

OTHER STATE LAWS AND REGULATIONS

SECTION 401 OF THE CLEAN WATER ACT

OVERVIEW

The federal Clean Water Act (CWA) is the primary federal law that protects the quality of the nation's surface waters, including lakes, rivers, aquifers, and coastal areas. Programs conducted under the CWA are directed at both point-source pollution (wastes discharged from discrete sources such as pipes and outfalls) and nonpoint-source pollution (pollution control that does not come from a defined discrete source, such as a pipe, but which is spatially diffuse--such as urban runoff or agricultural runoff). Under the CWA, the U.S. Environmental Protection Agency sets national standards and effluent limitations. The CWA embodies the concept that all discharges into the nation's waters are unlawful unless specifically authorized by a permit, which is the CWA's principal regulatory tool.

The Porter-Cologne Water Quality Control Act ([Porter-Cologne](#)) is California's primary State law protecting California's waters. Porter-Cologne is codified in Title 23 of the California Water Code. Porter-Cologne gives the State and Regional Boards the authority to regulate discharges of waste, including dredged or fill material, to any waters of the State. While California has traditionally relied upon the Corps' Clean Water Act Section 404 process and California's Section 401 authority to ensure that discharges of dredged and fill materials complied with the State's water quality standards, it has independent authority under the California Water Code. 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). 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).)

Waters of the United States is a term used to describe areas that fall under federal jurisdiction under the Clean Water Act. Waters of the United States include, but are not limited to:

- navigable waters;
- tributaries of navigable waters;
- waters that are, were, or may be used in interstate or foreign commerce;
- interstate waters;
- intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds used by interstate travelers for recreation and other purposes, the use, degradation or destruction of which could affect interstate or foreign commerce. This includes waters that:
 - are used by interstate or foreign travelers for recreation
 - are the source of fish or shellfish sold in interstate or foreign commerce, or
 - are used for industrial purposes by industries engaged in interstate commerce.

Section 401 of the CWA requires that federally authorized discharges into waters of the United States not violate state water quality standards. Under Section 401, anyone applying for a

federal license or permit for an activity that may result in any discharge into waters of the United States must request state certification that the proposed activity will not violate state water quality standards. Work on tribal lands that require a Federal license or permit must also obtain water quality criteria from the USEPA. In California, the State Water Resources Control Board (SWRCB), through the regional water quality control boards (RWQCBs), is responsible for issuing water quality certifications.

[Figure 9](#) illustrates the Section 401 certification process.

WHO NEEDS TO COMPLY?

Any one seeking a Federal permit or license for an activity that may result in the discharge of dredge or fill material must obtain certification from the State. CWA Section 401 requirements apply to all CALFED actions with federal approval of a project that may affect state water quality, including those that require federal agency approvals such as issuance of a Section 404 permit. Generally, Section 401 compliance will be required for any CALFED project that will directly affect a waterway and that is carried out or funded by a federal agency or requires authorization from the U.S. Army Corps of Engineers (USACE) (e.g., approval under Section 404 of the CWA or Section 10 of the Rivers and Harbors Act of 1899).

PROJECTS NOT REQUIRING APPLICATION FOR 401 CERTIFICATION

The State Board has issued Section 401 Water Quality Certification for select nationwide permits. The activities and conditions of certification may be found in Appendix D. For these activities, the project proponent does not need to seek individual certification from the State.

Dredge and fill projects that do not require a Federal Clean Water Act Section 404 permit. For example, as the result of a recent U.S. Supreme Court decision, *Solid Waste Association of Northern Cook Counties v. United States Corps of Engineers*, some isolated non-navigable waters appear to be outside the purview of Section 404 of the Clean Water Act. If a project is determined to be no longer be subject to Section 404, they would not require Section 401 Certification. However, the project proponent must file a report of waste discharge with the appropriate regional water quality control board (see the next section about [waste discharge requirements](#)).

HOW LONG DOES THE APPROVAL PROCESS TAKE?

The Corps allows the State a 'reasonable' period of time of 60 days to act on a valid application. The State may request additional time, not to exceed one year.

WHAT INFORMATION DOES THE APPLICANT NEED TO PROVIDE?

