 4. UNDERSTANDINGS OF THE PARTIES:

##### a. a. Pre-Filing/Pre-Application Meetings

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) In most cases, the Corps District will 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) When notification is required to both agencies, the Corps District and the certifying Water Board will advise project proponents to submit requests for certification concurrently to the certifying Water Board and the Corps District.

5) The Corps District and the certifying Water Board will encourage project proponents to submit pre-application materials to the certifying Water Board to facilitate consultation on proposed project specific issues.

##### b. Certification Request Receipt Date

1) Certification requests must be submitted concurrently to the Corps District and the certifying Water Board. "Concurrently" means the same certification request submitted by the project proponent to both agencies. The request for certification will not be deemed submitted until both the Corps District and the certifying Water Board have received the request.

2) The "receipt date" is the date the certifying Water Board office receives the certification request in accordance with procedures, including concurrent submittal as described in subsection b.1. Water Board submission procedures and mailing addresses are listed in the State Water Board's 401 Water Quality Certification and Wetlands Program Website and Staff Directory.

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c. Reasonable Period of Time

1) As specified in 33 C.F.R. § 325.2(b)(1)(ii), the district engineer may determine a reasonable period of time longer or less than 60 days, not to exceed one year. This MOU establishes longer reasonable periods of time for the circumstances described in (2) to (5). Reasonable periods of time will be determined using information in the certification request and any information provided in writing by the certifying Water Board to the Corps District prior to the Corps District determining the reasonable period of time.

2) 90 Calendar Days. A categorical reasonable period of time of 90 calendar days from receipt will be applied where the certifying Water Board notifies the Corps District in writing prior to receipt of a reasonable period of time that it has identified items required by CCR § 3856 of the Dredge or Fill Procedures that are missing, which include necessary information for the certifying Water Board to determine compliance with water quality standards and other appropriate requirements of state law, or to determine the need for additional study or evaluation of water quality effects from the discharge.

3) 120 Calendar Days. A categorical reasonable period of time of 120 calendar days from receipt will be applied in the following circumstances:

(i) Proposed projects that require authorization under a DA individual permit (standard or letter of permission) which do not involve the preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) (33 U.S.C. § 4321, et seq.).

(ii) Proposed projects that permanently impact 1.0 or more acres of waters of the U.S.

(iii) Proposed projects that discharge into a water body of special designation including designated critical resource waters and wetlands adjacent to such waters, Outstanding National Resource Waters such as Lake Tahoe and Mono Lake, and State Water Board designated Areas of Special Biological Significance, or into a water body that provides habitat for state listed rare, threatened, or endangered species.

(iv) Proposed projects where the certifying Water Board notifies the Corps District in writing that it will not defer to the Corps District alternatives analysis per section IV.B.3.b of the Dredge or Fill Procedures, or projects that require completion of a tier 3 alternatives analysis, as described in section IV.A.2.h of the Dredge or Fill Procedures.

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4) 180 Calendar Days. A categorical reasonable period of time of 180 calendar days from receipt will be applied in the following circumstances:

(i) Proposed projects where CEQA requires preparation of an Initial Study and Negative Declaration or Mitigated Negative Declaration, and it is not completed at the time the project proponent submits a certification request, or where the certifying Water Board is lead agency for the initial study.

(ii) Requests for certification of a programmatic or regional general permit.

5) 365 Calendar Days. A categorical reasonable period of time of 365 calendar days (one year) from receipt will be applied in the following circumstances:

(i) Proposed projects that require preparation of an EIS under NEPA by the Corps or another federal agency where the Corps will complete a Record of Decision to make a DA standard permit decision.

(ii) Proposed projects where CEQA 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.

6) Where a proposed project falls into more than one category above, the longest reasonable period of time applies.

7) The certifying Water Board may act on a certification request, which the Corps District has also received, before the Corps District establishes the reasonable period of time. In such cases, the Corps District will establish the reasonable period of time based on the water quality certification received from the certifying Water Board.

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d. Extensions to the Reasonable Period of Time

- 1) If any of the categorical reasons listed in (c) (2) – (5) are not known by the certifying Water Board before the Corps District establishes a reasonable period of time, the certifying Water Board may request an extension consistent with (d).
- 2) In most cases, the Corps District will agree to extend the reasonable period of time consistent with this MOU.
- 3) The certifying Water Board will request an extension from the Corps District by email at least 14 calendar days prior to end of the reasonable period of time. A request for an extension of the reasonable period of time will include a justification.
- 4) The Corps District will respond by email to the certifying Water Board and the project proponent agreeing to or not agreeing to the extension request within 7 calendar days following receipt of the request.
- 5) The certifying Water Board may request more than one extension to the reasonable period of time.
- 6) The total reasonable period of time, including any extension(s), may not exceed one year (365 calendar days).

5. RESPONSIBILITIES OF THE PARTIES:

- a. Upon the effective date of this MOU and any amendments hereafter, the Water Boards and the Corps will train their respective staff to ensure consistent implementation of this MOU.
- b. The Water Boards and Corps will set up and maintain email inboxes to facilitate communications.
- c. The Water Boards and Corps will, annually and as needed, update and share organization charts, email inboxes, and staff lists with contact information.
- d. The certifying Water Board will furnish by email the Corps District a copy of the final decision on each certification request within 3 days (CCR § 3859).
- e. The Corps District will furnish by email the certifying Water Board a copy of the final decision for each DA permit application within 15 days.
- f. The Corps District will copy the certifying Water Board on any provisional notification sent to a project proponent.

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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 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 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 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 Sacramento Regulatory Division may terminate the MOU on behalf of all the signatory Corps Districts. 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. Requests for enrollment under existing Water Boards' general orders will follow the timeframe and procedures for enrollment specified in the applicable general order.

f. This MOU does not alter the Corps' 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' discretion with respect to their regulatory authority, nor does it imply that the signatories will act in a particular manner.



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- h. Nothing in this MOU creates any legal rights, obligations, benefits, or responsibilities, substantive or procedural, enforceable at law or in equity.
- i. Nothing in this MOU infringes upon the Water Boards' authority to deny requests for certification consistent with state and federal law or regulation.
- j. Effective Date: This MOU takes effect the day after all parties have signed.

**Eileen Sobeck,** Digitally signed by  
Eileen Sobeck,  
Executive Director  
Date: 2023.04.20  
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**Executive Director**  
**Director**  
EILEEN SOBECK  
Executive Director  
State Water Resources Control Board

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*Valerie Q* Digitally signed by  
Valerie Quinto  
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Water Boards

VALERIE QUINTO  
Executive Officer  
North Coast  
Regional Water Quality Control Board

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April 24, 2023  
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EILEEN WHITE  
Executive Officer  
San Francisco Bay  
Regional Water Quality Control Board

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MATTHEW T. KEELING  
Executive Officer  
Central Coast  
Regional Water Quality Control Board

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RENEE PURDY  
Executive Officer  
Los Angeles  
Regional Water Quality Control Board


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PATRICK PULUPA  
Executive Officer  
Central Valley  
Regional Water Quality Control Board

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Date: 2023.04.20 12:21:09 -07'00'

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Eileen Sobeck,  
Executive Director  
State Water Resources Control Board

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[Date]

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VALERIE QUINTO  
Executive Officer  
North Coast  
Regional Water Quality Control Board

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 Digitally signed by Eileen White  
Date: 2023.04.21 09:45:27 -07'00'

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EILEEN WHITE  
Executive Officer  
San Francisco Bay  
Regional Water Quality Control Board

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MATTHEW T. KEELING  
Executive Officer  
Central Coast  
Regional Water Quality Control Board

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Date: 2023.04.20  
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**Executive Director**  
EILEEN SOBECK  
Executive Director  
State Water Resources Control Board

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VALERIE QUINTO  
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North Coast  
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**Matthew T. Keeling** Digitally signed by  
Matthew T. Keeling  
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**MATTHEW T. KEELING**  
Executive Officer  
Central Coast  
Regional Water Quality Control Board

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Executive Director  
Date: 2023.04.20  
12:21:09 -07'00'

**Executive Director**  
**Director**  
EILEEN SOBECK  
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State Water Resources Control Board

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MATTHEW T. KEELING  
Executive Officer  
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**Hugh Marley** Digitally signed by  
Hugh Marley  
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for  
RENEE PURDY  
Executive Officer  
Los Angeles  
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4/24/2023  
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PATRICK PULUPA  
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RENEE PURDY  
Executive Officer  
Los Angeles  
Regional Water Quality Control Board

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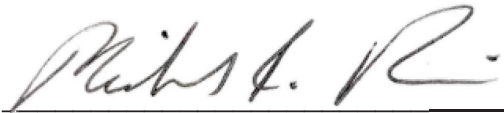
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MICHAEL R. PLAZIAK, PG  
Executive Officer  
Lahontan  
Regional Water Quality Control Board

April 20, 2023

[Date]

PAULA RASMUSSEN  
Executive Officer  
Colorado River Basin  
Regional Water Quality Control Board

[Date]

JAYNE JOY  
Executive Officer  
Santa Ana  
Regional Water Quality Control Board

[Date]

DAVID GIBSON  
Executive Officer  
San Diego  
Regional Water Quality Control Board

[Date]

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DAVID J CASTANON  
Chief, Regulatory Division  
Los Angeles District  
U.S. Army Corps of Engineers

[Date]



JAMES C MAZZA  
Chief, Regulatory Division  
San Francisco District  
U.S. Army Corps of Engineers

28 April 2023

[Date]



MICHAEL S JEWELL  
Chief, Regulatory Division  
Sacramento District  
U.S. Army Corps of Engineers

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Los Angeles District  
U.S. Army Corps of Engineers

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MICHAEL S JEWELL  
Chief, Regulatory Division  
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U.S. Army Corps of Engineers

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PAULA RASMUSSEN  
Executive Officer  
Colorado River Basin  
Regional Water Quality Control Board

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DAVID GIBSON  
Executive Officer  
San Diego  
Regional Water Quality Control Board

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JAMES C MAZZA  
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Water Boards

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JAYNE JOY  
Executive Officer  
Santa Ana  
Regional Water Quality Control Board

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PAULA RASMUSSEN  
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Regional Water Quality Control Board

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[Date]

David W. Gibson  
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David W. Gibson  
Date: 2023.04.20  
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DAVID GIBSON  
Executive Officer  
San Diego  
Regional Water Quality Control Board

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[Date]

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JAMES C MAZZA  
Chief, Regulatory Division  
San Francisco District  
U.S. Army Corps of Engineers

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[Date]

SUBJECT: Reasonable Periods of Time to Act on Certification Requests Under Section 401 of the Clean Water Act for Department of the Army Permits

## **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 office, 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.

SUBJECT: Reasonable Periods of Time to Act on Certification Requests Under Section 401 of the Clean Water Act for Department of the Army Permits

### 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.