Section 401 Certification Regulations spell out the required information for a complete application (see [Appendix D](#)). Generally, the applicant must provide the following:

- a full, technically accurate description of the entire proposed activity, including:
 - the purpose and final goal,
 - the project location,
 - affected water bodies,
 - the total area of waters of the United States that will be directly affected, and
 - any proposed mitigation of adverse impacts;
- an alternatives analysis;
- copies of any draft or final federal, State, and local licenses, permits, and agreements required for actions associated with the proposed activity (e.g., California Department of Fish and Game [DFG] Lake or Streambed Alteration Agreement);
- a copy of the CEQA document and notice of determination, if applicable; and
- a list of agencies that participated in the CEQA process as lead or responsible agencies.

WHAT IS THE FEE?

The RWQCB requires an initial deposit of \$500 for each application. Depending on other factors an additional fee of \$500–\$9,500 may be imposed. The fee schedule is provided in [Appendix D](#).

WHAT DOES THE APPLICATION AND EVALUATION PROCESS ENTAIL?

Most CALFED actions will take place in the jurisdiction of either the San Francisco Bay RWQCB (Region 2) or the Central Valley RWQCB (Region 5); [Figure 10](#) shows the region under the jurisdiction of each of the RWQCBs. Applicants should apply for water quality certification with the appropriate RWQCB after they complete the CEQA process, if applicable, and when applying for a federal authorization (e.g., [Section 404](#) or [Section 10 authorization](#)) that

triggers the need for Section 401 compliance. In some circumstances, applicants should apply for water quality certification from the SWRCB and notify the appropriate RWQCB of the application. The SWRCB would issue or deny certification for projects that:

- fall under the jurisdiction of more than one RWQCB;
- are associated with an appropriation of water, subject to Part 2 of Division 2 of the California Water Code;
- involve a hydroelectric facility where the proposed activity requires a Federal Energy Regulatory Commission license or license amendment; or
- require any other diversion of water for beneficial use.

The RWQCB or SWRCB will certify that the discharge complies with State water quality standards or will deny certification. When it issues a certification, the RWQCB or SWRCB must verify that the discharge will comply with applicable effluent limitations and water quality standards. A certification obtained for construction of a facility must also pertain to the facility's operation. The certification may be issued with conditions added to the project to ensure that it complies with the State water quality plan. If the project would have a large or unmitigated impact on water quality, certification may be denied. Processing includes a public notice period of at least 21 days, although this requirement can be modified in emergency cases.

DOES THIS PROCESS TRIGGER THE NEED FOR COMPLIANCE WITH OTHER REGULATIONS?

Because the decision regarding Section 401 certification is discretionary, the SWRCB or RWQCB must comply with CEQA. In most cases, another State or local agency is the lead agency for CEQA compliance. In these cases, it is important that the SWRCB or the RWQCB participates in the review of the document to ensure that their requirements, as responsible agencies under CEQA, are adequately met. The SWRCB or the RWQCB will then use the lead agency's CEQA document to meet the CEQA requirements of a responsible agency.

WHAT ARE THE OPPORTUNITIES FOR FACILITATING COMPLIANCE WITH THIS PROCESS?

The following are recommended steps to simplify and streamline the Section 401 process for CALFED actions.

- **Design the project in such a way that Section 401 certification is not required.** Section 401 review by the RWQCB or SWRCB will not be required for a project designed to avoid impacts on waters of the United States.
- **Provide complete, detailed information, using information previously prepared for a [Section 404 application](#) where possible.** As with many other permitting processes, preparing a complete application, including a detailed and relatively final project description and proof of CEQA compliance, can greatly help expedite

processing of a Section 401 permit. When the need for a Section 404 permit triggers the need for a Section 401 permit, the Section 404 permit application package can be used in the Section 401 application as well.

- **Coordinate early with resource agencies.** When the proposed activity requires other licenses, permits, and agreements, early coordination with the appropriate agencies, particularly DFG, is helpful.
- **Determine whether a general permit could apply to this and other CALFED actions.** The Central Valley RWQCB has an existing permit that covers a variety of actions deemed to have a negligible effect on water quality. This is a type of general permit, similar to a nationwide permit issued by USACE under Section 404. CALFED actions probably would not qualify for this permit. However, the Clean Water Act [Section 401 Memorandum of Understanding \(August 28, 2000\)](#) between the U.S. Bureau of Reclamation, the SWRCB, San Francisco Bay and Central Valley RWQCBs, California Department of Water Resources, and DFG specifies that the signatories will consider such a generalized permit certification process for implementing CALFED Stage 1 actions.



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